Competition law redress

A guide to taking action for breaches of competition law

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CMA55

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1. Introduction

1.1 Effective systems of redress, including court actions brought by private parties, are important: they complement and reinforce public enforcement and enable those who suffer harm from breaches of domestic and EU competition law to obtain redress, be it compensation or another form of relief.

1.2 This guide is intended to provide an outline for individuals and businesses of their rights to bring private actions for such redress, for breaches of competition law. Since 2010, when the Office of Fair Trading (OFT)[1] published a *Quick guide to private litigation,* the Consumer Rights Act 2015 has introduced significant reforms to the competition law private actions landscape. Implementation of the European Damages Directive[2] will bring further changes. These reforms are intended to make it easier for individuals and businesses to seek redress where they have suffered harm as a result of competition law being broken.

1.3 Competition law aims to promote, among other things, innovation, consumer choice, and lower prices for consumers and other customers. Where individuals or businesses, including customers and competitors, suffer harm due to others breaking competition law they are entitled to seek redress including compensation for any loss and, if necessary, may seek an injunction to bring the anti-competitive activity to an end.[3] The CMA[4] has developed a range of materials for small businesses and individuals including simple visual guides, short case studies and videos which explain the main types of unlawful, anti-competitive activities.

1.4 This guide provides high-level general information only and seeks to avoid use of technical language or jargon. Anyone considering private competition law litigation should first seek legal advice. Such advice would likely cover, among other things, a cost-benefit analysis of bringing an action, the different stages of the process, and the possible outcomes and risks. This guide is not intended to cover all competition-related private actions that can be brought. It does not, for instance, cover the possibility of bringing an action for loss

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[1] The OFT was one of the CMA's predecessor bodies.
[2] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014. The Directive will be implemented in the UK by 27 December 2016.
[3] An injunction may be sought after a court (including the Competition Appeal Tribunal) has decided in a claimant's favour. A claimant may also seek an interim injunction for an alleged breach of competition law, pending the full hearing of the case. See further paragraphs 5.7 to 5.9 below.
[4] The CMA is the UK's economy-wide competition and consumer authority. It is responsible for ensuring that competition and markets work well for consumers, businesses and the economy as a whole. Further information on the CMA can be found on the CMA's webpages. The CMA's primary duty is to promote competition, both within and outside the UK, for the benefit of consumers.

suffered where a business has failed to comply with an order made or undertaking given under the Enterprise Act 2002 (EA 2002).[5]

[5] This is provided for in relation to orders made and undertakings given in the context of mergers under sections 94(3) and (4) of EA 2002 and in the context of market investigations section 167(3) and (4) of EA 2002. See also the guidance in paragraph 1.30 of CC8 Merger Remedies: Competition Commission Guidelines and paragraph 91 of CC3 Guidelines for market investigations: Their role, procedures, assessment and remedies.

2. Initial questions when considering bringing a claim

2.1 This section outlines how competition law can be broken and what a claimant will have to subsequently prove in order to obtain redress.

A. Has competition law been broken?

2.2 In essence, the key provisions of EU and UK competition law[6] prohibit two types of behaviour:

- Anti-competitive agreements between businesses, and
- Abuses of a dominant market position by businesses.

Anti-competitive agreements – Article 101 and Chapter I prohibition

2.3 Agreements[7] between businesses which have as their object or effect the prevention, restriction or distortion of competition are prohibited and rendered void (and therefore unenforceable) under Chapter I of the Competition Act 1998 (CA98) and Article 101 of the Treaty on the Functioning of the European Union (TFEU), subject to the possibility of exemption. The types of agreement and practices that are most likely to be caught by these prohibitions include:

- fixing the prices to be charged for goods or services – this is particularly so between competitors but, under certain circumstances, may also include collusion between distributors and retailers;
- 'bid-rigging', which involves competing businesses that are invited to bid in competitive tenders secretly colluding so that, contrary to appearances, they are not fully competing for the contract. Bid-rigging tends to drive up prices by removing genuine competition between bidders;
- limiting production, technical development, markets or investment;
- sharing markets or sources of supply;

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[6] The UK provisions in the Competition Act 1998 apply where there is an effect on UK trade; the European provisions in Articles 101 and 102 of the Treaty on the Functioning of the European Union apply where the effect is on trade between EU Member States. It is, however, usually unnecessary for the claimant to specify which of EU or UK law applies to the agreement or conduct. The European and UK prohibitions are similar in substance. Under section of the 60 CA98, the courts are required to interpret UK competition law consistently with the equivalent EU provisions so far as possible.

[7] This is not restricted to legally binding agreements and also covers 'concerted practices' and 'decisions of associations of businesses'.

- disclosure of confidential and commercially sensitive information.

2.4 These prohibitions can be illustrated by a number of past public enforcement cases.

(a) In August 2015, the CMA found that an association of private ophthalmologists had broken competition law by recommending that members did not accept lower fees offered by an insurer and that they charge insured patients higher self-pay fees. The association also circulated a detailed price list to its members and shared its members' future pricing and business intentions.[8]

(b) In May 2015, the CMA fined an association of estate and lettings agents, three of its members, and a newspaper publisher for breaking competition law by entering into anti-competitive arrangements to deter or prevent the advertising of certain fees in a newspaper.[9]

(c) In March 2014, the OFT found that two pharmacies entered into a market-sharing agreement with each other. The substance of the agreement was that each pharmacy would not seek to supply prescription medicines to care home customers of the other.[10]

(d) In March 2013, the OFT found various forms of unlawful cartel activity between Mercedes-Benz and certain of its commercial vehicles dealers, imposing fines totalling over £2.8 million: the precise nature of the different infringements varied but all contained at least some element of market sharing, price co-ordination or the exchange of commercially sensitive information.[11]

(e) In September 2009, the OFT found that over 100 construction firms had engaged in unlawful anti-competitive bid-rigging activities, mostly in the form of 'cover pricing.[12,13]

Abuse of a dominant position – Article 102 and Chapter II Prohibition

2.5 A business holds a dominant position in a market if it is able to behave to an appreciable extent independently of the normal constraints imposed by

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[8] See Private ophthalmology: investigation into anti-competitive information exchange and pricing agreements.
[9] See Property sales and lettings investigation - Infringement decision.
[10] See Supply of care home medicines: market-sharing agreement.
[11] See Mercedes-Benz: distribution of commercial vehicles (trucks and vans).
[12] Cover pricing is where one or more bidders in a tender process obtains an artificially high price from a competitor. Such cover bids are priced so as not to win the contract but are submitted as genuine bids, which gives a misleading impression to clients as to the real extent of competition. This distorts the tender process and makes it less likely that other potentially cheaper firms are invited to tender.
[13] See Construction industry in England: bid-rigging.

competitors, suppliers and customers. It is not unlawful for a business to hold a dominant position but Chapter II of the CA98 and Article 102 of the TFEU prohibit abusing such a position. In general an abuse will involve a dominant business restricting the degree of competition it faces and/or exploiting its market position unjustifiably.

2.6 The types of activity most likely to be caught by these prohibitions include:

- Predatory low pricing aimed at driving a rival competitor out of business;
- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, putting them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, are unconnected with the subject of the contracts; and
- refusing to supply an existing long standing customer without objective good reason.

2.7 Again, several past public enforcement cases help illustrate these prohibitions:

(a) In April 2011, the OFT found that a pharmaceutical company had abused its dominant position in the market for the supply to the NHS of certain heartburn medicines by withdrawing and de-listing a product from NHS prescription, thereby preventing full generic competition in relation to related prescription medicines.[14]

(b) A dominant bus company introduced a ‘no frills’ service that charged below cost in order to make it impossible for a new entrant to compete. Once that new entrant was forced out of the market the no frills service was removed. The OFT fined the dominant company for abusing its

[14] See Reckitt Benckiser: alleged abuse of a dominant position.

dominant position. On the basis of that decision, the new entrant's liquidators successfully sued the dominant company for damages.[15]

(c) A pharmaceutical company that had an almost complete monopoly sold sustained release morphine in the community at ten times the price it sold the same product in hospitals. This differential pricing was intended to exclude competitors from entering the market. The company was ultimately fined £2.2 million.[16]

(d) A crematorium in Hertfordshire was owned by a firm of funeral directors who refused access to the facilities to a competing firm of funeral directors. As there were no other crematoria in the local area, that refusal undermined the ability of the other funeral directors to compete. The CAT ultimately found that refusing access in this way was outside the normal practice in the industry and an abuse.[17]

B. What proof is there that competition law has been broken?

2.8 In order to receive compensation or other redress, a claimant will need to prove that competition law has been broken. This may involve gathering evidence and undertaking economic analysis. There are, however, a number of instances where proving a breach is unnecessary, in particular:

(a) The CMA, a sector regulator[18] or another European competition authority (including the European Commission)[19] has made a decision that competition law has been broken. This allows for 'follow-on' actions in which an authority's findings are used as proof of an infringement. See further paragraphs 3.6 to 3.8 below.

(b) A court has awarded compensation following collective proceedings or a collective settlement in relation to an infringement and the individual or business falls within the class of persons eligible to receive that compensation. In this instance while the individual or business seeking compensation will need to provide evidence of their eligibility to claim they

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[15] See CAT judgment in connection with a claim for damages by 2 Travel Group PLC against Cardiff City Transport Services Limited.
[16] See CAT judgment: Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading.
[17] See CAT judgment: M.E. Burgess, J. J. Burgess and S. J. Burgess v the Office of Fair Trading and W. Austin & Sons (1), Harwood Park Crematorium Ltd (2), The Consumers' Association (3).
[18] For a number of industries, sectoral regulators apply and enforce Articles 101 and 102 of the TFEU and Chapter I and Chapter II of the CA98 in the UK concurrently with the CMA. The sector regulators and the scope of their concurrency as at 1 May 2016 are set out in the Glossary.
[19] See paragraph 3.6 below regarding potential reliance on infringement decisions made by competition authorities in other European Union Member States.

will not need to prove that competition law has been broken. See further paragraphs 3.10 to 3.17 below.

(c) The infringing business or businesses have admitted breaking competition law or, even if they have not conceded that they have broken competition law, are prepared to offer a settlement. This may be based on a CMA-approved redress scheme or a settlement reached after an alternative dispute resolution process. These are discussed further in paragraphs 3.18 to 3.23 below.

C. Is there evidence that a business breaking competition law caused you or your business loss?

2.9 Evidence of competition law being broken does not in itself entitle any individual or business to receive redress. An individual or business will also need to prove that a competition infringement has caused them loss. In practice, they will need to prove that their loss would not have occurred 'but for' competition law being broken, and that the type of loss suffered was reasonably foreseeable. Proving such causation and loss can be complex, often requiring expert evidence from accountants and economists. Significant legal expense may also be incurred.

2.10 It is not necessary to individually prove causation and loss to benefit from a redress scheme or collective proceedings. In both instances, however, those who suffered no loss are unlikely to be eligible for compensation. Each scheme or collective proceeding will have its own criteria for a person to show they are eligible to receive compensation.

D. Other considerations

2.11 Given that seeking redress, in particular through litigation, may involve significant time, complexity, and cost in some cases, as well as the questions in A. to C. above, it will also be important to consider:

(a) the most appropriate way to seek compensation or redress – see section 3 below;

(b) whether you are within the time limits for seeking redress – see section 4 below;

(c) the cost of bringing an action – see section 6 below.

3. Ways to seek compensation or redress

A. The Courts

3.1 Claims for redress can be brought in the following UK courts which have jurisdiction to hear competition cases:

- The High Court of England and Wales;[20]
- The Court of Session and Sheriff Court in Scotland;[21]
- The High Court of Northern Ireland; and
- The Competition Appeal Tribunal (the CAT).[22]

3.2 In this document, the term 'ordinary courts' is used to refer to the High Court of England and Wales, the Court of Session and Sheriff Court in Scotland, and the High Court of Northern Ireland.

B. Types of action

3.3 A claimant can start either a standalone action or a follow-on action in the ordinary courts or the CAT.

Standalone actions

3.4 A standalone action is a claim brought where the claimant seeks itself to prove that competition law has been broken without relying on an infringement decision made by the European Commission, the CMA or another competition authority (or a judgment of an appeal court confirming such a decision).

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[20] Specifically, the Chancery Division and the Commercial Court (a sub-division of the Queen's Bench Division) may hear cases: see Rule 30.8 of the Civil Procedure Rules.
[21] The exclusive competence of the sheriff court is for actions of payment of money not exceeding £100,000 (S. 39 of the Courts Reform (Scotland) Act 2014).
[22] The CAT is a specialist judicial body whose function is to hear and decide cases involving competition or economic regulatory issues. Typically cases are heard before a tribunal consisting of three members: either the President or a chairman and two ordinary members. The chairmen are judges or other senior lawyers. The ordinary members have expertise in law, business, accountancy, economics or other related fields. The CAT is based in London and has jurisdiction across the whole of the UK. While hearings are typically held in London the CAT has heard cases with a particular regional interest in that region.

3.5 While the CAT has similar powers to the ordinary courts in relation to competition cases, it is important to note the different period in which claims can be brought – this is discussed further in section 4 below.[23]

Follow-on actions

3.6 Where the CMA,[24] a sector regulator or the European Commission has made a final decision that competition law has been infringed, that decision will be binding on both the ordinary courts and the CAT.[25] A claimant can therefore use the decision as proof that competition law has been broken and may rely on certain findings of fact in it, so that in most cases they will need to prove only that they have suffered loss from the infringement.

3.7 An infringement decision becomes final when the time limit for an appeal has expired, any appeal has been withdrawn, dismissed, or discontinued, or the appeal court has confirmed the decision and all further substantive appeals have been exhausted.[26]

3.8 It may be that an existing infringement decision by a competition authority does not relate to precisely the same facts and/or parties that a claimant needs to establish their claim. In those circumstances, a claimant will have to bring a claim involving at least some standalone elements rather than a pure follow-on claim. A competition authority's decision will still be relevant, however, and it is likely that a court will admit the decision as evidence and, if so, regard it as highly persuasive.

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[23] The CAT is unable to grant interdicts in relation to Scottish proceedings, see paragraph 5.8 below.
[24] Or its predecessor the OFT.
[25] As regards decisions of other National Competition Authorities in other EU Member States, under the EU Damages Directive (see note 2 above), a final infringement decision of any national competition authority or review court of any EU Member State is treated as 'at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties'. This is intended to make it easier for claimants in the UK who have suffered loss as a result of a competition law infringement found in another EU country to bring an action for damages in the UK or other EU Member States.
[26] Decisions of the CMA or other UK competition authority may be appealed to the CAT, and subsequently to the Court of Appeal and Supreme Court in certain circumstances. Similarly, European Commission decisions may be appealed to the General Court and subsequently to the Court of Justice of the EU. Procedural appeals which relate to, for instance, the level of fines do not affect whether an infringement decision is considered final.

- Copies of decisions by the CMA, OFT and sector regulators made under the CA98 are accessible from the public register available on the CMA's web pages.
- European Commission decisions are published on their website.
- Decisions of competition authorities in other EU member states are likely to be published on their respective websites. A full list of the authorities is available on the European Commission website.

Fast-track claims before the CAT

3.9 When bringing a claim before the CAT, individuals or companies (generally, but not exclusively, small or medium sized enterprises (SMEs)) are able to make an application for the case to be handled according to a 'fast-track procedure'.[27] This is intended to help consumers and small business challenge anti-competitive behaviour by allowing less complex claims to be brought and decided quickly with limited risk as to costs.[28] In fast-track cases, the main substantive hearing of the case will normally take place within 6 months – sooner if practicable. The legal costs that the successful party can recover may also be capped. This may help to reassure claimants concerned about the possibility of – should their claim not succeed – having to pay very substantial costs incurred by well-resourced defendants. The CAT will determine whether the claim can be brought using the fast track procedure and in doing so will take into account, amongst other factors, whether one or more of the parties are SMEs, the complexity and novelty of the case, its value, the number of witnesses required, the extent of disclosure and documentary evidence, and whether the final hearing would be expected to last three days or less. A claim that starts on a fast track may be moved off it if the CAT considers it is no longer suitable.

C. Collective proceedings

3.10 Both follow-on and standalone actions may be brought before the CAT[29] by a representative person or body on behalf of a defined group of other

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[27] The procedure is governed by Rule 58 of the Competition Appeal Tribunal Rules 2015 (SI 2015 No.1648), see the CAT Rules and Guidance.
[28] It should be noted that the fast track procedure cannot be used in collective actions (as to which see paragraphs 3.10 to 3.14 below).
[29] Currently, there is no statutory basis for representative actions of this type in the ordinary courts, although there are a number of mechanisms for collective claims under existing procedural rules. These include consolidation of claims; use of a test case; a group litigation order (GLO, under Civil Procedure Rules (CPR) 19.11, although a GLO is not technically a group action as each claimant must file its own claim); or a

individuals or businesses. These are known as collective proceedings.[30] In a collective proceedings action several claims by different claimants are brought together as a single action. Each claim must raise the same, similar or related issues of fact or law and be suitable to be brought together. A collective claim is started by a representative applying for a collective proceedings order (CPO). The claim will only proceed if the CAT considers it is just and reasonable to grant a CPO; this will include considering the suitability of the representative. They will also consider whether the collective proceedings should be 'opt-in' or 'opt-out' and the 'description of a class of person whose claims are eligible for inclusion'. These are known as class members. A class member might, for example, be a purchaser of a product who has had to pay more for it because a retailer or manufacturer infringed competition law.

3.11 Collective proceedings can be either **opt-in** or **opt-out**.

(a) **Opt-in** collective proceedings are where the claim is brought on behalf of each class member who notifies the representative that they wish to be included. A time limit will be set by which each eligible class member will need to opt-in and if they do not do so by that point will be unable to benefit from any award resulting from the collective proceedings.

(b) **Opt-out** collective proceedings are automatically brought on behalf of all class members without them needing to notify the representative that they wish to be included. Instead, any class member who does not want to be included in the claim will need to notify the representative by a certain time. Class members who are not domiciled in the UK will need to opt-in to collective proceedings irrespective of whether they are opt-in or opt-out.

3.12 If the CAT awards damages in respect of collective proceedings, it will make an order specifying how the money is to be paid to the class members. In opt-out proceedings, if damages are not claimed by class members by a certain time they will be paid to charity unless the CAT orders them to be paid to cover the representative's costs.

3.13 It is possible to bring an individual standalone or follow-on action in relation to a matter even where there is an existing collective proceedings action. However, in such circumstances a claimant must either have opted-out or not have opted-in to the existing collective proceedings, so that they do not claim twice for the same infringement.

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representative action (under CPR 19.6). Aggregation of multiple claims using existing mechanisms has proved problematic in some instances. Further discussion of these rules is beyond the scope of this guidance.

[30] See sections 47B to 47E of the CA98.

3.14 It should also be noted that simply being within the class eligible for any award does not make such a person liable for costs, irrespective of the outcome of the case. However, costs may be borne by the class representative, who the CAT may order to pay some or all of their own or a defendant's costs. In some cases, an individual class member may be liable for costs if they pursue individual issues or make an individual application during the course of the proceedings.[31]

Collective settlements[32]

3.15 A business may seek to settle a collective proceedings claim in advance of its determination by the CAT.[33] It will be for the representative and the defendant to agree in principle the details of a proposed settlement but they will then need the CAT to approve the settlement on the grounds that its terms are just and reasonable.

3.16 It is also possible to settle a claim suitable to be brought as a collective proceedings action before a collective proceedings order is made.[34] In such a case the CAT first considers whether to grant a collective settlement order based on the same criteria as it would grant a CPO (see paragraph 3.10 above). It then considers whether to grant an order approving the settlement using the same test set out in paragraph 3.15 above, ie that doing so is just and reasonable.

3.17 The collective proceedings regime is intended to make it easier for individuals and businesses who have suffered damage as a result of competition law being broken to receive compensation. However, it may be beneficial to seek legal advice to assess whether membership of a collective proceedings action or accepting a collective settlement offer is preferable to pursuing an individual action.

D. Statutory redress schemes

3.18 A business being investigated by the CMA,[35] or against whom the CMA, a sectoral regulator, or the European Commission has made an infringement decision, may apply to the CMA or the relevant sectoral regulator for approval of a redress scheme. To be approved, a scheme must have been devised in

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[31] See Rule 98 of the 2015 CAT Rules.
[32] Settlements are also possible in individual actions – see section E of this chapter, below.
[33] See section 49A of the CA98.
[34] See section 49B of the CA98.
[35] Or sectoral regulator (see note 24 above).

accordance with a statutory process and must contain certain information and terms. A business may however apply for conditional approval of an outline scheme during the course of an investigation. In those cases, the approval is given subject to the other requirements being met later. Detailed guidance on approved voluntary redress schemes is available on the CMA's web pages.[36]

3.19 The specific terms of a scheme are devised by an independent chairperson and board of experts appointed for that purpose and put to the CMA for approval. The CMA does not consider in detail the underlying elements of the scheme but rather focusses on the process by which the scheme was devised and its fairness, reasonableness, and adequacy.

3.20 The application process and eligibility requirements will vary from scheme to scheme but should not be burdensome. Each scheme will include an independent complaints process which will be free of charge. This allows those who have been found ineligible for compensation under the scheme to challenge this decision. The CMA is not involved in any such challenges.

3.21 Applying for compensation under a statutory redress scheme approved by the CMA is entirely optional. Potential beneficiaries who decide not to apply for redress under an approved scheme do not lose their right to seek compensation through other means.[37] The process of accepting compensation through a redress scheme is intended to be straightforward and should not require a claimant to incur costs. As with collective proceedings however, potential claimants may wish to consider professional legal advice in choosing whether to accept redress through an approved scheme or seek compensation through other means.

E. Types of dispute resolution

3.22 The options for seeking redress explained above are provided for in statute and most involve litigation, either in the ordinary courts or the CAT. In the absence of existing collective proceedings or a statutory redress scheme, such litigation may be expensive (see chapter 6 below on costs). An individual or business may instead be able to resolve a competition law dispute without going to court. Even if litigation seems likely, courts encourage parties to make genuine attempts to settle cases before litigation and trial. The CAT for instance may consider staying proceedings while the parties seek to reach a compromise to settle proceedings.[38] Given this, legal advice should be sought

[36] See CMA (2015), *Guidance on the approval of voluntary redress schemes for infringements of competition law*.
[37] The consequences of accepting redress under a statutory redress scheme is are set out in paragraphs 2.38 to 2.41 of the CMA's redress scheme guidance – see note 36 above.
[38] See the 2015 CAT Rules regarding the response to a collective action claim form.

at an early stage of considering litigation to assess the strength of any claim and whether a private action or an alternative method of dispute resolution should be pursued.

3.23 Types of alternative dispute resolution include:

(a) **Negotiation** – this is an attempt to reach agreement on matters in dispute in the absence of third party assistance. It is informal and flexible. Negotiations are usually conducted on a confidential and 'without prejudice' basis, meaning that any admissions made during negotiations cannot be used as evidence if the matter ultimately goes to court.

(b) **Mediation** – this usually involves a neutral third party who helps identify the issues in dispute, explore options for resolution, and attempts to bring about agreement between the parties. Mediation is typically facilitative, that is the mediator's role is primarily to help the parties reach an agreement. It is, however, possible in certain instances for the mediator to evaluate a claim and their determination may or may not be-binding.

(c) **Non-statutory redress scheme** – a business may create a scheme to pay compensation for a breach of competition law outside of the statutory framework discussed in section D of this chapter, above. Those accepting payment under such a scheme may be required to waive any right to take further action. They will not necessarily be afforded the same protections as under the statutory scheme (for example the independent complaints process and other elements of the statutory scheme intended to ensure compensation is calculated under a fair process). This does not mean that the compensation will be inadequate but greater caution may be required.

(d) **Arbitration –** parties voluntarily submit themselves to the determination of the dispute by one or more private arbitrators. While voluntary, the agreement to settle the dispute through arbitration may be a contractual term between the parties. The outcome of an arbitration is binding, and in most circumstances is enforceable in court.

4. Time for bringing a claim

4.1 Whether in the ordinary courts or the CAT, a claim must be brought within a certain time from when the competition law infringement occurred. This is known as the limitation period.

4.2 Currently, the limitation period varies depending on the court in which claims are brought. The limitation rules can be complex and there are a number of exceptions and nuances to the basic rules. It is therefore particularly important to consider seeking legal advice on this developing area of the law.

4.3 Some points to consider include:

(a) Claims for a breach of competition law brought in the High Court in England and Wales and the Northern Ireland High Court must generally be brought within six years of the date on which the cause of action arose (which in competition cases will normally mean when the claimant suffered loss). Where a defendant has concealed essential facts relating to the infringement, the six year period may not commence until the claimant discovers the essential facts.

(b) Similar claims brought in a Sheriff Court or the Court of Session in Scotland must be brought within five years of the date the claimant suffered loss.

(c) Actions in the CAT where the claim arose after 1 October 2015 are subject to the same limitation period as in the ordinary courts (six years in England and Wales and Northern Ireland, five years in Scotland). Where a claim arose before 1 October 2015 the limitation period is two years.[39]

4.4 However, it is important to note that once the Damages Directive (see note 2 above) is implemented, there may be further changes to limitation periods.

[39] The limitation period in this context starts to run at a different time to those noted in paragraph 4.3(a) above. See Rule 31 of the 2003 CAT Rules.

5. Relief available

5.1 There are three main types of relief available to a successful claimant.

(a) damages;

(b) an injunction (in Scotland, an interdict);[40] and

(c) a declaration (in Scotland, a declaratory).

5.2 The ordinary courts are able to provide all three forms of relief. In England and Wales and Northern Ireland the CAT is able to award damages and/or an injunction. In Scotland the CAT can only award damages.

5.3 A claimant may be awarded more than one type of relief in the same case.

A. Damages

5.4 Damages are generally awarded on a compensatory basis, that is, to cover the amount lost by the claimant because of the defendant's breach of competition law. For example, if prices have been artificially inflated due to the operation of a cartel the difference between the price paid and the price that would have been charged but for the cartel may be recoverable. It may also be possible to claim for loss of sales if the claimant can show that it lost sales because it charged its own customers higher prices which reflected the increased prices the claimant faced as a result of the breach of competition law. A claimant may also seek interest on any damages from the date the infringement occurred to the date of the court's judgment.

5.5 This principle of compensatory damage can be difficult to apply in practice. In particular, it may be difficult to assess the amount of compensation due where part of the immediate loss suffered has been passed on to a subsequent purchaser. For example, a retailer who has been overcharged by a supplier as a result of a cartel may pass on part, or all, of the overcharge to customers, reducing the amount of loss it suffered. Calculating damages for indirect purchasers can be even more complex.

5.6 In collective proceedings the CAT may award damages without undertaking an individual assessment of the loss suffered by each individual. Instead it

[40] References to an injunction in this guide should be taken to include references to an interdict.

can group several claims together (see paragraph 3.10 above). The CAT cannot, however, award exemplary damages in collective proceedings.[41]

B. Injunctions

5.7 An injunction is an order requiring the defendant to do a specified act or refrain from doing a specified act. Whether to grant an injunction is at the discretion of the CAT or the relevant ordinary court which may grant an injunction 'in all cases in which it appears to the Court to be just or convenient to do so'.[42] In some competition law cases an injunction may be a more appropriate remedy than damages. For example where a claim relates to an unlawful refusal to supply goods or services, an injunction requiring supply may be more beneficial than damages compensating for losses arising out of that refusal.

5.8 A claimant may also seek an interim injunction for an alleged breach of competition law. This requires a defendant to take certain action (or refrain from acting) pending the full hearing of the case. Interim injunctions are typically granted where there is a risk that the claimant will suffer irreparable harm by the time the trial comes to court. Injunctions may also be sought to preserve evidence.

5.9 An interim injunction will not be granted by a court or the CAT unless they are satisfied that there is a serious case to be tried. Generally, if this test is met they will then go on to consider where the 'balance of convenience' lies.[43] This considers whether, if an interim injunction is not granted and a claimant is subsequently successful, they can nonetheless be adequately compensated through damages. The court may make the grant of an interim injunction conditional on the claimant agreeing to compensate the defendant for the cost of the interim injunction, if the defendant is ultimately successful. Under the CAT fast track procedure (see paragraph 3.9 above) the CAT may grant an interim injunction without making it conditional on the claimant offering such an undertaking, or may allow an undertaking to be capped.

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[41] See section 47C(1) of the CA98.
[42] Section 37(1) of the Senior Courts Act 1981, which applies to the High Court in England and Wales. The High Court in Northern Ireland applies similar principles without a statutory underpinning. See also section 47D of the CA98 which applies these principles to the CAT in relation to England, Wales and Northern Ireland.
[43] The court or CAT may also apply a higher threshold to the grant of interim relief if granting relief will effectively dispose of the action.

C. Declaration

5.10 The ordinary courts have the power to make a declaration that a certain agreement or conduct is anticompetitive. For example, the court might declare that an agreement or certain clauses in an agreement breach competition law and are therefore unenforceable. A declaration may be available in conjunction with other remedies.

6. Costs

6.1 A claimant may be able to recover some or all of its costs of bringing a successful action from the defendant. Such costs may include, for example, lawyers' costs and the cost of expert witnesses used in preparing evidence for the case. Both the ordinary courts and the CAT have a wide discretion in determining costs. Therefore, in deciding whether to award costs they may take a number of factors into account, including the parties' conduct in the case and any attempt to reach a settlement. It should be noted that costs may be capped where the fast-track procedure discussed at paragraph 3.9 above is used.

6.2 As the general rule is that costs 'follow the event', an unsuccessful claimant may be liable for the defendant's costs. The defendant may seek security for costs to ensure that the claimant would be able to meet any order to pay the defendant's costs if ordered to do so. In the CAT, opting-in or not opting-out of collective proceedings does not make individuals or businesses liable for costs if the action is ultimately unsuccessful; only the class representative is liable. A class member would only become liable for costs if they pursued individual issues or made an individual application during the course of the collective proceedings.

6.3 In relation to the funding of any private litigation there may be a range of potential funding options available, for example Damages Based Agreements (although these are not permitted in opt-out collective proceedings), conditional fee agreements, or third-party funding arrangements. These can be complicated and are beyond the scope of this guidance. Potential claimants may wish to consider seeking legal advice on costs and funding options.

7. Glossary

Term	Meaning
ADR	Alternative Dispute Resolution – dispute resolution methods which do not involve court proceedings. See paragraph 3.23.
CA98	The Competition Act 1998.
CAT	The Competition Appeal Tribunal – a specialist judicial body whose function is to hear and decide cases involving competition or economic regulatory issues.
Cause of action	The facts that entitle a person to sue.
CMA	The Competition and Markets Authority.
Collective proceedings	A legal action in which a claim is brought by a representative on behalf of a certain category of claimants. See paragraphs 3.10 to 3.14 above.
Collective proceedings order (CPO)	An order of the CAT which allows collective proceedings to continue and sets out the basis on which they do so.
Collective settlement	The settlement of collective proceedings or a claim suitable to be brought as collective proceedings. See paragraphs 3.15 to 3.17 above.
Damages	Financial compensation that the law awards to a person that has been injured by the actions of another.
Damages Directive	European Directive 2014/104/EU on antitrust damages actions.
Declaration	This is a court decision setting out the rights or legal position of the parties. In a competition law context this includes the enforceability of an agreement between them. See paragraph 5.11 above.
EU National Competition Authorities	Competition authorities of EU Member States (for example the CMA). A list of these is available on the European Commission website.

Fast-track procedure	This is a procedure for straightforward competition cases which can be brought to trial within no more than six months of allocation and, in general, trial must take no longer than three days. See paragraph 3.9 above.
Follow-on action	This is a competition law action where an existing regulatory decision is used as proof that competition law has been broken. See paragraphs 3.6 to 3.8 above.
Injunction	A court order prohibiting a person from taking a particular action or requiring them to take a particular action.
Limitation period	The period of time within which court action must be commenced.
OFT	The Office of Fair Trading – one of the predecessor bodies of the CMA.
Relief	The means by which a court enforces a right, imposes a penalty, or makes a court order to impose its will. See section 5 above.
Sector regulators	As at 1 May 2016, these are: • Civil Aviation Authority (CAA) (air traffic services and airport operation services) (www.caa.co.uk) • Financial Conduct Authority (FCA) (the provision of financial services) (www.fca.org.uk) • Monitor (the provision of health-care services in England) (www.gov.uk/government/organisations/monitor)[44] • Ofcom (electronic communications and post) (www.ofcom.org.uk) • Ofgem (gas and electricity markets in Great Britain) (www.ofgem.gov.uk)

[44] It should be noted that on 1 April 2016 Monitor became part of NHS Improvement.

	• Ofwat (water and sewerage markets in England and Wales) (www.ofwat.gov.uk) • Office of Rail and Road (ORR) (railway services in Great Britain) (www.orr.gov.uk) • Payment Systems Regulator (participation in payment systems) (www.psr.org.uk) • Utility Regulator, Northern Ireland (NIAUR) (gas, electricity, water and sewerage services in Northern Ireland) (www.uregni.gov.uk).
Settle a claim	Conclusively resolving a legal claim, usually by compromise, before final court judgement.
Small and medium sized enterprises (SMEs)	A company that: • has fewer than 250 employees; and • has either (a) annual turnover not exceeding €50 million or (b) an annual balance-sheet total not exceeding €43 million; This is based on the definition provided in the European Commission recommendation 2003/361.
Standalone action	This is a competition law action which does not rely on an existing regulatory decision to prove that competition law has been broken. See paragraphs 3.4 to 3.5.
TFEU	The Treaty on the Functioning of the European Union. The treaty that sets out organisational and functional details of the European Union.