

Private antitrust enforcement in England and Wales after the EU Damages Directives: Where are we heading?

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Abstract

The framework for private antitrust actions in the England and Wales has undergone a number of changes in recent years. The Consumer Rights Act 2015 introduced measures to facilitate access to justice for victims of anticompetitive conduct. It created a fast track procedure in the Competition Appeal Tribunal and granted the Tribunal the powers to permit opt-out representative actions. More changes were brought on with the implementation of the EU Damages Directive in March 2017. In this chapter, I will take stock of those recent developments and offer an insight into the functioning of private enforcement of competition law in England and Wales. I will document key developments and issues regarding access to documents (disclosure), joint and several liability of co-infringers, and claim aggregation (opt-out representative actions). The recent legislative measures seem to pull private enforcement of competition law in different directions facilitating both small claims and large compensation actions. The Consumer Rights Act implemented a number of measures to encourage private litigation but the impact of the changes following the Damages Directive are not clear yet.

1. Introduction

England and Wales is currently one of the main European jurisdictions for private damages actions against international cartels.¹ Although the number of litigated cases is relatively low, the courts and the Competition Appeal Tribunal (CAT) attract large multi-party litigation, especially against companies that engaged in anticompetitive agreements.² The framework for private actions has undergone a number of significant changes in recent years. The Competition Act 1998 set out the modernised competition law framework which was complemented by the Enterprise Act 2002, introducing a special procedure for follow-on damages claims in the CAT. The Consumer Rights Act 2015 added more litigation options by widening the CAT's jurisdiction.³ Finally, the UK Government implemented the EU Damages Directive⁴ in March 2017 with the *Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017* (Implementing Regulation).⁵ The UK's decision to leave the European Union will create uncertainty as to the working of the framework for competition claims.⁶ Currently, the national rules for private actions apply to both breaches of EU and breaches of national competition law and the Brussels Regulation (recast) governs most jurisdictional issues.⁷

Many of the issues addressed by recent legislation or raised by decisions in the CAT and High Court merit an in-depth analysis but go beyond the scope of this chapter. The chapter will reflect on recent jurisprudence and assess the potential impact of key changes in the litigation framework. In the first part of the chapter, I will provide an overview of the legal framework for private antitrust actions in the UK for those who are unfamiliar with its most recent changes. In the subsequent sections, I will discuss particularly fast-developing areas, beginning with access to documents in private litigation. Subsequently, I will assess the new framework for joint and several liability that implements the requirements of the Damages Directive. As I have argued elsewhere, the rules proposed in the

¹ The others being arguably Germany and the Netherlands. To avoid complications, I will focus on the rules that apply to competition litigation in England and Wales, ignoring Scotland and Northern Ireland. Most private competition actions are brought either in the High Court or in the Competition Appeal Tribunal in London.

² Barry J Rodger (ed), *Ten Years of UK Competition Law Reform* (Dundee University Press, Dundee 2010); Sebastian Peyer, 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence' [2012] 8 *Journal of Competition Law and Economics* 331.

³ See section 2 below.

⁴ *Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* [2014] OJ L 349/1 (hereinafter "Damages Directive" or "Directive").

⁵ *The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017*, SI 2017/385.

⁶ The UK Government triggered Article 50 of the TEU on 29 March 2017.

⁷ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351/1 (Brussels Regulation (recast)).

Directive are far from clear or positive for claimants.⁸ A distinct feature of UK litigation in competition law is the availability of an opt-out group action which I am going to discuss in subsection 3.3. I conclude in section 4.

2. Framework for private actions in England and Wales

In this section, I outline the main characteristics of private antitrust litigation in the UK.⁹ Access to files in civil litigation, changes to joint and several liability following the implementation of the Damages Directive and the opt-out representative action will be discussed in section 3.

Victims of anticompetitive conduct have a genuine choice to bring their claims in either the High Court (Chancery Division) or the Competition Appeal Tribunal (CAT).¹⁰ The former is an ordinary court that deals, *inter alia*, with competition law litigation. The latter is a specialist court for competition law that hears complaints against decisions of the Competition and Markets Authority (CMA) and the sectoral regulators. It also functions as a special court for private disputes that are brought on the basis of Articles 101, 102 TFEU and the national equivalents in the Competition Act 1998. Before the Consumer Rights Act 2015 came into force, the CAT's jurisdiction was limited to follow-on damages claims,¹¹ i.e. claims that rely on the finding of an infringement by a competition authority. Most commentators regarded this as a significant drawback because it severely limited the scope to bring claims in the CAT to true follow-on cases and hampered the use the CAT's competition expertise in private competition litigation.¹² Claims that sought to establish a longer infringement period than determined by a competition authority would not have been admissible under the old rules. The existence of an infringement finding determined the limits of any private claim in the CAT and, thus, the CAT's jurisdiction.¹³ The Consumer Protection Act 2015 widened the

⁸ Sebastian Peyser, 'Compensation and the Damages Directive' (2016) 12 European Competition Journal 87.

⁹ For an analysis of the early case law, see Barry J Rodger, 'Competition Law Litigation in the UK Courts, A Study of All Cases to 2004: Part 1' (2006) 27 European Competition Law Review 241; Barry J Rodger, 'Competition Law Litigation in the UK Courts, A Study of All Cases to 2004: Part 2' (2006) 27 European Competition Law Review 279; Barry J Rodger, 'Competition Law Litigation in the UK Courts, A Study of All Cases to 2004: Part 3' (2006) 27 European Competition Law Review 341; David Bailey, 'The Early Case Law of the Competition Appeal Tribunal' in Barry J Rodger (ed), *Ten Years of UK Competition Law Reform* (Dundee University Press, Dundee 2010).

¹⁰ CAT: § 47A CA 1998; High Court (Chancery division): § 2.1 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. Claims can be transferred from the High Court to the CAT and *vice versa*, section 16(4)(5) Enterprise Act 2002.

¹¹ See s 47A Competition Act 1998 (old).

¹² Mark Furze, 'Follow-On Actions in the UK: Litigating Section 47A of the Competition Act 1998' [2013] 9 European Competition Journal 79.

¹³ See, for example, the Court of Appeal's statement regarding the CAT's jurisdiction in *Enron Coal Services Ltd v EWS Railways* [2009] EWCA Civ 647 para 30.

scope of the CAT's jurisdiction and gave the CAT the powers to hear stand-alone claims, damages actions, other monetary claims and injunction requests.¹⁴ In addition, claimants in the Tribunal can aggregate individual claims in either an opt-in or opt-out representative action and the CAT can allocate claims to a fast track procedure.

There are only a few differences between High Court proceedings and proceedings in the CAT. The CAT procedure is said to be more informal and flexible. Cases in the CAT are normally heard by a tribunal consisting of three people, with the chairman being a lawyer and the other judges being drawn from the CAT's ordinary members, while High Court cases are usually heard by a single judge. Unlike the High Court, the CAT offers a fast track procedure and opt-out claim aggregation.¹⁵ The fast track procedure aims at small claims brought by individuals and small and medium-sized companies which can be heard in three days or less.¹⁶ Follow-on cartel claims do not normally qualify for the fast track procedure due to their complexity.¹⁷ Issues such as estimating the passing-on of overcharges, umbrella damages and volume effects of cartels require more evidence than can be dealt with in a shortened procedure. In the short period since the Consumer Rights Act came into force, the CAT has dealt with a number of fast track applications, typically concerning the alleged abuse of dominance in stand-alone cases, i.e. cases without the prior involvement of a competition authority.¹⁸ It seems that the fast-track procedure, combined with the possibility to apply for an interim injunction, enables parties to seek protection from the alleged abuse of market power.

Different periods of limitation used to apply in the CAT (2 years) and in the High Court (6 years). The Consumer Rights Act 2015 has aligned the CAT's short period of limitation with the standard period of limitation for tortious conduct that was and is applicable in the High Court (6 years).¹⁹ The running of the short two-year limitation period in the CAT was dependent on the finality of the public decision (on which the claimants had to rely to open the CAT's jurisdiction prior to the Consumer Rights Act 2015) was final.²⁰ The uncertainty about the running of limitation periods sparked a

¹⁴ Section 47(A)(1)(3) Competition Act 1998. For an interim injunction application, see *UKRS Training Limited v NSAR Limited*, Case No: 1258/5/7/16.

¹⁵ See rule 58 Competition Appeal Tribunal Rules 2015 (fast track). Lianne Craig, Tom Bolster and Gurpreet Chhokar, 'Living up to Expectations? The Consumer Rights Act 2015, a Year on' (2017) *Global Competition Litigation Review* 31. For opt-out group actions, see next section below.

¹⁶ 2015 CAT Rules r. 58.

¹⁷ *Breasley Pillows Ltd v Vita Cellular Foams (UK) Ltd* [2016] CAT 8.

¹⁸ *Socrates Training Limited v The Law Society of England and Wales*, Case No: 1249/5/7/16 (This is the first fast track claim proceeding to trial. Judgement is pending); *Shahid Latif & Mohammed Abdul Waheed v Tesco Stores Limited*, Case No: 1247/5/7/16 (Parties settled); *Labinvesta Limited v Dako Denmark*, Case No: 1273/5/7/16; *NCRQ Ltd v Institution for Occupational Safety and Health*, Case No: Case number: 1243/5/7/15

¹⁹ Section 2 Limitation Act 1980.

²⁰ For an overview of the previously applicable limitation period, see Nicola Boyle, Lesley Hannah and Stella Gartagani, 'United Kingdom: Supreme Court clarifies time limits for damages claimants in the CAT' (2014)

number of litigation battles and prompted the Government to adjust the CAT's limitation period to six years.²¹ The period of limitation begins to run from the date on which the cause of action accrued.²² The start of the period of limitation is postponed if any fact relevant to the claimant's case has been deliberately concealed from him by the claimant.²³ It is important to note that the claimant only needs to know facts that are sufficient to plead a *prima facie* case.²⁴ Appeals against the decision of the competition authority do no longer interrupt the running of the limitation period. The Implementing Regulation has not affected the limitation period applied in the English courts as it exceeds the period of five years that is set out in the Damages Directive. In accordance with the Directive, the Implementing Regulation suspends the running of the period of limitation when a competition authority investigates an allegation of anticompetitive conduct.²⁵

Findings of facts of the CMA (unless the court directs otherwise) and decisions of the European Commission, the CMA and national regulators are binding in proceedings in the CAT and High Court.²⁶ The recent decisions of the Competition Appeal Tribunal and the High Court in the actions that were brought against MasterCard demonstrated that the binding effect is narrowly interpreted and does not relieve the parties of proving the infringement for time periods that were not addressed in the regulator's decision.²⁷ MasterCard is currently defending itself against a number of claims, including an opt-out class action in the CAT,²⁸ for its setting of Multilateral Interchange Fees (MIF) for both debit and credit cards. The European Commission had established that the MIF set for cross-board transactions in the European Economic Area (EEA) until 2007 breached Article 101(1) TFEU. The claimants in the English proceedings sought to show that the same held true for MIFs set in the UK and Ireland, and for MIFs charged after 2007.²⁹ In the High Court proceedings, the court refused to read the Commission decision 'across' and apply the Commission's infringement findings to a more recent time-period and different geographical market.³⁰ Thus, the claimants had to demonstrate that MasterCard's MIF actually breached competition law, rather than just proving causation and quantum.

Global Competition Litigation Review R41-R45; Pinar Akman, 'Period of Limitations in Follow-on Competition Cases, When Does a 'Decision' Become Final?' (2014) 2 Journal of Antitrust Enforcement 389.

²¹ For an overview, see Akman (n 20).

²² Section 2 Limitation Act 1980.

²³ Section 32(1)(b) Limitation Act 1980.

²⁴ *Arcadia Group Brands and others v Visa Inc and others* [2015] EWCA Civ 883.

²⁵ Article 10 Damages Directive.

²⁶ Sections 58, 58A(2), 47A(6) Competition Act 1998.

²⁷ *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2016] CAT 23; *Asda Stores Ltd v Mastercard Incorporated* [2017] EWHC 93.

²⁸ See section 3.3. below.

²⁹ Commission Decision of 19 December 2007, Case COMP/34.579 — *MasterCard*, Case COMP/36.518 — *EuroCommerce*, Case COMP/38.580 — *Commercial Cards* [2009] OJ C 264/8.

³⁰ *Asda Stores Ltd v Mastercard Incorporated* (n 27) para 84.

As for the remedies of injured parties, it is generally accepted that claimants can seek injunctive relief³¹ and damages³² in the courts and, after the Consumer Rights Act 2016 came into force, in the CAT as well. Competition damages claims and injunctions are now expressly mentioned in section 47A Competition Act 1998. Since the House of Lord's decision in *Garden Cottage Foods* in 1983 it is clear that breaches of competition law can be pursued via private damages actions in the UK courts.³³ Ironically, the finding that victims can sue for damages on the basis of, what is now, Article 102 TFEU, worked against the claimants in *Garden Cottage Foods* who had sought an injunction against a monopolist who refused to deliver bulk butter to the claimants. The injunction was denied because it was held that damages for the breach of EU competition law are available in the domestic courts and that the availability of damages makes the injunction a less suitable remedy.³⁴

Compensation claims for the infringement of UK or EU competition law are normally based on a breach of statutory duty.³⁵ Claimant sought to establish other causes of action in competition law but their attempts to use on unjust enrichment (restitution)³⁶ or economic (intentional) torts have,³⁷ so far, been unsuccessful. The economic torts, namely, intentional interfering with business by unlawful means and conspiracy to injure using unlawful means, require the proof of intention to injure the claimant. While cartels harm their customers and, ultimately, consumers, the Court of Appeal held that the Commission decision in the air freight cartel³⁸ cannot establish such intention and struck out those causes of action.³⁹ The intention to make an (illegal) profit in a cartel is not the same as the intention to injure the claimant.⁴⁰ Whether the same reasoning applies to restrictions that have the object or effect of foreclosing the market is a question that has yet to be answered. Exemplary damages, i.e. damages that intend to punish the defended, were available against defendants who had not already been punished with a fine by a competition authority.⁴¹ The CAT awarded exemplary damages in the proceedings against *Cardiff Bus*⁴² but the Implementing

³¹ For successful injunction claims see, for example, *Arriva the Shires Ltd v London Luton Airport Operations Ltd* [2014] EWHC 64 (Ch); *Purple Parking Ltd & Anor v Heathrow Airport Ltd* [2011] EWHC 987 (Ch).

³² Very few damages claims have been successful (ignoring settlements): *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* (n 27); *2 Travel Group PLC v Cardiff City Transport Services Ltd* [2011] CAT 30.

³³ *Garden Cottage Foods Ltd v Milk Marketing Board* [1983] A.C. 130.

³⁴ One part of the test for the grant of injunction is whether damages are an adequate remedy which the House of Lords held to be the case.

³⁵ *ibid.*

³⁶ *Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA & Ors* [2007] EWHC 2394 (Ch).

³⁷ *WH Newson Holding Ltd & Ors v IMI Plc & Ors* [2013] EWCA Civ 1377; *Air Canada v Emerald Supplies Limited* [2015] EWCA Civ 1024.

³⁸ Commission Decision of 9 November 2010 (Case C.39258 — Airfreight) [2014] OJ C 371.

³⁹ *Emerald Supplies* (n 37).

⁴⁰ *Emerald Supplies* (n 37) para 169. See also *Newson Holding* (n 37) where it was held that the economic torts are, at least, in principle plausible causes of action.

⁴¹ *Devenish Nutrition* (n 36); *Cardiff Bus* (n 31).

⁴² *Cardiff Bus* (n 31).

Regulation has now abolished exemplary damages in competition law proceedings.⁴³ Exemplary damages are not available in group actions.⁴⁴

The passing-on defence and standing for indirect purchasers – one of the prominent aspects of the Damages Directive as well as the discussion in academic fora – has, so far, not been of major relevance in English competition proceedings. The CAT's recent decision in *Sainsbury's v MasterCard* clarified that the passing-on defence is available in competition proceedings and that indirect purchasers have standing to use.⁴⁵ Although the Damages Directive did not apply on those proceedings, the CAT was critical of the presumption of pass-on that is part of the Damages Directive and has not become part of English law. Paras 8 to 11 of the Implementing Regulation introduce the Directive's rules on standing for indirect purchasers and arrange the burden of proof for claims brought by indirect victims and for defendants who argue the passing-on defence. In accordance with the Directive, in an indirect victim action the defendant needs to rebut the presumption that the harm has been passed on to indirect purchasers or indirect sellers.⁴⁶ If the defendant seeks to employ the passing-on defence, i.e. the argument that the harm was passed on by the directly harmed claimant to the next level of the supply chain, the burden of proof is on the defendant.⁴⁷ The recent decision of the CAT in *Sainsbury's v MasterCard*⁴⁸ as well as the hearing of the group action in *Merricks v MasterCard*⁴⁹ have offered a glimpse of the issues to come. In the *Sainsbury's* case, the CAT held that MasterCard did not prove, on the balance of probabilities, that the harm was passed on by the claimant to its customers in the form of an increase in price.⁵⁰ In the pending opt-out group action, the claimants acknowledged in the hearing for the collective proceeding order (CPO) that establishing the pass-through of overcharges is going to be challenging for a proposed class of 40 million members. Furthermore, tensions between the decision in *Sainsbury's*⁵¹ (no pass-through) and the group action (alleged pass-through) were noted.

Another notable feature of the framework for private actions is the possibility for undertakings to set up an CMA-authorized voluntary consumer redress scheme.⁵² The Scheme has not been used so

⁴³ Para 36 Implementing Regulation.

⁴⁴ 47C(1) Competition Act 1998.

⁴⁵ *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* (n 27) paras 479, 483 ff. The passing-on defence was previously mentioned in *Devenish Nutrition* (n 36) para 147; *Emerald Supplies Ltd v British Airways plc* [2009] EWHC 741 (Ch) para 37; *Newson Holding* (n 37) para 40.

⁴⁶ For conditions., see para 9(2) Implementing Regulation and Article 14 (2) Damages Directive.

⁴⁷ Articles 12 and 14(2) Damages Directive.

⁴⁸ *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* (n 27).

⁴⁹ *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*, Case No 1266/7/7/16.

⁵⁰ *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* (n 27) para 485.

⁵¹ *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* (n 27).

⁵² Section 49C of the Competition Act 1998.

far but guidance is available on the CMA's webpage.⁵³ The Scheme can address breaches of EU and UK competition law. The idea behind the scheme is that it would help consumers to receive compensation quicker and more cost-effective.

The most recent changes were introduced with the Implementing Regulation. This will affect some of the key characteristics of private enforcement in the UK as I will demonstrate in the next section. The UK Government chose to implement the Directive as a single regime, i.e. making the rules of the Directive applicable to both actions based on EU competition law and actions based on the national equivalents. The application of the Implementing Regulation is split into two parts. Part 10 differentiates between substantive and procedural provisions.⁵⁴ The rules on disclosure and the use of materials from competition authorities as evidence in competition proceedings apply to proceedings that have begun on or after the day the Implementing Regulation came into force, i.e. 09 March 2017.⁵⁵ All other rules are considered substantive rules and they only apply to claims based on breaches of competition law that occurred on or after the day on which the Implementing Regulation came into force. Consequently, the rules on disclosure and use of information from competition authorities apply to all new proceedings in the Competition Appeal Tribunal and the courts even if the harm occurred before the Implementing Regulation came into force. The claimants in currently pending damages actions cannot rely on, for example, the presumption of harm or pass-through.

3. Focus areas of private litigation in England and Wales

In this section I will focus on three areas of private litigation that in the case of disclosure and group actions, may provide a model for other jurisdictions or in the case of joint and several liability are likely to lead to more litigation. In the first subsection, I deal with the changes affecting the disclosure of documents in the English courts. The Implementing Regulation is limiting access to certain documents and, thus, creates exceptions from the previously liberal disclosure regime in England and Wales. Subsection 3.2 discusses the framework for joint and several liability. An increasing number of damages actions are launched in the English courts and many of those actions are against companies that have engaged in anticompetitive agreements. This leads to contribution claims in turn and the defendants will have to grapple with the complicated exceptions that have become national law with the Implementing Regulation. Finally, the Consumer Rights Act 2015

⁵³ CMA, *Guidance on the Approval of Voluntary Redress Schemes for Infringements of Competition Law* (CMA40 2015).

⁵⁴ Paras 42, 43 & 44 Implementing Regulation.

⁵⁵ Paras 43 and 44 Implementing Regulation. See also Para 1(2).

introduced the possibility of bringing opt-out collective proceedings in the Competition Appeal Tribunal. Two cases are currently pending and I will review the issues that have emerged so far.

3.1. Access to documents

One attractive feature of litigation in England and Wales is the mandatory disclosure of documents in the courts. Problems have arisen with regard to the extent to which a confidential version of the Commission's decision and documents containing elements of the defendant's leniency statement should be disclosed.⁵⁶ Although disclosure is not a new aspect of litigation in the English courts, the interplay between public investigations and private actions, especially when litigants seek access to leniency material and the confidential version of a regulator's decision, poses a number of challenges for the interpretation and application of the disclosure rules.

Parties to litigation in England and Wales must disclose and allow the inspection of documents that are material to the litigation.⁵⁷ Standard disclosure requires that parties inform the respective other side about the documents on which they rely, the documents that adversely affect the disclosing party's case, the documents which adversely affect another party's case or support another party's case.⁵⁸ Normally the parties exchange a list of relevant documents and serve it on the other party, including a disclosure statement setting out the extent of the search that has been undertaken. The duty to disclose is limited to documents that are or have been in the party's control.⁵⁹ This includes documents the party had the right to inspect or take copies of. The concept of reasonableness limits the search for documents a party has to conduct, for example, to certain time periods, categories of documents or documents located in certain places.⁶⁰ What is reasonable depends on the particular facts of the case and relevant factors include the number of documents that are involved, the ease and expense with which a particular document can be retrieved, and the nature and complexity of the proceedings.⁶¹

Before the implementation of the Damages Directive, there was no particular privilege applicable to files and information gathered by a competition authority. Parties could only invoke a number of

⁵⁶ I will not explain the rulings of the CJEU on questions of file access in detail. See, for example, Sebastian Peyer, 'Access to Competition Authorities' Files in Private Antitrust Litigation' (2015) 3 Journal of Antitrust Enforcement 58.

⁵⁷ Civil Procedure Rule 31. For disclosure of electronic documents, see also Practice Direction 31B – Disclosure of Electronic Documents. Disclosure in the Competition Appeal Tribunal is governed by Rules 60 to 65, 89 of the Competition Appeal Tribunal Rules 2015, SI 2015/ 1648 (hereinafter CAT Rules 2015).

⁵⁸ CPR rule 31.6.

⁵⁹ CPR rule 31.8. Parties are also required to make a reasonable search for documents, CPR rule 31.7.

⁶⁰ CPR Practice Direction 31A, para.2.

⁶¹ CPR rule 31.7(2).

narrow privileges to prevent the disclosure of documents in civil proceedings. The legal advice privilege protects communication between the client and his lawyer and, unlike in proceedings before the European Commission,⁶² extends to communication with in-house legal counsel. The litigation privilege protects information created in preparation of legal proceedings. The privilege against self-incrimination prevents the disclosure of documents that would incriminate the disclosing party or expose the disclosing party to a penalty.⁶³ Confidentiality as such is not a privilege that allows a party to protect a particular document from disclosure.⁶⁴ The fact that confidentiality does not prevent the disclosure of a document has raised concerns on part of the competition authorities that rely heavily on whistle-blowers to detect cartels and fear for the attractiveness of the leniency programme should the whistle-blower be exposed to (too much) civil liability. The vast majority of large-scale damages cases brought or pending in the English courts and the CAT are damages cases in which at least one of the defendants was also investigated by a competition authority for an alleged participation in an anticompetitive agreement. Cartel investigations are usually triggered by a leniency application and other cartelists have the right to access the leniency statement in the course of the investigation. Knowing that some or all of the defendants have obtained access to leniency statements with more detailed information about the functioning of a cartel, claimants have an incentive to seek access to leniency statements or the confidential version of the Commission's decision to support their case.

The English courts have practised a balanced approach when dealing with requests for the disclosure of leniency-related material which, arguably, has been in favour of claimants.⁶⁵ The recent jurisprudence was characterised by a nuanced application of the CJEU's guidance cases on access to leniency documents in cartel litigation. In *Pfleiderer* and,⁶⁶ later in *Donau Chemie*,⁶⁷ the CJEU held that there is no absolute prohibition that would prevent litigations from accessing leniency material.⁶⁸ The CJEU stressed that both public and private enforcement contribute to the effective enforcement of EU competition rules. National courts are required to weigh the interests in favour and against disclosure of leniency material. The English High Court applied the *Pfleiderer* decision in *National Grid Electricity Transmission Plc v ABB Ltd*.⁶⁹ In *Emerald Supplies* the Court of Appeal held

⁶² Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, ECLI:EU:C:2010:512, [2010] OJ I-08301.

⁶³ *R v S* [2008] EWCA Crim 2177.

⁶⁴ *Science Research Council v Nasse* [1980] AC 1028.

⁶⁵ John Kwan, 'The Damages Directive: End of England's eminence?' (2015) 36 *European Competition Law Review* 455.

⁶⁶ C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011], ECLI:EU:C:2011:389, [2011] ECR I-05161.

⁶⁷ C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG*, ECLI:EU:C:2013:366.

⁶⁸ For more details, see Peyer (n 56).

⁶⁹ *National Grid Electricity Transmission Plc v ABB Ltd & Ors* [2012] EWHC 869 (Ch).

that the principles to access confidential information were not applicable and used the *Pergan* principles to limit access to the confidential version of the Commission decision.⁷⁰

In *National Grid Electricity Transmission Plc v ABB Ltd*, a case following the Commission's decision in the Gas Insulated Switchgear cartel,⁷¹ the claimants sought access to the confidential version of the Commission's decision, the defendant's responses to the Commission's statement of objections and the defendant's responses to requests for information made by the Commission.⁷² All statements contained information from the leniency application. Justice Roth applied the balancing exercise outlined by the CJEU in *Pfleiderer*.⁷³ He relied, inter alia, on the CJEU's statement that it is necessary "to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency."⁷⁴ Justice Roth extended the *Pfleiderer* test, which was established with regards to disclosure of documents submitted under national leniency programmes, and held that it also applies to documents and information submitted under the Commissions' leniency programme. He concluded that access to some information should be granted. Justice Roth ordered the release of the redacted version of the confidential Commission decision and ABB's, one of the defendant's, response to the Commission's request for information. Disclosure was ordered within a confidentiality ring to protect confidentiality information.⁷⁵

The High Court made a number of key findings in *National Grid*. First, it was held that the public enforcement proceedings were no longer ongoing despite pending appeals against the Commission's decision. For this access-friendly interpretation, the High Court relied on earlier Commission documents, in particular the Commission's White Paper on Damages Actions, in which the Commission strongly supported follow-on damages actions.⁷⁶ Second, Justice Roth established a nuanced framework for access to leniency-related material by posing several questions. He asked whether the disclosure would increase the leniency applicant's exposure to liability compared to non-cooperating parties. He determined whether the gravity and duration of the infringement outweigh the concerns regarding the deterrence of potential leniency applicants. Finally, the court stipulated that disclosure must be proportionate. With regards to the first step – exposure to liability

⁷⁰ *Emerald Supplies* (n 37); Case T-474/04 *Pergan Hilfstoffe v Commission*, ECLI:EU:T:2007:306, [2007] OJ II-04225.

⁷¹ Commission Decision of 24 January 2007 (Case COMP/38.899 — Gas Insulated Switchgear) [2008] OJ C 5/7.

⁷² *National Grid Electricity Transmission Plc v ABB Ltd & Ors* [2012] EWHC 869 (Ch).

⁷³ *Pfleiderer* (n 66).

⁷⁴ *Pfleiderer* (n 66), para 30.

⁷⁵ It is interesting to note that the referencing court in *Pfleiderer* ultimately denied access to leniency documents, see decision of Oberlandesgericht Düsseldorf of 22 August 2012, case B-4 Kart 5/11 (OWi) (Kafferöster).

⁷⁶ *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2008) 165 final (2 April 2008).

– Justice Roth held that all cartelists were co-defendants. Consequently, there was no risk that the leniency applicant would potentially be liable for the entire harm. Assessing the gravity and duration of the infringement, it was denoted that the serious nature of the cartel and its duration of almost 16 years constituted factors in favour of disclosure. For the final proportionality test, Justice Roth took into account whether the requested documents were relevant for the claimant’s case and whether the requested documents were available from other sources. It was held that the information could not be obtained from another source without excessive difficulties for the claimant.

In the other aforementioned case, *Emeralds Supplies*,⁷⁷ which has its origins in the Commissions’ decision against the participants of the air freight cartel,⁷⁸ the Court of Appeal reduced the scope of disclosure by applying the *Pergan* decision rather than the *Pfleiderer* principles. It held that the confidential version of the Commission’s decision must be redacted before being disclosed to the claimant to protect innocent non-addressees of the Commission’s decision. The first-instance judge in High Court ordered the disclosure of the unredacted confidential version of the Commission’s decision after becoming frustrated with the Commission’s failure to produce a non-confidential version in more than four years. The confidential version of the decision contained references to non-addressees, implying that those non-addressees were implicated in the *air freight* cartel. The Commission decision also contained references to findings against the addressees that did not form part of the operative part of the decision (and could, thus, not be appealed). On appeal from the High Court to the Court of Appeal, the defendants argued successfully that the so-called *Pergan* material must be redacted.⁷⁹ In *Pergan*, the General Court found that the presumption of innocence prevents the disclosure of certain types of information about non-addressees.⁸⁰ It means excluding statements that either describe conduct which is characterised by the Commission as infringing Article 101 TFEU or allude to breaches of competition law which can no longer be challenged or appealed in the courts.⁸¹ Releasing information within a confidentiality ring was not deemed to be sufficient to protect the rights of the non-addressees. Consequently, the Court of Appeal did not apply the weighing test under *Pfleiderer*. It held that this test is confined to balance the interests of addressee defendants (and the competition authority) and the interests of the claimants in obtaining

⁷⁷ *Emeralds Supplies* (n 39).

⁷⁸ *Airfreight* (n 38).

⁷⁹ *Pergan* (n 70).

⁸⁰ *Ibid*, paras 76-80.

⁸¹ *Emerald Supplies* (n 37), para 24.

compensation. Some argue that this decision is not restricting access to documents but is rather based on its particular facts.⁸²

Disclosure requests in the English courts have prompted the European Commission to intervene in recent years and opinions on the disclosure of documents in damages actions against *Mastercard*.⁸³ In *Morrison v Mastercard*,⁸⁴ the Commission referred to the weighing test outlined in *Donau Chemie* and *Pfleiderer*,⁸⁵ stressing the importance of public law enforcement.⁸⁶ It did not object to a disclosure of the defendant's response to the statement of objections as this would not undermine an undertaking's interest in defending itself when under investigation when the Commission has closed its case.⁸⁷ As for other information submitted to the Commission during its investigation, it alerted the court to the fact that some of the information stems from third parties and that a confidentiality ring may not satisfy the interests of those parties.⁸⁸ The Commission did not object to the release of the confidential version of the decision within a confidentiality ring or with redactions to protect confidential information.⁸⁹ In its second opinion issued in proceedings against MasterCard for its anticompetitive setting of Multilateral Interchange Fees (MIFs), the Commission opposed a request that sought disclosure of surveys that were part of the Commission's file in an on-going investigation and which Mastercard had obtained by gaining access to the Commission's file.⁹⁰ Referring to the Damages Directive, which was not applicable in those proceedings, the CJEU's *Donau Chemie* decision and the principle of sincere cooperation,⁹¹ the Commission objected to the disclosure of information from an ongoing investigation as otherwise it would undermine the effective enforcement of EU competition rules.⁹²

The weighing approach used in the English courts may still be relevant in cases brought post-Directive but the disclosure of leniency statements and settlement submissions can no longer be sought and ordered. The Implementing Regulation creates new privileges with regard to these

⁸² Heidi M Silton and Craig S Davis, 'The Discovery Evolution of European Commission Competition Law Documents' (2016) *Global Competition Litigation Review* 96.

⁸³ Commission Opinion of 5.5.2014 *Interchange fee litigation before the Judiciary of England and Wales: Wm. Morrison Supermarkets plc and Others v MasterCard Incorporated and Others*, C(2014) 3066 final and Commission Opinion of 29.10.2015, *Interchange fee litigation before the High Court of Justice, Chancery Division: Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others*, C(2015) 7682 final.

⁸⁴ *Wm Morrison Supermarkets Plc & Ors v Mastercard Inc & Ors* [2013] EWHC 3082 (Comm).

⁸⁵ *Pfleiderer* (n 66); *Donau Chemie* (n 67).

⁸⁶ Commission Opinion of 5.5.2014, para 14.

⁸⁷ Commission Opinion of 5.5.2014, para 16.

⁸⁸ Commission Opinion of 5.5.2014, para 19.

⁸⁹ Commission Opinion of 5.5.2014, para 20.

⁹⁰ See Articles 15, 16 of Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18–24.

⁹¹ Article 4(3) Treaty of the European Union (TEU).

⁹² Commission Opinion of 29.10.2015, para 15.

documents.⁹³ In paras 27 to 34 it translates Articles 6 and 7 of the Damages Directive into national law. Consequently, leniency statements and settlement offers (the latter only if not withdrawn) are blacklisted and can no longer be disclosed to the parties in a competition law action. This is in line with the CMA's statement that it will oppose requests to disclose leniency applications.⁹⁴ For most parts, the Implementing Regulation copies the Damages Directive. However, one of the potentially problematic differences arises from the implementation of Article 6(4) into national law. Article 6 of the Directive suggests a heightened proportionality test for disclosure requests for information from competition authorities. Article 6(4) lists a number of criteria the courts ought to take into account, inter alia, the scope of the request (a), the purpose of the request (b) and the need to safeguard the effectiveness of public enforcement (c). However, para 30 of the Implementing Regulation states:

"(1) For the purposes of competition proceedings, a court or the Tribunal must not make a disclosure order addressed to a competition authority in respect of documents or information included in a competition authority's file.

(2) Sub-paragraph (1) does not apply where the court or the Tribunal making the order is satisfied that no-one else is reasonably able to provide the documents or information."

Unlike the Directive, national law creates a presumption of no access that can only be rebutted if the documents *cannot be sourced from someone else*. This is a stricter test compared to the proportionality assessment that is supposed to be carried out under the Directive.⁹⁵ It remains to be seen whether the interpretation of the Implementing Regulation in the Competition Appeal Tribunal and the courts will be in line with the CJEU's case law. More generally, the Damages Directive's blanket ban on access to settlement submissions and leniency statements undermines the weighing principles stressed by the CJEU *Pfleiderer* and *Donau Chemie*.⁹⁶

By not directly copying Article 5 of the Directive but assuming that disclosure under English law is in line with the requirements of the Directive, it is likely that no material change with regard to search and disclosure is intended. The Directive's requirement to permit the disclosure of documents only when the claim is 'supported by available facts and evidence justifying the request to disclose evidence' is stricter than the disclosure requirements under English law.⁹⁷ Before the implementation of the Directive, commentators were concerned that a heightened standard for

⁹³ See also Practice Direction 31C – Disclosure and Inspection in Relation to Competition Claims.

⁹⁴ CMA, Applications for Leniency and No-action in Cartel Cases (OFT1495) July 2013, para 7.14.

⁹⁵ See also Peyer (n 56).

⁹⁶ *Pfleiderer* (n 66); *Donau Chemie* (n 67).

⁹⁷ Kwan (n 65) 459. See also Article 5(1)(3) Damages Directive.

initial disclosure would place claimants in a difficult spot after the English decision in *Cooper Tire*.⁹⁸ In *Cooper Tire*, the claimants sought to establish English jurisdiction by suing the English-domiciled daughter of a foreign-domiciled company where only the latter was an addressee of the Commission's synthetic rubber cartel decision.⁹⁹ The Court of Appeal held that they must demonstrate that the anchor defendant had actual knowledge of the cartel and implemented it in the UK. On the facts, the anchor defendant's knowledge must be sufficiently arguable. However, it was held that the claimants only needed to demonstrate the strength of their case after disclosure. Thus, *Cooper Tire* placed a minimal evidentiary burden on the claimants whereas the Directive would potentially require more facts and evidence before disclosure can be sought.¹⁰⁰

Overall, the implementation of the Damages Directive has reduced the scope of disclosure for claimants (bar changes brought upon with the Great Repeal Bill).¹⁰¹ The changes regarding disclosure will not only affect litigants in the High Court but also apply to proceedings in the Competition Appeal Tribunal. The Competition Appeal Tribunal adopted a Practice Direction to align its 2015 Competition Appeal Tribunal Rules with the Implementing Regulation on 14 March 2017.¹⁰² The Practice Directive directly refers to the proportionality test set out in Article 6(4) of the Damages Directive.¹⁰³ Access to leniency documents has been an issue in some cases and a more restrictive approach may not reduce the overall benefit of using wide-ranging disclosure with a relatively low threshold in the English courts and the CAT. Consequently, this is unlikely to reduce the incentives to bring cases in the English courts. However, the 'copy out' approach and the disparity between Article 6(4) of the Damages Directive and para 30 of the Implementing Regulation may lead to uncertainty and, consequently, costly litigation.

3.2. Joint and several liability

The new rules on joint and several liability will have a significant impact on claimants who settle their claims, who seek compensation from immunity recipients and defendants who seek contribution from their co-defendants. This is largely uncharted territory as the exemptions in the Damages Directive had no predecessors in English law.

⁹⁸ *Cooper Tire & Rubber Co Europe Ltd v Bayer Public Co Ltd* [2010] EWCA Civ 864.

⁹⁹ Commission Decision of 23 January 2008, (Case COMP/38.628 - *Nitrile Butadiene Rubber*) [2009] OJ C 86/ 7.

¹⁰⁰ *ibid.*

¹⁰¹ The Great Repeal Bill is the legislative act that will follow the UK's exit from the EU, ending the supremacy of EU law and implementing all existing EU law into national law.

¹⁰² Practice Direction Relating to Disclosure and Inspection of Evidence in Claims Made Pursuant to Parts 4 and 5 of the Competition Appeal Tribunal Rules 2015

¹⁰³ Para 5.2 Practice Direction.

Defendants that jointly commit a tort like, for example, breaching a competition statute, are jointly and severally liable. The Civil Liability (Contribution) Act 1978 states in section 1(1) that “[...] any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).” Section 2(1) specifies that the amount of “[...] contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question.” While section 2(1) provides for discretion to adjust contribution between jointly liable tortfeasors, the Implementing Regulation introduces new exemptions breaking with the principle that joint infringers are jointly and severally liable.¹⁰⁴

The Implementing Regulation introduces the contentious exemption for small- or medium-sized enterprises (SMEs).¹⁰⁵ SMEs are liable only for the damage done to their direct and indirect purchasers.¹⁰⁶ This exception applies if the firm has a market share of less than 5 per cent and if the application of the rules of joint and several liability “[...] would irretrievably jeopardize its economic viability and cause its assets to lose all their value”.¹⁰⁷ Ringleaders, repeat offenders or firms that have coerced others into participating in the illegal conduct cannot benefit from this exception.¹⁰⁸ Joint and several liability is further restricted in instances where the defendant has received full immunity from fines for cooperating with a competition authority.¹⁰⁹ The immunity recipient’s liability is restricted to the harm caused to its direct and indirect purchasers or providers of input.¹¹⁰ However, if claimants are not able to receive full compensation from the other co-infringers, they may fall back on the immunity recipient.¹¹¹ Limiting the immunity recipient’s exposure to civil liability is thought to encourage whistle-blowers to come forward with information about cartels. The motivation to enact such liability privilege is clear but the unintended consequences are likely to have the opposite effect. The leniency applicant is the fall-back option for any unsuccessful claimant and, thus, the leniency applicant does not know until the end of all proceedings whether he will face further claims. It is also not clear how this exception is going to work with limitation periods. To stop the period of limitation for claims against the immunity recipient from running, the claimant has an

¹⁰⁴ For a detailed analysis of the rules on joint and several liability in the Damages Directive, see Peyer (n 8). Defendants will normally join the potential co-defendant to the proceedings if they are not already joined. This so-called Part 20 Procedure is common in competition law litigation. See CPR rule 20.

¹⁰⁵ For a definition of ‘small or medium-sized company’, see Annex to Commission Recommendation (EC) No 2003/361 of 06 May 2003. A small or medium-sized firm has less than 250 employees and a maximum annual turnover of €50 million.

¹⁰⁶ Article 11(2) Damages Directive; Para 12(3) Implementing Regulation.

¹⁰⁷ Para 12(1)(b) Implementing Regulation.

¹⁰⁸ Para 12(2) Implementing Regulation.

¹⁰⁹ Paras 15 and 16 Implementing Regulation.

¹¹⁰ Para 15 Implementing Regulation.

¹¹¹ Para 15(e) Implementing Regulation.

incentive to keep the immunity recipient involved in the proceedings. Thus, despite having his exposure to liability limited, the immunity recipient is forced to remain involved in the proceedings (and bear at least part of the costs of it).

Settling defendants also benefit from a restriction of joint and several liability and limited contribution. If the claimant settles with one of the defendants, the claimant's overall claim is reduced by the settling defendant's share of the loss.¹¹² This rule is problematic and it will likely lead to more litigation because of the 'share of loss' criterion. Assume that the claimant has suffered a loss of €1,000 from a cartel that existed between two defendants. The claimant settles with one of the two defendants for €250. If the settling defendant caused half of the claimant's loss, i.e. €500, the claim will be reduced by €500 and not the €250 the claimant received. On the other hand, if the claimant manages to obtain a settlement payment of €750, his claim will be reduced by €500 rather than €750. Independent of the recovered settlement, the residual claim will be without the settling defendant's share of the loss. Thus, it is completely irrelevant whether the claimant received less or more than the defendant's share. The consequences are different though. In one case, the claimant is likely to be under-compensated, in the other scenario the claimant receives more than he has actually lost. This would violate the Damages Directive's prohibition of overcompensation.¹¹³

The 'share of harm' reduction of the claim is fraught with evidentiary problems. It assumes that it is simple to assess the real harm as opposed to what the settling defendant actually paid. The recent *Mastercard* cases in the CAT and in the High Court have demonstrated that it is not. Parties will not simply agree on a counterfactual on which the loss and share of loss calculation is to be based.¹¹⁴ Having to find out what the settling defendant's share in the overcharge was (rather than looking at the settlement payment the claimant received) will lead to complicated assessments. It is imaginable that the remaining defendants argue that the settling defendant's share was larger than the claimant assumed, whereas the claimant has an incentive to argue that the settlement payment is exactly the share of the harm caused by the settling infringer. These arguments make sense as the first reduces the claimant's residual claim and is, thus, beneficial for the remaining defendants. The latter argument makes sense for the claimant as he has an incentive to recover a 100% of his loss which he would not if the settling infringer's share was held to be larger than the sum for which he settled. But who then has to demonstrate that the residual claim is lower than sum alleged by the claimant after settlement? Only expensive litigation will help to answer this and related questions and, may,

¹¹² Para 39 Implementing Regulation.

¹¹³ Article 3(3) Damages Directive.

¹¹⁴ See *Sainsbury's* (n 27) and *Asda* (n 27) above. Although both cases are based on allegations of anti-competitive MIFs set by MasterCard, the Tribunal and the High Court came to opposing views as to the harm that was caused to the claimants due to the different counterfactuals that were constructed.

thus, increase the uncertainty which works as a deterrent for many who suffered a genuine loss from competition law infringements.

While a settlement will normally prevent the claimant from seeking more compensation from the settling defendant, para 40(3) Implementing Regulation (in line with the Damages Directive) permits recourse to the settling defendant if the remaining defendants are unable to compensate the claimant. The parties can, however, expressly exclude that fall-back option and are likely to do so in practice.¹¹⁵ One reason why litigants settle is to end the dispute and move on with business. Allowing one settling party to ask for more compensation after years of unsuccessful litigation against non-settling co-infringers appears to undermine the entire purpose of the settlement. Thus, excluding the claimant's fall-back option in a settlement agreement is likely to be the default option for settling defendants. The peculiar rules of joint and several liability are complemented by a limited scope of contribution. The non-settling defendants cannot ask the settling defendant for contribution with regard to the remaining claim.¹¹⁶

Even without the difficulties brought upon by the implementation of the Damages Directive, the recent decision of the High Court in *IMI Plc v Delta Ltd* is evidence of the complications that can arise in contribution proceedings.¹¹⁷ The first defendant (D1), who was sued for its participation in the copper fittings cartel and had settled with the claimant, sued another cartel member (D2) for contribution under the Civil Liability (Contribution) Act 1978. D2 can argue that it was not liable to the claimant but the law does not permit D2 to argue that D1 was not liable to C. The point is that it should prevent D1 from having to demonstrate in proceedings against D2 that it was actually liable. There is, however, one exception. D2 can argue that even on the factual basis established between D1 and the claimant, that D1 would not have been liable, i.e. it basically means that D1 had some defence available that would have allowed it to escape liability (so-called collateral defence). In *IMI*, D2 wanted to argue that the claimant's case against D1 was time-barred because the claimant knew about the cartel (which starts the running of the period of limitations). The question was whether this was a factual circumstance, i.e. D2 has to accept it or whether this fell within the remit of the collateral defence. The High Court held that this was the former, thus, ruling in favour of D1. The relevance of the case stems from the fact that the period of limitation is not applied between jointly

¹¹⁵ Para 40(3)(c) Implementing Regulation.

¹¹⁶ Para 41 Implementing Regulation; Article 19(2) Damages Directive.

¹¹⁷ *IMI Plc v Delta Ltd* [2015] EWHC 1676 (Ch).

and severally liable defendants to avoid a situation where D1 is forced to immediately sue potential contributors and co-defendants.¹¹⁸

The new rules for jointly and severally liable infringers are likely to increase uncertainty and the cost of litigation. First of all, it is not clear why those complicated exemptions were introduced into English law, especially against the background of the impending Brexit. This topic was not open to discussion in the UK Government's consultation on the implementation of the Directive.¹¹⁹ Thus, the exceptions, especially the limitations of joint and several liability for settling parties, have been copied without amendments into English law. Second, the rules assume that it is easy to work out what the co-infringer's share of the loss is. This assumption does not hold true and the assessment of the 'share of harm' will spawn satellite litigation. It is also noticeable that the Implementing Regulation is at pains to cover both supplier cartels (as intended by the Damages Directive) as well as demand-side cartels.¹²⁰ As I have argued elsewhere, the exemptions from joint and several liability in the Damages Directive, which have unfortunately become part of English law, are problematic because they clash with the objective of compensation that has driven the reform of private damages actions for competition law breaches.¹²¹

3.3. Opt-out group actions

The Consumer Rights Act 2015 introduced an opt-out group action for competition law claims in the CAT. The opt-out action complements the already existing opt-in action which proved to be rather ineffective. In this subsection, I will briefly discuss the issues that arose before the opt-out action was introduced and then look at the new framework in the CAT.

The Enterprise Act 2002 introduced the first competition-law specific opt-in representative action in the CAT.¹²² However, neither this special procedure nor the ordinary tools for claim aggregation proved to be fit for cases with a large number of harmed individuals. The existing procedural means to aggregate individual claims were either too complicated – requiring the identification of individual claimants before joining the claim – or attempts to use them to move towards a class-action system

¹¹⁸ Section 10(1)(3) Limitation Act 1980 mandates a 2 year period of limitation for contribution claims that is starting to run on the day a judgement has been given or an arbitration award has been made.

¹¹⁹ Department for Business, Innovation & Skills, 'Consultation: Implementing the EU Directive on Damages for Breaches of Competition Law (January 2016), para 7.31.

¹²⁰ Para 15 Implementing Regulation.

¹²¹ Sebastian Peyer, 'The Antitrust Damages Directive - Too Little, Too Late' (2015) CPI Antitrust Chronicle 1; Peyer (n 8).

¹²² S 47B (old) Competition Act 1998.

were thwarted by the courts.¹²³ In *Emeralds Supplies v British Airways* the claimants sought to bring an action on behalf of direct and indirect purchasers as a representative action under the Civil Procedure Rules (CPR) rule 19.6.¹²⁴ A representative action under rule 19.6 requires that all claimants have to have the same interest. The courts interpret this requirement narrowly and the Court of Appeal held that direct and indirect purchasers are unlikely to have the same interest.¹²⁵ The claimants also struggled to identify all potential members of the represented class at the outset and the judge found that to be an obstacle to claim aggregation.

The other route for claim aggregation was the representative opt-in action for damages in the CAT. The opt-in action was introduced with the Enterprise Act 2002,¹²⁶ allowing ‘specified bodies’, i.e. organisations that had received the approval from the Secretary of State, to bring claims on behalf of consumers.¹²⁷ The consumer organisation Which? brought a claim against JJB Sports, a retailer that had participated in a price-fixing agreement for Manchester United and England replica football shirts.¹²⁸ Despite a national advertising campaign, the consumer organisation only identified ca. 130 individuals who were able and willing to join the claim.¹²⁹ The case settled and, although those who joined the claim received £20 each if they could present proof of purchase of the shirt or present one of the affected replica shirts, it was ultimately regarded as a demonstration of the limitations of the opt-in action.¹³⁰

The limitations described in the previous section, especially the lack of incentives to pursue an opt-in action, have led to a widening of the CAT’s powers enabling it to allow opt-out collective

¹²³ For existing claim aggregation mechanisms, see CPR rules 19.1-19.5 (multiple party claims), rules 19.10-19.15 (group litigation orders) and CPR rule 19.6 (representative action). Group litigation orders are strictly speaking a case management tool rather than an action *sui generis*.

¹²⁴ *Emerald Supplies Ltd & Anor v British Airways Plc* [2010] EWCA Civ 1284. See also *Bao Xiang International Garment Centre & Ors v British Airways Plc* [2015] EWC 3071 (Ch), a representative claim that was struck out on the basis of lack of authority (i.e. the claimants did not authorise the claim) and abuse of process.

¹²⁵ *Emerald Supplies Ltd & Anor v British Airways Plc* (n 124). The same claimant succeeded and settled its claim against members of the air freight cartel in the US, *In Re Air Cargo Shipping Services Antitrust Litigation*, E.D.N.Y. Master File No. 06-MD-1775 (BMC) (VVP).

¹²⁶ See section 47B (old) Competition Act 1998.

¹²⁷ Only the consumer organisation Which? held the status of a specified body.

¹²⁸ *Price-fixing of replica football kit* (Case CP/0871/01) OFT Decision CA98/06/2003 of 1 August 2003.

¹²⁹ *The Consumers Association v JJB Sports PLC*, Case: 1078/7/9/07. It is estimated that this is only 0.1% of all individuals who purchased an article that was presumably affected by the cartel. See Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (2009) <http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf> accessed 28 March 2017.

¹³⁰ See the statement from Which? at <http://www.which.co.uk/news/2007/11/cartel-victims-need-better-rights-126297> (accessed 30 March 2017).

proceedings under section 47B(new) Competition Act 1998.¹³¹ According to section 47B(5) the Tribunal can make a collective proceedings order:¹³²

(a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and

(b) in respect of claims which are eligible for inclusion in collective proceedings.

The opt-out procedure is only available to claimants domiciled in the UK. Non-domiciled claimants have to opt into the class.¹³³ Claims are eligible for inclusion in collective proceedings if they raise the “same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.”¹³⁴ The 2015 CAT Rules specify that claims to be included in collective proceedings must be brought on behalf of an identifiable class of persons.¹³⁵ Further factors that are used to determine whether an opt-out action ought to be certified include, *inter alia*, the cost and benefits of a group action, whether the claims are suitable for an aggregate award, the size and the nature of the class, whether collective proceedings are an appropriate means for a fair and efficient resolution of the dispute and the availability of ADR.¹³⁶ The recent class certification hearings (or Group Litigation Order (GLO) hearing) in the two pending opt-out group actions have shown a tendency to refer to US class action jurisprudence to clarify and determine class certification in the UK.¹³⁷

The class of harmed individuals may be represented by either a member of the group or an individual that was not affected by the anticompetitive conduct if the Tribunal finds that it is just and reasonable for a person to do so.¹³⁸ The 2015 CAT rules specify which criteria must be considered to determine whether the representative is adequate for the class, including whether there are potential conflicts of interests, whether the representative would fairly represent the class,¹³⁹ and

¹³¹ For early assessments, see Andrew Higgins and Adrian Zuckerman, ‘Class Actions Come to England - More Access to Justice and more of a Compensation Culture, but they are Superior to the Alternatives’ (2015) 35 Civil Justice Quarterly 1; Rachael Mulheron, ‘A Spotlight on the Settlement Criteria Under the United Kingdom’s New Competition Class Action’ (2015) 35 Civil Justice Quarterly 14; Alma M Mozetic, ‘Collective Redress: a Case for Opt-out Class Actions in England and Wales’ (2015) 35 Civil Justice Quarterly 29; Craig, Bolster and Chhokar (n 15).

¹³² Section 47D Competition Act 1998 permits injunction group actions.

¹³³ S. 47B(11)(b)(1).

¹³⁴ S. 47B(6).

¹³⁵ 2015 CAT Rules r. 79(1)(a).

¹³⁶ 2015 CAT Rules r. 79(2).

¹³⁷ See oral hearings in *Dorothy Gibson v Pride Mobility Products Limited*, Case number: 1257/7/7/16; *Walter Hugh Merricks* (n 49).

¹³⁸ S. 47B(8).

¹³⁹ 2015 CAT Rules r. 78(2).

whether the representative is suitable to manage the proceedings.¹⁴⁰ The class representative is responsible for the cost of the representative action and must be able to pay the defendant's recoverable cost.¹⁴¹ A further control element to protect the members of the class is added by section 49A Competition Act 1998 that requires the CAT to approve any settlement on behalf of the class.

The problematic aspect of the new opt-out group action is the funding arrangement and allocation of unclaimed funds. Group actions are risky and, as the US experience demonstrates, an expensive endeavour. Contingency fee agreements, i.e. fee agreements that have a success fee calculated as a percentage of the damages award, are disallowed.¹⁴² Conditional fee agreements, i.e. fee agreements that determine a fee if the case is won ('no-win, no-fee agreement'), and after-the-event- insurance are still permitted.¹⁴³ The restrictions concerning contingency fee agreements were introduced to address concerns that those fee agreements could distort the incentives to bring an opt-out group action in the CAT.¹⁴⁴ Third-party funding of claims is possible in England and Wales and it remains to be seen whether investors are likely to fund competition litigation which is currently a rather high-risk undertaking.¹⁴⁵ Unclaimed awards can be paid fully or in part to the class representative.¹⁴⁶ It is also possible to transfer non-claimed compensation to a designated charity.¹⁴⁷ The arrangement for unclaimed funds and funding have been criticised as not giving sufficient incentives to bring opt-out actions in the first place. The fact that the Consumer Rights Act 2015 does not mention third-party funders and whether they are allowed to recover a profit from the compensation award, could undermine the opt-out action.¹⁴⁸ Section 47C(1) disallows exemplary damages in collective proceedings, further dampening the prospect of being rewarded for the investment.

Two opt-out actions are currently pending in the CAT.¹⁴⁹ In *Dorothy Gibson* the claimants brought a follow-on case against the manufacturers of mobility scooters for their participation in a price-fixing

¹⁴⁰ 2015 CAT Rules r. 78(3).

¹⁴¹ 2015 CAT Rules r. 78(2)(d).

¹⁴² Section 47C(8) Competition Act 1998. The Act refers to them as damages-based agreements.

¹⁴³ After the event (ATE) insurance mainly protects the litigant from an adverse cost order should the claim be unsuccessful. Due to the relatively high risk in competition proceedings, it is said that ATE insurance is not readily available.

¹⁴⁴ Department for Business Innovation & Skills, 'Private Actions in Competition Law: a Consultation on Options for Reform - Government Response' (29 January 2013) <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform> accessed 29 March 2017.

¹⁴⁵ See Rachael Mulheron, 'Third party funding and class actions reform' (2015) 131 Law Quarterly Review 291.

¹⁴⁶ Section 47C(6) Competition Act 1998.

¹⁴⁷ Section 47C(5). Currently this is the Access to Justice Fund.

¹⁴⁸ For more observations with regard to funding, see Higgins and Zuckerman (n 131) 12.

¹⁴⁹ *Dorothy Gibson* (n 137); *Walter Hugh Merricks* (n 49).

agreement. The second pending action is interesting as it is brought on behalf of 40 million consumers who were indirectly affected by the anticompetitive multilateral interchange fee set by MasterCard in its debit and credit card payment systems.¹⁵⁰ MasterCard is also litigating cases against claimants who were directly harmed.¹⁵¹ In the *Sainsbury's v Mastercard* the claimant, one of the large retailers in the UK, was awarded £68.5m (plus compound interests) in compensation. The CAT rejected the argument that Sainsbury's had passed on the overcharge to its customers. Some of the class members in the currently pending opt-out action have probably purchased products from Sainsbury's. Their claim is based on the assertion that the illegal multilateral interchange fee has been passed on to them. It is too early to tell how the CAT is going to address the issue but it certainly raises questions as to whether consumers have suffered a loss and whether they can recover for it.

4. Conclusions and outlook

The implementation of the Damages Directive has not lead to a major overhaul of the English framework for private actions but it has arguably restricted the prospect of compensation in some areas.¹⁵² Especially the new disclosure regime and the problems arising from joint and several liability are likely to negatively affect the incentives to bring a claim. However, many of the developments outlined in the previous sections are likely to encourage claimants to seek an injunction or ask for damages in either the CAT or the High Court. The first cases brought after the Consumer Rights Act 2015 came into force suggest that two trends are likely to emerge. The positive reception of the fast-track and injunction procedure in the CAT suggests that we will observe more stand-alone cases that address relatively small breaches of competition law. An injunction claim can also be used as a climbing stone for a compensation claim should the former be successful. The fast-track procedure in the CAT has had a promising start and it should enable small and medium-sized companies to enforce their rights. On the other end of the spectrum, the number of large-scale damages actions against members of international cartels is likely to rise in the immediate future. These are either follow-on or hybrid cases. The Mastercard litigation has documented that the English courts and the CAT are willing to engage with economic evidence in the court to quantify damages or, in the case of *Asda*, reject a claim. We are also likely to see an increase in the number of opt-out class actions and, potentially, an extension of opt-out actions to other civil law claims.

¹⁵⁰ See Commission decision of 19 December 2007 (COMP/34.579 MasterCard, COMP/36.518 EuroCommerce and COMP/38.580 Commercial Cards).

¹⁵¹ *Sainsbury's* (n 27); *Asda* (n 27).

¹⁵² Kwan (n 65); Arianna Andreangeli, 'Competition Litigation in the EU and the UK After the 2014 Antitrust Damages Directive' (2016) 35 Civil Justice Quarterly 342.

These observations have been made without mentioning the Brexit so far. This is the big unknown that is likely to significantly alter the rules for competition law enforcement in general, and private antitrust enforcement in particular. The UK's departure from the EU will, in the long run, lead to a divergence of the substantive competition rules. Depending on the Great Repeal Bill, decisions of the European Commission will no longer be binding on UK courts – and they are the basis for most follow-on and hybrid cases at the moment. One commentator argues that this will not diminish the attractiveness of the UK as a forum for competition claims.¹⁵³ Claims that are based on pre-Brexit infringements can most likely be brought in the English courts. If the Great Repeal Bill deprived victims of the possibility to bring such actions, it will most likely be in breach of Article 1 of Protocol 1 to the European Convention on Human Rights. However, the situation for claims arising post-Brexit is currently unclear. Beale argues that the Private International Law (Miscellaneous Provisions) Act 1995, which is currently suspended and the Rome II Regulation applied,¹⁵⁴ will allow EU law to be applied in the English courts.¹⁵⁵ In the absence of an equivalent to the Brussels Regulation (recast), there remains doubt as to the ability of private parties to establish jurisdiction in the English courts.¹⁵⁶

¹⁵³ <https://competitionbulletin.com/2016/11/21/competition-law-claims-post-brexit-the-issue-of-applicable-law/> (accessed 30 March 2017).

¹⁵⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

¹⁵⁵ Beale (n 153).

¹⁵⁶ <https://competitionbulletin.com/2016/11/22/islands-of-jurisdiction-for-competition-damages-claims-in-a-post-brexit-world/> (accessed 30 March 2017).