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THE JUDICIAL APPLICATION OF EUROPEAN COMPETITION LAW

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1 WAS COMPETITION LAW PRIVATELY ENFORCED IN YOUR COUNTRY BEFORE REGULATION 1/2003 ENTERED INTO FORCE?

1.1 The essential ingredients of civil actions based on Articles 81 and 82 were well established on or shortly after the UK's accession to the European Economic Community (as then was)[1]. Nevertheless, there was an initial (albeit somewhat protracted) period of confusion as regards how Articles 81 and 82 were to be applied in civil proceedings in the UK. In *Application des Gaz S.A. –v- Falks Veritas*[2], Lord Denning M.R.'s remark that "*…articles* [81] *and* [82]…*create new torts or wrongs*" led to some confusion regarding the characterisation of private actions based on Articles 81 and 82. However, in *Garden Cottage Foods -v- Milk Marketing Board*[3], the House of Lords clarified the position. In overruling the Court of Appeal (which thought it was "*not altogether certain*" that damages were available for breach of Article 82), Lord Diplock stated: "*…I…find it difficult to see how it can ultimately be successfully argued…that a contravention of article* [82] *which causes damage to an individual citizen does not give rise to a cause of action in English law of the nature of a cause of action for breach of statutory duty…*" This has subsequently generally been accepted as definitive authority for the proposition that private individuals who suffer loss caused by breach of Article 81 and/or Article 82 can bring proceedings before the UK courts for the tort of breach of statutory duty, seeking damages for resulting loss, as well as injunctive relief (including interim injunctive relief in an appropriate case)[4]. Finally, the Court of Appeal in *Crehan -v- Inntrepreneur Pub Co CPC*[5] accepted that the cause of action under English law was the tort of breach of statutory duty. Further, the Court ruled that damages could be claimed for breach of Article 81 so long as the loss was caused by the breach and irrespective of whether or not the loss claimed was of a type that Article 81 was intended to prevent (which is

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1 Section 2(1) of the European Communities Act 1972 (**ECA72**) provides that "*All such rights, powers, liabilities, obligations and restrictions from time to time created, arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties…are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.*.". Shortly after accession, in *Brasserie de Haecht –v- Wilkin (No.2)* (Case 48/72) [1973] E.C.R. 77 and in *BRT –v- Sabam* (Case 127/73) [1974] E.C.R. 51, the European Court of Justice (**ECJ**) recognised that Articles 81(1) and (2) and 82 produce direct effects and can be directly relied upon by private parties in civil proceedings.

2 [1974] Ch. 381.

3 [1982] Q.B. 1114, reversed on appeal [1984] AC 130. The issue before the Court of Appeal and House of Lords was whether the judge at first instance had been right to deny an interlocutory application by GCF for an interim injunction (requiring MMB to continue to supply bulk butter to GCF pending final resolution of the proceedings), on the grounds that damages would be an adequate remedy.

4 For instance, in *Arkin –v- Borchard Lines* [2003] 2 Lloyd's Rep. 225 the Commercial Court (Colman J.) ruled on all aspects of the claimant's claim for damages for breach of Articles 81 and 82 on breach of statutory duty principles. Likewise *Provimi Ltd –v- Aventis Animal Nutrition SA and others* [2003] U.K.C.L.R. 493 concerned proceedings commenced in May 2002 by direct purchasers of vitamins from Hoffman-La Roche and Aventis, claiming damages for breach of Article 81 following the Commission's 2001 infringement decision against both defendants. On the defendants' application to have the claims struck out on jurisdictional grounds, the judge, in rejecting the application, accepted that civil actions for breach of the competition rules were properly characterised as actions for breach of statutory duty. Finally, in the Scottish case *Argyll Group –v- Distillers* [1986] 1 C.M.L.R. 764, the court accepted, following *Garden Cottage*, that damages and (in an appropriate case) interdict relief would ultimately be available to compensate loss resulting from the alleged infringement (the proposed acquisition by Distillers of Guinness, Argyll having made a rival bid); however, the court rejected Argyll's claim for an interim interdict on a balance of convenience assessment.

5 [2004] E.C.C. 28.

generally a pre-requisite to claiming damages for breach of statutory duty): as to hold otherwise would, in the Court's view, have meant that English law did not, as a matter of EC law, provide an effective remedy in damages for breach of EC competition law.

1.2 While the coming into force of Regulation 1/2003 made a significant contribution to private enforcement in the UK[6], this was preceded by a number of key developments, most notably: (i) the recognition of the Commission's and OFT's discretion to decline to initiate infringement proceedings on the ground of lack of "Community interest" or "administrative priority"[7]; (ii) the Commission's 1993 *Notice on cooperation between national courts and the Commission in applying Articles* [81] *and* [82][8]; (iii) the entry into force of the Competition Act 1998 (**CA98**) in March 2000, which introduced a new substantive and procedural UK competition law regime modelled on the EC competition rules[9]; and (iv) the entry into force of sections 18 – 20 of the Enterprise Act 2002 (**EA02**) in June 2003, which inserted section 47A into the CA98, empowering the new Competition Appeal Tribunal (**CAT**) to entertain "follow-on" monetary claims relying on an infringement decision of the Commission or of the OFT (or one of the sectoral regulators with concurrent jurisdiction to apply the EC/UK competition rules[10] or a CAT judgment on appeal substituting an infringement decision for the decision of the OFT[11]).

1.3 In addition, the law and procedure applicable to claims in civil proceedings before the UK courts based on infringement of the EC (and, since 2000, UK) competition rules has also developed considerably via case-law in individual cases, not only by the UK courts but also by the European Courts (most notably the *Courage –v- Crehan* judgment in 2001[12]). A recent study of competition law cases before the domestic courts of the UK between 1973 and the end of 2004[13] (Regulation 1/2003 came into effect on 1 May 2004), identified 90 competition law cases[14] during that period, of which 86 were before the English courts and 4 before the Scottish courts[15]. The study noted the generally low success rate of competition claims, in particular in the few cases during this period that

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6 In particular, Regulation 1/2003 removed the Commission's exclusive competence to apply the Article 81(3) exemption criteria to individual agreements, decisions or concerted practices and empowered (and obliged) the domestic courts of the various EU member states to do so.

7 *Automec Srl –v- Commission* (Case T024/90) [1992] E.C.R. II-2223 at paragraph 77. The UK courts have since recognised a similar discretion on the part of the OFT. For a recent example, see *Cityhook –v- OFT* [2007] CAT 18 and *R. (on the application of Cityhook) –v- OFT* [2009] U.K.C.L.R. 255.

8 O.J. [1993] C39/6, now superseded by the Commission's 2004 Notice, O.J. [2004] C101/4.

9 In particular, the prohibitions in sections 2 and 18 CA98, referred to as the Chapter I and Chapter II prohibitions, are identical to Articles 81(1) and 82 save that they apply to agreements/conduct capable of affecting trade within the UK.

10 Section 54 and Parts I and II of Schedule 10 CA98. The sectoral regulators with concurrent jurisdiction are the Office of Communications, the Gas and Electricity Markets Authority (**Ofgem**), the Office of Rail Regulation (**ORR**), the Water Services Regulation Authority, the Civil Aviation Authority and the Office for the Regulation of Gas and Electricity (Northern Ireland). References in this report to "the OFT" should be read, where appropriate, as including those regulators.

11 References in this report to an "OFT infringement decision" should be read, where appropriate, as including a CAT judgment substituting its infringement decision for that of the OFT.

12 (Case C-453/99) [2001] E.C.R. I-6297.

13 *Competition law litigation in the UK courts: a study of all cases to 2004*, Barry Rodger, [2006] E.C.L.R. 27(5 – 7) – hereinafter referred to as the **Rodger Study (1973 – 2004)**.

14 i.e. cases where the competition law aspect was a factor in the determination of the particular issue between the parties in dispute, irrespective of the stage of the litigation process at which it was resolved.

15 While this study is the most comprehensive review of competition cases during the period 1973 – 2004 that the authors are aware of, the figure of 90 competition law cases most probably underestimates the number of competition law cases during this period, in particular as the search does not capture all unreported judgments, which could be a significant category. In *Gibbs Mew –v- Gemmell* [1999] 1 EGLR 43., for instance, Peter Gibson L.J. (at paragraph 39 of his judgment) mentioned, in support of his view (that the party to an agreement in breach of Article 81 cannot claim damages from its co-contractor), that this was the position accepted by the High Court in five unreported judgments between July 1993 and February 1998 – two of these judgments (*Inntrepreneur Estates Plc –v- Milne* (30 July 1993) and *Inntrepreneur Estates Plc –v- Smythe* (14 October 1993)) are not available even in summary on Westlaw (the main search engine used in the Rodger Study (1973 – 2004)). Nor does it capture cases which were settled prior to judgment (or even prior to the commencement of proceedings).

have reached the stage of final judgment (out of 14, only 3 were successful in whole/part).

2 IF YES, WAS COMPETITION LAW APPLIED AS THE MAIN OR PRINCIPAL ISSUE OF THE DISPUTE (*À TITRE PRINCIPAL*) OR ONLY AS A SUBSIDIARY ISSUE (*À TITRE D'INCIDENT*)?

2.1 Of the 90 competition law cases identified in the Rodger Study (1973 – 2004) (see paragraph 1.3 above), 50 were cases where the competition argument(s) was raised as a defence (*à titre d'incident*[16]) and 40 were cases where the claimant's claim was wholly or partly based on an alleged infringement of Article 81 and/or 82 (and/or the Chapter I and/or Chapter II prohibitions under CA98) (*à titre principal*). It is noticeable that prior to 1999, the number of cases where a competition issue was raised as a defence (37) outnumbered by some margin the number of cases where the claimant relied on a competition argument (22). However, during the period 1999 – 2004, the number of competition-based claims (18) outnumbered the number of cases where competition law was raised as a defence (13). The same author has also conducted a study of cases between 2000 – 2005 which settled out of court[17]. This research found that 28 disputes based on an alleged infringement of Articles 81/82 and/or the Chapters I/II prohibitions settled out-of-court during 2000 - 2004[18] - at least 17 of these cases involved an alleged infringement of Article 81/82[19]. It is not clear to what extent infringement of the competition rules was raised by the claimant or defendant, although the study does note that 11 of the 28 cases settled on the basis of "payment in lieu of damages" (which may suggest these cases were *à titre principal*).

3 WERE STAND-ALONE ACTIONS POSSIBLE/FREQUENT? WERE FOLLOW-ON ACTIONS POSSIBLE/FREQUENT?

3.1 During the period 1973 – 2004, both types of actions were (and still are) possible, although, at least as regards actions based on an alleged infringement of the competition rules that resulted in a reported judgment (at whatever stage in proceedings), stand-alone actions far outnumbered follow-on actions: of the 90 judgments in competition-based litigation identified by the Rodger Study (1973 – 2004), only two of them[20] can properly be characterised as "follow-on" actions[21].

4 HAS THE ENTRY INTO FORCE OF REGULATION 1/2003 SUBSTANTIALLY INCREASED THE POSSIBILITY TO BRING ACTIONS IN PRACTICE OR THE NUMBER OF ACTIONS BROUGHT?

4.1 The entry into force of Regulation 1/2003 introduced a number of changes which have facilitated the possibility to bring private actions based on alleged infringement of Articles

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16 Of course in many of the cases where competition law was raised as a defence, the defendant also raised a counter-claim against the claimant, seeking damages and/or other relief from loss caused by the alleged infringement. As regards such counterclaim, the competition argument(s) was obviously *à titre principal*.

17 *Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom,* 2000 – 2005, Barry J. Rodger, [2008] E.C.L.R. 96 (**Rodger Settlement Study**).

18 The study was based on responses to questionnaires sent to law firms identified by the Legal 500 as having a specialism in EU/Competition law. Therefore, the study does not claim to provide a comprehensive picture of out-of-court settlements during the period covered.

19 At least 6 cases involved an allegation of infringement of Chapter I or Chapter II only. 5 cases are listed as "other combination of rules" from which it is unclear whether breach of Article 81 or 82 was alleged.

20 *Camera Care –v- Hasselblad* [1986] E.C.C. 373 and *Provimi –v- Aventis Animal Nutrition* [2003] All ER (D) 59 (May).

21 In *Fyffes Plc –v- Chiquita Brands International* [1993] F.S.R. 83, the plaintiff sought (without success) an interlocutory injunction against the defendant's enforcement of certain restrictions in a trade mark license, relying on the issuance of a statement of objections by the Commission indicating that it intended to adopt a decision that the restrictions infringed the EC competition rules. This is not a "follow-on" action as it was not founded on a final Commission infringement decision.

81 and 82: (i) removing the Commission's exclusive competence to apply the Article 81(3) exemption criteria – thereby removing the risk that stand-alone proceedings before the UK courts would be stayed (possibly for years) pending a Commission decision on whether or not Article 81(3) is applicable; (ii) abolishing the system for notifying agreements to the Commission for exemption or negative clearance; (iii) enhancing the Commission's ability to deal expeditiously with infringement cases, in particular by accepting formal commitments[22] (since supplemented by the Commission's adoption of a formal settlement procedure[23]); and (iv) enhancing the Commission's fact-finding powers (e.g. introducing powers to inspect non-business premises). The rationale for these changes was (at least in part) to free the Commission to pursue more aggressive and more efficient enforcement action. The powers of the OFT in the UK were also modified to align with the Regulation 1/2003 regime (see answer to Question 5 below). These changes (together with the earlier developments mentioned in paragraph 1.2 above) should provide a double impetus to private enforcement in the UK courts. First, they should lead to a greater number of infringement decisions which can form the basis of follow-on actions for damages; secondly, private parties who perceive themselves to be the victims of infringements which the OFT and/or Commission do not regard (or would be unlikely to regard) as a sufficient priority to warrant initiating or continuing with infringement proceedings, are left with no option but to pursue private enforcement avenues of redress (whether court proceedings or some other form of dispute resolution).

4.2 Of equal significance have been reforms related to clarifying the courts competent to hear private enforcement actions and trying to ensure those courts have the right procedural tools and practical experience to handle such claims efficiently, in particular: (i) the establishment of the CAT and amendments to the Civil Procedure Rules (**CPR**) to ensure most cases commenced in the High Court are heard by the Chancery Division of the High Court[24]; (ii) the continuing appointment from 2003 to date of all the judges of the Chancery Division of the High Court to the panel of CAT chairmen[25]; and (iii) the willingness of the courts (both the High Court and, in particular, the CAT[26]) to proactively manage private enforcement actions, with a view to their expedition[27]).

4.3 A further factor that has led to an increase in private competition-based claims in recent years has been the emergence of a group of funders of competition damages claims actively buying-up or otherwise aggregating the claims of potential victims following (or in expectation of) a Commission or OFT infringement decision.

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22 Article 9 Regulation 1/2003. An Article 9 decision is not an infringement decision and so cannot be used as the basis for a follow-on monetary claim under section 47A CA98. However, to the extent that it frees Commission resources to pursue other hardcore infringement cases to decision, it could be viewed as, overall, facilitating follow-on actions.

23 See Council Regulation of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (O.J. [2008] L171/3) and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1.2003 in cartel cases (O.J. [2008] C167/1). An infringement decision adopted by the Commission under the settlement procedure can form the basis of a follow-on action for damages under section 47A CA98.

24 CPR Rule 30.8; The Commercial Court also retains jurisdiction to consider competition issues provided they arise in the context of a "commercial claim" (CPR Rule 58.1). See also Practice Direction – Competition Law – Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998.

25 Every case before the CAT is heard by a panel consisting of a chairman and two ordinary members: section 14(1) EA02.

26 Rule 44(1) CAT Rules 2003 (S.I. 2003/1372) requires that the CAT "*actively exercise*" its case management powers (under Rules 17 – 24) "*with a view to ensuring that the case is dealt with justly*".

27 Nevertheless, these actions, in particular follow-on damages actions, can be protracted, for various reasons, such as complexity of the factual issues, in particular quantum of damages (factoring in passing-on) and causation, and lack of clarity as regards various procedural, evidential and legal principles – which has on occasion enabled defendants in damages actions to draw proceedings out.

4.4 A study of the number of private action competition judgments before the UK courts during the period 2005 - 2008[28] commented that "*Despite the expectation that there would be an exponential increase in subsequent years from the high of seven cases in 2004, particularly following Regulation 1/2003 and the number of cartels uncovered by the Commission's leniency programme*", the number of cases in 2005 – 2007 (10, 9 and 8 respectively) was only "*fairly steady*". However, there were 14 competition judgments in 2008 ("*we may be witnessing early signs of a surge in competition law claims*"). So far in 2009 (to 22 October), there have been a further 9 judgments handed down in cases between private litigants relying on (or challenging reliance on) Articles 81/82 and/or the Chapters I/II prohibitions, which suggests that the (historically high) volume of competition judgments in 2008 may be maintained in 2009 but is unlikely to be exceeded. Further, all but one of these judgments are in follow-on actions. In addition, the Rodgers Settlement Study found that the number of competition disputes in the UK which settled out-of-court in 2005 (14) was considerably higher than in earlier years (e.g. between 6 – 8 in each of the three previous years).

4.5 Nevertheless, the number of private enforcement actions brought in the UK courts remains modest. For instance, in the 6 years since the CAT has had the ability to rule on "follow-on" monetary claims, only 11 cases have been brought, of which 7 have settled[29] and 4 are on-going[30]. In fact, the first main court hearing in such a case took place only in September 2009[31].

5 WAS THERE A NEED TO MODIFY THE NATIONAL COMPETITION LAW AND/OR THE PROCEDURAL LEGISLATION TO FACILITATE THE APPLICATION OF REGULATION 1/2003?

5.1 There was a need to modify UK competition law as a result of the entry into force of Regulation 1/2003. The necessary changes to the UK competition regime were brought about by The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004[32], the main elements of which were to align the procedures and powers of the OFT, in applying Articles 81/82 and Chapters I/II, to those of the Commission under Regulation 1/2003, in particular by: (i) abolishing the system for notifying agreements/practices to the OFT; (ii) introducing a formal mechanism for the OFT to close its file (without adopting an infringement decision) on the basis of commitments accepted from the party(ies) under investigation; and (iii) strengthening the OFT's investigatory powers in line with the Commission's new powers of investigation under Regulation 1/2003[33].

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28 Rodger, *Competition Law Litigation in the UK Courts: A study of all cases 2005 – 2008: Part I* [2009] G.C.L.R. 93; and *Competition Law Litigation in the UK Courts: A study of all cases 2005 – 2008: Part II* [2009] G.C.L.R 136.

29 *BCL Old Co Limited, DFL Old Co Limited and PFF Old Co Limited –v- Aventis SA, Rhodia Limited, F Hoffman-La Roche AG and Roche Products Limited* (***BCL (No.1)***) (Case No. 1028/5/7/04); *Deans Foods Limited –v- Roche Products Limited, F Hoffman-La Roche AG, Aventis SA* (Case No 1029/5/7/04); *Healthcare at Home Ltd –v- Genzyme Ltd* (Case No 1060/5/7/06); *ME Burgess, JJ Burgess and SJ Burgess (trading as JJ Burgess & Sons) –v- W Austin & Sons (Stevenage) Limited and Harwood Park Crematorium Limited* (Case No 1088/5/7/07); *Freightliner Limited, Freightliner Heavy Haul Limited –v- English Welsh & Scottish Railway Limited* (Case No 1105/5/7/08); *NJ and DM Wilson –v- Lancing College Limited* (Case No 1108/5/7/08); *Consumers' Association –v- JJB Sports* (Case No 1078/7/9/07)

30 *Emerson Electric Co and Others –v- Morgan Crucible Company plc* (Case No 1077/5/7/07); *BCL Old Co Ltd and Others –v- BASF SE and Others* (***BCL (No.2)***) (Case No 1098/5/7/08); *Grampian Country Foods Groups Ltd –v- Sanofi-Aventis SA and Others* (Case No 1101/5/7/08); *Enron Coal Services Limited (in liquidation) –v- English Welsh & Scottish Railway Limited* (Case No 1106/5/7/08).

31 See "Enron pushes EWS for damages in UK's CAT", mLex 17 September 2009. A transcript of the five day hearing is available at http://www.catribunal.org.uk/237-3346/1106-5-7-08-Enron-Coal-Services-Limited-in-liquidation.html

32 S.I. 2004/1261.

33 In addition, the OFT published guidance on its application of Regulation 1/2003 and the United Kingdom legal exception regime (OFT442) and up-dated its earlier guidance notes to reflect the "modernisation" changes.

6 HAS YOUR NATIONAL LEGISLATION BEEN MODIFIED TO TAKE INTO ACCOUNT THE RECOMMENDATIONS INCLUDED IN THE COMMISSION'S WHITE PAPER AND COMMISSION STAFF WORKING PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES? ARE ANY OF THESE RECOMMENDATIONS ALREADY PART OF YOUR NATIONAL LAW? ARE THERE CONCRETE LEGISLATIVE PROPOSALS TO IMPLEMENT ANY OF THESE RECOMMENDATIONS?

6.1 The UK has not modified any legislation or adopted any new legislation to implement the recommendations in the Commission's 2 April 2008 *White Paper on Damages actions for breach of the EC antitrust rules*[34] and accompanying Staff Working Paper[35]. Certain of the proposals in the White Paper are already, to a greater or lesser extent, reflected in the rules governing antitrust damages actions before the UK courts. In particular: (i) representative actions by designated bodies are already possible under section 47B CA98 (see response to Question 34 below); (ii) "standard" disclosure (generally applicable in both High Court and CAT proceedings) appears to guarantee a greater level of disclosure than contemplated by the Commission's proposals; (iii) the Commission's proposal of a new limitation period of at least two years from when the infringement decision on which a follow-on claimant relies has become final is already the applicable limitation period for follow-on monetary claims before the CAT; and (iv) in the UK courts, costs are already awarded at the discretion of the court[36].

6.2 However, a number of the Commission's proposals differ from the existing position in the UK, in particular: (i) the general position in UK private actions that the claimant bears the burden of proving that the defendant infringed the competition rules (in stand-alone actions only) and that the defendant directly caused the loss claimed, would potentially differ from the Commission's proposals regarding the burden of proving passing-on[37]; (ii) currently only infringement decisions by the OFT or by the Commission bind the UK courts (but not infringement decisions adopted by NCAs of other Member States); (iii) in UK court proceedings, there is currently no specific protection from disclosure for leniency applications or corporate statements; and (iv) currently in private actions in the UK, defendant cartelists who have received full immunity from fines under the Commission/OFT leniency programs should nevertheless be jointly and severally liable for the entirety of victims' resulting loss (see the answer to Question 24 below).

6.3 There are no concrete legislative proposals at UK level to implement the Commission's proposals. The Commission was expected to unveil a draft directive establishing certain minimum rules for anti-trust damages actions throughout the EU and the text was the subject of consultation with the NCAs, however, as at 24 October 2009, it is reported that the Commission has postponed formally proposing the directive, pending a re-consideration of the legal basis for the directive[38]. In addition, the OFT's Recommendations to Government make a number of reform proposals, in particular that conditional fee arrangements in representative actions should allow for the lawyers to

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34 COM(2008) 165 final.

35 SEC(2008) 404.

36 The OFT's November 2007 recommendations "Private Actions in competition law: effective redress for consumers and business" (OFT916resp) (***Recommendations to Government***) included a proposal that the UK Government consider codifying (in the CPR) (or, in Scotland, introducing measures allowing for) the court's discretion to cap parties' costs liabilities in competition cases and to provide for the court to have discretion to give the claimant cost-protection in appropriate cases – to provide claimants with certainty as to their potential exposure.

37 However, there are in any event a number of uncertainties regarding to what extent the passing on defence is available to defendants in UK proceedings. In *BCL (No 1)* [2005] CAT 2 the CAT stated: "...*the questions of whether the defendants are entitled to raise the 'passing on defence' (either upstream or downstream), and who bears the burden of proof, are novel and important issues…These issues are as yet undecided in the United Kingdom nor, as far as we know, definitively decided in any other European jurisdiction*".

38 *"Damages blueprint postponed as Barroso cedes to MEP pressure"*, mlex 2 October 2009.

benefit from a win-increase of more than 100%[39]. As at 22 October 2009, the Government had not proposed any measures to implement the OFT's recommendations.

7 IS PRIVATE LITIGATION IN COMPETITION CASES DEALT WITH BY ORDINARY CIVIL/COMMERCIAL COURTS OR BY A SPECIALIZED COURT? IS THERE A DIFFERENCE DEPENDING ON WHETHER COMPETITION LAW IS APPLIED *À TITRE PRINCIPAL* OR *À TITRE D'INCIDENT*?

7.1 Both the High Court and a specialist tribunal, the CAT deal with private litigation.[40] The competence of the courts and CAT differs as between 'follow on' claims and 'standalone' claims.

7.2 Where a natural or legal person wishes to bring a 'follow-on' claim, he has two options: he may invoke the possibility provided for by section 47A CA98 and bring a claim for damages or "*any other claim for a sum of money*" before the CAT; or he may commence the claim before the High Court[41]. A further type of follow-on action which may be brought before the CAT is a representative action under section 47B CA98; see the answer to Question 22 below. A number of follow on claims have been brought before the CAT[42] and ordinary courts in recent years. It is perhaps too early to discern any trends in the flow of follow-on 'traffic', but there are signs that in certain situations claimants are commencing actions in the High Court in advance of an anticipated infringement decision (or the determination of any appeal), rather than awaiting adoption of the decision and then bringing an action under section 47A.[43]

7.3 Turning to 'standalone' actions, only the ordinary courts may entertain the damages action; the CAT has no originating jurisdiction.[44]

7.4 It makes no difference, so far as the identity of the appropriate court is concerned, whether competition law is applied *à titre principal* or *à titre d'incident*.

8 IS PRIVATE LITIGATION IN PRACTICE ESSENTIALLY CIRCUMSCRIBED TO SPECIFIC PRACTICES OR INDUSTRIES (E.G. SUPPLY EXCLUSIVITY OF PETROL STATIONS; MOTOR VEHICLES DISTRIBUTION, ETC.)?

8.1 No. Unlike in certain other jurisdictions, private litigation in the UK has related to a huge variety of practices and has taken place between parties active in a wide variety of sectors, including the organisation of sport and the exploitation of media rights pertaining

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39 Currently the permitted increase in fees contingent on success is limited to 100% of the fee agreed upfront.

40 For a detailed examination of the CAT and its procedure, see e.g. Ward and Smith (eds) *UK Competition Litigation* (Sweet & Maxwell, 2005), ch 4; Gray et al *EU Competition Procedure and Remedies* (Richmond, 2006), ch 4; and O'Neill and Sanders *UK Competition Procedure: The Modernised Regime* (OUP, 2007) ch 12. See also the CAT's *Guide to Proceedings* (October 2005), available at www.catribunal.org.uk.

41 Section 47A(10) expressly states that the right to commence proceedings in the CAT under section 47A does not affect the right to bring other proceedings in respect of the claim, which in practice means proceedings before the High Court in England and Wales, the Court of Session in Scotland and the High Court of Northern Ireland in Northern Ireland.

42 See fn 29 and 30 above.

43 This appears particularly to be the case where the claimant considers there to be a risk, real or perceived, of a so-called "Italian torpedo" in another jurisdiction: see e.g. *National Grid Electricity Transmission plc v ABB Limited & Others* [2009] EWHC 1326 (Ch), para 26, and *Cooper Tire and Rubber Company Europe Limited & Others v Shell Chemicals UK Limited & Others* [2009] EWHC 1529 (Comm), para 3.

44 Note, however, that by virtue of section 16(1) of the EA02 the Lord Chancellor (now Secretary of State for Justice) may make secondary legislation providing the High Court with the ability to transfer to the CAT so much of any proceedings before it as relates to questions of infringement. Despite the calls of various commentators for the "activation" of section 16 (Brown, *Section 16: Time for Activation?* [2007] ECLR 488 and the literature cited therein), to date the Secretary of State has not made use of his powers in this respect. The President of the CAT, Sir Gerald Barling, has recently added his voice to the calls for secondary legislation: see the CAT's *Annual Review and Accounts 2007-2008*, p 9.

thereto,[45] telecoms,[46] pharmaceuticals,[47] transport services,[48] ICT,[49] and the distribution and retailing of beer[50] and automobiles,[51] to name but the most prolific in terms of private enforcement of competition law.

8.2 It is fair to say, however, that most of this litigation has taken place since the entry into force in 2000 of the 1998 Act, which – together with the other developments mentioned in the answer to Question 1 above – heralded the emergence of a competition 'culture', which included a greater awareness on the part of victims of anti-competitive conduct of the remedies open to them.

9 HAS THE NATIONAL COURT TO STAY ITS PROCEEDINGS ONCE THE NATIONAL COMPETITION AUTHORITY ("NCA") HAS INITIATED PROCEEDINGS ON THE SAME MATTER, UNTIL A DECISION HAS BEEN REACHED?

9.1 There is no obligation on the court to stay its proceedings in such situations, but the court has an inherent jurisdiction to do so.[52] The court is likely to bear in mind the existence of OFT proceedings when considering whether it is consistent with the "overriding objective" of dealing with cases justly, to which the courts must always have regard, to permit the claim to run its course or, rather, to stay proceedings pending the outcome of the OFT's investigation.[53]

10 HAS THE NCA TO STAY ITS PROCEEDINGS ONCE A NATIONAL COURT HAS INITIATED PROCEEDINGS ON THE SAME MATTER, UNTIL A DECISION HAS BEEN REACHED?

10.1 No. The OFT has a general discretion as to whether to open an investigation and, if an investigation is on foot, as to whether to proceed with it.[54] The OFT has published a set of *Prioritisation Principles*, which detail its general approach to the way in which it selects cases for investigation: OFT 953, October 2008. One consideration taken into account by the OFT is whether it is "best placed" to act; among the alternatives it cites is private

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45 See, in particular, *Attheraces Ltd v British Horseracing Board Ltd* [2005] EWHC 3015 (Ch), overturned on appeal [2007] EWCA Civ 38 (horseracing); *Bookmakers' Afternoon Greyhound Services and Others v Amalgamated Racing Ltd and Others* [2008] EWHC (Ch) 1978, affirmed on appeal [2009] EWCA Civ 750 (horseracing); *Hendry and Others v World Professional Billiards and Snooker Association* [2002] UKCLR 5 (snooker); *Adidas AG v ITF and Others* [2006] EWHC 1318 (Ch) (tennis); *Football Assocation Premier League Ltd and Others v QC Leisure and Others* [2008] EWHC 1411 (Ch) (football) (reference to ECJ pending, Case C-403/08; see O.J. [2008] C 301/19).

46 See *3 Com Europe Limited v Media Vertriebs GmbH* [2004] UKCLR 356; *Unipart Group Ltd v O2 UK Ltd* [2004] EWCA Civ 1034; *Software Cellular Network Ltd v T-Mobile (UK) Ltd* [2007] EWHC 1790 (Ch); *Hutchison 3G UK Ltd v O2 UK Ltd and Others* [2008] EWHC 50 (Comm).

47 See, in particular, *Glaxo Group Ltd v Dowelhurst Ltd and Another* [2000] EWHC 134 (Ch); *Provimi*, fn 21 above; *BCL Old Co (No. 1)*; *Trouw UK Ltd v Mitsui & Co UK Ltd* [2006] EWHC 863 (Comm); *BCL Old Co (No, 2)*; *Devenish Nutrition Limited v Sanofi-Aventis SA (France) & Others* [2008] EWCA Civ 1086; *AAH Pharmaceutical Ltd and Another v Pfizer Ltd and Another* [2007] EWHC 565 (Ch); *Secretary of State for Health v Norton Healthcare (No 1)* [2003] EWHC 1905 (Ch); and *Secretary of State for Health v Norton Healthcare (No 2)* [2004] EWHC 609 (Ch).

48 See *Chester CC v Arriva plc* [2007] EWHC 1373 (Ch) (buses); *Arkin v Borchard Lines Limited & Others* [2003] EWHC 687 (Comm). (shipping).

49 See e.g. *Intel Corp v VIA Technologies Inc and Others* [2003] EWCA Civ 1905; *Hewlitt-Packard Development Company LP and Another v Expansys* UK Ltd [2005] EWHC 1495 (Ch); *Sandisk Corp v Koninklijke Philips Electronics NV* [2007] EWHC 322 (Ch).

50 All of the cases in this area have concerned so-called 'beer ties': e.g. *Inntrepreneur Pub Co CPC v Crehan* [2006] UKHL 38; *Gibbs Mew v Gemmill* (fn 15); *Punch Taverns v Moses* [2006] All ER (D) 317; *P&S Amusements v Valley House Leisure Ltd* [2006] EWHC 99 (Ch).

51 See e.g. *Richard Cound v BMW (GB) Ltd* [1997] EuLR 277; *Clover Leaf Cars Ltd v BMW (GB) Ltd* [1997] EuLR 535; *SERE Holdings Ltd v Volkswagen Group UK Ltd* [2004] EWHC 1551 (Ch).

52 See CPR Rule 3.1(2)(f).

53 The "overriding objective" is set out in CPR Rule 1.1. Dealing with a case justly includes, so far as practicable, ensuring that parties are on an equal footing; saving expense; and dealing with cases proportionately, expeditiously and fairly.

54 See *Cityhook v OFT* (fn 7) and, in particular, *Cityhook v OFT* [2009] EWHC 57 (Admin), paras 163-165**.**

enforcement. It is reasonable to assume that that consideration must weigh more heavily in the balance if litigation is already underway.

11 ARE NATIONAL COURTS BOUND BY THE FINAL DECISIONS ADOPTED BY A NCA DECLARING THAT A CERTAIN PRACTICE AMOUNTS TO AN INFRINGEMENT? IS THE RESPONSE THE SAME WHERE THE NCA RULES THAT THE PRACTICE DOES NOT INFRINGE COMPETITION LAW?

11.1 Dealing first with the position in follow-on claims under section 47A CA98, where an infringement decision of the OFT has become final (i.e. any appeals have run their course or no appeal is lodged with the CAT within the requisite time period), the OFT's decision establishing an infringement of the prohibition in question binds the CAT.[55] The precise extent to which the OFT's decision as a whole is binding is, however, open to question. In particular, it is unclear to what extent the CAT is bound by findings of fact contained in an infringement decision, as opposed merely to the finding of infringement itself. This question has been touched upon, albeit indirectly, in a recent judgment of the Court of Appeal: *Enron Coal Services Ltd (in liquidation) v English, Scottish and Welsh Railways Ltd*.[56] In *Enron* there was a dispute between the parties as to whether the decision had found overcharging by EW&S at the expense of the claimant, in respect of which alleged conduct the claimant sought to claim. The Court of Appeal appears to have adopted a fairly narrow definition of the decision and therefore a narrow view of the extent to which the CAT is bound. Patten LJ, for the Court, said that "*For there to be such a claim (and, with it, the jurisdiction of the Tribunal to adjudicate upon it) the regulator must have made a decision of the kind described in s.47A(6). The use of the word "decision" makes it clear that s.47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct amounts to an infringement of the Chapter II prohibition. It is not open to a claimant such as ECSL to seek to recover damages through the medium of s.47A simply by identifying findings of fact which could arguably amount to such an infringement.*"[57] The Court of Appeal's judgment in *Enron* does not deal with findings of fact which do not go towards a finding of infringement, but it is likely that the same reasoning would apply to such findings of fact, too.[58]

11.2 Secondly, where a follow-on claim is brought in the High Court, section 58A CA98 provides that the court is similarly bound by the OFT's infringement decision (once it becomes final).

11.3 In *Iberian (UK) Ltd v BPB*[59] (a pre-*Masterfoods* case) the High Court (Laddie J) refused to permit the defendant, which had been found by the Commission to have infringed Article 82 EC, to challenge the Commission's findings of fact (which had been affirmed on appeal to the CFI and on further appeal to the ECJ) before the Court "*where, as here, the parties have disputed the same issues before the Commission and have had real and reasonable opportunities to appeal from an adverse decision, there is no injustice in obliging them to accept the result obtained in Europe. The position is* a fortiori *when, as*

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55 See section 47A(9).

56 [2009] EWCA Civ 647.

57 Ibid, para 31 (emphasis added).

58 See also *BCL (No. 2)* [2009] EWCA Civ 4343, para 28, where the Court of Appeal drew attention to the distinction but did not decide the matter: *"First, section 47A(9) provides that in determining a claim under the section the tribunal "is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed". Whatever the precise meaning and effect of that provision ([counsel for the defendants] drew a contrast, by reference to sections [58] and [58A], between a finding of an infringement and the detailed findings of fact in an infringement decision)..."* (emphasis in the original).

59 [1996] 2 CMLR 601.

here, the opportunities of appeal have been used to the full."[60] This has led some to suggest that facts found by the Commission in its decisions must be binding on the domestic court.[61]

11.4 Section 58 CA98 provides that any finding of fact by the OFT which is "*relevant to an issue arising in* [competition law] *proceedings* [before the court] *is binding on the parties*", unless the court otherwise directs. It will be seen immediately that the wording of section 58 differs from that of section 58A in two important respects: first, relevant findings of fact are binding on the parties rather than on the court itself; and the court may direct that they should not be so binding. Thus the court has a discretion.[62]

11.5 Non-infringement decisions are not mentioned in section 58A (or section 58) of the 1998 Act; findings of non-infringement are therefore not expressly stated to be binding on courts. It can be anticipated, however, that such decisions would be considered persuasive by a court hearing a damages action based on the same conduct as that investigated by the OFT.[63]

11.6 As for the status of OFT decisions which do not involve the same parties and conduct, there is no rule of law requiring the courts to take into account such decisions. This is in contrast to the status of relevant decisions and guidance of the Commission, to which the courts must have regard even when applying purely domestic law (i.e. where there is no effect on inter-State trade).[64]

11.7 It is worth noting that the OFT has recently called for the introduction into legislation of a provision requiring UK courts or tribunals formally to "have regard" to UK NCAs' decisions and guidance.[65]

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[60] Ibid, para 72.

[61] See e.g. Ward & Smith (eds) *Competition Litigation in the UK* (Sweet & Maxwell, 2005), para 7-039. This may, however, be an over-simplification. First of all, the *Iberian* decision was based on the principles of *res judicata* and abuse of process. In that case, BPB argued that the claimant, which was the victim of the abuse of dominance and the complainant to the Commission, should have to make out its case from scratch rather than be permitted to rely on the Commission's findings which led to the finding of abuse. In other cases, by contrast, the party found to have infringed a prohibition may simply disagree with a finding of fact which is not material to the finding of infringement, such as the extent of any overcharge and/or the effect on direct/indirect purchasers. In that case, it would appear that there is no basis for appealing against the finding of fact: if it is irrelevant to the validity of the decision, then an appeal against it would be inadmissible.

[62] It is unclear how the court will approach the exercise of its discretion under section 58, but it is anticipated by the authors that the court would be likely to direct that a finding of fact should not be binding in circumstances where the party concerned has not had a proper opportunity to test the evidence on which the finding of fact was made. In other words, the court may be prepared to make such a direction in a case where the facts are rather different from *Iberian*.

[63] If the claimant and defendant have both participated in the proceedings before the OFT and have both had an opportunity to put their case fully, a court may be persuaded that the attempt to relitigate the issue by the unsuccessful complainant amounts to *res judicata* or an abuse of process: see by analogy *Iberian*, cited above. The reality, however, is rather different: most complainants will not be able to put their 'case' fully, or at any rate as fully as if they were litigating in court with access to evidence disclosed by the defendant; for this reason, any attempt to argue *res judicata* or abuse of process is in the authors' view less likely to succeed. It should be noted, however, that the OFT is in practice unlikely to adopt non-infringement decisions frequently; where it considers that an investigation is unlikely to result in an infringement decision it is more likely (in the interests of the efficient deployment of its resources, among other reasons) to close its file than to issue a formal decision.

[64] See section 60(3) CA98. In practice, however, courts do take into account relevant decisions of the OFT in much the same way as they have regard to relevant decisions of the Commission.

[65] *Recommendations to Government*" (fn 36), para 10.8. See also the OFT's prior *Private actions in competition law: effective redress for consumers and business. Discussion paper* (OFT 916, April 2007) (***Discussion Paper***), para 8.6.

12 IS THE NCA BOUND BY THE FINAL DECISIONS ADOPTED BY A NATIONAL COURT DECLARING THAT A CERTAIN PRACTICE AMOUNTS TO AN INFRINGEMENT? IS THE RESPONSE THE SAME WHERE THE NATIONAL COURT RULES THAT THE PRACTICE DOES NOT INFRINGE COMPETITION LAW?

12.1 The OFT is not formally bound by a decision of a national court finding an infringement of competition law, but in practice the OFT is very unlikely to act inconsistently with the national court's decision unless it considers the decision to be wrong as a matter of substance and wishes to have the point considered by the CAT and/or a higher court.[66] It is unlikely to act at all where a national court has already found an infringement in the same case unless it considers that there is evidence of serious consumer detriment and/or a need for deterrence. The position is likewise where a national court rules that the conduct in question does not infringe competition law. If the OFT has serious doubts as to the correctness of the court's interpretation of EC competition law, and considers that there are broader policy issues at stake, it is in the authors' view more likely to intervene in any appeal lodged by the losing party with a view to submitting written observations and and/or seeking leave to make oral submissions.[67]

13 IF NOT, WHAT IS THE VALUE FOR A NATIONAL COURT OF A FINAL DECISION ADOPTED BY A NCA AND VICE VERSA?

13.1 See the answers to Questions 11 and 12 above.

14 IS THE FINAL REVIEW OF ALL THE DISPUTES (CIVIL AND ADMINISTRATIVE) RELATED TO COMPETITION LAW UNDER THE JURISDICTION OF A SINGLE COURT OF LAST INSTANCE? ARE THERE MECHANISMS TO AVOID INCONSISTENCIES IN THE CASE LAW?

14.1 As of 1 October 2009, the new Supreme Court is the court of last resort for all civil and administrative court proceedings (related to competition law or otherwise) in England and Wales, in Scotland and in Northern Ireland[68]. The Supreme Court replaces the Appellate Committee of the House of Lords, which handed down its last judgment on 30 July 2009.

14.2 The main mechanisms to avoid inconsistency in the case-law are:

(a) the doctrine of supremacy of EC law as established by the ECJ[69]. Section 3(1) ECA72 provides that "*For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the meaning, validity or effect of any EU instrument, shall be treated as a question of law (and if not*

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66 The Court of Appeal in England and Wales; the Court of Appeal of Northern Ireland in Northern Ireland; and the Court of Session in Scotland.

67 The OFT has the power to make written observations in cases relating to the application of Articles 81 and 82 EC and, with the court's permission, submit oral observations: Regulation 1/2003, Article 15(3). The OFT has the same power in cases relating to the application of the domestic prohibitions: see *Practice Direction - Competition law - Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998*, para 4.1A. As for the OFT's policy in relation to such intervention, see e.g. *Discussion Paper* para 8.8: "*If the level of private competition law actions increases, it will become more important for the OFT to consider intervention in certain cases. The OFT will not intervene in support of individual claimants or defendants, however. Our resources are limited and we are likely to give priority to cases where appellate courts are hearing private actions and there is a risk that they may not otherwise be made aware of broader policy issues.*"

68 Section 23 Constitutional Reform Act 2005 provides for the establishment of the Supreme Court and section 40 provides that it will have jurisdiction to hear appeals from any order or judgment of the Court of Appeal in England and Wales in civil proceedings or from any order or judgment of a Scottish court to the extent it would have been appealable to the Appellate Committee of the House of Lords prior to the coming into effect of the relevant provisions of the Constitutional Reform Act 2005.

69 See (Case 6/64) *Costa –v- ENEL* [1964] E.C.R. 585.

referred to the European Court, be for determination as in accordance with the principles laid down by and any relevant decision of the European Court)". The supremacy of EC law, as interpreted by the European courts, has long been accepted by the UK courts[70];

(b) section 60(2) and (3) CA98, which obliges the UK courts, in applying the Chapter I and II prohibitions, to follow the EC Treaty and ECJ/CFI judgments and to have regard to relevant decisions or statements of the Commission; and

(c) the doctrine of precedent at common law (*stare decisis*), which operates to ensure consistency between the judgments of the UK courts; put very crudly, lower courts must follow decisions of higher courts (and some higher courts must sometimes follow their own previous decisions).[71]

15 DOES YOUR LEGAL/CONSTITUTIONAL SYSTEM ALLOW COURTS TO BE BOUND BY ADMINISTRATIVE DECISIONS — AS PROVIDED FOR IN ARTICLE 16 OF REGULATION 1/2003 IN RESPECT TO THE COMMISSION'S DECISIONS—? IN THE ABSENCE OF A SPECIFIC LEGAL PROVISION SUCH AS ARTICLE 16 OF REGULATION 1/2003, WHAT IS OR COULD BE THE VALUE FOR A NATIONAL COURT OF A FINAL DECISION ADOPTED BY A NCA OF OTHER MEMBER STATE? AND OF A JUDGMENT OF THE COURT OF ANOTHER MEMBER STATE?

15.1 The UK's legal/constitutional system does allow courts to be bound by administrative decisions (see answer to Question 11 above). It would be possible for a new rule to be enacted making infringement decisions of NCAs of EU member states binding on the UK courts, for instance by adoption of an Act of Parliament amending sections 47A, 58 and 58A CA98[72] to widen their scope to non-UK NCA infringement decisions. In the absence of a provision similar to Article 16 Regulation 1/2003 or sections 47A, 58 and 58A CA98, final decisions by a NCA of another EU Member State currently have no binding effect on the UK courts. Any value of a non-UK NCA decision in proceedings before the UK courts is no more than persuasive, certainly of no more persuasive value than findings of fact of the Commission in application of the competition rules in a case between different parties in respect of different subject matter (compared to the court proceedings)[73]. A recent example of the UK courts taking into account an infringement decision of a NCA of another EU Member State is *Calor Gas Ltd –v- Express Fuels (Scotland) Ltd*[74] where the Outer House of the Court of Session (Lord Malcolm) in Scotland, in finding that a 5 year exclusive purchasing obligation in a cylinder LPG dealership agreement infringed Article 81, took into account a 2005 declaration by the Irish Competition Authority[75] which exempted such clauses on condition they did not last longer than 2 years.

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70 See for instance *Factortame –v- Secretary of State for Transport* [1990] 2 A.C. 85 at page 140.

71 See Halsbury's Laws of England, Civil Procedure, Vol. 11 (2009), para. 91 *et seq* and Stair Memorial Encyclopaedia: Sources of Law (Formal) (Vol. 22), para. 265.

72 These sections, in combination, currently give binding effect to OFT infringement decisions. See UK (DTi) 21 April 2006 Response to the Commission Green Paper on Damages Actions, paragraph 46: http://www.berr.gov.uk/files/file28534.pdf

73 See *Crehan –v- Inntreprenneur Pub Co* [2007] 1 A.C. 333, per Lord Hoffman at paragraph 69: "*when there is no question of a conflict of decisions* [i.e. where the UK court is not considering the same agreement/conduct between or by the same parties/party]*…the decision of the Commission is simply evidence properly admissible before the English court which, given the expertise of the Commission, may well be regarded by that court as highly persuasive. As a matter of law, however, it is only part of the evidence which the court will take into account. If, upon an assessment of the evidence, the judge comes to the conclusion that the view of the Commission was wrong, I do not see how, consistently with his judicial oath, he can say that as a matter of deference he proposes nevertheless to follow the Commission*".

74 [2008] S.L.T. 123, [2008] CSOH 13 (accessible on the Scottish Courts website: www.scotscourts.gov.uk).

75 http://www.tca.ie/AboutUs/Divisions/Monopolies/CylinderLPGConsultation/CylinderLPGConsultation.aspx

15.2 Judgments and court orders of the civil courts of any EU member state applying Articles 81 and/or 82 in proceedings between private parties are covered by the Judgments Regulation[76]. On registration in the appropriate court[77], such judgments/orders are enforceable as if they were UK court judgments/orders[78], as are court settlements approved by the courts of other EU member states in competition proceedings[79]. Apart from the issue of jurisdiction and enforcement of foreign judgments under the Judgments Regulation, judgments/orders of the courts of other EU member states do not bind the UK courts, although they may have persuasive value and can be adduced as evidence (translated and certified).

16 IS THERE ANY FORM OF DISCOVERY, EITHER PRE-TRIAL OR COURT-ORDERED, BASED ON FACT-PLEADING? IF NOT, WHAT MECHANISMS ARE AVAILABLE UNDER YOUR NATIONAL LAW TO OBTAIN EVIDENCE FROM THE OPPOSING PARTY? ARE THEY SUFFICIENT?

16.1 Yes. The normal rule is that discovery ("disclosure" in England and Wales;[80] "recovery" in Scotland;[81] "discovery" in Northern Ireland[82]) takes place once the claim and defence have been lodged. The general rule in England & Wales[83] is that disclosure should be restricted to what is necessary in the individual case, having regard to the "overriding objective" of dealing with cases justly.[84] There is no provision for automatic disclosure: the duty of disclosure only arises if and when it is ordered by the court. That said, parties frequently agree disclosure among themselves, given that it would almost certainly be ordered by the court in any event.[85]

16.2 "Standard disclosure" is set out in CPR Rule 31.6, which requires the disclosure by a party of the documents[86] on which he relies and those which: (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case. When undertaking standard disclosure pursuant to an order of the court, parties are obliged to conduct a "reasonable search" for documents.[87] The duty to disclose is limited to documents which have been in a party's control; that is, where the party is in physical possession of the document, or has or had a right to possession of it or a right to inspect

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76 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J. [2001] L12/1). As regards Denmark, the European Community and Denmark have concluded a parallel agreement which ensures the application of the Judgments Regulation provisions in Denmark as of 1 July 2007.

77 High Court of England and Wales, Court of Session (Scotland) and High Court of Northern Ireland. See Judgments Regulation, Annex II.

78 Articles 38(2) and 39 – 41 Judgments Regulation.

79 Article 58 Judgments Regulation.

80 See CPR Part 31.

81 See Rule 28 of the Ordinary Court Rules (Sheriff Court) and Rule 35 of the Court of Session Rules (Court of Session). These rules govern the procedure for the recovery of documents that are in the hands of a party to a depending action. As a general rule the Court will not grant authority for recovery of any document unless it can be demonstrated that the document has some relevance to the depending action. In addition, a party may obtain a variety of orders relative to documents and property before and after the commencement of an action by way of an application under and in terms of section 1 (1) of the Administration of Justice (Scotland) Act 1972. Note that in *Claymore Dairies v OFT (Recovery and Inspection)* [2004] CAT 16 the CAT was not referred to any authority by the parties on the relevant principles to be applied in applications for recovery in Scottish proceedings (para 107). The Tribunal, however, was satisfied that they were broadly the same as those which applied in England and Wales (para 108). See also Discussion Paper, fn 66.

82 Rules of the Supreme Court of Northern Ireland 1980, Order 24.

83 This report focuses on the position in England & Wales; it is understood that in material respects the position is not dissimilar in Scotland and Northern Ireland. See, in respect of Scotland, *Claymore Dairies,* fn 82, para 108 and, in respect of Northern Ireland, *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, para 27.

84 As to the "overriding objective", see CPR Rule 1.1.

85 Note that in follow-on claims before the CAT disclosure is also not automatic, although the CAT has the power, as part of its general case management powers, to order disclosure: see Rule 19(2)(k) CAT Rules.

86 "Documents" include "anything in which information of any description is recorded" and therefore extend to all electronic communications and databases: CPR Rule 31.4

87 CPR Rule 31.7. This means that parties may decline to search for documents on the grounds, for example, of the number of documents involved or the ease and expense of retrieval.

or take copies of it.[88] The act of disclosure consists of stating that a document exists or has existed.[89] Under the procedure for standard disclosure in CPR Rule 31.10, parties must make a list of documents under three categories, namely (a) those documents that they control, where there is no objection to inspection, (b) those documents that they control where inspection is objected to (on the grounds of privilege, for example) and (c) those documents no longer in the party's control (as to which the party must explain what has happened). There is a right of inspection of such documents as are disclosed, save in limited circumstances.[90]

16.3 Pre-trial disclosure is provided for by the CPR.[91] The court will only order pre-action disclosure where both the defendant and claimant are likely to be a party to subsequent proceedings.[92] Furthermore, pre-action disclosure must be desirable in order to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings or save costs.[93]

16.4 It should be noted that there is also a mechanism for disclosure from non-parties. Disclosure may be ordered when a non-party (including the OFT) appears to the court to be likely to have in its possession, custody or power any documents relevant to an issue arising out of a claim pending before that court. The court may make an order only where (a) the documents in question are likely to support the applicant's case or adversely affect another party's case and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.[94] Thus, it is open to a party to seek an order for disclosure of documents from the OFT's case file. That said, the OFT is very likely to resist such an application unless (a) the documents requested do not relate to a leniency application and (b) cannot be obtained by some other means. Even then, the OFT will resist the application if it is considered to be a "fishing expedition".[95]

16.5 The authors consider that the disclosure rules in the UK, which are some of the most extensive in the EU, are sufficient for the purposes of competition law litigation.

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88 CPR Rule 31.8

89 CPR Rule 31.2

90 CPR Rule 31.3. Where a party has a right to inspect a document, he must give written notice of his wish to inspect it or receive a copy of it. The disclosing party must then permit inspection or make a copy within seven days of receiving the notice: CPR Rule 31.15.

91 CPR Rule 31.16.

92 *Hutchison 3G UK Ltd v O2 (UK) Ltd* [2008] EWHC 55 (Comm), para 38.

93 CPR Rule 31.16(3)(d). It is fair to say that the courts are only rarely prepared to order pre-action disclosure: the circumstances must be outside "the usual run" to allow the hurdle to be surmounted: *Trouw UK Ltd v Mitsui & Co (UK) plc* [2006] EWHC 863 (Comm), para 43; *Hutchison 3G*, cited above, para 55. The mere speculative hope of production of a "smoking gun" cannot be sufficient to trigger the desirability of the exercise: *Hutchison 3G*, cited above, para 58. The only two applications for pre-action disclosure in competition litigation of which the authors are aware were both dismissed: *Trouw* and *Hutchison 3G*, cited above.

94 CPR Rule 31.17 On the question of disclosure against non-parties, see Nazzini *Concurrent Proceedings in Competition Law: Procedure, Evidence and Remedies* (OUP, 2004), paras 8.111 *et seq*.

95 See *Discussion Paper*, para 6.9, and the answer to Question 17 below. In *Enron Coal Services Limited* (fn 56), the CAT made an order for disclosure by the ORR of certain documents submitted to it by thid parties: see CAT Order of 2 April 2009.

17 IN CASE OF FOLLOW-ON LITIGATION, CAN PRIVATE PARTIES CLAIM ACCESS TO THE ADMINISTRATIVE FILE TO PREPARE THEIR ACTION BEFORE THE NATIONAL COURT? IF SO, WILL THEY ALSO HAVE ACCESS TO DOCUMENTS THAT HAVE BEEN DECLARED CONFIDENTIAL BY THE NCA AND TO INTERNAL DOCUMENTS OF THE NCA?

17.1 There is no general right of access on the part of private parties to the OFT's file. Instead, the issue is governed by OFT policy[96] and its statutory obligations.[97]

17.2 The OFT is particularly sensitive to the risks involved in disclosing leniency documents.[98] It has said that it "*will take all possible steps to protect from disclosure leniency documents*" and will "*oppose third party disclosure applications in the form of a 'fishing expedition'. This could be the case if, for instance, the application asked for disclosure of all documents submitted to the OFT by a person or all documents submitted in support of a leniency application, without further particularisation*".[99]

17.3 More generally, the OFT has said that the "*first port of call*" for claimants must be the disclosure process as set out above; only if there are "*difficulties in disclosure and/or there is relevant evidence on the OFT's file that is necessary for the case and cannot be obtained through the usual channels that additional requests to the OFT may be appropriate*."[100]

18 WHO BEARS THE BURDEN OF PROOF OF THE EXISTENCE OF AN INFRINGEMENT IN PRIVATE LITIGATION CASES? WHAT DOES THE PLAINTIFF HAVE TO PROVE TO CLAIM DAMAGES? DOES THE BURDEN OF PROOF SHIFT DURING THE PROCEEDINGS? ARE THERE LEGAL PRESUMPTIONS AFFECTING THE BURDEN OF PROOF?

18.1 By virtue of Article 2 of Regulation 1/2003, the burden of proof is on the party alleging that Article 81(1) and/or Article 82 EC has been infringed; and the burden is on the party to an agreement or concerted practice caught by Article 81(1) EC to prove that the requirements of Article 81(3) EC are satisfied such that the agreement or concerted

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96 At the investigation stage, a so-called "formal complainant" (i.e. a party who submits a written, reasoned complaint in accordance with the OFT's guidance: see *Involving third parties in Competition Act investigations* (OFT 451, April 2006), Annexes A and B) will normally be provided with a non-confidential version of the statement of objections (**SO**) to which its complaint relates (ibid, para 3.15), as may other third parties who are (or are likely to be) materially affected and are likely materially to assist the OFT in its investigation (para 3.7), but this will generally not include any documents annexed to the SO (para 3.21) nor will the OFT give access to any other documents or information save where it may be necessary in order for the third party to assist the OFT's assessment of the case: (para 3.22).

97 Section 237 EA02, contained in Part 9 of that Act, provides that the OFT may not disclose information relating to the affairs of any individual or business of an undertaking unless disclosure is specifically permitted. There are several 'gateways' for the disclosure of such information, including most notably where it is done "for the purpose of facilitating the exercise by the authority of any function which it has under or by virtue of [the EA02] or any other enactment" (section 241(1) EA02), which obviously includes the CA98. Before disclosing such information, the OFT must have regard to three considerations: first, the need to exclude from disclosure (so far as practicable) any "specified information" (which includes information the OFT acquires as a result of the performance of its functions under, inter alia, the CA98); secondly, the need to exclude from disclosure (again, so far as practicable) any information whose disclosure the OFT thinks is contrary to the public interest; and thirdly, the need to exclude from disclosure (so far as practicable) (a) commercial information whose disclosure might significantly harm the business interests of the undertaking to which it relates, or (b) information relating to the private affairs of an individual whose disclosure might significantly harm the individual's interests (section 244 EA02). As the OFT has noted, there is no generally applicable 'gateway' for disclosure for the purpose of facilitating private actions in the field of competition law: *Discussion Paper*, para 6.7; but the prohibition on disclosure does not apply where it has been ordered by a court: Section 237(6) EA02.

98 *Discussion Paper*, paras 6.10 and 7.15-7.16; *Recommendations to Government*, paras 9.1-9.5.

99 *Discussion Paper*, para 6.10. Moreover, the OFT has recommended that the Secretary of State for Business, Innovation and Skills be given the power (possibly exercisable on the advice of the OFT) to provide, by way of secondary legislation, for leniency documents to be excluded from use in litigation without the consent of the leniency applicant: *Recommendations to Government*, para 9.5.

100 *Discussion Paper*, para 6.9.

practice benefits from exemption. An identical approach is adopted in respect of the domestic prohibitions.[101] However, whilst the legal burden remains on the claimant throughout, in practice the evidential burden passes to the defendant to rebut the allegation once the claimant has adduced sufficient evidence to make out his case.[102]

18.2 To claim damages, the claimant must prove infringement (save in follow-on cases); loss[103]; and causation. As to the third of these elements the question is whether the infringement was the predominant cause of the loss suffered.[104]

19 WHAT FORM OF ORDERS OR REMEDIES ARE AVAILABLE (I) IN PRIVATE ACTIONS BEFORE THE COURTS; AND (II) IN ADMINISTRATIVE PROCEEDINGS BY THE NCA (E.G. DECLARATION OF INFRINGEMENT; DECLARATIONS AS TO COMPLIANCE WITH ARTICLE 81(3); ANNULMENT OF AGREEMENTS OR OF PARTICULAR CLAUSES; INJUNCTIONS TO RESTRAIN REPETITION OF INFRINGEMENTS; POSITIVE INJUNCTIONS; INTERIM MEASURES IN ADVANCE OF FINAL JUDGMENT; DAMAGES, ETC.)?

19.1 In private actions before the High Court or CAT, the following remedies are available:

(a) damages (interim and final): the kinds of damages available from the UK courts is described in the responses to Questions 36, 37 and 38 below. The CAT[105] and the High Court[106] can also order defendants to make interim payments of damages before the conclusion of a case, the main pre-conditions being that either the defendant has admitted liability to pay damages or the court believes that if the claim proceeds to trial the claimant would obtain judgment for a substantial sum of money (not including costs). Interim payments are limited to a reasonable amount of any probable final award of damages. The court may require the claimant to provide security for the defendant's costs as a condition to the grant of an interim payment[107]. In *Healthcare at Home –v- Genzyme*[108] the CAT awarded the claimant an interim payment of £2 million to Genzyme (the case settled before final damages were awarded).

(b) injunctive relief: the High Court (but not the CAT[109]) can order a party to refrain from doing something (prohibitory injunction) or to do something (mandatory injunction), either on a final or interim[110] basis. The court will only grant interim injunctive relief if of the view that there is a serious issue to be tried and the balance of convenience is in favour of the grant of interim relief (or if the balance

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101 See OFT's Modernisation guidance (OFT 442, December 2004) para 3.7. For a summary of the case law in this area, see *Chester CC v Arriva* [2007] EWHC 1373 (Ch), para 10. As explained above, in a follow-on action the infringement decision of the authority, once final, serves as conclusive proof of infringement, albeit only to the extent set out in the decision itself: *Enron Coal Services Limited* (fn 56), para 31.

102 See *Racecourse Association –v- OFT* [2005] CAT 29, paras 132-134.

103 The question of loss is dealt with in the response to Question 37 below.

104 In *Arkin –v- Borchard Lines Limited & Others* (fn 4), for example the claim was dismissed on the basis that the claimant had failed to show an infringement of competition law, but the judge went on to find that, even if an infringement had been shown, there was no causal link, as to which the onus was on the claimant: para 536. In this case, the claimant's business failed for reasons unconnected to the defendants' conduct, principally his own lack of business acumen: para 545.

105 Rule 46 CAT Rules 2003.

106 CPR Rules 25.1 and 25.6. See also October 2008 Practice Direction Part 25B – Interim Payments.

107 Rule 45 CAT Rules 2003 and CPR Rules 25.12 and 25.13.

108 [2006] CAT 29.

109 Only a claim for damages or any other claim for a sum of money (s.47A(1) CA98) may be made in proceedings before the CAT.

110 CPR Rule 25.1(a). See also Practice Direction 25B – Interim Injunctions.

of convenience is too finely balanced, that the grant of the interim injunction will best preserve the status quo)[111].

(c) declaratory relief: whether or not any other relief is claimed, the High Court (but not the CAT) may make binding declarations (final[112] or interim[113]), including a declaration of nullity of an agreement by reason of breach of the EC/UK competition rules, a declaration that an agreement is enforceable, including by virtue of Article 81(3) and a declaration as to whether clauses which infringe the competition rules are severable from the rest of an agreement[114].

The Scottish courts have broadly similar remedies, including the award of damages, the grant of an interdict (final or interim) and judicial declaration of rights.[115]

19.2 As regards administrative proceedings, CA98 empowers the OFT to: (i) adopt a final decision that Articles 81/82 and/or Chapters I/II has been infringed, give appropriate directions to bring the infringement to an end and/or requiring the infringing undertaking(s) to pay a penalty in respect of the infringement; (ii) give appropriate interim measures directions to prevent serious, irreparable damage to a particular person or category of person or to protect the public interest, where necessary as a matter of urgency; and (iii) accept commitments to take such action or refrain from taking such action as the OFT considers appropriate, as a condition of discontinuing an investigation.[116] The OFT can also take a decision that there are no grounds for action in respect of an agreement, decision, concerted practice or conduct on the grounds that the prohibitions in Articles 81/82 and/or Chapters I/II are not applicable[117]. As noted above (see paragraph 1.2), the OFT may also decide to discontinue an investigation (or not to commence one) on grounds of administrative priority or on other grounds (e.g. lack of evidence) which may not involve the OFT in expressing a view as to the existence of an infringement – such decisions are not "appealable decisions" under section 46 CA98[118]. Further, the OFT may be willing to provide confidential informal advice and, in certain circumstances, a formal Opinion on the application of Articles 81/82 and the Chapters I and II prohibitions[119].

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111 Thus in *Getmapping –v- Ordnance Survey* [2002] U.K.C.L.R. 410 the court refused an interim injunction, because it took the view that the claimant had a very weak case on the substance, would not suffer irreparable harm if the application was refused and had excessively delayed in making the application. More recently in *AAH Pharmaceuticals –v- Pfizer* (fn 47) a group of wholesale pharmaceutical supply companies sought a mandatory interim injunction requiring Pfizer to continue to supply them with Pfizer's prescription drugs. The High Court denied the application, largely because AAH had left it until "*the last minute*" to apply to the court for the interim injunction. On the other hand, in *Software Cellular Network Ltd –v- T-Mobile (UK) Ltd* (fn 46) the High Court made an order requiring T-Mobile to activate SCN's telephone numbers on T-Mobile's network. The court held that it was seriously arguable that T-Mobile's refusal was an abuse of dominance, granting the interim injunction would not materially disadvantage T-Mobile whereas if the injunction were refused but SCN was ultimately successful damages would be difficult to quantify, and therefore not an adequate remedy.

112 CPR Rule 40.20

113 CPR Rule 25.1(b).

114 For instance, in *English Welsh and Scottish Railway –v- E.ON UK* [2007] U.K.C.L.R. 1653, the High Court granted EWS a declaration that its coal carriage agreement with E.ON was wholly void and unenforceable, on the ground that EWS was obliged by directions (aimed at bringing to an end an infringement of Article 82 and the Chapter II prohibition) issued by the ORR to remove certain clauses from the agreement and that those clauses were not severable from the remaining clauses in the agreement.

115 See Stair Memorial Encyclopaedia, Vol. 13 Judicial and Other Remedies, for a detailed description.

116 See especially ss 31 to 36 CA98. As to interim measures, see *London Metal Exchange v OFT* [2006] CAT 19.

117 Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, Schedule, Rule 7(2).

118 *Claymore Dairies Limited –v- DGFT (Preliminary Issues)* [2003] CAT 3.

119 The OFT's Modernisation guidelines (OFT442) at section 7. The OFT has issued just one formal Opinion thus far: see *Newspaper and magazine distribution* (22 October 2008): http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft1025.pdf . Note the timescales involved (the OFT received the request for an Opinion in May 2004 and produced two draft opinions upon which it consulted).

20 ARE THE ADMINISTRATIVE LIMITATION PERIODS FOR THE IMPOSITION OF PENALTIES DIFFERENT FROM THE TERM WITHIN WHICH IT IS POSSIBLE TO BRING AN ACTION FOR BREACH OF COMPETITION LAW BEFORE THE NATIONAL COURT? WHAT IS THE TIME LIMIT TO BRING AN ACTION FOR DAMAGES?

20.1 The OFT's power to impose a penalty for breach of the EC/UK competition rules does not appear to be subject to any limitation period (beyond the limitation period inherent in the fact that the CA98 only came into effect in March 2000)[120]. Claims in the High Court for the tort of a breach of statutory duty must be brought before the expiration of six years from the date on which the cause of action accrued (i.e. the date the wrongful act caused the damage in issue)[121]. As regards claims in the Scottish courts, the limitation period is five years from when the loss occurs[122]. Follow-on claims before the CAT will be time-barred if brought more than two years after the "relevant date", which is the later of: (i) the date of the final infringement decision, once either the period for appealing the infringement decision has expired with no appeal having been made or, if there was an appeal, the appeal has been finally determined; or (ii) the date on which the cause of action accrued.[123]. In *Emerson Electric Co –v-. Morgan Crucible Company plc*[124] the CAT held that if an infringement decision is addressed to a number of parties and one (but not all) of these parties appeals against that decision, the time limit for bringing a damages action against any of the addresses does not start until all appeals against an underlying infringement decision have been determined. In that case, the cartelists' appeals sought to have the Commission's infringement decision annulled as well as challenging the level of the fine. However, in *BCL (No 2)*, the defendant had only appealed against the level of fine imposed by the Commission but not as regards the finding of infringement. The Court of Appeal held that an appeal only against the amount of penalty imposed but not challenging the finding of an infringement does not postpone the date from which the two-year time limit for bringing a follow-on damages claim runs,

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120 The CA98 imposes no limitation period on the OFT's power to impose a penalty under section 36 CA98. It has been suggested that the OFT's power is nevertheless subject to a limitation period, for instance, Professor Whish (Competition Law, OUP 6th Edition) says that as "a matter of general law, as established by the Limitation Act 1980", the OFT's ability to impose a penalty is subject to a 6 year limitation period (Professor Whish does not reference any specific section of the Limitation Act 1980); others have alluded to the possibility that, by virtue of section 60 CA98, the 5 year limitation period applicable to European Commission decisions to impose a fine (Article 25(1)(b) Regulation 1/2003) is also applicable to the OFT. In its 21 September 2009 *Bid Rigging in the construction industry in England* decision, the OFT rejected the argument that its power to fine is subject to any limitation period and did impose fines in respect of infringements which had ended more than 6 years before the OFT's decision. It is likely that this decision will be appealed to the CAT by one or more addressees (as at 24 October, no appeals had yet been filed).

121 Section 2 Limitation Act 1980. If the agreement, practice or conduct which infringes the EC competition rules is continuous in nature and caused the claimant damage within six years before the commencement of proceedings, the claim will not be time-barred (*Arkin –v- Borchard Lines* (fn 4)). Where any fact relevant to the claimant's right of action has been deliberately concealed from him by the defendant, the six-year limitation period begins when the claimant has discovered the concealment or could with reasonable diligence have discovered it (section 32 Limitation Act 1980). Under CPR Rule 19.5, the High Court can add or substitute a party to proceedings after expiry of the limitation period, provided the original proceedings were not out of time and the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant.

122 Section 6 Prescription and Limitation (Scotland) Act 1973 (again, discounting any delay in raising an action due to fraud or inducement of error). Under Rule 19.5, the High Court can add or substitute a party to proceedings after expiry of the limitation period, provided the original proceedings were not out of time and the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant. See Johnston *Prescription & Limitation* (W Green, 1999), para 2.09.

123 In addition, Rule 31(4) CAT Rules 2003 provides that no claim for damages may be made if, were the claim to be made in proceedings before a court, the claimant would be prevented from bringing the proceedings by reason of the limitation period having expired before the commencement of section 47A CA98.
The CAT may grant permission for section 47A proceedings to be commenced before the "relevant date" (Rule 31(3) CAT Rules 2003) or after the limitation period has expired (see Rule 19(2)(i) CAT Rules 2003, which says that the CAT may give directions "*as to the abridgement or extension of any time limits, whether or not expired*"; however, the CAT made clear in *Emerson Electric –v- Morgan Crucible* [2007] CAT 8 at paragraphs 79-96 that allowing claims before the relevant date is the exception rather than the rule).

124 [2007] CAT 28.

despite the "*extremely remote possibility*" that the CFI, in considering an appeal against fine, might itself raise an issue concerning the validity of the infringement decision[125].

21 ARE THERE SPECIAL RULES FOR COMPETITION LAW ISSUES IN RELATION TO STANDING? CAN INDIRECT PURCHASERS CLAIM REDRESS?

21.1 Claims may be brought in the UK by any natural or legal person who has suffered loss or damage as a result of an infringement of the EC competition rules and there are generally no special rules as to the standing of claimants to make claims based on the EC competition rules[126]. There are special considerations as to standing where a claimant seeks to bring a follow-on monetary claim before the CAT under section 47B CA98, which allows "specified bodies" [127] to bring representative follow-on actions on behalf of named consumers. Presently the only designated body able to bring such claims is Which?[128]

21.2 Indirect purchasers have sued for damages for breach of the EC competition rules and their ability to do so has been accepted[129], although to-date there has been no judgment awarding damages to indirect purchasers.

22 ARE THERE COLLECTIVE REDRESS MECHANISMS ALLOWING FOR THE AGGREGATION OF INDIVIDUAL CLAIMS FOR COMPETITION LAW INFRINGEMENTS? DO YOUR NATIONAL PROCEDURAL RULES ALLOW FOR (I) REPRESENTATIVE ACTIONS BEING BROUGHT BY A SPECIFIED BODY?; (II) CLASS ACTIONS GENERALLY; (III) THE CONSOLIDATIONS OF CLAIMS?

22.1 As mentioned in the answer to Question 7 above, there exists a specific collective redress mechanism in section 47B CA98, pursuant to which a specified body may bring a follow on action in the CAT on behalf of consumers.

22.2 A number of observations may be made on the procedure provided for by section 47B. First, the mechanism extends only to consumer claims; businesses, including small and medium-sized enterprises (**SMEs**), may not benefit from it. Secondly, section 47B provides for an 'opt-in', rather than 'opt-out', mechanism: the consumer body bringing the action must identify two or more individuals on whose behalf the claim is to be made[130] (although further claimants could be joined at a later stage); it must also provide evidence

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125 Fn 58, at paras 29 and 30 per Richards L.J.

126 There is obviously the additional question of whether the UK court will accept jurisdiction to hear the claim. Where the defendant is domiciled in the EU, that will be determined by the Judgments Regulation (Fn 77).

127 Section 47B(9) CA98 provides that a specified body is a body which has been specified by an order made by the Secretary of State.

128 Previously known as the Consumers' Association.

129 A number of indirect purchasers of vitamins (poultry farmers) initiated a section 47A monetary claim before the CAT in February 2004 against Aventis/Rhodia and Hoffman-La Roche (Case 1028/5/7/04). The claimants bought vitamins from nutrition companies (who themselves had purchased the vitamins from the defendants). The claimants argued that they had paid their suppliers higher prices as a result of the *Vitamins* cartel and had not been able to pass-on the overcharge. In its judgment of 28 January 2005 denying the defendants' applications for security for costs orders against the claimants ([2005] CAT 2), the CAT noted that this was the first instance of an indirect purchaser claiming damages before a UK court for breach of the competition rules and it was also the first time that the "passing-on" defence had been raised (paragraphs 33 – 35 of the judgment). However, the defendants did not argue that indirect purchasers had no standing to claim damages at all and the CAT stated that: "*the Claimants' have, at first sight, a good claim*" subject to the availability of the passing-on defence in law and on the facts (paragraphs 43 of the judgment). In any event, the claims settled against all the defendants during the course of 2005 and so the CAT did not decide whether the defendants' were entitled to raise passing on as a defence, nor who should be bear the burden of proof on the issue. On 13 March 2008, the same claimants brought a section 47A monetary claim in the CAT against BASF and these proceedings are on-going (subject to the CAT granting the claimants an extension of the limitation period for bringing the claim against BASF – see "Poultry firms ask UK court for extra time to file damage claim against BASF" mLex 22 October 2009).

130 Rule 33 CAT Rules 2003.

of their consent to the specified body acting on their behalf.[131] Thirdly, only "specified bodies" may bring such actions.[132] Fourthly, such actions may only be brought on the back of an infringement decision; there is hence no scope for "standalone" damages actions by a representative body on behalf of consumers. Fifthly, despite the fact that the mechanism has been in existence for more than 6 years, there has been just one action under section 47B so far: *Consumers' Association v JJB Sports*.[133] There, Which? brought an action on behalf of consumers harmed by the *Replica Kit* cartel.[134] Despite there being thousands of potential claimants, only approximately 130 consumers were identified on the claim form.[135]

22.3 The OFT has, perhaps unsurprisingly, said that: *"[t]he current evidence suggests that representative actions exclusively on behalf of named consumers continue to fail to optimise economies of scale and give rise to unnecessary costs and complexity. There is a risk that meritorious cases may not be brought or may only be brought by, or on behalf of, a small number of those who have been harmed."*[136] The OFT has recommended that the circumstances in which representative actions are permitted be widened. In particular, it has recommended that: (a) representative bodies should be able to bring actions not only in 'follow on' situations but also where there is no prior infringement decision of a relevant competition authority[137]; (b) representative actions should be permitted not just on behalf of consumers but also on behalf of businesses: for SMEs in particular, "*the barriers [to effective private redress] may be almost as significant as those faced by consumers*"[138]; and (c) it should be possible to bring a claim on behalf of consumers and businesses at large, rather than solely on behalf of named consumers/businesses; whether, on the facts of a particular case, the representative body should be able to do so would be a matter for determination by the court.[139]

22.4 Aside from representative actions under section 47B, the CPR provide for two further potentially relevant forms of collective or quasi-collective action, only the first of which might properly be described as a form of class action: claims by representative parties and the "Group Litigation Order" (**GLO**).

22.5 **The representative rule**: CPR Rule 19.6 provides, insofar as relevant, as follows:

"(1) Where more than one person has the same interest in a claim--

(a) the claim may be begun; or

(b) the court may order that the claim be continued,

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131 See CAT's *Guide to Proceedings* (October 2005), para 6.77.

132 Thus far, only one entity – Which? – has been specified pursuant to section 47B: see The Specified Body (Consumer Claims) Order 2005, SI 2005/2365.

133 Fn 29

134 OFT Decision CA 98/06/2003, substantially upheld on appeal in *JJB Sports & Another v Office of Fair Trading* [2004] CAT 17 (liability) and [2005] CAT 22 (penalty).

135 See *Consumers' Association v JJB Sports (Assessment of Costs)* [2009] CAT 2 ("*CA v JJB*"), para 7. This may be unsurprising given the amounts at issue, but it does beg the question whether an opt-in mechanism is appropriate for consumer claims, particularly such low value ones. It also goes some way to explaining why Which? appears to be rather reluctant to embark on further consumer claims under section 47B, which are undoubtedly complex to prosecute and inevitably represent a significant risk in terms of Which?'s own resources. See the submission of Which? in response to the *Discussion Paper*, para 5.1 et seq, cited in Mulheron "Reform of Collective redress in England and Wales: A Perspective of Need" (Research paper for submission to the Civil Justice Council, February 2008, pp 40-41: http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf); see, further, Wells "Collective actions in the United Kingdom" [2008] Comp Law 57, 61.

136 *Recommendations to Government*, para 7.12. The CAT has likewise observed, with a degree of understatement, that "the fullness or otherwise of section 47B as a vessel for consumer class claims remains a matter of debate": *CA v JJB*, para 8.

137 *Recommendations to Government*, para 5.13.

138 Ibid, para 6.7.

139 Ibid, para 7.33.

by or against one or more persons who have the same interest as representatives of any other persons who have that interest.

(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule—

(a) is binding on all persons represented in the claim; but

(b) may only be enforced by or against a person who is not a party to the claim with the permission of the court."

22.6 This type of claim is rarely utilised, in part because of the requirement that the representative and all parties represented must have "the same interest" in the claim: that expression has been interpreted narrowly by the courts. [140]

22.7 **The GLO**: The GLO is not in fact a collective action at all. It is a mechanism for managing multiple claims which give rise to "common or related issues of fact or law".[141] It will be noted that the wording is different from that used in CPR Rule 19.6, which refers to "same" interest. It is for the court to determine whether to make a GLO. If it does, the GLO must contain directions about the establishment of a register on which the claims to be managed as a group will be entered, specify the GLO issues and specify the court which will manage the claims on the register. In addition, the GLO may *inter alia* direct the transfer of relevant claims to the managing court and order their stay (e.g. if one claim is taken forward as a "test case") and give directions for publicising the GLO.[142] Where a judgment or order is given or made in a claim on the register in relation to one or more GLO issues, that judgment or order is binding on the parties to all other claims on the group register at that time, unless the court orders otherwise. The court may order that it be binding on claims entered on the register at a later date.[143] It will be apparent that the GLO regime requires all claimants to issue their own proceedings; it is not a mechanism for representative action but, rather, for the efficient and proportionate management of multiple claims raising similar issues. Thus far, it has not been used in the context of competition law damages actions.[144]

22.8 Finally, two or more individual claims may be consolidated.[145]

23 IF SUCH POSSIBILITIES DO EXIST, CAN CLAIMANTS HAVING SUFFERED DAMAGES IN ANOTHER MEMBER STATE BRING AN ACTION IN YOUR COUNTRY?

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140 See, very recently, *Emerald Supplies Ltd and Others v British Airways plc* [2009] EWHC 741 (Ch), in which a representative claim was struck out because the claimants – direct and indirect purchasers from alleged cartelists – did not have the "*same interest*" at the time the claim was issued (rather than, as the claimants had contended was sufficient, at the time judgment is given). The judge concluded: "*It is not convenient or conducive to justice that actions should be pursued on behalf of persons who cannot even be identified before judgment in the action and perhaps not even then. Further, the avoidance of multiple actions based on the same or similar facts can equally well be achieved by a Group Litigation Order made under CPR Rule 19.11. The existing 178 additional claimants [in respect of whom the claimants' solicitors had received instructions to act] and any others who seek to join in after the publication of the European Commission's investigation are more conveniently accommodated under that procedure*...": Ibid, para 38. The approach in *Emerald Supplies*, in particular the condition that the criteria of class membership cannot depend upon the outcome, has been criticised as not required by the wording of CPR Rule 19.6 itself and as representing a "*judicial shackling of the* [representative] *rule to the point where it lacks any degree of reasonable utility at all, except in the most limited of cases*": Mulheron "Emerald Supplies Ltd v British Airways plc: a century later, the ghost of *Markt* lives on" [2009] Comp Law 157 and 165. At the time of writing, an appeal to the Court of Appeal was pending.

141 CPR Rule 19.10.

142 CPR Rule 19.11.

143 CPR Rule 19.12.

144 But see the comments of the Chancellor in *Emerald Supplies* mentioned above. The reference in *Emerald Supplies* to the GLO regime as an alternative mechanism has been criticised by Mulheron, fn 140 above, as being ill-suited to achieving redress for victims of competition law infringements, principally because it requires each and every (would-be) claimant to issue proceedings in his own name.

145 CPR Rule 3.1(2)(g)

WOULD THEY HAVE TO PROVE THAT THEY HAD A DIRECT RELATION WITH THE DEFENDANT OR WOULD IT BE SUFFICIENT IF THEY HAD THIS DIRECT RELATION WITH THE DEFENDANT'S MOTHER/SISTER COMPANY?

23.1 This is matter for private international law, in particular the Judgments Regulation.[146] By virtue of Article 2, persons should in general be sued in the courts of the Member State in which they are domiciled. Article 5(3) provides that a person domiciled in one Member State may, where the matter relates to tort, delict or quasi-delict, be sued in the courts for the place where the harmful event occurred or may occur. Furthermore, by virtue of Article 6 a person domiciled in one Member State may, where he is one of a number of defendants, be sued in the courts for the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together so as to avoid the risk of irreconcilable judgments. If the defendant is domiciled in the UK, therefore, the claim may be commenced in the appropriate UK jurisdiction even if the claimant has suffered loss in another Member State.

23.2 In *Provimi Limited –v- Aventis Animal Nutrition*[147] the High Court was asked to strike out various claims brought by direct purchasers following the adoption by the Commission of its decision in relation to the *Vitamins* cartel. The claimants were two English companies and one German company. They claimed to have suffered loss as a result of the infringement of Article 81(1) EC and so brought proceedings in the High Court seeking damages. The defendants (Roche and Aventis) objected on jurisdiction grounds: specifically, they argued that (i) the German claimant did not purchase vitamins from the UK subsidiaries of the parties who were found by the Commission to have infringed Article 81 EC and so did not have a valid claim against a person domiciled in the UK, with the result that the English courts did not have jurisdiction; and (ii) the various contracts in place between the claimants and certain of the defendants conferred exclusive jurisdiction on courts other than those of England and Wales and so, by virtue of Article 23 Judgments Regulation, the English court was obliged to decline jurisdiction. The High Court dismissed the defendants' application to strike out the claim. [148] Aikens J held that it was arguable inter alia that the UK subsidiaries of Roche and Aventis were to be treated as infringers of Article 81(1) as a matter of law under the "single economic entity" doctrine: they were part of the same "undertaking" as their parent companies who were the recipients of the Commission's decision. It followed that it was arguable that the UK subsidiaries were, as a matter of English law, in breach of a statutory duty not to infringe Article 81(1).[149] It was similarly arguable that each tortfeasor within a corporate entity would have upheld the cartel price and so (arguably) caused loss, even if the UK subsidiary had had no contractual relationship with the claimants.[150] As the law currently stands, therefore, it would appear to be possible to bring an action against a subsidiary (or parent) company of the party with which the claimant had a direct relationship.

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146 Fn 76.

147 Fn 4.

148 CPR Rule 3.4 enables the court to strike out the whole or part of a statement of case which discloses no reasonable grounds for bringing or defending a claim.

149 *Provimi*, para 31.

150 Ibid, para 40.

24 CAN A PARTY CLAIM FULL DAMAGES FROM ONE OF THE MEMBERS OF A CARTEL BASED ON JOINT AND SEVERAL LIABILITY?

24.1 The general principle at common law is that both in the case of joint tortfeasors (i.e. where more than one party are each responsible for a joint, tortious venture[151]) and in the case of several tortfeasors causing the same damage, any one of the joint/several tortfeasors can be sued alone and is liable for the entirety of the claimant's damage. A party claiming damages caused by a cartel[152] should, therefore, be able to claim full damages against any one or more of the cartelists whether or not the claimant purchased (directly or indirectly) from the defendant cartelist, on the basis that all the cartelists are joint/several (or "concurrent") tortfeasors and that their resulting liability is joint and several (any one of them can be pursued for the entire loss) [153]. However, there is no decided case before the UK courts specifically recognising the joint and several liability of cartelists. The OFT and Commission have recommended that successful immunity applicants should have protection from joint and several liability[154].

25 WHAT IS THE LEVEL OF THE COSTS AND/OR FEES OF LEGAL PROCEDURES AS COMPARED WITH THE COST OF FILING A COMPLAINT BEFORE THE NCA?

25.1 No fee is payable to the OFT on the submission of the complaint. Various court fees are payable on commencement and during the course of civil proceedings (other than in proceedings before the CAT), although the sums payable[155] are negligible in the context of the parties' likely legal and other costs of litigating competition disputes before the courts in the UK. The level of legal fees and other costs (in particular experts' costs) associated with instituting or defending a claim in the UK courts based on an infringement of the EC/UK competition rules will depend on the complexity of the case, the overall length of proceedings, the number and complexity of preliminary hearings and so on. The 2004 Ashurst Study[156] estimated that the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law range from £200,000 - £300,000. However, there is ample scope for the costs of litigating competition claims to far exceed that range, as illustrated by *Arkin –v- Borchard Lines*[157] and by *BCL (No.1)* [158]. As regards the costs to third parties of making complaints to the OFT or Commission, again the level of costs will be impacted by a number of variables.

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151 See Clerk & Lindsell on Torts (19th Ed, 2006), at paragraph 4-04. Tortfeasors are joint when the cause of action against each is the same and the same evidence supports the claim against each. In particular, persons whose respective shares in the commission of a tort are done in furtherance of a common design are joint tortfeasors.

152 The same will not necessarily be true for all infringements of the EC competition rules. For instance, claims by a claimant for damages against two defendants alleged to be collectively dominant but to have caused separate loss by independent abusive conduct should not give rise to joint and several liability on the part of either defendant.

153 This is the OFT's view, see paragraph 7.17 *Discussion Paper.* See also Schild and Brankin, *Cartel Damages Actions in Germany and England: the case law experience to date*, Finnish Competition Law Yearbook (2008).

154 See the Commission's April 2008 White Paper (COM(2008) 165 final) (***White Paper***) at section 2.9 and Chapter 10, section B.1 of the accompanying staff working paper. See also the *Recommendations to White Paper Government* at paragraphs 9.9 and 9.10.

155 e.g. £1,530 on starting proceedings in the High Court to recover a sum of money where the sum claimed exceeds £300,000.

156 Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/executive_summaries/united_kingdom_en.pdf

157 [2005] 1 W.L.R. 3055. The opening paragraph of Lord Phillips MR's judgment speaks for itself: "*The court is concerned with the considerable fall-out of a disastrous piece of litigation…Mr Arkin's claim failed. His lawyers have recovered nothing. MPC's [professional funder] support has cost them in excess of £1.3 million for no return. Very substantial costs have been incurred by the Defendants…these amount to nearly £6 million*" (the judgment concerned whether MPC should be ordered to pay the defendants' costs).

158 Fn 37. The CAT's judgment on the defendants' application for security for costs provides considerable detail on the parties' respective costs. The claim was lodged on 30 January 2004; the issue of security for costs was addressed at the second case management conference on 8 December 2004, with the main hearing due to commence at the end of February 2005. By 8 December, the claimants had incurred costs of £200,000 (£130,000 legal fees and £70,000 experts' fees), Aventis/Rhodia had incurred costs in the region of £229,000 and Hoffman-La Roche had incurred costs of more than £400,000 (and anticipated that its costs were likely to be at least £500,000 by the time of the main hearing).

However, in general (although not always), the costs of making a complaint can be expected to be materially less than the costs of court proceedings, because the OFT, rather than the complainant, will shoulder a considerable portion of the costs of establishing the infringement, including the costs of establishing the facts and finding the supporting evidence.

26 DO THE LEGAL COSTS AND/OR FEES DETER CLAIMANTS FROM BRINGING STAND-ALONE ACTIONS? IDEM FROM FOLLOW-ON ACTIONS. ARE THERE PROCEDURAL MECHANISMS TO AVOID THIS?

26.1 As explained in response to Question 25, the costs of litigating competition claims can be very high, indeed potentially ruinous for many prospective claimants. Although the award of costs/expenses lies in the discretion of the court[159], the general principle in UK court proceedings is that costs "follow the event", i.e. the unsuccessful party will be ordered to pay the reasonable costs of the successful party[160]. The court is likely to make a different order if justified by factors such as the conduct of the successful party, the extent to which the overall unsuccessful party succeeded on one or more issues and offers to settle/tenders. The CAT, in particular, has emphasised that "*There is no automatic rule that costs follow the event*"[161]. Nevertheless, a prudent prospective claimant will assume that it may, if not successful, have to pay some/all of the defendants' costs. Therefore, as a general proposition, the level of legal and other advisers' fees and the risk of a claimant failing to recover such costs (even in part) and having to pay the defendants' costs in whole/part, as a result of failing to secure a successful outcome (i.e. a damages award or favourable settlement), are extremely significant factors for claimants in deciding whether or not to institute private enforcement claims[162]. That said, where the claimant's main objective is to secure a commercial advantage perceived as business-critical (e.g. to escape from a contractual relationship[163] or to secure continued supply of crucial inputs[164]) and where the claimant has ample financial resources, the costs of litigating the dispute in court may well be outweighed by other factors. This is the more usual scenario in which competition claims (in particular, stand-alone claims) are brought before the UK courts. Apart from the court's discretion as to costs, in those cases where third party funders are willing to finance the bringing of private enforcement actions and take on to a significant extent (if not entirely) the risks of failure (in return for a proportion of any damages awarded), this removes a major obstacle to the commencement of such claims.

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159 Section 51 Supreme Court Act 1981. Rule 55 CAT Rules 2003.

160 CPR Rule 44.3. In reality, the successful party will generally only recover in the region of 70 percent of its costs as generally any costs awarded are subject to scrutiny by a costs judge/auditor (referred to as "taxation of costs"). The court can order that a party should recover "indemnity costs" which should enable that party to recover all costs, but it is relatively rare for such an order to be made.

161 *Emerson –v- Morgan Crucible* (fn 123).

162 See paragraph 5.1 *Discussion Paper*: "*One of the major obstacles to bringing private actions in competition law is the cost of such actions and the difficulties and risks in funding them*."

163 e.g. easyJet UK's claim against Liverpool Airport, brought in October 2006, that certain terms of its airport services agreement with Liverpool Airport infringed Article 81/Chapter I and were void. The case eventually settled.

164 For instance, Virgin Media's claim against BSkyB in respect of BSkyB's alleged refusal to supply certain Sky TV channels to Virgin Media on reasonable carriage terms, commenced in April 2007, which finally settled in November 2008 when Virgin and BSkyB entered into reciprocal channel carriage agreements.

27 ARE THERE ANY SPECIFIC SUBSTANTIVE OR PROCEDURAL RULES APPLICABLE TO UNDERTAKINGS THAT HAVE FILED A LENIENCY APPLICATION? IF SO, ARE THEY ONLY APPLICABLE TO UNDERTAKINGS QUALIFYING FOR FULL IMMUNITY?

27.1 There are no specific substantive or procedural rules applicable to undertakings that have filed a leniency application, as regards their treatment as defendants in civil competition claims before the UK courts.

28 WHAT IS THE AVERAGE LENGTH OF JUDICIAL PROCEEDINGS BEFORE A FINAL AND BINDING JUDICIAL DECISION HAS BEEN ADOPTED AND ENFORCED? COMPARE WITH THE PROCEEDINGS FOLLOWED BEFORE A NCA.

28.1 A claim in the High Court will typically[165] take between one and two years to reach final judgment, although this depends on the complexity of the case[166]. As far as concerns claims brought by the CAT, it is difficult to estimate the timescale for claims before the CAT since a full damages action has yet to be completed. However, the actions that have been brought before the CAT would suggest that the process in the CAT might be quicker than in the High Court. Only one case (*Enron Coal Services –v- EWS*) has reached the main oral hearing, which took slightly less than 1 year.

28.2 In comparison, it can commonly take the OFT in excess of three years (sometimes well in excess) between initiation of enforcement proceedings and adoption of an infringement decision (assuming the OFT has not decided to close its file in the meantime on grounds of lack of administrative priority)[167].

29 IS THERE ANY JUDICIAL SETTLEMENT PROCEDURE? CAN ADMINISTRATIVE PROCEEDINGS CONCLUDE WITH A SETTLEMENT? WHAT WOULD BE, IF ANY, THE DIFFERENCES IN THE SETTLEMENT PROCEDURE?

29.1 Settlements between parties to private litigation and "settlements" in the context of administrative proceedings[168] are both features of the UK competition law landscape, but are entirely distinct.

29.2 Parties to private litigation are entitled to reach settlement at any stage in the proceedings, and they do not need the permission of the court to do so. Indeed, the court's "active case management" duties under the CPR include helping the parties to reach settlement.[169] Beyond general encouragement, the CPR contain a specific mechanism to help bring about settlement. Either the claimant or defendant may make a "Part 36 offer", pursuant to which he offers to accept or pay a sum of money, inclusive of interest, in satisfaction of all or part of the claim. If the other party does not accept and

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165 Leaving aside the impact on timing of defendant tactics such as the "Italian torpedo" strategy described above (fn 43). Cases can also be brought to an early conclusion if there is a successful application either: (i) to strike out the claim where there are no reasonable grounds for bringing or defending it; or (ii) for summary judgment where there is no real prospect of success in the claim.

166 For instance, in *Bookmakers Afternoon Greyhound Services –v- Amalgamated Racing Ltd* [2009] EWCA Civ 750, the claim was issued on 13 September 2007, the final first instance judgments were handed down in August and November 2008 and the Court of Appeal judgment was handed down in July 2009.

167 For instance, the OFT's investigations in *Independent School Fees* (Case CA98/05/2006), *Cardiff Bus* (Case CA98/01/2008), *Bid-rigging in the construction industry* (CE/4327-04) and *Recruitment Agencies* (CE/7510-06) all took more than 3 years.

168 Brown "Alternative Enforcement Techniques – the UK Experience" in Gheur and Petit (eds) *Alternative enforcement techniques under EC competition law* (Bruylant, 2009), 147; Lawrence and Sansom "*The increasing use of administrative settlement procedures in UK and EC competition investigations*" [2007] Comp Law 163.

169 CPR Rule 1.4(2)(f). The same is true of follow on actions in the CAT: the CAT Rules 2003 explicitly state that one of the purposes of the case management conference (a preliminary hearing which usually takes place early in the proceedings) is to facilitate settlement: see Rule 20(4)(e).

subsequently does not better the offer at trial, he will (unless the court considers it unjust to do so) be ordered to pay all of the costs of the offeror incurred in the proceedings (or the costs reasonably incurred in relation to those parts of the proceedings to which the offer related) once the offer lapsed. [170] Anecdotal evidence suggests that the great majority of threatened or actual competition law claims in the UK are settled, often without a claim even being commenced; indeed, according to one commentator, there had only been 15 final judgments in competition law cases in the UK in the 40 years to 2008.[171]

29.3 In the UK, the competition authorities have, perhaps unwittingly at first, become EU pioneers in the use of administrative settlements (or, to adopt the OFT's terminology; "early resolution agreements") between the competition authority and the party or parties under investigation. There is no statutory mechanism akin to that in place at Community level to regulate the way in which such agreements may be concluded; rather, the OFT acts on the basis of its general powers under CA98. Nor has the OFT (as yet) published any guidance detailing either the considerations it will take into account in relation to potential settlement or the settlement procedure itself; instead, the OFT appears, at this early stage, to be 'learning by doing'. The OFT has now resolved, or is in the process of resolving, four cartel cases by such means,[172] and the ORR has settled an abuse of dominance investigation in this way, too.[173] The OFT innovated further in its approach to a sixth investigation, into widespread bid-rigging in the construction sector, by offering those under investigation a take-it-or-leave-it "accelerated procedure".[174] In only one settlement case, *Independent Schools*, has a decision been published thus far. For this reason, it is currently rather difficult to draw concrete conclusions as to emerging OFT policy.[175]

29.4 It should be noted that the OFT also has the power to accept commitments from parties under investigation.[176]

30 SOME OF THE OBSTACLES TO EFFECTIVE REDRESS FOR VICTIMS OF BREACHES OF COMPETITION LAW ARE COMMON TO NON-CONTRACTUAL CLAIMS IN OTHER AREAS (PRODUCT OR ENVIRONMENTAL LIABILITY; ETC.). ARE SUCH CLAIMS EASIER/MORE FREQUENT IN YOUR COUNTRY? IF SO, WHY?

30.1 It is difficult to say whether other sorts of non-contractual claims are "easier" to pursue or more frequently commenced in the UK. Other types of non-contractual claims are,

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170 CPR Rule 36.14. The CAT Rules 2003 also contain a "payment to settle" provision, pursuant to which a defendant may make a formal offer to settle, notification of which is sent to the Registrar; if the claimant rejects the offer and fails to better it at trial, the panel hearing the case will be informed of the offer and will (unless it considers it unjust to do so) order the claimant to pay any costs incurred by the defendant from the last day on which the offer could have been accepted: see Rule 43.

171 Rodger Settlement Study, at 115.

172 Decision No. CA98/05/2006 *Exchange of information on future fees by certain independent fee-paying schools* (20 November 2006); *British Airways/Virgin* (press release: www.oft.gov.uk/news/press/2007/113-07); *Dairy Retail Price Imitative* (press releases: www.oft.gov.uk/news/press/2007/170/07 and www.oft.gov.uk/news/press/2008/22-08); and *Tobacco products* (press release: www.oft.gov.uk/news/press/2008/82-08).

173 *English, Welsh and Scottish Railway Limited*, decision of the Office of Rail Regulation, 17 November 2006 (available at http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/EWSrail.pdf).

174 See Press Release "OFT closes door on cartel leniency in construction bid rigging cases in England" March 22, 2007 (http://www.oft.gov.uk/news/press/2007/50-07); see also *Construction bid-rigging* (Decision of 22 September 2009, not yet published (press release: www.oft.gov.uk/news/press/2009/114/09).

175 For a tentative view as to emerging OFT policy, see the literature at fn 168 above.

176 See section 31A CA98. The authorities have accepted commitments in just three cases: Decision No. CA98/03/2005 *TV Eye*; Decision No. CA98/02/2006 *Associated Newspapers* (both OFT); and *Sp Manweb* (Ofgem), available at www.ofgem.gov.uk/About%20us/enforcement/Investigations/ClosedInvest/Documents1/55.pdf.

however, subject to the same procedural rules, and attempts to obtain collective redress, in particular, will face similar obstacles to those faced in the area of competition law.[177]

31 DO NATIONAL COURTS HAVE TO INFORM THE NCA AND/OR THE EUROPEAN COMMISSION OF ANY CLAIMS WHERE COMPETITION LAW WOULD HAVE TO BE APPLIED? IS THE OBLIGATION ESTABLISHED IN ARTICLE 15.2 OF REGULATION 1/2003 TO TRANSMIT JUDGMENTS REGULARLY COMPLIED WITH?

31.1 National courts themselves do not have a duty to inform the OFT or Commission of any such claims. However, any party whose statement of case raises an issue relating to the application of Article 81 or 82 EC, or the equivalent domestic prohibition, must serve a copy of the statement of case on the OFT at the same time as it is served on the other parties to the claim.[178] In this way, the OFT will be in a position to judge whether it is appropriate (a) itself to submit observations pursuant to its powers under Article 15(3) of Regulation 1/2003 and, presumably, (b) to inform the Commission, through the European Competition Network, of cases in which it may be desirable for the Commission itself to make observations.

31.2 It appears that the obligation imposed on Member States by Article 15(2) of Regulation 1/2003 to transmit judgments to the Commission without delay is rarely complied with. A consultation of the Commission's dedicated webpage to judgments of national courts which apply EC competition law[179] reveals that only three such judgments from the UK courts have been posted; of those, two were subsequently overturned on appeal.[180]

32 HAVE YOUR NATIONAL COURTS ASKED FOR PRELIMINARY RULINGS *EX* ARTICLE 234 EC IN CASES CONCERNING ARTICLES 81 OR 82 EC? IF NOT, WHY?

32.1 The UK courts have made use of the preliminary reference procedure under Article 234 EC to resolve issues arising under Articles 81/82[181]. The approach of the UK courts to the decision whether or not to make such a reference is described in *Bulmer –v-*

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177 It should be noted in particular that the GLO regime, mentioned in response to Question 22 above, has been used seven times in relation to product liability claims and nine times in relation to environmental claims since its introduction to English civil procedure in 1998: Mulheron, "Reform of Collective Redress in England and Wales: A Perspective of Need" (fn 135), Table 1. According to a recent survey of practitioners with experience of group litigation, participation rates in product liability and environmental claims vary considerably, with rates being lower than 10% in a number of cases: ibid, Table 2. Professor Mulheron's research paper is particularly useful in identifying the various procedural problems associated with 'opt-in' actions in England and Wales generally; the three principal reasons, given by practitioners to her survey, as to why an opt-in procedure did not suit the litigation at hand were (i) the sheer number of class members who had to be identified at the outset of the action; (ii) the low-value recovery per class member; and (iii) actual or perceived barriers (social, economic, etc) to class members coming forward at the outset of the action. Further reasons given included insufficient commonality between the claims; the onerous nature of preparing individual pleadings; the risk of inconsistent judgments along the way for or against class members; and an excess of "satellite litigation" as to how individual claims should be dealt with. See ibid, Table 4. These figures suggest that, as far as collective redress is concerned, there are formidable obstacles regardless of the type of non-contractual claim.

178 *Practice Direction – Competition Law – Claims Relating to the Application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998*, para 3.

179 http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/

180 *Attheraces Ltd & Another v British Horseracing Board Ltd & Another* (fn 45), reversed on appeal to the Court of Appeal (fn 45); and *Crehan v Inntrepreneur Pub Company CPC* (Court of Appeal) (fn 5), reversed on appeal to the House of Lords (fn 73). According to the relevant Practice Direction issued pursuant to the CPR, where any judgment is given which relates to the application of Article 81 or 82 EC the judge shall direct that a copy of the transcript of the judgment be sent to the Commission: *Practice Direction – Competition Law – Claims Relating to the Application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998*, para 6. It would appear that, in practice, such directions are not being made as a matter of course. The Practice Direction does not stipulate the party to whom the direction should be addressed, but it would be sensible for the judge to direct that one or other of the parties should send the judgment. Note also that the OFT's own "UK competition court cases database", which supposedly "*aims to list comprehensively UK judgments in cases involving competition law*", only contains cases up to 2003: see http://www.oft.gov.uk/advice_and_resources/resource_base/competition-courts/..

181 See B. J. Rodger, *Article 234 and Competition Law: A Comparative Analysis*, Maastricht J. 2008, 15(2), 149-191

Bollinger[182] and *R –v- Stock Exchange, ex p Else Ltd*[183], confirming the complete discretion of all courts but the House of Lords (now Supreme Court)[184] as to whether or not to make a reference and establishing certain guidelines to assist in that decision[185]. A recent example is *Football Association Premier League Ltd v QC Leisure*[186].

32.2 The importance of the decision whether or not to make a reference is illustrated by the outcome of the Court of Appeal's decision in *Crehan v Courage*[187] to make a reference asking for confirmation whether the rule that co-contractors could not sue each other for damages for breach of the EC competition rules was compatible with EC law – the ECJ ruled that this absolute rule was not compatible with EC law[188]. This rule – *in pari delicto* – had not long before been reaffirmed (in the context of competition claims) by the Court of Appeal in *Gibbs Mew Plc v Gemmell*[189]: in that case the court decided not to make a reference on the basis that it "*did not regard it as necessary to do so to enable* [the] *court to give judgment*".

33 HAVE YOUR NATIONAL COURTS REQUESTED YOUR NCA OR THE EUROPEAN COMMISSION INTERVENTION IN JUDICIAL PROCEEDINGS BETWEEN PRIVATE PARTIES INVOLVING THE APPLICATION OF COMPETITION LAW? HOW? WAS THEIR INTERVENTION REQUIRED BY ONE OF THE PARTIES OR DECIDED *EX OFFICIO*? ARE THERE ANY NATIONAL PROCEDURAL RULES PROVIDING FOR THE INTERVENTION OF NCAS OR THE COMMISSION IN JUDICIAL PROCEEDINGS?

33.1 Under Article 15 Regulation 1/2003, the Commission and the OFT each have the right to submit written observations, and with the court's permission, can also submit oral representations to the court in any case concerning Article 81/82 EC. The OFT also has similar powers in cases which raise issues relating to the application of the Chapter I/II prohibitions[190]. The OFT has stated[191] that, while it will submit observations whenever requested to do so by the court, it otherwise (i.e. of its own initiative) *"does not intend to submit such observations frequently"*. The OFT's policy is to prioritise private actions before appeal courts where there are broader policy issues at stake.[192]

33.2 There are two instances to date of the OFT or sectoral regulator with concurrent jurisdiction intervening in civil competition proceedings under Article 15 Regulation 1/2003. The OFT, acting on its own initiative (rather than at the request of the court),

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182 [1974] 3 WLR 202

183 [1993] Q.B. 534.

184 Article 234(3) EC Treaty obliges a court from which there is no further right of appeal/judicial review under national law to make a reference.

185 The facts of the case should normally have been established and the EC law issue should be critical to the court's final decision; if so, unless the court can with complete confidence resolve the issue, it should be referred, although the court may also take into account various factors such as timing and expense, difficulty/importance of the point of law and the parties' wishes.

186 [2008] U.K.C.L.R. 329 where the High Court made a reference because (see paragraphs 371 – 374 of Kitchin J.'s judgment): (i) the case raised very serious questions which were of importance to the European single market. The arguments of each of the parties raised serious policy issues, which the court believed would be better served in having an authoritative decision by the ECJ; (ii) a reference at that time was likely to produce a definitive answer more quickly and more cheaply than if the matter were left for consideration by an appellate court; (iii) although a reference may have created a high degree of uncertainty in relation to the rights of FA Premier League, this would also be the case in the event of an appeal to the Court of Appeal and a subsequent reference; and (iv) the issues of Community law raised by the case were eminently suitable for consideration by the ECJ.

187 [1999] All ER (D) 551

188 Fn 12.

189 Fn 15.

190 OFT Guidelines, OFT 442 (Modernisation), December 2004, paragraph 10.4. See also Section 4 of the EU Competition Practice Direction 2004 (under the CPR).

191 OFT's *Enforcement* Guidelines (OFT407) at paragraph 6.6.

192 *Discussion Paper* para 8.8 (see fn 67).

intervened in the case of *Inntrepreneur v Crehan*[193]. Likewise, in *English and Welsh and Scottish Railway Ltd –v- E.ON UK Plc*[194], the ORR (again acting on its own initiative) served written submissions and also, with the leave of the High Court, made oral submissions.

34 CAN ANY OTHER BODIES REPRESENTING PUBLIC INTEREST (E.G. PUBLIC PROSECUTOR) AND/OR CONSUMER ASSOCIATIONS BRING JUDICIAL ACTIONS FOR BREACH OF COMPETITION LAW? CAN THEY INTERVENE IN JUDICIAL PROCEEDINGS BETWEEN PRIVATE PARTIES INVOLVING THE APPLICATION OF COMPETITION LAW? HOW?

34.1 Section 47B CA98 permits a specified consumer body[195] to bring a representative consumer monetary claim under section 47A CA98 on behalf of named consumers[196]. See the response to Question 22 above.

34.2 In addition, the Serious Fraud Office (in England and Wales and in Northern Ireland) and the Lord Advocate (in Scotland), as well as the OFT, have the power to initiate prosecutions of individuals alleged to have committed the cartel offence under section 188 EA02[197]. Although the cartel offence does not refer explicitly to the Articles 81/82 or Chapters I/II prohibitions, an individual is only guilty of the offence if he dishonestly agrees with others to engage in certain prescribed cartel conduct (horizontal price fixing, market sharing, limitation of supply/production and bid-rigging) which would most likely also involve the undertakings represented by the guilty individuals infringing the Articles 81/82 and/or Chapters I/II prohibitions.

34.3 Finally, the Attorney General has a general right of intervention at the invitation or with the permission of the court in a private action whenever it may affect the prerogatives of the crown or raise any question of public policy on which the executive may wish to bring its views to the court's attention[198] - although the likelihood of this ever happening in private competition proceedings is probably largely theoretical given the OFT's specific right of intervention under Article 15(3) Regulation 1/2003.

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193 [2006] 3 WLR 148. The OFT's intervention in this case was motivated by a need to highlight the importance of the ruling for issues relating to effective private enforcement: see speeches by Philip Collins, OFT Chairman, *Public and private enforcement challenges and opportunities*, 7 June 2006 (available at: http://www.oft.gov.uk/shared_oft/speeches/0306.pdf), and *Current issues and future challenges*, 15 May 2008 (available at: http://www.oft.gov.uk/shared_oft/speeches/sp0308.pdf).

194 [2007] EWHC 599

195 Section 47B(9) CA98 provides that a specified body is a body which has been specified by an order made by the Secretary of State, in accordance with criteria to be published by the Secretary of State. The current criteria are that: (i) the body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity; (ii) the body is able to demonstrate that it represents and/or protects the interests of consumers (generally or specific groups of consumers); (iii) the body has the capability to take forward a claim on behalf of consumers; and (iv) if the body has a trading arm, the trading arm does not control the body and any profits of the trading arm are only used to further the stated objective of the body. The full guidance is available at: http://www.berr.gov.uk/files/file11957.pdf

196 In November 2007, the OFT published recommendations to the UK Government on measures to improve private antitrust actions (*Private actions in competition law: effective redress for consumers and business* (OFT916resp)), including that representative bodies representing consumers or business should be able bring stand-alone or follow-on actions for damages and/or injunctive relief, both for named claimants and for claimants "at large".

197 Section 190 EA02.

198 *Adams –v-* Adams [1971] P. 188. See also Halsbury's Laws of England, Constitutional Law and Human Rights (Volume 8(2) (Reissue)), Chapter 5, section 7 at paragraphs 531. The ability of the Lord Advocate to intervene in Scottish proceedings appears to be considerably more limited – see Stair Memorial Encylcopaedia, The Crown (Vol.7) at paragraph 752.

35 CAN COMPETITION LAW ISSUES BE SOLVED BY PRIVATE ARBITRATION OR OTHER FORMS OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS?

35.1 Arbitration and alternative dispute resolution (**ADR**) have certain perceived advantages over litigation which also apply in the context of competition law disputes: (i) increased control over the dispute resolution process; (ii) choice over where and how the case is heard; (iii) the ability to appoint an arbitrator with particular expertise; (iv) speed and efficiency; (v) ease of enforcement worldwide; and (vi) very importantly in the competition context, confidentiality.

35.2 In *Eco Swiss China Time –v- Benetton International*[199], the ECJ held that national courts to which applications are made to annul arbitral awards, must grant these applications and set aside awards where they consider the award to be contrary to Article 81 EC. This ruling thus gave rise to a *de facto* duty on arbitrators to consider competition law issues in order to avoid the possibility of an award infringing public policy and being refused recognition and enforcement[200]. Since then, it has been widely accepted that competition law issues are capable of and suitable for determination through arbitration. For instance, in *ET Plus SA –v- Welter*[201], the High Court found that claims alleging a breach of Article 81 EC and/or Article 82 EC are arbitrable if they fall within the scope of the arbitration clause. The court stated: "t*here is no realistic doubt that ... 'competition' or 'anti-trust' claims are arbitrable; the issue is whether they come within the scope of the arbitration clause as a matter of its true construction*"[202]. In this respect it is important to note that in practice most clauses are considered to be wide enough to cover competition law disputes. Recently the Court of Appeal, in *Attheraces Ltd v British Horseracing Board* [203], backed arbitration as a suitable method of resolving competition law disputes: "*the problems of gaining access to essential facilities and of legal curbs on excessive and discriminatory pricing might, when negotiations between the parties fail, be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers. The adversarial procedures of an ordinary private law action, the limited scope of expertise in the ordinary courts and the restricted scope of legal remedies available are not best suited to helping the parties out of a deadlocked negotiating position or to achieving a business-like result reflecting both their respective interest and the public interest*"[204]. In addition, ADR is actively encouraged by both the CPR[205], and the CAT Rules 2003[206].

35.3 The OFT's *Recommendations to Government* also recognised that in many cases, early resolution of competition claims by means of a settlement made between the parties,

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199 (Case C-126/97); [1999] ECR I-3055, paragraph 41.

200 Public policy is one of the grounds (Article V (2)(b)) enumerated in the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958) for refusal to enforce an award. Since the concept of public policy is nebulous, it tends to be one of the more commonly-invoked (and controversial) grounds for refusal to enforce. The divergence of approach to public policy in different jurisdictions leads to element of uncertainty and forum shopping. In the context of whether competition law forms part of the public policy in the country where recognition and enforcement is sought, it is interesting to note that for example the Swiss courts will not necessarily refuse recognition or enforcement of an arbitral award on the basis that it infringes relevant competition laws (since competition law is not considered part of mandatory public policy).

201 [2005] EWHC 2115 (Comm).

202 Paragraph 51 of the judgment

203 Fn 45.

204 See paragraph 7 of the judgment.

205 CPR Rule 1.4.

206 Rule 44(3) CAT Rules 2003 provides that the CAT may encourage and facilitate the use of an ADR procedure if it considers it appropriate

whether facilitated by a third party or otherwise, will be a more desirable outcome, both for businesses and for consumers, than taking a case to court and trial[207].

36 WHAT ARE THE KINDS OF DAMAGES THAT CAN BE AWARDED FOLLOWING A SUCCESSFUL CLAIM FOR BREACH OF COMPETITION LAW (I.E. COMPENSATORY, PUNITIVE, DISGORGEMENT, ETC.)?

36.1 As explained in the answer to Question 1, actions in respect of loss sustained as a result of a breach of competition law are tortious in nature: ever since the House of Lords' judgment in *Garden Cottage Foods v Milk Marketing Board*[208] it has been accepted that such actions are properly to be categorised as actions for breach of statutory duty. The general object of an award of damages in tort claims is to place the claimant in the position he would have been in but for the tort: *"the aim of the law of tort is to compensate for loss suffered"*. [209] Very recently the question has arisen for determination whether, in addition to (or instead of) compensatory damages, claimants may seek punitive (known in English law as "exemplary") damages and/or some form of restitutionary, or gain-based, award.[210]

36.2 **Exemplary damages**: Under English law, but not Scots law,[211] exemplary damages may be awarded in tort claims to teach a defendant that "*tort does not pay*" and to act as a deterrent to the defendant and others in the future.[212] Relevantly, a court may award such damages where *"the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the [claimant]"*.[213] The court must take into account three factors when considering whether to make an award of exemplary damages. First, the claimant must himself be a victim of the punishable behaviour; secondly, the power to award exemplary damages should be used sparingly; and thirdly, the means of the defendant are relevant, as is everything that aggravates or mitigates the defendant's conduct.[214] Recently, in *Devenish Nutrition v Sanofi-Aventis & Others*, the availability of exemplary damages in 'follow-on' competition law cases was considered by High Court.[215] In that case, the claimants were direct and indirect purchasers against the defendants, all of whom were recipients of the European Commission's *Vitamins* decision finding an infringement of Article 81(1) EC. They sought *inter alia* the award of exemplary damages. Lewison J held that, in the circumstances, an award of exemplary damages was precluded by two principles of Community law. First, exemplary damages were not available to claimants bringing actions against cartelists who have already been fined by the Commission: to award such damages would infringe the Community law principle of *ne bis in idem*, known in English law as double jeopardy.[216] The judge further considered that, as a matter of domestic law, (a)

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207 See paragraph 11.1 of the *Recommendations to Government*.

208 Fn 3.

209 *Devenish Nutrition Limited v Sanofi-Aventis SA (France) & Others* [2008] EWCA Civ 1086 *per* Arden LJ at para 2. See, generally, *Clerk & Lindsell on Torts*, 19th ed, 2006, para 29-06.

210 The expression "restitution" may be interpreted in different ways. Where the claim is between parties to a void contract, it may mean that restitution of sums paid pursuant to it should be made; on the other hand, it is sometimes used more liberally as referring to the 'disgorgement' of profits unlawfully made. In *Attorney-General v Blake* [2001] AC 268, 284 Lord Nicholls described it as an "unhappy expression".

211 See *Devenish Nutrition Limited v Sanofi-Aventis SA (France) & Others* [2007] EWHC 2394 (Ch), at para 33.

212 *Broome v Cassell & Co Ltd* [1972] AC 1072, 1073.

213 *Rookes v Barnard* [1964] AC 1129, 1226; see generally *Clerk & Lindsell on Torts*, para 29-139 *et seq*.

214 *Rookes v Barnard*, *op cit*, at 1227-1228.

215 Fn 209. The Court was asked to consider this issue, and the issue of whether a "restitutionary" award was available, as preliminary issues prior to a trial.

216 The judge applied the conditions set out in the judgment of the CFI in Case T-59/02 *Archer Daniels Midland v Commission* [2006] ECR II-3627 (subsequently upheld on appeal in Case C-511/06P, judgment of 9 July 2009). In particular, he considered that the imposition of fines and the award of exemplary damages served the same aim, namely to punish and deter anti-competitive behaviour. It was irrelevant that one defendant, Aventis, had been granted immunity from fines pursuant to the Commission's *Leniency Notice*; indeed, it would undermine the Commission's policy aim of encouraging

the fact that a defendant had been fined for his conduct was a powerful factor against the award of exemplary damages, although it may not be conclusive in itself;[217] and (b) the fact that there were multiple actual and potential claimants also weighed against the award of exemplary damages: as the judge put it, *"the claimants are not the only ones affected...[w]hy should they scoop the pool?*"[218] This issue did not form part of the claimants' appeal,[219] so – for now at least – the judgment of Lewison J is the only one in which the availability of exemplary damages in competition law litigation has been considered by the domestic courts of the UK.[220]

36.3 **Gain-based awards**: In relation to certain types of tort, specifically proprietary torts, it has long been established that the wronged party may seek an award which does not reflect his loss but, rather, focuses on the gain made by the tortfeasor. For example, in cases of invasion of intellectual property rights, the courts have long ordered the tortfeasor to "account" to the claimant for the profits made as a result of the invasion.[221] In *Attorney-General v Blake*,[222] the House of Lords held for the first time that the remedy of an "account of profits" was not limited to cases involving proprietary torts and could, in exceptional circumstances, be awarded in a breach of contract case.[223] In *Devenish Nutrition* the court was asked to make a restitutionary or gain-based award in favour of the claimants. At first instance, Lewison J held that such an award was not available.[224] On appeal, the Court of Appeal (Arden, Longmore and Tuckey LJJ) also refused to make a gain-based award. The Court of Appeal considered, first, whether Community law required that restitutionary damages be made available to claimants who had suffered due to a breach of competition law. The Court was unanimous in finding that Community law neither ruled out a restitutionary award nor required it.[225] Turning to domestic law, it held by a majority (Longmore LJ dissenting[226]) that it was precluded by precedent[227] from making such an award in a non-proprietary tort case: *Blake*, a contract case, had not necessarily overruled previous Court of Appeal authority, by which the Court was bound.[228] The Court then proceeded to consider the principal issue of relevance to this

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whistleblowers to approach the Commission if exemplary damages could be awarded against those whose fines were commuted pursuant to the policy: paras 40-52. Secondly, the judge held that he was precluded from making an award of exemplary damages in circumstances where the Commission had already imposed penalties because to do so would "run counter" to the Commission's decision contrary to Article 16(2) of Regulation 1/2003: it would be suggesting that the penalties imposed by the Commission were insufficient to punish and deter: para 54.

217 Ibid, para 64.

218 Ibid, para 68.

219 [2008] EWCA Civ 1086.

220 It should be noted that the judge's view that he was precluded, as a matter of Community law, from making an award of exemplary damages is confined to circumstances in which the competition authority has issued an infringement decision and imposed financial penalties. It would therefore appear that, in standalone claims, the courts are not so precluded, although where there are numerous actual or potential claimants then a court may be reluctant to make such an award. Secondly, it is clear that an award of exemplary damages is in any event within the discretion of the court and should not be made lightly. Particular attention will be paid to whether an award going beyond compensatory damages is necessary to punish and deter the wrongdoer(s).

221 See e.g. *Clerk & Lindsell on Torts*, *op cit*, para 29-151. Similarly, so-called "user damages" (damages assessed by reference to the fair price for what has been taken from the claimant) have been awarded in cases involving interference with property rights such as trespass and wrongful detention of goods, where the claimant has suffered no tangible loss: see the discussion in *Attorney-General v Blake* [2001] AC 268.

222 *Op cit*.

223 Lord Nicholls opined that "*Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract…. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.":* Ibid, at 284-5.

224 [2007] EWHC 2394 (Ch), para 108.

225 Ibid, paras 129 and 134 (Arden LJ), 149 (Longmore LJ) and 153 (Tuckey LJ).

226 [2008] EWCA Civ 1086, para 144.

227 Specifically, *Stoke-on-Trent City Council v WJ Wass Ltd* [1988] 1 WLR 1406.

228 [2008] EWCA Civ 1086, para 75 and 155

report, namely whether the Lewison J had been correct to hold that, in any event, compensatory damages would be an adequate and just remedy for the claimants in the circumstances, thereby precluding a restitutionary award or an account of profits. In line with *Blake*, the Court held that a restitutionary remedy would only be available if the claimants could show that the circumstances were exceptional and that compensatory damages would not be a sufficient remedy to address the infringement of Article 81 EC. Here, the claimants had argued that they would likely have evidential difficulties proving that they had suffered loss; indeed, some of them might not be able to show any loss at all if the passing on defence were upheld. Arden LJ, giving the leading judgment, distinguished between claims for damages which are unavailable on the facts and those, such as this one, which were difficult to prove for evidential reasons. Damages would only be an insufficient remedy in relation to the former set of claims.[229] As for the latter set, the courts are used to dealing with such difficulties "*by the exercise of a sound imagination and the practice of the broad axe*".[230] Moreover, if some of the claimants had passed on the overcharge, it would not be just to give them a restitutionary award to enable them to avoid the consequences of doing so.[231]

36.4 Whilst the Court of Appeal's judgment in *Devenish* suggests that victims of anti-competitive conduct will not be awarded some form of gain-based damages as the law currently stands, it should be noted that the OFT has recommended to Government that damages should be available on a "*resititutionary basis*" and that "*mechanisms be developed for the management and distribution of damages awards*".[232] It should also be noted that the Court of Appeal's judgment does not necessarily impact on the position in follow on actions before the CAT under section 47A of the 1998 Act. As mentioned earlier, section 47A applies to claims for damages or "any other claim for a sum of money" which a person who has suffered loss or damage may make in civil proceedings brought in any part of the UK. At this stage, it is still unclear what is meant by this latter phrase, but it is arguable that it would extend to a claim for an award which does not merely reflect the loss suffered by the claimant.[233]

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229 Ibid, para 106. Arden LJ added, however, that it was in her view "*at least arguable*" that a court should award an account of profits where the evidential difficulties were not of the claimant's making; *contra* Longmore LJ at para 147 and Tuckey LJ at para 158.

230 Ibid, para 109, quoting from the famous dicta of Lord Shaw in *Watson, Laidlaw v Pott, Cassells and Williamson* (1914) 31 RPC 104.

231 Ibid, para 108. Indeed, Longmore LJ put the point graphically; *"there is no very obvious reason why the profit made by the defendants (albeit undeserved and wrongful) should be transferred to the claimant without the claimant being obliged to transfer it down the line to those who have actually suffered the loss. Neither the law of restitution nor the law of damages is in the business of transferring monetary gains from one undeserving recipient to another undeserving recipient even if the former has acted illegally while the latter has not*": para 146; see, to the same effect, Tuckey LJ at para 157. In his view, the only real argument in favour of an order for account of profits was the argument of policy that cartels are a "notorious evil" and the national courts should in some way provide an incentive for their eradication by making such an order. It did not seem to him to be right, however, for the courts to take this step on their own initiative:, para 148. It is interesting to note Arden LJ's *obiter* provisional view that the multiplicity of actual and potential claimants, and the potential for conflicting claims, was not itself a reason not to award an account of profits: case management directions may deal with that problem: see para 113. Tuckey LJ, by contrast, thought that "the difficulties caused by multiple claimants, (some perhaps claiming compensatory damages), attempting to allocate profits between claimants and taking account of fines cannot be underestimated": para 159.

232 *Recommendations to Government*, para 7.35.

233 See, in particular, the observations of the CAT during the case management conference in *BCL Old Co Limited & Others v Aventis SA & Others* (cases 1028 and 1029/5/7/04), transcript, p 3: "That [the wording of section 47A] may in turn raise the question of whether claims arising from infringements of the 1998 Act, or of Community Law are strictly speaking in the nature of damages in a way analogous to an action for tort or whether they can be looked at in some other way, for example, as some kind of claim that could perhaps go under the general heading of "Unjust Enrichment" – unjust enrichment in the sense of a defendant who has made an undue or "secret" profit, as a result of breaking the law." On the other hand, it is fairly clear that the claim would need to be one that was admissible in civil proceedings generally, and so following *Devenish* it is strongly arguable that a claim for a gain-based remedy ought to be treated consistently with the Court of Appeal's judgment.

37 WHAT IS THE DISCRETION OF THE COURTS ON THE CALCULATION OF DAMAGES? IS THE EXISTENCE OF AN ADMINISTRATIVE PENALTY, IMPOSED EITHER BY THE EUROPEAN COMMISSION OR BY A NCA, TAKEN INTO ACCOUNT WHEN AWARDING DAMAGES?

37.1 Subject to issues of causation and, arguably, remoteness, the courts have a good degree of discretion in relation to the calculation of damages. As mentioned in the answer to Question 36 above, the courts are well versed in "*the exercise of a sound imagination and the practice of the broad axe*" when assessing quantum, particularly when faced with an incomplete evidential picture.

37.2 In competition law damages claims, there is a good degree of uncertainty as to the calculation of damages, given the paucity of judgments in which the issues has been discussed. In *Devenish* the High Court cited, seemingly with approval, the approach adopted by the claimants' expert in that case to cartel damages, namely: *"i) Determine or estimate the actual prices charged by the cartel for each period; ii) Estimate the price (known as the "but for price") which would have been charged if there had been no cartel; iii) Subtract the "but for price" from the actual price, thus giving the amount of the overcharge; iv) Determine or estimate the quantity of vitamins purchased by each claimant; v) Estimate the proportion of the overcharge absorbed by upstream undertakings, and hence the proportion of the overcharge passed down to the claimant; vi) Estimate the proportion of the overcharge passed down in turn by the claimant to downstream undertakings; vii) Estimate the proportion of the overcharge absorbed by the claimant; viii) Multiply the overcharge absorbed by the claimant and the quantity of vitamins purchased."*[234]

37.3 In *Crehan v Inntrepreneur Pub Co CPC*,[235] the Court of Appeal favoured a measure of damages relating to the "*lost going concern value*" of the pubs run by the claimant which were said to have gone out of business due to the anti-competitive "beer tie" agreement in place between the claimant and defendant.

37.4 The prior imposition of an administrative penalty is not relevant to the award of (compensatory) damages by a court and so is not taken into account.[236]

38 DOES THE NCA TAKE INTO ACCOUNT THE COMPENSATION PAID OR TO BE PAID BY THE COMPANY WHEN DETERMINING THE FINE?

38.1 No. The OFT has not, to the authors' knowledge, ever taken into account compensation paid or to be paid by the recipient(s) of any infringement decision in which penalties are imposed.[237] However, it is noteworthy that in *Independent Schools*[238] the fine imposed

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234 [2007] EWHC 2394 (Ch), at para 19; at para 21 the judge described this methodology as "one that appears to be typical in anti-trust cases".

235 [2004] EWCA Civ 637; the point did not, in the event, fall to be considered by the House of Lords on further appeal.

236 Note that, in relation to the potential gain-based remedy of an "account of profits" in *Devenish*, it was argued by one of the defendants that such an award would, in the circumstances, offend the Community law principle of *ne bis in idem* in much the same way as the award of exemplary damages. In response, Arden LJ said that it would be relevant to consider, in determining whether it was just to order an account of profits, "whether on its true interpretation the fines imposed by the [*Vitamins*] decision had already required the respondents to account for their profits obtained as a result of the cartel". Whilst she left the point open, it seemed to Arden LJ that (taking Roche and vitamin A as an example) the fine was not calculated with reference to the profits which Roche had made: see para 111.

237 Indeed, it would be surprising if the OFT were to take such a consideration into account: first, the imposition of financial penalties by the OFT in respect of infringements of competition law has the objective of punishment and deterrence: *OFT's guidance as to the appropriate amount of a penalty* (OFT 423, December 2004), para 1.4. Compensation, by contrast, focuses on the victim, seeking to restore him to the position he would have been in, but for the infringement; in other words, it merely looks to 'right the wrong'. Fines and compensation therefore pursue distinct objectives. Secondly, the OFT cannot know whether any (or any further) private actions will be brought (or threatened) in respect of the

by the OFT (£10,000 for each school subject to any reduction for leniency) took into account that each of the schools agreed to make an *ex gratia* payment, amounting to a combined total of £3 million, into an educational charitable trust fund to benefit the pupils who attended the schools during the relevant period.

39 IS THE PASSING ON DEFENCE ADMISSIBLE AS A DEFENSE BEFORE NATIONAL COURTS IN A COMPETITION LAW DISPUTE?

39.1 It is still undecided whether the so-called "passing on defence" is a valid one before the courts of the UK. There has been no case law directly on the point, although Tuckey LJ did make the following forthright observation (*obiter*) in *Devenish*: *"Devenish is claiming the overcharge as if it were the defendants' net profit so as to avoid having to take into account the fact (if true) that it passed on the whole of the overcharge to its customers. I can see no way in which it could avoid taking this "pass on" into account in any compensatory claim for damages."*[239]

40 IDENTIFY THREE MAIN ELEMENTS WHICH, IN YOUR VIEW, HINDER THE DEVELOPMENT OF PRIVATE ENFORCEMENT OF COMPETITION LAW IN YOUR COUNTRY.

40.1 In the authors' view, the three main elements which deter many claimants (particularly those of modest means, including consumers and SMEs from bringing civil proceedings for beach of the competition rules are: (i) the legal and factual complexity of the issues, partly as a result of the lack of a sufficient body of case-law (e.g. the uncertainty as regards the availability of the passing-on defence and who bears the burden of proof) but (it is submitted) in any event inherent in most disputes concerning Articles 81 and 82 (in particular claims for compensation for loss); (ii) the resulting uncertainty as regards the outcome of most competition-based disputes; and (iii) the very high cost of litigating competition-based disputes before the UK courts and the risk that an unsuccessful claimant will likely have to pay a significant proportion (if not all) of the successful defendants' costs.[240]. The measures suggested in response to Question 41 below are focused on reducing the costs and risks for those category of claimants otherwise least likely to bring competition-based claims, namely consumers and SMEs, by broadening the scope for representative actions and for contingency of lawyers's fees.

41 INDICATE AT LEAST THREE MEASURES WHICH, IN YOUR VIEW, WOULD FACILITATE THE DEVELOPMENT OF PRIVATE ENFORCEMENT OF COMPETITION LAW IN YOUR COUNTRY.

41.1 In the authors' view the following measures ought to facilitate private enforcement. First of all, as recommended by the OFT, it would be helpful to expand the range of victims of anti-competitive conduct who may be represented in an action under section 47B CA98. Whilst it is understandable that section 47B should seek to enhance the ability of

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infringement at issue, and so would not be able confidently to assess the extent of any compensation (or other redress) that would be paid or made by the infringer(s): It is worth noting, however, that at the time of the publication of its *Discussion Paper* the OFT was "*exploring whether, as part of our administrative procedure, it might be appropriate for the OFT to encourage undertakings against whom it proposes to take enforcement action to provide redress to those who have suffered loss due to infringements*": *Discussion Paper,* para 7.24. This point is not, however, pursued in the OFT's *Recommendations to Government*.

238 Fn 167; see paragraph 36 of the decision.

239 [2008] EWCA Civ 1086, para 151. Arden LJ left the point open : see para 115.

240 It should be noted that a Court of Appeal judge, Lord Justice Jackson, is currently conducting a detailed review of civil litigation costs and in May 2009 published his preliminary report: see http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm.

consumers to obtain redress, in the authors' view there is no good reason not to extend its scope to businesses, in particular SMEs, which are particularly at risk of being denied justice, owing in particular to the costs of litigating in the UK. Likewise, there is no good reason not to extend the scope of section 47B so as to include standalone damages actions.[241] If these proposals were accepted, then the criteria for becoming a 'specified' representative body would also require amendment. In the authors' view, the OFT's recommendation that there be a 'permission' stage in proceedings, at which the body wishing to represent businesses and/or consumers may apply to the court for permission to bring an action, is a sensible one: it would remove the unnecessary burden of needing to obtain "specified" status from Government and would allow for flexibility as to which body brings the claim.

41.2 Secondly, the authors see merit in opening up representative actions so as to allow for 'opt-out' litigation to take place. This will have the benefit of creating an incentive for representative bodies to bring cases unburdened by the need to name each and every consumer/business on whose behalf the claim is brought.[242]

41.3 Thirdly, incentivising lawyers and others to take on and fund private competition law litigation ought to result in more cases being brought. The current system, which permits so-called "conditional fee agreements", under which lawyers agree to receive less than usual payment in the event that the case is lost, and an uplift (capped at 100%) on normal payment in the event that the case is won, is considered by some to provide an insufficient incentive to take on well-founded, complex cases of long duration.[243] This is particularly the case in relation to standalone actions. There may well be some merit, therefore, in allowing a higher uplift in appropriate cases, which could be subject to the court's approval so as to minimise the risk of abuse and conflicts of interest between the lawyer and his client.[244]

42 THE COMMISSION AND THE EUROPEAN PARLIAMENT HAVE BEEN PUSHING FOR A "EUROPEAN" MODEL OF JUDICIAL APPLICATION OF COMPETITION LAW THAT WOULD AVOID THE "POTENTIAL EXCESSES OF THE US SYSTEM". GIVEN THE PRESENT UNDERDEVELOPMENT OF PRIVATE ENFORCEMENT IN EUROPE, DO YOU THINK IT IS POSSIBLE TO FIND RIGHT AWAY A CORRECT EQUILIBRIUM OR WOULD IT BE NECESSARY, TO REVERSE THE PRESENT ATROPHY OF PRIVATE ENFORCEMENT IN EUROPE, TO INTRODUCE SOME POSITIVE INCENTIVES THAT COULD BE EVENTUALLY REMOVED IF EXCESSES ALSO APPEAR?

42.1 The authors applaud the efforts of the Commission, European Parliament and other stakeholders to seek ways to enhance the ability of claimants to bring competition-based claims which have merit (in recognition that the current systems in various EU members states do not sufficiently encourage such actions) while at the same time avoiding excesses. As noted above, a number of the key proposals of the Commission are

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241 The President of the CAT, Sir Gerald Barling, has (tentatively) expressed similar views in the CAT's *Annual Review & Accounts 2008-2009*, p 8.

242 With proper case management it ought to have the further benefit of helping to ensure that as many of the 'victims' of anti-competitive conduct are brought before the same court, at the same time, as possible, which would, in principle, be an efficient way of dealing with damages claims. It would also, possibly, remove one of the objections to a gain-based remedy being awarded in appropriate cases, as most if not all claimants would be before the court: there would be no risk of one or a few claimants "scooping the pool", to coin the expression used by Lewison J in relation to exemplary damages in *Devenish Nutrition* (fn 209), at para 62.

243 See e.g. *Discussion Paper*, para 5.6; *Recommendations to Government*,

244 It is acknowledged that difficult questions would arise, such as whether the unsuccessful defendant should be expected to bear the burden of an uplift in excess of 100% or whether, instead, the excess should come out of the successful claimant's damages award (assuming in both instances, of course, that the court were prepared to make a full costs order against the defendant). See, generally, *Discussion Paper*, ch 5.

already catered for under the current UK system for litigating competition-based disputes but undoubtedly further efforts are required. In the authors' view, the OFT's *Recommendations for Government* are an important supplement to the Commission's proposals, because they rightly also focus on the issue of funding competition-based claims, limiting claimants' exposure to pay defendants' costs and on the extent to which lawyers should be permitted to share a greater proportion of the risks of failure (in return for a higher success fee), which are all likely to be key factors for claimants currently discouraged from bringing such claims. The authors do not, however, favour introducing short-term "positive incentives" where it is clear that they have a tendency to encourage excesses (and the authors do not believe the current proposals of the Commission and OFT should be so characterised).