
THE CARTELS AND LENIENCY REVIEW

FIFTH EDITION

EDITORS

CHRISTINE A VARNEY AND JOHN TERZAKEN

LAW BUSINESS RESEARCH

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CHRISTINE A VARNEY AND JOHN TERZAKEN

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EDITORS' PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part because of US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors of these chapters are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations, and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with chapters on 30 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the fifth edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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January 2017

Chapter 30

UNITED KINGDOM

Philippe Chappatte and Paul Walter¹

I ENFORCEMENT POLICIES AND GUIDANCE

The two principal pieces of national legislation regarding cartel activity in the United Kingdom are the Competition Act 1998 and the Enterprise Act 2002 (both as amended by the Enterprise and Regulatory Reform Act 2013). In addition, Regulation (EC) No. 1/2003² requires the UK competition authorities and courts to apply and enforce Article 101 of the Treaty on the Functioning of the European Union (TFEU) in relation to cartel conduct that may affect trade between Member States. The UK electorate's vote to leave the European Union on 23 June 2016 may – depending on the model for exit that is adopted – result in changes to cartel regulation within the UK. At this stage, it is not possible to predict how and when the legal framework may change.

The Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that may affect trade within the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom. This prohibition (known as the Chapter I prohibition) is modelled on Article 101 TFEU and is intended to be interpreted consistently with the corresponding EU rules.³

Under the Enterprise Act, it is a criminal offence for an individual to agree with one or more other persons to make or implement, or to cause to be made or implemented, arrangements relating to at least two undertakings involving the following prohibited cartel activities: price fixing, market sharing, limitation of production or supply, and bid rigging.

1 Philippe Chappatte is a partner and Paul Walter is a special adviser at Slaughter and May. The authors would like to thank Sophia Haq, a visiting lawyer at Slaughter and May, for her help in preparing this chapter.

2 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty.

3 Section 60 of the Competition Act 1998.

The principal enforcement agency in the UK is the Competition and Markets Authority (CMA). The sectoral regulators for communications matters, electricity and gas, water and sewerage, civil aviation, health, railway services and financial services have concurrent competition powers. The sectoral regulators are required to consider whether the use of these powers would be more appropriate than their sector-specific powers to promote competition. Nonetheless, cartel investigations in general tend to be handled by the CMA, given that it is the only competition regulator with the power to investigate criminal cartels under the Enterprise Act.

The CMA's guidelines state that '[p]rice-fixing or market-sharing agreements and other cartel activities are among the most serious infringements of Article 101 [TFEU] and/or the Chapter I prohibition'.⁴ The CMA is, however, prepared to offer lenient treatment to businesses and individuals that come forward with information about a cartel in which they are involved. The framework principles for the leniency policy are set out in the publications 'Applications for leniency and no-action in cartel cases' and 'Guidance as to the appropriate amount of a penalty'. The CMA has also published prosecution guidance in respect of the cartel offence.⁵

II COOPERATION WITH OTHER JURISDICTIONS

The CMA cooperates extensively with the European Commission and with the national competition authorities in the other Member States through the European Competition Network (ECN) – see the European Union chapter for further details. In addition, the United Kingdom is party to mutual assistance arrangements relating to competition law enforcement with a number of other non-European countries including the United States, Australia, Canada, China and New Zealand.

The CMA's guidance states that information supplied as part of an application for leniency will not be passed on to an overseas agency without the consent of the provider except in one situation: such information may be disclosed within the ECN in accordance with the provisions and safeguards set out in the European Commission's Network Notice.⁶

In cases where leniency has been applied for in other jurisdictions, the CMA generally expects the leniency applicant to provide a waiver of confidentiality in order to allow the CMA to discuss matters with those other jurisdictions. Normally, any transfer of information in these circumstances is limited to that which is necessary to coordinate planned concerted action, such as on-site investigations.

Where the United Kingdom has extradition relations with another territory, individuals may be extradited for prosecution for participation in a cartel.

4 Office of Fair Trading (OFT) guidance as to the appropriate amount of a penalty, September 2012 (adopted by the CMA).

5 CMA Cartel Offence Prosecution Guidance, March 2014.

6 See Paragraphs 40 and 41 of the Commission Notice on cooperation within the Network of Competition Authorities and Paragraph 7.31 of the OFT publication 'Applications for leniency and no-action in cartel cases', July 2013 (adopted by the CMA).

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Extraterritoriality

The Chapter I prohibition can apply to agreements between undertakings located outside the United Kingdom if they may have an impact on competition within the country. The Chapter I prohibition applies wherever the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom. Similarly, the criminal offence under the Enterprise Act will apply to an agreement outside the United Kingdom if it is, or is intended to be, implemented in whole or in part in the United Kingdom.

ii Parent company liability

The UK competition authorities and courts follow the principles established by the Court of Justice of the European Union (CJEU) on the issue of parent company liability (see the EU chapter for further details). Accordingly, the conduct of a subsidiary (and, in certain circumstances, a minority interest holding) may be imputed to a parent company where, having regard to the economic, organisational and legal links between those two entities, the subsidiary does not decide independently upon its own conduct on the market but carries out in all material respects the instructions given to it by the parent company. Where a parent company has a 100 per cent shareholding in a subsidiary, there is a rebuttable presumption that the parent company exercises a decisive influence over its subsidiary and, therefore, the two entities form a single undertaking.

Shareholdings below 100 per cent may also give rise to a position of a single undertaking depending on the level of the shareholding and the nature of the links between the companies.⁷

iii Affirmative defences and exemptions

Although exemptions are available for conduct that falls within the Chapter I prohibition or Article 101 TFEU, it is highly unlikely that a hard-core cartel agreement could qualify for such an exemption.

The Competition Act does, however, exclude certain agreements from the scope of the Chapter I prohibition relating to the production of, or trade in, agricultural products. Certain types of public transport ticketing schemes are also exempt. The Secretary of State may exclude further categories of agreement if he or she is satisfied that there are exceptional and compelling public policy reasons for exclusion.

⁷ See, for example, Case C-97/08 P, *Akzo Nobel NV and others v. Commission*, judgment of 10 September 2009.

IV LENIENCY PROGRAMMES

The CMA's leniency programme⁸ provides different types of protection to an applicant depending on its order in the queue and whether an investigation has already commenced:

- a* Type A immunity – available where the undertaking is the first to apply and there is no pre-existing civil or criminal investigation (or both) into such activity. Type A immunity provides automatic immunity from civil fines for an undertaking, and criminal immunity for all current and former employees and directors who cooperate with the CMA.⁹ Cooperating individuals should also avoid disqualification as a director.
- b* Type B immunity – available where the undertaking is the first to apply but there is already a pre-existing civil or criminal investigation (or both) into such activity. In these circumstances, the CMA retains discretion as to whether to provide civil immunity to the undertaking, and criminal immunity to current and former employees and directors who cooperate with the CMA. Cooperating individuals should also avoid disqualification as a director. Type B immunity will no longer be available when the CMA has sufficient information to establish an infringement, where another undertaking has been granted Type B immunity or when the CMA already has, or is in the course of gathering, sufficient information to bring a successful criminal prosecution.
- c* Type B leniency – where the CMA decides not to grant Type B immunity to an undertaking, it may still provide a reduction from any financial penalty imposed under the Competition Act. There is no limit to the level of reduction that may be granted under Type B leniency. The CMA will consider whether it is in the public interest to grant immunity on a blanket or individual basis. Cooperating individuals should also avoid disqualification as a director.
- d* Type C leniency – available to undertakings that are not the first to apply but provide evidence of cartel activity before a statement of objections is issued (provided such evidence genuinely advances the investigation). Recipients of Type C leniency may be granted a reduction of up to 50 per cent of the level of a financial penalty imposed under the Competition Act. The CMA may exercise its discretion to award immunity from criminal prosecution for specific individuals. Cooperating individuals should also avoid disqualification as a director.

8 OFT publication, 'Applications for leniency and no-action in cartel cases', July 2013 (adopted by the CMA).

9 Immunity from criminal prosecution is granted in the form of a no-action letter issued by the CMA. A no-action letter will prevent a prosecution being brought against an individual in England, Wales and Northern Ireland. Guarantees of immunity from prosecution cannot be given in relation to Scotland, but cooperation with the CMA will be reported to the Lord Advocate, who will give such cooperation serious weight when considering whether to prosecute the individual in question, and may give an early decision as to whether that individual remains liable to be prosecuted.

In addition to fulfilling the above criteria, an undertaking must fulfil the following conditions in order to be granted Type A or Type B immunity or leniency:

- a* accept that it participated in cartel activity in breach of the law;
- b* provide the CMA with all information, documents and evidence available to it regarding the cartel activity;¹⁰
- c* maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CMA arising as a result of the investigation;
- d* refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA); and
- e* not have taken steps to coerce another undertaking to take part in the cartel activity.

In order to be granted Type C leniency, an undertaking must also fulfil each of the above conditions, except the non-coercion condition, which does not apply.

i Markers

An initial approach to the CMA may be made by an undertaking's legal advisers on a hypothetical 'no names' basis to secure a preliminary marker protecting the applicant's place in the queue. In order to do so, the adviser must have instructions to apply for Type A immunity if the CMA confirms that it is available. Before contacting the CMA, the adviser must therefore ensure that there is a 'concrete basis' for a suspicion of cartel activity and be able to confirm that the undertaking has a 'genuine intention to confess' – that is, acceptance that the available information suggests that it has been engaged in cartel conduct in breach of the Chapter I prohibition or Article 101 TFEU, or both.

In order to confirm the availability of a preliminary marker, the CMA must be provided with sufficient details to allow it to determine whether there is a pre-existing civil or criminal investigation or a pre-existing applicant. If the CMA confirms that Type A immunity is available, the adviser must identify the undertaking and apply for immunity by providing an application package with details of the suspected infringement and the evidence uncovered at that stage. A discussion of the timing and process for confirming the marker would then follow.

A similar approach may be made to obtain a preliminary marker for Type B immunity – although in Type B cases it is possible to ask the CMA whether immunity is available without a requirement to make an immediate application if the CMA confirms that it is available.

An applicant may also apply for a preliminary marker in respect of Type B and Type C leniency. In order to confirm the marker, the applicant must provide in the application package all relevant information available to it in relation to the cartel, and that information must, as a minimum, add significant value to the CMA's investigation.

10 The CMA should not as a condition of leniency require waivers of legal professional privilege (LPP) over any relevant information in either civil or criminal investigations. However, save where the position is uncontroversial and clear to the CMA's satisfaction, the CMA will ordinarily require a review of any relevant information in respect of which LPP is claimed, by an independent counsel selected, instructed and funded on a case-by-case basis by the CMA. See OFT publication, 'Applications for leniency and no-action in cartel cases', July 2013 (adopted by the CMA).

ii Duties of cooperation

A senior representative of the applicant will be asked to sign a letter indicating that the applicant understands the conditions for the grant of leniency, and in particular that it is committed to complete and continuous cooperation throughout the CMA's investigation and subsequent enforcement action. The CMA notes in its guidance that the requirement to maintain continuous and complete cooperation implies that the overall approach to the leniency process must be a constructive one designed genuinely to assist the CMA in efficiently and effectively detecting, investigating and taking enforcement action against cartel conduct.¹¹ If, at any time, the CMA has concerns that the applicant is not adopting such a constructive approach, or that there are unreasonable delays in providing information or otherwise cooperating with CMA requirements, the matter will be raised with the applicant by the case team.

iii Access of private litigants to leniency materials

In June 2011, the CJEU provided guidance in the *Pfleiderer* case regarding when private litigants may obtain discovery of materials surrendered as part of a leniency programme.¹² The CJEU noted that EU law does not automatically preclude the disclosure of a leniency applicant's submission in subsequent court proceedings where such disclosure is required by national law. The CJEU concluded that it was for each national court to determine on a case-by-case basis the response to be applied to such requests, balancing concerns over disclosure undermining the effectiveness of leniency regimes against the need to ensure that it is not unduly difficult for parties to bring damages actions to recover losses arising from competition law violations.

In December 2014, a Directive on rules governing actions for damages under national law for breach of the EU antitrust rules and those of Member States came into force, allowing Member States two years to implement it (the Damages Directive – see the EU chapter and Section VII, *infra*, for further details).¹³ The Damages Directive sets out a number of safeguards in relation to leniency programmes, including requiring Member States to ensure that leniency corporate statements and settlement submissions have absolute protection from disclosure or use as evidence, and that documents specifically prepared in the context of the public enforcement proceedings by the parties (e.g., replies to authorities' requests for information) or the competition authorities (e.g., a statement of objections) have temporary protection (i.e., for the duration of the relevant competition authority's investigation). In addition, Member States must ensure that national courts limit the disclosure of evidence to that which is proportionate considering the legitimate interest of the parties and third parties concerned.

11 OFT publication, 'Applications for leniency and no-action in cartel cases', July 2013 (adopted by the CMA).

12 Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, judgment of 14 June 2011.

13 Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

iv Representation by counsel of the corporate entity and its employees

In the absence of a conflict of interest, there is no absolute legal restriction preventing a law firm from representing both employees and the undertaking under investigation, provided that this is compatible with the law firm's own professional conduct obligations. In practice, however, it is possible that the undertaking may wish to distance itself from the conduct of individual employees and to argue that the employee was acting without authority. In addition, separate representation is likely to be appropriate where individual employees face possible criminal prosecution under the Enterprise Act, given the real possibility of conflicts of interest between the corporate entity and employee.

V PENALTIES

The principal sanction that may be imposed for a breach of the Chapter I prohibition or Article 101 TFEU is a civil fine of up to 10 per cent of the infringing undertaking's worldwide turnover in its previous business year.¹⁴

The UK competition authorities have imposed severe financial penalties in respect of cartel activities, including:

- a* in April 2010, the Office of Fair Trading (OFT) announced fines totalling £225 million after finding that two tobacco manufacturers and 10 retailers had engaged in unlawful practices in relation to retail prices for tobacco products in the United Kingdom. The highest individual fine imposed was £112 million upon Imperial Tobacco. However, the fines imposed upon Imperial Tobacco and a number of the retailers were quashed following an appeal on liability to the Competition Appeal Tribunal (CAT). The Court of Appeal has also recently ordered the CMA to repay the penalties paid by two other infringers under early resolution agreements entered into with the OFT on grounds of procedural fairness;¹⁵
- b* in April 2012, the OFT imposed a fine of £58.5 million on British Airways for its role in an alleged fuel surcharge price-fixing agreement with Virgin Atlantic (this case is considered in further detail in subsection ii, *infra*); and
- c* in August 2011, the OFT announced total fines of £49.51 million in respect of its finding that four supermarkets and five dairy processors had been involved in a number of infringements covering the dairy market.

i Factors taken into account when setting the penalty

A financial penalty imposed by the CMA under the Competition Act will be calculated following a six-step approach:

- a* The starting point is calculated with regard to the seriousness of the infringement and the relevant turnover of the undertaking. The relevant turnover is that of the undertaking in the relevant product and geographical markets affected by the

14 Section 36 of the Competition Act.

15 See *Gallaber Group Ltd & Anor & Anor v. Competition and Markets Authority* [2016] EWCA Civ 719 (15 July 2016). The CMA has subsequently sought permission from the Supreme Court to appeal the Court of Appeal's judgment.

- infringement in the last financial year before the infringement ended. The starting point may not exceed 30 per cent of the relevant turnover. The guidance indicates that the starting point for hard-core cartel activity will be at the upper end of the range.
- b* Adjustment for duration – the starting point may then be multiplied by a figure up to a maximum of the number of years the infringement lasted. Part years may be treated as full years for these purposes. Any duration of less than a year will normally be treated as a full year although, exceptionally, the starting point may be decreased where the duration is less than a year.
 - c* Adjustment for aggravating and mitigating factors.
 - d* Adjustment for specific deterrence and proportionality – the penalty may be increased to ensure that the infringing undertaking will be deterred from breaching competition law again, having regard to its size and financial position, and any other relevant circumstances. The penalty figure may also be increased to take account of any gain made by the undertaking from the infringement. The CMA will then assess whether, in its view, the overall penalty proposed is proportionate and appropriate in the round.
 - e* Adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy.
 - f* Adjustment for leniency or settlement discounts.

In exceptional circumstances, the CMA may reduce a penalty where the undertaking is unable to pay because of its financial position. The guidance, however, emphasises that such financial hardship adjustments will be exceptional, and there can be no expectation that a penalty will be adjusted on this basis.¹⁶

ii Sanctions applying to individuals

Any individual found guilty of committing a criminal cartel offence under the Enterprise Act may be imprisoned for up to five years and receive an unlimited fine. In addition, an application may be made for the disqualification of a company director in certain circumstances.¹⁷

Although the OFT had the power to prosecute individuals in respect of the cartel offence for a decade, only two cases reached trial stage during its tenure, and only one of them resulted in convictions. The first case related to a worldwide cartel in the marine hose market, which was investigated by the OFT in parallel with the US Department of Justice and the European Commission. Three UK executives filed plea-bargaining agreements in the United States, agreeing to return to custody in the UK and cooperate with the OFT's investigation, and pleaded guilty to the UK cartel offence. The second case, which concerned an alleged fuel surcharge price-fixing agreement between British Airways and Virgin Atlantic, collapsed for procedural reasons before the main trial.

Three individuals were tried for the cartel offence in 2015, following investigation into suspected cartel activity in the supply in the United Kingdom of galvanised steel tanks for water storage. Two of the individuals were acquitted as the jury was not persuaded that they had acted dishonestly. The third individual had pleaded guilty, and received a six-month

16 OFT guidance as to the appropriate amount of a penalty, September 2012.

17 In December 2016, the CMA announced that it had, for the first time, used its power to accept an undertaking from a director of a company that had breached competition law not to act as a director of any UK company for five years.

suspended sentence with an order to complete 120 hours of community service. The CMA's Senior Director for Cartels noted that the trial experience in the *Galvanised Steel Water Storage Tank* case 'would tend to suggest that the challenge of establishing dishonesty and bringing a successful prosecution for pre-April 2014 cartels may be greater than even the CMA or OFT had anticipated'.¹⁸

In March 2016, a guilty plea was entered in criminal cartel proceedings brought by the CMA in relation to the supply of precast concrete drainage products to the construction industry. The individual was charged with dishonestly agreeing to divide supply, fix prices and divide customers between 2006 and 2013. As the relevant conduct took place prior to 1 April 2014, it falls under the old cartel offence.

In an attempt to facilitate convictions, the government amended the Enterprise Act to remove the dishonesty element from the cartel offence pursuant to the Enterprise and Regulatory Reform Act. The new-look offence only applies to arrangements entered into on or after 1 April 2014.

A number of additional amendments were introduced by the Enterprise and Regulatory Reform Act, including:

- a* two new exclusions from the cartel offence: the notification exclusion (where customers are provided with relevant information before the arrangements are made) and the publication exclusion (where the relevant information is publicised in the manner specified);¹⁹
- b* a provision that an individual will not commit the offence if the agreement is made in order to comply with a legal requirement; and
- c* three new defences to the cartel offence: where there is no intention to conceal the nature of the arrangements from customers; where there is no intention to conceal the nature of the arrangements from the CMA; and where the defendant took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.

The CMA has published prosecution guidance in an attempt to bring further transparency to the exercise of its prosecutorial discretion.²⁰

iii Early resolutions and settlement procedures

In March 2014, the CMA issued guidance²¹ setting out details for a formal settlement procedure, the key features of which include:

- a* a reduced penalty where an undertaking is prepared to admit that it has breached competition law and accepts that a streamlined administrative procedure will govern the remainder of the investigation;

18 Stephen Blake, Senior Director – Cartels and Criminal Group, 'The UK steel tanks criminal cartel trial: implications for criminalisation and leniency', 13 November 2015.

19 The pre-existing exclusion relating to the notification of bid-rigging arrangements is retained.

20 CMA Cartel Offence Prosecution Guidance, March 2014.

21 Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases, March 2014.

- b* the CMA will retain broad discretion in determining which cases to settle. Businesses will not have a right to settle in a given case, but are also not under any obligation to settle or enter into any settlement discussions where these are offered by the CMA. Settlement discussions can be initiated either before or after the statement of objections is issued;
- c* at a minimum, the CMA will require a settling undertaking to make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement, cease the infringing behaviour and confirm that it will pay a penalty set at a maximum amount;
- d* the streamlined administrative procedure will normally include streamlined access to file arrangements; no written representations on the statement of objections (except in relation to manifest factual inaccuracies); no oral hearings; no separate draft penalty statement after settlement has been reached and no case decision group will be appointed;
- e* settlement discounts will be capped at a level of 20 per cent. The actual discount awarded will take account of the resource savings achieved in settling that particular case at that particular stage in the investigation. The discount available for settlement before the statement of objections is issued will be up to 20 per cent, and the discount available for settlement after the statement of objections is issued will be up to 10 per cent; and
- f* the leniency policy and the use of settlements are not mutually exclusive – it is possible for a leniency applicant to settle a case and benefit from both leniency and settlement discounts.²²

At the time of writing, the CMA has used the formal settlement procedure in six cases: *Property Advertising* (2015), *Consultant Eye Surgeon Partnership* (2015), *Galvanised Steel Water Storage Tank* (2016), *Bathroom Fittings* (2016), *Commercial Refrigeration* (2016) and *Online Sales of Posters and Frames* (2016).

VI 'DAY ONE' RESPONSE

CMA officials may carry out announced or unannounced inspections anywhere in the United Kingdom to investigate possible cartel activities. Where the CMA has obtained a warrant, officials may enter and search both business and domestic premises, and may:

- a* examine books and other business records;
- b* take copies or originals of books and records (including from electronic devices);
- c* require on-the-spot oral explanations of documents; and
- d* seal any business premises and books or records for the time necessary for the investigation.²³

It is a criminal offence to obstruct an inspection by the CMA, to provide false or misleading information or to destroy, falsify or conceal evidence. It is a civil offence not to comply

22 Id.

23 CMA officials are also able to inspect businesses premises without a warrant in certain circumstances.

with a formal information request without a lawful excuse and the CMA may impose fines for failure to provide documents or answer questions. It is therefore essential to develop a coordinated strategy for dealing with an inspection, which should cover issues such as:

- a* arranging for each official to be assisted or shadowed by a member of staff or lawyer;
- b* briefing relevant employees that they should not obstruct the investigation (e.g., by destroying or deleting records) while also noting that anything they say to the officials may be recorded as evidence;
- c* establishing a process for identifying documents that may be covered by legal privilege before officials are allowed to see or copy them;
- d* maintaining a record of what officials ask for and inspect, and keeping copies of documents copied by the officials; and
- e* ensuring that the fact that the inspection is taking place is not leaked outside of the company.

In addition to carrying out inspections, the CMA may issue information requests under the Competition Act as a means of obtaining information from undertakings. The CMA also has new powers to require any individual who has a connection with a business under investigation to answer questions on any matter relevant to the investigation. The CMA may also require the individual to provide information that may be relevant to the investigation. As noted above, the CMA now has the power to fine any person who fails, without reasonable excuse, to comply with a formal notice to answer the CMA's questions.

In light of the significant penalties that may be imposed for a breach of the Chapter I prohibition or Article 101 TFEU, a tailored strategy should be developed to deal with the fallout from an unannounced inspection or receipt of an information request covering alleged cartel activities. Active consideration should be given to whether it is appropriate to be making applications for leniency. The strategy should be developed with senior management and the legal department in view of the surrounding facts and the different issues and risks raised in all potentially relevant jurisdictions. Delay in the implementation of a strategy could have serious consequences (e.g., in terms of priority of leniency applications), as could the implementation of a policy that does not take due account of identifiable risks (e.g., in terms of potential civil actions and follow-on investigations in other jurisdictions).

VII PRIVATE ENFORCEMENT

i Private actions

Private actions brought before the English courts claiming damages or other relief for breaches of competition law are generally framed as tortious actions for breach of statutory duty. In practice, claims relating to anticompetitive agreements are often based on both the relevant EU and UK provisions.

On 1 October 2015, the Competition Act and Enterprise Act were amended by virtue of the Consumer Rights Act 2015 with a view to facilitating actions for damages under a more liberal collective actions regime (see Section VII.iv, *infra*). The Consumer Rights Act introduced a number of additional reforms, including:

- a* extending the CAT's jurisdiction to hear stand-alone as well as follow-on cases (while permitting the transfer of cases between the ordinary courts and the CAT);
- b* harmonising the limitation periods for the CAT with those of the High Court;
- c* enabling the CAT to grant injunctions in order to bring anticompetitive behaviour to a halt;
- d* introducing a fast-track procedure for simpler competition claims in the CAT; and
- e* enabling the CMA to certify a voluntary redress scheme offered by any company that has been found to have infringed competition law.

EU Member States were required to transpose the Damages Directive into their national laws by 27 December 2016. On 20 December 2016, the UK government published its response to its consultation on the implementation of the Damages Directive. As the UK's established rules relating to claims for competition damages are similar to the regime set out in the Damages Directive, the government has decided that a 'light-touch' approach to implementation is more appropriate than a 'copy-out' approach. The government will therefore rely, wherever possible, on existing UK legislation, case law or court rules that already reflect the requirements of the Damages Directive, and will legislate where necessary to ensure full implementation.

In particular, the government has decided:

- a* to implement the Damages Directive as a single regime that has the same procedures whether the original breach was of EU or domestic competition law;
- b* to retain existing limitation periods but to amend domestic limitation provisions and create a stand-alone competition limitation regime in the Competition Act to reflect the Damages Directives' provisions;
- c* to implement the Damages Directives' specific requirements concerning disclosure (e.g., in relation to proportionality requirements and the non-disclosure of leniency statements and settlement submissions);
- d* to legislate to ensure that exemplary damages cannot be awarded;
- e* to legislate to ensure that it is clear that the burden of proving that an overcharge has been passed on rests with the defendant and what an indirect purchaser must show to establish a claim;
- f* to amend legislation to give clear effect to the rebuttable presumption that cartels cause harm;
- g* to introduce legislation in relation to the assessment of contributions between those jointly liable for an infringement;
- h* to implement the Damages Directives' specific requirements in relation to the effect of consensual settlements on the competition claim and any contribution claims; and
- i* to allow final infringement decisions of other Member States' competition authorities or courts to be presented as *prima facie* evidence of an infringement.

The substantive new rules will only apply to claims where both the infringement and harm occurred after the implementing legislation has come into force, which the government

describes as being the ‘fairest approach’. Procedural provisions will apply to proceedings that begin after the commencement of the implementing legislation and may apply to cases where the harm or infringement took place before the coming into force date.

The government’s decisions will be implemented by the draft Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, which have been laid before Parliament. These draft Regulations will introduce new provisions into the Competition Act.

ii Interplay between government investigations and private litigation

Where a prior finding by a UK competition authority or the European Commission of an infringement exists, and where the redress sought is limited to a claim for damages, a claimant may bring an action for damages as a follow-on claim. In a follow-on action, the claimant does not need to establish that the defendant has infringed the relevant competition law. The claimant can rely on the decision of the relevant competition authority to that effect, and thus only needs to prove causation and loss.

iii Damages

Compensatory damages are available in the United Kingdom for breaches of competition law, and those damages ought to be calculated by reference to what is necessary to restore the victim to the position he or she would have been in had the infringement not occurred. It would seem to follow that, where the defendant can show that the claimant has avoided or mitigated its loss by passing on the loss (e.g., in a chain of purchasers in which prices have been increased down the chain), the defendant may be able to claim a defence or a reduction in the damages otherwise payable. Indeed, the Damages Directive requires national courts to make the passing-on defence available to defendants – see the EU chapter for further details.

Following the High Court decision in *Devenish*,²⁴ it appears that, while exemplary damages are also, in theory, available for infringements of the competition rules, their award is discretionary and the courts will exercise their discretion with caution. In cases where there are multiple claimants, the difficulty of apportioning any exemplary damages means that the courts are less likely to exercise their discretion in favour of an award of exemplary damages. Moreover, where fines have already been imposed upon a defendant (or would have been imposed were it not for a successful leniency application) by an EU or UK competition authority, exemplary damages are unlikely to be awarded, as to do so would breach the principle that a wrongdoer ought not to be punished twice for the same wrong.²⁵ Recent reforms to the Competition Act (see Section VII.iv, *infra*) prohibit the CAT from

24 *Devenish Nutrition Limited and others v. Sanofi-Aventis SA and others* [2007] EWHC 2394 (Ch); *Devenish Nutrition Limited v. Sanofi-Aventis SA (France) & others* [2008] EWCA Civ 1086.

25 The CAT awarded exemplary damages amounting to £60,000 (in addition to compensatory damages) to 2 Travel as relief for an abuse of dominance by Cardiff City Transport Services Limited. When deciding on the amount of the exemplary damages, the CAT’s considerations included the amount of the compensatory damages, the economic size of Cardiff Bus, and the economic and regulatory context. See *Travel Group PLC (in liquidation) v. Cardiff City Transport Services Limited* [2012] CAT 19, judgment of 5 July 2012.

awarding exemplary damages in collective proceedings. It should be noted, however, that the government plans to prohibit the award of exemplary damages, as part of its implementation of the Damages Directive.

The English courts have also concluded that restitutionary damages – damages assessed by reference to the infringing party's gain rather than the victim's loss – are not currently available in competition law cases.²⁶

In 2014, the CJEU ruled that another species of damages, known as 'umbrella damages', must also be available where a cartel has inflated the price of a good or service and, in light of this, a non-cartelist has raised its prices as well (under the protection of the cartel's umbrella, as it were).²⁷ In those circumstances, a party that has paid a non-cartelist an inflated price can claim umbrella damages from the cartelists. The amount of the umbrella damages will be the difference between the inflated price and the competitive price of the good or service in question.

iv Collective actions

On 1 October 2015, the Competition Act and Enterprise Act were amended by virtue of the Consumer Rights Act with a view to facilitating actions for damages under a more liberal collective actions regime. Previously, only specified bodies could bring collective actions for damages on behalf of named consumers before the specialist CAT. A specified body had to meet certain criteria designed to ensure its independence, impartiality, integrity and ability to represent the interests of consumers. This regime was criticised as ill-equipped to maximise the economies of scale of collective actions. Although several infringement decisions were adopted in respect of retail goods in the United Kingdom, only one collective was action taken on behalf of UK consumers under the old regime (*Which? v. JJB Sports*). Commentators placed the blame on difficulties associated with finding and recruiting claimants (especially with the low value of individual claims), providing evidence of eligibility and obtaining disclosure to calculate the losses caused.

Under the new regime, any person authorised by the CAT may act as the representative of the claimants. The new regime applies to both follow-on and stand-alone cases, and is available to both consumer and business complainants. The CAT will now allow opt-out (as well as opt-in) collective proceedings. The opt-out aspect of a claim only applies to UK-domiciled claimants, but non-UK claimants are able to opt-in to a claim if desired.

The regime establishes a range of safeguards to protect against frivolous or unmeritorious cases being brought. In particular, the CAT is prohibited from awarding exemplary damages, and the use of contingency fees that are determined by reference to the amount of damages awarded is also prohibited in collective actions. Moreover, the CAT, in its gatekeeper role, will only authorise a representative to bring a claim if it considers that it is just and reasonable for it to do so. It will also only allow collective actions where it considers that claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings. These measures, along with a strong process of judicial certification and the maintenance of the loser-pays rule, are designed to guard against a US-style culture of class actions.

26 Id.

27 Case C-557/12, *Kone AG and others v. OBB-Infrastruktur AG*, judgment of 5 June 2014.

In May 2016, the first application to commence collective action was made under the amended Section 47B of the Competition Act.²⁸ The proposed opt-out proceedings combine follow-on actions for damages arising from a decision of the OFT that related to agreements and concerted practices aimed at prohibiting online advertising of mobility scooters below the respondent's recommended retail prices. A second application for opt-out collective proceedings has also been made, following the European Commission decision regarding interchange fees charged by MasterCard.²⁹ At the time of writing, the CAT is yet to decide whether to make collective proceeding orders authorising the class representative and certifying the claims as eligible for inclusion in collective proceedings. The outcome of these claims will provide useful guidance on the operation of the new regime.

In May 2016, the CMA published guidance for consumers and businesses on obtaining redress for competition law breaches.³⁰ The guidance reflects the changes in the law as a result of the Consumer Rights Act, and also takes account of the Damages Directive.

v Private litigation funding rules

In the private sector, interest in third-party funding (where businesses offer litigation funding in return for a percentage of the damages) has been fuelled by predictions of a surge in private actions before the English courts based on competition law. A number of firms are authorised by the Financial Conduct Authority to provide these services, and an increasing number of cases are now funded in this way. However, as noted in subsection iv, *supra*, this type of funding is prohibited by the CAT in relation to collective actions.

VIII CURRENT DEVELOPMENTS

On 23 June 2016, the UK electorate voted to leave the EU. At the time of writing, it is unclear what the implications of the Brexit decision will be for competition law; it will largely depend on the structure of the UK's post-Brexit relationship with the EU.

If the UK were to remain in the European Economic Area (EEA), there would be little practical change. However, if the UK were to withdraw from both the EU and EEA, it could cause significant changes to cartel regulation. In particular, there is a risk that businesses could face parallel investigations in the UK and EU, as the European Commission would no longer have jurisdiction over the UK aspects of anticompetitive arrangements. This could lead to a number of challenges for businesses under investigation, including increased regulatory burden and a risk of inconsistent outcomes. Leniency applicants would also need to consider lodging applications with both regulators, as an application to the European Commission would no longer cover conduct in the UK. Transitional arrangements would also need to be made to clarify how cases currently in train, and future cases involving historical (pre-Brexit) conduct, would be handled.

28 Case 1257/7/7/16, *Dorothy Gibson v. Pride Mobility Products Limited*.

29 Case 1266/7/7/16, *Walter Hugh Merricks CBE v. Mastercard Incorporated and Others*.

30 Competition law redress – a guide to taking action for breaches of competition law, May 2016.

Appendix 1

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