International
Comparative
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Cartels & Leniency 2021

A practical cross-border insight into cartels & leniency

14th Edition

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Section 2 of the Competition Act 1998 (the "Competition Act") sets out the civil offence for companies (also known as the "Chapter I prohibition") and Section 188 of the Enterprise Act 2002 (the "Enterprise Act") sets out the criminal offence for individuals.

Until the end of the transitional period under Brexit arrangements (i.e. 11 pm on 31 December 2020) the Competition and Markets Authority ("CMA") must also apply Article 101 of the Treaty on the Functioning of the European Union ("TFEU") when applying the Chapter I prohibition to conduct which may affect trade between EU Member States. During this time, the European Commission ("EC") also has jurisdiction to investigate suspected infringements of Article 101 TFEU in the UK or which have effects on a UK market (see the CMA's January 2020 "*Guidance on the functions of the CMA under the Withdrawal Agreement*").

Under the CMA's January 2020 guidance, where the EC has formally initiated proceedings before the end of the transitional period, the EC will continue to be competent for such proceedings after the end of the transitional period. However, if EC proceedings have not been initiated prior to the end of the transitional period, the CMA will be entitled to commence a cartel investigation in parallel to any future investigation commenced by the EC.

After the end of the transitional period, the CMA will no longer apply Article 101 TFEU and will no longer be subject to Regulation 1/2003. The legal basis for the CMA would be the Chapter I prohibition only. Any UK elements of any commitments given or remedies imposed in connection with any prior EC proceedings under Article 101 TFEU will continue to be overseen by the EC, unless responsibility for such oversight is transferred to the CMA by mutual agreement. The CMA may also obtain jurisdiction over elements of proceedings which have already been initiated by the EC, the precise scope of which may be the subject of future legislation.

1.2 What are the specific substantive provisions for the cartel prohibition?

Section 2(1) of the Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK, and may have as their object or effect the prevention, restriction or distortion of competition within the UK.

Under Section 188 of the Enterprise Act, an individual will commit an offence if they enter into a horizontal agreement, with one or more persons, that undertakings will engage in cartel activities (direct and indirect price-fixing; limitation of supply or production; market sharing; or bid rigging). This applies irrespective of whether the agreement was implemented or whether the individuals had authority to act on behalf of the undertakings at the relevant time. An individual can also be prosecuted for attempting to commit and conspiracy to do so. Dishonesty on the part of the individuals concerned must be shown for arrangements performed from 20 June 2003 to 31 March 2014.

1.3 Who enforces the cartel prohibition?

The CMA, along with sectoral regulators (such as the Office of Communications, the Gas and Electricity Markets Authority, the Water Services Regulation Authority, the Civil Aviation Authority, the Payment Systems Regulator and the Financial Conduct Authority or "FCA"), enforce the civil prohibition. In February 2019, the FCA published its first decision finding that three asset management firms breached competition law by sharing information on initial public offerings before share prices had been set, issuing fines totalling over £400,000.

Only the CMA and Serious Fraud Office ("SFO") enforce the criminal offence in England, Wales and Northern Ireland, and the Crown Office Procurator Fiscal Service enforces such offence in Scotland.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The CMA or a sectoral regulator may conduct an investigation if there are reasonable grounds for suspecting that the Competition Act has been infringed, usually based on a complaint or leniency application, or its own intelligence. The CMA can then issue a statement of objections ("SO") to the relevant parties, setting out its allegations and giving them an opportunity to be heard. Depending on the outcome, an infringement decision may be issued. The CMA may also choose to convert a civil investigation into a criminal one, or conduct a parallel criminal investigation.

1.5 Are there any sector-specific offences or exemptions?

The Competition Act excludes certain agreements from the Chapter I prohibition, such as agreements: (i) relating to the production and trade of agricultural products; and (ii) subject

to competition regulation under other legislation, including the Financial Services and Markets Act 2000, the Broadcasting Act 1990 and the Communications Act 2003. The Secretary of State may order that the Chapter I prohibition not apply where there are exceptional and compelling public policy reasons.

No sector-specific exemptions apply to the criminal offence.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

The civil offence applies to agreements actually (or intended to be) implemented in the UK, regardless of where they were entered into. The criminal offence only applies to agreements entered into outside the UK if they are in fact implemented in whole or part in the UK. This implementation test can be satisfied if there are affected sales in the UK.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Under Sections 26, 26A, 27, 28 and 28A of the Competition Act, the CMA has the following investigatory powers:

Investigatory Power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes	Yes
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	Yes	Yes
■ Right to retain original documents	Yes	Yes
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	Yes	Yes

Please Note: * Searches of business and residential premises with a warrant require the authorisation of the High Court, the Competition Appeal Tribunal ("CAT") or another body independent of the CMA. In a civil investigation, the CMA can also visit business premises without a warrant if it has a reasonable suspicion that these are or have been occupied by a party to a suspected infringement, though will have limited powers (no ability to search, only to request and take copies of/extracts from documents).

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

In civil investigations, the CMA and sectoral regulators have the power to take original documents where necessary to preserve them or where it is not reasonably practicable to make copies. Original documents must be returned within three months.

For criminal investigations, the CMA/SFO will generally always take original documents.

2.3 Are there general surveillance powers (e.g. bugging)?

The CMA has powers of directed surveillance and can make use of covert human intelligence sources to investigate infringements of the Competition Act and the Enterprise Act.

In criminal investigations, the CMA/SFO have the power to use intrusive surveillance, including bugging.

2.4 Are there any other significant powers of investigation?

In criminal investigations only, the CMA/SFO have the power to access communications data (including telephone and messages records) of the individuals under investigation.

The CMA runs a whistle-blower programme, allowing individuals who are aware of the existence of a cartel to receive up to £100,000 for providing significant "inside information" about such cartel. Individuals actively participating in the cartel would not be entitled to any financial remuneration when blowing the whistle, but will benefit from immunity from prosecution by submitting a leniency application. During the period between 1 April 2018 and 31 March 2019, 20 'qualifying disclosures' were made under this tool.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of business and/or residential premises will be conducted by CMA officers and other assisting third parties named on the search warrant. The occupiers of the premises can request the presence of a legal adviser, for whom CMA officers will ordinarily wait a reasonable time to arrive. Where the CMA has not given prior notice about the search, but an in-house lawyer is on the premises, the CMA can conduct their search irrespective of whether such lawyer specialises in competition law.

While the legal advisers arrive, the CMA may take necessary precautions to prevent tampering with evidence or warning other businesses about the investigation (e.g. suspending external email or calls, or sealing filing cabinets).

In November 2017, Concordia sought to discharge or vary parts of a CMA search warrant, which the CMA had argued was justified due to new information which it refused to share on public interest immunity grounds. The High Court confirmed that the CMA must produce all information, including that protected by public interest immunity, to the Court when applying for a warrant, and granted the warrant to the CMA on that basis. A subsequent appeal by Concordia was rejected in January 2019.

2.6 Is in-house legal advice protected by the rules of privilege?

Under English law, privileged communications are communications either between a professional legal adviser and client or those made in connection with, or in contemplation of, legal proceedings, including communication with both in-house and private practice counsel. In February 2020, the Court of Appeal

confirmed in *Civil Aviation Authority v R* that the dominant purpose of the communication must be to give or obtain legal advice in order to attract legal privilege. The English rules on privilege apply where the CMA conducts an inspection on its own initiative, or, until the end of the transitional period, on behalf of the EC or a competition authority of another EU Member State.

When the CMA is only assisting the EC with an investigation in the UK, EU rules of privilege apply, meaning that legal advice provided by in-house counsel and lawyers not qualified in an EU Member State is not privileged. This may change following the end of the transitional period.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The CMA does not have the power to search a person and in civil investigations cannot force a business to provide answers that would result in an admission of a competition law infringement.

The CMA/SFO have the power to compel individuals to answer questions if they relate to a criminal cartel investigation, but any statements made in response to mandatory interview questions may not be used against that person upon prosecution for the cartel offence.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Civil and criminal sanctions apply to individuals and undertakings for non-compliance with or obstruction of the CMA's investigation powers. In March 2019, the CMA fined Fender Musical Instruments Europe Limited £25,000 for such obstruction due to a senior officer concealing notebooks during a dawn raid. The company handed the notebooks to the CMA three weeks later.

Persons who fail to comply with the CMA's investigations (intentionally or without reasonable excuse), such as failing to answer questions or produce documents, and failing to provide adequate or accurate information in response to a request, may be subject to a fixed penalty of up to £30,000 and/or a daily penalty of up to £15,000.

Sanctions of a criminal nature include fines or even imprisonment for a person:

1. intentionally obstructing an officer investigating with or without a warrant;
2. intentionally or recklessly destroying, disposing of, falsifying or concealing documents, or causing or permitting such things to happen; or
3. knowingly or recklessly supplying information which is false or misleading in a material respect either directly to the CMA, or to anyone else, knowing it is for the purpose of providing information to the CMA.

Penalties are usually financial, but imprisonment for up to two years is also possible.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The CMA can impose fines on companies that have intentionally or negligently breached the Chapter I prohibition, up to a maximum of 10% of their worldwide turnover. Such agreements are void and unenforceable.

Generally, companies with a combined UK annual turnover below £20 million will benefit from immunity from fines, but this will not apply to breaches of Article 101 TFEU or price-fixing agreements.

The CMA must provide a Draft Penalty Statement to the parties setting out how the fine has been calculated and giving the parties a reasonable period to make representations:

1. Starting point: the maximum starting point for the fine calculation is 30% of relevant turnover (the turnover of the undertaking in the product and geographic market affected by the infringement, in the undertaking's last financial year preceding the end date of the infringement). Such starting point will be determined based on the seriousness of the infringement – more serious offences are likely to have a starting point of 21%–30%. This is then subject to five different stages of adjustment, set out below.
2. Duration: for infringements lasting more than one year, the fines cannot be multiplied by more than the number of years of the infringement.
3. Aggravating or mitigating factors: aggravating factors include: (i) role as a leader or instigator; (ii) involvement of directors and senior management; (iii) recidivism; and (iv) failure to comply with a warning/advisory letter. Mitigating factors include: (i) acting under severe duress; (ii) genuine uncertainty as to whether the agreement or conduct constituted an infringement; (iii) termination of the infringement as soon as the CMA intervenes; and (iv) cooperation with the CMA's investigation.
4. Deterrence and proportionality: the fine should have a deterrent effect on the undertaking on which it is imposed and on other undertakings in the same field, which is assessed based on an undertaking's financial size and position, over a period of three years.
5. The overall cap: the fine will be adjusted to ensure that it does not exceed 10% of worldwide turnover.
6. Leniency or settlement discounts: any such discounts will be applied at the final stage.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

For implementing or causing the implementation of cartel arrangements after 20 June 2003, individuals can face up to five years' imprisonment and/or an unlimited fine. Such prosecutions were first imposed in *Marine Hoses* in June 2008. Most recently, in September 2017, one individual was sentenced to two years' imprisonment suspended for two years, having pleaded guilty to dishonestly agreeing to divide supply and customers and fix prices in *Precast Concrete Drainage Products*.

Directors can also be disqualified for up to 15 years where they knew, or ought to have known, that their company was guilty of an infringement of UK competition law. The CMA can either apply to the court for such orders, or agree a disqualification undertaking with the relevant director. Since its first director disqualification in *Posters and Frames* in December 2016, the CMA has applied director disqualifications in five other cases (*Estate Agent*, *Pre-cast Concrete Drainage Products*, and *Non-residential Premises Refurbishment* cartels, and the *Nortriptyline* and *Fludrocortisone acetate tablets* pharmaceutical cases), securing 20 director disqualifications in total. In July 2020, the High Court upheld the CMA's seven-year disqualification of Michael Martin in the *Estate Agent* cartel following a four-day trial, despite Martin's absence from the infringing meetings – his knowledge of the agreement and failure to prevent or end the company's participation were deemed sufficient to justify his disqualification.

The CMA's January 2020 EU exit guidance suggests that the Competition (Amendment etc.) (EU Exit) Regulations 2019 will be amended so that the CMA will be able to rely on conduct held to have infringed Article 101 TFEU during the transitional period for the purposes of making a director disqualification application.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Financial hardship can, in exceptional circumstances, be a reason for a reduction of a fine provided the undertaking has sufficient information to show that it is unable to pay the fine due to its financial position, including in relation to all parent or subsidiary entities. However, there can be no expectation that a fine will be adjusted on this basis.

3.4 What are the applicable limitation periods?

There are no limitation periods for public enforcement action for the criminal cartel offence under the Enterprise Act or for the civil cartel offence under Chapter I of the Competition Act.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Subject to a company's articles of association, a company can indemnify the legal costs and/or financial penalties imposed on a former or current employee.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Employees or directors cannot be held liable by their employer for legal costs or fines imposed on the employer as a result of competition law breaches. The Court of Appeal found in *Safeway Stores Ltd v Twigger* that a company could not recover the fines from the employees or directors, as the Competition Act does not impose liability of any kind on the directors or employees for which it could be vicariously responsible, also justified by policy reasons (e.g. encouraging individuals to report cartel activity and incentivising companies to adopt a compliance culture).

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

A parent company will be liable if it is (i) directly involved in the infringement, or (ii) jointly and severally liable with its directly involved subsidiary.

Liability for direct involvement will arise where the parent participated in the cartel, directed the subsidiary's involvement, or was aware of the subsidiary's infringing conduct and did not actively intervene to end it. This is largely a question of fact, assessing whether the parent knew of or was complicit in the subsidiary's behaviour. Direct involvement may also arise out of specific contractual arrangements between the parent and subsidiary (e.g. agency).

The CMA will also determine whether direct liability should be jointly and severally shared with a parent entity. Such liability will be found where, at the time of the infringement, the parent company had the ability to, and actually did, exercise decisive influence over the conduct of the subsidiary in question.

The Office of Fair Trading ("OFT") in the *Construction Recruitment Forum* case endorsed the EU Courts' approach in *Akzo Nobel*, noting that where a parent company directly or indirectly owns 100% or close to 100% of the subsidiary, there is a presumption of decisive influence, rebuttable by the parent adducing evidence (relating, e.g., to the economic, organisational and legal links between the parent and subsidiary), demonstrating that the subsidiary independently determined its conduct. The EU Courts have continued to broaden their approach to parental liability, most notably in *Akzo Nobel* (2017) and *Goldman Sachs* (2018) (currently on appeal to the Court of Justice of the EU, "CJEU"). Whether the CMA will endorse such a broad approach is uncertain, particularly after the end of the transitional period when EU Court judgments will not be binding on the CMA.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Part 3 of the OFT's September 2012 "Guidance as to appropriate amount of penalty for substantive infringements of competition law" (which the CMA applies) outlines the corporate leniency policy applied in the UK. A more detailed explanation of the CMA's leniency policy is outlined in the OFT's July 2013 guidance on "Applications for leniency and no-action in cartel cases".

The three types of leniency include:

1. Type A: the applicant must be the first applicant and there must not be a pre-existing investigation by the CMA. The information provided must allow the CMA to take forward a credible investigation, and the company/individuals involved must provide all relevant information, accept participation in the cartel, cooperate with the CMA and cease participation in the cartel. Applicants that successfully meet this threshold will receive corporate immunity (no fine), blanket immunity from criminal prosecution for cooperating current or former individual employees/officers, and director disqualification protection. Type A immunity is unavailable to applicants that coerced other undertakings to participate in the cartel.
2. Type B: the applicant must be the first in a pre-existing investigation. Information provided must add significant value to the investigation, and the applicant must comply with the other conditions for Type A above. The applicant will benefit from discretionary corporate immunity from financial penalties, or percentage fine reductions. Cooperating current or former individual employees and directors could benefit from discretionary immunity from criminal prosecution ("blanket" immunity or otherwise). Directors could benefit from protection against disqualification provided corporate immunity or a leniency reduction is granted. Type B leniency/immunity is unavailable to applicants that coerced other undertakings to participate in the cartel.
3. Type C: available for applicants who are coercers and/or not the first to apply, regardless of whether there is a pre-existing investigation. Information must add significant value to the investigation. Applicants will benefit from a discretionary reduction in fines of up to 50%, and discretionary immunity from criminal prosecution for specific individuals, to be agreed with the CMA. Director disqualification protection is available if a corporate leniency reduction is granted.

In November 2017, the CMA issued an information note clarifying the process behind handling leniency applications across regulated sectors. The note confirms that the CMA should always be approached first so parties secure their place in the leniency "queue" – this position will then determine corresponding positions with other regulators, without the need to submit concurrent leniency applications. The regulators will then cooperate closely throughout the application process, with the CMA having responsibility for all initial inquiries, and other regulators having responsibility for confirming any markers/leniency applications. The CMA remains solely responsible for assessing criminal immunity applications.

The CMA's January 2020 EU exit guidance confirms that the CMA's leniency regime will remain unchanged after the end of the transitional period.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

To secure a Type A "marker", an applicant can approach the CMA on a hypothetical no-names basis to confirm that Type A immunity is available. The applicant should identify a "concrete basis for the suspicion" of a cartel and have a "genuine intention to confess". If the CMA confirms availability, the undertaking must make an immediate application and provide its identity. A discussion of perfecting the marker then follows. A similar approach may be taken to secure a Type B marker, but without a requirement to make an immediate application once the CMA confirms availability.

To "perfect" a marker for Type A immunity, the applicant must provide the CMA with all available information giving a sufficient basis to take forward a credible investigation. For Type B immunity/leniency, or Type C leniency, applicants must provide all information to add significant value to, and genuinely advance, the CMA investigation.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes. However, certain parts of the process must be in writing, e.g.: (i) all pre-existing evidence of the cartel; (ii) witness signatures confirming the accuracy and authenticity of their statements; and (iii) leniency agreements.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

In cases where the CMA launches a civil investigation, the name of the party who applied for leniency and the information it has submitted on which the CMA intends to rely will be set out in the SO issued to the other parties to the proceedings, as well as during the course of access to file. The leniency applicants and the nature of certain leniency evidence submitted will be included in the public version of any infringement decision. Leniency statements are protected from disclosure in national proceedings in line with Article 6 of the EU Damages Directive (Directive 2014/104/EU, "Damages Directive"), a provision incorporated into UK law (please see below at question 8.1).

Although the UK courts have a history of enforcing wide pre-trial disclosure (e.g., in follow-on claims related to the EC's *Trucks* case), in recent follow-on claims related to the EC's *Forex* decision, the High Court rejected the claimants' request for a disclosure of documents related to a time period not covered by the decision.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The cooperation requirement, which requires parties to adopt a "constructive approach" and genuinely assist the CMA, is expected to continue until the conclusion of any action brought by the CMA, extending to the conclusion of any appeals. The CMA may withdraw leniency in the event of non-compliance with such obligations.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

The CMA operates a "leniency plus" policy. If a firm is already cooperating with one cartel investigation, and comes forward with information and obtains immunity in relation to a second cartel, it may receive an additional reduction in the penalty for the first cartel. Reductions are unlikely to be high and will depend on factors such as the amount of effort by the applicant to uncover the second cartel and whether the CMA would have been likely to discover it in any event.

The CMA does not operate a "penalty plus" policy.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes, please see above at question 2.4. A "no-action" letter may also be granted, where an individual whose employer has taken part in cartel activity is the first to report cartel conduct directly to the CMA in return for immunity from prosecution and/or director disqualification. In such instances, the relevant company may lose the chance to apply for Type A or B immunity.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Once the CMA considers that the evidential standard for issuing an SO is met, it has the discretion to discuss the possibility of a settlement with the defendants. To be eligible for a settlement, the defendant must:

1. make a "clear and unequivocal" admission of the infringement;
2. terminate its involvement in the infringement;
3. confirm that it will pay a penalty set at a maximum amount, including a discount for settlement; and
4. agree to procedural cooperation with the CMA.

Additional case-specific conditions may also be imposed. Settlement discount is capped at 20% if settlement occurs before the CMA has issued an SO, and at 10% thereafter. The settlement procedure is streamlined, with no oral hearings or written responses to the SO, and only limited access to file. Where a settling party appeals the infringement decision, it ceases to benefit from the settlement discount.

In October 2019, the CMA fined three construction companies £36 million for their participation in a seven-year cartel in a hybrid settlement case, where two of these companies settled with the CMA.

The CMA also operates a commitment procedure where parties can provide binding commitments to cease and desist conduct or behave in a certain manner, instead of receiving an infringement decision and fine. Revised guidance on this procedure was published in January 2019.

7 Appeal Process

7.1 What is the appeal process?

Decisions can be appealed to the CAT in the first instance, a specialist competition tribunal that determines appeals from decisions applying the competition provisions "on the merits" (both law and fact; and both liability and quantum). The CAT may remit the decision to the CMA for reconsideration or reach its own decision which supersedes that of the CMA.

Further appeals on points of law or quantum of a penalty are available at the Court of Appeal in relation to CAT proceedings in England and Wales with the permission of the CAT or the appellate court. CMA decisions may also be challenged under judicial review procedures before the High Court.

7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes, until the appeal is determined.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Yes, but any cross-examination can be limited by the CAT as it deems appropriate.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Both follow-on and stand-alone claims can be brought before the CAT or the High Court.

Follow-on actions rely on a decision taken by either the CMA or the EC establishing a breach of competition law, meaning the claimant is only required to prove that it suffered damage as a result. Stand-alone claims will only succeed if the claimant establishes that the defendant breached competition law, and that it suffered loss as a result. The CAT may grant injunctions as regards both stand-alone and follow-on actions, and such actions may be brought in the civil courts by way of a breach of statutory duty claim.

In March 2017, the UK incorporated the Damages Directive into national law by way of the Competition Act and Other Enactments (Amendment) Regulations 2017. Changes include: the introduction of a rebuttable presumption that cartels cause harm, and the possibility of exclusion from joint and several liability between infringing companies for small and medium-sized entities ("SMEs") and immunity recipients. Substantive provisions will only apply to claims where both the infringement and harm occurred post-9 March 2017, whilst procedural provisions will apply to all proceedings brought post-9 March 2017. This may lead to some uncertainty in UK courts.

Parties subject to an investigation or infringement finding may enter into voluntary redress schemes under the Consumer Rights Act 2015, to voluntarily compensate parties suffering loss as a result. A fast-track procedure for bringing claims is also available to SMEs, where a hearing takes place within six months and the CAT can impose caps on the parties' costs.

8.2 Do your procedural rules allow for class-action or representative claims?

Collective proceedings can be brought when approved by the CAT. The claimants must have "the same, similar or related issues of fact or law", the matter in dispute must be "suitable to be brought in collective proceedings", and the "representative" bringing such proceedings must be regarded as "just and reasonable". The CAT's collective proceedings order ("CPO") will stipulate whether the class will be defined using the "opt-in" (the representative brings a claim on behalf of all parties who have expressly decided to participate) or "opt-out" (the representative brings a claim on behalf of all parties who fit a particular description, unless some parties expressly choose to be excluded) models.

A key pending judgment on this issue relates to the collective claim brought by Walter Merricks on behalf of consumers suffering overcharges as a result of MasterCard's multilateral interchange fees ("MIFs"). The CAT's refusal to approve this class action in 2017 was rejected by the Court of Appeal in April 2019, which found that the CAT imposed too high a standard in relation to the evidence required at the certification stage and only needed to be satisfied that the claimant's data method was "*capable of, or offer[ed] a realistic prospect of, establishing loss to the class*". MasterCard appealed this judgment to the Supreme Court, arguing in a May 2020 hearing that Merricks had failed to provide supporting data for the calculation of the class-wide loss and how such loss would be distributed. The Supreme Court's judgment on this issue is pending and will be informative for any future collective claims – indeed the CAT's approvals of two collective follow-on claims brought in July 2018 in respect of the EC's *Trucks* decision have been put on hold pending this judgment.

Approval requests for two opt-out claims against multiple banks involved in the EC's *Forex* cartel will also be jointly heard by the CAT in March 2021, where the CAT will decide whether a CPO should be made and, if so, to which of the two class representatives.

8.3 What are the applicable limitation periods?

The limitation period is six years for stand-alone or follow-on claims before the High Court or CAT which relate to loss or damage suffered, or arise as a result of an actual or alleged competition law infringement occurring, on or after 9 March 2017. Such limitation period runs from the later of: (i) the day on which the infringement of competition law that is the subject of the claim ceases; and (ii) the claimant's day of knowledge (i.e. the day on which the claimant first knows or could reasonably be expected to know: (a) of the infringer's behaviour; (b) that the behaviour constitutes a competition law infringement; (c) that the claimant has suffered loss or damage arising from the infringement; and (d) the identity of the infringer). Such limitation period will be suspended while the competition authority's investigation is ongoing, and for at least one year after the conclusion of such investigation.

The same six-year limitation period also applies to: (a) stand-alone or follow-on claims before the High Court relating to loss or damage suffered/resulting from an infringement occurring

before 9 March 2017; and (b) stand-alone or follow-on claims before the CAT related to a cause of action accruing between 1 October 2015 and 9 March 2017. This period runs from the date of the accrual of the cause of action in accordance with Section 2 of the Limitation Act 1980.

The limitation period is only two years before the CAT in respect of stand-alone or follow-on claims related to a cause of action accruing before 1 October 2015. This period runs from the later of the date on which the infringement decision is final, or on which the cause of action accrued.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The Competition Act recognises passing on damages for overcharges and underpayments. MasterCard's attempt to employ the defence in 2016, alleging that Sainsbury's passed on the overcharge to customers, was rejected by the CAT on the basis that MasterCard did not show: (i) an identifiable (and causally connected) increase in retail prices for consumers; and (ii) that there was another class of claimant to whom the overcharge had been passed on. This finding was dismissed by the Supreme Court in June 2020 (please see question 8.6 below).

The burden of proving that an overcharge has been passed on rests with the entity from whom damages are being sought. In July 2019, the Commission published "*Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser*" which provide practical guidance to assist national courts in estimating the share of the overcharge passed on.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

In civil courts, costs usually follow the event, meaning that the losing party will ordinarily have to pay a proportion of the costs of the winning party. This ultimately remains at the court's discretion. The CAT does not have specific rules on costs, but may make any order it thinks fit on costs at any point in the proceedings.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

The first successful stand-alone claim was brought by Sainsbury's against MasterCard, relating to MasterCard's imposition of UK MIFs. MasterCard was ordered to pay £68.5 million in damages by the CAT on appeal. This judgment (amongst other High Court findings relating to Visa and MasterCard's MIFs) was subsequently appealed to the Court of Appeal, who in July 2018 confirmed that the MIFs did breach Article 101(1) TFEU and remitted the cases back to the CAT to assess a potential application of the Article 101(3) TFEU exemption, as well as the quantum of damages.

Following an appeal by Visa and MasterCard, in June 2020 the Supreme Court upheld the majority of the Court of Appeal's findings, concluding that: (a) the Court of Appeal was bound by the CJEU's judgment which annulled MasterCard's appeal against the original EC decision, and was therefore correct in finding that the MIFs amounted to a restriction of competition contrary to Article 101(1) TFEU; (b) parties seeking to rely on the Article 101(3) TFEU exemption are required to substantiate and evaluate the efficiencies they claim arise out of their conduct, and verify the link between such efficiencies and the anti-competitive conduct itself (including by providing detailed, empirical evidence and analysis); and (c) the "fair share" requirement of the Article 101(3) TFEU exemption was not met as the retailers were not fully compensated for the harm inflicted (due in particular to the two-sided nature of the market). However, the Supreme Court ruled that the Court of Appeal was wrong to require a greater degree of precision from MasterCard and Visa as defendants in their quantification of the level of pass-on than would be required of a claimant. The cases have been remitted back to the CAT for the specific determination of damages, together with a rehearing on the Article 101(3) TFEU issue as regards Sainsbury's claim.

In May 2020, Arcelik, an electrical-appliance manufacturer, announced it received out-of-court settlements of £20.15 million and €22.8 million from members of the *Cathode Ray Tube* cartel, having filed a claim before the High Court in December 2018. In September 2020, National Grid entered into an out-of-court settlement with one of the participants in the *Power Cables* cartel, NKT. Its damages claim against the remaining cartel participants continues.

Many other follow-on damages claims, including against participants in the EC's *Trucks*, *Cathode Ray Tubes*, *Air Cargo*, *Maritime Car Carriers* and *Forex* cases, are ongoing before the UK courts.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

In August 2020, the CMA commenced a public consultation on proposed revisions to its guidance on procedures for running investigations under the Competition Act. Such consultation proposes to make minor amendments to the wording of current procedures to ensure increased transparency at case opening, the possibility for draft penalty statements to be sent with SOs, and other clarifications.

Please see questions 1.1, 3.1, 4.1 and 9.2 for guidance issued by the CMA in relation to the UK's exit from the EU.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

Brexit: 2021 will be the CMA's first year as a standalone regulator outside of the EU. The CMA's 2020–21 Annual Plan identifies "taking on new responsibility as a result of the UK leaving the EU" as one of its strategic objectives, including the launch or takeover of major international cartel cases. Indeed, as explained in response to question 1.1 above, after the end of the transitional period the CMA will no longer apply Article 101 TFEU and will be able to commence its own cartel investigations on the basis of UK law alone. In the CMA's view, this will increase its engagement with other competition regulators worldwide and enhance its presence on the global competition enforcement stage.

COVID-19: The CMA published guidance in March 2020 clarifying its approach to business cooperation in response to the pandemic. It confirmed that it will not take action against companies that take temporary measures to coordinate, provided that the measures: (i) are appropriate and necessary; (ii) are in the public interest; (iii) are for the benefit or wellbeing of consumers; (iv) deal with critical issues arising as a result of the pandemic; and (v) last no longer than necessary. The CMA will not tolerate companies exploiting the crisis as a 'cover' for non-essential collusion. A number of formal public policy exclusion orders have been issued to UK grocers, dairy producers and providers of health services allowing them to benefit from relaxed competition laws as a result.

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