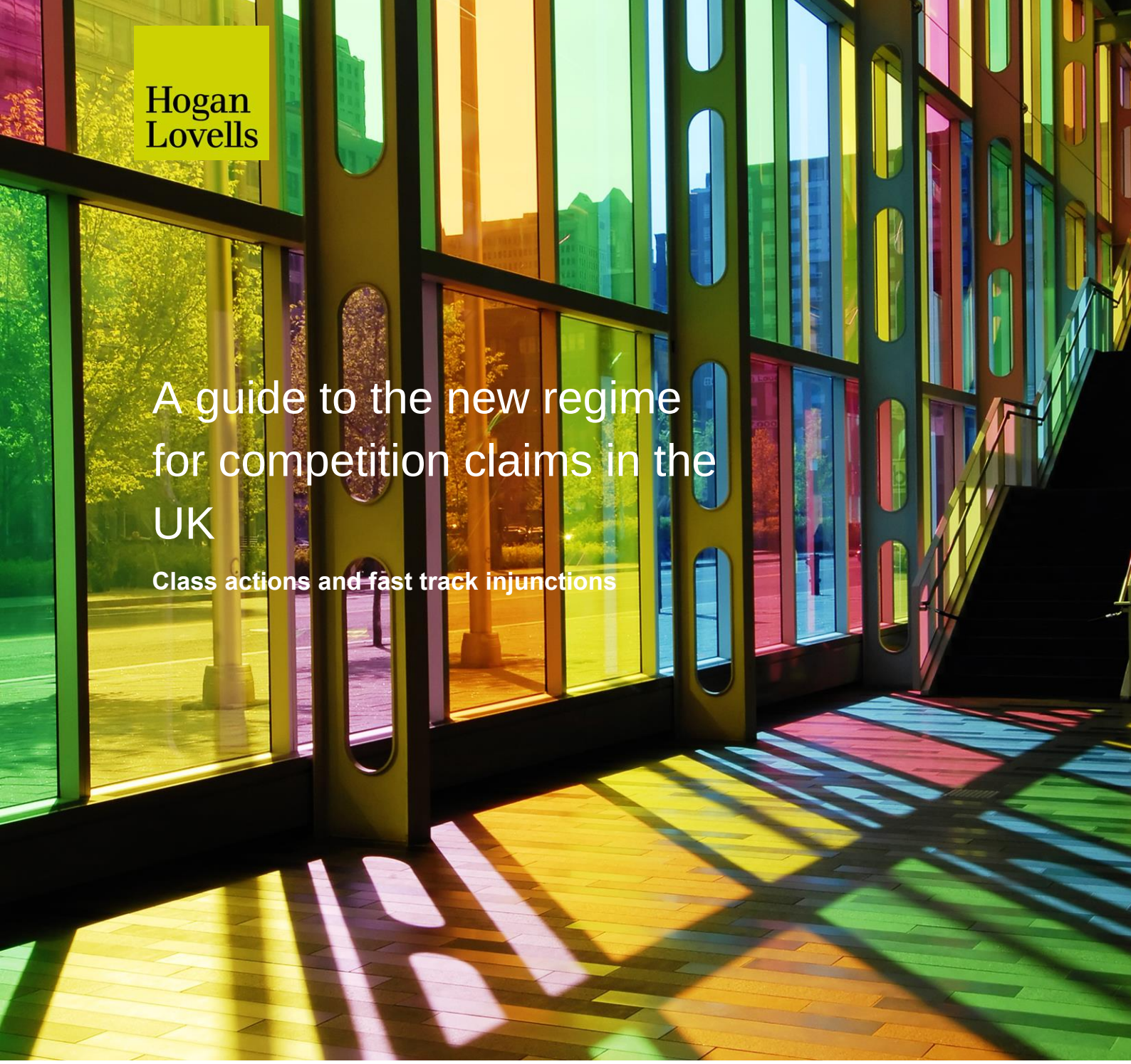

Hogan Lovells

A guide to the new regime for competition claims in the UK

Class actions and fast track injunctions

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Contents

1. Far reaching reform of UK Competition Litigation

1.1 The Consumer Rights Act 2015 ("**CRA15**") comes into force on **1 October 2015**. It brings about radical changes to the way in which claims for breach of competition law can be brought in the UK. The objective of these changes is to encourage and facilitate private enforcement of competition law, in particular by consumers and small and medium-sized businesses ("**SMEs**").

1.2 The reforms are expected to increase further the rapidly growing number of competition claims, but in particular to increase the exposure of consumer-facing businesses and those that may be dominant in their market. As England is the leading centre for competition litigation in the EU, understanding these changes and the threats and opportunities they bring are important for every business operating in the EU, whether as a potential claimant or defendant.

1.3 The reforms have 4 main elements:

(a) Introducing to the UK for the first time US-style opt-out class actions;

(b) Introducing class settlements and redress schemes;

(c) A new fast track procedure intended for consumers and SMEs, with short early trials and a cap on costs;

(d) Changes to the specialist Competition Appeal Tribunal ("**CAT**") to remove limits on its current jurisdiction that had made making claims more difficult including:

(i) allowing it to hear stand-alone claims, not just those following on from an earlier infringement decision of the Competition and Markets Authority ("**CMA**") or European Commission (the **"Commission"**);

(ii) giving it the power to grant injunctions, including before a claim is brought; and

(iii) changing limitation periods.

2. The position prior to the CRA15

2.1 **Competition Appeal Tribunal** – Prior to the CRA15, the CAT only had jurisdiction to hear follow-on damages claims (that is claims where the CMA or Commission had already issued a decision finding that an infringement of UK or EU competition law had been committed). This restriction on the scope of the CAT's jurisdiction has caused problems for parties wanting to bring competition claims in the CAT by limiting the parties against which claims could be brought and the scope of those claims[1]. In addition, time-limits for bringing claims prior to the CRA15 were tied to the date of the infringement decision or the determination of appeals from it, and this has caused significant uncertainty as to the appropriate time limits[2].

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1 See *Emerson Electric Co. and others v Morgan Crucible Company Plc and others* [2011] CAT 4

2 For example, see *Deutsche Bahn AG and others v Morgan Advanced Materials Plc (formerly Morgan Crucible Co Plc)*

2.2 Section 47B of the Competition Act 1998 (the "**Competition Act**") has allowed representative claims for breach of competition law to be brought in the CAT by a specified body on behalf of consumers. However, such claims could only be brought on an opt-in basis (where the consent of each of the individuals represented by the specified body has to be obtained).

2.3 The Consumers' Association was the only body that had previously been designated as a specified body for the purposes of section 47B of the Competition Act and, since 2002, only one opt-in representative action had been brought (an action on behalf of 130 affected customers against JJB Sports following an Office of Fair Trading decision regarding the illegal price-fixing of replica England and Manchester United football kits). This mechanism has been generally regarded as a failure.

2.4 **English High Court** – The High Court has unlimited jurisdiction to hear competition damages claims and has been the forum of choice for claims. It has no mechanism to allow collective claims to be brought (an attempt to bring representative proceedings was rejected by the Court of Appeal[3]). High Court proceedings have instead often taken the form of multiparty claims in which multiple named claimants issue proceedings on the same claim form, pursuing the same defendant(s).

2.5 **Frequency and type of claim** – The number of competition claims have been rising rapidly over the last 7 or 8 years, making England the most popular jurisdiction in the EU in which to bring such claims. Most of the claims that have been brought share common features: they are "follow-on" claims; relate to cartels; arise from Commission infringement decisions; are brought by large businesses rather than consumers or SMEs; claim damages; and have been brought in the High Court rather than the CAT.

2.6 **The reforms** - The reforms raise the prospect of changing this status quo in every respect. Widening the CAT's jurisdiction will facilitate stand-alone claims; its new power to make injunctions will be key in aiding claims to stop businesses abusing their dominant position; and class actions and the fast track procedure offer opportunities for SMEs and consumers to bring claims. The threats and opportunities created by competition claims that have existed until now will not be diminished, but new threats and opportunities will arise as a result of these changes.

3. The key changes

3.1 The changes brought in by the CRA15 relate only to proceedings before the CAT; claims brought in the High Court remain unchanged. It is anticipated that the CAT will, over time, now become the main forum for competition damages claims in the UK. New procedural rules apply in the CAT form 1 October 2015 to implement the CRA15 reforms.

4. The introduction of class actions

4.1 The CAT will now have powers to hear class actions for breach of competition law, on either an opt-out or opt-in basis. If the CAT approves an opt-out class action, all eligible claimants domiciled in the UK will be included in the action automatically, unless they choose to opt-out. Overseas claimants will not be automatically included in the class, but they may choose expressly to opt-in to the class. Significantly for consumer facing companies, an opt-out claim could, therefore, be brought on behalf of every UK consumer

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[2014] UKSC 24 where the Supreme Court decided that where there has been an infringement jointly by a number of undertakings, e.g., a cartel, then any appeal against the finding of infringement by any other addressee of that competition authority decision is irrelevant to the limitation period applicable to the non-appealing addressee.

3 See *Emerald Supplies Ltd v British Airways Plc* [2010] EWCA Civ 1284

that has, for example, bought a particular product. It is possible that class members from other jurisdictions could be recruited to join the class. There is no reason, however, why the class could not be made up of business claimants.

4.2 The CAT can still approve claims as an opt-in class action, covering only claimants who choose to join the class action.

Class certification

4.3 Before a class action can proceed, the CAT will need to make a collective proceedings order – effectively certifying the class. This is an important protection for defendants against frivolous or inappropriate claims and is likely to prove a very important part of the litigation. To be certified:

(a) the claim must be brought on behalf of an identifiable class;

(b) each claim included in the class action must raise the same, similar or related issues of fact or law; and

(c) be "suitable" for a collective claim.

4.4 In considering what is suitable for a collective claim, the CAT will take into account all matters it thinks fit, including: whether a collective claim is an appropriate means for the fair and efficient resolution of the common issues; the costs benefits; the size and nature of the class; and whether the claims are suitable for an aggregate award of damages.

4.5 The CAT will also consider whether the claim should be an opt-out or opt-in claim and in doing so will consider the strength of the claim and whether an opt-in claim would be practicable.

4.6 It remains to be seen how the CAT will apply its very wide discretion, but the kinds of claim most likely to be considered suitable for class actions and in particular opt-out claims are consumer claims, where the size of the class makes a class action efficient and an opt-in claim impracticable. In addition, a consumer claim is less likely to raise individual issues (such as the extent of pass on) than a business claim.

4.7 It is important to note that the CAT can order that parts of a claim or certain issues in a claim are suitable for collective determination and this may provide a method to bring a collective claim even where aspects of a case are not common.

4.8 Critically the CAT's decision whether to make a collective proceedings order cannot be appealed. This deliberate policy stance is designed to avoid generating satellite litigation – very common in class certification proceedings in the USA – on what is a gateway issue for putative class actions.

4.9 If an opt-out class is certified, the outcome of the proceedings will be binding on all those who are members of the class domiciled in the UK and who have not opted-out, together with those overseas members who have opted in.

Class representative

4.10 Before it can make a collective proceedings order, the CAT must determine that the individual or body bringing the class action is an appropriate representative of the proposed class. The CAT must determine if it is just and reasonable for that person to act as a representative. The representative need not be a member of the proposed class and could, for example, be a representative body such as a trade or consumer association. The CAT must consider if the representative would fairly and adequately represent the interest of class members; whether it has any conflict of interest with class members; and is able to pay the defendants costs (see below in relation to costs). It will also look at the capability of the representative to manage the proceedings; whether it has a plan for communicating with and consulting class members; and the arrangements it has made in respect of funding the claim. It is possible

for sub-classes to be identified and for sub-class representatives to be appointed if there are issues that are not common across the entire class.

4.11 In practice, it is expected that the lawyers for the class representative will play the major role in putting in place the necessary arrangements, including the all-important funding. One of the main concerns for a class representative lending their name to class proceedings will be that they alone will be liable to the defendants for any costs orders made and, therefore, they will need to be satisfied that this potential exposure is addressed.

Damages/costs and funding

4.12 The CAT has the power in suitable cases to make an aggregate award of damages in respect of the class as a whole, without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented class member. Exemplary damages are not available in class actions.

4.13 Damages awarded will be paid to the representative, from which class members must claim their share within a stated period. Any monies not claimed by class members within the period will be paid to charity or may be paid to meet the representative claimant's legal costs.

4.14 The representative claimant will remain exposed to the cost of bringing proceedings that are ultimately unsuccessful, as the general principle of 'loser-pays' in English litigation principle will apply to class actions. However, in follow-on claims where a competition authority has already determined liability, the risk of the claimants 'losing' is likely to be low. In addition, the contingency fees regime which has recently allowed contingency fees in English litigation for the first time (known as damages based agreements) cannot be used for opt-out class actions, although conditional fee arrangements, third party funding, and after-the-event insurance will all be available. These funding arrangements will all assist claimants in bringing these types of claim, removing or mitigating some of the financial risks involved. Damage based agreements will be permitted for opt-in class actions.

5. Class settlements and voluntary redress schemes

5.1 The CAT will be able to approve collective settlements both where a class action has been brought and, most significantly, in circumstances in which no class action has been brought.

5.2 A collective settlement will be approved by the CAT only if it is satisfied that the terms are just and reasonable. In determining this, it must have regard to the amount and terms of the settlement; the class size; the likelihood of a judgment being obtained for a significantly higher sum; the likely duration and costs of the proceedings and the views of the parties' expert or lawyer or other any class member.

5.3 Where no class action has been brought, a would-be representative may apply to be appointed as a settlement class representative and then, once a settlement has been agreed, seek the approval of the settlement, which will then be binding on the class members. In these circumstances, the CAT first has to consider the suitability of the proposed settlement class representative and whether the claim would be eligible for a collective claim and then whether it will approve the settlement.

5.4 The CRA15 also gives the CMA the power to certify voluntary redress schemes submitted by a business that relate to infringements of competition law set out in the Competition Act 1998 or Articles 101 or 102 of the Treaty on the Functioning of the European Union (the "**TFEU**") (including both agreements or concerted practices between businesses which prevent, restrict or distort competition

and/or abuse a business' dominant position). The CMA will also have the power to approve a redress scheme subject to a condition or conditions requiring the provision of further information about the operation of the scheme (including as to the amount or value of compensation to be offered under the scheme or how this will be determined). Once the redress scheme is approved, the compensating party is under a duty to comply with the terms of the approved scheme. The duty is owed to any person entitled to compensation under the terms of the approved scheme. Where such a person suffers loss or damage as a result of a breach of the duty, the injured party or the CMA may bring civil proceedings before the court for damages or an injunction.

5.5 On 14 August 2015, the CMA issued guidance on the approval of voluntary redress schemes for infringements of competition law[4]. The CMA sees its voluntary redress scheme as a form of Alternative Dispute Resolution and expresses the hope that it will serve as an additional option for businesses to offer, and harmed persons to receive, compensation for loss suffered as a result of a competition law breach with a view to reaching an early compromise and avoiding litigation altogether. A business wishing to set up a voluntary redress scheme may apply to do so after an infringement decision has been issued by the CMA or the Commission, or alternatively, an application can be made whilst an investigation by the CMA is underway but no infringement decision has been rendered. Applications in the course of an on-going CMA competition investigation are in practice expected to be submitted after the CMA has issued its Statement of Objections to parties under investigation, since that is the point at which businesses will have seen the detail of the infringements alleged against them.

5.6 There is a real risk that setting up such a scheme could open businesses up to a potentially significant financial exposure that might not otherwise arise. Businesses will have to weigh up the benefits of setting up the scheme (and any potential penalty reduction that the CMA may consider in light of the infringing party's voluntary provision of redress – see below) and avoiding costly litigation, against the potential exposure that might arise anyway if the potential claimants were left to bring damages claims.

5.7 The CMA's guidance indicates that it will retain discretion to decide whether a scheme merits a penalty reduction (up to a maximum of 20%), but there is no absolute right to a reduction.

6. New powers for the CAT

6.1 The CAT will now be able to hear stand-alone damages claims (where no infringement has yet been found by a competition authority) as well as follow-on claims (which 'follow-on' from a competition authority infringement decision). This brings the CAT regime in line with that of the High Court and fills an important gap in the CAT's jurisdiction that has to date limited its use as a forum.

6.2 The CAT will have powers to make injunctions, which will have the same effect, and can be enforced, as if they were injunctions granted by the High Court. This will again bring the CAT regime in line with that of the High Court. This is a very important development, as an injunction is often a key remedy in a claim for abuse of dominance/ breach of Article 102, where the main objective is to bring the abuse to an end, for example, to secure continued supply of a product.

6.3 Like the High Court, the CAT is able to grant injunctions in suitable cases before a claim is made, in order to protect the position pending the ultimate determination of the claim.

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[4] See the CMA's Guidance at Guidance on the approval of voluntary redress schemes for infringements of competition law

Normally when such an interim injunction is sought, the applicant is required to undertake to pay the defendant any damages it suffers as a result of the injunction if it should ultimately prove to have been wrongly granted. This so-called "cross-undertaking" can often prove a significant deterrent, especially if the applicant is a consumer or SME and the defendant is a large business that could suffer significant losses as a result of the injunction. Importantly, in some cases, the CAT may grant an interim injunction but either waive the requirement for a cross-undertaking or cap the amount of it. This will facilitate injunctions being sought, especially by SMEs.

6.4 A fast track claims procedure is also being introduced in the CAT. The CAT will be able to decide at any time, either of its own initiative or on the application of a party, to make an order that the proceedings be subject to the fast track procedure (note, it cannot apply to class actions). If the fast track applies, it will have important consequences, as the trial will take place within 6 months and any costs a party could be ordered to pay will be capped. This expedited procedure and capped costs exposure is intended for simpler claims and is designed to make claims more accessible to SMEs. The real risk for a defendant is that, even if the claimant is an SME, the issues at stake can be very important with much wider significance (e.g. is the company dominant in a particular market), yet the defendant may find itself with limited time in which to defend itself.

6.5 In deciding whether to make a claim subject to the fast track, the CAT will take into account all matters it thinks fit, including, but not limited to:

(a) whether the time estimate for the final hearing is three days or less;

(b) the complexity and novelty of the issues involved;

(c) the scale and nature of the documentary evidence and the number of witnesses involved; and

(d) the nature of the remedy being sought and, in respect of any claim for damages, the amount of any damages claimed.

6.6 Numerous other changes have been made to the CAT's procedure for damages claims, designed to make the process more robust and allow the CAT to undertake more active case management. The changes also seek to cure defects and omissions identified in the current version of the CAT rules. Generally speaking, these bring the CAT's procedure closer to the procedure in the High Court. The most notable of these changes is that, for claims arising after 1 October 2015, the limitation period within which claims must be brought in the CAT will be the same as the limitation period for claims before the High Court. This means that the 6 year limitation period will now run from the date on which the cause of action accrued (under Section 2 Limitation Act 1980), i.e. when a breach of competition law causes damage. However, where there is deliberate concealment of any fact relevant to the claimant's cause of action, the 6 year limitation period will begin to run from the date on which the claimant discovered, or could with reasonable diligence have discovered, the concealment (Section 32 Limitation Act 1980). A deliberate breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment for these purposes. In practice, therefore, in many competition cases, such as those arising from a secret cartel, the limitation period might only start to run from the date of the relevant infringement decision of the CMA or the Commission.

6.7 This is a significant change from the current regime under which the limitation period runs for 2 years from the date when the relevant infringement decision on which the claim is based has become final, that is to say, once

time for appealing has expired or any appeals have been determined. In addition, no claims can be brought, without permission, before the infringement decision becomes final. These rules have proved difficult to apply and had resulted in a number of decisions from the CAT being appealed to the Court of Appeal and the Supreme Court. The current regime will continue to be relevant for some time, as it applies to claims that arose before 1 October 2015.

Further information

If you would like further information on the new regime please get in touch with one of the key contacts below.

Nicholas Heaton
Partner, London
T +44 20 7296 5919
nicholas.heaton@hoganlovells.com

Ivan Shiu
Partner, London
T +44 20 7296 2834
ivan.shiu@hoganlovells.com

Paul Chaplin
Counsel, London
T +44 20 7296 5611
paul.chaplin@hoganlovells.com

www.hoganlovells.com

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