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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- United Kingdom --

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-- United Kingdom --

Introduction

1. In the UK, the private enforcement¹ of competition law has developed significantly in recent years. Alongside Germany and the Netherlands, the UK has one of the most active private antitrust enforcement regimes in the EU.²

2. The UK as a forum of choice for private litigants is likely to continue given legislative reforms designed to facilitate private damages claims which enter into force in October 2015. These changes, to be introduced by the Consumer Rights Act 2015 (CRA15),³ are in addition to the EU Directive on antitrust damages actions (the Damages Directive)⁴ to be implemented by 2016⁵, also intended to bolster private antitrust enforcement. It is anticipated there will be a material increase in the volume of private antitrust enforcement in the UK following the reforms. A key aspect of the reforms is the new opt-out collective actions regime under CRA15 designed to improve access to compensation, in particular for SMEs and consumers. The new opt-out regime is unprecedented in the UK.

1. Overview of private enforcement in the UK

1.1 The longstanding right to compensation

3. The right to compensation for loss suffered as a result of competition law infringement has been enshrined in case law for well over a decade.⁶ Article 2 of the Damages Directive further endorses this

¹ In addition to damages claims, private antitrust enforcement also captures seeking injunctive relief before the courts, seeking a declaration or invoking competition law as a ‘shield’ (rather than as a ‘sword’), for instance in defending an allegation of intellectual property right infringement or breach of contract. For the purposes of this paper, the focus is on private enforcement through damages claims.

² As noted by the European Commission (the Commission) http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf For a recent survey in these jurisdictions, see ‘Actions for Damages in the Netherlands, the United Kingdom, and Germany’ *Journal of European Competition Law & Practice*, 2015 Vol 6. No. 2 (Matthijs Kuijpers, Stefan Tuinenga, Stephen Wisking, Kim Dietzel, Suzy Campbell, and Alexander Fritzsche).

³ The full text of the CRA15 as enacted is available online: <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> and in pdf form: http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf.

Schedule 8 relates to private actions in competition law: <http://www.legislation.gov.uk/ukpga/2015/15/schedule/8/enacted>.

⁴ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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, OJ L 349, 5.12.2014, p1-19.

⁵ Member States must implement the Damages Directive by 27 December 2016.

⁶ The EU Court of Justice (CJEU) confirmed the availability of damages where harm results from a competition law infringement in Case C-453/99 *Courage v Crehan* [2001] ECR I-6297. The CJEU noted, at §27, damages actions before national courts can make a significant contribution to the maintenance of effective competition. See also C-295/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619. Even earlier, the UK courts had recognised the right to damages in an abuse of dominance case (*Garden Cottage Foods v. Milk Marketing Board* [1983] 2 ALL ER 770) and the CJEU in 1974 had held the Treaty provisions have *direct effect* (*BRT and SABAM*, C-127/73).

right, requiring EU Member States to ensure ‘any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.’

4. The existence of the right to compensation is a matter of EU law, given direct effect, while the detailed rules governing the exercise of the right are a matter of UK national law, subject to the principles of equivalence and effectiveness⁷ (the ‘whether’ and the ‘how’ compensation is to be granted⁸). Member States must have procedural rules ensuring the effective exercise of the right to compensation. This also follows from the right to effective judicial protection laid down in Article 47 of the Charter of Fundamental Rights of the European Union and Article 19(1) of the Treaty on the European Union.

1.2 Damages available

5. The right to compensation aims to place a person who has suffered harm in the position he would have been in ‘but for’ the infringement. The claimant must prove, on the balance of probabilities, that but for the infringement, its loss would not have occurred. In the UK, damages available for competition law breach are compensatory rather than restitutionary⁹ (damages are calculated by reference to the claimant’s loss, not on the basis of the infringer’s gain or unjust enrichment).

6. UK case law, however, permits exemplary damages in limited circumstances¹⁰ and the Competition Appeal Tribunal¹¹ (CAT) has awarded exemplary damages in the context of competition law¹². However, unlike in the US where treble damages are the norm, the circumstances in which a damages award may be made on a punitive basis are very limited in the UK, and the new CRA15 prohibits exemplary damages in the new opt-out claims process.

1.3 Access to compensation - the status of private enforcement in the UK¹³

7. As in a number of other jurisdictions, it seems the exercise of the right to compensation has been rather limited in certain respects in the UK.¹⁴ Claims have filtered through the judicial system with varying

⁷ See *Manfredi (supra)*.

⁸ Opinion of Advocate General Kokott 30.01.2014 (Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* [2014] ECLI:EU:C:2014:1317)§23 available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147064&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=185155>.

⁹ *Devenish Nutrition v Sanofi-Aventis* [2008] EWCA Civ 1086. The Court of Appeal held a restitutionary award (‘account of profits’) was not available where compensatory damages are an adequate remedy.

¹⁰ *Rookes v Barnard* [1964] AC 1129. The availability of exemplary damages was considered in *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2007] EWHC 2394. The court left open the possibility of exemplary damages but on the facts (where a fine had been imposed) did not award such damages in light of double jeopardy issues.

¹¹ The United Kingdom Competition Appeal Tribunal is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy whose function is to hear and decide cases involving competition or economic regulatory issues.

¹² The CAT first awarded exemplary damages in *2Travel* in the sum of £60,000. While a follow-on claim, no prior fine had been imposed (*2Travel Group plc (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19 (judgment available at: <http://catribunal.co.uk/238-7662/Judgment.html>)).

¹³ For example, as cited in *2Travel*, ‘Where a defendant with a cynical disregard for a plaintiff’s rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk...’ (*Rookes v Barnard, supra*).

levels of success and various procedural disputes along the way.¹⁵ The following features are of note in the most recent UK private damages litigation:

- **Settlement:** There is anecdotal evidence of settlement of damages claims suggesting the visible litigation in the UK is merely the ‘*tip of the iceberg*.’¹⁶ Many claims settle before reaching court altogether. Of those that do reach court, few result in final judgment with many settling beforehand. Two high-profile cartel damages cases settled for undisclosed sums in 2014: *National Grid Electricity Transmission plc v ABB Ltd & Others*¹⁷ and *Cooper Tire & Rubber Company Europe Ltd & Others v Dow Deutschland Incorporated & Others*¹⁸.
- **Final¹⁹ awards** of damages have been rare. Final damages were, however, awarded in the following two abuse of dominance cases:
 - In *Albion Water*²⁰, the CAT awarded £1,854,493.16 plus interest
 - In *2Travel*²¹, the CAT awarded £33,818.79 plus interest for loss of profits and £60,000 exemplary damages.
- **Follow-on:**²² the sizeable majority of the private antitrust enforcement appears to be follow-on damages claims, normally brought in the High Court (the CAT also has jurisdiction to hear follow-on claims and under the CRA15 now has jurisdiction to hear stand-alone actions too).²³

¹⁴ References to the UK insofar as they relate to litigation refer to the courts of England and Wales, not Scotland and Northern Ireland, with the exception of the CAT whose jurisdiction extends to the whole of the UK.

¹⁵ For instance on issues including limitation and jurisdiction. For a discussion on the interpretation of jurisdictional issues in UK cartel damages claims, see P. Stuart, ‘Jurisdictional Issues in UK Cartel Damages Claims’ (2014) *Comp Law* 176. As observed by M. Furse, ‘Follow-on Actions in the UK: Litigating Section 47A of the Competition Act 1998’ (2013) *Euro. C.J* 9(1): 79, of the handful of s47A follow-on claims, two have reached the Supreme Court in battles over the interpretation of the limitation period. In April 2014, the Supreme Court determined important issues in relation to the relevant limitation period for follow-on actions before the CAT where only some of the addressees appeal the underlying decision (*Deutsche Bahn AG and others v Morgan Advanced Materials plc* [2014] UKSC 24 (https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0209_Judgment.pdf)).

¹⁶ B Rodger, ‘Private Enforcement of Competition Law, The Hidden Story: Competition Litigation Settlements in the UK 2000 – 2005’ (2008) *ECLR* 96 - 116.

¹⁷ [2013] EWHC 822 (Ch).

¹⁸ [2010] EWCA Civ 864.

¹⁹ An interim payment of £2m was made in *Healthcare at Home Ltd v Genzyme Ltd* [2006] CAT 26. Of note the landmark case *Courage (supra)* confirming the availability of damages where harm results from a competition law infringement failed to result in damages despite lasting 13 years.

²⁰ *Albion Water Ltd v Dwr Cymru Cyfyngedig* [2013] CAT 6 (judgment available at: <http://www.catribunal.org.uk/237-6629/1166-5-7-10-Albion-Water-Limited.html>)

²¹ *2Travel Group plc (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19 (judgment available at: <http://catribunal.co.uk/238-7662/Judgment.html>).

²² Claims *following on* from an authority’s infringement decision (eg CMA, sector regulator or European Commission (the Commission)). The claimant need not prove the infringement but must establish loss suffered as a result of it.

- **Stand-alone:**²⁴ Generally such claims are rarer than follow-on claims and have arisen in cases concerning alleged abusive conduct.²⁵ Examples include *Purple Parking Limited v Heathrow Parking Limited*.²⁶
- **Collective claims:** there are a number of mechanisms for collective claims under existing procedural rules, including consolidation of claims, use of a test case, a group litigation order (GLO)²⁷ or a representative action.²⁸ Aggregation of multiple claims using existing mechanisms has proved problematic in some instances. For example:
 - In *Emerald Supplies v BA*²⁹ the Court of Appeal held the claimant class was too ill-defined for a representative action as it comprised both direct and indirect purchasers. The judgment demonstrates the difficulty of fulfilling the ‘*same interest*’ requirement under Civil Procedure Rule (CPR) 19.6. A GLO was suggested as an alternative way to pursue the claims. To date, however, a GLO has not been used in competition damages claims.³⁰
 - The only follow-on representative claim brought on behalf of consumers³¹ was the *JJB Sports* action³² where only 0.1% of the eligible consumers signed up. The claim settled but the only consumer body authorised to bring such an action stated it would not bring another under current rules.

²³ Follow-on claims may be brought in the CAT under the Competition Act 1998. Due to the High Court’s inherent jurisdiction (as opposed to the CAT’s statutory jurisdiction), it seems to have been the preferred forum for claims, for instance where relief beyond monetary damages is sought as part of the claim. It is anticipated the volume of litigation brought in the CAT will increase following the entry into force of the changes under the CRA15. The UK Government intends for the CAT, as the specialist competition tribunal, to be the main forum for private competition enforcement.

²⁴ Where there is no prior infringement decision of a public authority. The claimant must prove an infringement in addition to loss caused by it. There have also been a number of so-called ‘hybrid’ claims in the UK which are follow-on in nature but have stand-alone elements. For instance, *WM Morrison Supermarkets plc and others v MasterCard Incorporated and others* (Claim Nos. 2012 699-703/1305-1311).

²⁵ As observed in much of the literature, the evidence to prove an infringement may be more readily available regarding abuse of dominance, eg for a potential claimant to substantiate allegations of a refusal to deal, and practices falling foul of Chapter II/Article 102 are more likely to affect a particular party or fewer entities. Anticompetitive behaviour within the scope of Chapter I/Article 101 is likely to affect a wider number of entities, dispersing the harm across numerous parties, and is harder to detect. As noted in *Cityhook v OFT* [2007] CAT 18, §208, bringing a private action against secret cartels is no easy task. Those involved typically ‘*keep written evidence to a minimum and often explicit evidence of unlawful contact is only fragmentary and sparse.*’

²⁶ [2011] EWHC 987 (Ch).

²⁷ Civil Procedure Rules (CPR) 19.11. A GLO is not technically a group action as each claimant must file its own claim.

²⁸ CPR 19.6.

²⁹ [2010] EWCA Civ 1284.

³⁰ justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders.

³¹ Brought under s47B CA98 by the Consumers’ Association (now known as Which?)

³² *The Consumers Association v. JJB Sports plc* (Case No 1078/7/9/07).

8. New provisions in the CRA15 introducing an opt-out collective claims regime and a collective settlement process (see further below) are intended to alleviate in part some of the difficulties associated with existing mechanisms for bringing collective proceedings in private antitrust proceedings.

1.4 Overall picture of private enforcement

9. In the UK, we have certainly moved on from the ‘total underdevelopment’ in private actions described well over a decade ago in the 2004 Ashurst Study.³³ Whilst the overall number of claimants remains low³⁴, claimants have sought to recover significant individual losses. However, the private enforcement landscape has developed unevenly: follow-on claims for individual substantial losses arising from Business-to-Business (B2B) dealings are the most apparent type of claim. SME, consumer and collective claims are less frequent. This is – at least in part – likely to be symptomatic of wider issues concerning access to compensation through the court system, not limited to competition claims, where claims are of lower value and losses are dispersed across multiple potential claimants (given the viability of pursuing smaller claims in light of the costs of litigation).

10. Even if a significant number of claims are follow-on in nature, it has been noted 75% of EU infringement decisions still do not lead to damages claims.³⁵ In a UK study, Rodger observes the follow-on procedure has not been utilised as widely as expected given the number of decisions.³⁶ This is not insignificant: the European Commission’s upper estimate of EU compensation foregone each year is €23.3 billion.³⁷

2. Changes to bolster private claims

11. The lack of compensation, in particular for SMEs and consumers, has been widely recognised³⁸ and, at both domestic and European level, has driven significant legislative reform to facilitate private enforcement claims. The Damages Directive, yet to be implemented in the UK, is not considered in detail here. This section will focus instead on changes to be brought in by the CRA15 which will enter into force in October 2015, introducing various provisions to facilitate damages claims, including a new collective claims and settlement process in the CAT.

12. Changes to be brought in under the CRA15 (Schedule 8) include:

- widening the types of cases the CAT is able to hear and making other procedural changes to private actions before the CAT. In particular, the CAT will have the power to issue injunctions and hear stand-alone cases, not just follow-on damages claims. The basis for bringing opt-in claims in the CAT has been widened as a result

³³ Study on the conditions of claims for damages in case of infringement of EC competition rules (2004) available at: europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

³⁴ As observed by Dame Vivien Rose ‘Predicting the Past: Constructing the Counterfactual in Antitrust Damages Claims’ (2014) *Comp Law* 141.

³⁵ Only 25% antitrust infringements in the last 7 years were followed by damages actions ([europa.eu/rapid/press-release MEMO-14-310_en.htm](http://europa.eu/rapid/press-release_MEMO-14-310_en.htm))

³⁶ ‘Competition law litigation in the UK courts: a study of all cases 2009-2012’ (2013) *GCLR*. See also ‘Why not court? A study of follow-on actions in the UK’ (2012) *Journal of Antitrust Enforcement*, pp1–28.

³⁷ Impact Assessment Report accompanying the Damages Directive (COM(2013) 404 final).

³⁸ See OFT916 *Private actions in competition law: effective redress for consumers and businesses* (2007); BIS *Private actions in competition law: a consultation on options for reform* (BIS/12/742); *Government Response* (BIS/13/501) eg §5.12.

- providing for a fast track procedure for claims to enable simpler cases brought by SMEs to be resolved more quickly and a lower cost
- providing for opt-out collective actions and opt-out collective settlements (further details provided below)
- empowering the CMA to certify voluntary redress schemes (see further below)
- aligning the limitation period for claims before the CAT with those in the ordinary courts

2.1 *New collective actions (opt-out)*

13. The CRA15 gives the CAT jurisdiction to hear collective proceedings (combining two or more stand-alone or follow-on actions). Collective claims can be brought on an opt-in³⁹ or an opt-out⁴⁰ basis on behalf of a group of claimants (individuals and businesses). Opt-out collective actions are intended to allow both consumers and businesses to easily achieve redress for losses suffered as a result of breaches of competition law.

14. Under the new regime, to apply for a collective proceedings order (CPO), a class representative will need to send a collective proceedings claim form to the CAT. The CAT will require certain strict conditions are met before making a CPO. This ensures there are safeguards in place to protect against the risk of frivolous claims. The CAT's requirements for certification include:

- *Appointment of a suitable class representative:* The collective actions process will require a suitable representative to be appointed. The representative must be a person whom the CAT considers it is just and reasonable to appoint as a representative. In its discretion the CAT will consider a number of factors.
- *Eligibility of claims for inclusion in collective proceedings:* The CAT will need to be satisfied the claims raise the 'same, similar or related issues of fact or law' and are suitable to be brought in collective proceedings.

2.2 *Damages and costs*

15. Collective proceedings will enable damages to be determined on an aggregate, or class wide, basis, i.e. without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person. Exemplary damages in collective proceedings are not recoverable.

16. Any damages not claimed in opt-out proceedings must be paid to a charity⁴¹ unless the CAT decides to award part or all of any unclaimed damages to the claimant representative to cover their costs.

17. In terms of funding, damages-based agreements (where the lawyer's fee is related to the damages awarded, rather than the work done by the lawyer) are not permitted in opt-out collective actions. Any

³⁹ Claimants must 'opt-in' to the legal action to be able to obtain any damages

⁴⁰ Claimants are automatically included in the action unless they 'opt-out' in a manner prescribed by the CAT on a case by case basis

⁴¹ Specified by section 194(8) of the Legal Services Act 2007. This is currently the Access to Justice Foundation, although the Secretary of State may make regulations to substitute a different a different charity

award of costs is made against the representative in collective proceedings, rather than against those represented.

2.3 *Collective settlements*

18. The new collective settlement process requires the representative and the defendant in the collective proceedings to apply jointly to the CAT for approval of a proposed collective settlement. The CAT may make an order approving a proposed collective settlement if it is satisfied its terms are '*just and reasonable*.' The CAT will take into account a number of factors in the exercise of its discretion.

19. Further details of the new collective proceedings regime can be found in the draft CAT Rules of Procedure which were recently subject to consultation: Part V relates to collective proceedings and settlements. The consultation closed in April 2015 and the final version of the Rules is awaited. The draft rules can be viewed here (and the final version will be made available on the CAT website⁴² in due course): <https://www.gov.uk/government/consultations/competition-appeal-tribunal-rules-of-procedure-review>.

3. **Balancing public and private enforcement**

20. The interplay between public and private enforcement captures a wide range of different issues. These include evidentiary issues such as disclosure and access to evidence in the competition authority's file.⁴³ There are also factors such as the timing interaction between the investigative processes and private litigation claims, including the effect of any appeals brought against infringement decisions on related private claims. Other issues concern the impact of private enforcement on the effectiveness of public enforcement, for instance in relation to leniency and settlement incentives.

21. Public authorities have finite resources, so need to prioritise cases in order to generate maximum impact. Private actions can, therefore, complement public enforcement in the courts by increasing deterrence in two ways: bringing cases the authority has not prioritised, thereby increasing overall deterrence (stand-alone claims) and adding to the overall consequences of infringing (follow-on claims).

22. However, it is important that public enforcement is not undermined by private actions, not least because to the extent such actions are follow-on claims, they depend on effective public enforcement.

23. As noted by the Commission, the Damages Directive seeks to fine-tune the interplay between private damages claims and public enforcement, noting optimal interaction between the two complementary means of enforcement will lead to optimal overall enforcement of EU competition rules.⁴⁴ For instance, in relation to disclosure, the Damages Directive will make it easier for victims to gain access to evidence to substantiate their claims. The UK already has a well-developed disclosure regime (and culture of disclosure) and so aspects of the Damages Directive will not require the same degree of implementation as in Member States with a less established disclosure regime. For further detail, the following article provides a recent overview of disclosure: *Disclosure of Infringement Decisions in*

⁴² <http://www.catribunal.org.uk/>

⁴³ Case law includes Case C-360/09, *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161. See also the 2014 Opinion of the Commission following the High Court's request for clarification available at: http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf For the High Court judgment setting out the 'balancing exercise', see *National Grid Electricity plc v others* [2012] EWHC 869 (Ch) available at: <http://www.bailii.org/ew/cases/EWHC/Ch/2012/869.html>

⁴⁴ http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf Competition Policy Brief on the Damages Directive (Issue 2015-1, January 2015)

*Competition Damages Proceedings: How the UK Courts are Leading the Way Ahead of the Damages Directive.*⁴⁵

24. The Damages Directive also protects from disclosure certain categories of evidence included in a competition authority's file (namely leniency statements and settlement submissions as defined in the Damages Directive) and introduces rules to protect documents specifically created for the purpose of an investigation.⁴⁶ This is to ensure that the materials created by applicants in support of an application for leniency or in settlement discussions do not place them in a worse position than non-leniency/ non-settling parties. The protection seeks to strike a balance between ensuring that parties remain willing to cooperate with investigating authorities and the need for victims to access the evidence required to pursue their claims.

25. The CMA is taking an increasingly proactive approach to cartel detection and looking further to reduce its reliance on leniency, including through the recruitment of additional staff and investment in a more sophisticated digital forensics and intelligence capability.⁴⁷ While many competition authorities are increasingly intelligence led, due to the inherently secretive nature of cartel conduct, leniency nevertheless remains an important tool in the detection of anticompetitive behaviour for national competition authorities and the Commission.

26. The CMA's leniency programme has been designed to maximise incentives for would-be applicants to come forward. Depending on the circumstances, undertakings may benefit from total immunity from financial penalties and their employees may benefit from immunity from prosecution from the criminal cartel offence. Businesses which cooperate with competition authorities play a key role in uncovering anticompetitive behavior and bringing it to an end. The cooperation requirements of leniency also help facilitate authorities' investigative processes, and can enable quicker resolution of cases and thus enabling both a) an authority's finite resource to be reallocated to further enforcement; and b) from the perspective of private claimants an earlier decision on which follow-on actions can be based. It is, therefore, vital to protect this key source of information and ensure undertakings are not deterred from seeking leniency. Without leniency the number of cartel cases that are detected by investigating authorities would be lower, thereby reducing the opportunities for cartel victims to seek damages.

27. It seems the Damages Directive strikes a good balance: leniency recipients are not shielded from compensating victims, nor victims prevented from recovering damages as against a leniency recipient. However, protecting leniency and settlement submissions from disclosure seeks to preserve both leniency and settlement incentives and, in certain circumstances, there is an exception to joint and several liability for immunity applicants (save for as a last resort debtor).

3.1 CMA certification of a voluntary redress scheme

28. At the intersection of public/private antitrust enforcement an issue coming increasingly to the fore is the extent to which the public enforcement regime should seek to proactively facilitate private enforcement. The CMA's redress scheme approval power outlined below is effectively a mechanism through which the public regime is being used to encourage the voluntary provision of redress.

⁴⁵ Anneli Howard, *Journal of European Competition Law & Practice* 2015, Volume 6 Issue 4 (available to order online at <http://jeclap.oxfordjournals.org/content/6/4/256.full.pdf+html>).

⁴⁶ The Damages Directive also restricts disclosure of documents from competition authorities' files until after investigations have concluded.

⁴⁷ See <https://www.gov.uk/government/speeches/stephen-blake-explains-the-benefit-of-specialist-cartel-enforcement-authorities> for a speech given by Stephen Blake, Senior Director of the CMA's Cartels and Criminal Group (3 February 2015).

29. In relation to the domestic reforms under the CRA15, a key aspect of the new changes impacting the public/private antitrust enforcement interplay is the new power for the CMA to certify a voluntary redress scheme offered by a party in relation to a CMA infringement decision, or a decision of a UK competition authority (sector regulator) or the European Commission. This new power will come into force in October 2015. Redress schemes are not unprecedented in the UK's history. The CMA's predecessor the OFT took account of a redress scheme set up by infringing parties as part of the settlement and infringement decision in the Independent Schools case.⁴⁸

30. While redress schemes can be offered separately without CMA certification, the new process puts a CMA approved redress scheme on a statutory footing. Such schemes are intended to provide an alternative means for compensation to be achieved, as a separate option to private litigation before the courts. It allows the CMA to approve the framework of a voluntary compensation scheme, where the levels of redress to be offered under the scheme are determined by an independent board of experts.

31. Where schemes are approved, the CMA will take into account the voluntary offer of redress when assessing the level of fine for an infringement and would generally expect to offer a reduction in the level of penalty imposed.

32. The Secretary of State will be issuing complementary regulations about the approval of voluntary redress schemes in due course, including high-level provisions on the procedure for CMA approval and the information to be provided in applications for approval. The CMA has recently consulted on draft guidance related to the new power. The consultation has now closed and the CMA is considering the various responses received.

33. A party who has a voluntary redress scheme approved has a duty to comply with its terms and the CMA may require a person who applies for the approval of a voluntary redress scheme to pay the CMA's reasonable costs of assessing that scheme for approval. If a business or consumer suffers as a result of a breach by a business of the terms of voluntary redress scheme, they may bring legal proceedings before a court for damages or another remedy, such as an injunction.⁴⁹ This is to ensure there are remedies available for a breach of a voluntary redress scheme.

34. For further details, the CMA's draft guidance on its power to approve a voluntary redress scheme can be found here: <https://www.gov.uk/government/consultations/redress-scheme-approval-in-competition-cases-draft-guidance>.

4. Conclusion

35. Private antitrust enforcement has developed considerably in the UK in recent years but remains generally looked at through the lens of compensation, rather than deterrence. The two regimes have distinct functions: it is clear private enforcement's primary function is to seek compensation and the primary objective of public enforcement is to deter anti-competitive conduct. However, as noted above, private actions increase deterrence by enabling cases to be brought which an authority has not prioritised (stand-alone claims) and adding to the overall consequences of infringing (follow-on claims).

⁴⁸ The schools agreed to ex-gratia payments totalling £3m to benefit pupils who attended the schools during the fee information sharing period (<http://webarchive.nationalarchives.gov.uk/20090105101812/http://oft.gov.uk/news/press/2006/schools2>)

⁴⁹ Under the CRA15 the CMA has the power to enforce a redress scheme in addition to the ability for a scheme beneficiary to seek to enforce a redress scheme. The power is discretionary and the CMA does not generally expect to bring such proceedings

36. In relation to the Damages Directive, the Commission states: ‘the Directive is aimed at fully compensating those who suffered harm. Unlike in some other jurisdictions, the European approach does not conceive private damages actions as a tool for punishment and deterrence...This remains the responsibility of competition authorities...which...sanction infringements in the public interest (public enforcement).’⁵⁰

37. In the US, owing to the historical development of the antitrust system there, private claims represent a substantial component of antitrust enforcement and the availability of treble damages, in particular, acts as a significant deterrent.⁵¹ The US Supreme Court has observed treble damages are a chief tool in antitrust enforcement, ‘*posing a crucial deterrent to potential violators.*’⁵²

38. Certain aspects of the recent UK reforms have generated comment that they ‘*potentially cross the line from redress to punishment.*’⁵³ However, the precise impact the reforms will have on facilitating access to compensation and the impact of the changes on deterrence remains to be seen.

39. What is clear is that the increasing frequency and continued success of private enforcement claims will likely have a beneficial effect on deterrence. Advocate General Kokott has observed private enforcement has a powerful deterrent effect because the financial risks of joining a cartel are not calculable in advance: if the financial risks were calculable, ‘*[t]he deterrent effect which private enforcement mechanisms have, and were expressly intended to have, on undertakings...contemplating infringing...would be turned on its head.*’⁵⁴

40. Given the public/private antitrust enforcement interplay, the new power for the CMA to certify a voluntary redress scheme is a novel mechanism for the public enforcement process to encourage the voluntary provision of redress. This redress scheme approval power reflects support for redress forming part of enforcement in response to BIS’ consultation,⁵⁵ and the CMA considers it will generally be appropriate to incentivise appropriate voluntary redress related to its investigations with a penalty reduction. How in practice this new power will work alongside the far-reaching reforms under the CRA15 to facilitate private damages claims remains to be seen.

⁵⁰ europa.eu/rapid/press-release_MEMO-14-310_en.htm.

⁵¹ R. Lande, J. Davis, ‘Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws’ (2011) *Brigham Young University Law Review*. See also G. Werden, S. Hammon, B. Barnett ‘Deterrence and Detection of Cartels: Using all the Tools and Sanctions’ (2011) *Antitrust Bulletin* and R. Lande, J. Davis ‘The Extraordinary Deterrence of Private Antitrust Enforcement: A Reply to Werden, Hammond and Barnett’ (2013) *The Antitrust Bulletin* Vol. 58, No. 1/Spring 2013 : 173.

⁵² As cited by Werden, Hammond and Barnett (*supra*) from *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc* (1985) 473 US 614, 635.

⁵³ S. Wisking, K. Dietzel, M. Herron, ‘The Rise and Rise of Private Enforcement in the United Kingdom’ (2013) *GCLR* 6(2), 68.

⁵⁴ Opinion §65 (*supra*).

⁵⁵ Responses A-Z available at gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform.