

# The Consumer Rights Act

Enhancing the rights of competition law claimants and consumer law enforcers



## Ongoing reform

The Consumer Rights Act 2015 (the Act) is the keystone of the changing consumer protection landscape. Its scope signifies the growing weight that consumer protection law commands in the UK and the EU more generally. This update continues our coverage of the current reform of UK consumer rights law (see **"Implementing the Consumer Rights Bill"**).

We discuss the key changes in Part 3 of the Act, namely the availability of legal redress options for claimants where there has been a breach of competition law and the enhancement of the enforcement powers of consumer law bodies. We also take this opportunity to explain

which organisations are responsible for enforcing consumer protection law in the UK and give an update on alternative dispute resolution (ADR). A small number of provisions in Part 3 of the Act dealing with very specific areas (letting agents, student complaint schemes and secondary ticketing platforms) are not covered by this update – we would be happy to provide you with further information about these, or any of the other changes detailed here.

The changes brought about by the Act which we discuss below are expected to come into force from 1 October 2015.

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Please contact us if you would like to discuss any subject covered in this issue.

## Competition law

### Increased jurisdiction of the Competition Appeals Tribunal (CAT)

The largest change brought about by Part 3 of the Act is the widening of private actions available in competition law, making it easier for injured parties to receive redress to receive redress without resorting to the courts.

Broadly speaking, the Act increases the CAT's jurisdiction, bringing it in line with the powers of the High Court. More specifically:

- The CAT will have the power to hear standalone damages claims, where the parties are required to prove a competition law infringement in the absence of an infringement decision by a relevant competition authority. (It already has the power to hear follow-on damages actions for breaches of competition law, such actions being brought following a competition law infringement decision by the Competition and Markets Authority (CMA), the European Commission or certain sectoral regulators). The CAT will be bound by a finding of fact of the CMA, unless it directs otherwise.
- The CAT will be empowered to grant injunctions for claims for damages and for collective proceedings (see below). Failure to comply with an injunction may result in contempt proceedings before the High Court.
- The time limit for claims being brought before the CAT will be brought in line with the limitation period for claims before the High Court, increasing it from two to six years (five years for the Court of Session in Scotland). In the case of collective actions, the limitation period will be suspended to allow for the parties to make an individual claim for damages should the collective proceedings not progress.
- The CAT will be able to fast track claims for damages, where the final hearing will be commenced within six months of the decision taken by the Tribunal to go down the fast track route. This is designed to give individuals and SMEs greater access to redress damages caused by breaches of competition law. Fast track claims will be subject to different rules of procedure, in particular in relation to the granting of an interim injunction.

## Collective action

### Collective proceedings

Collective proceedings are those which combine two or more claims raising the same, similar or related issues of fact or law. The proceedings may be either standalone or follow-on. The CAT already has the power to hear "opt-in" collective actions; it will now have the power under

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the Act to hear "opt-out" actions, where UK-domiciled claimants will be automatically included in the action unless they opt out in the prescribed manner.

The CAT must be satisfied that it is just and reasonable for the person bringing the proceedings to act as representative of the class of claimants (although that person need not be a class member) before making a collective proceedings order. Up until now, it has been only Which? that has been allowed to bring opt-in actions but under the Act other consumer bodies and trade associations will be able to bring both opt-in and opt-out actions.

It is Government policy that collective actions should not be brought by law firms, third party funders or special purpose vehicles. One way of achieving this aim would be to introduce a rebuttable presumption to this effect into the new CAT Rules of Procedure. It remains to be seen whether this will be the case once the draft Rules are finalised following third party consultation. More generally, it seems likely that class certification by the CAT will become a battleground for the parties (as it is in the US).

When deciding the amount of damages to be awarded, the CAT will not need to assess the amount of damages recoverable to each individual person but instead can group the claims together for this purpose. Exemplary damages will not be available. For opt-out actions, it will not be possible for claimants to agree contingency fees with their lawyers.

### Collective settlement

Businesses that find themselves the subject of competition law claims may propose collective settlements to the CAT for their approval. This will be possible only for opt-out collective proceedings, but will be available both in cases where there is and in cases where there is not a collective proceedings order in place (the latter would cover litigation at a very early stage). The provisions under the Act are different depending on whether the CAT has made such an

order, but in both cases the CAT may only approve the collective settlement if it is satisfied its terms are just and reasonable. A collective settlement is binding on all class members except those who have opted out, or who are not domiciled in the UK.

The devil is in the detail and it may be that the CAT Rules of Procedure hide a number of difficult issues which will have to be resolved by litigation. For example, do issues arise if the same members of the CAT hear all stages of a case – collective settlement and collective proceedings? What will be the role of expert evidence in fast track proceedings and how will this impact on cross-examination?

#### Voluntary redress

Voluntary redress schemes are a type of ADR which the Government is keen for parties to pursue before becoming involved in a private damages action for breach of competition law. A voluntary redress scheme need not be certified by the CMA but, if it is, the CMA could take this into account when assessing the level of fines for the breach of competition law. The CMA has indicated that it is willing to reduce the penalty imposed on an infringing party by up to 10 per cent in the majority of cases where a redress scheme is approved at the time the CMA makes an infringement decision.

The CMA may approve a redress scheme at the same time as making an infringement decision, or after having made such a decision. It may also approve a scheme after the European Commission or a UK sectoral regulator has made an infringement decision. When considering a redress scheme submitted to it before it has made an infringement decision, the CMA may make its approval of the scheme subject to compliance with certain conditions, such as the provision of further information about the level of compensation that will be offered. The CMA may decide not to approve any scheme where it considers that the compensation is exceptionally low. Generally speaking, it expects redress schemes to compensate for harm caused to both direct and indirect consumers and to operate for at least nine months.

Once approved by the CMA, the business that has committed the infringement is under a duty to comply with the terms of the scheme. In the event of non-compliance, claimants entitled to compensation (under the scheme), as well as the CMA, may bring court action for breach of statutory duty. The approved scheme may not be subsequently varied by the CMA or the business concerned, although the business may be released from its duty to comply with the terms of the scheme where the CMA considers this to be appropriate.





There are draft CMA Guidelines on Voluntary Redress, which set out the approval process. These have yet to be published in final form, together with Regulations to be issued by the Secretary of State. It is worth mentioning that the CMA's role is limited to ensuring that a proposed scheme satisfies the requirements of the Regulations. The party seeking the CMA's approval of the redress scheme will be responsible for setting up an independent Board to consider the evidence of harm, as well as other matters, such as the terms and conditions of the scheme and the level of compensation. The Board will consist of a chairman and at least three other members, including an economist, an industry figure and a representative of the potential beneficiaries (for example Which? or a trade association).

Both voluntary redress schemes and collective settlements are examples of ADR – see below.

## Consumer law

### Wider enforcement measures

The Act makes a number of changes to the powers the authorities will have to enforce consumer law

from 1 October 2015. (The Act also consolidates the investigatory powers of consumer law enforcers.) One of the principal changes is the introduction of enhanced consumer measures which certain authorities will be able to attach to enforcement orders and undertakings. Broadly speaking, the authorities in question are the

CMA, Trading Standards Services and sectoral regulators (other bodies such as Which? may also be included provided they meet certain conditions).

The new enhanced consumer measures are designed to give enforcers greater flexibility. More specifically, they widen the orders that enforcers can seek in the civil courts (and undertakings). The measures must fall within one or more of the following categories:

- redress – such measures will offer compensation or other redress to consumers suffering loss as a result of breach of consumer law;
- compliance – these measures increase business compliance with the law, reducing the likelihood of further breaches; and/or
- choice – this type of measure helps consumers obtain relevant market information to enable them to make informed purchasing decisions.

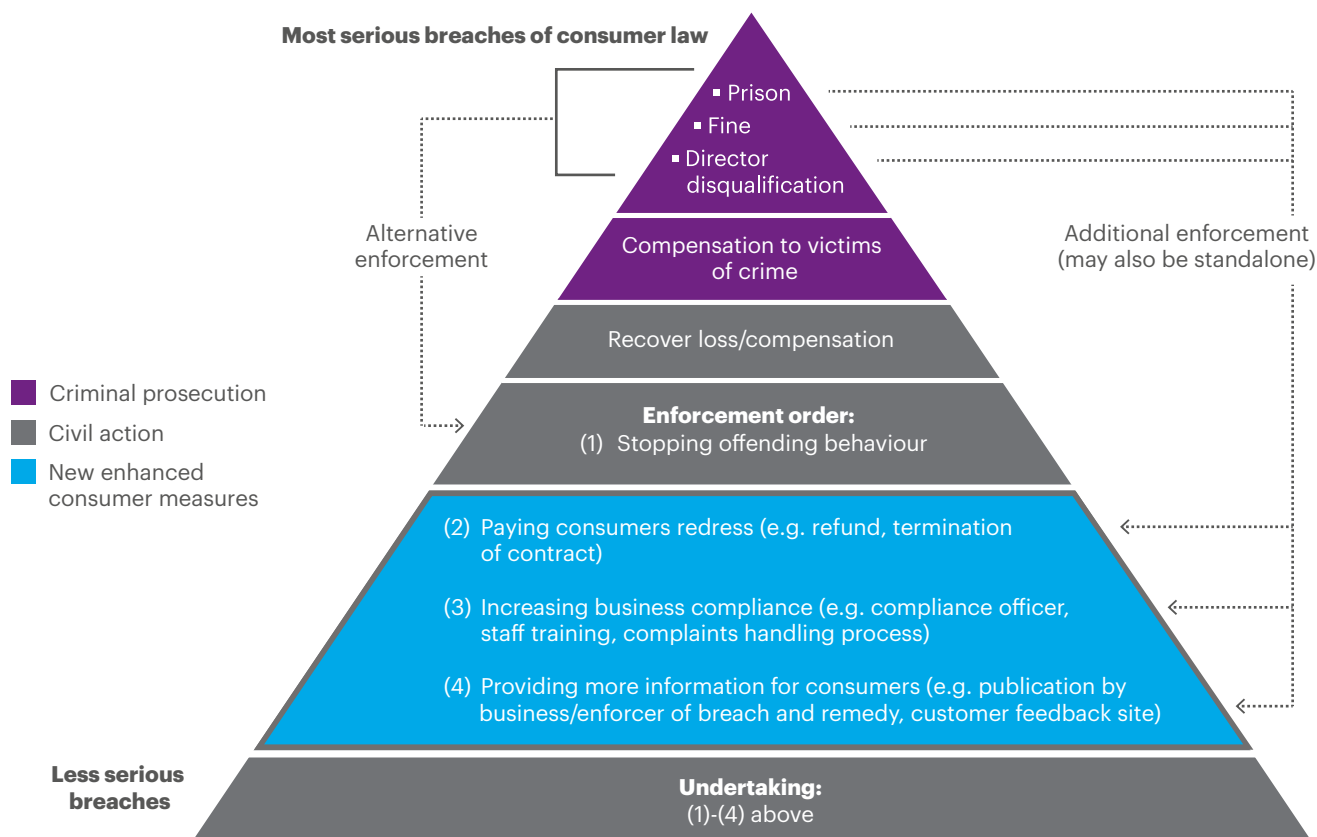
The Act does not contain an exhaustive list of the different measures within each category; instead it is for the court or enforcer to determine the most suitable way of dealing with a breach on a case-by-case basis. This flexible approach also means that the business in question may be able to suggest possible measures to remedy its breach. In every case, an enhanced consumer measure must be just, reasonable and proportionate.

### Shared consumer protection powers

The CMA remains the UK's competition and consumer authority. It has responsibility for certain areas of consumer law, such as unfair terms. One of its strategic goals in 2015/16 is to refocus consumer protection so that it leads policy development and pursues complex, precedent-setting cases. It has stated that it will prioritise projects where there are systematic market problems or where consumers are unable to exercise choice, or where it can expect to achieve wider impact. The CMA intends to initiate three consumer cases as a minimum in 2015/16.

The CMA works closely with national and international enforcement partners, including as part of the Consumer Protection Cooperation Network within the European Commission. It will take up a year's Presidency of the International Consumer Protection and Enforcement Network (ICPEN) from July 2015.





The CMA is one of the key players in the Consumer Protection Partnership (CPP), which also includes the National Trading Standards Board (and the equivalent in Scotland and Northern Ireland), the Trading Standards Institute, Citizens Advice (and the equivalent in Scotland and Northern Ireland) and the Financial Conduct Authority. The CPP aims to achieve a better impact for consumers by the CPP partners working together in areas where there is significant consumer detriment. According to its Priorities Report for 2015, CPP partners will be tackling issues in the following areas: online markets (subscription traps, use of personal data, adverts); unfair terms and conditions (cancellation terms and consumer rights); travel (car hire and holiday products including timeshares); and quality of services (intermediaries, such as price comparison websites).

Various groups have been established to ensure effective case allocation between Trading Standards and the CMA. The CMA collaborates with sectoral regulators through the Consumer Concurrences Group. The use of concurrent powers under consumer protection legislation is governed by a memorandum of understanding between the CMA and individual regulators.

### Alternative Dispute Resolution

Under the European Directive on Alternative Dispute Resolution, ADR must be available by 9 July 2015 for all contractual disputes between consumers and businesses within the EU. In principle, this means the UK Government

must ensure that ADR, provided by a certified ADR body, is available for any contractual dispute between a consumer and a business in the UK. Those businesses who are obliged to use ADR (by law, the rules of a trade association or term of a contract) must provide information regarding the ADR entity they use on their websites and in their general terms and conditions. Every business must provide a consumer with information regarding the availability of ADR when the business has exhausted its internal complaint handling process in relation to a complaint brought by that consumer.

In a similar vein, the European Regulation on Consumer Online Dispute Resolution (ODR) requires the European Commission to establish an online platform to aid communication between consumers, businesses and ADR providers when resolving disputes arising from online transactions in the EU. The interactive website is a mechanism which allows consumers and traders to resolve online disputes through electronic means (provided the ADR entity is agreed). It provides the parties with an electronic complaint form, case management tools and translation services, as well as general information about ADR and the ODR process. As of 9 January 2016, any business within the EU that sells goods online, or acts as a platform for businesses to sell their goods or services, must provide a link to the ODR platform on its website/by email/in its contract terms and conditions as appropriate.

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