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Blog - Commentary

A consumer revolution

The Consumer Rights Bill will revolutionise consumer rights but the devil will be in the detail, says David Green of Edwin Coe.

The devil is in the detail of the new consumer rights legislation

The Consumer Rights Bill ("CRB") typifies the juggernaut of the regulation of consumer rights. The modern statute reads in a user friendly prose, not quite the street talk of US statutes but something akin to modern English. As ever, the primary legislation provides, however, only the framework, with all the detailed complicated stuff for everyday life to follow in secondary legislation. The modern statute can often enjoin a rag bag of stray legislative material looking for a home. The only reason a measure finds its way into a piece of legislation is because it is not large enough to stand on its own and needs to hitch a lift on the next legislative juggernaut. One comes along, stops and the hitchhiker jumps on.

US-style class action

Schedule 8 of the CRB is a bit like that. The Schedule seeks, amongst other things, to introduce a US-style class action for damages claims arising from breach of competition law. These are often referred to as "follow on" claims, because generally they follow on from the finding of a breach of competition law by a regulator. When there is no finding these claims are referred to as "stand alone claims". One can dress this up as a consumer issue particularly when we look at the hurdles faced by consumers to bring such a claim but the adoption of the policy ideas behind the Schedule should have much wider effect and no doubt are revolutionary. Indeed if we were looking at the changes as a consumer rights issue we might start not with competition claims but with more specific consumer claims such as mis-selling or product failings.

Competition Appeal Tribunal changes

Schedule 8 as currently drafted provides for various changes to the role of the Competition Appeal Tribunal ("CAT") and the manner in which it works within the framework of private actions for damages for breaches of competition law.

The two revolutionary provisions introduce two procedures for "opt out" class claims. The first sets out a procedure by which a representative of a "class" may apply to the CAT to certify a class of claimants which he/she will represent. If the CAT certifies the class and appoints the representative then all persons who may have a claim within the terms of the "class claim", which will be defined, are automatically included in the claim unless they opt out. Damages will be assessed for the class rather than individuals. Non UK claimants will not form part of the opt-out class but may be able to opt in. The provision is hedged in by safeguards but the main one is that the representative, who could be a law firm instructed to act, must persuade the CAT that class certification is appropriate. That will undoubtedly be hard fought because it will often determine whether the claim lives or dies.

Settlement of claims

The second opt out process is one that applies only to the settlement of claims. This allows a defendant and claimant to come to the CAT to seek that a settlement applies to all those who may have claims falling within a defined class. The court certifies the class of individuals to whom the settlement would apply and whether they are subject to an opt-out process or have to opt in. When the settlement offer is approved by the CAT on an opt out basis it binds all who are within the defined class unless they opt-out or are non-UK domiciled and do not opt-in. This reflects a similar process that works well in the Dutch courts and has been used to settle claims not just in the Netherlands but also claims that originated here.

The settlement process is relatively uncontroversial. It allows the defendant to ensure that any settlement approved by the CAT is binding on anyone who may have a claim. The opt-out class action is highly controversial and it remains to be seen whether it will survive in the Bill in its current form. There are amendments laid in the Lords that would rip the heart out of it and leave it an empty vessel.

Those in favour of the opt out process call on the long development of the idea from European Commission and domestic proposals over many years, to the failings of the existing legislation (allowing consumer bodies to manage claims on an opt in basis) which has been used once with sufficient problems for it never to be used again. Those against see this as the further development of the litigation culture that besets business. The lobby in favour might counter that the effect of the changes may bring much litigation business to the UK from other jurisdictions. The Dutch process attracted claims in the same way.

Business wins the day

It is not the first time the two have clashed. When they did so in Europe the business lobby won. Here there was an opt out proposal for financial claims included in a bill prior to the last election but it was lost in the pre-election wash-up. If the Bill does pass in its present form, it will be revolutionary, at least in concept. It will establish principles of procedure that could be invoked for other mass consumer claims. How it will work in practice will be seen. In that respect like all primary legislation, even if the Bill gets through, the devil will be in the detail of the secondary legislation, which in this case will be in the CAT rules that will apply to the procedure.

David Greene is a past President of the London Solicitors Litigation Association and a senior partner at Edwin Coe LLP.