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# Competition World

A global survey of recent competition and antitrust law developments with practical relevance

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## Quarter 4: 2015

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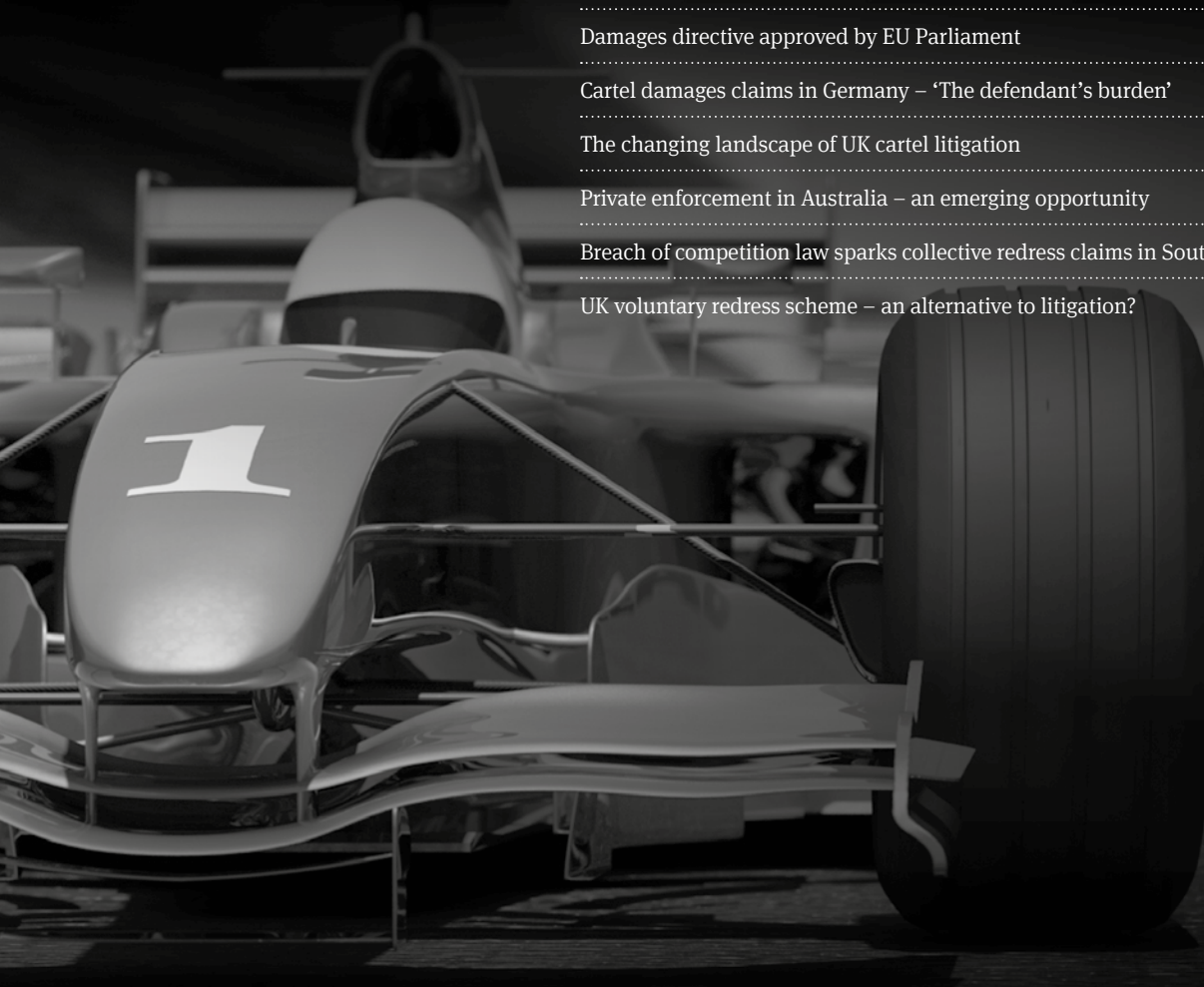
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## From the guest editor

Welcome to a special disputes edition of Competition World.

This edition of *Competition World* focuses on antitrust litigation. It has been produced to coincide with significant developments in antitrust litigation around the world. We have commissioned articles from across our global team to pick out some of the most topical issues affecting antitrust litigation in Europe, North America, Australia and South Africa.

Perhaps the most eye-catching development has been the introduction of an opt-out class action regime in the UK for competition law cases, with the Consumer Rights Act entering into force on October 1, 2015. We start by describing what to expect from this highly significant development.

In assessing how this new UK legislation will be interpreted, the well-established class action regimes of North America provide the obvious point of comparison. Perhaps contrary to common perceptions in Europe, where policymakers regularly cite the perils of the so-called excesses of the US class action regime, the Supreme Court in the US has reined in the scope of certification in a series of recent cases. By contrast, in Canada the courts have taken a more permissive approach to claimants, with most recently the British Columbia Court of Appeal holding that breach of the Competition Act can ground a claim in civil conspiracy.

We then describe the key features of the EU's Damages Directive, which is set to transform the national court procedures for some Member States, as it seeks to ensure that certain minimum procedural rights exist for victims of competition law breaches across the EU.

In Germany, we explain how the courts are interpreting national legislation that places a material burden on defendants in proceedings by victims of breaches of competition law that seek to recover losses.

Also in the EU, we provide an overview of cartel litigation in the UK. This article describes the four inter-connecting features of all cartel litigation across the EU – being the European Commission's investigation and binding decision; the inevitable appeal against that decision to the EU Courts;

the private follow-on enforcement action in the national courts; and the settlement process. We explain how in the UK we are entering a new phase of cartel litigation with less scope for procedural delay in the early stages and a greater focus on substantive issues.

We then move to Australia, with an article that describes how recent developments look set to lead to more private enforcement. Similarly in South Africa, we consider recent case law developments which open the door for class actions in antitrust cases.

Finally, we round-out this edition where we started – by looking at the most recent reforms to antitrust litigation in the UK, with an article explaining the significance of the new voluntary redress scheme that has been launched by the UK's competition regulator, the Competition and Markets Authority. This scheme is designed to give those companies caught up in a cartel investigation the opportunity to offer redress to victims and to put the matter behind them.

For companies caught up in cartels or any other breaches of competition law, the risk of facing private action is now greater than ever – and is no longer confined to North America. The importance of taking a coordinated and global approach to both the investigations by regulators around the world – but also now the private enforcement that follows – has never been greater.

If you have any comments or questions about the articles in this issue, please feel free to contact the authors. Similarly, if you would like to discuss other antitrust and competition issues relevant to your part of the world, please feel free to contact me or any of the antitrust and competition litigation partners across our global network. Contact details are at the end of the issue.

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**Peter Scott**  
Guest editor, Partner  
peter.scott@nortonrosefulbright.com

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# UK opt-out collective actions – ‘US class action lite’ but still set to make an impact

## Introduction

On October 1, 2015 the Consumer Rights Act 2015<sup>1</sup> entered into force. This reforms and consolidates consumer protection laws in the UK but also – significantly from a litigation perspective – provides a mechanism for a form of ‘class action’ to be brought for the first time in the UK. The new regime will allow representative litigants to apply to the Competition Appeal Tribunal (CAT) for ‘certification’ (i.e. approval) to bring proceedings for damages on an ‘opt out’ basis on behalf of a class of claimants (with the exception of those that expressly elect not to be included in the class).

Although the new mechanism will be limited to competition law claims, it is likely to have a significant impact on litigation risk by increasing the scope for consumers and small businesses to claim for losses suffered as a result of an infringement of competition law.

In recent years, there has been significant growth in claims in the English courts being issued by victims of anti-competitive conduct, seeking to rely on infringement decisions by competition authorities as a basis for litigation to recover losses from companies named in those decisions. This includes high profile actions in respect of the air cargo cartel and action by high street retailers against

MasterCard and Visa in relation to interchange fees.

Most of these claims have been brought by large businesses, as individual claimants or listed groups of claimants. The introduction of the collective actions regime opens the door for small businesses and consumers to obtain compensation for losses suffered. Such claims are often too small to justify expensive litigation, but the new procedure is intended to overcome this by allowing large numbers of smaller claims to be bundled together without requiring the individuals that might benefit from a damages award being involved in the conduct of the litigation.

## Opt-out proceedings under section 47B

The Consumer Rights Act 2015 amends the Competition Act 1998, substituting a new section 47B which introduces an opt-out collective action regime for both: (i) follow-on competition law claims (i.e. claims based on the defendants’ liability as established by an infringement decision by a competition authority); and (ii) stand-alone competition law claims (i.e. claims where there is no infringement decision meaning that the claimants are required to prove that the defendants have breached competition law).

The CAT has issued new procedural rules which set out how it intends to consider and manage cases brought under the new regime.<sup>2</sup> There remains significant uncertainty which we consider in detail below.

In summary, a claim brought under section 47B will go through the following phases:

### Certification

Before a claim can proceed, the claimant representative is required to apply to the CAT for a collective proceedings order. An order will only be granted if the CAT is satisfied that the representative body bringing the claim is ‘suitable’, that the class of claimants is adequately defined and that it is appropriate that the claim be brought on an opt-out collective basis (rather than an opt-in basis, which would require the representative to sign up all participating claimants).<sup>3</sup>

### Settlement

The representative body cannot agree a settlement on behalf of the class members. A settlement is only binding when it has been approved by the CAT and even then class members have the opportunity to opt out and proceed with individual claims.

<sup>1</sup> [http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga\\_20150015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf).

<sup>2</sup> [http://www.legislation.gov.uk/uksi/2015/1648/pdfs/uksi\\_20151648\\_en.pdf](http://www.legislation.gov.uk/uksi/2015/1648/pdfs/uksi_20151648_en.pdf).

<sup>3</sup> Note that the opt-out mechanism only applies to UK domiciled claimants. Non-UK domiciled claimants will be required to formally opt-in even if the claim is categorised as opt-out.

## Damages

If the claim reaches trial and judgment is given in favour of the claimants, the CAT will assess damages on a compensatory basis. Exemplary or punitive damages are not available. The CAT will award damages on an aggregate basis and provide directions as to how the claim of each class member should be assessed. The CAT has the power to order that any unclaimed damages be passed to charity.

## Limitations on the application of the regime

There are competing tensions in the design of the regime. On the one hand, the fact that claims can be brought on an opt-out basis makes it an attractive commercial proposition for claimant law firms to organise claims. The number of US claimant law firms that have established offices in London is testament to this. There will be competition between claimant firms to identify suitable cases and representatives, and to obtain certification to represent classes.

There are, however, a number of important limitations built into the regime which are designed to limit the scope for abusive litigation. In particular: (i) the regime is limited to competition law claims; (ii) law firms are prevented from bringing claims on a contingency fee (or ‘damages based agreement’) basis<sup>4</sup>; and (iii) claims can only be brought by ‘suitable representatives’. The limits of these restrictions will be tested in time.

The detail of the procedural rules could restrict the availability of the new regime to a limited number of potential cases. This is because although section 47B states that the collective actions mechanism applies to claims arising before October 1, 2015 – the new limitation rules (set out in section 47E) do not apply to claims arising before October 1, 2015. For pre-existing claims, the old CAT Rules on limitation will apply, which prevent claims being brought until a competition authority’s infringement decision is final (i.e. until either all appeals against the substance of the decision have been resolved or the time limit for lodging an appeal has elapsed)<sup>5</sup>. Although it is possible to obtain permission from the CAT to issue a claim in advance of the expiry of this period, permission has only previously been granted in exceptional cases.<sup>6</sup> Any suggestion that there will be a flood of claims under the new regime on (or shortly after) October 1 is unlikely to be realised.

## Certification

The application of the test for certification of an opt-out class is integral to the success of the regime. There are a number of elements that the CAT is required to consider before granting a collective proceedings order (certifying the class) and many are vague and open to interpretation. In particular:

- The claims must be ‘suitable to be brought in collective proceedings’. In determining this, the CAT is required to consider: (i) whether making a collective proceedings order would give rise to the promotion of ‘fair and efficient resolution of common issues’; (ii) a cost/benefit analysis; (iii) the ability of the court to award an aggregate amount in damages; and (iv) whether making a collective

proceedings order is ‘appropriate’. In any case claimants and defendants will have very different views on all of these considerations.

- The CAT’s obligation to consider ‘whether it is practicable for the proceedings to be brought as opt-out collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.’ The CAT might interpret this requirement as an indication that collective actions should be restricted to consumers and small businesses with low value claims that would be uneconomic to bring alone. Claims which do not meet this threshold would be required to be brought on an opt-in basis.
- The CAT will only certify a claim where the class representative is ‘suitable’. It will be interesting to see how the CAT applies the suitability test and in particular how it will treat special purpose vehicles (SPVs) if they are used to collect representative claims. In the law reform process, SPVs (together with law firms and funders) were originally to be prevented from bringing such claims but there is no absolute prohibition in the legislation.

Given these uncertainties, certification will be the key battleground in the new regime, with claimants and defendants looking to test the boundaries of the rules and set helpful precedents going forward. With so much at stake, certification hearings are likely to be heavily contested and could result in multiple appeals on the interpretation of these points. The first cases could, therefore, take many years to reach resolution. We expect claimants and defendants alike to refer to aspects of the approaches taken to class action certification in the US and Canada – where there is a significant body of case law – to support their arguments

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<sup>4</sup> Competition Act 1998 section 47(C)(8) – the prohibition on damages based agreements is contrary to the position in general litigation rules and could limit the scope for genuine collective claims to be brought. While difficult to reconcile with the wider policy of allowing such cost arrangements, this limitation perhaps reflects the government’s nervousness about the development of a class action industry and the political implications of claimant lawyers recovering a potentially substantial costs payment from any award that would otherwise be due to consumers.

<sup>5</sup> The Competition Appeal Tribunal Rules 2003, Rule 31.

<sup>6</sup> *Emerson II* [2007] CAT 30 – the CAT exercised its discretion in this case and granted the claimants permission to issue at an earlier stage as there was an enhanced risk that documents in the possession of the defendant would not be available for disclosure if proceedings could not be brought until the exhaustion of all rights of appeal.

on how the CAT should interpret the factors it is required to take into account in considering certification.

In an ideal world, claimant law firms will be looking for a test claim which is narrowly-defined and straightforward (giving rise to as few issues as possible) to allow them to work through the myriad of issues that will need to be resolved. However, the combination of the fact that the size of the claim will need to be substantial to justify the time commitment and the associated costs for the first case, and the competition between claimant law firms to be the first to bring a strong claim, means that this may be wishful thinking.

## Settlement

Collective claims cannot be settled directly between the representative body and the defendant(s). Consistent with the approach taken in the US and Canada, the Consumer Rights Act provides for a court-approved settlement procedure. The CAT will only approve the settlement if it is satisfied that its terms are 'just and reasonable'.<sup>7</sup> In deciding whether a proposed settlement meets this test, the CAT can consider: (i) the likelihood of the claimants being awarded more than the settlement at trial; (ii) the likely cost and duration of proceedings; (iii) an independent expert opinion; and (iv) the view of represented parties.

These are all questions that the CAT has experience of in other contexts, but it is not clear how the CAT will approach some of these questions in a damages settlement situation where it will be concerned to protect the interests of a large class of absent litigants. This

applies in particular at an early stage of proceedings where the relative merits of the parties' cases remain unclear.

Relevant to potential defendants, the Consumer Rights Act also contains a mechanism for companies that have infringed competition law to apply to the Competition and Markets Authority (CMA) for approval of a statutory voluntary redress scheme.<sup>8</sup> This procedure complements the collective redress regime and gives companies that have infringed competition law the opportunity to settle cases before proceedings have been brought. Companies caught up in competition investigations will need to consider whether a voluntary redress scheme might help avoid protracted follow-on litigation if they end up subject to an infringement finding. An advantage of the mechanism is that the CMA approves the scheme as offering appropriate compensation.

## Conclusion

The new regime sees the UK take a Europe-leading step forward in antitrust litigation, increasing its attraction as a venue for damages claims. In time we expect that it will have a significant impact, but in the short term there are significant uncertainties about the scope and application of the new rules which is likely to slow down the progress of the early cases. These early claims will be critical in establishing precedent for how the mechanics of the regime will operate. Only after these first claims have been certified (or not) will we know how far the UK legal system might travel down the road towards US-style class actions.

For more information contact:



**Peter Scott**  
Partner, London  
peter.scott@nortonrosefulbright.com



**Mark Simpson**  
Partner, London  
mark.simpson@nortonrosefulbright.com



**James Flett**  
Senior associate, London  
james.flett@nortonrosefulbright.com

<sup>7</sup> Competition Act 1998 section 49A (as inserted by the Consumer Rights Act 2015).

<sup>8</sup> Competition Act 1998 section 49C (as inserted by the Consumer Rights Act 2015).



# US class actions – will the Supreme Court continue to rein them in?

Corporations worldwide are frequent targets of class or group actions. The respondents to Norton Rose Fulbright's 2015 Litigation Trends Annual Survey – primarily general counsel – indicated that the increasing number of class or group actions and a more litigious business environment were the most important issues impacting companies.<sup>1</sup> Class action lawsuits were listed as the top litigation issue by respondents in the US, Canada, and Australia.<sup>2</sup>

A quarter of all respondents reported at least one class or group action pending against their companies in the preceding 12 months, with survey participants from the US comprising 80 per cent of that number. And 71 per cent of those who reported a class action had more than one filed against their companies during that period. Of those who have had a class or group action brought against their companies, 30 per cent indicated that one or more were certified.

Although the volume of reported antitrust/competition class or group actions in the survey was significantly less than other categories (labour/employment, consumer, securities, or mass tort), the expense of litigating antitrust class actions and the ultimate threat of automatic treble damages

under the US antitrust laws ensures that those cases become the focus of C-Suite attention.

On the US antitrust class action front, courts have been grappling with class certification determinations in the wake of the Supreme Court's decision in *Comcast Corp. v Behrend*, 133 S. Ct. 1426 (2013). The Court had been expected to use *Comcast* as an opportunity to resolve a circuit split on whether courts must decide challenges to experts at the class certification stage, but the majority opinion never got that far. Instead, it resolved the case based on predominance grounds, holding that the expert's methodology for calculating damages was too far removed from the liability theory of antitrust impact that was accepted for class-action treatment to support a finding that proof of damages could be determined on a class-wide basis.

In the absence of a means of proving class-wide damages, individual questions would predominate at trial, which precluded class certification. The *Comcast* Court thus confirmed that plaintiffs must come forward with a specifically tailored (and presumably reliable) methodology to prove class damages at trial before they can win class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

The next question on the horizon is whether *Comcast* allows certification of an overly broad class, i.e. a class in which not all class members have been

injured. The District of Columbia Circuit Court of Appeals, in an antitrust case alleging that the defendants colluded to raise fuel surcharge rates, held that all class members must have suffered injury for a class to be certified.<sup>3</sup>

The *Rail Freight* defendants argued that the plaintiffs' damages model, which purported to quantify the injury-in-fact to all class members attributable to the defendants' allegedly collusive conduct, was defective because the methodology also detected injury where none could exist. The model yielded similar results when applied to shippers who were subject to legacy contracts during the class period and were bound by rates negotiated before any conspiratorial behaviour was alleged to have occurred. If accurate, the court found that fact would 'shred the plaintiffs' case for certification'.

The court explained that the plaintiffs were required to show that they could prove, through common evidence, that all class members were in fact injured by the alleged conspiracy. Without that ability, the requirement that questions common to the class predominate at trial would not be met because individual trials would be necessary to establish whether a particular shipper had suffered harm from the alleged price fixing scheme.

Although the court did not require proof at the certification stage of the

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<sup>1</sup> The survey was conducted by Acritas, a global legal services market business research firm. This year's survey is the 11th overall and the most extensive in its history, polling more than 800 corporate counsel representing companies across 26 countries on disputes-related issues and concerns.

<sup>2</sup> As with any survey, not all participants answered every question.

<sup>3</sup> *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013).

precise amount of damages incurred by each class member, the court did expect the common evidence to show all class members suffered some injury. Noting that ‘the case law was far more accommodating to class certification’ before *Comcast*, the court vacated and remanded the trial court’s decision certifying a class for reconsideration in light of *Comcast*.

More recently, the First Circuit Court of Appeals took a narrower view of *Comcast*, finding that *Comcast* does not require that plaintiffs show at the class certification stage that all alleged class members had suffered injury, but only requires that at class certification, the damages calculation must reflect the liability theory.<sup>4</sup> *Nexium* was a pay-for-delay case against drug manufacturers brought by indirect purchasers under state antitrust laws alleging that *Nexium* manufacturers settled patent infringement cases by paying generic manufacturers to delay the launch of their products.

The *Nexium* court, in a two-to-one decision, set out three principles relevant to the question of whether a class can include uninjured class members. First, a class action is improper unless the theory of liability is limited to the injury caused by the defendants. Second, the class definition must be sufficiently definite to allow the class members to be ascertainable. And third, where an individual claims process will be conducted at the liability and damages phases of the litigation, the payout of the amount for which the defendants would be held liable must be limited to injured parties.

Applying those principles, the court held that at the certification stage, a trial court need only be satisfied that it will be possible to establish before judgment a mechanism for distinguishing the injured from the uninjured class members. The court reasoned that at the class certification stage, it will not be feasible in many cases to entirely separate the injured from the uninjured class members.

The dissenting member of the three-judge panel agreed with the predicate principle of the majority’s opinion—that it is possible to certify a class that includes uninjured members provided that the trial court identifies a feasible method for culling the uninjured class members before entry of a judgment—but disagreed with its application of that principle. The dissent would require plaintiffs and the trial court to identify specifically a feasible culling method before certifying a class.

The dissent also noted that during the time that the interlocutory appeal from class certification was pending, the lower court tried most of the pending liability issues in the case, and the trial concluded with a defence verdict just as the First Circuit’s decision was about to issue. Further action on the *Nexium* class decision is therefore unlikely.

The Supreme Court, however, in June 2015 granted certiorari in *Tyson Foods, Inc. v PEG Bouaphakeo*, No. 14-1146, to determine whether a class may be certified that contains hundreds of members who were not injured and have no legal right to damages. The *Tyson* case was a collective action certified under the Fair Labor Standards Act and under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

A petition for writ of certiorari is also pending (as of this writing) before the Supreme Court in *Dow Chemical Co. v Industrial Polymers, Inc.*, No. 14-1091, which arises from a US\$1.1 billion judgment in an antitrust class action alleging coordinated price announcements. One of the questions presented in the Dow petition for certiorari is whether courts may presume class-wide injury from an alleged price-fixing agreement, even when prices are individually negotiated and individual purchasers frequently succeed in negotiating away allegedly collusive overcharges and would not have been injured.

While class actions in other jurisdictions across the globe are in their infancy, the United States Supreme Court, with the benefit of decades of experience, has in recent years reinforced more stringent requirements for class certification and that trend is expected to continue.

For more information contact:



**Anne Rodgers**  
Partner, Houston  
anne.rodgers@nortonrosefulbright.com

<sup>4</sup> In re *Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015).

# The British Columbia Court of Appeal holds that breach of the Competition Act can ground a claim in civil conspiracy

In *Watson v Bank of America Corporation*, the British Columbia Court of Appeal upheld the certification of a class action by retail merchants against Visa Canada Corporation, MasterCard International Inc. and a number of major Canadian banks in which the plaintiff alleges that banks and credit card companies unlawfully conspired in relation to fees charged to merchants on credit card transactions.<sup>1</sup>

This case has implications for B.C. class actions based on alleged breaches of the Competition Act,<sup>2</sup> and potentially for similar class actions in other Canadian provinces if the B.C. Court of Appeal's decision is followed in other jurisdictions.

## Background of the case

In *Watson*, the plaintiff alleges that the defendants entered into agreements to impose burdensome fees upon merchants who accept payment via credit cards and to mandate rules that restrict merchants' ability to determine their business practices. The plaintiff claims that these agreements are contrary to s45 (criminal conspiracy) and s61 (price maintenance) of the Competition Act, and seeks damages under s36 of the Competition Act. The plaintiff further relies on the various alleged breaches of the Competition Act to found claims in tort and

equity for civil conspiracy (including both unlawful means conspiracy and conspiracy to injure), unlawful interference with economic interests, unjust enrichment, constructive trust and waiver of tort.

In 2014, Chief Justice Bauman of the B.C. Supreme Court certified the class action but struck out the plaintiff's claims for breach of s61 of the Competition Act, unlawful means conspiracy, unlawful interference with economic interests, and constructive trust.<sup>3</sup> In striking out these claims, Bauman C.J. followed the B.C. Court of Appeal's decision in *Wakelam v Wyeth Consumer Healthcare*<sup>4</sup> in which the Court found the Competition Act to be a 'complete code' with exhaustive remedies for breach of the Competition Act. The plaintiff appealed the parts of the order striking out the claims for unlawful means conspiracy and constructive trust. The defendants cross-appealed the certification order arguing that Bauman C.J. erred in certifying any of the plaintiff's claims.

## Disposition

The primary issue on the plaintiff's appeal was whether the Competition Act provided a 'complete code' for remedies for breach of the Act, or

whether a breach of the Competition Act could also give rise to 'unlawful means' that could ground a claim for damages in common law or equity independent of the statutory remedies contained in the Act. In deciding this case, the Court of Appeal considered (a) whether the breach of a statute could amount to 'unlawful means' and (b) whether breach of the Competition Act in particular could amount to 'unlawful means'.

On the first question, the Court of Appeal held that 'unlawful means' could be established by a statutory breach. The Court held that this principle was already established in the case law.

On the second question, the Court of Appeal held that a breach of the Competition Act in particular could give rise to 'unlawful means.' The Court cited its previous holding in *Wakelam* for the proposition that a breach of the Competition Act alone could not ground claims for restitutionary remedies, but distinguished it from claims based on the tort of unlawful means conspiracy. In the Court's view, there was no evidence of legislative intent to limit civil remedies for breach of the Competition Act to those remedies contained in the Act. The Court held that the scheme for civil redress contained in s36 of the Competition Act was not intended to replace the common law action in unlawful means conspiracy. The fact that the statutory and common law

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<sup>1</sup> *Watson v Bank of America*, 2015 BCCA 362. Full text available at: <http://www.courts.gov.bc.ca/jdb-txt/CA/15/03/2015BCCA0362.htm>.

<sup>2</sup> RSC 1985, c. C-34.

<sup>3</sup> *Watson v Bank of America Corporation*, 2014 BCSC 532. Full text available at: <http://www.courts.gov.bc.ca/jdb-txt/SC/14/05/2014BCSC0532.htm>.

<sup>4</sup> *Wakelam v Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36. Full text available at: <http://www.canlii.org/en/bc/bcca/doc/2014/2014bcca36/2014bcca36.html>.



causes of action had different elements, remedies and limitation periods was evidence that the legislature intended them to co-exist.

For these reasons, the B.C. Court of Appeal held that a breach of the Competition Act could constitute ‘unlawful means’ and ground claims for damages in common law or equity.

The Court of Appeal then turned to the cross-appeal, the focus of which was whether the court below had correctly interpreted and applied section 4(1)(a) of the British Columbia Class Proceedings Act,<sup>5</sup> which requires the pleadings to disclose a proper cause of action in order to be certified as a class action.

The Court of Appeal gave deference to the lower court’s decision with only one exception. The Court of Appeal agreed with the defendants that Bauman C.J. erred in certifying the plaintiff’s statutory claim for conspiracy under s36(1) and s45 of the Competition Act because the pleadings did not disclose a proper cause of action. The plaintiff’s pleadings failed to state that the defendants made any agreements with a ‘competitor’ as required by s45. Although the plaintiff had pleaded that agreements were made between banks, networks and issuers of credit cards, these entities were not in competition with one another. The pleadings could not be read to allege agreements between banks and other banks, for instance, who were competitors.

## Implications

The *Watson* case synthesizes a number of recent B.C. competition law decisions and clarifies the relationship between the Competition Act and common law or equitable claims for relief in that province. The Competition Act does not preclude existing common law or equitable claims for relief to be brought in B.C., such as unlawful means conspiracy. This means that defendants in B.C. will continue to be required to defend against statutory, common law and equitable claims of relief arising from the same alleged conspiracy (as they had before the *Watson* case was originally decided). It remains to be seen whether the B.C. Court of Appeal’s reasoning will be followed in other Canadian provinces or by the Supreme Court of Canada where the question of whether the Competition Act provides a complete remedial code has yet to be judicially considered.<sup>6</sup>

For more information contact:



**Kevin Ackhurst**  
Partner, Toronto  
kevin.ackhurst@nortonrosefulbright.com



**D Michael Brown**  
Partner, Toronto  
michael.brown@nortonrosefulbright.com



**Eric Lefebvre**  
Partner, Montréal  
eric.lefebvre@nortonrosefulbright.com



**Steve Leidl**  
Partner, Calgary  
steve.leidl@nortonrosefulbright.com

<sup>5</sup> *Class Proceedings Act*, RSC 1996, c 50.

<sup>6</sup> The authors wish to thank Danny Urquhart, articling student, for his assistance in preparation of this article.

# Damages directive approved by EU Parliament

## Introduction

On November 26, 2014, a new directive on antitrust damages actions entered into force.<sup>1</sup> The directive was introduced to harmonise the procedural rules for antitrust/competition damages actions across all EU Member States, making it easier for victims of anti-competitive conduct to obtain compensation for loss suffered.

The directive includes a number of claimant-friendly measures that will likely give rise to an increased number of antitrust/competition law claims, including: (i) the introduction of a disclosure regime across all Member States; (ii) confirmation that indirect purchasers are entitled to issue proceedings directly against cartelists; (iii) confirmation that cartelists (with the exception of leniency applicants) are jointly and severally liable for the entire loss caused by a cartel; and (iv) the introduction of a rebuttable presumption that cartels cause harm.

On the other hand, the directive also contains safeguards to ensure that: (i) companies are not incentivised to bring vexatious claims and abusive litigation; and (ii) the Commission's leniency programme is not undermined.

EU Member States are required to introduce national legislation implementing the directive by December 27, 2016. Member

States remain free to adopt national legislation going beyond the scope of the directive provided that legislation is not inconsistent with the directive.

Damages claims are already relatively common in a number of EU Member States, including the UK, Germany and the Netherlands. Although the directive will have a significant impact on the law in some Member States, we would not expect it to have a significant impact on the position in Member States, such as the UK, where the law has already developed beyond the standard set out in the directive. In particular, the UK's adoption of a US-style 'opt-out' system for collective actions and its developed procedural rules are likely to ensure that the English courts will remain the forum of choice for antitrust/competition damages claims.

## Background

Antitrust/competition damages have been a hot topic for over a decade. The European Commission has repeatedly expressed concerns that:

- Only a small percentage of its infringement decisions give rise to successful private damages actions resulting in compensation for the victims of the antitrust/competition law infringement, when the cost to EU consumers of cartels is estimated to amount to many millions of euros per year.

- Although certain regimes are seeing a rise in the number of private damages actions, the vast majority of EU Member States have had very few private damages actions or none at all.

The Commission published a Green<sup>2</sup> Paper on this topic in 2005 and a White Paper<sup>3</sup> in 2008. However, it was not until June 2013 that concrete proposals for reform in this area were advanced with the European Commission publishing a draft legislation package. This publication was followed by discussions between the EU institutions before the draft text was approved on March 26 and entered into law on November 26, 2014.

## The main provisions of the directive

The new directive introduces rules to make it more attractive for claimants to bring private damages claims whilst ensuring that: (i) companies are not incentivised to bring vexatious claims and abusive litigation; and (ii) the risk of claims does not deter applicants under the Commission's leniency programme. This programme is fundamental to the Commission's detection and prosecution of antitrust/competition law infringements – in excess of 85 per cent of the Commission's cartel cases have been

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<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>.

<sup>2</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0672>.

<sup>3</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008DC0165>.

triggered by leniency applications. The EU has accordingly taken a cautious approach; in particular, the EU has rejected the adoption of a US-style 'opt-out' class action system.

The main provisions of the directive are as follows.

### Passing-on – the position of indirect purchasers

The directive confirms that indirect purchasers are entitled to issue proceedings directly against a cartel to recover loss suffered even though they did not directly contract with any of the cartelists. From a policy perspective, it makes sense that any person that suffered loss as a result of anti-competitive conduct should be able to claim against those responsible for that loss regardless of where that person sits in the supply chain.

The directive goes one step further, by introducing a presumption that an overcharge levied on a supplier/direct purchaser was passed on to an indirect purchaser (i.e., that the direct purchaser did not absorb the overcharge) although the indirect purchaser will need to prove the extent of the overcharge that was passed on and the loss suffered.<sup>4</sup> This approach is a double-edged sword for claimants, as a defendant can benefit from the passing-on defence if it is able to demonstrate that a claimant in turn passed on the overcharge to its own customers rather than absorbing it.

### Precedent effect of infringement decisions

The directive provides that an infringement decision of a national competition authority of one Member State can be presented as evidence of an infringement before a court in another Member State. Although the EU has retreated from the Commission's original position that such decisions would be legally binding across the

EU, an infringement decision of a national competition authority is likely to be very persuasive before a court in another Member State.<sup>5</sup> Decisions of the EU Commission are already binding on the courts of Member States.<sup>6</sup>

### Presumption of harm

Controversially, the directive introduces a rebuttable presumption that cartels cause harm. The directive envisages that courts in EU Member States will have the power to estimate the amount of loss suffered if it is established that a claimant suffered loss but the exact amount of loss suffered is excessively difficult to quantify.<sup>7</sup> This presumption does not however prevent defendants adducing evidence that the competition law infringement had no effect on the claimant.

### Joint and several liability

The directive requires Member States to introduce rules that cartelists are jointly and severally liable for all of the loss caused by the cartel, which means that a claimant can recover its entire loss from a single cartelist (subject to the exemption described below). This position is already recognised by the English courts and is one of the features of the UK regime that has made it attractive to claimants.<sup>8</sup>

However, a company that has been granted immunity under a leniency programme (i.e. a 100 per cent reduction on fines) will be exempt from this general rule and will not be jointly and severally liable for the entire harm caused by the cartel; they will only be liable for loss concerning their own sales. This exception is designed to avoid discouraging potential immunity applicants and indeed provides a further incentive to apply for immunity. The immunity applicant is an obvious target for bringing a claim as it has admitted liability and

will not therefore be able to appeal against the infringement decision and rely on on-going proceedings to delay determination of damages claims. At present, this means that immunity applicants are often front and centre in damages claims, needing to pursue their fellow cartelists for a contribution to any damages awarded. Going forward, immunity applicants will be a significantly less attractive target for potential claimants.<sup>9</sup>

### Protection from contribution claims for settling defendants

A defendant that settles a claim will be protected from contribution claims by co-defendants that subsequently settle or that are subject to damages awards.<sup>10</sup> Thus, a non-settling co-defendant cannot come after a defendant that has already settled for a further payment. The effect of this provision will be to increase the incentives on defendants to settle early, as there will be a prospect of getting out of litigation early at a lower cost for their share of the losses caused by a cartel infringement.

### Disclosure – access to evidence

The directive requires Member States to introduce a disclosure regime whereby cartelists will be required to disclose relevant evidence to claimants. The lack of available evidence has been cited by the Commission as one of the key obstacles facing victims of cartel conduct in bringing claims. Disclosure is not a new phenomenon in damages claims – for example, the UK has a well-established disclosure regime that exceeds the requirements of the directive and provides broad access to relevant documents.<sup>11</sup>

The directive's disclosure requirement is not absolute; a defendant to a competition/antitrust damages claim will not be required to disclose self-incriminating leniency statements

<sup>5</sup> Article 9.

<sup>6</sup> Regulation 1/2003 Article 16(1).

<sup>7</sup> Article 16.

<sup>8</sup> Article 12.

<sup>9</sup> Article 11.

<sup>10</sup> Article 18.

<sup>11</sup> Article 5.

<sup>4</sup> Article 13.



or settlement statements (although the documents which accompany those statements will be disclosable – confirming the position established on this issue in *Pfleiderer*<sup>12</sup> and *National Grid*<sup>13</sup>). This approach is designed to ensure that leniency applicants and settlement parties are not disadvantaged as compared to the other infringing parties in private litigation.<sup>14</sup>

### The impact of the directive on the claimants' forum of choice

Although the directive will achieve the Commission's aim of removing a number of the procedural barriers to bringing private damages claims in many EU Member States, the incentives for claimants to bring pan-EU claims in particular 'claimant friendly' jurisdictions – such as the UK, Germany and the Netherlands – are likely to remain unchanged.

Indeed, although the purpose of the directive is to introduce a minimum standard across the EU, many of the factors that make these jurisdictions attractive – such as favourable procedural rules, experienced judiciaries and efficient case management – will remain. In addition, it remains open to Member States to introduce legislation that goes beyond that required by the directive.

In fact, the UK is likely to become increasingly claimant-friendly with the introduction of a US-style 'opt-out' system for collective actions<sup>15</sup> – i.e., US-style class actions in all but name, a proposal rejected by the EU. We can therefore be certain of two things: the significant increase in private competition law claims seen in Europe in recent years will continue, and the UK will continue to be a preferred jurisdiction for bringing these claims.<sup>16</sup>

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#### For more information contact:



**Peter Scott**  
Partner, London  
peter.scott@nortonrosefulbright.com



**Mark Simpson**  
Partner, London  
mark.simpson@nortonrosefulbright.com



**Jay Modrall**  
Partner, Brussels  
jay.modrall@nortonrosefulbright.com

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<sup>12</sup> *Pfleiderer v Bundeskartellamt* (Case C-360-09 [2011] WLR (D) 196.

<sup>13</sup> *National Grid Electricity Transmission plc v ABB Ltd* [2009] EWHC 1326 (Ch).

<sup>14</sup> Article 6.

<sup>15</sup> Competition Act 1998 section 47B, as inserted by the Consumer Rights Act 2015.

<sup>16</sup> See our article on UK opt-out collective actions – 'US class action lite' but still set to make an impact.

# Cartel damages claims in Germany – ‘The defendant’s burden’

The legal position of claimants bringing private damages claims against companies found to have been involved in a cartel has been strengthened by both the interpretation of the codified law in Germany and also recent case law. Although the general rule under German procedural law is that the burden is on the claimant to prove the facts of the case, the burden of proof in antitrust cases has shifted from the claimant to the defendant.

In this article we outline the provisions of section 33 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, hereafter: GWB), which is the basis for private claims for damages. We then explain the binding effect of infringement decisions reached by competition authorities, before evaluating the courts’ position on the respective questions of evidence and, in particular, the burden of proof. Finally, we consider the practical consequences of the burden shifting to the defendant.

## Section 33 GWB and its development

In common with other EU regimes, antitrust law in Germany is generally based on a combination of both public and private enforcement: public enforcement comprises the administrative investigation process, leading to the sanctioning of violations of the cartel prohibition (section 1 GWB; Art. 101 TFEU) and the prohibition of an abuse of a dominant

market position (section 19, 20 GWB; Art. 102 TFEU), while parties that have been individually affected by unlawful conduct may bring private actions in order to be compensated.

The rules governing private claims for damages under German antitrust law are set out in section 33 GWB, which provides as follows:

- Subsection 1 entitles natural and legal persons, who as participants in the market were affected by violations of German or European antitrust law, to receive a remedy for their loss suffered or, in the case of a risk of repetition of the violation, to obtain an injunction against the violator preventing it from further infringing such rights.
- A claim under section 33 GWB may also be brought by certain associations with legal capacity pursuant to subsection 2.
- If violations have been committed intentionally or negligently, a claim for compensation for the loss suffered as a result of the infringement may be available in accordance with subsection 3.
- In a claim for compensation, the relevant court will be bound by any anti-competitive findings in the final decision of the German Federal Cartel Office (*Bundeskartellamt*, BKartA), the European Commission or the respective authority of a member state of the European Union (subsection 4).

- Finally, subsection 5 provides that the limitation period is suspended where cartel proceedings are initiated by the *Bundeskartellamt*, the European Commission or any other antitrust authority within the European Union. In addition, the general provisions on limitation under the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) apply to cartel proceedings. This means that claims regularly become time-barred three years after (i) the claim arising and (ii) the claimant having knowledge of the cartel conduct (section 195, 199 BGB). Given that the conduct on which antitrust claims are based often took place in secret, the knowledge provision is often critical. However, German law also includes a backstop date – claims can only be brought within a period of ten years of the conduct taking place regardless of when the claimant became aware of that conduct (section 199 subsection 3).

The current wording of section 33 GWB partly results from a landmark change to the legal system which took place in 2005 when the seventh amendment to the GWB was implemented. Since that time German antitrust law has been based on the system of legal exception rather than the system of administrative exception. This means that the risk of negligently violating antitrust law has shifted to the company. Pre-2005 it was possible to notify arrangements to the regulator and to proceed with those



arrangements unless prevented from doing so. Today companies are required to 'self assess' whether or not their market conduct is in compliance with antitrust law.

In addition, in 2005 section 33 GWB was amended to significantly strengthen the position of private third parties as enforcers of antitrust law – providing under subsection 4 that authorities' findings have a binding effect on courts in claims that follow-on from such decisions. Therefore, where there is an infringement decision, it is not possible for defendants to argue that they did not participate in the cartel.

### The binding effect of infringement decisions

When the German legislator implemented the binding effect provision, it was explicitly stated in the respective justification for the legislation (see *Begr RegE BT-Drucks.* 15/3640, p. 54) that this binding effect was limited to the violation of antitrust law. All other issues concerning the existence and causality of damages were explicitly excluded and left to the courts' assessment of the evidence.

Consequently, any binding effect can only apply to the violation of antitrust law itself. However, this statement is not as clear as it might appear at first. On the one hand, the authorities' findings on the existence of a cartel infringement may lead to the conclusion that the company has participated in cartel schemes throughout the whole period of infringement, and that all respective contractual agreements concluded by that company during that time are affected. On the other hand, the

binding effect may be limited to the more general finding that the company has been participating in a cartel scheme, which would not encompass a binding statement on every single agreement entered into by the company during the relevant period.

The competition authority's fine notice is the decisive point of reference for any kind of binding effect. As it is very unlikely that the competition authority will explicitly include findings on every single transaction that took place during the period covered by the infringement decision, (especially in cartel schemes that cover a long period of time), in the vast majority of cases the courts will only be bound by a more abstract statement on the companies' participation in cartel schemes, leaving the extent to which individual agreements are affected as a matter for determination by the courts.

### Factual extension by the courts

As stated above, the binding effect of section 33 subsection 4 GWB is limited by the decisive findings of the competition authority. Applying the general principles established by German procedural law, it would be for the claimant to adduce evidence of the facts on which the claim is based, so as to prove that the disputed transactions have been the subject of cartel agreements.

However, the first decisions of Regional Courts (*Landgerichte*) as well as Higher Regional Courts (*Oberlandesgerichte*) seem to take a distinctly claimant-friendly approach to this legal test, as the following two cases demonstrate:

- The Higher Regional Court of Karlsruhe (see OLG Karlsruhe, decision of July 31, 2013, Civil Division 6 U 51/12) took an approach based on a specific German instrument in procedural law called '*Anscheinsbeweis*' (prima facie-evidence). According to this principle, which has been developed by case law, the party that would otherwise be obliged to prove a specific fact, could benefit from a presumption in certain cases (see for example the decision of the Federal Supreme Court (*Bundesgerichtshof*) of March 18, 1987, Civil Panel IVa 205/84). The Higher Regional Court of Karlsruhe therefore inferred from the general existence of a cartel scheme with a broad scope that it was likely that all procurements of the company concluded during that time had been affected by the cartel. The approach of the Court in this case was based on the assumption that a cartel scheme typically leads to an increase of prices and affects all of the agreements entered into during the period the cartel is in place.
- The Regional Court of Berlin in its decision of August 6, 2013, Civil Chamber 16 O 193/11, p. 11, imposed an even greater burden on the defendant. It held that in circumstances where the claimant was largely unable to present and prove the facts demonstrating that specific procurements had been affected by cartel agreements it was appropriate to apply a so-called '*sekundäre Beweislast*' (secondary burden of proof). This effectively reversed the burden of proof – requiring the defendant to present substantial contradictory evidence, i.e. to prove that the respective procurement had not been affected.



Whereas an ‘*Anscheinsbeweis*’ supports the claimant’s arguments, this ‘*sekundäre Beweislast*’ completely shifts the burden of proof from the claimant to the defendant.

### Practical consequences

The practical effect of section 33 subsection 4 GWB, combined with the outcome of these cases (which have recently been confirmed by, inter alia, the Regional Court of Erfurt in its decision of March 19, 2015, Civil Chamber 3 O 1050/14 ) effectively limits the defendants’ arguments in most follow on damages claims to challenging the quantity of losses

caused by their infringement of antitrust law, rather than whether or not any losses have occurred at all.

These cases have shifted the risks associated with violations of antitrust law. Until very recently in Germany, the biggest threat to companies held liable for violations of antitrust law was fines of up to ten per cent of the annual turnover of that company. Now the amount of damages payable in private claims regularly significantly exceeds the fines imposed by the authorities. However, until there has been a decision by the German Federal Court (*Bundesgerichtshof*, BGH) on this issue, the existing case law may yet change to reduce the burden on defendants.

For more information contact:



**Maxim Kleine**  
**Partner, Hamburg**  
[maxim.kleine@nortonrosefulbright.com](mailto:maxim.kleine@nortonrosefulbright.com)

# The changing landscape of UK cartel litigation

## Introduction

The UK is the forum of choice for some of the largest damages claims arising from cartel conduct in Europe. This article describes how cartel litigation in the UK is currently in something of an interim phase, having moved past a first phase that was characterised by delays caused by procedural issues, but with a distinct new era around the corner with the implementation of the Consumer Rights Act which entered into force from October 1, 2015.<sup>1</sup>

This article highlights the key strategic decisions in bringing and defending claims by reference to four interrelated arenas: the regulator's investigation; the likely appeal of any infringement decision to the EU's courts; the High Court procedure; and the settlement process.

## The European Commission cartel investigation

The key defining feature that sets cartel litigation apart from other types of commercial litigation is the fact that in Europe to date, the vast majority of cartel litigation 'follows on' from an infringement finding by the European Commission (or a national regulator such as the Competition and Markets Authority in the UK). This is an unusual feature of commercial litigation – for a prospective claimant to start the case

with liability effectively having been established, or at least in the process of being established, by a binding decision that sets out how the cartel operated and who participated in it. Furthermore, the regulator has already gathered and reviewed all of the critical incriminating documents and has made public announcements about the status of its investigation, including encouraging victims to recover their loss when it reaches the final decision.

However, while the findings of the Commission are potentially a substantial asset for any claimant – and a factor that makes third party funding an attractive proposition for potential claimants – what follows is almost inevitably a very long appeal process by the addressees of the infringement decision to the EU's General Court and on to the Court of Justice.

## The appeal process to the EU Courts

The appeal process typically takes five to seven years to be resolved from the adoption of the decision. Although the EU's General Court has recently reported a 'dramatic drop' in new cases this year and a boost in productivity<sup>2</sup>, which could reduce the backlog of appeals, the appeal process has been – and will continue to remain – a feature

that influences all cartel litigation in the UK and elsewhere in Europe. It has a very significant effect because the *Masterfoods*<sup>3</sup> judgment means that a national court is under a duty to stay proceedings in circumstances where the outcome depends on the validity of a Commission decision which is the subject of an appeal on the merits to avoid the risk of irreconcilable judgments pursuant to Article 16(1) of Regulation 1/2003.

Therefore, in deciding whether or not to appeal the infringement decision, there is potentially a real incentive for addressees of a cartel decision to challenge not only the size of any fine, but also the infringement decision itself. In practice, this means that by the time of any trial, a national court is likely to be examining events that probably took place at least a decade ago – and in many cases even longer.

## The High Court procedure

As regards the key developments in High Court claims, it is possible to identify the end of a 'first phase' of cartel claims and the beginning of a new 'interim' phase. Although the basic operating model is essentially unchanged – there are still some new eye-catching features that makes this current interim phase of cartel litigation rather like a technology upgrade: 'UK cartel litigation 2.0'. Five

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<sup>1</sup> See our article *UK opt-out collective actions – 'US class action lite'* but still set to make an impact.

<sup>2</sup> In the first half of 2015, the General Court received only 376 new appeals, compared with 912 for all of 2014. These figures come at a time where the European Parliament is considering whether to conduct an overhaul of the system which will double the number of judges at the EU's General Court.

<sup>3</sup> *Masterfoods Limited v HB Ice Cream Ltd* [2000] ECR I-11369.

of the key features of this interim phase are as follows:

- A move beyond the mainly procedural issues to reach the substance of the case more quickly, (which we explain in more detail below).
- Claimants have changed their tactics to attempt to avoid significant delays, such as only suing one or two of the cartelists on the basis that they are jointly and severally liable for all of the loss, rather than proceeding against all of them. This in turn has led to contribution proceedings under Part 20 of the Civil Procedure Rules being a feature of current cases.
- The increase of claims now being brought by indirect as well as direct purchasers.
- That many so-called ‘follow on’ claims are in fact hybrid claims, which include a stand-alone portion to the extent that the claim extends beyond the cartel period as found by the regulator or applies to alternative facts by association with the decision.
- The fact that claims are being brought at an ever earlier stage, and often before an infringement decision has been reached, which is a feature that is only likely to increase as the growing number of claimant law firms based in the UK seek to establish themselves as the lead in any given cartel. This will be even more acute for opt-out claims.

### The procedural delays that characterised the first phase of cartel cases

After the test cases of *Arkin*<sup>4</sup>, *Crehan*<sup>5</sup> and a few others, there is a distinct phase of claims that started with the

*Cooper Tire*<sup>6</sup> case that was issued in December 2007 and ended in the summer of 2014 with the final settlement in that case two weeks into trial in May 2014 (a six and a half year period) and also with the settlement in the *National Grid*<sup>7</sup> case a few days before trial in June 2014 (a case that lasted five years).

The reason these cases took so long to get to trial can be explained by the EU appeal process. However, the defendants used this time to raise a number of challenges which took considerable time to resolve. There were challenges to jurisdiction, applications to stay the claim pending the infringement decision appeal process and applications to resist disclosure of the infringement decision, of all of the related material passed to the Commission, and of any documents held in France pursuant to the French Blocking Statute.

What has essentially now changed – and why we are now in a new interim phase – is that a number of these procedural issues have largely been resolved, at least in principle, so that the opportunity for a defendant to delay has been substantially eroded. For example:

#### Jurisdiction

In determining jurisdiction, the basic rule is that defendants should be sued in their jurisdiction of domicile. Article 8(1) of the Judgments Regulation 1215/2012 EC is an exception to this rule. Article 8(1) provides that where the jurisdiction of the English courts has been established over one defendant, additional defendants domiciled in other Member States can also be sued in England in the same action, provided the claims are ‘so

closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separating proceedings.’ It has now been established by *Provimi*<sup>8</sup> and *Cooper Tire* that jurisdiction can be established under Article 8.1 by pleading that an ‘anchor’ defendant that is within the cartel group but not an addressee of the decision nonetheless implemented the cartel in the relevant forum. In addition, the Court of Justice’s decision in *Hydrogen Peroxide*<sup>9</sup> establishes that even if there is a settlement with the ‘anchor’ defendant, that does not render Article 8(1) inapplicable.

#### Stay of proceedings

It is now clear from *National Grid*<sup>10</sup> – a claim in respect of the gas insulated switchgear cartel – that while the Masterfoods stay will apply before any trial, the court will allow the case to progress in the interim. Where a claim is brought before an infringement decision has been reached, as in the Secretary of State for Health’s claim against Servier relating to the cardiovascular medicine perindopril,<sup>11</sup> it was held that the case should be stayed until 21 days after the oral hearing before the Commission (which is post-Statement of Objections but pre-Decision) to avoid the burden of the defendant fighting simultaneously on two fronts.

#### Disclosure of infringement decision

Although it will be important to preserve the confidentiality of the decision and to redact references to any leniency material, *National Grid*<sup>12</sup>,

<sup>4</sup> *Arkin v Borchard* [2003] EWHC 687 (Comm).

<sup>5</sup> *Crehan v Imntrepreneur Pub Company* [2003] EWHC 1510 (Ch).

<sup>6</sup> *Cooper Tire and Rubber Company Europe Ltd and others v Dow Deutschland Inc and others; Cooper Tire and Rubber Company and others v Shell Chemicals UK Limited and others*.

<sup>7</sup> *National Grid Electricity Transmission Plc v ABB Ltd & others* [2009] EWHC 1326 (Ch), judgment of June 12, 2009.

<sup>8</sup> *Provimi Ltd v Roche Products Ltd and other actions* [2003] EWHC 961 (Comm).

<sup>9</sup> OJ 2006 L353/54.

<sup>10</sup> *National Grid Electricity Transmission Plc v ABB Ltd & others* [2009] EWHC 1326 (Ch), judgment of June 12, 2009.

<sup>11</sup> *Secretary of State for Health and others v Servier Laboratories Ltd and others*, [2012] EWHC 2761 (Ch), judgment of October 12, 2012.

<sup>12</sup> *National Grid Electricity Transmission Plc v ABB Ltd & others* [2011] EWHC 1717 (Ch), judgment of July 4, 2011; [2012] EWHC 869 (Ch), judgment of April 4, 2012; [2013] EWHC 822 (Ch), judgment of April 11, 2013.



*Servier*<sup>13</sup> and *Emerald Supplies*<sup>14</sup> all confirm that claimants will be allowed access to the infringement decision, within the confines of a confidentiality ring that, in particular, protects third party rights. When the litigation has started pending the outcome of the antitrust investigation, disclosure is likely to be restricted to material already disclosed by the parties to the Commission, at least in the first instance, as established by *Infederation v Google*<sup>15</sup> and *Servier*<sup>16</sup>.

### The French Blocking statute

In the cases of *Servier* and *National Grid*, the English Court of Appeal<sup>17</sup> dealt with the effect of the French Blocking Statute on the disclosure of documents by French companies in the context of UK damages proceedings. The French defendants in those cases asked the English High Court to make a ‘court to court’ request to obtain the relevant documents/information pursuant to EU Regulation 1206/2001 providing for the taking of evidence in legal proceedings because in the absence of such a request, the French companies would be put at risk of criminal prosecution. It is now clear from the Court of Appeal’s judgment that the Regulation is not mandatory but discretionary and the judges were allowed to use their discretion not to use it and to instead order compliance with English procedural rules. As a result of these cases, the French Blocking Statute is unlikely to be used as a defence to non-compliance with disclosure orders.

Having resolved these more procedural issues in principle, the types of preliminary application that are now

before the courts are addressing more substantive issues. For example, where the defendant perceives the claimants to have potentially overreached by striving to claim the absolute maximum amount, this can set up issues to be challenged at a preliminary stage and which probably need to be determined by the court before any sensible settlement discussion can take place. For example:

- The interchange claims by a variety of retailers against Visa and MasterCard<sup>18</sup> claimed in respect of the whole period during which default interchange fees had been set by Visa, dating back to 1977. Visa argued the limitation defence by way of a preliminary issue – that there were sufficient facts in the public domain to plead the claim at an earlier stage – and succeeded in knocking out the portion of the claim other than the six-year period preceding the claim.
- In *Newson*,<sup>19</sup> the defendant, IMI plc, succeeded in dismissing the conspiracy aspect of the claim on the basis that the infringement findings did not support the required ‘intent to injure’. Similarly, in *Emerald Supplies* the defendants have sought to dismiss the claims brought by the claimants to recover losses suffered outside the EU by alleging unlawful means conspiracy and unlawful interference.

### The settlement process

An obvious but important point is that all cartel claims brought in the UK to date have at some point settled. It was left very late in the *Cooper Tire* and *National Grid* cases, but many more cases have been settled on a confidential basis in the meantime and

we have not seen any cartel case end with a judgment. In *Cooper Tire* there were a series of bilateral settlements over the course of the case whereas in the *National Grid* case there was a group settlement.

In terms of the timing of any settlement in future cases, the removal of the procedural obstacles and the move more quickly to substantive issues sets up an obvious dynamic, which is to explore settlement opportunities while the EU court appeal is pending – notwithstanding that some defendants will always be reluctant to settle while there is a chance that the infringement decision will be overturned. This means a without prejudice track developing in parallel with the litigation to advance both sides’ understanding of the underlying merits of the case and the scope for settlement at a relatively early stage.

Balanced against the prospect of the litigation being stayed for years pending the outcome of the EU appeal process is the fact that interest and costs will continue to mount over that period. The timing of any settlement has consequences for third party funding, after-the-event (ATE) insurance and for lawyers on conditional fee arrangements. So while delaying the case might work to undermine the claimant’s resolve and ultimately lower the settlement payment in the without prejudice discussions, it also creates ever greater obstacles to settle.

On the defendant side, for those companies looking for a way to reach a final resolution to otherwise protracted and costly litigation, there may be appetite to explore the Competition and Markets Authority’s voluntary redress scheme – or perhaps a less rigid version of it.<sup>20</sup>

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<sup>13</sup> Commission Opinion dated 22.12.2014 following a request by the High Court under Article 15(1) of Regulation 1/2003.

<sup>14</sup> *Emerald Supplies Ltd v British Airways* [2015].

<sup>15</sup> [2013] EWHC 2295 (Ch).

<sup>16</sup> *Secretary of State and others v Servier Laboratories Ltd and others*, judgment of July 31, 2014 [2014] EWHC 2720 (Ch).

<sup>17</sup> *Secretary of State for Health and others v Servier Laboratories Ltd and others and National Grid Electricity Transmission plc v ABB Limited and others*, [2013] EWCA Civ 1234, judgment of October 22, 2013.

<sup>18</sup> *WM Morrison Supermarkets Plc and others v MasterCard Incorporated and others* [2013] EWHC 1071 (Comm).

<sup>19</sup> *WH Newson Holding v IMI and others* [2012] EWHC 3680 (Ch).

<sup>20</sup> See our article *UK voluntary redress scheme – An alternative to litigation?*



## What does the future hold?

The Consumer Rights Act 2015 entered into force on October 1, 2015 together with new rules of procedure for the Competition Appeals Tribunal (CAT) (CAT Rules 2015).

While the most striking feature of the Act is the new procedure for representative litigants to apply to the CAT to bring claims on an ‘opt-out’ basis on behalf of claimants,<sup>21</sup> the Act has also removed a number of limitations on the jurisdiction of the CAT which will have significant implications. For example, the CAT will be able to hear stand-alone claims and applications for injunctions for the first time, which may well result in the CAT becoming the forum of choice for damages claims in the UK rather than the High Court – particularly in circumstances where the CAT has been granted wide discretion and has the opportunity to apply procedural rules in a more liberal way than the High Court.

Some of the key changes to the CAT Rules 2015 are set out in summary below:

- A new ‘fast-track’ procedure has been introduced which is intended to facilitate access to justice for consumers and small businesses by enabling them to obtain swift and cheap access to redress. Under the fast-track procedure, claims will be fixed for trial within six months of a case being subject to the fast track procedure and the trial length will be less than three months.
- The CAT now has the flexibility to grant an interim injunction within the ‘fast track’ procedure without requiring the applicant to provide an undertaking as to damages, or to cap the amount of the undertaking as to damages where it determines

that it is in the interests of justice. Over time, this is likely to result in many more injunction applications in private actions being made in the CAT as there is little risk to the applicant of making such applications.

- Appellants are able to raise new points on appeal, particularly if the appellant was not reasonably able to realise the importance of a piece of evidence earlier in the process.
- New rules have been adopted similar to Part 36 of the Civil Procedure Rules to provide a procedure for making an offer to settle (by either a claimant or a defendant). However, these will not apply to opt-out collective actions because of the concern that the claimant representative will feel compelled to accept a settlement offer that they are uncomfortable with for fear of the cost consequences associated with Part 36 offers. Instead, the new rules allow parties to make ‘Calderbank offers’ in collective actions in the CAT (i.e. offers without prejudice as to costs).

The effect of the combination of these procedural changes, together with the new UK class action regime, remains untested and there will be a large number of open points which need to be determined. For example, the types of cases deemed suitable for an opt-out class action and for the fast-track procedure. It therefore seems likely that for the foreseeable future the new regime could bring us back to the ‘first phase’ of cartel claims – characterised by substantial procedural issues and delays – until it beds down into a ‘steady state’. Only then will we know the extent to which cartel litigation in the UK has more in common with north America than the rest of the EU.

*This article is based on the presentation given by Peter Scott at the Mlex Competition Litigation conference held in London on September 24, 2015.*

For more information contact:



**Peter Scott**  
Partner, London  
peter.scott@nortonrosefulbright.com



**Mark Simpson**  
Partner, London  
mark.simpson@nortonrosefulbright.com



**James Flett**  
Senior associate, London  
james.flett@nortonrosefulbright.com

<sup>21</sup> See our article UK opt-out collective actions – ‘US class action lite’ but still set to make an impact.

# Private enforcement in Australia – an emerging opportunity

Whilst private enforcement action has been available to the victims of competition law infringements since the mid 1970s, Australia's competition law landscape has traditionally been dominated by public enforcement proceedings.

However, major changes to Australia's competition laws may be on the horizon with a raft of reforms under review by the Australian Government, including changes which ought to see an emergence of private enforcement in Australia.

In this article, we look at some examples of private enforcement action in Australia, identify some of the potential barriers to private enforcement and explore some of the proposed reforms.

## Private competition law enforcement landscape

The Australian private competition law enforcement landscape is not entirely barren. In recent times, a small number of significant private enforcement actions have been commenced. These proceedings have followed successful prosecutions by the Australian regulator, the Australian Competition and Consumer Commission (ACCC).

The ACCC's successful prosecution of the packaging company, Visy, for cartel conduct in contravention of the Competition and Consumer Act (CCA)

led to two private enforcement proceedings. One of those actions was taken by one of Visy's most significant customers, Cadbury Schweppes, seeking A\$245 million in damages which was resolved on confidential terms. The second proceeding was a class action by a group of customers, led by Jarra Creek, which sought A\$466 million in damages. It settled for A\$95 million.

More recently, the ACCC's successful prosecution of a group of international airlines for entering into price fixing arrangements for the provision of air freight services led to a class action which resulted in a A\$38 million settlement.

Indeed, class actions are likely to remain a prominent feature of any private competition law enforcement in Australia primarily due to their 'opt-out' basis and the emergence of litigation funders in this arena.

## Potential barriers to private enforcement in Australia

Despite these examples of activity, private enforcement in Australia remains dwarfed by the scale of public enforcement. In exploring the reasons for this imbalance, it is instructive to compare three key elements of the regime with the position in the United States (where private enforcement actions represent the significant majority of competition proceedings).

## Financial incentives

In Australia, the amount recoverable in private competition litigation is limited to the loss or damage resulting from a contravener's breach. That is in stark contrast with the position in the United States where treble damages are available.

The rules governing costs within Australia are also less favourable to a plaintiff than those in the United States, resulting in more risk for private claimants. In Australia, costs follow the event – win or lose – potentially leading to a plaintiff being responsible for the defendant's costs, or even multiple defendants' costs. In contrast, the United States has an asymmetric costs rule which permits a successful plaintiff, but not a successful defendant, to recover costs.

## Evidence gathering

In the United States, plaintiffs are permitted to depose potential witnesses prior to trial. The deposition process provides US plaintiffs with a dynamic and probing evidence gathering option not available to Australian plaintiffs who are limited to the more rigid pre-trial evidence gathering tools such as interrogatories and discovery.

## Abuse of dominance

The Australian prohibition of an abuse of dominance (referred to as a misuse of market power; s46 of the CCA) has been somewhat anaemic. The provision requires a plaintiff to establish that

the defendant ‘took advantage’ of its market power for a proscribed purpose. It is insufficient to establish mere motive and the plaintiff must establish what the respondent ‘had in view’ or the ‘end sought to be accomplished’<sup>1</sup>.

### Change on the horizon?

The need to address regulatory and practical impediments to private enforcement in Australia was recognised in the recent Competition Policy Review (referred to as the Harper Review). Key reforms advocated by the Harper Review which ought to encourage private enforcement in Australia include the following:

#### Allow the use of admissions in a prior proceeding as prima facie evidence in private enforcement

Recent successes in significant private competition law cases in Australia have ridden on the coattails of prosecutions by the ACCC. Whilst the CCA allows a finding of fact by a Court in a prior proceeding to be used as prima facie evidence of that fact in a subsequent private enforcement proceeding (s83 of the CCA), the utility of this provision may be undermined in circumstances where the ACCC’s prosecution is resolved with the respondents. The Harper Review noted that there is uncertainty as to whether a private litigant can rely on s83 of the CCA in relation to facts which have been admitted in a prior proceeding.

The Review has recommended that s83 of the CCA be amended to expressly extend to admissions of fact made by a person in a prior proceeding. If implemented, this should encourage more private actions to follow on from ACCC proceedings.

#### Substantive changes to misuse of market power prohibition

The Harper Review found that the Australian law regarding misuse of market power is currently ‘deficient’ and ‘out of step with international approaches’. The Review recommended that it be amended to abolish the ‘purpose’ and ‘taking advantage of power’ tests and, instead, to prohibit a company which has substantial market power from engaging in any conduct where the purpose or the likely effect is to substantially lessen competition in any market.

Such amendments would overcome the perceived difficulties associated with establishing a misuse of market power.

#### Allow private enforcement against overseas corporations without Australian Government consent

Currently, before conduct outside of Australia can be relied upon in a private enforcement proceeding, written consent must be obtained from a Minister in the Australian Government (s5 of the CCA). Consent can be refused for reasons including that, in the opinion of the Minister, it is not in Australia’s national interest to grant the consent.

The Harper Review described this requirement as ‘an unnecessary roadblock’ and has recommended its removal.

#### Promote greater access to support services for small business

The Harper Review found that small businesses face significant difficulties when endeavouring to engage in private enforcement actions.

In an effort to help address those difficulties, the Harper Review has recommended that where the ACCC decides not to take enforcement action in relation to a complaint by a small

business, it should direct the parties to alternative dispute resolution.

On a global heat-map of private competition law enforcement, Australia may be represented as amber. Compared with the applicable regimes in red-hot jurisdictions such as the United States, there are some perceived impediments for private plaintiffs in this arena. However, proposed reforms are likely to generate energy and we expect to see meaningful growth in private competition law enforcement as a consequence.

#### For more information contact:



**Andrew Riordan**  
Partner, Melbourne  
andrw.riordan@nortonrosefulbright.com



**James Love**  
Senior associate, Melbourne  
james.love@nortonrosefulbright.com



**Christopher Sones**  
Graduate, Melbourne  
christopher.sones@nortonrosefulbright.com

<sup>1</sup> Australian Competition and Consumer Commission (ACCC) v Pfizer Australia Pty Ltd (2015)110 IPR 324, at [340].

# Breach of competition law sparks collective redress claims in South Africa

To date there have not been any successful private enforcement or collective redress claims in South Africa arising from breaches of competition law. However, over the last few years the Supreme Court of Appeal and the Constitutional Court, in cases against several bread manufacturers – the *Pioneer Foods* cases<sup>1</sup> – have opened the door in South Africa to class actions in all forms.

The *Pioneer Foods* cases arose from the competition law complaints against bread manufacturers for price fixing and market allocation. Representatives of both a class of consumers of bread and a class of distributors of bread, brought an application for damages arising from the increased price of bread resulting from the cartel conduct.

The courts in South Africa ultimately remitted the applications for certification back to the High Court, where they have not yet been heard. Therefore, as yet, there are no decisions on the merits, including the determination of the precise cause of

action for such a class action. However, the Supreme Court of Appeal and Constitutional Court did provide useful guidelines on certification and causes of action. These cases represent an important first step for class action development in South Africa. They are the first cases in South Africa to recognise the use of class actions where there has been a breach of common law rights or statutory duties.

We have since seen several other class actions being launched in South Africa, the most prominent being class actions launched against the major mines by large groups of mineworkers suffering from silicosis, a degenerative lung disease arising from exposure to silica dust during mining.

The *Pioneer Foods* cases may also be the catalyst for the emergence of individual private enforcement actions as a result of breaches of competition law in South Africa. The only private enforcement case brought in South Africa to date was Nationwide Airlines' claim against the national carrier, South African Airways, for damages suffered as a result of an abuse of

dominance – but this case settled out of court. Several municipalities and other organisations have publicly indicated their intention to claim damages arising from arguably the most famous cartel to date in South Africa – the rigging of bids by numerous construction companies for the 2010 Soccer World Cup stadiums and many other projects.

The extent to which South African individual and collective private enforcement cases arising from anticompetitive conduct will take off remains to be seen, but claims arising from competition law are clearly at the forefront of developing collective redress jurisprudence in the country.

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For more information contact:



**Tanya Haskins**  
Senior associate, Johannesburg  
[tanya.haskins@nortonrosefulbright.com](mailto:tanya.haskins@nortonrosefulbright.com)

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<sup>1</sup> *Children's Resource Centre and others v Pioneer Foods, Tiger Consumer Brands and Premier Foods.*

# UK voluntary redress scheme – an alternative to litigation?

On October 1, 2015 the competition law reforms contained in the Consumer Rights Act 2015 entered into force.<sup>1</sup> These include measures which will make it easier for victims of anti-competitive conduct to obtain compensation for their loss including: (i) new powers for the Competition Appeal Tribunal (CAT) to hear stand-alone claims<sup>2</sup> and to grant injunctive relief; and (ii) a new mechanism for opt-out collective claims to be brought for the first time in the UK.<sup>3</sup>

Although the Consumer Rights Act is likely to encourage claims, it also includes a mechanism by which companies under investigation for anti-competitive conduct can agree a settlement scheme with the Competition and Markets Authority (CMA)<sup>4</sup> upon being found to have infringed competition law. In principle at least, this should be a valuable tool for infringing companies looking to avoid lengthy and costly follow-on damages proceedings and to achieve finality. It may also bring reputational benefits – offering compensation to victims at the same time as the infringement decision is published may help dilute the negative PR impact of the infringement.

Voluntary redress schemes also bring advantages to victims of anti-competitive conduct in allowing them access to compensation quickly without the need to resort to lengthy and expensive litigation.<sup>5</sup> These schemes are likely to play an integral part in the new class action regime in the UK, with potential defendants at least exploring whether it might be preferable to seek to pre-empt costly class actions with CMA approved settlement offers.

## Background

The Consumer Rights Act introduces a new section 49C of the Competition Act 1998 which allows a person to apply to the CMA for approval of a redress scheme. An application can be made before the infringement decision but can only be approved and made public at the same time as (or after) the decision.

The Competition Act 1998 (Redress Scheme) Regulations 2015<sup>6</sup> have since been approved which describe how the CMA will consider applications for approval of redress schemes.<sup>7</sup> This was followed by guidance published by the CMA on the operation of voluntary redress schemes. The CMA has also published a standard application

form to be filled out by companies requesting approval of a scheme.<sup>8</sup>

## Applying for a voluntary redress scheme

An application for a voluntary redress scheme can be made by a single entity or on a group basis (by multiple parties implicated in an infringement). In practice, it will be challenging to agree a settlement scheme which does not involve all (or at least the majority) of participants in the infringement in any cartel investigation under Article 101 TFEU given that the cartellists are jointly and severally liable for the entire loss caused by that infringement. This means that, even if a company agrees a scheme to compensate its customers, it will potentially be liable to be joined to proceedings either: (i) as a primary defendant to a claim by a purchaser of the affected product even if that purchaser did not have any relationship with that company; or (ii) as a defendant to contribution proceedings, whereby the primary defendants look to recover a portion of the damages claimed or awarded against them.

<sup>1</sup> [http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga\\_20150015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf).

<sup>2</sup> These are proceedings where the claimants must prove a competition law infringement – previously the CAT only had jurisdiction to hear claims based on pre-existing infringement decisions by authorities.

<sup>3</sup> For detailed consideration of these reforms please see our article.

<sup>4</sup> Together with the sectoral regulators with concurrent competition powers.

<sup>5</sup> Compensation schemes have been deployed with varying degrees of success in other areas including phone hacking, blacklisting and financial services.

<sup>6</sup> [http://www.legislation.gov.uk/uksi/2015/1587/pdfs/uksi\\_20151587\\_en.pdf](http://www.legislation.gov.uk/uksi/2015/1587/pdfs/uksi_20151587_en.pdf).

<sup>7</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/453925/Voluntary\\_redress\\_schemes\\_guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453925/Voluntary_redress_schemes_guidance.pdf).

<sup>8</sup> <https://www.gov.uk/government/publications/approval-of-redress-schemes-for-competition-law-infringements>.



The scheme can relate to an infringement found by: (i) the CMA (in respect of which it is possible to make an application prior to the decision being reached); or (ii) by the European Commission (in respect of which applications can only be brought post-decision).

In the case of a CMA investigation it is possible to submit an outline scheme to the CMA at any time during the investigation although in practice it would be challenging to do so prior to the CMA issuing its statement of objections (setting out its case against the parties under investigation). The CMA guidance makes it clear that it would not view an application for a compensation scheme as being an admission of liability or in any way inconsistent with the applicant continuing to exercise its rights of defence – although of course the reality is that it would be challenging for a party under investigation to simultaneously credibly defend its conduct while also entertaining a settlement scheme.

The first stage for a potential applicant is to present an outline scheme to the CMA. The CMA will then consider the outline scheme and makes it clear whether it intends to prioritise assessment of an application.

If the scheme is to be prioritised, the next stage is to submit a formal application using the standard form. The application form requires the applicant to set out:

- The start date, terms and duration of the redress scheme (which must be at least nine months).
- Persons entitled to claim compensation under the scheme (including: (i) whether the scheme will compensate indirect purchasers as well as direct purchasers; and

(ii) whether the scheme will extend to ‘umbrella’ damages<sup>9</sup>).

- The scope and level of compensation to be offered under the scheme (including whether the scheme will only compensate for harm suffered in the UK or also elsewhere – this will be a particular issue where the scheme results from a European Commission investigation).
- The process for applying for compensation under the scheme (including the estimated time it will take to determine applications for compensation) together with: (i) the evidence that applicants will be asked to submit in connection with their application for compensation; (ii) how the scheme is to be advertised; (iii) the complaints procedure; and (iv) the consequences of accepting compensation under the scheme.

An applicant will be required to appoint a chairperson who will be responsible for assisting in devising the terms of the scheme and deciding whether to recommend the scheme to the CMA. There are strict requirements as to who can act as a chairperson – only senior lawyers and judges (ideally with experience and knowledge of competition law) will qualify for this role.

The chairperson is then responsible for appointing board members which must include: (i) an economist; (ii) an industry expert; and (iii) a person to represent the interests of the victims of the infringement who will be entitled to claim compensation under the scheme.

The chairperson and the board will have the task of determining the methodology for assessing the level of compensation payable to each applicant. In addition to the compensation payable under the

scheme, the parties seeking to set up the scheme will also be required to pay the fees of the chairperson and the board members and the CMA’s costs in relation to the scheme.

Once the scheme is formally approved by the CMA, the infringing party has a statutory duty to comply with it. Failure to do so could result in private legal proceedings or enforcement action by the CMA.

### Considerations for an infringing company

There are potential advantages to agreeing to a voluntary arrangement at an early stage, prior to claims being issued:

- It may allow the infringing company to make a clean break from past conduct, allowing it to present the scheme as part of a new culture of compliance within the organisation. Any negative publicity which comes from being found to have infringed competition law may be diluted if the redress scheme is announced at the same time as the infringement.
- It allows the infringing company to make an open settlement offer to all of its victims at an amount that is acceptable to it. In so doing, it may avoid many years of protracted litigation.
- The CMA has the power (but no obligation) to offer a reduction in the level of fine of up to 20 per cent to reflect the infringing party’s voluntary provision of redress.

However, there are also some negative considerations that companies will need to consider:

- Offering a voluntary redress scheme would be inconsistent with an appeal against the decision – it

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<sup>9</sup> Purchases from a seller that was not implicated in the infringement, where the price was inflated as a result of the cartel.

would be difficult for a company to maintain that its conduct did not breach competition law while simultaneously offering compensation on a voluntary basis to those that suffered loss as a result of its conduct.<sup>10</sup> The voluntary redress scheme is therefore only likely to be suitable for a company that accepts its conduct is unlawful and wishes to proactively put that period behind it.

- Even once it is approved by the CMA (and the process described in the rules is detailed and likely to be protracted), the scheme cannot bind persons affected by the infringement. It is up to those persons to actively opt in to the settlement. They could choose to issue follow-on proceedings in any event. However, the claimant would need to be confident that it would be awarded more than the offer under the scheme (which has been approved by the CMA as reasonable) at trial. Failure to do so could expose that claimant to liability to pay the defendant's costs.
- There are commercial risks of going down this route. It crystallises the company's liability in circumstances where there is a chance that – even with the introduction of the collective redress regime – a claim will not be issued. The prospect of

claims arising, and the potential size of those claims, will be a key consideration. An application for a redress scheme also requires the company to pay the CMA's costs together with the costs of administering the scheme.

## Conclusion

Against the backdrop of the new collective actions regime introduced by the Consumer Rights Act and the associated expected growth in competition litigation, the new redress scheme will warrant careful consideration by companies implicated in anti-competitive conduct – particularly in those situations where there is a real commercial imperative for a company to put that conduct behind it.

Experience in other industries suggests that compensation schemes are not always successful and - given the opt-in nature of compensation schemes – it is possible that consumer take up will not be as high as anticipated. However, the existence of a compensation scheme which has been approved by the CMA as reasonable is likely to significantly deter potential claimants to pursue the litigation route and on this basis brings key tactical benefits to potential defendants in bringing finality and discouraging claims before they are issued.

For more information contact:



**Peter Scott**  
Partner, London  
peter.scott@nortonrosefulbright.com



**Mark Simpson**  
Partner, London  
mark.simpson@nortonrosefulbright.com



**James Flett**  
Senior associate, London  
james.flett@nortonrosefulbright.com

<sup>10</sup> The CMA guidance does not rule out that it might consider applications for redress schemes when the liability finding has been appealed but in practice it is unlikely to consider applications in these circumstances (unless the appeal focuses solely on the level of the fine).

# Contacts

If you would like further information please contact:

## Europe

### London

**Peter Scott**

Tel +44 20 7444 3834

[peter.scott@nortonrosefulbright.com](mailto:peter.scott@nortonrosefulbright.com)

**Mark Simpson**

Tel +44 20 7444 5742

[mark.simpson@nortonrosefulbright.com](mailto:mark.simpson@nortonrosefulbright.com)

### Paris

**Marta Giner**

Tel +33 1 56 59 52 72

[marta.ginerasins@nortonrosefulbright.com](mailto:marta.ginerasins@nortonrosefulbright.com)

### Brussels

**Jay Modrall**

Tel +32 2 237 61 47

[jay.modrall@nortonrosefulbright.com](mailto:jay.modrall@nortonrosefulbright.com)

### Germany

**Maxim Kleine**

Tel +49 40 970799 180

[maxim.kleine@nortonrosefulbright.com](mailto:maxim.kleine@nortonrosefulbright.com)

### The Netherlands

**Yke Lennartz**

Tel +31 20 462 9470

[yke.lennartz@nortonrosefulbright.com](mailto:yke.lennartz@nortonrosefulbright.com)

## US

**Layne E. Kruse**

Tel +1 713 651 5194

[layne.kruse@nortonrosefulbright.com](mailto:layne.kruse@nortonrosefulbright.com)

**Anne M. Rodgers**

Tel +1 713 651 3797

[anne.rodgers@nortonrosefulbright.com](mailto:anne.rodgers@nortonrosefulbright.com)

**Darryl W. Anderson**

Tel +1 713 651 5562

[darryl.anderson@nortonrosefulbright.com](mailto:darryl.anderson@nortonrosefulbright.com)

## Canada

**Eric Lefebvre**

Tel +1 514 847 4891

[eric.lefebvre@nortonrosefulbright.com](mailto:eric.lefebvre@nortonrosefulbright.com)

**D. Michael Brown**

Tel +1 416.216.3962

[michael.brown@nortonrosefulbright.com](mailto:michael.brown@nortonrosefulbright.com)

**Steve Leitl**

Tel +1 403 267 8140

[steven.leitl@nortonrosefulbright.com](mailto:steven.leitl@nortonrosefulbright.com)

**Kevin Ackhurst**

Tel +1 416 216 3993

[kevin.ackhurst@nortonrosefulbright.com](mailto:kevin.ackhurst@nortonrosefulbright.com)

## Australia

**Nick McHugh**

Tel +61 2 9330 8028

[nick.mchugh@nortonrosefulbright.com](mailto:nick.mchugh@nortonrosefulbright.com)

**Andrew Riordan**

Tel +61 3 8686 6680

[andrew.riordan@nortonrosefulbright.com](mailto:andrew.riordan@nortonrosefulbright.com)

**Tom Jarvis**

Tel +61 3 8686 6966

[tom.jarvis@nortonrosefulbright.com](mailto:tom.jarvis@nortonrosefulbright.com)

## Africa

**Heather Irvine**

Tel +27 11 685 8829

[heather.irvine@nortonrosefulbright.com](mailto:heather.irvine@nortonrosefulbright.com)

**Lara Granville**

Tel +27 11 685 8684

[lara.granville@nortonrosefulbright.com](mailto:lara.granville@nortonrosefulbright.com)

**Jeffrey Kron**

Tel +27 11 685 8873

[jeffrey.kron@nortonrosefulbright.com](mailto:jeffrey.kron@nortonrosefulbright.com)

## Asia

**Marc Waha**

Tel +852 3405 2508

[marc.waha@nortonrosefulbright.com](mailto:marc.waha@nortonrosefulbright.com)

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Central Asia

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<sup>1</sup> Susandarini & Partners in association with Norton Rose Fulbright Australia

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