AMERICAN ANTITRUST INSTITUTE

PRIVATE ANTITRUST ENFORCEMENT CONFERENCE

SUPPORTING MATERIALS

SESSION IV: INTERNATIONAL - PRIVATE ANTITRUST ENFORCEMENT AROUND THE GLOBE

- Council Directive 2014/104, 2014 O.J. (L 349) 1.
- Consumer Rights Act, 2015, c. 15 (U.K.).
- James L. McGinnis and Oliver Heinisch, *Eyes Across the Atlantic*, LEXOLOGY (Apr. 14, 2017).
- Damien Geradin, *Collective Redress for Antitrust Damages in the European Union: Is This a Reality Now?* 22 GEO. MASON L. REV. 1079 (2015).
- Deborah R. Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 U. KAN. L. REV. 965 (2017).
- Commission of the European Communities, White Paper on Damages Actions for Breach of the EC Antitrust Rules (Apr. 2, 2008).
- Verica Trstenjak & Petra Weinger, *Collective Actions in the European Union – American or European Model?*, 5 Beijing L. Rev. 155 (2014).
- *Adams v. Apple Inc.*, [2014] No. CV-12-17511 (Can. Ont.).

I

(Legislative acts)

DIRECTIVES

DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 26 November 2014

on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 103 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Acting in accordance with the ordinary legislative procedure ([2]),

Whereas:

(1) Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are a matter of public policy and should be applied effectively throughout the Union in order to ensure that competition in the internal market is not distorted.

(2) The public enforcement of Articles 101 and 102 TFEU is carried out by the Commission using the powers provided by Council Regulation (EC) No 1/2003 ([3]). Upon the entry into force of the Treaty of Lisbon on 1 December 2009, Articles 81 and 82 of the Treaty establishing the European Community became Articles 101 and 102 TFEU, and they remain identical in substance. Public enforcement is also carried out by national competition authorities, which may take the decisions listed in Article 5 of Regulation (EC) No 1/2003. In accordance with that Regulation, Member States should be able to designate administrative as well as judicial authorities to apply Articles 101 and 102 TFEU as public enforcers and to carry out the various functions conferred upon competition authorities by that Regulation.

(3) Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers

([1]) OJ C 67, 6.3.2014, p. 83.
([2]) Position of the European Parliament of 17 April 2014 (not yet published in the Official Journal) and decision of the Council of 10 November 2014.
([3]) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions. The right to compensation in Union law applies equally to infringements of Articles 101 and 102 TFEU by public undertakings and by undertakings entrusted with special or exclusive rights by Member States within the meaning of Article 106 TFEU.

(4) The right in Union law to compensation for harm resulting from infringements of Union and national competition law requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. Member States should ensure effective legal protection in the fields covered by Union law.

(5) Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation.

(6) To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid the divergence of applicable rules, which could jeopardise the proper functioning of the internal market.

(7) In accordance with Article 26(2) TFEU, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. There are marked differences between the rules in the Member States governing actions for damages for infringements of Union or national competition law. Those differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the TFEU and affect the substantive effectiveness of such right. As injured parties often choose their Member State of establishment as the forum in which to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may thus affect competition on the markets on which those injured parties, as well as the infringing undertakings, operate.

(8) Undertakings established and operating in various Member States are subject to differing procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the right to compensation in Union law may result not only in a competitive advantage for some undertakings which have infringed Article 101 or 102 TFEU but also in a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is enforced more effectively. As the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market, it is appropriate to base this Directive on the dual legal bases of Articles 103 and 114 TFEU.

(9) It is necessary, bearing in mind that large-scale infringements of competition law often have a cross-border element, to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights that they derive from the internal market. It is appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of both Union competition law and national competition law where that is applied in parallel with Union competition law. An approximation of those rules will help to prevent the increase of differences between the Member States' rules governing actions for damages in competition cases.

(10) Article 3(1) of Regulation (EC) No 1/2003 provides that '[w]here the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1) TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101 TFEU] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU].' In the interests of the proper functioning of the internal market and with a view to greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive extend to actions for damages based on the infringement of national competition law where it is applied pursuant to Article 3(1) of Regulation (EC) No 1/2003. Applying differing rules on civil liability in respect of infringements of Article 101 or 102 TFEU and in respect of infringements of rules of national competition law which must be applied in the same cases in parallel to Union competition law would otherwise adversely affect the position of

claimants in the same case and the scope of their claims, and would constitute an obstacle to the proper functioning of the internal market. This Directive should not affect actions for damages in respect of infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU.

(11) In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States. According to the case-law of the Court of Justice of the European Union (Court of Justice), any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law. All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that they should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU or less favourably than those applicable to similar domestic actions. Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.

(12) This Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as stated in the case-law of the Court of Justice, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.

(13) The right to compensation is recognised for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority. This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU. Without prejudice to compensation for loss of opportunity, full compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages.

(14) Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

(15) Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants. National courts should also be able to order that evidence be disclosed by third parties, including public authorities. Where a national court wishes to order disclosure of evidence by the Commission, the principle in Article 4(3) TEU of sincere cooperation between the Union and the Member States and Article 15(1) of Regulation (EC) No 1/2003 as regards requests for information apply. Where national courts order public authorities to disclose evidence, the principles of legal and administrative cooperation under Union or national law apply.

(16) National courts should be able, under their strict control, especially as regards the necessity and proportionality of disclosure measures, to order the disclosure of specified items of evidence or categories of evidence upon request of a party. It follows from the requirement of proportionality that disclosure can be ordered only where a claimant has made a plausible assertion, on the basis of facts which are reasonably available to that claimant, that the claimant has suffered harm that was caused by the defendant. Where a request for disclosure aims to obtain a category of evidence, that category should be identified by reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts.

(17) Where a court in one Member State requests a competent court in another Member State to take evidence or requests that evidence be taken directly in another Member State, the provisions of Council Regulation (EC) No 1206/2001 ([1]) apply.

(18) While relevant evidence containing business secrets or otherwise confidential information should, in principle, be available in actions for damages, such confidential information needs to be protected appropriately. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. Those measures could include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation.

(19) This Directive affects neither the possibility under the laws of the Member States to appeal disclosure orders, nor the conditions for bringing such appeals.

(20) Regulation (EC) No 1049/2001 of the European Parliament and of the Council ([2]) governs public access to European Parliament, Council and Commission documents, and is designed to confer on the public as wide a right of access as possible to documents of those institutions. That right is nonetheless subject to certain limits based on reasons of public or private interest. It follows that the system of exceptions laid down in Article 4 of that Regulation is based on a balancing of the opposing interests in a given situation, namely, the interests which would be favoured by the disclosure of the documents in question and those which would be jeopardised by such disclosure. This Directive should be without prejudice to such rules and practices under Regulation (EC) No 1049/2001.

(21) The effectiveness and consistency of the application of Articles 101 and 102 TFEU by the Commission and the national competition authorities require a common approach across the Union on the disclosure of evidence that is included in the file of a competition authority. Disclosure of evidence should not unduly detract from the effectiveness of the enforcement of competition law by a competition authority. This Directive does not cover the disclosure of internal documents of, or correspondence between, competition authorities.

(22) In order to ensure the effective protection of the right to compensation, it is not necessary that every document relating to proceedings under Article 101 or 102 TFEU be disclosed to a claimant merely on the grounds of the claimant's intended action for damages since it is highly unlikely that the action for damages will need to be based on all the evidence in the file relating to those proceedings.

(23) The requirement of proportionality should be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or risks having a negative effect on the way in which undertakings cooperate with the competition authorities. Particular attention should be paid to preventing 'fishing expeditions', i.e. non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings. Disclosure requests should therefore not be deemed to be proportionate where they refer to the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case. Such wide disclosure requests would not be compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible.

([1]) Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1).

([2]) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

(24) This Directive does not affect the right of courts to consider, under Union or national law, the interests of the effective public enforcement of competition law when ordering the disclosure of any type of evidence with the exception of leniency statements and settlement submissions.

(25) An exemption should apply in respect of any disclosure that, if granted, would unduly interfere with an ongoing investigation by a competition authority concerning an infringement of Union or national competition law. Information that was prepared by a competition authority in the course of its proceedings for the enforcement of Union or national competition law and sent to the parties to those proceedings (such as a 'Statement of Objections') or prepared by a party thereto (such as replies to requests for information of the competition authority or witness statements) should therefore be disclosable in actions for damages only after the competition authority has closed its proceedings, for instance by adopting a decision under Article 5 or under Chapter III of Regulation (EC) No 1/2003, with the exception of decisions on interim measures.

(26) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. Furthermore, as many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programmes are also important for the effectiveness of actions for damages in cartel cases. Undertakings might be deterred from cooperating with competition authorities under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed. Such disclosure would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the competition authorities. To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence. That exemption should also apply to verbatim quotations from leniency statements or settlement submissions included in other documents. Those limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with the applicable Union or national law. In order to ensure that that exemption does not unduly interfere with injured parties' rights to compensation, it should be limited to those voluntary and self-incriminating leniency statements and settlement submissions.

(27) The rules in this Directive on the disclosure of documents other than leniency statements and settlement submissions ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages. National courts should themselves be able, upon request by a claimant, to access documents in respect of which the exemption is invoked in order to verify whether the contents thereof fall outside the definitions of leniency statements and settlement submissions laid down in this Directive. Any content falling outside those definitions should be disclosable under the relevant conditions.

(28) National courts should be able, at any time, to order, in the context of an action for damages, the disclosure of evidence that exists independently of the proceedings of a competition authority ('pre-existing information').

(29) The disclosure of evidence should be ordered from a competition authority only when that evidence cannot reasonably be obtained from another party or from a third party.

(30) Pursuant to Article 15(3) of Regulation (EC) No 1/2003, competition authorities, acting upon their own initiative, can submit written observations to national courts on issues relating to the application of Article 101 or 102 TFEU. In order to preserve the contribution made by public enforcement to the application of those Articles, competition authorities should likewise be able, acting upon their own initiative, to submit their observations to a national court for the purpose of assessing the proportionality of a disclosure of evidence included in the authorities' files, in light of the impact that such disclosure would have on the effectiveness of the public enforcement of competition law. Member States should be able to set up a system whereby a competition authority is informed of requests for disclosure of information when the person requesting disclosure or the person from whom disclosure is sought is involved in that competition authority's investigation into the alleged infringement, without prejudice to national law providing for *ex parte* proceedings.

(31) Any natural or legal person that obtains evidence through access to the file of a competition authority should be able to use that evidence for the purposes of an action for damages to which it is a party. Such use should also be allowed on the part of any natural or legal person that succeeded in its rights and obligations, including through the acquisition of its claim. Where the evidence was obtained by a legal person forming part of a corporate group constituting one undertaking for the application of Articles 101 and 102 TFEU, other legal persons belonging to the same undertaking should also be able to use that evidence.

(32) However, the use of evidence obtained through access to the file of a competition authority should not unduly detract from the effective enforcement of competition law by a competition authority. In order to ensure that the limitations on disclosure laid down in this Directive are not undermined, the use of evidence of the types referred to in recitals 24 and 25 which is obtained solely through access to the file of a competition authority should be limited under the same circumstances. The limitation should take the form of inadmissibility in actions for damages or the form of any other protection under applicable national rules capable of ensuring the full effect of the limits on the disclosure of those types of evidence. Moreover, evidence obtained from a competition authority should not become an object of trade. The possibility of using evidence that was obtained solely through access to the file of a competition authority should therefore be limited to the natural or legal person that was originally granted access and to its legal successors. That limitation to avoid trading of evidence does not, however, prevent a national court from ordering the disclosure of that evidence under the conditions provided for in this Directive.

(33) The fact that a claim for damages is initiated, or that an investigation by a competition authority is started, entails a risk that persons concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders as to disclosure are complied with, national courts should be able to impose sufficiently deterrent penalties. In so far as parties to the proceedings are concerned, the risk of adverse inferences being drawn in the proceedings for damages can be a particularly effective penalty, and can help avoid delays. Penalties should also be available for non-compliance with obligations to protect confidential information and for the abusive use of information obtained through disclosure. Similarly, penalties should be available if information obtained through access to the file of a competition authority is used abusively in actions for damages.

(34) Ensuring the effective and consistent application of Articles 101 and 102 TFEU by the Commission and the national competition authorities necessitates a common approach across the Union on the effect of national competition authorities' final infringement decisions on subsequent actions for damages. Such decisions are adopted only after the Commission has been informed of the decision envisaged or, in the absence thereof, of any other document indicating the proposed course of action pursuant to Article 11(4) of Regulation (EC) No 1/2003, and if the Commission has not relieved the national competition authority of its competence by initiating proceedings pursuant to Article 11(6) of that Regulation. The Commission should ensure the consistent application of Union competition law by providing, bilaterally and within the framework of the European Competition Network, guidance to the national competition authorities. To enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, the finding of an infringement of Article 101 or 102 TFEU in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages. Therefore, such a finding should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction. Where a decision has found that provisions of national competition law are infringed in cases where Union and national competition law are applied in the same case and in parallel, that infringement should also be deemed to be irrefutably established.

(35) Where an action for damages is brought in a Member State other than the Member State of a national competition authority or a review court that found the infringement of Article 101 or 102 TFEU to which the action relates, it should be possible to present that finding in a final decision by the national competition authority or the review court to a national court as at least prima facie evidence of the fact that an infringement of competition law has occurred. The finding can be assessed as appropriate, along with any other evidence adduced by the parties. The effects of decisions by national competition authorities and review courts finding an infringement of the competition rules are without prejudice to the rights and obligations of national courts under Article 267 TFEU.

(36) National rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. This is particularly important in respect of actions that build upon a finding by a competition authority or a review court of an infringement. To that end, it should be possible to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and Union competition law. The limitation period should not begin to run before the infringement ceases and before a claimant knows, or can reasonably be expected to know, the behaviour constituting the infringement, the fact that the infringement caused the claimant harm and the identity of the infringer. Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.

(37) Where several undertakings infringe the competition rules jointly, as in the case of a cartel, it is appropriate to make provision for those co-infringers to be held jointly and severally liable for the entire harm caused by the infringement. A co-infringer should have the right to obtain a contribution from other co-infringers if it has paid more compensation than its share. The determination of that share as the relative responsibility of a given infringer, and the relevant criteria such as turnover, market share, or role in the cartel, is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence.

(38) Undertakings which cooperate with competition authorities under a leniency programme play a key role in exposing secret cartel infringements and in bringing them to an end, thereby often mitigating the harm which could have been caused had the infringement continued. It is therefore appropriate to make provision for undertakings which have received immunity from fines from a competition authority under a leniency programme to be protected from undue exposure to damages claims, bearing in mind that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity, thus potentially making the immunity recipient the preferential target of litigation. It is therefore appropriate that the immunity recipient be relieved in principle from joint and several liability for the entire harm and that any contribution it must make vis-à-vis co-infringers not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. To the extent that a cartel has caused harm to those other than the customers or providers of the infringers, the contribution of the immunity recipient should not exceed its relative responsibility for the harm caused by the cartel. That share should be determined in accordance with the same rules used to determine the contributions between infringers. The immunity recipient should remain fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers.

(39) Harm in the form of actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of the infringement. When an injured party has reduced its actual loss by passing it on, entirely or in part, to its own purchasers, the loss which has been passed on no longer constitutes harm for which the party that passed it on needs to be compensated. It is therefore in principle appropriate to allow an infringer to invoke the passing-on of actual loss as a defence against a claim for damages. It is appropriate to provide that the infringer, in so far as it invokes the passing-on defence, must prove the existence and extent of pass-on of the overcharge. This burden of proof should not affect the possibility for the infringer to use evidence other than that in its possession, such as evidence already acquired in the proceedings or evidence held by other parties or third parties.

(40) In situations where the passing-on resulted in reduced sales and thus harm in the form of a loss of profit, the right to claim compensation for such loss of profit should remain unaffected.

(41) Depending on the conditions under which undertakings are operating, it may be commercial practice to pass on price increases down the supply chain. Consumers or undertakings to whom actual loss has thus been passed on have suffered harm caused by an infringement of Union or national competition law. While such harm should be compensated for by the infringer, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the extent of that harm. It is therefore appropriate to provide that, where the existence of a claim for damages or the amount of damages to be awarded depends on whether or to what degree an overcharge paid by a direct purchaser from the infringer has been passed on to an indirect purchaser, the latter is regarded as having proven that an overcharge paid by that direct purchaser has

been passed on to its level where it is able to show prima facie that such passing-on has occurred. This rebuttable presumption applies unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser. It is furthermore appropriate to define under what conditions the indirect purchaser is to be regarded as having established such prima facie proof. As regards the quantification of passing-on, national courts should have the power to estimate which share of the overcharge has been passed on to the level of indirect purchasers in disputes pending before them.

(42) The Commission should issue clear, simple and comprehensive guidelines for national courts on how to estimate the share of the overcharge passed on to indirect purchasers.

(43) Infringements of competition law often concern the conditions and the price under which goods or services are sold, and lead to an overcharge and other harm for the customers of the infringers. The infringement may also concern supplies to the infringer (for example in the case of a buyers' cartel). In such cases, the actual loss could result from a lower price paid by infringers to their suppliers. This Directive and in particular the rules on passing-on should apply accordingly to those cases.

(44) Actions for damages can be brought both by those who purchased goods or services from the infringer and by purchasers further down the supply chain. In the interest of consistency between judgments resulting from related proceedings and hence to avoid the harm caused by the infringement of Union or national competition law not being fully compensated or the infringer being required to pay damages to compensate for harm that has not been suffered, national courts should have the power to estimate the proportion of any overcharge which was suffered by the direct or indirect purchasers in disputes pending before them. In this context, national courts should be able to take due account, by procedural or substantive means available under Union and national law, of any related action and of the resulting judgment, particularly where it finds that passing-on has been proven. National courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level. Such means should also be available in cross-border cases. This possibility to take due account of judgments should be without prejudice to the fundamental rights of the defence and the rights to an effective remedy and a fair trial of those who were not parties to the judicial proceedings, and without prejudice to the rules on the evidenciary value of judgments rendered in that context. It is possible for actions pending before the courts of different Member States to be considered as related within the meaning of Article 30 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council ([1]). Under that Article, national courts other than that first seized may stay proceedings or, under certain circumstances, may decline jurisdiction. This Directive is without prejudice to the rights and obligations of national courts under that Regulation.

(45) An injured party who has proven having suffered harm as a result of a competition law infringement still needs to prove the extent of the harm in order to obtain damages. Quantifying harm in competition law cases is a very fact-intensive process and may require the application of complex economic models. This is often very costly, and claimants have difficulties in obtaining the data necessary to substantiate their claims. The quantification of harm in competition law cases can thus constitute a substantial barrier preventing effective claims for compensation.

(46) In the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State to determine its own rules on quantifying harm, and for the Member States and for the national courts to determine what requirements the claimant has to meet when proving the amount of the harm suffered, the methods that can be used in quantifying the amount, and the consequences of not being able to fully meet those requirements. However, the requirements of national law regarding the quantification of harm in competition law cases should not be less favourable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness). Regard should be had to any information asymmetries between the parties and to the fact that quantifying the harm means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy. It is therefore appropriate to ensure that national courts have the power to estimate the amount of the harm caused

([1]) 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 (OJ L 351, 20.12.2012, p. 1).

by the competition law infringement. Member States should ensure that, where requested, national competition authorities may provide guidance on quantum. In order to ensure coherence and predictability, the Commission should provide general guidance at Union level.

(47) To remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of harm. Infringers should be allowed to rebut the presumption. It is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm.

(48) Achieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.

(49) Limitation periods for bringing an action for damages could be such that they prevent injured parties and infringers from having sufficient time to come to an agreement on the compensation to be paid. In order to provide both sides with a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before national courts, limitation periods need to be suspended for the duration of the consensual dispute resolution process.

(50) Furthermore, when parties decide to engage in consensual dispute resolution after an action for damages for the same claim has been brought before a national court, that court should be able to suspend the proceedings before it for the duration of the consensual dispute resolution process. When considering whether to suspend the proceedings, the national court should take into account the advantages of an expeditious procedure.

(51) To encourage consensual settlements, an infringer that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement. That might happen if a settling infringer, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement. A settling infringer should in principle therefore not contribute to its non-settling co-infringers when the latter have paid damages to an injured party with whom the first infringer had previously settled. The corollary to this non-contribution rule is that the claim of the injured party should be reduced by the settling infringer's share of the harm caused to it, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party. That relative share should be determined in accordance with the rules otherwise used to determine the contributions among infringers. Without such a reduction, non-settling infringers would be unduly affected by settlements to which they were not a party. However, in order to ensure the right to full compensation, settling co-infringers should still have to pay damages where that is the only possibility for the settling injured party to obtain compensation for the remaining claim. The remaining claim refers to the claim of the settling injured party reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the settling injured party. The latter possibility to claim damages from the settling co-infringer exists unless it is expressly excluded under the terms of the consensual settlement.

(52) Situations should be avoided in which settling co-infringers, by paying contribution to non-settling co-infringers for damages they paid to non-settling injured parties, pay a total amount of compensation exceeding their relative responsibility for the harm caused by the infringement. Therefore, when settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers to non-settling injured parties, national courts should take account of the damages already paid under the consensual settlement, bearing in mind that not all co-infringers are necessarily equally involved in the full substantive, temporal and geographical scope of the infringement.

(53) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union.

(54) Since the objectives of this Directive, namely to establish rules concerning actions for damages for infringements of Union competition law in order to ensure the full effect of Articles 101 and 102 TFEU, and the proper functioning of the internal market for undertakings and consumers, cannot be sufficiently achieved by the Member States, but can rather, by reason of the requisite effectiveness and consistency in the application of Articles 101 and 102 TFEU, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(55) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents ([1]), Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(56) It is appropriate to provide rules for the temporal application of this Directive,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

Subject matter and scope

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.

2. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.

Article 2

Definitions

For the purposes of this Directive, the following definitions apply:

(1) 'infringement of competition law' means an infringement of Article 101 or 102 TFEU, or of national competition law;

(2) 'infringer' means an undertaking or association of undertakings which has committed an infringement of competition law;

(3) 'national competition law' means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced;

(4) 'action for damages' means an action under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties where Union or national law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim;

(5) 'claim for damages' means a claim for compensation for harm caused by an infringement of competition law;

(6) 'injured party' means a person that has suffered harm caused by an infringement of competition law;

([1]) OJ C 369, 17.12.2011, p. 14.

(7) 'national competition authority' means an authority designated by a Member State pursuant to Article 35 of Regulation (EC) No 1/2003, as being responsible for the application of Articles 101 and 102 TFEU;

(8) 'competition authority' means the Commission or a national competition authority or both, as the context may require;

(9) 'national court' means a court or tribunal of a Member State within the meaning of Article 267 TFEU;

(10) 'review court' means a national court that is empowered by ordinary means of appeal to review decisions of a national competition authority or to review judgments pronouncing on those decisions, irrespective of whether that court itself has the power to find an infringement of competition law;

(11) 'infringement decision' means a decision of a competition authority or review court that finds an infringement of competition law;

(12) 'final infringement decision' means an infringement decision that cannot be, or that can no longer be, appealed by ordinary means;

(13) 'evidence' means all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored;

(14) 'cartel' means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors;

(15) 'leniency programme' means a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction in, fines for its involvement in the cartel;

(16) 'leniency statement' means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information;

(17) 'pre-existing information' means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority;

(18) 'settlement submission' means a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure;

(19) 'immunity recipient' means an undertaking which, or a natural person who, has been granted immunity from fines by a competition authority under a leniency programme;

(20) 'overcharge' means the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law;

(21) 'consensual dispute resolution' means any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages;

(22) 'consensual settlement' means an agreement reached through consensual dispute resolution.

(23) 'direct purchaser' means a natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law;

(24) 'indirect purchaser' means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom.

Article 3

Right to full compensation

1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.

2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.

3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

Article 4

Principles of effectiveness and equivalence

In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law. In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law.

CHAPTER II

DISCLOSURE OF EVIDENCE

Article 5

Disclosure of evidence

1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.

This paragraph is without prejudice to the rights and obligations of national courts under Regulation (EC) No 1206/2001.

2. Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.

3. Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:

(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;

(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;

(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

4. Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.

5. The interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.

6. Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence.

7. Member States shall ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure under this Article.

8. Without prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.

Article 6

Disclosure of evidence included in the file of a competition authority

1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this Article applies in addition to Article 5.

2. This Article is without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001.

3. This Article is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities.

4. When assessing, in accordance with Article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following:

(a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;

(b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and

(c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition law.

5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:

(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;

(b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and

(c) settlement submissions that have been withdrawn.

6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

(a) leniency statements; and

(b) settlement submissions.

7. A claimant may present a reasoned request that a national court access the evidence referred to in point (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence.

8. If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this Article.

9. The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this Article may be ordered in actions for damages at any time, without prejudice to this Article.

10. Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence.

11. To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought.

Article 7

Limits on the use of evidence obtained solely through access to the file of a competition authority

1. Member States shall ensure that evidence in the categories listed in Article 6(6) which is obtained by a natural or legal person solely through access to the file of a competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

2. Member States shall ensure that, until a competition authority has closed its proceedings by adopting a decision or otherwise, evidence in the categories listed in Article 6(5) which is obtained by a natural or legal person solely through access to the file of that competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

3. Member States shall ensure that evidence which is obtained by a natural or legal person solely through access to the file of a competition authority and which does not fall under paragraph 1 or 2, can be used in an action for damages only by that person or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim.

Article 8

Penalties

1. Member States shall ensure that national courts are able effectively to impose penalties on parties, third parties and their legal representatives in the event of any of the following:

(a) their failure or refusal to comply with the disclosure order of any national court;

(b) their destruction of relevant evidence;

(c) their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information;

(d) their breach of the limits on the use of evidence provided for in this Chapter.

2. Member States shall ensure that the penalties that can be imposed by national courts are effective, proportionate and dissuasive. The penalties available to national courts shall include, with regard to the behaviour of a party to proceedings for an action for damages, the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order the payment of costs.

CHAPTER III

EFFECT OF NATIONAL DECISIONS, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

Article 9

Effect of national decisions

1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts 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.

3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU.

Article 10

Limitation periods

1. Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.

2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:

(a) of the behaviour and the fact that it constitutes an infringement of competition law;

(b) of the fact that the infringement of competition law caused harm to it; and

(c) the identity of the infringer.

3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.

4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

Article 11

Joint and several liability

1. Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.

2. By way of derogation from paragraph 1, Member States shall ensure that, without prejudice to the right of full compensation as laid down in Article 3, where the infringer is a small or medium-sized enterprise (SME) as defined in Commission Recommendation 2003/361/EC [1], the infringer is liable only to its own direct and indirect purchasers where:

(a) its market share in the relevant market was below 5 % at any time during the infringement of competition law; and

(b) the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value.

3. The derogation laid down in paragraph 2 shall not apply where:

(a) the SME has led the infringement of competition law or has coerced other undertakings to participate therein; or

(b) the SME has previously been found to have infringed competition law.

4. By way of derogation from paragraph 1, Member States shall ensure that an immunity recipient is jointly and severally liable as follows:

(a) to its direct or indirect purchasers or providers; and

(b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

Member States shall ensure that any limitation period applicable to cases under this paragraph is reasonable and sufficient to allow injured parties to bring such actions.

---

[1] Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

5. Member States shall ensure that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law. The amount of contribution of an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

6. Member States shall ensure that, to the extent the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm.

CHAPTER IV

THE PASSING-ON OF OVERCHARGES

Article 12

Passing-on of overcharges and the right to full compensation

1. To ensure the full effectiveness of the right to full compensation as laid down in Article 3, Member States shall ensure that, in accordance with the rules laid down in this Chapter, compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer, and that compensation of harm exceeding that caused by the infringement of competition law to the claimant, as well as the absence of liability of the infringer, are avoided.

2. In order to avoid overcompensation, Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.

3. This Chapter shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.

4. Member States shall ensure that the rules laid down in this Chapter apply accordingly where the infringement of competition law relates to a supply to the infringer.

5. Member States shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on.

Article 13

Passing-on defence

Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.

Article 14

Indirect purchasers

1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.

2. In the situation referred to in paragraph 1, the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that:

(a) the defendant has committed an infringement of competition law;

(b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and

(c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

This paragraph shall not apply where the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

Article 15

Actions for damages by claimants from different levels in the supply chain

1. To avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability of the infringer, Member States shall ensure that in assessing whether the burden of proof resulting from the application of Articles 13 and 14 is satisfied, national courts seized of an action for damages are able, by means available under Union or national law, to take due account of any of the following:

(a) actions for damages that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain;

(b) judgments resulting from actions for damages as referred to in point (a);

(c) relevant information in the public domain resulting from the public enforcement of competition law.

2. This Article shall be without prejudice to the rights and obligations of national courts under Article 30 of Regulation (EU) No 1215/2012.

Article 16

Guidelines for national courts

The Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser.

CHAPTER V

QUANTIFICATION OF HARM

Article 17

Quantification of harm

1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.

2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.

3. Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.

CHAPTER VI

CONSENSUAL DISPUTE RESOLUTION

Article 18

Suspensive and other effects of consensual dispute resolution

1. Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or that were involved or represented in the consensual dispute resolution.

2. Without prejudice to provisions of national law in matters of arbitration, Member States shall ensure that national courts seized of an action for damages may suspend their proceedings for up to two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by that action for damages.

3. A competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.

Article 19

Effect of consensual settlements on subsequent actions for damages

1. Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party.

2. Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers. Non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer.

3. By way of derogation from paragraph 2, Member States shall ensure that where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer.

The derogation referred to in the first subparagraph may be expressly excluded under the terms of the consensual settlement.

4. When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement of competition law, national courts shall take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.

CHAPTER VII

FINAL PROVISIONS

Article 20

Review

1. The Commission shall review this Directive and shall submit a report thereon to the European Parliament and the Council by 27 December 2020.

2. The report referred to in paragraph 1 shall, inter alia, include information on all of the following:

(a) the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of competition law on the possibility for injured parties to obtain full compensation for the harm caused by that infringement of competition law;

(b) the extent to which claimants for damages caused by an infringement of competition law established in an infringement decision adopted by a competition authority of a Member State are able to prove before the national court of another Member State that such an infringement of competition law has occurred;

(c) the extent to which compensation for actual loss exceeds the overcharge harm caused by the infringement of competition law or suffered at any level of the supply chain.

3. If appropriate, the report referred to in paragraph 1 shall be accompanied by a legislative proposal.

Article 21

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016. They shall forthwith communicate to the Commission the text thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 22

Temporal application

1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.

2. Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seized prior to 26 December 2014.

Article 23

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 24

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 26 November 2014.

For the European Parliament	*For the Council*
The President	*The President*
M. SCHULZ	S. GOZI

Consumer Rights Act 2015

CHAPTER 15

Explanatory Notes have been produced to assist in the understanding of this Act and are available separately

£23.75

CONSUMER RIGHTS ACT 2015

Published by TSO (The Stationery Office) and available from:
Online
www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail
TSO
PO Box 29, Norwich, NR3 1GN
Telephone orders/General enquiries: 0870 600 5522
Fax orders: 0870 600 5533
E-mail: customer.services@tso.co.uk
Textphone: 0870 240 3701

The Houses of Parliament Shop
12 Bridge Street, Parliament Square
London SW1A 2JX
Telephone orders/General enquiries: 020 7219 3890
Fax orders: 020 7219 3866
Email: shop@parliament.uk
Internet: http://www.shop.parliament.uk

TSO@Blackwell and other Accredited Agents

ISBN 978-0-10-540004-2

Consumer Rights Act 2015

CHAPTER 15

CONTENTS

Consumer Rights Act 2015

2015 CHAPTER 15

An Act to amend the law relating to the rights of consumers and protection of their interests; to make provision about investigatory powers for enforcing the regulation of traders; to make provision about private actions in competition law and the Competition Appeal Tribunal; and for connected purposes.

[26th March 2015]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1

CONSUMER CONTRACTS FOR GOODS, DIGITAL CONTENT AND SERVICES

CHAPTER 1

INTRODUCTION

1 Where Part 1 applies

(1) This Part applies where there is an agreement between a trader and a consumer for the trader to supply goods, digital content or services, if the agreement is a contract.

(2) It applies whether the contract is written or oral or implied from the parties' conduct, or more than one of these combined.

(3) Any of Chapters 2, 3 and 4 may apply to a contract—

(a) if it is a contract for the trader to supply goods, see Chapter 2;

(b) if it is a contract for the trader to supply digital content, see Chapter 3 (also, subsection (6));

(c) if it is a contract for the trader to supply a service, see Chapter 4 (also, subsection (6)).

(4) In each case the Chapter applies even if the contract also covers something covered by another Chapter (a mixed contract).

(5) Two or all three of those Chapters may apply to a mixed contract.

(6) For provisions about particular mixed contracts, see—
(a) section 15 (goods and installation);
(b) section 16 (goods and digital content).

(7) For other provision applying to contracts to which this Part applies, see Part 2 (unfair terms).

2 Key definitions

(1) These definitions apply in this Part (as well as the definitions in section 59).

(2) "Trader" means a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.

(3) "Consumer" means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.

(4) A trader claiming that an individual was not acting for purposes wholly or mainly outside the individual's trade, business, craft or profession must prove it.

(5) For the purposes of Chapter 2, except to the extent mentioned in subsection (6), a person is not a consumer in relation to a sales contract if—
(a) the goods are second hand goods sold at public auction, and
(b) individuals have the opportunity of attending the sale in person.

(6) A person is a consumer in relation to such a contract for the purposes of—
(a) sections 11(4) and (5), 12, 28 and 29, and
(b) the other provisions of Chapter 2 as they apply in relation to those sections.

(7) "Business" includes the activities of any government department or local or public authority.

(8) "Goods" means any tangible moveable items, but that includes water, gas and electricity if and only if they are put up for supply in a limited volume or set quantity.

(9) "Digital content" means data which are produced and supplied in digital form.

CHAPTER 2

GOODS

What goods contracts are covered?

3 Contracts covered by this Chapter

(1) This Chapter applies to a contract for a trader to supply goods to a consumer.

(2) It applies only if the contract is one of these (defined for the purposes of this Part in sections 5 to 8)—

(a) a sales contract;
(b) a contract for the hire of goods;
(c) a hire-purchase agreement;
(d) a contract for transfer of goods.

(3) It does not apply—

(a) to a contract for a trader to supply coins or notes to a consumer for use as currency;
(b) to a contract for goods to be sold by way of execution or otherwise by authority of law;
(c) to a contract intended to operate as a mortgage, pledge, charge or other security;
(d) in relation to England and Wales or Northern Ireland, to a contract made by deed and for which the only consideration is the presumed consideration imported by the deed;
(e) in relation to Scotland, to a gratuitous contract.

(4) A contract to which this Chapter applies is referred to in this Part as a "contract to supply goods".

(5) Contracts to supply goods include—

(a) contracts entered into between one part owner and another;
(b) contracts for the transfer of an undivided share in goods;
(c) contracts that are absolute and contracts that are conditional.

(6) Subsection (1) is subject to any provision of this Chapter that applies a section or part of a section to only some of the kinds of contracts listed in subsection (2).

(7) A mixed contract (see section 1(4)) may be a contract of any of those kinds.

4 Ownership of goods

(1) In this Chapter ownership of goods means the general property in goods, not merely a special property.

(2) For the time when ownership of goods is transferred, see in particular the following provisions of the Sale of Goods Act 1979 (which relate to contracts of sale)—

section 16:	goods must be ascertained
section 17:	property passes when intended to pass
section 18:	rules for ascertaining intention
section 19:	reservation of right of disposal
section 20A:	undivided shares in goods forming part of a bulk
section 20B:	deemed consent by co-owner to dealings in bulk goods

5 Sales contracts

(1) A contract is a sales contract if under it—
(a) the trader transfers or agrees to transfer ownership of goods to the consumer, and
(b) the consumer pays or agrees to pay the price.

(2) A contract is a sales contract (whether or not it would be one under subsection (1)) if under the contract—
(a) goods are to be manufactured or produced and the trader agrees to supply them to the consumer,
(b) on being supplied, the goods will be owned by the consumer, and
(c) the consumer pays or agrees to pay the price.

(3) A sales contract may be conditional (see section 3(5)), but in this Part "conditional sales contract" means a sales contract under which—
(a) the price for the goods or part of it is payable by instalments, and
(b) the trader retains ownership of the goods until the conditions specified in the contract (for the payment of instalments or otherwise) are met;
and it makes no difference whether or not the consumer possesses the goods.

6 Contracts for the hire of goods

(1) A contract is for the hire of goods if under it the trader gives or agrees to give the consumer possession of the goods with the right to use them, subject to the terms of the contract, for a period determined in accordance with the contract.

(2) But a contract is not for the hire of goods if it is a hire-purchase agreement.

7 Hire-purchase agreements

(1) A contract is a hire-purchase agreement if it meets the two conditions set out below.

(2) The first condition is that under the contract goods are hired by the trader in return for periodical payments by the consumer (and "hired" is to be read in accordance with section 6(1)).

(3) The second condition is that under the contract ownership of the goods will transfer to the consumer if the terms of the contract are complied with and—
(a) the consumer exercises an option to buy the goods,
(b) any party to the contract does an act specified in it, or
(c) an event specified in the contract occurs.

(4) But a contract is not a hire-purchase agreement if it is a conditional sales contract.

8 Contracts for transfer of goods

A contract to supply goods is a contract for transfer of goods if under it the trader transfers or agrees to transfer ownership of the goods to the consumer and—
(a) the consumer provides or agrees to provide consideration otherwise than by paying a price, or

(b) the contract is, for any other reason, not a sales contract or a hire-purchase agreement.

What statutory rights are there under a goods contract?

9 Goods to be of satisfactory quality

(1) Every contract to supply goods is to be treated as including a term that the quality of the goods is satisfactory.

(2) The quality of goods is satisfactory if they meet the standard that a reasonable person would consider satisfactory, taking account of—

(a) any description of the goods,
(b) the price or other consideration for the goods (if relevant), and
(c) all the other relevant circumstances (see subsection (5)).

(3) The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods—

(a) fitness for all the purposes for which goods of that kind are usually supplied;
(b) appearance and finish;
(c) freedom from minor defects;
(d) safety;
(e) durability.

(4) The term mentioned in subsection (1) does not cover anything which makes the quality of the goods unsatisfactory—

(a) which is specifically drawn to the consumer's attention before the contract is made,
(b) where the consumer examines the goods before the contract is made, which that examination ought to reveal, or
(c) in the case of a contract to supply goods by sample, which would have been apparent on a reasonable examination of the sample.

(5) The relevant circumstances mentioned in subsection (2)(c) include any public statement about the specific characteristics of the goods made by the trader, the producer or any representative of the trader or the producer.

(6) That includes, in particular, any public statement made in advertising or labelling.

(7) But a public statement is not a relevant circumstance for the purposes of subsection (2)(c) if the trader shows that—

(a) when the contract was made, the trader was not, and could not reasonably have been, aware of the statement,
(b) before the contract was made, the statement had been publicly withdrawn or, to the extent that it contained anything which was incorrect or misleading, it had been publicly corrected, or
(c) the consumer's decision to contract for the goods could not have been influenced by the statement.

(8) In a contract to supply goods a term about the quality of the goods may be treated as included as a matter of custom.

(9) See section 19 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

10 Goods to be fit for particular purpose

(1) Subsection (3) applies to a contract to supply goods if before the contract is made the consumer makes known to the trader (expressly or by implication) any particular purpose for which the consumer is contracting for the goods.

(2) Subsection (3) also applies to a contract to supply goods if—

(a) the goods were previously sold by a credit-broker to the trader,

(b) in the case of a sales contract or contract for transfer of goods, the consideration or part of it is a sum payable by instalments, and

(c) before the contract is made, the consumer makes known to the credit-broker (expressly or by implication) any particular purpose for which the consumer is contracting for the goods.

(3) The contract is to be treated as including a term that the goods are reasonably fit for that purpose, whether or not that is a purpose for which goods of that kind are usually supplied.

(4) Subsection (3) does not apply if the circumstances show that the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the trader or credit-broker.

(5) In a contract to supply goods a term about the fitness of the goods for a particular purpose may be treated as included as a matter of custom.

(6) See section 19 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

11 Goods to be as described

(1) Every contract to supply goods by description is to be treated as including a term that the goods will match the description.

(2) If the supply is by sample as well as by description, it is not sufficient that the bulk of the goods matches the sample if the goods do not also match the description.

(3) A supply of goods is not prevented from being a supply by description just because—

(a) the goods are exposed for supply, and

(b) they are selected by the consumer.

(4) Any information that is provided by the trader about the goods and is information mentioned in paragraph (a) of Schedule 1 or 2 to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) (main characteristics of goods) is to be treated as included as a term of the contract.

(5) A change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.

(6) See section 2(5) and (6) for the application of subsections (4) and (5) where goods are sold at public auction.

(7) See section 19 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

12 Other pre-contract information included in contract

(1) This section applies to any contract to supply goods.

(2) Where regulation 9, 10 or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) required the trader to provide information to the consumer before the contract became binding, any of that information that was provided by the trader other than information about the goods and mentioned in paragraph (a) of Schedule 1 or 2 to the Regulations (main characteristics of goods) is to be treated as included as a term of the contract.

(3) A change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.

(4) See section 2(5) and (6) for the application of this section where goods are sold at public auction.

(5) See section 19 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in the contract.

13 Goods to match a sample

(1) This section applies to a contract to supply goods by reference to a sample of the goods that is seen or examined by the consumer before the contract is made.

(2) Every contract to which this section applies is to be treated as including a term that—

(a) the goods will match the sample except to the extent that any differences between the sample and the goods are brought to the consumer's attention before the contract is made, and

(b) the goods will be free from any defect that makes their quality unsatisfactory and that would not be apparent on a reasonable examination of the sample.

(3) See section 19 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

14 Goods to match a model seen or examined

(1) This section applies to a contract to supply goods by reference to a model of the goods that is seen or examined by the consumer before entering into the contract.

(2) Every contract to which this section applies is to be treated as including a term that the goods will match the model except to the extent that any differences between the model and the goods are brought to the consumer's attention before the consumer enters into the contract.

(3) See section 19 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

15 Installation as part of conformity of the goods with the contract

(1) Goods do not conform to a contract to supply goods if—
(a) installation of the goods forms part of the contract,
(b) the goods are installed by the trader or under the trader's responsibility, and
(c) the goods are installed incorrectly.

(2) See section 19 for the effect of goods not conforming to the contract.

16 Goods not conforming to contract if digital content does not conform

(1) Goods (whether or not they conform otherwise to a contract to supply goods) do not conform to it if—
(a) the goods are an item that includes digital content, and
(b) the digital content does not conform to the contract to supply that content (for which see section 42(1)).

(2) See section 19 for the effect of goods not conforming to the contract.

17 Trader to have right to supply the goods etc

(1) Every contract to supply goods, except one within subsection (4), is to be treated as including a term—
(a) in the case of a contract for the hire of goods, that at the beginning of the period of hire the trader must have the right to transfer possession of the goods by way of hire for that period,
(b) in any other case, that the trader must have the right to sell or transfer the goods at the time when ownership of the goods is to be transferred.

(2) Every contract to supply goods, except a contract for the hire of goods or a contract within subsection (4), is to be treated as including a term that—
(a) the goods are free from any charge or encumbrance not disclosed or known to the consumer before entering into the contract,
(b) the goods will remain free from any such charge or encumbrance until ownership of them is to be transferred, and
(c) the consumer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

(3) Every contract for the hire of goods is to be treated as including a term that the consumer will enjoy quiet possession of the goods for the period of the hire except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before entering into the contract.

(4) This subsection applies to a contract if the contract shows, or the circumstances when they enter into the contract imply, that the trader and the consumer intend the trader to transfer only—
(a) whatever title the trader has, even if it is limited, or
(b) whatever title a third person has, even if it is limited.

(5) Every contract within subsection (4) is to be treated as including a term that all charges or encumbrances known to the trader and not known to the consumer were disclosed to the consumer before entering into the contract.

(6) Every contract within subsection (4) is to be treated as including a term that the consumer's quiet possession of the goods—

(a) will not be disturbed by the trader, and

(b) will not be disturbed by a person claiming through or under the trader, unless that person is claiming under a charge or encumbrance that was disclosed or known to the consumer before entering into the contract.

(7) If subsection (4)(b) applies (transfer of title that a third person has), the contract is also to be treated as including a term that the consumer's quiet possession of the goods—

(a) will not be disturbed by the third person, and

(b) will not be disturbed by a person claiming through or under the third person, unless the claim is under a charge or encumbrance that was disclosed or known to the consumer before entering into the contract.

(8) In the case of a contract for the hire of goods, this section does not affect the right of the trader to repossess the goods where the contract provides or is to be treated as providing for this.

(9) See section 19 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

18 No other requirement to treat term about quality or fitness as included

(1) Except as provided by sections 9, 10, 13 and 16, a contract to supply goods is not to be treated as including any term about the quality of the goods or their fitness for any particular purpose, unless the term is expressly included in the contract.

(2) Subsection (1) is subject to provision made by any other enactment (whenever passed or made).

What remedies are there if statutory rights under a goods contract are not met?

19 Consumer's rights to enforce terms about goods

(1) In this section and sections 22 to 24 references to goods conforming to a contract are references to—

(a) the goods conforming to the terms described in sections 9, 10, 11, 13 and 14,

(b) the goods not failing to conform to the contract under section 15 or 16, and

(c) the goods conforming to requirements that are stated in the contract.

(2) But, for the purposes of this section and sections 22 to 24, a failure to conform as mentioned in subsection (1)(a) to (c) is not a failure to conform to the contract if it has its origin in materials supplied by the consumer.

(3) If the goods do not conform to the contract because of a breach of any of the terms described in sections 9, 10, 11, 13 and 14, or if they do not conform to the contract under section 16, the consumer's rights (and the provisions about them and when they are available) are—

(a) the short-term right to reject (sections 20 and 22);

(b) the right to repair or replacement (section 23); and

(c) the right to a price reduction or the final right to reject (sections 20 and 24).

(4) If the goods do not conform to the contract under section 15 or because of a breach of requirements that are stated in the contract, the consumer's rights (and the provisions about them and when they are available) are—

(a) the right to repair or replacement (section 23); and

(b) the right to a price reduction or the final right to reject (sections 20 and 24).

(5) If the trader is in breach of a term that section 12 requires to be treated as included in the contract, the consumer has the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid or the value of other consideration given for the goods.

(6) If the trader is in breach of the term that section 17(1) (right to supply etc) requires to be treated as included in the contract, the consumer has a right to reject (see section 20 for provisions about that right and when it is available).

(7) Subsections (3) to (6) are subject to section 25 and subsections (3)(a) and (6) are subject to section 26.

(8) Section 28 makes provision about remedies for breach of a term about the time for delivery of goods.

(9) This Chapter does not prevent the consumer seeking other remedies—

(a) for a breach of a term that this Chapter requires to be treated as included in the contract,

(b) on the grounds that, under section 15 or 16, goods do not conform to the contract, or

(c) for a breach of a requirement stated in the contract.

(10) Those other remedies may be ones—

(a) in addition to a remedy referred to in subsections (3) to (6) (but not so as to recover twice for the same loss), or

(b) instead of such a remedy, or

(c) where no such remedy is provided for.

(11) Those other remedies include any of the following that is open to the consumer in the circumstances—

(a) claiming damages;

(b) seeking specific performance;

(c) seeking an order for specific implement;

(d) relying on the breach against a claim by the trader for the price;

(e) for breach of an express term, exercising a right to treat the contract as at an end.

(12) It is not open to the consumer to treat the contract as at an end for breach of a term that this Chapter requires to be treated as included in the contract, or on the grounds that, under section 15 or 16, goods do not conform to the contract, except as provided by subsections (3), (4) and (6).

(13) In this Part, treating a contract as at an end means treating it as repudiated.

(14) For the purposes of subsections (3)(b) and (c) and (4), goods which do not conform to the contract at any time within the period of six months beginning

with the day on which the goods were delivered to the consumer must be taken not to have conformed to it on that day.

(15) Subsection (14) does not apply if—

(a) it is established that the goods did conform to the contract on that day, or

(b) its application is incompatible with the nature of the goods or with how they fail to conform to the contract.

20 Right to reject

(1) The short-term right to reject is subject to section 22.

(2) The final right to reject is subject to section 24.

(3) The right to reject under section 19(6) is not limited by those sections.

(4) Each of these rights entitles the consumer to reject the goods and treat the contract as at an end, subject to subsections (20) and (21).

(5) The right is exercised if the consumer indicates to the trader that the consumer is rejecting the goods and treating the contract as at an end.

(6) The indication may be something the consumer says or does, but it must be clear enough to be understood by the trader.

(7) From the time when the right is exercised—

(a) the trader has a duty to give the consumer a refund, subject to subsection (18), and

(b) the consumer has a duty to make the goods available for collection by the trader or (if there is an agreement for the consumer to return rejected goods) to return them as agreed.

(8) Whether or not the consumer has a duty to return the rejected goods, the trader must bear any reasonable costs of returning them, other than any costs incurred by the consumer in returning the goods in person to the place where the consumer took physical possession of them.

(9) The consumer's entitlement to receive a refund works as follows.

(10) To the extent that the consumer paid money under the contract, the consumer is entitled to receive back the same amount of money.

(11) To the extent that the consumer transferred anything else under the contract, the consumer is entitled to receive back the same amount of what the consumer transferred, unless subsection (12) applies.

(12) To the extent that the consumer transferred under the contract something for which the same amount of the same thing cannot be substituted, the consumer is entitled to receive back in its original state whatever the consumer transferred.

(13) If the contract is for the hire of goods, the entitlement to a refund extends only to anything paid or otherwise transferred for a period of hire that the consumer does not get because the contract is treated as at an end.

(14) If the contract is a hire-purchase agreement or a conditional sales contract and the contract is treated as at an end before the whole of the price has been paid, the entitlement to a refund extends only to the part of the price paid.

(15) A refund under this section must be given without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund.

(16) If the consumer paid money under the contract, the trader must give the refund using the same means of payment as the consumer used, unless the consumer expressly agrees otherwise.

(17) The trader must not impose any fee on the consumer in respect of the refund.

(18) There is no entitlement to receive a refund—
(a) if none of subsections (10) to (12) applies,
(b) to the extent that anything to which subsection (12) applies cannot be given back in its original state, or
(c) where subsection (13) applies, to the extent that anything the consumer transferred under the contract cannot be divided so as to give back only the amount, or part of the amount, to which the consumer is entitled.

(19) It may be open to a consumer to claim damages where there is no entitlement to receive a refund, or because of the limits of the entitlement, or instead of a refund.

(20) Subsection (21) qualifies the application in relation to England and Wales and Northern Ireland of the rights mentioned in subsections (1) to (3) where—
(a) the contract is a severable contract,
(b) in relation to the final right to reject, the contract is a contract for the hire of goods, a hire-purchase agreement or a contract for transfer of goods, and
(c) section 26(3) does not apply.

(21) The consumer is entitled, depending on the terms of the contract and the circumstances of the case—
(a) to reject the goods to which a severable obligation relates and treat that obligation as at an end (so that the entitlement to a refund relates only to what the consumer paid or transferred in relation to that obligation), or
(b) to exercise any of the rights mentioned in subsections (1) to (3) in respect of the whole contract.

21 Partial rejection of goods

(1) If the consumer has any of the rights mentioned in section 20(1) to (3), but does not reject all of the goods and treat the contract as at an end, the consumer—
(a) may reject some or all of the goods that do not conform to the contract, but
(b) may not reject any goods that do conform to the contract.

(2) If the consumer is entitled to reject the goods in an instalment, but does not reject all of those goods, the consumer—
(a) may reject some or all of the goods in the instalment that do not conform to the contract, but
(b) may not reject any goods in the instalment that do conform to the contract.

(3) If any of the goods form a commercial unit, the consumer cannot reject some of those goods without also rejecting the rest of them.

(4) A unit is a "commercial unit" if division of the unit would materially impair the value of the goods or the character of the unit.

(5) The consumer rejects goods under this section by indicating to the trader that the consumer is rejecting the goods.

(6) The indication may be something the consumer says or does, but it must be clear enough to be understood by the trader.

(7) From the time when a consumer rejects goods under this section—
  (a) the trader has a duty to give the consumer a refund in respect of those goods (subject to subsection (10)), and
  (b) the consumer has a duty to make those goods available for collection by the trader or (if there is an agreement for the consumer to return rejected goods) to return them as agreed.

(8) Whether or not the consumer has a duty to return the rejected goods, the trader must bear any reasonable costs of returning them, other than any costs incurred by the consumer in returning those goods in person to the place where the consumer took physical possession of them.

(9) Section 20(10) to (17) apply to a consumer's right to receive a refund under this section (and in section 20(13) and (14) references to the contract being treated as at an end are to be read as references to goods being rejected).

(10) That right does not apply—
  (a) if none of section 20(10) to (12) applies,
  (b) to the extent that anything to which section 20(12) applies cannot be given back in its original state, or
  (c) to the extent that anything the consumer transferred under the contract cannot be divided so as to give back only the amount, or part of the amount, to which the consumer is entitled.

(11) It may be open to a consumer to claim damages where there is no right to receive a refund, or because of the limits of the right, or instead of a refund.

(12) References in this section to goods conforming to a contract are to be read in accordance with section 19(1) and (2), but they also include the goods conforming to the terms described in section 17.

(13) Where section 20(21)(a) applies the reference in subsection (1) to the consumer treating the contract as at an end is to be read as a reference to the consumer treating the severable obligation as at an end.

22 Time limit for short-term right to reject

(1) A consumer who has the short-term right to reject loses it if the time limit for exercising it passes without the consumer exercising it, unless the trader and the consumer agree that it may be exercised later.

(2) An agreement under which the short-term right to reject would be lost before the time limit passes is not binding on the consumer.

(3) The time limit for exercising the short-term right to reject (unless subsection (4) applies) is the end of 30 days beginning with the first day after these have all happened—

(a) ownership or (in the case of a contract for the hire of goods, a hire-purchase agreement or a conditional sales contract) possession of the goods has been transferred to the consumer,
(b) the goods have been delivered, and
(c) where the contract requires the trader to install the goods or take other action to enable the consumer to use them, the trader has notified the consumer that the action has been taken.

(4) If any of the goods are of a kind that can reasonably be expected to perish after a shorter period, the time limit for exercising the short-term right to reject in relation to those goods is the end of that shorter period (but without affecting the time limit in relation to goods that are not of that kind).

(5) Subsections (3) and (4) do not prevent the consumer exercising the short-term right to reject before something mentioned in subsection (3)(a), (b) or (c) has happened.

(6) If the consumer requests or agrees to the repair or replacement of goods, the period mentioned in subsection (3) or (4) stops running for the length of the waiting period.

(7) If goods supplied by the trader in response to that request or agreement do not conform to the contract, the time limit for exercising the short-term right to reject is then either—
(a) 7 days after the waiting period ends, or
(b) if later, the original time limit for exercising that right, extended by the waiting period.

(8) The waiting period—
(a) begins with the day the consumer requests or agrees to the repair or replacement of the goods, and
(b) ends with the day on which the consumer receives goods supplied by the trader in response to the request or agreement.

23 Right to repair or replacement

(1) This section applies if the consumer has the right to repair or replacement (see section 19(3) and (4)).

(2) If the consumer requires the trader to repair or replace the goods, the trader must—
(a) do so within a reasonable time and without significant inconvenience to the consumer, and
(b) bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).

(3) The consumer cannot require the trader to repair or replace the goods if that remedy (the repair or the replacement)—
(a) is impossible, or
(b) is disproportionate compared to the other of those remedies.

(4) Either of those remedies is disproportionate compared to the other if it imposes costs on the trader which, compared to those imposed by the other, are unreasonable, taking into account—
(a) the value which the goods would have if they conformed to the contract,

(b) the significance of the lack of conformity, and

(c) whether the other remedy could be effected without significant inconvenience to the consumer.

(5) Any question as to what is a reasonable time or significant inconvenience is to be determined taking account of—

(a) the nature of the goods, and

(b) the purpose for which the goods were acquired.

(6) A consumer who requires or agrees to the repair of goods cannot require the trader to replace them, or exercise the short-term right to reject, without giving the trader a reasonable time to repair them (unless giving the trader that time would cause significant inconvenience to the consumer).

(7) A consumer who requires or agrees to the replacement of goods cannot require the trader to repair them, or exercise the short-term right to reject, without giving the trader a reasonable time to replace them (unless giving the trader that time would cause significant inconvenience to the consumer).

(8) In this Chapter, "repair" in relation to goods that do not conform to a contract, means making them conform.

24 Right to price reduction or final right to reject

(1) The right to a price reduction is the right—

(a) to require the trader to reduce by an appropriate amount the price the consumer is required to pay under the contract, or anything else the consumer is required to transfer under the contract, and

(b) to receive a refund from the trader for anything already paid or otherwise transferred by the consumer above the reduced amount.

(2) The amount of the reduction may, where appropriate, be the full amount of the price or whatever the consumer is required to transfer.

(3) Section 20(10) to (17) applies to a consumer's right to receive a refund under subsection (1)(b).

(4) The right to a price reduction does not apply—

(a) if what the consumer is (before the reduction) required to transfer under the contract, whether or not already transferred, cannot be divided up so as to enable the trader to receive or retain only the reduced amount, or

(b) if anything to which section 20(12) applies cannot be given back in its original state.

(5) A consumer who has the right to a price reduction and the final right to reject may only exercise one (not both), and may only do so in one of these situations—

(a) after one repair or one replacement, the goods do not conform to the contract;

(b) because of section 23(3) the consumer can require neither repair nor replacement of the goods; or

(c) the consumer has required the trader to repair or replace the goods, but the trader is in breach of the requirement of section 23(2)(a) to do so within a reasonable time and without significant inconvenience to the consumer.

(6) There has been a repair or replacement for the purposes of subsection (5)(a) if—

(a) the consumer has requested or agreed to repair or replacement of the goods (whether in relation to one fault or more than one), and

(b) the trader has delivered goods to the consumer, or made goods available to the consumer, in response to the request or agreement.

(7) For the purposes of subsection (6) goods that the trader arranges to repair at the consumer's premises are made available when the trader indicates that the repairs are finished.

(8) If the consumer exercises the final right to reject, any refund to the consumer may be reduced by a deduction for use, to take account of the use the consumer has had of the goods in the period since they were delivered, but this is subject to subsections (9) and (10).

(9) No deduction may be made to take account of use in any period when the consumer had the goods only because the trader failed to collect them at an agreed time.

(10) No deduction may be made if the final right to reject is exercised in the first 6 months (see subsection (11)), unless—

(a) the goods consist of a motor vehicle, or

(b) the goods are of a description specified by order made by the Secretary of State by statutory instrument.

(11) In subsection (10) the first 6 months means 6 months beginning with the first day after these have all happened—

(a) ownership or (in the case of a contract for the hire of goods, a hire-purchase agreement or a conditional sales contract) possession of the goods has been transferred to the consumer,

(b) the goods have been delivered, and

(c) where the contract requires the trader to install the goods or take other action to enable the consumer to use them, the trader has notified the consumer that the action has been taken.

(12) In subsection (10)(a) "motor vehicle"—

(a) in relation to Great Britain, has the same meaning as in the Road Traffic Act 1988 (see sections 185 to 194 of that Act);

(b) in relation to Northern Ireland, has the same meaning as in the Road Traffic (Northern Ireland) Order 1995 (SI 1995/2994 (NI 18)) (see Parts I and V of that Order).

(13) But a vehicle is not a motor vehicle for the purposes of subsection (10)(a) if it is constructed or adapted—

(a) for the use of a person suffering from some physical defect or disability, and

(b) so that it may only be used by one such person at any one time.

(14) An order under subsection (10)(b)—

(a) may be made only if the Secretary of State is satisfied that it is appropriate to do so because of significant detriment caused to traders as a result of the application of subsection (10) in relation to goods of the description specified by the order;

(b) may contain transitional or transitory provision or savings.

(15) No order may be made under subsection (10)(b) unless a draft of the statutory instrument containing it has been laid before, and approved by a resolution of, each House of Parliament.

Other rules about remedies under goods contracts

25 Delivery of wrong quantity

(1) Where the trader delivers to the consumer a quantity of goods less than the trader contracted to supply, the consumer may reject them, but if the consumer accepts them the consumer must pay for them at the contract rate.

(2) Where the trader delivers to the consumer a quantity of goods larger than the trader contracted to supply, the consumer may accept the goods included in the contract and reject the rest, or may reject all of the goods.

(3) Where the trader delivers to the consumer a quantity of goods larger than the trader contracted to supply and the consumer accepts all of the goods delivered, the consumer must pay for them at the contract rate.

(4) Where the consumer is entitled to reject goods under this section, any entitlement for the consumer to treat the contract as at an end depends on the terms of the contract and the circumstances of the case.

(5) The consumer rejects goods under this section by indicating to the trader that the consumer is rejecting the goods.

(6) The indication may be something the consumer says or does, but it must be clear enough to be understood by the trader.

(7) Subsections (1) to (3) do not prevent the consumer claiming damages, where it is open to the consumer to do so.

(8) This section is subject to any usage of trade, special agreement, or course of dealing between the parties.

26 Instalment deliveries

(1) Under a contract to supply goods, the consumer is not bound to accept delivery of the goods by instalments, unless that has been agreed between the consumer and the trader.

(2) The following provisions apply if the contract provides for the goods to be delivered by stated instalments, which are to be separately paid for.

(3) If the trader makes defective deliveries in respect of one or more instalments, the consumer, apart from any entitlement to claim damages, may be (but is not necessarily) entitled—

(a) to exercise the short-term right to reject or the right to reject under section 19(6) (as applicable) in respect of the whole contract, or

(b) to reject the goods in an instalment.

(4) Whether paragraph (a) or (b) of subsection (3) (or neither) applies to a consumer depends on the terms of the contract and the circumstances of the case.

(5) In subsection (3), making defective deliveries does not include failing to make a delivery in accordance with section 28.

(6) If the consumer neglects or refuses to take delivery of or pay for one or more instalments, the trader may—

(a) be entitled to treat the whole contract as at an end, or

(b) if it is a severable breach, have a claim for damages but not a right to treat the whole contract as at an end.

(7) Whether paragraph (a) or (b) of subsection (6) (or neither) applies to a trader depends on the terms of the contract and the circumstances of the case.

27 Consignation, or payment into court, in Scotland

(1) Subsection (2) applies where—

(a) a consumer has not rejected goods which the consumer could have rejected for breach of a term mentioned in section 19(3) or (6),

(b) the consumer has chosen to treat the breach as giving rise only to a claim for damages or to a right to rely on the breach against a claim by the trader for the price of the goods, and

(c) the trader has begun proceedings in court to recover the price or has brought a counter-claim for the price.

(2) The court may require the consumer—

(a) to consign, or pay into court, the price of the goods, or part of the price, or

(b) to provide some other reasonable security for payment of the price.

Other rules about goods contracts

28 Delivery of goods

(1) This section applies to any sales contract.

(2) Unless the trader and the consumer have agreed otherwise, the contract is to be treated as including a term that the trader must deliver the goods to the consumer.

(3) Unless there is an agreed time or period, the contract is to be treated as including a term that the trader must deliver the goods—

(a) without undue delay, and

(b) in any event, not more than 30 days after the day on which the contract is entered into.

(4) In this section—

(a) an "agreed" time or period means a time or period agreed by the trader and the consumer for delivery of the goods;

(b) if there is an obligation to deliver the goods at the time the contract is entered into, that time counts as the "agreed" time.

(5) Subsections (6) and (7) apply if the trader does not deliver the goods in accordance with subsection (3) or at the agreed time or within the agreed period.

(6) If the circumstances are that—

(a) the trader has refused to deliver the goods,

(b) delivery of the goods at the agreed time or within the agreed period is essential taking into account all the relevant circumstances at the time the contract was entered into, or

(c) the consumer told the trader before the contract was entered into that delivery in accordance with subsection (3), or at the agreed time or within the agreed period, was essential,

then the consumer may treat the contract as at an end.

(7) In any other circumstances, the consumer may specify a period that is appropriate in the circumstances and require the trader to deliver the goods before the end of that period.

(8) If the consumer specifies a period under subsection (7) but the goods are not delivered within that period, then the consumer may treat the contract as at an end.

(9) If the consumer treats the contract as at an end under subsection (6) or (8), the trader must without undue delay reimburse all payments made under the contract.

(10) If subsection (6) or (8) applies but the consumer does not treat the contract as at an end—

(a) that does not prevent the consumer from cancelling the order for any of the goods or rejecting goods that have been delivered, and

(b) the trader must without undue delay reimburse all payments made under the contract in respect of any goods for which the consumer cancels the order or which the consumer rejects.

(11) If any of the goods form a commercial unit, the consumer cannot reject or cancel the order for some of those goods without also rejecting or cancelling the order for the rest of them.

(12) A unit is a "commercial unit" if division of the unit would materially impair the value of the goods or the character of the unit.

(13) This section does not prevent the consumer seeking other remedies where it is open to the consumer to do so.

(14) See section 2(5) and (6) for the application of this section where goods are sold at public auction.

29 Passing of risk

(1) A sales contract is to be treated as including the following provisions as terms.

(2) The goods remain at the trader's risk until they come into the physical possession of—

(a) the consumer, or

(b) a person identified by the consumer to take possession of the goods.

(3) Subsection (2) does not apply if the goods are delivered to a carrier who—

(a) is commissioned by the consumer to deliver the goods, and

(b) is not a carrier the trader named as an option for the consumer.

(4) In that case the goods are at the consumer's risk on and after delivery to the carrier.

(5) Subsection (4) does not affect any liability of the carrier to the consumer in respect of the goods.

(6) See section 2(5) and (6) for the application of this section where goods are sold at public auction.

30 Goods under guarantee

(1) This section applies where—
  (a) there is a contract to supply goods, and
  (b) there is a guarantee in relation to the goods.

(2) "Guarantee" here means an undertaking to the consumer given without extra charge by a person acting in the course of the person's business (the "guarantor") that, if the goods do not meet the specifications set out in the guarantee statement or in any associated advertising—
  (a) the consumer will be reimbursed for the price paid for the goods, or
  (b) the goods will be repaired, replaced or handled in any way.

(3) The guarantee takes effect, at the time the goods are delivered, as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and in any associated advertising.

(4) The guarantor must ensure that—
  (a) the guarantee sets out in plain and intelligible language the contents of the guarantee and the essential particulars for making claims under the guarantee,
  (b) the guarantee states that the consumer has statutory rights in relation to the goods and that those rights are not affected by the guarantee, and
  (c) where the goods are offered within the territory of the United Kingdom, the guarantee is written in English.

(5) The contents of the guarantee to be set out in it include, in particular—
  (a) the name and address of the guarantor, and
  (b) the duration and territorial scope of the guarantee.

(6) The guarantor and any other person who offers to supply to consumers the goods which are the subject of the guarantee must, on request by the consumer, make the guarantee available to the consumer within a reasonable time, in writing and in a form accessible to the consumer.

(7) What is a reasonable time is a question of fact.

(8) If a person fails to comply with a requirement of this section, the enforcement authority may apply to the court for an injunction or (in Scotland) an order of specific implement against that person requiring that person to comply.

(9) On an application the court may grant an injunction or (in Scotland) an order of specific implement on such terms as it thinks appropriate.

(10) In this section—
  "court" means—
    (a) in relation to England and Wales, the High Court or the county court,
    (b) in relation to Northern Ireland, the High Court or a county court, and

(c) in relation to Scotland, the Court of Session or the sheriff;

"enforcement authority" means—

(a) the Competition and Markets Authority,

(b) a local weights and measures authority in Great Britain, and

(c) the Department of Enterprise, Trade and Investment in Northern Ireland.

Can a trader contract out of statutory rights and remedies under a goods contract?

31 Liability that cannot be excluded or restricted

(1) A term of a contract to supply goods is not binding on the consumer to the extent that it would exclude or restrict the trader's liability arising under any of these provisions—

(a) section 9 (goods to be of satisfactory quality);

(b) section 10 (goods to be fit for particular purpose);

(c) section 11 (goods to be as described);

(d) section 12 (other pre-contract information included in contract);

(e) section 13 (goods to match a sample);

(f) section 14 (goods to match a model seen or examined);

(g) section 15 (installation as part of conformity of the goods with the contract);

(h) section 16 (goods not conforming to contract if digital content does not conform);

(i) section 17 (trader to have right to supply the goods etc);

(j) section 28 (delivery of goods);

(k) section 29 (passing of risk).

(2) That also means that a term of a contract to supply goods is not binding on the consumer to the extent that it would—

(a) exclude or restrict a right or remedy in respect of a liability under a provision listed in subsection (1),

(b) make such a right or remedy or its enforcement subject to a restrictive or onerous condition,

(c) allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy, or

(d) exclude or restrict rules of evidence or procedure.

(3) The reference in subsection (1) to excluding or restricting a liability also includes preventing an obligation or duty arising or limiting its extent.

(4) An agreement in writing to submit present or future differences to arbitration is not to be regarded as excluding or restricting any liability for the purposes of this section.

(5) Subsection (1)(i), and subsection (2) so far as it relates to liability under section 17, do not apply to a term of a contract for the hire of goods.

(6) But an express term of a contract for the hire of goods is not binding on the consumer to the extent that it would exclude or restrict a term that section 17 requires to be treated as included in the contract, unless it is inconsistent with that term (and see also section 62 (requirement for terms to be fair)).

(7) See Schedule 3 for provision about the enforcement of this section.

32 Contracts applying law of non-EEA State

(1) If—

(a) the law of a country or territory other than an EEA State is chosen by the parties to be applicable to a sales contract, but

(b) the sales contract has a close connection with the United Kingdom,

this Chapter, except the provisions in subsection (2), applies despite that choice.

(2) The exceptions are—

(a) sections 11(4) and (5) and 12;

(b) sections 28 and 29;

(c) section 31(1)(d), (j) and (k).

(3) For cases where those provisions apply, or where the law applicable has not been chosen or the law of an EEA State is chosen, see Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

CHAPTER 3

DIGITAL CONTENT

What digital content contracts are covered?

33 Contracts covered by this Chapter

(1) This Chapter applies to a contract for a trader to supply digital content to a consumer, if it is supplied or to be supplied for a price paid by the consumer.

(2) This Chapter also applies to a contract for a trader to supply digital content to a consumer, if—

(a) it is supplied free with goods or services or other digital content for which the consumer pays a price, and

(b) it is not generally available to consumers unless they have paid a price for it or for goods or services or other digital content.

(3) The references in subsections (1) and (2) to the consumer paying a price include references to the consumer using, by way of payment, any facility for which money has been paid.

(4) A trader does not supply digital content to a consumer for the purposes of this Part merely because the trader supplies a service by which digital content reaches the consumer.

(5) The Secretary of State may by order provide for this Chapter to apply to other contracts for a trader to supply digital content to a consumer, if the Secretary of State is satisfied that it is appropriate to do so because of significant detriment caused to consumers under contracts of the kind to which the order relates.

(6) An order under subsection (5)—

(a) may, in particular, amend this Act;

(b) may contain transitional or transitory provision or savings.

(7) A contract to which this Chapter applies is referred to in this Part as a "contract to supply digital content".

(8) This section, other than subsection (4), does not limit the application of section 46.

(9) The power to make an order under subsection (5) is exercisable by statutory instrument.

(10) No order may be made under subsection (5) unless a draft of the statutory instrument containing it has been laid before, and approved by a resolution of, each House of Parliament.

What statutory rights are there under a digital content contract?

34 Digital content to be of satisfactory quality

(1) Every contract to supply digital content is to be treated as including a term that the quality of the digital content is satisfactory.

(2) The quality of digital content is satisfactory if it meets the standard that a reasonable person would consider satisfactory, taking account of—

(a) any description of the digital content,

(b) the price mentioned in section 33(1) or (2)(b) (if relevant), and

(c) all the other relevant circumstances (see subsection (5)).

(3) The quality of digital content includes its state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of digital content—

(a) fitness for all the purposes for which digital content of that kind is usually supplied;

(b) freedom from minor defects;

(c) safety;

(d) durability.

(4) The term mentioned in subsection (1) does not cover anything which makes the quality of the digital content unsatisfactory—

(a) which is specifically drawn to the consumer's attention before the contract is made,

(b) where the consumer examines the digital content before the contract is made, which that examination ought to reveal, or

(c) where the consumer examines a trial version before the contract is made, which would have been apparent on a reasonable examination of the trial version.

(5) The relevant circumstances mentioned in subsection (2)(c) include any public statement about the specific characteristics of the digital content made by the trader, the producer or any representative of the trader or the producer.

(6) That includes, in particular, any public statement made in advertising or labelling.

(7) But a public statement is not a relevant circumstance for the purposes of subsection (2)(c) if the trader shows that—

(a) when the contract was made, the trader was not, and could not reasonably have been, aware of the statement,

(b) before the contract was made, the statement had been publicly withdrawn or, to the extent that it contained anything which was incorrect or misleading, it had been publicly corrected, or

(c) the consumer's decision to contract for the digital content could not have been influenced by the statement.

(8) In a contract to supply digital content a term about the quality of the digital content may be treated as included as a matter of custom.

(9) See section 42 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

35 Digital content to be fit for particular purpose

(1) Subsection (3) applies to a contract to supply digital content if before the contract is made the consumer makes known to the trader (expressly or by implication) any particular purpose for which the consumer is contracting for the digital content.

(2) Subsection (3) also applies to a contract to supply digital content if—

(a) the digital content was previously sold by a credit-broker to the trader,

(b) the consideration or part of it is a sum payable by instalments, and

(c) before the contract is made, the consumer makes known to the credit-broker (expressly or by implication) any particular purpose for which the consumer is contracting for the digital content.

(3) The contract is to be treated as including a term that the digital content is reasonably fit for that purpose, whether or not that is a purpose for which digital content of that kind is usually supplied.

(4) Subsection (3) does not apply if the circumstances show that the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the trader or credit-broker.

(5) A contract to supply digital content may be treated as making provision about the fitness of the digital content for a particular purpose as a matter of custom.

(6) See section 42 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

36 Digital content to be as described

(1) Every contract to supply digital content is to be treated as including a term that the digital content will match any description of it given by the trader to the consumer.

(2) Where the consumer examines a trial version before the contract is made, it is not sufficient that the digital content matches (or is better than) the trial version if the digital content does not also match any description of it given by the trader to the consumer.

(3) Any information that is provided by the trader about the digital content that is information mentioned in paragraph (a), (j) or (k) of Schedule 1 or paragraph (a), (v) or (w) of Schedule 2 (main characteristics, functionality and compatibility) to the Consumer Contracts (Information, Cancellation and

Additional Charges) Regulations 2013 (SI 2013/3134) is to be treated as included as a term of the contract.

(4) A change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.

(5) See section 42 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

37 Other pre-contract information included in contract

(1) This section applies to any contract to supply digital content.

(2) Where regulation 9, 10 or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) required the trader to provide information to the consumer before the contract became binding, any of that information that was provided by the trader other than information about the digital content and mentioned in paragraph (a), (j) or (k) of Schedule 1 or paragraph (a), (v) or (w) of Schedule 2 to the Regulations (main characteristics, functionality and compatibility) is to be treated as included as a term of the contract.

(3) A change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.

(4) See section 42 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

38 No other requirement to treat term about quality or fitness as included

(1) Except as provided by sections 34 and 35, a contract to supply digital content is not to be treated as including any term about the quality of the digital content or its fitness for any particular purpose, unless the term is expressly included in the contract.

(2) Subsection (1) is subject to provision made by any other enactment, whenever passed or made.

39 Supply by transmission and facilities for continued transmission

(1) Subsection (2) applies where there is a contract to supply digital content and the consumer's access to the content on a device requires its transmission to the device under arrangements initiated by the trader.

(2) For the purposes of this Chapter, the digital content is supplied—
  (a) when the content reaches the device, or
  (b) if earlier, when the content reaches another trader chosen by the consumer to supply, under a contract with the consumer, a service by which digital content reaches the device.

(3) Subsections (5) to (7) apply where—
  (a) there is a contract to supply digital content, and
  (b) after the trader (T) has supplied the digital content, the consumer is to have access under the contract to a processing facility under arrangements made by T.

(4) A processing facility is a facility by which T or another trader will receive digital content from the consumer and transmit digital content to the consumer (whether or not other features are to be included under the contract).

(5) The contract is to be treated as including a term that the processing facility (with any feature that the facility is to include under the contract) must be available to the consumer for a reasonable time, unless a time is specified in the contract.

(6) The following provisions apply to all digital content transmitted to the consumer on each occasion under the facility, while it is provided under the contract, as they apply to the digital content first supplied—

(a) section 34 (quality);

(b) section 35 (fitness for a particular purpose);

(c) section 36 (description).

(7) Breach of a term treated as included under subsection (5) has the same effect as breach of a term treated as included under those sections (see section 42).

40 Quality, fitness and description of content supplied subject to modifications

(1) Where under a contract a trader supplies digital content to a consumer subject to the right of the trader or a third party to modify the digital content, the following provisions apply in relation to the digital content as modified as they apply in relation to the digital content as supplied under the contract—

(a) section 34 (quality);

(b) section 35 (fitness for a particular purpose);

(c) section 36 (description).

(2) Subsection (1)(c) does not prevent the trader from improving the features of, or adding new features to, the digital content, as long as—

(a) the digital content continues to match the description of it given by the trader to the consumer, and

(b) the digital content continues to conform to the information provided by the trader as mentioned in subsection (3) of section 36, subject to any change to that information that has been agreed in accordance with subsection (4) of that section.

(3) A claim on the grounds that digital content does not conform to a term described in any of the sections listed in subsection (1) as applied by that subsection is to be treated as arising at the time when the digital content was supplied under the contract and not the time when it is modified.

41 Trader's right to supply digital content

(1) Every contract to supply digital content is to be treated as including a term—

(a) in relation to any digital content which is supplied under the contract and which the consumer has paid for, that the trader has the right to supply that content to the consumer;

(b) in relation to any digital content which the trader agrees to supply under the contract and which the consumer has paid for, that the trader will have the right to supply it to the consumer at the time when it is to be supplied.

(2) See section 42 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

What remedies are there if statutory rights under a digital content contract are not met?

42 Consumer's rights to enforce terms about digital content

(1) In this section and section 43 references to digital content conforming to a contract are references to the digital content conforming to the terms described in sections 34, 35 and 36.

(2) If the digital content does not conform to the contract, the consumer's rights (and the provisions about them and when they are available) are—
  (a) the right to repair or replacement (see section 43);
  (b) the right to a price reduction (see section 44).

(3) Section 16 also applies if an item including the digital content is supplied.

(4) If the trader is in breach of a term that section 37 requires to be treated as included in the contract, the consumer has the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid for the digital content or for any facility within section 33(3) used by the consumer.

(5) If the trader is in breach of the term that section 41(1) (right to supply the content) requires to be treated as included in the contract, the consumer has the right to a refund (see section 45 for provisions about that right and when it is available).

(6) This Chapter does not prevent the consumer seeking other remedies for a breach of a term to which any of subsections (2), (4) or (5) applies, instead of or in addition to a remedy referred to there (but not so as to recover twice for the same loss).

(7) Those other remedies include any of the following that is open to the consumer in the circumstances—
  (a) claiming damages;
  (b) seeking to recover money paid where the consideration for payment of the money has failed;
  (c) seeking specific performance;
  (d) seeking an order for specific implement;
  (e) relying on the breach against a claim by the trader for the price.

(8) It is not open to the consumer to treat the contract as at an end for breach of a term to which any of subsections (2), (4) or (5) applies.

(9) For the purposes of subsection (2), digital content which does not conform to the contract at any time within the period of six months beginning with the day on which it was supplied must be taken not to have conformed to the contract when it was supplied.

(10) Subsection (9) does not apply if—
  (a) it is established that the digital content did conform to the contract when it was supplied, or
  (b) its application is incompatible with the nature of the digital content or with how it fails to conform to the contract.

43 Right to repair or replacement

(1) This section applies if the consumer has the right to repair or replacement.

(2) If the consumer requires the trader to repair or replace the digital content, the trader must—

(a) do so within a reasonable time and without significant inconvenience to the consumer; and

(b) bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).

(3) The consumer cannot require the trader to repair or replace the digital content if that remedy (the repair or the replacement)—

(a) is impossible, or

(b) is disproportionate compared to the other of those remedies.

(4) Either of those remedies is disproportionate compared to the other if it imposes costs on the trader which, compared to those imposed by the other, are unreasonable, taking into account—

(a) the value which the digital content would have if it conformed to the contract,

(b) the significance of the lack of conformity, and

(c) whether the other remedy could be effected without significant inconvenience to the consumer.

(5) Any question as to what is a reasonable time or significant inconvenience is to be determined taking account of—

(a) the nature of the digital content, and

(b) the purpose for which the digital content was obtained or accessed.

(6) A consumer who requires or agrees to the repair of digital content cannot require the trader to replace it without giving the trader a reasonable time to repair it (unless giving the trader that time would cause significant inconvenience to the consumer).

(7) A consumer who requires or agrees to the replacement of digital content cannot require the trader to repair it without giving the trader a reasonable time to replace it (unless giving the trader that time would cause significant inconvenience to the consumer).

(8) In this Chapter, "repair" in relation to digital content that does not conform to a contract, means making it conform.

44 Right to price reduction

(1) The right to a price reduction is the right to require the trader to reduce the price to the consumer by an appropriate amount (including the right to receive a refund for anything already paid above the reduced amount).

(2) The amount of the reduction may, where appropriate, be the full amount of the price.

(3) A consumer who has that right may only exercise it in one of these situations—

(a) because of section 43(3)(a) the consumer can require neither repair nor replacement of the digital content, or

(b) the consumer has required the trader to repair or replace the digital content, but the trader is in breach of the requirement of section 43(2)(a) to do so within a reasonable time and without significant inconvenience to the consumer.

(4) A refund under this section must be given without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund.

(5) The trader must give the refund using the same means of payment as the consumer used to pay for the digital content, unless the consumer expressly agrees otherwise.

(6) The trader must not impose any fee on the consumer in respect of the refund.

45 Right to a refund

(1) The right to a refund gives the consumer the right to receive a refund from the trader of all money paid by the consumer for the digital content (subject to subsection (2)).

(2) If the breach giving the consumer the right to a refund affects only some of the digital content supplied under the contract, the right to a refund does not extend to any part of the price attributable to digital content that is not affected by the breach.

(3) A refund must be given without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund.

(4) The trader must give the refund using the same means of payment as the consumer used to pay for the digital content, unless the consumer expressly agrees otherwise.

(5) The trader must not impose any fee on the consumer in respect of the refund.

Compensation for damage to device or to other digital content

46 Remedy for damage to device or to other digital content

(1) This section applies if—

(a) a trader supplies digital content to a consumer under a contract,

(b) the digital content causes damage to a device or to other digital content,

(c) the device or digital content that is damaged belongs to the consumer, and

(d) the damage is of a kind that would not have occurred if the trader had exercised reasonable care and skill.

(2) If the consumer requires the trader to provide a remedy under this section, the trader must either—

(a) repair the damage in accordance with subsection (3), or

(b) compensate the consumer for the damage with an appropriate payment.

(3) To repair the damage in accordance with this subsection, the trader must—

(a) repair the damage within a reasonable time and without significant inconvenience to the consumer, and

(b) bear any necessary costs incurred in repairing the damage (including in particular the cost of any labour, materials or postage).

(4) Any question as to what is a reasonable time or significant inconvenience is to be determined taking account of—

(a) the nature of the device or digital content that is damaged, and

(b) the purpose for which it is used by the consumer.

(5) A compensation payment under this section must be made without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to the payment.

(6) The trader must not impose any fee on the consumer in respect of the payment.

(7) A consumer with a right to a remedy under this section may bring a claim in civil proceedings to enforce that right.

(8) The Limitation Act 1980 and the Limitation (Northern Ireland) Order 1989 (SI 1989/1339 (NI 11)) apply to a claim under this section as if it were an action founded on simple contract.

(9) The Prescription and Limitation (Scotland) Act 1973 applies to a right to a remedy under this section as if it were an obligation to which section 6 of that Act applies.

Can a trader contract out of statutory rights and remedies under a digital content contract?

47 Liability that cannot be excluded or restricted

(1) A term of a contract to supply digital content is not binding on the consumer to the extent that it would exclude or restrict the trader's liability arising under any of these provisions—

(a) section 34 (digital content to be of satisfactory quality),

(b) section 35 (digital content to be fit for particular purpose),

(c) section 36 (digital content to be as described),

(d) section 37 (other pre-contract information included in contract), or

(e) section 41 (trader's right to supply digital content).

(2) That also means that a term of a contract to supply digital content is not binding on the consumer to the extent that it would—

(a) exclude or restrict a right or remedy in respect of a liability under a provision listed in subsection (1),

(b) make such a right or remedy or its enforcement subject to a restrictive or onerous condition,

(c) allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy, or

(d) exclude or restrict rules of evidence or procedure.

(3) The reference in subsection (1) to excluding or restricting a liability also includes preventing an obligation or duty arising or limiting its extent.

(4) An agreement in writing to submit present or future differences to arbitration is not to be regarded as excluding or restricting any liability for the purposes of this section.

(5) See Schedule 3 for provision about the enforcement of this section.

(6) For provision limiting the ability of a trader under a contract within section 46 to exclude or restrict the trader's liability under that section, see section 62.

CHAPTER 4

SERVICES

What services contracts are covered?

48 Contracts covered by this Chapter

(1) This Chapter applies to a contract for a trader to supply a service to a consumer.

(2) That does not include a contract of employment or apprenticeship.

(3) In relation to Scotland, this Chapter does not apply to a gratuitous contract.

(4) A contract to which this Chapter applies is referred to in this Part as a "contract to supply a service".

(5) The Secretary of State may by order made by statutory instrument provide that a provision of this Chapter does not apply in relation to a service of a description specified in the order.

(6) The power in subsection (5) includes power to provide that a provision of this Chapter does not apply in relation to a service of a description specified in the order in the circumstances so specified.

(7) An order under subsection (5) may contain transitional or transitory provision or savings.

(8) No order may be made under subsection (5) unless a draft of the statutory instrument containing it has been laid before, and approved by a resolution of, each House of Parliament.

What statutory rights are there under a services contract?

49 Service to be performed with reasonable care and skill

(1) Every contract to supply a service is to be treated as including a term that the trader must perform the service with reasonable care and skill.

(2) See section 54 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

50 Information about the trader or service to be binding

(1) Every contract to supply a service is to be treated as including as a term of the contract anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service, if—

(a) it is taken into account by the consumer when deciding to enter into the contract, or

(b) it is taken into account by the consumer when making any decision about the service after entering into the contract.

(2) Anything taken into account by the consumer as mentioned in subsection (1)(a) or (b) is subject to—

(a) anything that qualified it and was said or written to the consumer by the trader on the same occasion, and

(b) any change to it that has been expressly agreed between the consumer and the trader (before entering into the contract or later).

(3) Without prejudice to subsection (1), any information provided by the trader in accordance with regulation 9, 10 or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) is to be treated as included as a term of the contract.

(4) A change to any of the information mentioned in subsection (3), made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.

(5) See section 54 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

51 Reasonable price to be paid for a service

(1) This section applies to a contract to supply a service if—

(a) the consumer has not paid a price or other consideration for the service,

(b) the contract does not expressly fix a price or other consideration, and does not say how it is to be fixed, and

(c) anything that is to be treated under section 50 as included in the contract does not fix a price or other consideration either.

(2) In that case the contract is to be treated as including a term that the consumer must pay a reasonable price for the service, and no more.

(3) What is a reasonable price is a question of fact.

52 Service to be performed within a reasonable time

(1) This section applies to a contract to supply a service, if—

(a) the contract does not expressly fix the time for the service to be performed, and does not say how it is to be fixed, and

(b) information that is to be treated under section 50 as included in the contract does not fix the time either.

(2) In that case the contract is to be treated as including a term that the trader must perform the service within a reasonable time.

(3) What is a reasonable time is a question of fact.

(4) See section 54 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

53 Relation to other law on contract terms

(1) Nothing in this Chapter affects any enactment or rule of law that imposes a stricter duty on the trader.

(2) This Chapter is subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description.

What remedies are there if statutory rights under a services contract are not met?

54 Consumer's rights to enforce terms about services

(1) The consumer's rights under this section and sections 55 and 56 do not affect any rights that the contract provides for, if those are not inconsistent.

(2) In this section and section 55 a reference to a service conforming to a contract is a reference to—

(a) the service being performed in accordance with section 49, or

(b) the service conforming to a term that section 50 requires to be treated as included in the contract and that relates to the performance of the service.

(3) If the service does not conform to the contract, the consumer's rights (and the provisions about them and when they are available) are—

(a) the right to require repeat performance (see section 55);

(b) the right to a price reduction (see section 56).

(4) If the trader is in breach of a term that section 50 requires to be treated as included in the contract but that does not relate to the service, the consumer has the right to a price reduction (see section 56 for provisions about that right and when it is available).

(5) If the trader is in breach of what the contract requires under section 52 (performance within a reasonable time), the consumer has the right to a price reduction (see section 56 for provisions about that right and when it is available).

(6) This section and sections 55 and 56 do not prevent the consumer seeking other remedies for a breach of a term to which any of subsections (3) to (5) applies, instead of or in addition to a remedy referred to there (but not so as to recover twice for the same loss).

(7) Those other remedies include any of the following that is open to the consumer in the circumstances—

(a) claiming damages;

(b) seeking to recover money paid where the consideration for payment of the money has failed;

(c) seeking specific performance;

(d) seeking an order for specific implement;

(e) relying on the breach against a claim by the trader under the contract;

(f) exercising a right to treat the contract as at an end.

55 Right to repeat performance

(1) The right to require repeat performance is a right to require the trader to perform the service again, to the extent necessary to complete its performance in conformity with the contract.

(2) If the consumer requires such repeat performance, the trader—

(a) must provide it within a reasonable time and without significant inconvenience to the consumer; and

(b) must bear any necessary costs incurred in doing so (including in particular the cost of any labour or materials).

(3) The consumer cannot require repeat performance if completing performance of the service in conformity with the contract is impossible.

(4) Any question as to what is a reasonable time or significant inconvenience is to be determined taking account of—

(a) the nature of the service, and

(b) the purpose for which the service was to be performed.

56 Right to price reduction

(1) The right to a price reduction is the right to require the trader to reduce the price to the consumer by an appropriate amount (including the right to receive a refund for anything already paid above the reduced amount).

(2) The amount of the reduction may, where appropriate, be the full amount of the price.

(3) A consumer who has that right and the right to require repeat performance is only entitled to a price reduction in one of these situations—

(a) because of section 55(3) the consumer cannot require repeat performance; or

(b) the consumer has required repeat performance, but the trader is in breach of the requirement of section 55(2)(a) to do it within a reasonable time and without significant inconvenience to the consumer.

(4) A refund under this section must be given without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund.

(5) The trader must give the refund using the same means of payment as the consumer used to pay for the service, unless the consumer expressly agrees otherwise.

(6) The trader must not impose any fee on the consumer in respect of the refund.

Can a trader contract out of statutory rights and remedies under a services contract?

57 Liability that cannot be excluded or restricted

(1) A term of a contract to supply services is not binding on the consumer to the extent that it would exclude the trader's liability arising under section 49 (service to be performed with reasonable care and skill).

(2) Subject to section 50(2), a term of a contract to supply services is not binding on the consumer to the extent that it would exclude the trader's liability arising under section 50 (information about trader or service to be binding).

(3) A term of a contract to supply services is not binding on the consumer to the extent that it would restrict the trader's liability arising under any of sections 49 and 50 and, where they apply, sections 51 and 52 (reasonable price and reasonable time), if it would prevent the consumer in an appropriate case from recovering the price paid or the value of any other consideration. (If it would not prevent the consumer from doing so, Part 2 (unfair terms) may apply.)

(4) That also means that a term of a contract to supply services is not binding on the consumer to the extent that it would —

(a) exclude or restrict a right or remedy in respect of a liability under any of sections 49 to 52,

(b) make such a right or remedy or its enforcement subject to a restrictive or onerous condition,

(c) allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy, or

(d) exclude or restrict rules of evidence or procedure.

(5) The references in subsections (1) to (3) to excluding or restricting a liability also include preventing an obligation or duty arising or limiting its extent.

(6) An agreement in writing to submit present or future differences to arbitration is not to be regarded as excluding or restricting any liability for the purposes of this section.

(7) See Schedule 3 for provision about the enforcement of this section.

CHAPTER 5

GENERAL AND SUPPLEMENTARY PROVISIONS

58 Powers of the court

(1) In any proceedings in which a remedy is sought by virtue of section 19(3) or (4), 42(2) or 54(3), the court, in addition to any other power it has, may act under this section.

(2) On the application of the consumer the court may make an order requiring specific performance or, in Scotland, specific implement by the trader of any obligation imposed on the trader by virtue of section 23, 43 or 55.

(3) Subsection (4) applies if —

(a) the consumer claims to exercise a right under the relevant remedies provisions, but

(b) the court decides that those provisions have the effect that exercise of another right is appropriate.

(4) The court may proceed as if the consumer had exercised that other right.

(5) If the consumer has claimed to exercise the final right to reject, the court may order that any reimbursement to the consumer is reduced by a deduction for use, to take account of the use the consumer has had of the goods in the period since they were delivered.

(6) Any deduction for use is limited as set out in section 24(9) and (10).

(7) The court may make an order under this section unconditionally or on such terms and conditions as to damages, payment of the price and otherwise as it thinks just.

(8) The "relevant remedies provisions" are—

(a) where Chapter 2 applies, sections 23 and 24;

(b) where Chapter 3 applies, sections 43 and 44;

(c) where Chapter 4 applies, sections 55 and 56.

59 Interpretation

(1) These definitions apply in this Part (as well as the key definitions in section 2)—

"conditional sales contract" has the meaning given in section 5(3);

"Consumer Rights Directive" means Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council;

"credit-broker" means a person acting in the course of a business of credit brokerage carried on by that person;

"credit brokerage" means—

(a) introducing individuals who want to obtain credit to persons carrying on any business so far as it relates to the provision of credit,

(b) introducing individuals who want to obtain goods on hire to persons carrying on a business which comprises or relates to supplying goods under a contract for the hire of goods, or

(c) introducing individuals who want to obtain credit, or to obtain goods on hire, to other persons engaged in credit brokerage;

"delivery" means voluntary transfer of possession from one person to another;

"enactment" includes—

(a) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978,

(b) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales,

(c) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament, and

(d) an enactment contained in, or in an instrument made under, Northern Ireland legislation;

"producer", in relation to goods or digital content, means—

(a) the manufacturer,

(b) the importer into the European Economic Area, or

(c) any person who purports to be a producer by placing the person's name, trade mark or other distinctive sign on the goods or using it in connection with the digital content.

(2) References in this Part to treating a contract as at an end are to be read in accordance with section 19(13).

60 Changes to other legislation

Schedule 1 (amendments consequential on this Part) has effect.

PART 2

UNFAIR TERMS

What contracts and notices are covered by this Part?

61 Contracts and notices covered by this Part

(1) This Part applies to a contract between a trader and a consumer.

(2) This does not include a contract of employment or apprenticeship.

(3) A contract to which this Part applies is referred to in this Part as a "consumer contract".

(4) This Part applies to a notice to the extent that it—
  (a) relates to rights or obligations as between a trader and a consumer, or
  (b) purports to exclude or restrict a trader's liability to a consumer.

(5) This does not include a notice relating to rights, obligations or liabilities as between an employer and an employee.

(6) It does not matter for the purposes of subsection (4) whether the notice is expressed to apply to a consumer, as long as it is reasonable to assume it is intended to be seen or heard by a consumer.

(7) A notice to which this Part applies is referred to in this Part as a "consumer notice".

(8) In this section "notice" includes an announcement, whether or not in writing, and any other communication or purported communication.

What are the general rules about fairness of contract terms and notices?

62 Requirement for contract terms and notices to be fair

(1) An unfair term of a consumer contract is not binding on the consumer.

(2) An unfair consumer notice is not binding on the consumer.

(3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.

(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

(5) Whether a term is fair is to be determined—
  (a) taking into account the nature of the subject matter of the contract, and
  (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.

(6) A notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

(7) Whether a notice is fair is to be determined—

(a) taking into account the nature of the subject matter of the notice, and

(b) by reference to all the circumstances existing when the rights or obligations to which it relates arose and to the terms of any contract on which it depends.

(8) This section does not affect the operation of—

(a) section 31 (exclusion of liability: goods contracts),

(b) section 47 (exclusion of liability: digital content contracts),

(c) section 57 (exclusion of liability: services contracts), or

(d) section 65 (exclusion of negligence liability).

63 Contract terms which may or must be regarded as unfair

(1) Part 1 of Schedule 2 contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair for the purposes of this Part.

(2) Part 1 of Schedule 2 is subject to Part 2 of that Schedule; but a term listed in Part 2 of that Schedule may nevertheless be assessed for fairness under section 62 unless section 64 or 73 applies to it.

(3) The Secretary of State may by order made by statutory instrument amend Schedule 2 so as to add, modify or remove an entry in Part 1 or Part 2 of that Schedule.

(4) An order under subsection (3) may contain transitional or transitory provision or savings.

(5) No order may be made under subsection (3) unless a draft of the statutory instrument containing it has been laid before, and approved by a resolution of, each House of Parliament.

(6) A term of a consumer contract must be regarded as unfair if it has the effect that the consumer bears the burden of proof with respect to compliance by a distance supplier or an intermediary with an obligation under any enactment or rule implementing the Distance Marketing Directive.

(7) In subsection (6)—

"the Distance Marketing Directive" means Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC;

"distance supplier" means—

(a) a supplier under a distance contract within the meaning of the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095), or

(b) a supplier of unsolicited financial services within the meaning of regulation 15 of those regulations;

"enactment" includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978;

"intermediary" has the same meaning as in the Financial Services (Distance Marketing) Regulations 2004;

"rule" means a rule made by the Financial Conduct Authority or the Prudential Regulation Authority under the Financial Services and Markets Act 2000 or by a designated professional body within the meaning of section 326(2) of that Act.

64 Exclusion from assessment of fairness

(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—

(a) it specifies the main subject matter of the contract, or

(b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

(2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

(3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.

(4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.

(5) In subsection (4) "average consumer" means a consumer who is reasonably well-informed, observant and circumspect.

(6) This section does not apply to a term of a contract listed in Part 1 of Schedule 2.

65 Bar on exclusion or restriction of negligence liability

(1) A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence.

(2) Where a term of a consumer contract, or a consumer notice, purports to exclude or restrict a trader's liability for negligence, a person is not to be taken to have voluntarily accepted any risk merely because the person agreed to or knew about the term or notice.

(3) In this section "personal injury" includes any disease and any impairment of physical or mental condition.

(4) In this section "negligence" means the breach of—

(a) any obligation to take reasonable care or exercise reasonable skill in the performance of a contract where the obligation arises from an express or implied term of the contract,

(b) a common law duty to take reasonable care or exercise reasonable skill,

(c) the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957, or

(d) the duty of reasonable care imposed by section 2(1) of the Occupiers' Liability (Scotland) Act 1960.

(5) It is immaterial for the purposes of subsection (4)—

(a) whether a breach of duty or obligation was inadvertent or intentional, or
(b) whether liability for it arises directly or vicariously.

(6) This section is subject to section 66 (which makes provision about the scope of this section).

66 Scope of section 65

(1) Section 65 does not apply to—
(a) any contract so far as it is a contract of insurance, including a contract to pay an annuity on human life, or
(b) any contract so far as it relates to the creation or transfer of an interest in land.

(2) Section 65 does not affect the validity of any discharge or indemnity given by a person in consideration of the receipt by that person of compensation in settlement of any claim the person has.

(3) Section 65 does not—
(a) apply to liability which is excluded or discharged as mentioned in section 4(2)(a) (exception to liability to pay damages to relatives) of the Damages (Scotland) Act 2011, or
(b) affect the operation of section 5 (discharge of liability to pay damages: exception for mesothelioma) of that Act.

(4) Section 65 does not apply to the liability of an occupier of premises to a person who obtains access to the premises for recreational purposes if—
(a) the person suffers loss or damage because of the dangerous state of the premises, and
(b) allowing the person access for those purposes is not within the purposes of the occupier's trade, business, craft or profession.

67 Effect of an unfair term on the rest of a contract

Where a term of a consumer contract is not binding on the consumer as a result of this Part, the contract continues, so far as practicable, to have effect in every other respect.

68 Requirement for transparency

(1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.

(2) A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible.

69 Contract terms that may have different meanings

(1) If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.

(2) Subsection (1) does not apply to the construction of a term or a notice in proceedings on an application for an injunction or interdict under paragraph 3 of Schedule 3.

How are the general rules enforced?

70 Enforcement of the law on unfair contract terms

(1) Schedule 3 confers functions on the Competition and Markets Authority and other regulators in relation to the enforcement of this Part.

(2) For provision about the investigatory powers that are available to those regulators for the purposes of that Schedule, see Schedule 5.

Supplementary provisions

71 Duty of court to consider fairness of term

(1) Subsection (2) applies to proceedings before a court which relate to a term of a consumer contract.

(2) The court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it.

(3) But subsection (2) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term.

72 Application of rules to secondary contracts

(1) This section applies if a term of a contract ("the secondary contract") reduces the rights or remedies or increases the obligations of a person under another contract ("the main contract").

(2) The term is subject to the provisions of this Part that would apply to the term if it were in the main contract.

(3) It does not matter for the purposes of this section—
  (a) whether the parties to the secondary contract are the same as the parties to the main contract, or
  (b) whether the secondary contract is a consumer contract.

(4) This section does not apply if the secondary contract is a settlement of a claim arising under the main contract.

73 Disapplication of rules to mandatory terms and notices

(1) This Part does not apply to a term of a contract, or to a notice, to the extent that it reflects—
  (a) mandatory statutory or regulatory provisions, or
  (b) the provisions or principles of an international convention to which the United Kingdom or the EU is a party.

(2) In subsection (1) "mandatory statutory or regulatory provisions" includes rules which, according to law, apply between the parties on the basis that no other arrangements have been established.

74 Contracts applying law of non-EEA State

(1) If—

(a) the law of a country or territory other than an EEA State is chosen by the parties to be applicable to a consumer contract, but

(b) the consumer contract has a close connection with the United Kingdom,

this Part applies despite that choice.

(2) For cases where the law applicable has not been chosen or the law of an EEA State is chosen, see Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

75 Changes to other legislation

Schedule 4 (amendments consequential on this Part) has effect.

76 Interpretation of Part 2

(1) In this Part—

"consumer contract" has the meaning given by section 61(3);

"consumer notice" has the meaning given by section 61(7);

"transparent" is to be construed in accordance with sections 64(3) and 68(2).

(2) The following have the same meanings in this Part as they have in Part 1—

"trader" (see section 2(2));

"consumer" (see section 2(3));

"goods" (see section 2(8));

"digital content" (see section 2(9)).

(3) Section 2(4) (trader who claims an individual is not a consumer must prove it) applies in relation to this Part as it applies in relation to Part 1.

PART 3

MISCELLANEOUS AND GENERAL

CHAPTER 1

ENFORCEMENT ETC.

77 Investigatory powers etc

(1) Schedule 5 (investigatory powers etc) has effect.

(2) Schedule 6 (investigatory powers: consequential amendments) has effect.

78 Amendment of weights and measures legislation regarding unwrapped bread

(1) In the Weights and Measures (Packaged Goods) Regulations 2006 (S.I. 2006/659), Schedule 5 (application to bread) is amended in accordance with subsections (2) and (3).

(2) For paragraph 9 substitute—

"9 Regulation 9(1)(b)(ii) (duty to keep records) does not apply to bread which is sold unwrapped or in open packs."

(3) After paragraph 13 insert—

"Transitional provision

14 (1) Regulation 9(1)(b)(ii) (duty to keep records) does not apply to a packer who holds a notice of exemption which is in force.

(2) A "notice of exemption" means a notice issued under paragraph 9 as it stood before section 78 of the Consumer Rights Act 2015 came into force."

(4) The use of this Act to make amendments to the Weights and Measures (Packaged Goods) Regulations 2006 has no effect on the availability of any power in the Weights and Measures Act 1985 to amend or revoke those Regulations, including the provision substituted by subsection (2) and that inserted by subsection (3).

(5) In the Weights and Measures (Packaged Goods) Regulations (Northern Ireland) 2011 (SR 2011/331), Schedule 5 (application to bread) is amended in accordance with subsections (6) and (7).

(6) For paragraph 9 substitute—

"9 Regulation 9(1)(b)(ii) (duty to keep records) does not apply to bread which is sold unwrapped or in open packets."

(7) After paragraph 13 insert—

"Transitional provision

14 (1) Regulation 9(1)(b)(ii) (duty to keep records) does not apply to a packer who holds a notice of exemption which is in force.

(2) A "notice of exemption" means a notice issued under paragraph 9 as it stood before section 78 of the Consumer Rights Act 2015 came into force."

(8) The use of this Act to make amendments to the Weights and Measures (Packaged Goods) Regulations (Northern Ireland) 2011 has no effect on the availability of any power in the Weights and Measures (Northern Ireland) Order 1981 (SI 1981/231 (NI 10)) to amend or revoke those Regulations, including the provision substituted by subsection (6) and that inserted by subsection (7).

79 Enterprise Act 2002: enhanced consumer measures and other enforcement

(1) Schedule 7 contains amendments of Part 8 of the Enterprise Act 2002 (enforcement of certain consumer legislation).

(2) The amendments have effect only in relation to conduct which occurs, or which is likely to occur, after the commencement of this section.

80 Contravention of code regulating premium rate services

(1) In section 120(3) of the Communications Act 2003 (conditions under section 120 must require compliance with directions given in accordance with an approved code or with an order under section 122) before paragraph (a) insert—

"(za) the provisions of an approved code;".

(2) In section 121(5) of that Act (provision about enforcement that may be made by approved code) after paragraph (a) insert—

"(aa) provision that applies where there is or has been more than one contravention of the code or directions given in accordance with it by a person and which enables—

(i) a single penalty (which does not exceed that maximum penalty) to be imposed on the person in respect of all of those contraventions, or

(ii) separate penalties (each of which does not exceed that maximum penalty) to be imposed on the person in respect of each of those contraventions,

according to whether the person imposing the penalty determines that a single penalty or separate penalties are appropriate and proportionate to those contraventions;".

(3) Section 123 of that Act (enforcement by OFCOM of conditions under section 120) is amended as follows.

(4) After subsection (1) insert—

"(1A) Subsection (1B) applies where a notification under section 94 as applied by this section relates to more than one contravention of—

(a) a code approved under section 121,

(b) directions given in accordance with such a code, or

(c) an order under section 122.

(1B) Section 96(3) as applied by this section enables OFCOM to impose—

(a) a single penalty in respect of all of those contraventions, or

(b) separate penalties in respect of each of those contraventions,

according to whether OFCOM determine that a single penalty or separate penalties are appropriate and proportionate to those contraventions."

(5) In subsection (2) (maximum amount of penalty) for "the penalty" substitute "each penalty".

CHAPTER 2

COMPETITION

81 Private actions in competition law

Schedule 8 (private actions in competition law) has effect.

82 Appointment of judges to the Competition Appeal Tribunal

(1) In section 12(2) of the Enterprise Act 2002 (constitution of the Competition

Appeal Tribunal) after paragraph (a) insert—

"(aa) such judges as are nominated from time to time by the Lord Chief Justice of England and Wales from the High Court of England and Wales;

(ab) such judges as are nominated from time to time by the Lord President of the Court of Session from the judges of the Court of Session;

(ac) such judges as are nominated from time to time by the Lord Chief Justice of Northern Ireland from the High Court in Northern Ireland;".

(2) In section 14 of that Act (constitution of the Competition Appeal Tribunal for particular proceedings and its decisions)—

(a) in subsection (2) after "the President" insert ", a judge within any of paragraphs (aa) to (ac) of section 12(2)", and

(b) in subsection (3) for "either" substitute "the judges within paragraphs (aa) to (ac) of section 12(2),".

(3) In Schedule 4 (Tribunal procedure) to that Act, in paragraph 18(3)(b) (consequences of member of Tribunal being unable to continue) after "if that person is not" insert "a judge within any of paragraphs (aa) to (ac) of section 12(2) or".

CHAPTER 3

DUTY OF LETTING AGENTS TO PUBLICISE FEES ETC

83 Duty of letting agents to publicise fees etc

(1) A letting agent must, in accordance with this section, publicise details of the agent's relevant fees.

(2) The agent must display a list of the fees—

(a) at each of the agent's premises at which the agent deals face-to-face with persons using or proposing to use services to which the fees relate, and

(b) at a place in each of those premises at which the list is likely to be seen by such persons.

(3) The agent must publish a list of the fees on the agent's website (if it has a website).

(4) A list of fees displayed or published in accordance with subsection (2) or (3) must include—

(a) a description of each fee that is sufficient to enable a person who is liable to pay it to understand the service or cost that is covered by the fee or the purpose for which it is imposed (as the case may be),

(b) in the case of a fee which tenants are liable to pay, an indication of whether the fee relates to each dwelling-house or each tenant under a tenancy of the dwelling-house, and

(c) the amount of each fee inclusive of any applicable tax or, where the amount of a fee cannot reasonably be determined in advance, a description of how that fee is calculated.

(5) Subsections (6) and (7) apply to a letting agent engaging in letting agency or property management work in relation to dwelling-houses in England.

(6) If the agent holds money on behalf of persons to whom the agent provides services as part of that work, the duty imposed on the agent by subsection (2) or (3) includes a duty to display or publish, with the list of fees, a statement of whether the agent is a member of a client money protection scheme.

(7) If the agent is required to be a member of a redress scheme for dealing with complaints in connection with that work, the duty imposed on the agent by subsection (2) or (3) includes a duty to display or publish, with the list of fees, a statement—

(a) that indicates that the agent is a member of a redress scheme, and

(b) that gives the name of the scheme.

(8) The appropriate national authority may by regulations specify—

(a) other ways in which a letting agent must publicise details of the relevant fees charged by the agent or (where applicable) a statement within subsection (6) or (7);

(b) the details that must be given of fees publicised in that way.

(9) In this section—

"client money protection scheme" means a scheme which enables a person on whose behalf a letting agent holds money to be compensated if all or part of that money is not repaid to that person in circumstances where the scheme applies;

"redress scheme" means a redress scheme for which provision is made by order under section 83 or 84 of the Enterprise and Regulatory Reform Act 2013.

84 Letting agents to which the duty applies

(1) In this Chapter "letting agent" means a person who engages in letting agency work (whether or not that person engages in other work).

(2) A person is not a letting agent for the purposes of this Chapter if the person engages in letting agency work in the course of that person's employment under a contract of employment.

(3) A person is not a letting agent for the purposes of this Chapter if—

(a) the person is of a description specified in regulations made by the appropriate national authority;

(b) the person engages in work of a description specified in regulations made by the appropriate national authority.

85 Fees to which the duty applies

(1) In this Chapter "relevant fees", in relation to a letting agent, means the fees, charges or penalties (however expressed) payable to the agent by a landlord or tenant—

(a) in respect of letting agency work carried on by the agent,

(b) in respect of property management work carried on by the agent, or

(c) otherwise in connection with—

(i) an assured tenancy of a dwelling-house, or

(ii) a dwelling-house that is, has been or is proposed to be let under an assured tenancy.

(2) Subsection (1) does not apply to—

(a) the rent payable to a landlord under a tenancy,

(b) any fees, charges or penalties which the letting agent receives from a landlord under a tenancy on behalf of another person,

(c) a tenancy deposit within the meaning of section 212(8) of the Housing Act 2004, or

(d) any fees, charges or penalties of a description specified in regulations made by the appropriate national authority.

86 Letting agency work and property management work

(1) In this Chapter "letting agency work" means things done by a person in the course of a business in response to instructions received from—

(a) a person ("a prospective landlord") seeking to find another person wishing to rent a dwelling-house under an assured tenancy and, having found such a person, to grant such a tenancy, or

(b) a person ("a prospective tenant") seeking to find a dwelling-house to rent under an assured tenancy and, having found such a dwelling-house, to obtain such a tenancy of it.

(2) But "letting agency work" does not include any of the following things when done by a person who does nothing else within subsection (1)—

(a) publishing advertisements or disseminating information;

(b) providing a means by which a prospective landlord or a prospective tenant can, in response to an advertisement or dissemination of information, make direct contact with a prospective tenant or a prospective landlord;

(c) providing a means by which a prospective landlord and a prospective tenant can communicate directly with each other.

(3) "Letting agency work" also does not include things done by a local authority.

(4) In this Chapter "property management work", in relation to a letting agent, means things done by the agent in the course of a business in response to instructions received from another person where—

(a) that person wishes the agent to arrange services, repairs, maintenance, improvements or insurance in respect of, or to deal with any other aspect of the management of, premises on the person's behalf, and

(b) the premises consist of a dwelling-house let under an assured tenancy.

87 Enforcement of the duty

(1) It is the duty of every local weights and measures authority in England and Wales to enforce the provisions of this Chapter in its area.

(2) If a letting agent breaches the duty in section 83(3) (duty to publish list of fees etc on agent's website), that breach is taken to have occurred in each area of a local weights and measures authority in England and Wales in which a dwelling-house to which the fees relate is located.

(3) Where a local weights and measures authority in England and Wales is satisfied on the balance of probabilities that a letting agent has breached a duty

imposed by or under section 83, the authority may impose a financial penalty on the agent in respect of that breach.

(4) A local weights and measures authority in England and Wales may impose a penalty under this section in respect of a breach which occurs in England and Wales but outside that authority's area (as well as in respect of a breach which occurs within that area).

(5) But a local weights and measures authority in England and Wales may impose a penalty in respect of a breach which occurs outside its area and in the area of a local weights and measures authority in Wales only if it has obtained the consent of that authority.

(6) Only one penalty under this section may be imposed on the same letting agent in respect of the same breach.

(7) The amount of a financial penalty imposed under this section—
(a) may be such as the authority imposing it determines, but
(b) must not exceed £5,000.

(8) Schedule 9 (procedure for and appeals against financial penalties) has effect.

(9) A local weights and measures authority in England must have regard to any guidance issued by the Secretary of State about—
(a) compliance by letting agents with duties imposed by or under section 83;
(b) the exercise of its functions under this section or Schedule 9.

(10) A local weights and measures authority in Wales must have regard to any guidance issued by the Welsh Ministers about—
(a) compliance by letting agents with duties imposed by or under section 83;
(b) the exercise of its functions under this section or Schedule 9.

(11) The Secretary of State may by regulations made by statutory instrument—
(a) amend any of the provisions of this section or Schedule 9 in their application in relation to local weights and measures authorities in England;
(b) make consequential amendments to Schedule 5 in its application in relation to such authorities.

(12) The Welsh Ministers may by regulations made by statutory instrument—
(a) amend any of the provisions of this section or Schedule 9 in their application in relation to local weights and measures authorities in Wales;
(b) make consequential amendments to Schedule 5 in its application in relation to such authorities.

88 Supplementary provisions

(1) In this Chapter—
"the appropriate national authority" means—
(a) in relation to England, the Secretary of State, and
(b) in relation to Wales, the Welsh Ministers;
"assured tenancy" means a tenancy which is an assured tenancy for the purposes of the Housing Act 1988 except where—

(a) the landlord is—

(i) a private registered provider of social housing,

(ii) a registered social landlord, or

(iii) a fully mutual housing association, or

(b) the tenancy is a long lease;

"dwelling-house" may be a house or part of a house;

"fully mutual housing association" has the same meaning as in Part 1 of the Housing Associations Act 1985 (see section 1(1) and (2) of that Act);

"landlord" includes a person who proposes to be a landlord under a tenancy and a person who has ceased to be a landlord under a tenancy because the tenancy has come to an end;

"long lease" means a lease which—

(a) is a long lease for the purposes of Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993, or

(b) in the case of a shared ownership lease (within the meaning given by section 7(7) of that Act), would be a lease within paragraph (a) of this definition if the tenant's total share (within the meaning given by that section) were 100%;

"registered social landlord" means a body registered as a social landlord under Chapter 1 of Part 1 of the Housing Act 1996;

"tenant" includes a person who proposes to be a tenant under a tenancy and a person who has ceased to be a tenant under a tenancy because the tenancy has come to an end.

(2) In this Chapter "local authority" means—

(a) a county council,

(b) a county borough council,

(c) a district council,

(d) a London borough council,

(e) the Common Council of the City of London in its capacity as local authority, or

(f) the Council of the Isles of Scilly.

(3) References in this Chapter to a tenancy include a proposed tenancy and a tenancy that has come to an end.

(4) References in this Chapter to anything which is payable, or which a person is liable to pay, to a letting agent include anything that the letting agent claims a person is liable to pay, regardless of whether the person is in fact liable to pay it.

(5) Regulations under this Chapter are to be made by statutory instrument.

(6) A statutory instrument containing (whether alone or with other provision) regulations made by the Secretary of State under section 87(11) is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(7) A statutory instrument containing (whether alone or with other provision) regulations made by the Welsh Ministers under section 87(12) is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, the National Assembly for Wales.

(8) A statutory instrument containing regulations made by the Secretary of State under this Chapter other than one to which subsection (6) applies is subject to annulment in pursuance of a resolution of either House of Parliament.

(9) A statutory instrument containing regulations made by the Welsh Ministers under this Chapter other than one to which subsection (7) applies is subject to annulment in pursuance of a resolution of the National Assembly for Wales.

(10) Regulations under this Chapter—
(a) may make different provision for different purposes;
(b) may make provision generally or in relation to specific cases.

(11) Regulations under this Chapter may include incidental, supplementary, consequential, transitional, transitory or saving provision.

CHAPTER 4

STUDENT COMPLAINTS SCHEME

89 Qualifying institutions for the purposes of the student complaints scheme

(1) The Higher Education Act 2004 is amended as follows.

(2) In section 11 (qualifying institutions for the purposes of the student complaints scheme) after paragraph (d) insert—

"(e) an institution (other than one within another paragraph of this section) which provides higher education courses which are designated for the purposes of section 22 of the 1998 Act by or under regulations under that section;

(f) an institution (other than one within another paragraph of this section) whose entitlement to grant awards is conferred by an order under section 76(1) of the 1992 Act."

(3) In section 12 (qualifying complaints for the purposes of the student complaints scheme)—
(a) in subsection (1) for "subsection (2)" substitute "subsections (2) and (3)", and
(b) after subsection (2) insert—

"(3) The designated operator may determine that a complaint within subsection (1) about an act or omission of a qualifying institution within paragraph (e) or (f) of section 11 is a qualifying complaint only if it is made by a person who is undertaking or has undertaken a particular course or a course of a particular description."

CHAPTER 5

SECONDARY TICKETING

90 Duty to provide information about tickets

(1) This section applies where a person ("the seller") re-sells a ticket for a recreational, sporting or cultural event in the United Kingdom through a secondary ticketing facility.

(2) The seller and each operator of the facility must ensure that the person who buys the ticket ("the buyer") is given the information specified in subsection (3), where this is applicable to the ticket.

(3) That information is—

(a) where the ticket is for a particular seat or standing area at the venue for the event, the information necessary to enable the buyer to identify that seat or standing area,

(b) information about any restriction which limits use of the ticket to persons of a particular description, and

(c) the face value of the ticket.

(4) The reference in subsection (3)(a) to information necessary to enable the buyer to identify a seat or standing area at a venue includes, so far as applicable—

(a) the name of the area in the venue in which the seat or standing area is located (for example the name of the stand in which it is located),

(b) information necessary to enable the buyer to identify the part of the area in the venue in which the seat or standing area is located (for example the block of seats in which the seat is located),

(c) the number, letter or other distinguishing mark of the row in which the seat is located, and

(d) the number, letter or other distinguishing mark of the seat.

(5) The reference in subsection (3)(c) to the face value of the ticket is to the amount stated on the ticket as its price.

(6) The seller and each operator of the facility must ensure that the buyer is given the information specified in subsection (7), where the seller is—

(a) an operator of the secondary ticketing facility,

(b) a person who is a parent undertaking or a subsidiary undertaking in relation to an operator of the secondary ticketing facility,

(c) a person who is employed or engaged by an operator of the secondary ticketing facility,

(d) a person who is acting on behalf of a person within paragraph (c), or

(e) an organiser of the event or a person acting on behalf of an organiser of the event.

(7) That information is a statement that the seller of the ticket is a person within subsection (6) which specifies the ground on which the seller falls within that subsection.

(8) Information required by this section to be given to the buyer must be given—

(a) in a clear and comprehensible manner, and

(b) before the buyer is bound by the contract for the sale of the ticket.

(9) This section applies in relation to the re-sale of a ticket through a secondary ticketing facility only if the ticket is first offered for re-sale through the facility after the coming into force of this section.

91 Prohibition on cancellation or blacklisting

(1) This section applies where a person ("the seller") re-sells, or offers for re-sale, a ticket for a recreational, sporting or cultural event in the United Kingdom through a secondary ticketing facility.

(2) An organiser of the event must not cancel the ticket merely because the seller has re-sold the ticket or offered it for re-sale unless—

(a) a term of the original contract for the sale of the ticket—

(i) provided for its cancellation if it was re-sold by the buyer under that contract,

(ii) provided for its cancellation if it was offered for re-sale by that buyer, or

(iii) provided as mentioned in sub-paragraph (i) and (ii), and

(b) that term was not unfair for the purposes of Part 2 (unfair terms).

(3) An organiser of the event must not blacklist the seller merely because the seller has re-sold the ticket or offered it for re-sale unless—

(a) a term of the original contract for the sale of the ticket—

(i) provided for the blacklisting of the buyer under that contract if it was re-sold by that buyer,

(ii) provided for the blacklisting of that buyer if it was offered for re-sale by that buyer, or

(iii) provided as mentioned in sub-paragraph (i) and (ii), and

(b) that term was not unfair for the purposes of Part 2 (unfair terms).

(4) In subsections (2) and (3) "the original contract" means the contract for the sale of the ticket by an organiser of the event to a person other than an organiser of the event.

(5) For the purposes of this section an organiser of an event cancels a ticket if the organiser takes steps which result in the holder for the time being of the ticket no longer being entitled to attend that event.

(6) For the purposes of this section an organiser of an event blacklists a person if the organiser takes steps—

(a) to prevent the person from acquiring a ticket for a recreational, sporting or cultural event in the United Kingdom, or

(b) to restrict the person's opportunity to acquire such a ticket.

(7) Part 2 (unfair terms) may apply to a term of a contract which, apart from that Part, would permit the cancellation of a ticket for a recreational, sporting or cultural event in the United Kingdom, or the blacklisting of the seller of such a ticket, in circumstances other than those mentioned in subsection (2) or (3).

(8) Before the coming into force of Part 2, references to that Part in this section are to be read as references to the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).

(9) This section applies in relation to a ticket that is re-sold or offered for re-sale before or after the coming into force of this section; but the prohibition in this section applies only to things done after its coming into force.

92 Duty to report criminal activity

(1) This section applies where—

(a) an operator of a secondary ticketing facility knows that a person has used or is using the facility in such a way that an offence has been or is being committed, and

(b) the offence relates to the re-sale of a ticket for a recreational, sporting or cultural event in the United Kingdom.

(2) The operator must, as soon as the operator becomes aware that a person has used or is using the facility as mentioned in subsection (1), disclose the matters specified in subsection (3) to—

(a) an appropriate person, and

(b) an organiser of the event (subject to subsection (5)).

(3) Those matters are—

(a) the identity of the person mentioned in subsection (1), if this is known to the operator, and

(b) the fact that the operator knows that an offence has been or is being committed as mentioned in that subsection.

(4) The following are appropriate persons for the purposes of this section—

(a) a constable of a police force in England and Wales,

(b) a constable of the police service of Scotland, and

(c) a police officer within the meaning of the Police (Northern Ireland) Act 2000.

(5) This section does not require an operator to make a disclosure to an organiser of an event if the operator has reasonable grounds for believing that to do so will prejudice the investigation of any offence.

(6) References in this section to an offence are to an offence under the law of any part of the United Kingdom.

(7) This section applies only in relation to an offence of which an operator becomes aware after the coming into force of this section.

93 Enforcement of this Chapter

(1) A local weights and measures authority in Great Britain may enforce the provisions of this Chapter in its area.

(2) The Department of Enterprise, Trade and Investment may enforce the provisions of this Chapter in Northern Ireland.

(3) Each of the bodies referred to in subsections (1) and (2) is an "enforcement authority" for the purposes of this Chapter.

(4) Where an enforcement authority is satisfied on the balance of probabilities that a person has breached a duty or prohibition imposed by this Chapter, the authority may impose a financial penalty on the person in respect of that breach.

(5) But in the case of a breach of a duty in section 90 or a prohibition in section 91 an enforcement authority may not impose a financial penalty on a person ("P") if the authority is satisfied on the balance of probabilities that—

(a) the breach was due to—

(i) a mistake,

(ii) reliance on information supplied to P by another person,

(iii) the act or default of another person,

(iv) an accident, or

(v) another cause beyond P's control, and

(b) P took all reasonable precautions and exercised all due diligence to avoid the breach.

(6) A local weights and measures authority in England and Wales may impose a penalty under this section in respect of a breach which occurs in England and Wales but outside that authority's area (as well as in respect of a breach which occurs within that area).

(7) A local weights and measures authority in Scotland may impose a penalty under this section in respect of a breach which occurs in Scotland but outside that authority's area (as well as in respect of a breach which occurs within that area).

(8) Only one penalty under this section may be imposed on the same person in respect of the same breach.

(9) The amount of a financial penalty imposed under this section—
(a) may be such as the enforcement authority imposing it determines, but
(b) must not exceed £5,000.

(10) Schedule 10 (procedure for and appeals against financial penalties) has effect.

(11) References in this section to this Chapter do not include section 94.

94 Duty to review measures relating to secondary ticketing

(1) The Secretary of State must—
(a) review, or arrange for a review of, consumer protection measures applying to the re-sale of tickets for recreational, sporting or cultural events in the United Kingdom through secondary ticketing facilities,
(b) prepare a report on the outcome of the review or arrange for such a report to be prepared, and
(c) publish that report.

(2) The report must be published before the end of the period of 12 months beginning with the day on which this section comes into force.

(3) The Secretary of State must lay the report before Parliament.

(4) In this section "consumer protection measures" includes such legislation, rules of law, codes of practice and guidance as the Secretary of State considers relate to the rights of consumers or the protection of their interests.

95 Interpretation of this Chapter

(1) In this Chapter—
"enforcement authority" has the meaning given by section 93(3);
"operator", in relation to a secondary ticketing facility, means a person who—
(a) exercises control over the operation of the facility, and
(b) receives revenue from the facility,
but this is subject to regulations under subsection (2);
"organiser", in relation to an event, means a person who—
(a) is responsible for organising or managing the event, or
(b) receives some or all of the revenue from the event;
"parent undertaking" has the meaning given by section 1162 of the Companies Act 2006;

"secondary ticketing facility" means an internet-based facility for the re-sale of tickets for recreational, sporting or cultural events;

"subsidiary undertaking" has the meaning given by section 1162 of the Companies Act 2006;

"undertaking" has the meaning given by section 1161(1) of the Companies Act 2006.

(2) The Secretary of State may by regulations provide that a person of a description specified in the regulations is or is not to be treated for the purposes of this Chapter as an operator in relation to a secondary ticketing facility.

(3) Regulations under subsection (2)—

(a) are to be made by statutory instrument;

(b) may make different provision for different purposes;

(c) may include incidental, supplementary, consequential, transitional, transitory or saving provision.

(4) A statutory instrument containing regulations under subsection (2) is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

CHAPTER 6

GENERAL

96 Power to make consequential provision

(1) The Secretary of State may by order made by statutory instrument make provision in consequence of this Act.

(2) The power conferred by subsection (1) includes power—

(a) to amend, repeal, revoke or otherwise modify any provision made by an enactment or an instrument made under an enactment (including an enactment passed or instrument made in the same Session as this Act);

(b) to make transitional, transitory or saving provision.

(3) A statutory instrument containing (whether alone or with other provision) an order under this section which amends, repeals, revokes or otherwise modifies any provision of primary legislation is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(4) A statutory instrument containing an order under this section which does not amend, repeal, revoke or otherwise modify any provision of primary legislation is subject to annulment in pursuance of a resolution of either House of Parliament.

(5) In this section—

"enactment" includes an Act of the Scottish Parliament, a Measure or Act of the National Assembly for Wales and Northern Ireland legislation;

"primary legislation" means—

(a) an Act of Parliament,

(b) an Act of the Scottish Parliament,

(c) a Measure or Act of the National Assembly for Wales, and

(d) Northern Ireland legislation.

97 Power to make transitional, transitory and saving provision

(1) The Secretary of State may by order made by statutory instrument make transitional, transitory or saving provision in connection with the coming into force of any provision of this Act other than the coming into force of Chapter 3 or 4 of this Part in relation to Wales.

(2) The Welsh Ministers may by order made by statutory instrument make transitional, transitory or saving provision in connection with the coming into force of Chapter 3 or 4 of this Part in relation to Wales.

98 Financial provision

There is to be paid out of money provided by Parliament—

(a) any expenses incurred by a Minister of the Crown or a government department under this Act, and

(b) any increase attributable to this Act in the sums payable under any other Act out of money so provided.

99 Extent

(1) The amendment, repeal or revocation of any provision by this Act has the same extent as the provision concerned.

(2) Section 27 extends only to Scotland.

(3) Chapter 3 of this Part extends only to England and Wales.

(4) Subject to that, this Act extends to England and Wales, Scotland and Northern Ireland.

100 Commencement

(1) The provisions of this Act listed in subsection (2) come into force on the day on which this Act is passed.

(2) Those provisions are—

(a) section 48(5) to (8),

(b) Chapter 3 of this Part in so far as it confer powers to make regulations,

(c) section 88(5) to (11),

(d) this Chapter, and

(e) paragraph 12 of Schedule 5.

(3) Chapters 3 and 4 of this Part come into force—

(a) in relation to England, on such day as the Secretary of State may appoint by order made by statutory instrument;

(b) in relation to Wales, on such day as the Welsh Ministers may appoint by order made by statutory instrument.

(4) Chapter 5 of this Part comes into force at the end of the period of two months beginning with the day on which this Act is passed.

(5) The other provisions of this Act come into force on such day as the Secretary of State may appoint by order made by statutory instrument.

(6) An order under this section may appoint different days for different purposes.

101 Short title

This Act may be cited as the Consumer Rights Act 2015.

SCHEDULES

SCHEDULE 1

Section 60

AMENDMENTS CONSEQUENTIAL ON PART 1

Supply of Goods (Implied Terms) Act 1973 (c. 13)

1 The Supply of Goods (Implied Terms) Act 1973 is amended as follows.

2 For "hire-purchase agreement" (or "hire purchase agreement") in each place, except in section 15(1), substitute "relevant hire-purchase agreement".

3 (1) Section 10 (implied undertakings as to quality or fitness) is amended as follows.

(2) Omit subsections (2D) to (2F).

(3) Omit subsection (8).

4 (1) Section 11A (modification of remedies for breach of statutory condition in non-consumer cases) is amended as follows.

(2) In subsection (1) omit "then, if the person to whom the goods are bailed does not deal as consumer,".

(3) In subsection (3), for paragraph (b) substitute—

"(b) that the agreement was a relevant hire-purchase agreement."

(4) Omit subsection (4).

5 In section 12A (remedies for breach of hire-purchase agreement as respects Scotland) omit subsections (2) and (3).

6 Omit section 14 (special provisions as to conditional sale agreements).

7 (1) Section 15 (supplementary) is amended as follows.

(2) In subsection (1)—

(a) in the definition of "hire-purchase agreement" at the end insert—

"and a hire-purchase agreement is relevant if it is not a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies;", and

(b) omit the definition of "producer".

(3) Omit subsection (3).

Sale of Goods Act 1979 (c. 54)

8 The Sale of Goods Act 1979 is amended as follows.

9 In section 1 (contracts to which Act applies), after subsection (4) insert—

"(5) Certain sections or subsections of this Act do not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies.

(6) Where that is the case it is indicated in the section concerned."

10 In section 11 (when condition to be treated as warranty), after subsection (4) insert—

"(4A) Subsection (4) does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in sections 19 to 22 of that Act)."

11 In section 12 (implied terms about title etc), after subsection (6) insert—

"(7) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 17 of that Act)."

12 In section 13 (sale by description), after subsection (4) insert—

"(5) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 11 of that Act)."

13 (1) Section 14 (implied terms about quality or fitness) is amended as follows.

(2) Omit subsections (2D) to (2F).

(3) After subsection (8) insert—

"(9) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in sections 9, 10 and 18 of that Act)."

14 In section 15 (sale by sample), after subsection (4) insert—

"(5) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in sections 13 and 18 of that Act)."

15 In section 15A (modification of remedies for breach of condition in non-consumer cases), in subsection (1) omit "then, if the buyer does not deal as consumer,".

16 (1) Section 15B (remedies for breach of contract as respects Scotland) is amended as follows.

(2) After subsection (1) insert—

"(1A) Subsection (1) does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in sections 19 to 22 of that Act)."

(3) Omit subsection (2).

17 (1) In section 20 (passing of risk), for subsection (4) substitute—

"(4) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 29 of that Act)."

(2) The marginal note "Passing of risk" substituted by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) is not affected by the revocation of those Regulations by this Schedule.

18 In section 29 (rules about delivery), after subsection (3) insert—

"(3A) Subsection (3) does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 28 of that Act)."

19 (1) Section 30 (delivery of wrong quantity) is amended as follows.

(2) In subsection (2A) omit "who does not deal as consumer".

(3) After subsection (5) insert—

"(6) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 25 of that Act)."

20 In section 31 (instalment deliveries) after subsection (2) insert—

"(3) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 26 of that Act)."

21 In section 32 (delivery to carrier), for subsection (4) substitute—

"(4) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 29 of that Act)."

22 (1) Section 33 (risk where goods are delivered at distant place) is amended as follows.

(2) At the beginning insert "(1)".

(3) At the end insert—

"(2) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 29 of that Act)."

23 (1) Section 34 (buyer's right of examining the goods) is amended as follows.

(2) At the beginning insert "(1)".

(3) At the end insert—

"(2) Nothing in this section affects the operation of section 22 (time limit for short-term right to reject) of the Consumer Rights Act 2015."

24 (1) Section 35 (acceptance) is amended as follows.

(2) Omit subsection (3).

(3) After subsection (8) insert—

"(9) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 21 of that Act)."

25 In section 35A (right of partial rejection), after subsection (4) insert—

"(5) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 21 of that Act)."

26 (1) Section 36 (buyer not bound to return rejected goods) is amended as follows.

(2) At the beginning insert "(1)".

(3) At the end insert—

"(2) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 20 of that Act)."

27 Omit Part 5A (additional rights of buyer in consumer cases).

28 In section 51 (damages for non-delivery), after subsection (3) insert—

"(4) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 19 of that Act)."

29 In section 52 (specific performance), after subsection (4) insert—

"(5) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 19 of that Act)."

30 In section 53 (remedy for breach of warranty), after subsection (4) insert—

"(4A) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 19 of that Act)."

31 In section 53A (measure of damages as respects Scotland), after subsection (2) insert—

"(2A) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 19 of that Act)."

32 (1) Section 54 (interest) is amended as follows.

(2) At the beginning insert "(1)".

(3) At the end insert—

"(2) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 19 of that Act)."

33 In section 55 (exclusion of implied terms), after subsection (1) insert—

"(1A) Subsection (1) does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 31 of that Act)."

34 (1) Section 58 (payment into court in Scotland) is amended as follows.

(2) At the beginning insert "(1)".

(3) At the end insert—

"(2) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 27 of that Act)."

35 (1) Section 61 (interpretation) is amended as follows.

(2) In subsection (1) omit the following definitions—

(a) "consumer contract";
(b) "producer";
(c) "repair".

(3) Omit subsection (5A).

36 In section 62(2) (savings for rules of law etc), for "this Act" substitute "legislation including this Act and the Consumer Rights Act 2015".

Supply of Goods and Services Act 1982 (c. 29)

37 The Supply of Goods and Services Act 1982 is amended as follows.

38 In each place—

(a) for "contract for the transfer of goods" substitute "relevant contract for the transfer of goods";
(b) for "contract for the hire of goods" substitute "relevant contract for the hire of goods";
(c) for "contract for the supply of a service" substitute "relevant contract for the supply of a service".

39 In section 1 (the contracts concerned: transfer of property in goods, as respects England and Wales and Northern Ireland), in subsection (1) at the end insert ", and other than a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies."

40 In section 4 (implied terms about quality or fitness in contracts for transfer of goods) omit subsections (2B) to (2D).

41 In section 5A (modification of remedies for breach of statutory condition in non-consumer cases), in subsection (1) omit "then, if the transferee does not deal as consumer,".

42 In section 6 (the contracts concerned: hire of goods, as respects England and Wales and Northern Ireland), in subsection (1) at the end insert ", and other than a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies."

43 In section 9 (implied terms about quality or fitness in contracts for hire of goods) omit subsections (2B) to (2D).

44 In section 10A (modification of remedies for breach of statutory condition in non-consumer cases) in subsection (1) omit "then, if the bailee does not deal as consumer,".

45 In section 11A (the contracts concerned: transfer of property in goods, as respects Scotland), in subsection (1) at the end insert ", and other than a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies."

46 In section 11D (implied terms about quality or fitness in contracts for transfer of property in goods) omit subsections (3A) to (3C) and (10).

47 In section 11F (remedies for breach of contract) omit subsections (2) and (3).

48 In section 11G (the contracts concerned: hire of goods, as respects Scotland), in subsection (1) at the end insert ", and other than a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies."

49 In section 11J (implied terms about quality or fitness in contracts for hire of goods) omit subsections (3A) to (3C) and (10).

50 Omit Part 1B (additional rights of transferee in consumer cases).

51 In section 12 (the contracts concerned: supply of services, as respects England and Wales and Northern Ireland), in subsection (1) at the end insert ", other than a contract to which Chapter 4 of Part 1 of the Consumer Rights Act 2015 applies."

52 (1) Section 18 (interpretation: general) is amended as follows.

(2) In subsection (1) omit the definitions of "producer" and "repair".

(3) Omit subsection (4).

Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045)

53 The Sale and Supply of Goods to Consumers Regulations 2002 are revoked.

Regulatory Enforcement and Sanctions Act 2008 (c. 13)

54 In Schedule 3 to the Regulatory Enforcement and Sanctions Act 2008 (enactments specified for the purposes of Part 1), at the appropriate place insert—

"Consumer Rights Act 2015, Part 1".

Consequential repeal and revocation

55 In consequence of the amendments made by this Schedule—

(a) omit paragraph 5(9) of Schedule 2 to the Sale and Supply of Goods Act 1994, and

(b) omit paragraph 97 of Schedule 2 to the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).

SCHEDULE 2

Section 63

CONSUMER CONTRACT TERMS WHICH MAY BE REGARDED AS UNFAIR

PART 1

LIST OF TERMS

1 A term which has the object or effect of excluding or limiting the trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader.

This does not include a term which is of no effect by virtue of section 65 (exclusion for negligence liability).

2 A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.

3 A term which has the object or effect of making an agreement binding on the consumer in a case where the provision of services by the trader is subject to a condition whose realisation depends on the trader's will alone.

4 A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract.

5 A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.

6 A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.

7 A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract.

8 A term which has the object or effect of enabling the trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.

This is subject to paragraphs 21 (financial services) and 24 (sale of securities, foreign currency etc).

9 A term which has the object or effect of automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express a desire not to extend the contract is unreasonably early.

10 A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.

11 A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.

This is subject to paragraphs 22 (financial services), 23 (contracts which last indefinitely) and 24 (sale of securities, foreign currency etc).

12 A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.

This is subject to paragraph 23 (contracts which last indefinitely).

13 A term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.

14 A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.

This is subject to paragraphs 23 (contracts which last indefinitely), 24 (sale of securities, foreign currency etc) and 25 (price index clauses).

15 A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

This is subject to paragraphs 24 (sale of securities, foreign currency etc) and 25 (price index clauses).

16 A term which has the object or effect of giving the trader the right to determine whether the goods, digital content or services supplied are in conformity with the contract, or giving the trader the exclusive right to interpret any term of the contract.

17 A term which has the object or effect of limiting the trader's obligation to respect commitments undertaken by the trader's agents or making the trader's commitments subject to compliance with a particular formality.

18 A term which has the object or effect of obliging the consumer to fulfil all of the consumer's obligations where the trader does not perform the trader's obligations.

19 A term which has the object or effect of allowing the trader to transfer the trader's rights and obligations under the contract, where this may reduce the guarantees for the consumer, without the consumer's agreement.

20 A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by—

(a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,

(b) unduly restricting the evidence available to the consumer, or

(c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.

PART 2

SCOPE OF PART 1

Financial services

21 Paragraph 8 (cancellation without reasonable notice) does not include a term by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, if the supplier is required to inform the consumer of the cancellation immediately.

22 Paragraph 11 (variation of contract without valid reason) does not include a term by which a supplier of financial services reserves the right to alter the rate of interest payable by or due to the consumer, or the amount of other charges for financial services without notice where there is a valid reason, if—

(a) the supplier is required to inform the consumer of the alteration at the earliest opportunity, and

(b) the consumer is free to dissolve the contract immediately.

Contracts which last indefinitely

23 Paragraphs 11 (variation of contract without valid reason), 12 (determination of characteristics of goods etc after consumer bound) and 14 (determination of price after consumer bound) do not include a term under which a trader reserves the right to alter unilaterally the conditions of a contract of indeterminate duration if—

(a) the trader is required to inform the consumer with reasonable notice, and

(b) the consumer is free to dissolve the contract.

Sale of securities, foreign currency etc

24 Paragraphs 8 (cancellation without reasonable notice), 11 (variation of contract without valid reason), 14 (determination of price after consumer bound) and 15 (increase in price) do not apply to—

(a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control, and

(b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

Price index clauses

25 Paragraphs 14 (determination of price after consumer bound) and 15 (increase in price) do not include a term which is a price-indexation clause (where otherwise lawful), if the method by which prices vary is explicitly described.

SCHEDULE 3

Section 70

ENFORCEMENT OF THE LAW ON UNFAIR CONTRACT TERMS AND NOTICES

Application of Schedule

1 This Schedule applies to—

(a) a term of a consumer contract,

(b) a term proposed for use in a consumer contract,

(c) a term which a third party recommends for use in a consumer contract, or

(d) a consumer notice.

Consideration of complaints

2 (1) A regulator may consider a complaint about a term or notice to which this Schedule applies (a "relevant complaint").

(2) If a regulator other than the CMA intends to consider a relevant complaint, it must notify the CMA that it intends to do so, and must then consider the complaint.

(3) If a regulator considers a relevant complaint, but decides not to make an application under paragraph 3 in relation to the complaint, it must give reasons for its decision to the person who made the complaint.

Application for injunction or interdict

3 (1) A regulator may apply for an injunction or (in Scotland) an interdict against a person if the regulator thinks that—

(a) the person is using, or proposing or recommending the use of, a term or notice to which this Schedule applies, and

(b) the term or notice falls within any one or more of sub-paragraphs (2), (3) or (5).

(2) A term or notice falls within this sub-paragraph if it purports to exclude or restrict liability of the kind mentioned in—

(a) section 31 (exclusion of liability: goods contracts),

(b) section 47 (exclusion of liability: digital content contracts),

(c) section 57 (exclusion of liability: services contracts), or

(d) section 65(1) (business liability for death or personal injury resulting from negligence).

(3) A term or notice falls within this sub-paragraph if it is unfair to any extent.

(4) A term within paragraph 1(1)(b) or (c) (but not within paragraph 1(1)(a)) is to be treated for the purposes of section 62(4) and (5) (assessment of fairness) as if it were a term of a contract.

(5) A term or notice falls within this sub-paragraph if it breaches section 68 (requirement for transparency).

(6) A regulator may apply for an injunction or interdict under this paragraph in relation to a term or notice whether or not it has received a relevant complaint about the term or notice.

Notification of application

4 (1) Before making an application under paragraph 3, a regulator other than the CMA must notify the CMA that it intends to do so.

(2) The regulator may make the application only if—

(a) the period of 14 days beginning with the day on which the regulator notified the CMA has ended, or

(b) before the end of that period, the CMA agrees to the regulator making the application.

Determination of application

5 (1) On an application for an injunction under paragraph 3, the court may grant an injunction on such conditions, and against such of the respondents, as it thinks appropriate.

(2) On an application for an interdict under paragraph 3, the court may grant an interdict on such conditions, and against such of the defenders, as it thinks appropriate.

(3) The injunction or interdict may include provision about—

(a) a term or notice to which the application relates, or

(b) any term of a consumer contract, or any consumer notice, of a similar kind or with a similar effect.

(4) It is not a defence to an application under paragraph 3 to show that, because of a rule of law, a term to which the application relates is not, or could not be, an enforceable contract term.

(5) If a regulator other than the CMA makes the application, it must notify the CMA of—

(a) the outcome of the application, and

(b) if an injunction or interdict is granted, the conditions on which, and the persons against whom, it is granted.

Undertakings

6 (1) A regulator may accept an undertaking from a person against whom it has applied, or thinks it is entitled to apply, for an injunction or interdict under paragraph 3.

(2) The undertaking may provide that the person will comply with the conditions that are agreed between the person and the regulator about the use of terms or notices, or terms or notices of a kind, specified in the undertaking.

(3) If a regulator other than the CMA accepts an undertaking, it must notify the CMA of—

(a) the conditions on which the undertaking is accepted, and

(b) the person who gave it.

Publication, information and advice

7 (1) The CMA must arrange the publication of details of—

(a) any application it makes for an injunction or interdict under paragraph 3,
(b) any injunction or interdict under this Schedule, and
(c) any undertaking under this Schedule.

(2) The CMA must respond to a request whether a term or notice, or one of a similar kind or with a similar effect, is or has been the subject of an injunction, interdict or undertaking under this Schedule.

(3) Where the term or notice, or one of a similar kind or with a similar effect, is or has been the subject of an injunction or interdict under this Schedule, the CMA must give the person making the request a copy of the injunction or interdict.

(4) Where the term or notice, or one of a similar kind or with a similar effect, is or has been the subject of an undertaking under this Schedule, the CMA must give the person making the request—
(a) details of the undertaking, and
(b) if the person giving the undertaking has agreed to amend the term or notice, a copy of the amendments.

(5) The CMA may arrange the publication of advice and information about the provisions of this Part.

(6) In this paragraph—
(a) references to an injunction or interdict under this Schedule are to an injunction or interdict granted on an application by the CMA under paragraph 3 or notified to it under paragraph 5, and
(b) references to an undertaking are to an undertaking given to the CMA under paragraph 6 or notified to it under that paragraph.

Meaning of "regulator"

8 (1) In this Schedule "regulator" means—
(a) the CMA,
(b) the Department of Enterprise, Trade and Investment in Northern Ireland,
(c) a local weights and measures authority in Great Britain,
(d) the Financial Conduct Authority,
(e) the Office of Communications,
(f) the Information Commissioner,
(g) the Gas and Electricity Markets Authority,
(h) the Water Services Regulation Authority,
(i) the Office of Rail Regulation,
(j) the Northern Ireland Authority for Utility Regulation, or
(k) the Consumers' Association.

(2) The Secretary of State may by order made by statutory instrument amend sub-paragraph (1) so as to add, modify or remove an entry.

(3) An order under sub-paragraph (2) may amend sub-paragraph (1) so as to add a body that is not a public authority only if the Secretary of State thinks that the body represents the interests of consumers (or consumers of a particular description).

(4) The Secretary of State must publish (and may from time to time vary) other criteria to be applied by the Secretary of State in deciding whether to add an entry to, or remove an entry from, sub-paragraph (1).

(5) An order under sub-paragraph (2) may make consequential amendments to this Schedule (including with the effect that any of its provisions apply differently, or do not apply, to a body added to sub-paragraph (1)).

(6) An order under sub-paragraph (2) may contain transitional or transitory provision or savings.

(7) No order may be made under sub-paragraph (2) unless a draft of the statutory instrument containing it has been laid before, and approved by a resolution of, each House of Parliament.

(8) In this paragraph "public authority" has the same meaning as in section 6 of the Human Rights Act 1998.

Other definitions

9 In this Schedule—

"the CMA" means the Competition and Markets Authority;

"injunction" includes an interim injunction;

"interdict" includes an interim interdict.

The Financial Conduct Authority

10 The functions of the Financial Conduct Authority under this Schedule are to be treated as functions of the Authority under the Financial Services and Markets Act 2000.

SCHEDULE 4

Section 75

AMENDMENTS CONSEQUENTIAL ON PART 2

Misrepresentation Act 1967 (c. 7)

1 (1) Section 3 of the Misrepresentation Act 1967 (avoidance of provision excluding liability for misrepresentation) is amended as follows.

(2) At the beginning insert "(1)".

(3) At the end insert—

"(2) This section does not apply to a term in a consumer contract within the meaning of Part 2 of the Consumer Rights Act 2015 (but see the provision made about such contracts in section 62 of that Act)."

Unfair Contract Terms Act 1977 (c. 50)

2 The Unfair Contract Terms Act 1977 is amended as follows.

3 In section 1(2) (scope of Part 1) for "to 4" substitute ", 3".

4 In section 2 (negligence liability), after subsection (3) insert—

"(4) This section does not apply to—

(a) a term in a consumer contract, or

(b) a notice to the extent that it is a consumer notice,

(but see the provision made about such contracts and notices in sections 62 and 65 of the Consumer Rights Act 2015)."

5 (1) Section 3 (liability arising in contract) is amended as follows.

(2) In subsection (1) omit "as consumer or".

(3) After subsection (2) insert—

"(3) This section does not apply to a term in a consumer contract (but see the provision made about such contracts in section 62 of the Consumer Rights Act 2015)."

6 Omit section 4 (unreasonable indemnity clauses).

7 Omit section 5 ("guarantee" of consumer goods).

8 (1) Section 6 (sale and hire-purchase) is amended as follows.

(2) After subsection (1) insert—

"(1A) Liability for breach of the obligations arising from—

(a) section 13, 14 or 15 of the 1979 Act (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);

(b) section 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire purchase),

cannot be excluded or restricted by reference to a contract term except in so far as the term satisfies the requirement of reasonableness."

(3) Omit subsections (2) and (3).

(4) After subsection (4) insert—

"(5) This section does not apply to a consumer contract (but see the provision made about such contracts in section 31 of the Consumer Rights Act 2015)."

9 (1) Section 7 (miscellaneous contracts under which goods pass) is amended as follows.

(2) After subsection (1) insert—

"(1A) Liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to such a term except in so far as the term satisfies the requirement of reasonableness."

(3) Omit subsections (2) and (3).

(4) After subsection (4) insert—

"(4A) This section does not apply to a consumer contract (but see the provision made about such contracts in section 31 of the Consumer Rights Act 2015)."

10 Omit section 9 (effect of breach of contract).

11 Omit section 12 ("dealing as consumer").

12 In section 13(1) (varieties of exemption clauses) for "and 5 to" substitute ", 6 and".

13 In section 14 (interpretation of Part 1), at the appropriate places insert—

""consumer contract" has the same meaning as in the Consumer Rights Act 2015 (see section 61);";

""consumer notice" has the same meaning as in the Consumer Rights Act 2015 (see section 61);".

14 (1) Section 15 (scope of Part 2) is amended as follows.

(2) In subsection (2) for "to 18" substitute "and 17".

(3) In subsection (3)—

(a) for "to 18" substitute "and 17", and

(b) in paragraph (b) omit sub-paragraph (ii) and the "or" preceding it.

15 In section 16 (liability for breach of duty), after subsection (3) insert—

"(4) This section does not apply to—

(a) a term in a consumer contract, or

(b) a notice to the extent that it is a consumer notice,

(but see the provision made about such contracts and notices in sections 62 and 65 of the Consumer Rights Act 2015)."

16 (1) Section 17 (control of unreasonable exemptions in consumer or standard form contracts) is amended as follows.

(2) In the heading omit "consumer or".

(3) In subsection (1)—

(a) omit "a consumer contract or",

(b) in paragraph (a) omit "consumer or", and

(c) in paragraph (b) omit "consumer or".

(4) After subsection (2) insert—

"(3) This section does not apply to a term in a consumer contract (but see the provision made about such contracts in section 62 of the Consumer Rights Act 2015)."

17 Omit section 18 (unreasonable indemnity clauses in consumer contracts).

18 Omit section 19 ("guarantee" of consumer goods).

19 (1) Section 20 (obligations implied by law in sale and hire-purchase contracts) is amended as follows.

(2) After subsection (1) insert—

"(1A) Any term of a contract which purports to exclude or restrict liability for breach of the obligations arising from—

(a) section 13, 14 or 15 of the 1979 Act (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);

(b) section 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire purchase),

shall have effect only if it was fair and reasonable to incorporate the term in the contract.

(1B) This section does not apply to a consumer contract (but see the provision made about such contracts in section 31 of the Consumer Rights Act 2015)."

(3) Omit subsection (2).

20 (1) Section 21 (obligations implied by law in other contracts for the supply of goods) is amended as follows.

(2) In subsection (1), for paragraphs (a) and (b) substitute "such as is referred to in subsection (3) below shall have no effect if it was not fair and reasonable to incorporate the term in the contract."

(3) In subsection (2)(b) omit "unless it is a consumer contract (and then only in favour of the consumer)".

(4) After subsection (3A) insert—

"(3B) This section does not apply to a consumer contract (but see the provision made about such contracts in section 31 of the Consumer Rights Act 2015)."

21 Omit section 22 (consequence of breach of contract).

22 (1) Section 25 (interpretation of Part 2) is amended as follows.

(2) In subsection (1)—

(a) omit the definition of "consumer",

(b) for the definition of "consumer contract" substitute—

""consumer contract" has the same meaning as in the Consumer Rights Act 2015 (see section 61);", and

(c) at the appropriate place insert—

""consumer notice" has the same meaning as in the Consumer Rights Act 2015 (see section 61);".

(3) Omit subsections (1A) and (1B).

(4) In subsection (5), for "and 16 and 19 to" substitute ", 16, 20 and".

23 In section 26(2) (international supply contracts) omit "or 4".

24 (1) Section 27 (choice of law clauses) is amended as follows.

(2) In subsection (2)—

(a) omit "(either or both)", and

(b) omit paragraph (b) and the "or" preceding it.

(3) Omit subsection (3).

25 Omit section 28 (temporary provision for sea carriage of passengers).

26 (1) Schedule 1 (scope of sections 2 to 4 and 7) is amended as follows.

(2) In the heading, for "to 4" substitute ", 3".

(3) In paragraph 1, for "to 4" substitute "and 3".

(4) In paragraph 2—
(a) for "to 4" substitute ", 3", and
(b) omit "except in favour of a person dealing as consumer".

(5) In paragraph 3—
(a) for ", 3 and 4" substitute "and 3", and
(b) omit ", except in favour of a person dealing as consumer,".

27 In Schedule 2 ("guidelines" for application of reasonableness test), for "6(3), 7(3) and (4)," substitute "6(1A), 7(1A) and (4),".

Companies Act 1985 (c. 6)

28 (1) Schedule 15D to the Companies Act 1985 (specified descriptions of disclosures for the purposes of section 449) is amended as follows.

(2) In paragraph 17—
(a) omit paragraph (i), and
(b) after paragraph (l) insert—
"(m) Schedule 3 to the Consumer Rights Act 2015".

(3) For paragraph 25 substitute—

"25 A disclosure for the purposes of enabling or assisting a regulator under Schedule 3 to the Consumer Rights Act 2015 other than the Competition and Markets Authority to exercise its functions under that Schedule."

Merchant Shipping Act 1995 (c. 21)

29 In section 184 of the Merchant Shipping Act 1995 (application of Schedule 6 to carriage within British Islands) omit subsection (2).

Arbitration Act 1996 (c. 23)

30 The Arbitration Act 1996 is amended as follows.

31 (1) Section 89 (application of unfair terms regulations to consumer arbitration agreements) is amended as follows.

(2) In subsection (1), for "the Unfair Terms in Consumer Contracts Regulations 1994" substitute "Part 2 (unfair terms) of the Consumer Rights Act 2015".

(3) For subsection (2) substitute—

"(2) In those sections "the Part" means Part 2 (unfair terms) of the Consumer Rights Act 2015."

32 For section 90 (regulations apply where consumer is a legal person)

substitute—

"90 Part applies where consumer is a legal person

The Part applies where the consumer is a legal person as it applies where the consumer is an individual."

33 In section 91(1) (arbitration agreement unfair where modest amount sought) for "Regulations" substitute "Part".

Unfair Terms in Consumer Contracts Regulations 1999 (S.I. 1999/2083)

34 The Unfair Terms in Consumer Contracts Regulations 1999 are revoked.

Enterprise Act 2002 (c. 40)

35 In Schedule 15 to the Enterprise Act 2002 (enactments for the purposes of which disclosures may be made), at the end insert—

"Schedule 3 to the Consumer Rights Act 2015."

Companies Act 2006 (c. 46)

36 The Companies Act 2006 is amended as follows.

37 (1) Section (A) of Part 2 of Schedule 2 (specified descriptions of disclosures for the purposes of section 948) is amended as follows.

(2) In paragraph 25—

(a) omit paragraph (h), and

(b) after paragraph (j) insert—

"(k) Schedule 3 to the Consumer Rights Act 2015".

(3) For paragraph 33 substitute—

"33 A disclosure for the purposes of enabling or assisting a regulator under Schedule 3 to the Consumer Rights Act 2015 other than the Competition and Markets Authority to exercise its functions under that Schedule."

38 (1) Part 2 of Schedule 11A (specified descriptions of disclosures for the purposes of section 1224A) is amended as follows.

(2) In paragraph 39, for paragraph (i) insert—

"(i) Schedule 3 to the Consumer Rights Act 2015".

(3) For paragraph 48 substitute—

"48 A disclosure for the purposes of enabling or assisting a regulator under Schedule 3 to the Consumer Rights Act 2015 other than the Competition and Markets Authority to exercise its functions under that Schedule."

Consequential repeals

39 In consequence of the amendments made by this Schedule—

(a) omit paragraph 19(b) of Schedule 2 to the Sale of Goods Act 1979, and

(b) in paragraph 21 of that Schedule, omit "and (2)(a)" and "(in each case)".

SCHEDULE 5

Section 77

INVESTIGATORY POWERS ETC.

PART 1

BASIC CONCEPTS

Overview

1 (1) This Schedule confers investigatory powers on enforcers and specifies the purposes for which and the circumstances in which those powers may be exercised.

(2) Part 1 of this Schedule contains interpretation provisions; in particular paragraphs 2 to 6 explain what is meant by an "enforcer".

(3) Part 2 of this Schedule explains what is meant by "the enforcer's legislation".

(4) Part 3 of this Schedule contains powers in relation to the production of information; paragraph 13 sets out which enforcers may exercise those powers, and the purposes for which they may do so.

(5) Part 4 of this Schedule contains further powers; paragraphs 19 and 20 set out which enforcers may exercise those powers, and the purposes for which they may do so.

(6) Part 5 of this Schedule contains provisions that are supplementary to the powers in Parts 3 and 4 of this Schedule.

(7) Part 6 of this Schedule makes provision about the exercise of functions by certain enforcers outside their area or district and the bringing of proceedings in relation to conduct outside an enforcer's area or district.

Enforcers

2 (1) In this Schedule "enforcer" means—

(a) a domestic enforcer,

(b) an EU enforcer,

(c) a public designated enforcer, or

(d) an unfair contract terms enforcer.

(2) But in Part 4 and paragraphs 38 and 41 of this Schedule "enforcer" means—

(a) a domestic enforcer, or

(b) an EU enforcer.

(3) In paragraphs 13, 19 and 20 of this Schedule, a reference to an enforcer exercising a power includes a reference to an officer of the enforcer exercising that power.

Domestic enforcers

3 (1) In this Schedule "domestic enforcer" means—

(a) the Competition and Markets Authority,
(b) a local weights and measures authority in Great Britain,
(c) a district council in England,
(d) the Department of Enterprise, Trade and Investment in Northern Ireland,
(e) a district council in Northern Ireland,
(f) the Secretary of State,
(g) the Gas and Electricity Markets Authority,
(h) the British Hallmarking Council,
(i) an assay office within the meaning of the Hallmarking Act 1973, or
(j) any other person to whom the duty in subsection (1) of section 27 of the Consumer Protection Act 1987 (duty to enforce safety provisions) applies by virtue of regulations under subsection (2) of that section.

(2) But the Gas and Electricity Markets Authority is not a domestic enforcer for the purposes of Part 4 of this Schedule.

(3) The reference to the Department of Enterprise, Trade and Investment in Northern Ireland includes a person with whom the Department has made arrangements, under paragraph 3(1) of Schedule 15 to the Lifts Regulations 1997 (SI 1997/831) for enforcement of those regulations.

EU enforcers

4 In this Schedule "EU enforcer" means—

(a) the Competition and Markets Authority,
(b) a local weights and measures authority in Great Britain,
(c) the Department of Enterprise, Trade and Investment in Northern Ireland,
(d) the Financial Conduct Authority,
(e) the Civil Aviation Authority,
(f) the Secretary of State,
(g) the Department of Health, Social Services and Public Safety in Northern Ireland,
(h) the Office of Communications,
(i) an enforcement authority within the meaning of section 120(15) of the Communications Act 2003 (regulation of premium rate services), or
(j) the Information Commissioner.

Public designated enforcers

5 In this Schedule "public designated enforcer" means a person or body which—

(a) is designated by order under subsection (2) of section 213 of the Enterprise Act 2002, and
(b) has been designated by virtue of subsection (3) of that section (which provides that the Secretary of State may designate a public body only if satisfied that it is independent).

Unfair contract terms enforcer

6 In this Schedule "unfair contract terms enforcer" means a person or body which—

(a) is for the time being listed in paragraph 8(1) of Schedule 3 (persons or bodies that may enforce provisions about unfair contract terms), and

(b) is a public authority within the meaning of section 6 of the Human Rights Act 1998.

Officers

7 (1) In this Schedule "officer", in relation to an enforcer, means—

(a) an inspector appointed by the enforcer to exercise powers under this Schedule, or authorised to do so,

(b) an officer of the enforcer appointed by the enforcer to exercise powers under this Schedule, or authorised to do so,

(c) an employee of the enforcer (other than an inspector or officer) appointed by the enforcer to exercise powers under this Schedule, or authorised to do so, or

(d) a person (other than an inspector, officer or employee of the enforcer) authorised by the enforcer to exercise powers under this Schedule.

(2) But references in this Schedule to an officer in relation to a particular power only cover a person within sub-paragraph (1) if and to the extent that the person has been appointed or authorised to exercise that power.

(3) A person who, immediately before the coming into force of this Schedule, was appointed or authorised to exercise a power replaced by a power in this Schedule is to be treated as having been appointed or authorised to exercise the new power.

(4) In this paragraph "employee", in relation to the Secretary of State, means a person employed in the civil service of the State.

Interpretation of other terms

8 In this Schedule—

"Community infringement" has the same meaning as in section 212 of the Enterprise Act 2002;

"document" includes information recorded in any form;

"enforcement order" means an order under section 217 of the Enterprise Act 2002;

"interim enforcement order" means an order under section 218 of that Act;

"the Regulation on Accreditation and Market Surveillance" means Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93.

PART 2

THE ENFORCER'S LEGISLATION

Enforcer's legislation

9 (1) In this Schedule "the enforcer's legislation", in relation to a domestic enforcer, means—

(a) legislation or notices which, by virtue of a provision listed in paragraph 10, the domestic enforcer has a duty or power to enforce, and

(b) where the domestic enforcer is listed in an entry in the first column of the table in paragraph 11, the legislation listed in the corresponding entry in the second column of that table.

(2) References in this Schedule to a breach of or compliance with the enforcer's legislation include a breach of or compliance with a notice issued under—

(a) the enforcer's legislation, or

(b) legislation under which the enforcer's legislation is made.

(3) References in this Schedule to a breach of or compliance with the enforcer's legislation are to be read, in relation to the Lifts Regulations 1997 (SI 1997/831), as references to a breach of or compliance with the Regulations as they apply to relevant products (within the meaning of Schedule 15 to the Regulations) for private use or consumption.

Enforcer's legislation: duties and powers mentioned in paragraph 9(1)(a)

10 The duties and powers mentioned in paragraph 9(1)(a) are those arising under any of the following provisions—

section 26(1) or 40(1)(b) of the Trade Descriptions Act 1968 (including as applied by regulation 8(3) of the Crystal Glass (Descriptions) Regulations 1973 (SI 1973/1952) and regulation 10(2) of the Footwear (Indication of Composition) Labelling Regulations 1995 (SI 1995/2489));

section 9(1) or (6) of the Hallmarking Act 1973;

paragraph 6 of the Schedule to the Prices Act 1974 (including as read with paragraph 14(1) of that Schedule);

section 161(1) of the Consumer Credit Act 1974;

section 26(1) of the Estate Agents Act 1979;

Article 39 of the Weights and Measures (Northern Ireland) Order 1981 (SI 1981/231 (NI 10));

section 16A(1) or (4) of the Video Recordings Act 1984;

section 27(1) of the Consumer Protection Act 1987 (including as applied by section 12(1) of the Fireworks Act 2003 to fireworks regulations under that Act);

section 215(1) of the Education Reform Act 1988;

section 107A(1) or (3) or 198A(1) or (3) of the Copyright, Designs and Patents Act 1988;

paragraph 3(a) of Schedule 5 to the Simple Pressure Vessels (Safety) Regulations 1991 (SI 1991/2749);

paragraph 1 of Schedule 3 to the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288);

section 30(4) or (7) or 31(4)(a) of the Clean Air Act 1993;

paragraph 1 of Schedule 2 to the Sunday Trading Act 1994;

section 93(1) or (3) of the Trade Marks Act 1994;

section 8A(1) or (3) of the Olympic Symbol etc (Protection) Act 1995;

paragraph 2(a) or 3(1) of Schedule 15 to the Lifts Regulations 1997 (SI 1997/831);

paragraph 2(a) or 3(3)(a) of Schedule 8 to the Pressure Equipment Regulations 1999 (SI 1999/2001);

regulation 5C(5) of the Motor Fuel (Composition and Content) Regulations 1999 (SI 1999/3107);

paragraph 1(1)(b) or (2)(b) or 2 of Schedule 9 to the Radio Equipment and Telecommunications Terminal Equipment Regulations 2000 (SI 2000/730);

paragraph 1(a) of Schedule 10 to the Personal Protective Equipment Regulations 2002 (SI 2002/1144);

paragraph 1 of Schedule 4 to the Packaging (Essential Requirements) Regulations 2003 (SI 2003/1941);

section 3(1) of the Christmas Day Trading Act 2004;

regulation 10(1) of the General Product Safety Regulations 2005 (SI 2005/1803);

regulation 10(1) of the Weights and Measures (Packaged Goods) Regulations 2006 (SI 2006/659);

regulation 17 of the Measuring Instruments (Automatic Discontinuous Totalisers) Regulations 2006 (SI 2006/1255);

regulation 18 of the Measuring Instruments (Automatic Rail-weighbridges) Regulations 2006 (SI 2006/1256);

regulation 20 of the Measuring Instruments (Automatic Catchweighers) Regulations 2006 (SI 2006/1257);

regulation 18 of the Measuring Instruments (Automatic Gravimetric Filling Instruments) Regulations 2006 (SI 2006/1258);

regulation 18 of the Measuring Instruments (Beltweighers) Regulations 2006 (SI 2006/1259);

regulation 16 of the Measuring Instruments (Capacity Serving Measures) Regulations 2006 (SI 2006/1264);

regulation 17 of the Measuring Instruments (Liquid Fuel and Lubricants) Regulations 2006 (SI 2006/1266);

regulation 16 of the Measuring Instruments (Material Measures of Length) Regulations 2006 (SI 2006/1267);

regulation 17 of the Measuring Instruments (Cold-water Meters) Regulations 2006 (SI 2006/1268);

regulation 18 of the Measuring Instruments (Liquid Fuel delivered from Road Tankers) Regulations 2006 (SI 2006/1269);

regulation 37(1)(a)(ii) or (b)(ii) of the Electromagnetic Compatibility Regulations 2006 (SI 2006/3418);

regulation 13(1) or (1A) of the Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276);

regulation 19(1) or (1A) of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277);

paragraph 2 or 5 of Schedule 5 to the Supply of Machinery (Safety) Regulations 2008 (SI 2008/1597);

regulation 32(2) or (3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960);

regulation 10(1) of the Weights and Measures (Packaged Goods) Regulations (Northern Ireland) 2011 (SR 2011/331);

regulation 11 of the Textile Products (Labelling and Fibre Composition) Regulations 2012 (SI 2012/1102);

regulation 6(1) of the Cosmetic Products Enforcement Regulations 2013 (SI 2013/1478);

section 87(1) of this Act;

section 93(1) or (2) of this Act.

Enforcer's legislation: legislation mentioned in paragraph 9(1)(b)

11 Here is the table mentioned in paragraph 9(1)(b)—

Enforcer	*Legislation*
A local weights and measures authority in Great Britain or the Department of Enterprise, Trade and Investment in Northern Ireland	Section 35ZA of the Registered Designs Act 1949
A local weights and measures authority in Great Britain or the Department of Enterprise, Trade and Investment in Northern Ireland	The Measuring Container Bottles (EEC Requirements) Regulations 1977 (SI 1977/932)
The Secretary of State	The Alcoholometers and Alcohol Hydrometers (EEC Requirements) Regulations 1977 (SI 1977/1753)
A local weights and measures authority in Great Britain	The Weights and Measures Act 1985 and regulations and orders made under that Act
A local weights and measures authority in Great Britain or the Department of Enterprise, Trade and Investment in Northern Ireland	The Measuring Instruments (EEC Requirements) Regulations 1988 (SI 1988/186)
A local weights and measures authority in Great Britain or the Department of Enterprise, Trade and Investment in Northern Ireland	The Financial Services and Markets Act 2000 so far as it relates to a relevant regulated activity within the meaning of section 107(4)(a) of the Financial Services Act 2012

Enforcer	*Legislation*
A local weights and measures authority in Great Britain or the Department of Enterprise, Trade and Investment in Northern Ireland	The Non-Automatic Weighing Instruments Regulations 2000 (SI 2000/3236)

Powers to amend paragraph 10 or 11

12 (1) The Secretary of State may by order made by statutory instrument—

(a) amend paragraph 10 or the table in paragraph 11 by adding, modifying or removing any entry in it;

(b) in consequence of provision made under paragraph (a), amend, repeal or revoke any other legislation (including this Act) whenever passed or made.

(2) The Secretary of State may not make an order under this paragraph that has the effect that a power of entry, or an associated power, contained in legislation other than this Act is replaced by a power of entry, or an associated power, contained in this Schedule unless the Secretary of State thinks that the condition in sub-paragraph (3) is met.

(3) That condition is that, on and after the changes made by the order, the safeguards applicable to the new power, taken together, provide a greater level of protection than any safeguards applicable to the old power.

(4) In sub-paragraph (2) "power of entry" and "associated power" have the meanings given by section 46 of the Protection of Freedoms Act 2012.

(5) An order under this paragraph may contain transitional or transitory provision or savings.

(6) A statutory instrument containing an order under this paragraph that amends or repeals primary legislation may not be made unless a draft of the instrument containing the order has been laid before, and approved by a resolution of, each House of Parliament.

(7) Any other statutory instrument containing an order under this paragraph is subject to annulment in pursuance of a resolution of either House of Parliament.

(8) In this paragraph "primary legislation" means—

(a) an Act of Parliament,

(b) an Act of the Scottish Parliament,

(c) an Act or Measure of the National Assembly for Wales, or

(d) Northern Ireland legislation.

PART 3

POWERS IN RELATION TO THE PRODUCTION OF INFORMATION

Exercise of powers in this Part

13 (1) An enforcer of a kind mentioned in this paragraph may exercise a power in this Part of this Schedule only for the purposes and in the circumstances mentioned in this paragraph in relation to that kind of enforcer.

(2) The Competition and Markets Authority may exercise the powers in this Part of this Schedule for any of the following purposes—

(a) to enable the Authority to exercise or to consider whether to exercise any function it has under Part 8 of the Enterprise Act 2002;

(b) to enable a private designated enforcer to consider whether to exercise any function it has under that Part;

(c) to enable a Community enforcer to consider whether to exercise any function it has under that Part;

(d) to ascertain whether a person has complied with or is complying with an enforcement order or an interim enforcement order;

(e) to ascertain whether a person has complied with or is complying with an undertaking given under section 217(9), 218(10) or 219 of the Enterprise Act 2002.

(3) A public designated enforcer, a local weights and measures authority in Great Britain, the Department of Enterprise, Trade and Investment in Northern Ireland or an EU enforcer other than the Competition and Markets Authority may exercise the powers in this Part of this Schedule for any of the following purposes—

(a) to enable that enforcer to exercise or to consider whether to exercise any function it has under Part 8 of the Enterprise Act 2002;

(b) to ascertain whether a person has complied with or is complying with an enforcement order or an interim enforcement order made on the application of that enforcer;

(c) to ascertain whether a person has complied with or is complying with an undertaking given under section 217(9) or 218(10) of the Enterprise Act 2002 following such an application;

(d) to ascertain whether a person has complied with or is complying with an undertaking given to that enforcer under section 219 of that Act.

(4) A domestic enforcer may exercise the powers in this Part of this Schedule for the purpose of ascertaining whether there has been a breach of the enforcer's legislation.

(5) But a domestic enforcer may not exercise the power in paragraph 14 (power to require the production of information) for the purpose in sub-paragraph (4) unless an officer of the enforcer reasonably suspects a breach of the enforcer's legislation.

(6) Sub-paragraph (5) does not apply if the enforcer is a market surveillance authority within the meaning of Article 2(18) of the Regulation on Accreditation and Market Surveillance and the power is exercised for the purpose of market surveillance within the meaning of Article 2(17) of that Regulation.

(7) An unfair contract terms enforcer may exercise the powers in this Part of this Schedule for either of the following purposes—

(a) to enable the enforcer to exercise or to consider whether to exercise any function it has under Schedule 3 (enforcement of the law on unfair contract terms and notices);

(b) to ascertain whether a person has complied with or is complying with an injunction or interdict (within the meaning of that Schedule) granted under paragraph 5 of that Schedule or an undertaking given under paragraph 6 of that Schedule.

(8) But an unfair contract terms enforcer may not exercise the power in paragraph 14 for a purpose mentioned in sub-paragraph (7)(a) unless an officer of the enforcer reasonably suspects that a person is using, or proposing or recommending the use of, a contractual term or notice within paragraph 3 of Schedule 3.

(9) A local weights and measures authority in Great Britain may exercise the powers in this Part of this Schedule for either of the following purposes—

(a) to enable it to determine whether to make an order under section 3 or 4 of the Estate Agents Act 1979;

(b) to enable it to exercise any of its functions under section 5, 6, 8, 13 or 17 of that Act.

(10) In this paragraph—

"Community enforcer" has the same meaning as in the Enterprise Act 2002 (see section 213(5) of that Act);

"private designated enforcer" means a person or body which—

(a) is designated by order under subsection (2) of section 213 of that Act, and

(b) has been designated by virtue of subsection (4) of that section (which provides that the Secretary of State may designate a person or body which is not a public body only if it satisfies criteria specified by order).

Power to require the production of information

14 An enforcer or an officer of an enforcer may give notice to a person requiring the person to provide the enforcer with the information specified in the notice.

Procedure for notice under paragraph 14

15 (1) A notice under paragraph 14 must be in writing and specify the purpose for which the information is required.

(2) If the purpose is to enable a person to exercise or to consider whether to exercise a function, the notice must specify the function concerned.

(3) The notice may specify—

(a) the time within which and the manner in which the person to whom it is given must comply with it;

(b) the form in which information must be provided.

(4) The notice may require—

(a) the creation of documents, or documents of a description, specified in the notice, and

(b) the provision of those documents to the enforcer or an officer of the enforcer.

(5) A requirement to provide information or create a document is a requirement to do so in a legible form.

(6) A notice under paragraph 14 does not require a person to provide any information or create any documents which the person would be entitled to refuse to provide or produce—

(a) in proceedings in the High Court on the grounds of legal professional privilege, or

(b) in proceedings in the Court of Session on the grounds of confidentiality of communications.

(7) In sub-paragraph (6) "communications" means—

(a) communications between a professional legal adviser and the adviser's client, or

(b) communications made in connection with or in contemplation of legal proceedings or for the purposes of those proceedings.

Enforcement of notice under paragraph 14

16 (1) If a person fails to comply with a notice under paragraph 14, the enforcer or an officer of the enforcer may make an application under this paragraph to the court.

(2) If it appears to the court that the person has failed to comply with the notice, it may make an order under this paragraph.

(3) An order under this paragraph is an order requiring the person to do anything that the court thinks it is reasonable for the person to do, for any of the purposes for which the notice was given, to ensure that the notice is complied with.

(4) An order under this paragraph may require the person to meet the costs or expenses of the application.

(5) If the person is a company, partnership or unincorporated association, the court in acting under sub-paragraph (4) may require an official who is responsible for the failure to meet the costs or expenses.

(6) In this paragraph—

"the court" means—

(a) the High Court,

(b) in relation to England and Wales, the county court,

(c) in relation to Northern Ireland, a county court,

(d) the Court of Session, or

(e) the sheriff;

"official" means—

(a) in the case of a company, a director, manager, secretary or other similar officer,

(b) in the case of a limited liability partnership, a member,

(c) in the case of a partnership other than a limited liability partnership, a partner, and
(d) in the case of an unincorporated association, a person who is concerned in the management or control of its affairs.

Limitations on use of information provided in response to a notice under paragraph 14

17 (1) This paragraph applies if a person provides information in response to a notice under paragraph 14.

(2) This includes information contained in a document created by a person in response to such a notice.

(3) In any criminal proceedings against the person—
(a) no evidence relating to the information may be adduced by or on behalf of the prosecution, and
(b) no question relating to the information may be asked by or on behalf of the prosecution.

(4) Sub-paragraph (3) does not apply if, in the proceedings—
(a) evidence relating to the information is adduced by or on behalf of the person providing it, or
(b) a question relating to the information is asked by or on behalf of that person.

(5) Sub-paragraph (3) does not apply if the proceedings are for—
(a) an offence under paragraph 36 (obstruction),
(b) an offence under section 5 of the Perjury Act 1911 (false statutory declarations and other false statements without oath),
(c) an offence under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (false statements and declarations), or
(d) an offence under Article 10 of the Perjury (Northern Ireland) Order 1979 (SI 1979/1714 (NI 19)) (false statutory declarations and other false unsworn statements).

Application to Crown

18 In its application in relation to—
(a) an enforcer acting for a purpose within paragraph 13(2) or (3), or
(b) an enforcer acting for the purpose of ascertaining whether there has been a breach of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277),
this Part binds the Crown.

PART 4

FURTHER POWERS EXERCISABLE BY DOMESTIC ENFORCERS AND EU ENFORCERS

Exercise of powers in this Part: domestic enforcers

19 (1) A domestic enforcer may exercise a power in this Part of this Schedule only for the purposes and in the circumstances mentioned in this paragraph in relation to that power.

(2) A domestic enforcer may exercise any power in paragraphs 21 to 26 and 31 to 34 for the purpose of ascertaining compliance with the enforcer's legislation.

(3) A domestic enforcer may exercise the power in paragraph 27 (power to require the production of documents) for either of the following purposes—

(a) subject to sub-paragraph (4), to ascertain compliance with the enforcer's legislation;

(b) to ascertain whether the documents may be required as evidence in proceedings for a breach of, or under, the enforcer's legislation.

(4) A domestic enforcer may exercise the power in paragraph 27 for the purpose mentioned in sub-paragraph (3)(a) only if an officer of the enforcer reasonably suspects a breach of the enforcer's legislation, unless—

(a) the power is being exercised in relation to a document that the trader is required to keep by virtue of a provision of the enforcer's legislation, or

(b) the enforcer is a market surveillance authority within the meaning of Article 2(18) of the Regulation on Accreditation and Market Surveillance and the power is exercised for the purpose of market surveillance within the meaning of Article 2(17) of that Regulation.

(5) A domestic enforcer may exercise the power in paragraph 28 (power to seize and detain goods) in relation to—

(a) goods which an officer of the enforcer reasonably suspects may disclose (by means of testing or otherwise) a breach of the enforcer's legislation,

(b) goods which an officer of the enforcer reasonably suspects are liable to forfeiture under that legislation, and

(c) goods which an officer of the enforcer reasonably suspects may be required as evidence in proceedings for a breach of, or under, that legislation.

(6) A domestic enforcer may exercise the power in paragraph 29 (power to seize documents required as evidence) in relation to documents which an officer of the enforcer reasonably suspects may be required as evidence—

(a) in proceedings for a breach of the enforcer's legislation, or

(b) in proceedings under the enforcer's legislation.

(7) A domestic enforcer may exercise the power in paragraph 30 (power to decommission or switch off fixed installations)—

(a) if an officer of the enforcer reasonably suspects a breach of the Electromagnetic Compatibility Regulations 2006 (SI 2006/3418), and

(b) for the purpose of ascertaining (by means of testing or otherwise) whether there has been such a breach.

(8) For the purposes of the enforcement of the Estate Agents Act 1979—

(a) the references in sub-paragraphs (2) and (3)(a) to ascertaining compliance with the enforcer's legislation include ascertaining whether a person has engaged in a practice mentioned in section 3(1)(d) of that Act (practice in relation to estate agency work declared undesirable by the Secretary of State), and

(b) the references in sub-paragraph (4) and paragraphs 23(6)(a) and 32(3)(a) to a breach of the enforcer's legislation include references to a person's engaging in such a practice.

Exercise of powers in this Part: EU enforcers

20 (1) Any power in this Part of this Schedule which is conferred on an EU enforcer may be exercised by such an enforcer only for the purposes and in the circumstances mentioned in this paragraph in relation to that power.

(2) If the condition in sub-paragraph (3) is met, an EU enforcer may exercise any power conferred on it by paragraphs 21 to 25 and 31 to 34 for any purpose relating to the functions that the enforcer has under Part 8 of the Enterprise Act 2002 in its capacity as a CPC enforcer under that Part.

(3) The condition is that an officer of the EU enforcer reasonably suspects—

(a) that there has been, or is likely to be, a Community infringement,

(b) a failure to comply with an enforcement order or an interim enforcement order made on the application of that enforcer,

(c) a failure to comply with an undertaking given under section 217(9) or 218(10) of the Enterprise Act 2002 following such an application, or

(d) a failure to comply with an undertaking given to that enforcer under section 219 of that Act.

(4) An EU enforcer may exercise the power in paragraph 27 (power to require the production of documents) for either of the following purposes—

(a) the purpose mentioned in sub-paragraph (2), if the condition in sub-paragraph (3) is met;

(b) to ascertain whether the documents may be required as evidence in proceedings under Part 8 of the Enterprise Act 2002.

(5) An EU enforcer may exercise the power in paragraph 28 (power to seize and detain goods) in relation to goods which an officer of the enforcer reasonably suspects—

(a) may disclose (by means of testing or otherwise) a Community infringement or a failure to comply with a measure specified in sub-paragraph (3)(b), (c) or (d), or

(b) may be required as evidence in proceedings under Part 8 of the Enterprise Act 2002.

(6) An EU enforcer may exercise the power in paragraph 29 (power to seize documents required as evidence) in relation to documents which an officer of the enforcer reasonably suspects may be required as evidence in proceedings under Part 8 of the Enterprise Act 2002.

Power to purchase products

21 (1) An officer of an enforcer may—

(a) make a purchase of a product, or

(b) enter into an agreement to secure the provision of a product.

(2) For the purposes of exercising the power in sub-paragraph (1), an officer may—

(a) at any reasonable time, enter premises to which the public has access (whether or not the public has access at that time), and

(b) inspect any product on the premises which the public may inspect.

(3) The power of entry in sub-paragraph (2) may be exercised without first giving notice or obtaining a warrant.

Power to observe carrying on of business etc

22 (1) An officer of an enforcer may enter premises to which the public has access in order to observe the carrying on of a business on those premises.

(2) The power in sub-paragraph (1) may be exercised at any reasonable time (whether or not the public has access at that time).

(3) The power of entry in sub-paragraph (1) may be exercised without first giving notice or obtaining a warrant.

Power to enter premises without warrant

23 (1) An officer of an enforcer may enter premises at any reasonable time.

(2) Sub-paragraph (1) does not authorise the entry into premises used wholly or mainly as a dwelling.

(3) In the case of a routine inspection, the power of entry in sub-paragraph (1) may only be exercised if a notice has been given to the occupier of the premises in accordance with the requirements in sub-paragraph (4), unless sub-paragraph (5) applies.

(4) Those requirements are that—

(a) the notice is in writing and is given by an officer of the enforcer,

(b) the notice sets out why the entry is necessary and indicates the nature of the offence under paragraph 36 (obstruction), and

(c) there are at least two working days between the date of receipt of the notice and the date of entry.

(5) A notice need not be given if the occupier has waived the requirement to give notice.

(6) In this paragraph "routine inspection" means an exercise of the power in sub-paragraph (1) other than where—

(a) the power is exercised by an officer of a domestic enforcer who reasonably suspects a breach of the enforcer's legislation,

(b) the officer reasonably considers that to give notice in accordance with sub-paragraph (3) would defeat the purpose of the entry,

(c) it is not reasonably practicable in all the circumstances to give notice in accordance with that sub-paragraph, in particular because the officer reasonably suspects that there is an imminent risk to public health or safety, or

(d) the enforcer is a market surveillance authority within the meaning of Article 2(18) of the Regulation on Accreditation and Market Surveillance and the entry is for the purpose of market surveillance within the meaning of Article 2(17) of that Regulation.

(7) If an officer of an enforcer enters premises under sub-paragraph (1) otherwise than in the course of a routine inspection, and finds one or more occupiers on the premises, the officer must provide to that occupier or (if there is more than one) to at least one of them a document that—

(a) sets out why the entry is necessary, and

(b) indicates the nature of the offence under paragraph 36 (obstruction).

(8) If an officer of an enforcer enters premises under sub-paragraph (1) and finds one or more occupiers on the premises, the officer must produce evidence of the officer's identity and authority to that occupier or (if there is more than one) to at least one of them.

(9) An officer need not comply with sub-paragraph (7) or (8) if it is not reasonably practicable to do so.

(10) Proceedings resulting from the exercise of the power under sub-paragraph (1) are not invalid merely because of a failure to comply with sub-paragraph (7) or (8).

(11) An officer entering premises under sub-paragraph (1) may be accompanied by such persons, and may take onto the premises such equipment, as the officer thinks necessary.

(12) In this paragraph—

"give", in relation to the giving of a notice to the occupier of premises, includes delivering or leaving it at the premises or sending it there by post;

"working day" means a day other than—

(a) Saturday or Sunday,

(b) Christmas Day or Good Friday, or

(c) a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom in which the premises are situated.

Application of paragraphs 25 to 31

24 Paragraphs 25 to 31 apply if an officer of an enforcer has entered any premises under the power in paragraph 23(1) or under a warrant under paragraph 32.

Power to inspect products etc

25 (1) The officer may inspect any product on the premises.

(2) The power in sub-paragraph (3) is also available to an officer of a domestic enforcer acting pursuant to the duty in section 27(1) of the Consumer Protection Act 1987 or regulation 10(1) of the General Product Safety Regulations 2005 (SI 2005/1803).

(3) The officer may examine any procedure (including any arrangements for carrying out a test) connected with the production of a product.

(4) The powers in sub-paragraph (5) are also available to an officer of a domestic enforcer acting pursuant to—

(a) the duty in regulation 10(1) of the Weights and Measures (Packaged Goods) Regulations 2006 (SI 2006/659) ("the 2006 Regulations"), or

(b) the duty in regulation 10(1) of the Weights and Measures (Packaged Goods) Regulations (Northern Ireland) 2011 (SR 2011/331) ("the 2011 Regulations").

(5) The officer may inspect and take copies of, or of anything purporting to be—

(a) a record of a kind mentioned in regulation 5(2) or 9(1), or

(b) evidence of a kind mentioned in regulation 9(3).

(6) The references in sub-paragraph (5) to regulations are to regulations in the 2006 Regulations in the case of a domestic enforcer in Great Britain or the 2011 Regulations in the case of a domestic enforcer in Northern Ireland.

(7) The powers in sub-paragraph (8) are also available to an officer of a domestic enforcer acting pursuant to the duty in regulation 37(1)(a)(ii) or (b)(ii) of the Electromagnetic Compatibility Regulations 2006 (SI 2006/3418).

(8) The officer may—

(a) inspect any apparatus or fixed installation (as defined in those Regulations), or

(b) examine any procedure (including any arrangements for carrying out a test) connected with the production of apparatus.

Power to test equipment

26 (1) An officer of a domestic enforcer may test any weighing or measuring equipment—

(a) which is, or which the officer has reasonable cause to believe may be, used for trade or in the possession of any person or on any premises for such use, or

(b) which has been, or which the officer has reasonable cause to believe to have been, passed by an approved verifier, or by a person purporting to act as such a verifier, as fit for such use.

(2) Expressions used in sub-paragraph (1) have the same meaning—

(a) as in the Weights and Measures Act 1985, in the case of a domestic enforcer in Great Britain;

(b) as in the Weights and Measures (Northern Ireland) Order 1981 (SI 1981/231 (NI 10)), in the case of a domestic enforcer in Northern Ireland.

(3) The powers in sub-paragraph (4) are available to an officer of a domestic enforcer acting pursuant to—

(a) the duty in regulation 10(1) of the Weights and Measures (Packaged Goods) Regulations 2006 (SI 2006/659) ("the 2006 Regulations"), or

(b) the duty in regulation 10(1) of the Weights and Measures (Packaged Goods) Regulations (Northern Ireland) 2011 (SR 2011/331) ("the 2011 Regulations").

(4) The officer may test any equipment which the officer has reasonable cause to believe is used in—

(a) making up packages (as defined in regulation 2) in the United Kingdom, or

(b) carrying out a check mentioned in paragraphs (1) and (3) of regulation 9.

(5) The references in sub-paragraph (4) to regulations are to regulations in the 2006 Regulations in the case of a domestic enforcer in Great Britain or the 2011 Regulations in the case of a domestic enforcer in Northern Ireland.

Power to require the production of documents

27 (1) The officer may, at any reasonable time—

(a) require a trader occupying the premises, or a person on the premises acting on behalf of such a trader, to produce any documents relating to the trader's business to which the trader has access, and

(b) take copies of, or of any entry in, any such document.

(2) The power in sub-paragraph (1) is available regardless of whether—

(a) the purpose for which the documents are required relates to the trader or some other person, or

(b) the proceedings referred to in paragraph 19(3)(b) or 20(4)(b) could be taken against the trader or some other person.

(3) That power includes power to require the person to give an explanation of the documents.

(4) Where a document required to be produced under sub-paragraph (1) contains information recorded electronically, the power in that sub-paragraph includes power to require the production of a copy of the document in a form in which it can easily be taken away and in which it is visible and legible.

(5) This paragraph does not permit an officer to require a person to create a document other than as described in sub-paragraph (4).

(6) This paragraph does not permit an officer to require a person to produce any document which the person would be entitled to refuse to produce—

(a) in proceedings in the High Court on the grounds of legal professional privilege, or

(b) in proceedings in the Court of Session on the grounds of confidentiality of communications.

(7) In sub-paragraph (6) "communications" means—

(a) communications between a professional legal adviser and the adviser's client, or

(b) communications made in connection with or in contemplation of legal proceedings or for the purposes of those proceedings.

(8) In this paragraph "trader" has the same meaning as in Part 1 of this Act.

Power to seize and detain goods

28 (1) The officer may seize and detain goods other than documents (for which see paragraph 29).

(2) An officer seizing goods under this paragraph from premises which are occupied must produce evidence of the officer's identity and authority to an occupier of the premises before seizing them.

(3) The officer need not comply with sub-paragraph (2) if it is not reasonably practicable to do so.

(4) An officer seizing goods under this paragraph must take reasonable steps to—

(a) inform the person from whom they are seized that they have been seized, and

(b) provide that person with a written record of what has been seized.

(5) If, under this paragraph, an officer seizes any goods from a vending machine, the duty in sub-paragraph (4) also applies in relation to—

(a) the person whose name and address are on the vending machine as the owner of the machine, or

(b) if there is no such name and address on the machine, the occupier of the premises on which the machine stands or to which it is fixed.

(6) In determining the steps to be taken under sub-paragraph (4), an officer exercising a power under this paragraph in England and Wales or Northern Ireland must have regard to any relevant provision about the seizure of property made by—

(a) a code of practice under section 66 of the Police and Criminal Evidence Act 1984, or

(b) a code of practice under Article 65 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)),

(as the case may be).

(7) Goods seized under this paragraph (except goods seized for a purpose mentioned in paragraph 19(5)(b)) may not be detained—

(a) for a period of more than 3 months beginning with the day on which they were seized, or

(b) where the goods are reasonably required to be detained for a longer period by the enforcer for a purpose for which they were seized, for longer than they are required for that purpose.

Power to seize documents required as evidence

29 (1) The officer may seize and detain documents.

(2) An officer seizing documents under this paragraph from premises which are occupied must produce evidence of the officer's identity and authority to an occupier of the premises before seizing them.

(3) The officer need not comply with sub-paragraph (2) if it is not reasonably practicable to do so.

(4) An officer seizing documents under this paragraph must take reasonable steps to—

(a) inform the person from whom they are seized that they have been seized, and

(b) provide that person with a written record of what has been seized.

(5) In determining the steps to be taken under sub-paragraph (4), an officer exercising a power under this paragraph in England and Wales or Northern Ireland must have regard to any relevant provision about the seizure of property made by—

(a) a code of practice under section 66 of the Police and Criminal Evidence Act 1984, or

(b) a code of practice under Article 65 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)),

(as the case may be).

(6) This paragraph does not confer any power on an officer to seize from a person any document which the person would be entitled to refuse to produce—

(a) in proceedings in the High Court on the grounds of legal professional privilege, or

(b) in proceedings in the Court of Session on the grounds of confidentiality of communications.

(7) In sub-paragraph (6) "communications" means—

(a) communications between a professional legal adviser and the adviser's client, or

(b) communications made in connection with or in contemplation of legal proceedings or for the purposes of those proceedings.

(8) Documents seized under this paragraph may not be detained—

(a) for a period of more than 3 months beginning with the day on which they were seized, or

(b) where the documents are reasonably required to be detained for a longer period by the enforcer for the purposes of the proceedings for which they were seized, for longer than they are required for those purposes.

Power to decommission or switch off fixed installations

30 (1) The power in sub-paragraph (2) is available to an officer of a domestic enforcer acting pursuant to the duty in regulation 37(1)(a)(ii) or (b)(ii) of the Electromagnetic Compatibility Regulations 2006 (SI 2006/3418).

(2) The officer may decommission or switch off any fixed installation (as defined in those Regulations) or part of such an installation.

Power to break open container etc

31 (1) The officer may, for the purpose of exercising any of the powers in paragraphs 28 to 30, require a person with authority to do so to—

(a) break open any container,

(b) open any vending machine, or

(c) access any electronic device in which information may be stored or from which it may be accessed.

(2) Where a requirement under sub-paragraph (1) has not been complied with, the officer may, for the purpose of exercising any of the powers in paragraphs 28 to 30—

(a) break open the container,

(b) open the vending machine, or

(c) access the electronic device.

(3) Sub-paragraph (1) or (2) applies if and to the extent that the exercise of the power in that sub-paragraph is reasonably necessary for the purposes for which that power may be exercised.

(4) In this paragraph "container" means anything in which goods may be stored.

Power to enter premises with warrant

32 (1) A justice of the peace may issue a warrant authorising an officer of an enforcer to enter premises if satisfied, on written information on oath given by such an officer, that there are reasonable grounds for believing that—

(a) condition A or B is met, and

(b) condition C, D or E is met.

(2) Condition A is that on the premises there are—

(a) products which an officer of the enforcer has power to inspect under paragraph 25, or

(b) documents which an officer of the enforcer could require a person to produce under paragraph 27.

(3) Condition B is that, on the premises—

(a) in the case of a domestic enforcer, there has been or is about to be a breach of the enforcer's legislation,

(b) in the case of an EU enforcer, there has been or is about to be a Community infringement as defined in section 212 of the Enterprise Act 2002, or

(c) in the case of an EU enforcer, there has been a failure to comply with a measure specified in paragraph 20(3)(b), (c) or (d).

(4) Condition C is that—

(a) access to the premises has been or is likely to be refused, and

(b) notice of the enforcer's intention to apply for a warrant under this paragraph has been given to the occupier of the premises.

(5) Condition D is that it is likely that products or documents on the premises would be concealed or interfered with if notice of entry on the premises were given to the occupier of the premises.

(6) Condition E is that—

(a) the premises are unoccupied, or

(b) the occupier of the premises is absent, and it might defeat the purpose of the entry to wait for the occupier's return.

(7) In the application of this paragraph to Scotland—

(a) the reference in sub-paragraph (1) to a justice of the peace is to be read as a reference to a sheriff, and

(b) the reference in that sub-paragraph to information on oath is to be read as a reference to evidence on oath.

(8) In the application of this paragraph to Northern Ireland—

(a) the reference in sub-paragraph (1) to a justice of the peace is to be read as a reference to a lay magistrate, and

(b) the reference in that sub-paragraph to written information is to be read as a reference to a written complaint.

Entry to premises under warrant

33 (1) A warrant under paragraph 32 authorises an officer of the enforcer to enter the premises at any reasonable time, using reasonable force if necessary.

(2) A warrant under that paragraph ceases to have effect at the end of the period of one month beginning with the day it is issued.

(3) An officer entering premises under a warrant under paragraph 32 may be accompanied by such persons, and may take onto the premises such equipment, as the officer thinks necessary.

(4) If the premises are occupied when the officer enters them, the officer must produce the warrant for inspection to an occupier of the premises.

(5) Sub-paragraph (6) applies if the premises are unoccupied or the occupier is temporarily absent.

(6) On leaving the premises the officer must—
(a) leave a notice on the premises stating that the premises have been entered under a warrant under paragraph 32, and
(b) leave the premises as effectively secured against trespassers as the officer found them.

Power to require assistance from person on premises

34 (1) If an officer of an enforcer has entered premises under the power in paragraph 23(1) or under a warrant under paragraph 32, the officer may require any person on the premises to provide such assistance or information as the officer reasonably considers necessary.

(2) Sub-paragraph (3) applies if an officer of a domestic enforcer has entered premises under the power in paragraph 23(1) or under a warrant under paragraph 32 for the purposes of the enforcement of—
(a) the Weights and Measures (Packaged Goods) Regulations 2006 (SI 2006/659), or
(b) the Weights and Measures (Packaged Goods) Regulations (Northern Ireland) 2011 (SR 2011/331).

(3) The officer may, in particular, require any person on the premises to provide such information as the person possesses about the name and address of the packer and of any importer of a package which the officer finds on the premises.

(4) In sub-paragraph (3) "importer", "package" and "packer" have the same meaning as in—
(a) the Weights and Measures (Packaged Goods) Regulations 2006 (see regulation 2), in the case of a domestic enforcer in Great Britain, or
(b) the Weights and Measures (Packaged Goods) Regulations (Northern Ireland) 2011 (see regulation 2), in the case of a domestic enforcer in Northern Ireland.

Definitions for purposes of this Part

35 In this Part of this Schedule—

"goods" has the meaning given by section 2(8);

"occupier", in relation to premises, means any person an officer of an enforcer reasonably suspects to be the occupier of the premises;

"premises" includes any stall, vehicle, vessel or aircraft;

"product" means—
(a) goods,

(b) a service,
(c) digital content, as defined in section 2(9),
(d) immovable property, or
(e) rights or obligations.

PART 5

PROVISIONS SUPPLEMENTARY TO PARTS 3 AND 4

Offence of obstruction

36 (1) A person commits an offence if the person—
(a) intentionally obstructs an enforcer or an officer of an enforcer who is exercising or seeking to exercise a power under Part 4 of this Schedule in accordance with that Part,
(b) intentionally fails to comply with a requirement properly imposed by an enforcer or an officer of an enforcer under Part 4 of this Schedule, or
(c) without reasonable cause fails to give an enforcer or an officer of an enforcer any other assistance or information which the enforcer or officer reasonably requires of the person for a purpose for which the enforcer or officer may exercise a power under Part 4 of this Schedule.

(2) A person commits an offence if, in giving information of a kind referred to in sub-paragraph (1)(c), the person—
(a) makes a statement which the person knows is false or misleading in a material respect, or
(b) recklessly makes a statement which is false or misleading in a material respect.

(3) A person who is guilty of an offence under sub-paragraph (1) or (2) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(4) Nothing in this paragraph requires a person to answer any question or give any information if to do so might incriminate that person.

Offence of purporting to act as officer

37 (1) A person who is not an officer of an enforcer commits an offence if the person purports to act as such under Part 3 or 4 of this Schedule.

(2) A person who is guilty of an offence under sub-paragraph (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(3) If section 85(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force on or before the day on which this Act is passed—
(a) section 85 of that Act (removal of limit on certain fines on conviction by magistrates' court) applies in relation to the offence in this paragraph as if it were a relevant offence (as defined in section 85(3) of that Act), and
(b) regulations described in section 85(11) of that Act may amend or otherwise modify sub-paragraph (2).

Access to seized goods and documents

38 (1) This paragraph applies where anything seized by an officer of an enforcer under Part 4 of this Schedule is detained by the enforcer.

(2) If a request for permission to be granted access to that thing is made to the enforcer by a person who had custody or control of it immediately before it was seized, the enforcer must allow that person access to it under the supervision of an officer of the enforcer.

(3) If a request for a photograph or copy of that thing is made to the enforcer by a person who had custody or control of it immediately before it was seized, the enforcer must—

(a) allow that person access to it under the supervision of an officer of the enforcer for the purpose of photographing or copying it, or

(b) photograph or copy it, or cause it to be photographed or copied.

(4) Where anything is photographed or copied under sub-paragraph (3), the photograph or copy must be supplied to the person who made the request within a reasonable time from the making of the request.

(5) This paragraph does not require access to be granted to, or a photograph or copy to be supplied of, anything if the enforcer has reasonable grounds for believing that to do so would prejudice the investigation for the purposes of which it was seized.

(6) An enforcer may recover the reasonable costs of complying with a request under this paragraph from the person by whom or on whose behalf it was made.

(7) References in this paragraph to a person who had custody or control of a thing immediately before it was seized include a representative of such a person.

Notice of testing of goods

39 (1) Sub-paragraphs (3) and (4) apply where goods purchased by an officer of a domestic enforcer under paragraph 21 are submitted to a test and as a result—

(a) proceedings are brought for a breach of, or under, the enforcer's legislation or for the forfeiture of the goods by the enforcer, or

(b) a notice is served by the enforcer preventing a person from doing any thing.

(2) Sub-paragraphs (3) and (4) also apply where goods seized by an officer of a domestic enforcer under paragraph 28 are submitted to a test.

(3) The enforcer must inform the relevant person of the results of the test.

(4) The enforcer must allow a relevant person to have the goods tested if it is reasonably practicable to do so.

(5) In sub-paragraph (3) "relevant person" means the person from whom the goods were purchased or seized or, where the goods were purchased or seized from a vending machine—

(a) the person whose name and address are on the vending machine as the owner of the machine, or

(b) if there is no such name and address on the machine, the occupier of the premises on which the machine stands or to which it is fixed.

(6) In sub-paragraph (4) "relevant person" means—

(a) a person within sub-paragraph (5),

(b) in a case within sub-paragraph (1)(a), a person who is a party to the proceedings, and

(c) in a case within sub-paragraph (1)(b), a person with an interest in the goods.

Appeals against detention of goods and documents

40 (1) This paragraph applies where goods or documents are being detained as the result of the exercise of a power in Part 4 of this Schedule.

(2) A person with an interest in the goods or documents may apply for an order requiring them to be released to that or another person.

(3) An application under this paragraph may be made in England and Wales or Northern Ireland—

(a) to any magistrates' court in which proceedings have been brought for an offence as the result of the investigation in the course of which the goods or documents were seized,

(b) to any magistrates' court in which proceedings have been brought for the forfeiture of the goods or documents or (in the case of seized documents) any goods to which the documents relate, or

(c) if no proceedings within paragraph (a) or (b) have been brought, by way of complaint to a magistrates' court.

(4) An application under this paragraph may be made in Scotland by summary application to the sheriff.

(5) On an application under this paragraph, the court or sheriff may make an order requiring goods to be released only if satisfied that condition A or B is met.

(6) Condition A is that—

(a) no proceedings have been brought—

(i) for an offence as the result of the investigation in the course of which the goods or documents were seized, or

(ii) for the forfeiture of the goods or documents or (in the case of seized documents) any goods to which the documents relate, and

(b) the period of 6 months beginning with the date the goods or documents were seized has expired.

(7) Condition B is that—

(a) proceedings of a kind mentioned in sub-paragraph (6)(a) have been brought, and

(b) those proceedings have been concluded without the goods or documents being forfeited.

(8) A person aggrieved by an order made under this paragraph by a magistrates' court, or by the decision of a magistrates' court not to make such an order, may appeal against the order or decision—

(a) in England and Wales, to the Crown Court;

(b) in Northern Ireland, to a county court.

(9) An order made under this paragraph by a magistrates' court may contain such provision as the court thinks appropriate for delaying its coming into force pending the making and determination of any appeal.

(10) In sub-paragraph (9) "appeal" includes an application under section 111 of the Magistrates' Courts Act 1980 or Article 146 of the Magistrates' Courts (Northern Ireland) Order 1981 (SI 1981/1675 (NI 26)) (statements of case).

Compensation

41 (1) This paragraph applies where an officer of an enforcer has seized and detained goods under Part 4 of this Schedule for a purpose within paragraph 19(5)(a) or 20(5)(a).

(2) The enforcer must pay compensation to any person with an interest in the goods in respect of any loss or damage caused by the seizure and detention, if the condition in sub-paragraph (3) or (4) that is relevant to the enforcer is met.

(3) The condition that is relevant to a domestic enforcer is that—

(a) the goods have not disclosed a breach of the enforcer's legislation, and

(b) the power to seize and detain the goods was not exercised as a result of any neglect or default of the person seeking the compensation.

(4) The condition that is relevant to an EU enforcer is that—

(a) the goods have not disclosed a Community infringement or a failure to comply with a measure specified in paragraph 20(3)(b), (c) or (d), and

(b) the power to seize and detain the goods was not exercised as a result of any neglect or default of the person seeking the compensation.

(5) Any dispute about the right to or amount of any compensation payable under this paragraph is to be determined—

(a) in England and Wales or Northern Ireland, by arbitration, or

(b) in Scotland, by a single arbitrator appointed by the parties or, if there is no agreement between the parties as to that appointment, by the sheriff.

Meaning of "goods" in this Part

42 In this Part of this Schedule "goods" does not include a document.

PART 6

EXERCISE OF ENFORCEMENT FUNCTIONS BY AREA ENFORCERS

Interpretation of this Part

43 In this Part, "area enforcer" means—

(a) a local weights and measures authority in Great Britain,

(b) a district council in England, or

(c) a district council in Northern Ireland.

Investigatory powers

44 (1) Sub-paragraphs (3) to (6) apply in relation to an area enforcer's exercise, in accordance with this Schedule, of a power in Part 3 or 4 of this Schedule.

(2) Sub-paragraphs (3) to (6) also apply in relation to an area enforcer's exercise of an investigatory power—

(a) conferred by legislation which, by virtue of a provision listed in paragraph 10 of this Schedule, the area enforcer has a duty or power to enforce, or conferred by legislation under which such legislation is made, or

(b) conferred by legislation listed in the second column of the table in paragraph 11 of this Schedule,

for the purpose of ascertaining whether there has been a breach of that legislation or of any notice issued by the area enforcer under that legislation.

(3) A local weights and measures authority in England or Wales may exercise the power in a part of England or Wales which is outside that authority's area.

(4) A local weights and measures authority in Scotland may exercise the power in a part of Scotland which is outside that authority's area.

(5) A district council in England may exercise the power in a part of England which is outside that council's district.

(6) A district council in Northern Ireland may exercise the power in a part of Northern Ireland which is outside that council's district.

Civil proceedings

45 (1) Sub-paragraphs (4) to (7) apply in relation to civil proceedings which may be brought by an area enforcer under—

(a) Part 8 of the Enterprise Act 2002,

(b) Schedule 3 to this Act,

(c) legislation which, by virtue of a provision listed in paragraph 10 of this Schedule, the area enforcer has a duty or power to enforce,

(d) legislation under which legislation mentioned in paragraph (c) is made, or

(e) legislation listed in the second column of the table in paragraph 11 of this Schedule.

(2) Sub-paragraphs (4) to (7) also apply in relation to an application for forfeiture which may be made by an area enforcer, in circumstances where there are no related criminal proceedings,—

(a) under section 35ZC of the Registered Designs Act 1949,

(b) under section 16 of the Consumer Protection Act 1987,

(c) under section 97 of the Trade Marks Act 1994 (including as applied by section 11 of the Olympic Symbol etc (Protection) Act 1995), or

(d) under legislation which, by virtue of a provision listed in paragraph 10 of this Schedule, the area enforcer has a duty or power to enforce.

(3) In sub-paragraphs (4), (5), (6) and (7), the reference to civil proceedings includes a reference to an application mentioned in sub-paragraph (2).

(4) A local weights and measures authority in England or Wales may bring civil proceedings in respect of conduct in a part of England or Wales which is outside that authority's area.

(5) A local weights and measures authority in Scotland may bring civil proceedings in respect of conduct in a part of Scotland which is outside that authority's area.

(6) A district council in England may bring civil proceedings in respect of conduct in a part of England which is outside that council's district.

(7) A district council in Northern Ireland may bring civil proceedings in respect of conduct in a part of Northern Ireland which is outside that council's district.

Criminal proceedings

46 (1) A local weights and measures authority in England or Wales may bring proceedings for a consumer offence allegedly committed in a part of England or Wales which is outside that authority's area.

(2) In sub-paragraph (1) "a consumer offence" means—

(a) an offence under legislation which, by virtue of a provision listed in paragraph 10 of this Schedule, a local weights and measures authority in England or Wales has a duty or power to enforce,

(b) an offence under legislation under which legislation within paragraph (a) is made,

(c) an offence under legislation listed in the second column of the table in paragraph 11 of this Schedule in relation to which a local weights and measures authority is listed in the corresponding entry in the first column of the table as an enforcer,

(d) an offence originating from an investigation into a breach of legislation mentioned in paragraph (a), (b) or (c), or

(e) an offence described in paragraph 36 or 37 of this Schedule.

(3) A district council in England may bring proceedings for a consumer offence allegedly committed in a part of England which is outside that council's district.

(4) In sub-paragraph (3) "a consumer offence" means—

(a) an offence under legislation which, by virtue of a provision listed in paragraph 10 of this Schedule, a district council in England has a duty or power to enforce,

(b) an offence under legislation under which legislation within paragraph (a) is made,

(c) an offence originating from an investigation into a breach of legislation mentioned in paragraph (a) or (b), or

(d) an offence described in paragraph 36 or 37 of this Schedule.

(5) A district council in Northern Ireland may bring proceedings for a consumer offence allegedly committed in a part of Northern Ireland which is outside that council's district.

(6) In sub-paragraph (5) "a consumer offence" means—

(a) an offence under legislation which, by virtue of a provision listed in paragraph 10 of this Schedule, a district council in Northern Ireland has a duty or power to enforce,

(b) an offence under legislation under which legislation within paragraph (a) is made,

(c) an offence originating from an investigation into a breach of legislation mentioned in paragraph (a) or (b), or

(d) an offence described in paragraph 36 or 37 of this Schedule.

SCHEDULE 6

Section 77

INVESTIGATORY POWERS: CONSEQUENTIAL AMENDMENTS

Registered Designs Act 1949 (c. 88)

1 (1) Section 35ZB of the Registered Designs Act 1949 (enforcement) is amended as follows.

(2) Omit subsection (1).

(3) Before subsection (2) insert—

"(1A) For the investigatory powers available to a local weights and measures authority or the Department of Enterprise, Trade and Investment in Northern Ireland for the purposes of the enforcement of section 35ZA, see Schedule 5 to the Consumer Rights Act 2015."

Trade Descriptions Act 1968 (c. 29)

2 The Trade Descriptions Act 1968 is amended as follows.

3 In section 26 (enforcing authorities) after subsection (1) insert—

"(1A) For the investigatory powers available to a local weights and measures authority for the purposes of the duty in subsection (1), see Schedule 5 to the Consumer Rights Act 2015."

4 Omit section 27 (power to make test purchases).

5 Omit section 28 (power to enter premises and inspect and seize goods and documents).

6 Omit section 29 (obstruction of authorised officers).

7 Omit section 30 (notice of test and intended prosecution).

8 Omit section 33 (compensation for loss, etc of goods seized under section 28).

9 (1) Section 40 (provisions as to Northern Ireland) is amended as follows.

(2) In subsection (1), omit paragraph (c).

(3) After subsection (1) insert—

"(1A) For the investigatory powers available to the Department of Enterprise, Trade and Investment in Northern Ireland for the

purposes of the duty in subsection (1)(b), see Schedule 5 to the Consumer Rights Act 2015."

Hallmarking Act 1973 (c. 43)

10 (1) Section 9 of the Hallmarking Act 1973 (enforcement of Act) is amended as follows.

(2) After subsection (2) insert—

"(2A) For the investigatory powers available to a local weights and measures authority, the Council and an assay office for the purposes of the duty in subsection (1) and the power in subsection (2), see Schedule 5 to the Consumer Rights Act 2015."

(3) Omit subsections (3), (4) and (7).

Prices Act 1974 (c. 24)

11 (1) The Schedule to the Prices Act 1974 (enforcement) is amended as follows.

(2) Omit paragraphs 3, 7, 9 and 10.

(3) In paragraph 14(1) omit "and paragraph 10 above shall be omitted".

(4) After paragraph 14 insert—

"15 For the investigatory powers available to a local weights and measures authority or the Department of Enterprise, Trade and Investment in Northern Ireland for the purposes of the duty in paragraph 6, see Schedule 5 to the Consumer Rights Act 2015."

Consumer Credit Act 1974 (c. 39)

12 The Consumer Credit Act 1974 is amended as follows.

13 In section 161 (enforcement authorities), after subsection (1A) insert—

"(1B) For the investigatory powers available to a local weights and measures authority or the Department of Enterprise, Trade and Investment in Northern Ireland for the purposes of the duty in subsection (1), see Schedule 5 to the Consumer Rights Act 2015."

14 Omit section 162 (powers of entry and inspection).

15 Omit section 163 (compensation for loss).

16 Omit section 164 (power to make test purchases etc).

17 Omit section 165 (obstruction of authorised officers).

18 In Schedule 1 (prosecution and punishment of offences) omit the entries for sections 162(6), 165(1) and 165(2).

Estate Agents Act 1979 (c. 38)

19 The Estate Agents Act 1979 is amended as follows.

20 In section 3(1)(cb) (power to make orders prohibiting unfit persons from doing estate agency work: failure to comply with section 9(1) or 11(1A)(b))

for "section 9(1) or 11(1A)(b) below" substitute "paragraph 14 or 27 of Schedule 5 to the Consumer Rights Act 2015".

21 In section 9 (information for the lead enforcement authority) omit subsections (1) to (4).

22 Omit section 11 (powers of entry and inspection).

23 Omit section 11A (failure to produce information).

24 In section 26 (enforcement authorities), after subsection (1) insert—

"(1A) For the investigatory powers available to an authority for the purposes of the duty in subsection (1), see Schedule 5 to the Consumer Rights Act 2015."

25 Omit section 27 (obstruction and personation of authorised officers).

26 (1) Paragraph 14 of Schedule 2 (applications under sections 6(1) and 8(3)) is amended as follows.

(2) For "section 9 of this Act" substitute "paragraph 14 of Schedule 5 to the Consumer Rights Act 2015".

(3) Omit "or the production of documents".

Video Recordings Act 1984 (c. 39)

27 (1) Section 16A of the Video Recordings Act 1984 (enforcement) is amended as follows.

(2) Omit subsections (1A), (1B) and (2).

(3) In subsection (4)—

(a) for "Subsections (1) and (1A)" substitute "Subsection (1)", and

(b) omit the words from "For that purpose" to the end of the subsection.

(4) After that subsection insert—

"(4ZA) For the investigatory powers available to a local weights and measures authority or the Department of Enterprise, Trade and Investment in Northern Ireland for the purposes of the functions in this section, see Schedule 5 to the Consumer Rights Act 2015."

(5) Omit subsection (4A).

Weights and Measures Act 1985 (c. 72)

28 The Weights and Measures Act 1985 is amended as follows.

29 In section 38(2) (special powers of inspectors with respect to certain goods) for "section 79 below" substitute "Schedule 5 to the Consumer Rights Act 2015".

30 Omit section 42 (power to make test purchases).

31 Omit section 79 (general powers of inspection and entry).

32 Before section 80 insert—

"79A Investigatory powers

For the investigatory powers available to a local weights and measures authority for the purposes of the enforcement of this Act, see Schedule 5 to the Consumer Rights Act 2015."

33 In section 80 omit "or the packaged goods regulations".

34 In section 81(1)(b) (failure to provide assistance or information) omit "or under this Part of this Act".

35 (1) Section 84 (penalties) is amended as follows.

(2) In subsection (2), after the entry for section 20(8) insert—

"section 80;
section 81(1);
section 81(2);".

(3) Omit subsection (5).

36 In paragraph 21(2)(b) of Schedule 11 (application of provisions applying to inspectors to persons authorised under the Weights and Measures Act 1963) omit "and except in section 79(3)".

Consumer Protection Act 1987 (c. 43)

37 The Consumer Protection Act 1987 is amended as follows.

38 In section 27 (enforcement) after subsection (3) insert—

"(3A) For the investigatory powers available to a person for the purposes of the duty imposed by subsection (1), see Schedule 5 to the Consumer Rights Act 2015 (as well as section 29)."

39 Omit section 28 (test purchases).

40 (1) Section 29 (powers of search etc) is amended as follows.

(2) In subsection (1) for "any of the powers conferred by the following provisions of this section" substitute "the power conferred by subsection (4)".

(3) Omit subsections (2), (3), (5) and (6).

(4) In subsection (7) omit—
(a) ", (5) or (6)", and
(b) "or records".

41 (1) Section 30 (provisions supplemental to section 29) is amended as follows.

(2) In subsection (1)—
(a) for "29" substitute "29(4)", and
(b) omit "or records" in both places.

(3) In subsection (2)(a)(i)—
(a) omit "goods or", and
(b) for "29" substitute "29(4)".

(4) In subsection (3) omit "section 29 above or".

(5) In each of subsections (5), (6) and (7) for "29" substitute "29(4)".

42 In section 31(1) (power of customs officer to detain goods) for "or under this Part" substitute "section 29(4) of this Act or Schedule 5 to the Consumer Rights Act 2015".

43 In section 32(1) (obstruction of authorised officer)—

(a) in paragraph (a)—

(i) for "any provision of this Part" substitute "section 29(4)", and

(ii) for "so acting" substitute "acting in pursuance of section 31",

(b) in paragraph (b) for "any provision of this Part" substitute "section 29(4)", and

(c) in paragraph (c) for "any provision of this Part" substitute "section 29(4)".

44 In section 33(1) (appeals against detention of goods) for "any provision of this Part" substitute "section 29(4)".

45 In section 34(1) (compensation for seizure and detention) for "29" substitute "29(4)".

46 In section 44(4) (service of documents)—

(a) omit "28(2) or", and

(b) omit "purchased or" in each place.

Education Reform Act 1988 (c. 40)

47 (1) Section 215 of the Education Reform Act 1988 (unrecognised degrees: enforcement) is amended as follows.

(2) After that section insert—

"(1A) For the investigatory powers available to a local weights and measures authority for the purposes of the duty to enforce imposed by subsection (1), see Schedule 5 to the Consumer Rights Act 2015."

(3) Omit subsections (2) to (8).

Copyright, Designs and Patents Act 1988 (c. 48)

48 The Copyright, Designs and Patents Act 1988 is amended as follows.

49 (1) Section 107A (enforcement of section 107 by local weights and measures authority) is amended as follows.

(2) Omit subsection (2).

(3) In subsection (3) omit the words from "For that purpose" to the end of the subsection.

(4) After that subsection insert—

"(3A) For the investigatory powers available to a local weights and measures authority or the Department of Enterprise, Trade and Investment in Northern Ireland for the purposes of the duties in this section, see Schedule 5 to the Consumer Rights Act 2015."

50 (1) Section 198A (enforcement of section 198 by local weights and measures authority) is amended as follows.

(2) Omit subsection (2).

(3) In subsection (3) omit the words from "For that purpose" to the end of the subsection.

(4) After that subsection insert—

"(3A) For the investigatory powers available to a local weights and measures authority or the Department of Enterprise, Trade and Investment in Northern Ireland for the purposes of the duties in this section, see Schedule 5 to the Consumer Rights Act 2015."

Clean Air Act 1993 (c. 11)

51 The Clean Air Act 1993 is amended as follows.

52 (1) Section 30 (regulations about motor fuel) is amended as follows.

(2) Omit subsection (5).

(3) Before subsection (6) insert—

"(5A) For the investigatory powers available to a local weights and measures authority for the purposes of the duty in subsection (4), see Schedule 5 to the Consumer Rights Act 2015."

(4) Omit subsection (8).

(5) Before subsection (9) insert—

"(8A) For the investigatory powers available to the Department of Enterprise, Trade and Investment in Northern Ireland for the purposes of the duty in subsection (7), see Schedule 5 to the Consumer Rights Act 2015."

53 In section 31 (regulations about sulphur content of oil fuel for furnaces or engines) after subsection (4) insert—

"(4A) For the investigatory powers available to a local authority for the purposes of the duty in subsection (4)(a), see Schedule 5 to the Consumer Rights Act 2015."

54 In section 32(4) (powers of entry not to apply in relation to persons in the public service of the Crown) for "sections 56 to 58 (rights of entry and inspection and other local authority powers)" substitute "Schedule 5 to the Consumer Rights Act 2015 (investigatory powers)".

55 In section 49(1) (unjustified disclosures of information) after "this Act" insert "or in the exercise of a power in Schedule 5 to the Consumer Rights Act 2015 for the purposes of the duty in section 30(4) or (7) or 31(4)(a) of this Act".

56 In section 56 (rights of entry and inspection etc) after subsection (6) insert—

"(7) This section does not apply in relation to—

(a) a function conferred on a local authority by Part 4, or

(b) a provision of an instrument made under that Part."

57 In section 58(1) (power of local authorities to obtain information)—

(a) omit "IV or", and
(b) for "those Parts" substitute "that Part".

Sunday Trading Act 1994 (c. 20)

58 (1) Part 1 of Schedule 2 to the Sunday Trading Act 1994 (general enforcement provisions) is amended as follows.

(2) Omit paragraphs 3 and 4.

(3) Before paragraph 5 insert—

"Investigatory powers

4A For the investigatory powers available to a local authority and the inspectors appointed by it under paragraph 2 for the purposes of the duty in paragraph 1, see Schedule 5 to the Consumer Rights Act 2015."

Trade Marks Act 1994 (c. 26)

59 (1) Section 93 of the Trade Marks Act 1994 (enforcement function of local weights and measures authority) is amended as follows.

(2) Omit subsection (2).

(3) In subsection (3) omit the words from "For that purpose" to the end of the subsection.

(4) After that subsection insert—

"(3A) For the investigatory powers available to a local weights and measures authority or the Department of Enterprise, Trade and Investment in Northern Ireland for the purposes of the duties in this section, see Schedule 5 to the Consumer Rights Act 2015."

Olympic Symbol etc (Protection) Act 1995 (c. 32)

60 (1) Section 8A of the Olympic Symbol etc (Protection) Act 1995 is amended as follows.

(2) Omit subsection (2).

(3) In subsection (3) omit paragraph (b) and the "and" immediately preceding that paragraph.

(4) After that subsection insert—

"(3A) For the investigatory powers available to a local weights and measures authority or the Department of Enterprise, Trade and Investment in Northern Ireland for the purposes of the powers in this section, see Schedule 5 to the Consumer Rights Act 2015."

Criminal Justice and Police Act 2001 (c. 16)

61 The Criminal Justice and Police Act 2001 is amended as follows.

62 In section 57(1) (retention of seized items)—

(a) omit paragraphs (d), (g) and (pa), and
(b) after paragraph (r) insert—

"(s) paragraphs 28(7) and 29(8) of Schedule 5 to the Consumer Rights Act 2015".

63 (1) Section 65 (meaning of legal privilege) is amended as follows.

(2) Omit subsections (6) and (8A).

(3) Before subsection (9) insert—

"(8B) An item which is, or is comprised in, property which has been seized in exercise or purported exercise of the power of seizure conferred by paragraph 27(1)(b) or 29(1) of Schedule 5 to the Consumer Rights Act 2015 shall be taken for the purposes of this Part to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of paragraph 27(6) or (as the case may be) 29(6) of that Schedule (privileged documents)."

(4) In subsection (9)—
(a) omit paragraph (c),
(b) at the end of paragraph (d) insert "or", and
(c) omit paragraph (f) and the "or" immediately preceding that paragraph.

64 In section 66(4) (construction of references to a search)—
(a) omit paragraphs (a), (c), (d), (e), (f), (g), (ma), (q), (r) and (s),
(b) in paragraph (h) for "29" substitute "29(4)",
(c) in paragraph (o) for "22" substitute "22(4)", and
(d) after paragraph (p) insert—

"(t) Part 4 of Schedule 5 to the Consumer Rights Act 2015".

65 (1) Part 1 of Schedule 1 (powers to which section 50 applies) is amended as follows.

(2) Omit—
(a) paragraph 9,
(b) paragraph 16,
(c) paragraph 18,
(d) paragraph 19,
(e) paragraph 24,
(f) paragraph 36,
(g) paragraph 73BA,
(h) the first paragraph 73G,
(i) the second paragraph 73J,
(j) the second paragraph 73K,
(k) paragraph 73N, and
(l) paragraph 73O.

(3) In paragraph 45 for "29(4), (5) and (6)" substitute "29(4)".

(4) In the second paragraph 73G for "22(4) to (6)" substitute "22(4)".

(5) After paragraph 73M insert—

"Consumer Rights Act 2015

73P Each of the powers of seizure conferred by paragraphs 27(1)(b), 28(1) and 29(1) of Schedule 5 to the Consumer Rights Act 2015."

66 (1) Part 1 of Schedule 2 (application of enactments) is amended as follows.

(2) Omit paragraphs 1, 4B, 4C, 5, 7, 9B and 9C.

(3) In paragraph 3 for "29" in each place substitute "29(4)".

(4) In paragraph 4A—
(a) for "23" substitute "22(4)", and
(b) for "22" substitute "22(4)".

(5) After paragraph 4A insert—

"4D Paragraph 39 of Schedule 5 to the Consumer Rights Act 2015 (notice of testing of goods) shall apply in relation to items seized under section 50 of this Act in reliance on the power of seizure conferred by paragraph 28(1) of that Schedule as it applies in relation to goods seized under that paragraph.

Access to seized items

4E Subject to section 61 of this Act, paragraph 38 of Schedule 5 to the Consumer Rights Act 2015 (access to seized goods and documents) shall apply in relation to items seized under section 50 of this Act in reliance on the power of seizure conferred by paragraph 28(1) or 29(1) of that Schedule as it applies in relation to things seized under Part 4 of that Schedule."

(6) In paragraph 8 for "29" in each place substitute "29(4)".

(7) In paragraph 9A—
(a) for the first "22" substitute "22(4)", and
(b) for "products under regulations 22 of those Regulations." substitute "those items, as it applies to the seizure and detention of products under regulation 22(4) of those Regulations."

(8) After paragraph 9A insert—

"9D Paragraph 41 of Schedule 5 to the Consumer Rights Act 2015 (compensation for seizure and detention) shall apply in relation to the seizure of items under section 50 of this Act in reliance on the power of seizure conferred by paragraph 28(1) or 29(1) of that Schedule, and the retention of those items, as it applies in relation to the seizure and detention of goods under Part 4 of that Schedule."

Enterprise Act 2002 (c. 40)

67 The Enterprise Act 2002 is amended as follows.

68 Omit section 224 (power of CMA to require the provision of information).

69 Omit section 225 (power of other enforcer to require the provision of information).

70 Omit section 226 (procedure for notices requiring information).

71 Omit section 227 (enforcement of notices).

72 Omit section 227A (power to enter premises without warrant).

73 Omit section 227B (powers exercisable on the premises).

74 Omit section 227C (power to enter premises with warrant).

75 Omit section 227D (ancillary provisions about powers of entry).

76 Omit section 227E (obstructing, or failing to co-operate with, powers of entry).

77 Omit section 227F (retention of documents and goods).

78 Before section 228 (but after the italic heading "Miscellaneous") insert—

"223A Investigatory powers

For the investigatory powers available to enforcers for the purposes of enforcers' functions under this Part, see Schedule 5 to the Consumer Rights Act 2015."

79 In section 228 (evidence) omit subsection (4).

80 In section 236 (application of Part 8 to Crown) omit subsection (2).

81 In Schedule 14 (specified functions for the purposes of Part 9 restrictions on disclosure), at the end insert—

"Paragraph 13(2), (3) or (7) of Schedule 5 to the Consumer Rights Act 2015."

Fireworks Act 2003 (c. 22)

82 (1) Section 12 of the Fireworks Act 2003 (enforcement) is amended as follows.

(2) In subsection (2)—

(a) omit paragraph (a), and

(b) in paragraph (b), for "29(1) to (5), (6)(a) and (7)" substitute "29(4) and (7)".

(3) After subsection (2) insert—

"(2A) For the investigatory powers available to a person for the purposes of the duty to enforce imposed by virtue of subsection (1) (in addition to the powers in Part 4 of the Consumer Protection Act 1987), see Schedule 5 to the Consumer Rights Act 2015."

Christmas Day (Trading) Act 2004 (c. 26)

83 (1) Section 3 of the Christmas Day (Trading) Act 2004 (enforcement) is amended as follows.

(2) Omit subsection (3).

(3) Before subsection (4) insert—

"(3A) For the powers available to a local authority and the inspectors appointed by it under subsection (3) for the purposes of the duty in subsection (1), see Schedule 5 to the Consumer Rights Act 2015."

Financial Services Act 2012 (c. 21)

84 (1) Section 107 of the Financial Services Act 2012 (power to make further provision about regulation of consumer credit) is amended as follows.

(2) In subsection (2) omit paragraph (g).

(3) In subsection (4) for "(2)(g) to (i)" substitute "(2)(h) and (i)".

Consequential repeals and revocations

85 In consequence of the amendments made by this Schedule, the following are repealed or revoked—

(a) section 16(2)(b) of the Price Commission Act 1977;
(b) article 2(13) of the Deregulation (Weights and Measures) Order 1999 (SI 1999/503);
(c) paragraph 9(8)(b) and (9)(a) of Schedule 25 to the Enterprise Act 2002;
(d) paragraphs 50 and 62 of Schedule 27 to the Civil Partnerships Act 2004;
(e) paragraphs (10) and (24) to (27) of Schedule 1 to the Weights and Measures (Packaged Goods) Regulations 2006 (SI 2006/659);
(f) regulations 15 to 18 and 24 to 28 of the Enterprise Act 2002 (Amendment) Regulations 2006 (SI 2006/3363);
(g) section 51(2) of the Consumer Credit Act 2006;
(h) paragraph 41 of Schedule 21 to the Legal Services Act 2007;
(i) sections 57 and 58(1), (3) and (4) of the Consumers, Estate Agents and Redress Act 2007;
(j) paragraphs 63 to 65 of Schedule 2 to the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277);
(k) paragraph 2 of Schedule 6 to the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960);
(l) regulation 2 of the Timeshare (Amendment) Regulations 2011 (SI 2011/1065);
(m) paragraphs 17 to 20 of Schedule 1 to the Weights and Measures (Packaged Goods) Regulations (Northern Ireland) 2011 (SR 2011/331);
(n) paragraph 82(a) of Schedule 9 to the Crime and Courts Act 2013.

SCHEDULE 7

Section 79

ENTERPRISE ACT 2002: ENHANCED CONSUMER MEASURES AND OTHER ENFORCEMENT

1 Part 8 of the Enterprise Act 2002 (enforcement of certain consumer legislation) is amended as follows.

2 In section 210 (consumers), omit subsection (5).

3 (1) Section 211 (domestic infringements) is amended as follows.

(2) In subsection (1)(c), omit "in the United Kingdom".

(3) After subsection (1) insert—

"(1A) But an act or omission which satisfies the conditions in subsection (1) is a domestic infringement only if at least one of the following is satisfied—

(a) the person supplying (or seeking to supply) goods or services has a place of business in the United Kingdom, or

(b) the goods or services are supplied (or sought to be supplied) to or for a person in the United Kingdom (see section 232)."

4 In section 213(5A) (CPC enforcers), for paragraph (i) substitute—

"(i) an enforcement authority within the meaning of section 120(15) of the Communications Act 2003 (regulation of premium rate services);".

5 (1) Section 214 (consultation) is amended as follows.

(2) In subsection (4)(a), after "14 days" insert "or, where subsection (4A) applies, 28 days".

(3) After subsection (4) insert—

"(4A) This subsection applies where the person against whom the enforcement order would be made is a member of, or is represented by, a representative body, and that body operates a consumer code which has been approved by—

(a) an enforcer, other than a designated enforcer which is not a public body,

(b) a body which represents an enforcer mentioned in paragraph (a),

(c) a group of enforcers mentioned in paragraph (a), or

(d) a community interest company whose objects include the approval of consumer codes.

(4B) In subsection (4A)—

"consumer code" means a code of practice or other document (however described) intended, with a view to safeguarding or promoting the interests of consumers, to regulate by any means the conduct of persons engaged in the supply of goods or services to consumers (or the conduct of their employees or representatives), and

"representative body" means an organisation established to represent the interests of two or more businesses in a particular sector or area, and for this purpose "business" has the meaning it bears in section 210."

6 In section 217 (enforcement orders), after subsection (10) insert—

"(10A) An enforcement order may require a person against whom the order is made to take enhanced consumer measures (defined in section 219A) within a period specified by the court.

(10B) An undertaking under subsection (9) may include a further undertaking by the person to take enhanced consumer measures within a period specified in the undertaking.

(10C) Subsections (10A) and (10B) are subject to section 219C in a case where the application for the enforcement order was made by a designated enforcer which is not a public body.

(10D) Where a person is required by an enforcement order or an undertaking under this section to take enhanced consumer measures, the order or undertaking may include requirements as to the provision of information or documents to the court by the person in order that the court may determine if the person is taking those measures."

7 In section 219 (undertakings), after subsection (5) insert—

"(5ZA) An undertaking under this section may include a further undertaking by the person—

(a) to take enhanced consumer measures (defined in section 219A) within a period specified in the undertaking, and

(b) where such measures are included, to provide information or documents to the enforcer in order that the enforcer may determine if the person is taking those measures.

(5ZB) Subsection (5ZA) is subject to section 219C in a case where the enforcer is a designated enforcer which is not a public body."

8 After section 219 insert—

"219A Definition of enhanced consumer measures

(1) In this Part, enhanced consumer measures are measures (not excluded by subsection (5)) falling within—

(a) the redress category described in subsection (2),

(b) the compliance category described in subsection (3), or

(c) the choice category described in subsection (4).

(2) The measures in the redress category are—

(a) measures offering compensation or other redress to consumers who have suffered loss as a result of the conduct which has given rise to the enforcement order or undertaking,

(b) where the conduct referred to in paragraph (a) relates to a contract, measures offering such consumers the option to terminate (but not vary) that contract,

(c) where such consumers cannot be identified, or cannot be identified without disproportionate cost to the subject of the enforcement order or undertaking, measures intended to be in the collective interests of consumers.

(3) The measures in the compliance category are measures intended to prevent or reduce the risk of the occurrence or repetition of the conduct to which the enforcement order or undertaking relates (including measures with that purpose which may have the effect of improving compliance with consumer law more generally).

(4) The measures in the choice category are measures intended to enable consumers to choose more effectively between persons supplying or seeking to supply goods or services.

(5) The following are not enhanced consumer measures—

(a) a publication requirement included in an enforcement order as described in section 217(8),

(b) a publication requirement included in an undertaking accepted by the court as described in section 217(10), or

(c) a publication requirement included in an undertaking accepted by a CPC enforcer as described in section 219(5A)(a).

219B Inclusion of enhanced consumer measures etc.

(1) An enforcement order or undertaking may include only such enhanced consumer measures as the court or enforcer (as the case may be) considers to be just and reasonable.

(2) For the purposes of subsection (1) the court or enforcer must in particular consider whether any proposed enhanced consumer measures are proportionate, taking into account—

(a) the likely benefit of the measures to consumers,

(b) the costs likely to be incurred by the subject of the enforcement order or undertaking, and

(c) the likely cost to consumers of obtaining the benefit of the measures.

(3) The costs referred to in subsection (2)(b) are—

(a) the cost of the measures, and

(b) the reasonable administrative costs associated with taking the measures.

(4) An enforcement order or undertaking may include enhanced consumer measures in the redress category—

(a) only in a loss case, and

(b) only if the court or enforcer (as the case may be) is satisfied that the cost of such measures to the subject of the enforcement order or undertaking is unlikely to be more than the sum of the losses suffered by consumers as a result of the conduct which has given rise to the enforcement order or undertaking.

(5) The cost referred to in subsection (4)(b) does not include the administrative costs associated with taking the measures.

(6) Subsection (7) applies if an enforcement order or undertaking includes enhanced consumer measures offering compensation and a settlement agreement is entered into in connection with the payment of compensation.

(7) A waiver of a person's rights in the settlement agreement is not valid if it is a waiver of the right to bring civil proceedings in respect of conduct other than the conduct which has given rise to the enforcement order or undertaking.

(8) The following definitions apply for the purposes of subsection (4)(a).

(9) In the case of an enforcement order or undertaking under section 217, "a loss case" means a case in which—

(a) subsection (1) of that section applies (a finding that a person has engaged in conduct which constitutes an infringement), and

(b) consumers have suffered loss as a result of that conduct.

(10) In the case of an undertaking under section 219, "a loss case" means a case in which—

(a) subsection (3)(a) or (b) of that section applies (a belief that a person has engaged or is engaging in conduct which constitutes an infringement), and

(b) consumers have suffered loss as a result of that conduct.

219C Availability of enhanced consumer measures to private enforcers

(1) An enforcement order made on the application of a designated enforcer which is not a public body may require a person to take enhanced consumer measures only if the following conditions are satisfied.

(2) An undertaking given under section 217(9) following an application for an enforcement order made by a designated enforcer which is not a public body, or an undertaking given to such an enforcer under section 219, may include a further undertaking by a person to take enhanced consumer measures only if the following conditions are satisfied.

(3) The first condition is that the enforcer is specified for the purposes of this section by order made by the Secretary of State.

(4) The second condition is that the enhanced consumer measures do not directly benefit the enforcer or an associated undertaking.

(5) Enhanced consumer measures which directly benefit an enforcer or an associated undertaking include, in particular, measures which—

(a) require a person to pay money to the enforcer or associated undertaking,

(b) require a person to participate in a scheme which is designed to recommend persons supplying or seeking to supply goods or services to consumers and which is administered by the the enforcer or associated undertaking, or

(c) would give the enforcer or associated undertaking a commercial advantage over any of its competitors.

(6) The Secretary of State may make an order under subsection (3) specifying an enforcer only if the Secretary of State is satisfied that to do so is likely to—

(a) improve the availability to consumers of redress for infringements to which the enforcer's designation relates,

(b) improve the availability to consumers of information which enables them to choose more effectively between persons supplying or seeking to supply goods or services, or

(c) improve compliance with consumer law.

(7) The Secretary of State may make an order under subsection (3) specifying an enforcer only if the functions of the enforcer under this Part have been specified under section 24 of the Legislative and Regulatory Reform Act 2006 (functions to which principles under section 21 and code of practice under section 22 apply), to the extent that they are capable of being so specified.

(8) The power to make an order under subsection (3)—

(a) is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament;

(b) includes power to make incidental, supplementary, consequential, transitional, transitory or saving provision.

(9) Subsection (10) applies if—

(a) an enforcer exercises a function in relation to a person by virtue of subsection (1) or (2),

(b) that function is a relevant function for the purposes of Part 2 (co-ordination of regulatory enforcement) of the Regulatory Enforcement and Sanctions Act 2008, and

(c) a primary authority (within the meaning of that Part) has given advice or guidance under section 27(1) of that Act—

(i) to that person in relation to that function, or

(ii) to other local authorities (within the meaning of that Part) with that function as to how they should exercise it in relation to that person.

(10) The enforcer must, in exercising the function in relation to that person, act consistently with that advice or guidance.

(11) In this section "associated undertaking", in relation to a designated enforcer, means—

(a) a parent undertaking or subsidiary undertaking of the enforcer, or

(b) a subsidiary undertaking of a parent undertaking of the enforcer,

and for this purpose "parent undertaking" and "subsidiary undertaking" have the meanings given by section 1162 of the Companies Act 2006."

9 (1) Section 220 (further proceedings) is amended as follows.

(2) After subsection (1) insert—

"(1A) This section does not apply in the case of a failure to comply with an order or undertaking which consists only of a failure to provide information or documents required by the order or undertaking as described in section 217(10D)."

(3) In subsection (2), for "In such a case the CMA" substitute "Any CPC enforcer".

(4) In subsection (5)—

(a) in the opening words, for "sections 215 and 217 or 218 (as the case may be)" substitute "sections 215, 217 or 218 (as the case may be) and 219A, 219B and 219C",

(b) for paragraph (c) substitute—

"(c) section 217(9), (10), (10B) and (11) must be ignored, and section 217(10C) and (10D) must be ignored to the extent that they relate to an undertaking under section 217(9);",

(c) after paragraph (d) insert—

"(e) sections 219A, 219B and 219C must be ignored to the extent that they relate to an undertaking under section 217(9) or 219."

10 In section 229 (advice and information), after subsection (1) insert—

"(1A) As soon as is reasonably practicable after the commencement of Schedule 5 to the Consumer Rights Act 2015 (investigatory powers etc.) the CMA must prepare and publish advice and information with a view to—

(a) explaining the provisions of that Schedule, so far as they relate to investigatory powers exercised for the purposes set out in paragraphs 13(2) and (3) and 19 of that Schedule, to persons who are likely to be affected by them, and

(b) indicating how the CMA expects such provisions to operate."

SCHEDULE 8

Section 81

PRIVATE ACTIONS IN COMPETITION LAW

PART 1

COMPETITION ACT 1998

1 The Competition Act 1998 is amended in accordance with this Part.

2 For the heading of Chapter 4 of Part 1, substitute "Appeals, proceedings before the Tribunal and settlements relating to infringements of competition law".

3 For the cross-heading preceding section 46, substitute "Appeals and proceedings before the Tribunal".

4 (1) For section 47A substitute—

"47A Proceedings before the Tribunal: claims for damages etc.

(1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.

(2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—

(a) the Chapter I prohibition,

(b) the Chapter II prohibition,

(c) the prohibition in Article 101(1), or

(d) the prohibition in Article 102.

(3) The claims are—

(a) a claim for damages;
(b) any other claim for a sum of money;
(c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.

(4) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded.

(5) The right to make a claim in proceedings under this section does not affect the right to bring any other proceedings in respect of the claim.

(6) In this Part (except in section 49C) "infringement decision" means—
(a) a decision of the CMA that the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed,
(b) a decision of the Tribunal on an appeal from a decision of the CMA that the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed, or
(c) a decision of the Commission that the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed."

(2) Section 47A of the Competition Act 1998 (as substituted by sub-paragraph (1)) applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time.

5 (1) For section 47B substitute—

"47B Collective proceedings before the Tribunal

(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings").

(2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.

(3) The following points apply in relation to claims in collective proceedings—
(a) it is not a requirement that all of the claims should be against all of the defendants to the proceedings,
(b) the proceedings may combine claims which have been made in proceedings under section 47A and claims which have not, and
(c) a claim which has been made in proceedings under section 47A may be continued in collective proceedings only with the consent of the person who made that claim.

(4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.

(5) The Tribunal may make a collective proceedings order only—
(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.

(6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

(7) A collective proceedings order must include the following matters—

(a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,

(b) description of a class of persons whose claims are eligible for inclusion in the proceedings, and

(c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections (10) and (11)).

(8) The Tribunal may authorise a person to act as the representative in collective proceedings—

(a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a "class member"), but

(b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.

(9) The Tribunal may vary or revoke a collective proceedings order at any time.

(10) "Opt-in collective proceedings" are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.

(11) "Opt-out collective proceedings" are collective proceedings which are brought on behalf of each class member except—

(a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and

(b) any class member who—

(i) is not domiciled in the United Kingdom at a time specified, and

(ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings.

(12) Where the Tribunal gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all represented persons, except as otherwise specified.

(13) The right to make a claim in collective proceedings does not affect the right to bring any other proceedings in respect of the claim.

(14) In this section and in section 47C, "specified" means specified in a direction made by the Tribunal."

(2) Section 47B of the Competition Act 1998 (as substituted by sub-paragraph (1)) applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time.

6 After section 47B (as substituted by paragraph 5) insert—

"47C Collective proceedings: damages and costs

(1) The Tribunal may not award exemplary damages in collective proceedings.

(2) The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person.

(3) Where the Tribunal makes an award of damages in opt-out collective proceedings, the Tribunal must make an order providing for the damages to be paid on behalf of the represented persons to—

(a) the representative, or

(b) such person other than a represented person as the Tribunal thinks fit.

(4) Where the Tribunal makes an award of damages in opt-in collective proceedings, the Tribunal may make an order as described in subsection (3).

(5) Subject to subsection (6), where the Tribunal makes an award of damages in opt-out collective proceedings, any damages not claimed by the represented persons within a specified period must be paid to the charity for the time being prescribed by order made by the Lord Chancellor under section 194(8) of the Legal Services Act 2007.

(6) In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings.

(7) The Secretary of State may by order amend subsection (5) so as to substitute a different charity for the one for the time being specified in that subsection.

(8) A damages-based agreement is unenforceable if it relates to opt-out collective proceedings.

(9) In this section—

(a) "charity" means a body, or the trustees of a trust, established for charitable purposes only;

(b) "damages" (except in the term "exemplary damages") includes any sum of money which may be awarded by the Tribunal in collective proceedings (other than costs or expenses);

(c) "damages-based agreement" has the meaning given in section 58AA(3) of the Courts and Legal Services Act 1990."

7 After section 47C (inserted by paragraph 6) insert—

"47D Proceedings under section 47A or collective proceedings: injunctions etc.

(1) An injunction granted by the Tribunal in proceedings under section 47A or in collective proceedings—

(a) has the same effect as an injunction granted by the High Court, and

(b) is enforceable as if it were an injunction granted by the High Court.

(2) In deciding whether to grant an injunction in proceedings under section 47A or in collective proceedings, the Tribunal must—

(a) in proceedings in England and Wales, apply the principles which the High Court would apply in deciding whether to grant an injunction under section 37(1) of the Senior Courts Act 1981, and

(b) in proceedings in Northern Ireland, apply the principles that the High Court would apply in deciding whether to grant an injunction.

(3) Subsection (2) is subject to Tribunal rules which make provision of the kind mentioned in paragraph 15A(3) of Schedule 4 to the Enterprise Act 2002 (undertakings as to damages in relation to claims subject to the fast-track procedure)."

8 (1) After section 47D (inserted by paragraph 7) insert—

"47E Limitation or prescriptive periods for proceedings under section 47A and collective proceedings

(1) Subsection (2) applies in respect of a claim to which section 47A applies, for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made in—

(a) proceedings under section 47A, or

(b) collective proceedings at the commencement of those proceedings.

(2) Where this subsection applies—

(a) in the case of proceedings in England and Wales, the Limitation Act 1980 applies as if the claim were an action in a court of law;

(b) in the case of proceedings in Scotland, the Prescription and Limitation (Scotland) Act 1973 applies as if the claim related to an obligation to which section 6 of that Act applies;

(c) in the case of proceedings in Northern Ireland, the Limitation (Northern Ireland) Order 1989 applies as if the claim were an action in a court established by law.

(3) Where a claim is made in collective proceedings at the commencement of those proceedings ("the section 47B claim"), subsections (4) to (6) apply for the purpose of determining the limitation or prescriptive period which would apply in respect of the claim if it were subsequently to be made in proceedings under section 47A.

(4) The running of the limitation or prescriptive period in respect of the claim is suspended from the date on which the collective proceedings are commenced.

(5) Following suspension under subsection (4), the running of the limitation or prescriptive period in respect of the claim resumes on the date on which any of the following occurs—

(a) the Tribunal declines to make a collective proceedings order in respect of the collective proceedings;

(b) the Tribunal makes a collective proceedings order in respect of the collective proceedings, but the order does not provide that the section 47B claim is eligible for inclusion in the proceedings;

(c) the Tribunal rejects the section 47B claim;

(d) in the case of opt-in collective proceedings, the period within which a person may choose to have the section 47B claim included in the proceedings expires without the person having done so;

(e) in the case of opt-out collective proceedings—

(i) a person domiciled in the United Kingdom chooses (within the period in which such a choice may be made) to have the section 47B claim excluded from the collective proceedings, or

(ii) the period within which a person not domiciled in the United Kingdom may choose to have the section 47B claim included in the collective proceedings expires without the person having done so;

(f) the section 47B claim is withdrawn;

(g) the Tribunal revokes the collective proceedings order in respect of the collective proceedings;

(h) the Tribunal varies the collective proceedings order in such a way that the section 47B claim is no longer included in the collective proceedings;

(i) the section 47B claim is settled with or without the Tribunal's approval;

(j) the section 47B claim is dismissed, discontinued or otherwise disposed of without an adjudication on the merits.

(6) Where the running of the limitation or prescriptive period in respect of the claim resumes under subsection (5) but the period would otherwise expire before the end of the period of six months beginning with the date of that resumption, the period is treated as expiring at the end of that six month period.

(7) This section has effect subject to any provision in Tribunal rules which defers the date on which the limitation or prescriptive period begins in relation to claims in proceedings under section 47A or in collective proceedings."

(2) Section 47E of the Competition Act 1998 does not apply in relation to claims arising before the commencement of this paragraph.

9 (1) Section 49 (further appeals) is amended in accordance with this paragraph.

(2) In subsection (1)—

(a) at the end of paragraph (a) insert "and", and
(b) omit paragraph (b) and the "and" at the end of that paragraph.

(3) After subsection (1) insert—

"(1A) An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings—
(a) as to the award of damages or other sum (other than a decision on costs or expenses), or
(b) as to the grant of an injunction.

(1B) An appeal lies to the appropriate court from a decision of the Tribunal in proceedings under section 47A or in collective proceedings as to the amount of an award of damages or other sum (other than the amount of costs or expenses).

(1C) An appeal under subsection (1A) arising from a decision in respect of a stand-alone claim may include consideration of a point of law arising from a finding of the Tribunal as to an infringement of a prohibition listed in section 47A(2).

(1D) In subsection (1C) "a stand-alone claim" is a claim—
(a) in respect of an alleged infringement of a prohibition listed in section 47A(2), and
(b) made in proceedings under section 47A or included in collective proceedings."

(4) In subsection (2)(a), at the beginning insert "except as provided by subsection (2A),".

(5) After subsection (2) insert—

"(2A) An appeal from a decision of the Tribunal in respect of a claim included in collective proceedings may be brought only by the representative in those proceedings or by a defendant to that claim."

10 (1) After section 49 insert—

"Settlements relating to infringements of competition law

49A Collective settlements: where a collective proceedings order has been made

(1) The Tribunal may, in accordance with this section and Tribunal rules, make an order approving the settlement of claims in collective proceedings (a "collective settlement") where—
(a) a collective proceedings order has been made in respect of the claims, and
(b) the Tribunal has specified that the proceedings are opt-out collective proceedings.

(2) An application for approval of a proposed collective settlement must be made to the Tribunal by the representative and the defendant in the collective proceedings.

(3) The representative and the defendant must provide agreed details of the claims to be settled by the proposed collective settlement and the proposed terms of that settlement.

(4) Where there is more than one defendant in the collective proceedings, "defendant" in subsections (2) and (3) means such of the defendants as wish to be bound by the proposed collective settlement.

(5) The Tribunal may make an order approving a proposed collective settlement only if satisfied that its terms are just and reasonable.

(6) On the date on which the Tribunal approves a collective settlement—
(a) if the period within which persons may opt out of or (in the case of persons not domiciled in the United Kingdom) opt in to the collective proceedings has expired, subsections (8) and (10) apply so as to determine the persons bound by the settlement;
(b) if that period has not yet expired, subsections (9) and (10) apply so as to determine the persons bound by the settlement.

(7) If the period within which persons may opt out of the collective proceedings expires on a different date from the period within which persons not domiciled in the United Kingdom may opt in to the collective proceedings, the references in subsection (6) to the expiry of a period are to the expiry of whichever of those periods expires later.

(8) Where this subsection applies, a collective settlement approved by the Tribunal is binding on all persons falling within the class of persons described in the collective proceedings order who—
(a) were domiciled in the United Kingdom at the time specified for the purposes of determining domicile in relation to the collective proceedings (see section 47B(11)(b)(i)) and did not opt out of those proceedings, or
(b) opted in to the collective proceedings.

(9) Where this subsection applies, a collective settlement approved by the Tribunal is binding on all persons falling within the class of persons described in the collective proceedings order.

(10) But a collective settlement is not binding on a person who—
(a) opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective settlement, or
(b) is not domiciled in the United Kingdom at a time specified, and does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective settlement.

(11) This section does not affect a person's right to offer to settle opt-in collective proceedings.

(12) In this section and in section 49B, "specified" means specified in a direction made by the Tribunal."

(2) Section 49A of the Competition Act 1998 applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time.

11 (1) After section 49A (inserted by paragraph 10) insert—

"49B Collective settlements: where a collective proceedings order has not been made

(1) The Tribunal may, in accordance with this section and Tribunal rules, make an order approving the settlement of claims (a "collective settlement") where—

(a) a collective proceedings order has not been made in respect of the claims, but

(b) if collective proceedings were brought, the claims could be made at the commencement of the proceedings (disregarding any limitation or prescriptive period applicable to a claim in collective proceedings).

(2) An application for approval of a proposed collective settlement must be made to the Tribunal by—

(a) a person who proposes to be the settlement representative in relation to the collective settlement, and

(b) the person who, if collective proceedings were brought in respect of the claims, would be a defendant in those proceedings (or, where more than one person would be a defendant in those proceedings, such of those persons as wish to be bound by the proposed collective settlement).

(3) The persons applying to the Tribunal under subsection (2) must provide agreed details of the claims to be settled by the proposed collective settlement and the proposed terms of that settlement.

(4) The Tribunal may make an order approving a proposed collective settlement (see subsection (8)) only if it first makes a collective settlement order.

(5) The Tribunal may make a collective settlement order only—

(a) if it considers that the person described in subsection (2)(a) is a person who, if the order were made, the Tribunal could authorise to act as the settlement representative in relation to the collective settlement in accordance with subsection (7), and

(b) in respect of claims which, if collective proceedings were brought, would be eligible for inclusion in the proceedings (see section 47B(6)).

(6) A collective settlement order must include the following matters—

(a) authorisation of the person described in subsection (2)(a) to act as the settlement representative in relation to the collective settlement, and

(b) description of a class of persons whose claims fall within subsection (5)(b).

(7) The Tribunal may authorise a person to act as the settlement representative in relation to a collective settlement—

(a) whether or not that person is a person falling within the class of persons described in the collective settlement order for that settlement, but

(b) only if the Tribunal considers that it is just and reasonable for that person to act as the settlement representative in relation to that settlement.

(8) Where the Tribunal has made a collective settlement order, it may make an order approving a proposed collective settlement only if satisfied that its terms are just and reasonable.

(9) A collective settlement approved by the Tribunal is binding on all persons falling within the class of persons described in the collective settlement order.

(10) But a collective settlement is not binding on a person who—

(a) opts out by notifying the settlement representative, in a manner and by a time specified, that the claim should not be included in the collective settlement, or

(b) is not domiciled in the United Kingdom at a time specified, and does not, in a manner and by a time specified, opt in by notifying the settlement representative that the claim should be included in the collective settlement.

(11) In this section, "settlement representative" means a person who is authorised by a collective settlement order to act in relation to a collective settlement."

(2) Section 49B of the Competition Act 1998 applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time.

12 After section 49B (inserted by paragraph 11) insert—

"49C Approval of redress schemes by the CMA

(1) A person may apply to the CMA for approval of a redress scheme.

(2) The CMA may consider an application before the infringement decision to which the redress scheme relates has been made, but may approve the scheme only—

(a) after that decision has been made, or

(b) in the case of a decision of the CMA, at the same time as that decision is made.

(3) In deciding whether to approve a redress scheme, the CMA may take into account the amount or value of compensation offered under the scheme.

(4) The CMA may approve a redress scheme under subsection (2)(b) subject to a condition or conditions requiring the provision of further information about the operation of the scheme (including about the amount or value of compensation to be offered under the scheme or how this will be determined).

(5) If the CMA approves a redress scheme subject to such a condition, it may—

(a) approve the scheme subject to other conditions;

(b) withdraw approval from the scheme if any conditions imposed under subsection (4) or paragraph (a) are not met;

(c) approve a redress scheme as a replacement for the original scheme (but may not approve that scheme subject to conditions).

(6) An approved scheme may not be varied by the CMA or the compensating party.

(7) But, where the CMA approves a redress scheme subject to a condition of the kind mentioned in subsection (4), subsection (6) does not prevent further information provided in accordance with the condition from forming part of the terms of the scheme.

(8) The Secretary of State may make regulations relating to the approval of redress schemes, and the regulations may in particular—

(a) make provision as to the procedure governing an application for approval of a redress scheme, including the information to be provided with the application;

(b) provide that the CMA may approve a redress scheme only if it has been devised according to a process specified in the regulations;

(c) provide that the CMA may approve a redress scheme only if it is in a form, or contains terms, specified in the regulations (which may include terms requiring a settlement agreement under the scheme to be in a form, or contain terms, specified in the regulations);

(d) provide that the CMA may approve a redress scheme only if (so far as the CMA can judge from facts known to it) the scheme is intended to be administered in a manner specified in the regulations;

(e) describe factors which the CMA may or must take into account, or may not take into account, in deciding whether to approve a redress scheme.

(9) The CMA must publish guidance with regard to—

(a) applications for approval of redress schemes,

(b) the approval of redress schemes, and

(c) the enforcement of approved schemes, and in particular as to the criteria which the CMA intends to adopt in deciding whether to bring proceedings under section 49E(4).

(10) Guidance under subsection (9) must be approved by the Secretary of State before it is published.

(11) In this section and sections 49D and 49E—

"approved scheme" means a redress scheme approved by the CMA,

"compensating party" means a person offering compensation under an approved scheme,

"infringement decision" means—

(a) a decision of the CMA that the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed, or

(b) a decision of the Commission that the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed, and

"redress scheme" means a scheme under which a person offers compensation in consequence of an infringement decision made in respect of that person.

(12) For the purposes of this section and section 49E, "compensation"—

(a) may be monetary or non-monetary, and

(b) may be offered to persons who have not suffered a loss as a result of the infringement decision to which the redress scheme relates.

49D Redress schemes: recovery of costs

(1) The CMA may require a person making an application for approval of a redress scheme to pay some or all of the CMA's reasonable costs relating to the application.

(2) A requirement to pay costs is imposed by giving that person written notice specifying—

(a) the amount to be paid,

(b) how that amount has been calculated, and

(c) by when that amount must be paid.

(3) A person required to pay costs under this section may appeal to the Tribunal against the amount.

(4) Where costs required to be paid under this section relate to an approved scheme, the CMA may withdraw approval from that scheme if the costs have not been paid by the date specified in accordance with subsection (2)(c).

(5) Costs required to be paid under this section are recoverable by the CMA as a debt.

49E Enforcement of approved schemes

(1) A compensating party is under a duty to comply with the terms of an approved scheme ("the duty").

(2) The duty is owed to any person entitled to compensation under the terms of the approved scheme.

(3) Where such a person suffers loss or damage as a result of a breach of the duty, the person may bring civil proceedings before the court for damages, an injunction or interdict or any other appropriate relief or remedy.

(4) Where the CMA considers that the compensating party is in breach of the duty, the CMA may bring civil proceedings before the court for an injunction or interdict or any other appropriate relief or remedy.

(5) Subsection (4) is without prejudice to any right that a person has to bring proceedings under subsection (3).

(6) In any proceedings brought under subsection (3) or (4), it is a defence for the compensating party to show that it took all reasonable steps to comply with the duty.

(7) Where the CMA considers that it is no longer appropriate for the compensating party to be subject to the duty, the CMA may give notice in writing to that party stating that it is released from the duty.

(8) Where a person has entered into a settlement agreement with the compensating party, that agreement remains enforceable notwithstanding the release of the compensating party under subsection (7) from the duty.

(9) In this section "the court" means—

(a) in England and Wales, the High Court or the county court,

(b) in Northern Ireland, the High Court or a county court,

(c) in Scotland, the Court of Session or the sheriff."

13 (1) Section 58 (findings of fact by CMA) is amended in accordance with this paragraph.

(2) In subsection (1), after "the court" insert "or the Tribunal".

(3) In subsection (2)—

(a) in the definition of "Part I proceedings", before paragraph (a) insert—

"(za) in respect of an infringement decision;", and

(b) in the definition of "relevant party", in paragraphs (a) and (b), for "is alleged to have infringed the prohibition" substitute "has been found to have infringed the prohibition or is alleged to have infringed the prohibition (as the case may be)".

(4) In subsection (3)—

(a) after "Rules of court" insert "or Tribunal rules", and

(b) after "the court" insert "or the Tribunal".

(5) After subsection (3) insert—

"(4) In this section "the court" means—

(a) in England and Wales or Northern Ireland, the High Court,

(b) in Scotland, the Court of Session or the sheriff."

14 (1) For section 58A substitute—

"58A Infringement decisions

(1) This section applies to a claim in respect of an infringement decision which is brought in proceedings—

(a) before the court, or

(b) before the Tribunal under section 47A or 47B.

(2) The court or the Tribunal is bound by the infringement decision once it has become final.

(3) An infringement decision specified in section 47A(6)(a) or (b) becomes final—

(a) when the time for appealing against that decision expires without an appeal having been brought;

(b) where the decision is specified in section 47A(6)(a) and an appeal has been brought against the decision under section 46 or 47, when that appeal—

(i) has been withdrawn, dismissed or otherwise discontinued, or

(ii) has confirmed the infringement decision and the time for making any further appeal against that confirmatory decision expires without a further appeal having been brought;

(c) where an appeal has been brought in relation to the decision under section 49, when that appeal—

(i) in the case of an appeal against the infringement decision or against a decision which confirmed the infringement decision, has been withdrawn, dismissed or otherwise discontinued, or

(ii) has confirmed the infringement decision and the time for making any further appeal to the Supreme Court against that confirmatory decision expires without a further appeal having been brought; or

(d) where an appeal has been brought to the Supreme Court in relation to the decision, when that appeal—

(i) in the case of an appeal against a decision which confirmed the infringement decision, has been withdrawn, dismissed or otherwise discontinued, or

(ii) has confirmed the infringement decision.

(4) An infringement decision specified in section 47A(6)(c) becomes final—

(a) when the time for appealing against that decision in the European Court expires without an appeal having been brought; or

(b) where such an appeal has been brought against the decision, when that appeal—

(i) has been withdrawn, dismissed or otherwise discontinued, or

(ii) has confirmed the infringement decision.

(5) This section applies to the extent that the court or the Tribunal would not otherwise be bound by the infringement decision in question.

(6) In this section "the court" means—

(a) in England and Wales or Northern Ireland, the High Court,

(b) in Scotland, the Court of Session or the sheriff."

(2) Section 58A of the Competition Act 1998 (as substituted by sub-paragraph (1)) does not apply in relation to decisions made before the commencement of this paragraph.

15 (1) Section 59 (interpretation of Part 1) is amended in accordance with this paragraph.

(2) In subsection (1), at the appropriate places insert—

""class member" has the meaning given in section 47B(8)(a);";

""collective proceedings" has the meaning given in section 47B(1);";

""collective proceedings order" means an order made by the Tribunal authorising the continuance of collective proceedings;";

""infringement decision", except in section 49C, has the meaning given in section 47A(6);";

""injunction" includes an interim injunction;";

""opt-in collective proceedings" has the meaning given in section 47B(10);";

""opt-out collective proceedings" has the meaning given in section 47B(11);";

""representative" means a person who is authorised by a collective proceedings order to bring collective proceedings;";

""represented person" means a class member who—

(a) has opted in to opt-in collective proceedings,

(b) was domiciled in the United Kingdom at the time specified for the purposes of determining domicile (see section 47B(11)(b)(i)) and has not opted out of opt-out collective proceedings, or

(c) has opted in to opt-out collective proceedings;".

(3) In subsection (1), in the definition of "the court", before "58" insert "49E,".

(4) After subsection (1) insert—

"(1A) In this Part, in respect of proceedings in Scotland, "defendant" is to be read as "defender".

(1B) Sections 41, 42, 45 and 46 of the Civil Jurisdiction and Judgments Act 1982 apply for the purpose of determining whether a person is regarded as "domiciled in the United Kingdom" for the purposes of this Part."

16 In section 71 (regulations, orders and rules), after subsection (4)(ca) insert—

"(cb) section 47C(7),".

17 (1) Schedule 8 (appeals) is amended in accordance with this paragraph.

(2) In paragraph 2(1), for "46 or 47" substitute "46, 47 or 49D(3)".

(3) After paragraph 3A insert—

"3B (1) This paragraph applies to an appeal under section 49D(3).

(2) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.

(3) The Tribunal may—

(a) approve the amount of costs which is the subject of the appeal, or

(b) impose a requirement to pay costs of a different amount.

(4) The Tribunal may also give such directions, or take such other steps, as the CMA could itself have given or taken.

(5) A requirement imposed by the Tribunal under sub-paragraph (3)(b) has the same effect, and may be enforced in the same manner, as a requirement imposed by the CMA under section 49D."

PART 2

ENTERPRISE ACT 2002

18 The Enterprise Act 2002 is amended in accordance with this Part.

19 (1) Section 14 (constitution of Tribunal for particular proceedings and its decisions) is amended as follows.

(2) In subsection (1), after "before it" insert ", including proceedings relating to the approval of a collective settlement under section 49A or 49B of the 1998 Act,".

(3) After subsection (1) insert—

"(1A) But in the case of proceedings relating to a claim under section 47A of the 1998 Act which is subject to the fast-track procedure (as described in Tribunal rules), the Tribunal may consist of a chairman only."

20 In section 15 (Tribunal rules), in subsection (1), at the end insert ", including proceedings relating to the approval of a collective settlement under section 49A or 49B of the 1998 Act."

21 In section 16 (transfers of certain proceedings to and from Tribunal), in subsection (5), for "High Court or the Court of Session of" substitute "court of all or any part of".

22 Schedule 4 (Tribunal: procedure) is amended in accordance with the following paragraphs of this Part.

23 In paragraph 1 (decisions of the Tribunal), for sub-paragraph (1)(a) substitute—

"(a) state the reasons for the decision;

(aa) state whether the decision was unanimous or taken by a majority or, where proceedings are heard by a chairman only, state that fact;".

24 After paragraph 1 insert—

"Enforcement of injunctions in England and Wales and Northern Ireland

1A (1) Where a person ("A") fails to comply with an injunction granted by the Tribunal in proceedings under section 47A or 47B of the 1998 Act, the Tribunal may certify the matter to the High Court.

(2) The High Court may enquire into the matter.

(3) If, after hearing any witnesses who may be produced against or on behalf of A, and any statement made by or on behalf of A, the High Court is satisfied that A would have been in contempt of court if the injunction had been granted by the High Court, the High Court may deal with A as if A were in contempt."

25 In each of paragraphs 4(c) and 5(1)(c)—

(a) for "47B(6)" substitute "47C(3) or (4)"; and

(b) for "specified body concerned" substitute "representative in the proceedings under section 47B of that Act".

26 In paragraph 6—

(a) for sub-paragraph (a) substitute—

"(a) awards damages to a person in respect of a claim made or continued on behalf of that person (but is not the subject of an order under section 47C(3) or (4) of that Act); or";

(b) in sub-paragraph (b)—

(i) for "an individual" substitute "a person",

(ii) for "his behalf" substitute "behalf of that person"; and

(c) in the full-out words at the end, for "individual" substitute "person".

27 In paragraph 7—

(a) for "specified body" substitute "representative"; and

(b) for "individual" substitute "person".

28 In paragraph 9—

(a) the existing provision is numbered as sub-paragraph (1), and

(b) after that provision insert—

"(2) In this Schedule, where a paragraph is capable of applying to proceedings relating to the approval of a collective settlement under section 49A or 49B of the 1998 Act, any reference in that paragraph to "proceedings" includes a reference to those proceedings."

29 In paragraph 11(2), for paragraph (a) substitute—

"(a) make further provision as to procedural aspects of the operation of the limitation or prescriptive periods in relation to claims which may be made in proceedings under section 47A of the 1998 Act, as set out in section 47E(3) to (6) of that Act;".

30 For paragraph 13 substitute—

"13 (1) Tribunal rules may provide for the Tribunal—

(a) to reject a claim made under section 47A of the 1998 Act or a section 47B claim if it considers that there are no reasonable grounds for making it;

(b) to reject a section 47B claim if—

(i) the Tribunal declines to make a collective proceedings order in respect of the proceedings under section 47B of the 1998 Act,

(ii) the Tribunal makes a collective proceedings order in respect of the proceedings, but the order does not provide that the claim in question is eligible for inclusion in the proceedings,

(iii) the Tribunal revokes the collective proceedings order in respect of the proceedings, or

(iv) the Tribunal varies the collective proceedings order in such a way that the claim in question is no longer included in the proceedings;

(c) to reject a section 47B claim if the claim had been previously made in proceedings under section 47A of the 1998 Act by a person who has not consented to its being continued in proceedings under section 47B of that Act.

(2) In this paragraph, "a section 47B claim" means a claim made in proceedings under section 47B of the 1998 Act at the commencement of those proceedings."

31 After paragraph 15 insert—

"Fast-track procedure

15A (1) Tribunal rules may make provision in relation to a fast-track procedure for claims made in proceedings under section 47A of the 1998 Act, including describing the factors relevant to determining whether a claim is suitable to be dealt with according to that procedure.

(2) Tribunal rules may make different provision for claims in proceedings under section 47A of the 1998 Act which are and which are not subject to the fast-track procedure.

(3) Tribunal rules may, in particular, provide for the Tribunal to—

(a) grant an interim injunction on a claim in proceedings under section 47A of the 1998 Act which is subject to the fast-track procedure to a person who has not given an undertaking as to damages, or

(b) impose a cap on the amount that a person may be required to pay under an undertaking as to damages given on the granting of such an interim injunction.

(4) In sub-paragraph (3) "an undertaking as to damages" means an undertaking to pay damages which a person sustains as a result of the interim injunction and which the Tribunal considers the person to whom the injunction is granted should pay.

Collective proceedings

15B (1) Tribunal rules may make provision in relation to collective proceedings under section 47B of the 1998 Act.

(2) Rules under sub-paragraph (1) must in particular make provision as to the following matters—

(a) the procedure governing an application for a collective proceedings order;

(b) the factors which the Tribunal must take into account in deciding whether a claim is suitable to be brought in collective proceedings (but rules need not make provision in connection with the determination as to whether claims raise the same, similar or related issues of fact or law);

(c) the factors which the Tribunal must take into account in deciding whether to authorise a person to act as a representative in collective proceedings;
(d) the procedure by which the Tribunal is to reach a decision as to whether to make a collective proceedings order;
(e) the procedure by which a person may opt in or opt out of collective proceedings;
(f) the factors which the Tribunal must take into account in deciding whether to vary or revoke a collective proceedings order;
(g) the assessment of damages in collective proceedings;
(h) the payment of damages in collective proceedings, including the procedure for publicising an award of damages;
(i) the effect of judgments and orders in collective proceedings.

Collective settlements

15C (1) Tribunal rules may make provision in relation to collective settlements under sections 49A and 49B of the 1998 Act.

(2) Rules under sub-paragraph (1) must in particular make provision as to the following matters—
(a) the procedure governing an application for approval of a proposed collective settlement;
(b) where section 49B applies, the factors which the Tribunal must take into account in deciding whether to make a collective settlement order (but rules need not make provision in connection with the determination as to whether claims raise the same, similar or related issues of fact or law);
(c) where section 49B applies, the factors which the Tribunal must take into account in deciding whether to authorise a person to act as a settlement representative in relation to a collective settlement;
(d) where section 49B applies, the procedure by which the Tribunal is to reach a decision as to whether to make a collective settlement order;
(e) the factors which the Tribunal must take into account in deciding whether to approve a proposed collective settlement;
(f) the procedure by which the Tribunal is to reach a decision as to whether to approve a collective settlement;
(g) the procedure by which a person may opt in or opt out of a collective settlement;
(h) the payment of compensation under a collective settlement, including the procedure for publicising a compensation award."

32 In paragraph 17 (conduct of the hearing)—

(a) after sub-paragraph (1)(h) insert—

"(ha) allowing the Tribunal to order payments in respect of the representation of a party to proceedings under section 47A or 47B of the 1998 Act, where the representation by a legal representative was provided free of charge;";

(b) in sub-paragraph (2)—

(i) for "an individual" substitute "a person"; and

(ii) for "that individual" substitute "that person";

(c) after sub-paragraph (2) insert—

"(2A) Rules under sub-paragraph (1)(h) may provide for costs or expenses to be awarded to or against a person on whose behalf a claim is made or continued in proceedings under section 47B of the 1998 Act in respect of an application in the proceedings made by that person (where that application is not made by the representative in the proceedings on that person's behalf).."; and

(d) in sub-paragraph (3), for "an individual" substitute "a person".

33 After paragraph 20 insert—

"Stay or sist of proceedings

20A (1) In relation to proceedings in England and Wales or Northern Ireland under section 47A or 47B of the 1998 Act, Tribunal rules may make provision as to the stay of the proceedings, including as to—

(a) the circumstances in which a stay may be ordered or removed at the request of a party to the proceedings,

(b) the circumstances in which the proceedings may be stayed at the instance of the Tribunal, and

(c) the procedure to be followed.

(2) In relation to proceedings in Scotland under section 47A or 47B of the 1998 Act, Tribunal rules may make provision as to the sist of the proceedings, including as to—

(a) the circumstances in which a sist may be granted or recalled at the request of a party to the proceedings,

(b) the circumstances in which the proceedings may be sisted at the instance of the Tribunal, and

(c) the procedure to be followed.

(3) Rules under sub-paragraph (1) or (2) may in particular make provision in relation to the stay or sist of proceedings under section 47A or 47B which relate to a claim in respect of an infringement decision (as defined in section 47A(6)) which has not become final (see section 58A of the 1998 Act)."

34 After paragraph 21 insert—

"Injunctions

21A Tribunal rules may make provision in relation to the grant of injunctions (including interim injunctions) in proceedings under section 47A or 47B of the 1998 Act."

35 In paragraph 23(3), for "an individual" substitute "a person".

36 In paragraph 25, after "transfer of" insert "all or any part of".

PART 3

COURTS AND LEGAL SERVICES ACT 1990

37 In the Courts and Legal Services Act 1990, in section 58AA (damages-based agreements), after subsection (10) insert—

"(11) Subsection (1) is subject to section 47C(8) of the Competition Act 1998."

SCHEDULE 9

Section 87

DUTY OF LETTING AGENTS TO PUBLICISE FEES: FINANCIAL PENALTIES

Notice of intent

1 (1) Before imposing a financial penalty on a letting agent for a breach of a duty imposed by or under section 83, a local weights and measures authority must serve a notice on the agent of its proposal to do so (a "notice of intent").

(2) The notice of intent must be served before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the agent's breach, subject to sub-paragraph (3).

(3) If the agent is in breach of the duty on that day, and the breach continues beyond the end of that day, the notice of intent may be served—

(a) at any time when the breach is continuing, or

(b) within the period of 6 months beginning with the last day on which the breach occurs.

(4) The notice of intent must set out—

(a) the amount of the proposed financial penalty,

(b) the reasons for proposing to impose the penalty, and

(c) information about the right to make representations under paragraph 2.

Right to make representations

2 The letting agent may, within the period of 28 days beginning with the day after that on which the notice of intent was sent, make written representations to the local weights and measures authority about the proposal to impose a financial penalty on the agent.

Final notice

3 (1) After the end of the period mentioned in paragraph 2 the local weights and measures authority must—

(a) decide whether to impose a financial penalty on the letting agent, and

(b) if it decides to do so, decide the amount of the penalty.

(2) If the authority decides to impose a financial penalty on the agent, it must serve a notice on the agent (a "final notice") imposing that penalty.

(3) The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was sent.

(4) The final notice must set out—

(a) the amount of the financial penalty,

(b) the reasons for imposing the penalty,

(c) information about how to pay the penalty,

(d) the period for payment of the penalty,

(e) information about rights of appeal, and

(f) the consequences of failure to comply with the notice.

Withdrawal or amendment of notice

4 (1) A local weights and measures authority may at any time—

(a) withdraw a notice of intent or final notice, or

(b) reduce the amount specified in a notice of intent or final notice.

(2) The power in sub-paragraph (1) is to be exercised by giving notice in writing to the letting agent on whom the notice was served.

Appeals

5 (1) A letting agent on whom a final notice is served may appeal against that notice to—

(a) the First-tier Tribunal, in the case of a notice served by a local weights and measures authority in England, or

(b) the residential property tribunal, in the case of a notice served by a local weights and measures authority in Wales.

(2) The grounds for an appeal under this paragraph are that—

(a) the decision to impose a financial penalty was based on an error of fact,

(b) the decision was wrong in law,

(c) the amount of the financial penalty is unreasonable, or

(d) the decision was unreasonable for any other reason.

(3) An appeal under this paragraph to the residential property tribunal must be brought within the period of 28 days beginning with the day after that on which the final notice was sent.

(4) If a letting agent appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(5) On an appeal under this paragraph the First-tier Tribunal or (as the case may be) the residential property tribunal may quash, confirm or vary the final notice.

(6) The final notice may not be varied under sub-paragraph (5) so as to make it impose a financial penalty of more than £5,000.

Recovery of financial penalty

6 (1) This paragraph applies if a letting agent does not pay the whole or any part of a financial penalty which, in accordance with this Schedule, the agent is liable to pay.

(2) The local weights and measures authority which imposed the financial penalty may recover the penalty or part on the order of the county court as if it were payable under an order of that court.

(3) In proceedings before the county court for the recovery of a financial penalty or part of a financial penalty, a certificate which is—

(a) signed by the chief finance officer of the local weights and measures authority which imposed the penalty, and

(b) states that the amount due has not been received by a date specified in the certificate,

is conclusive evidence of that fact.

(4) A certificate to that effect and purporting to be so signed is to be treated as being so signed unless the contrary is proved.

(5) A local weights and measures authority may use the proceeds of a financial penalty for the purposes of any of its functions (whether or not the function is expressed to be a function of a local weights and measures authority).

(6) In this paragraph "chief finance officer" has the same meaning as in section 5 of the Local Government and Housing Act 1989.

SCHEDULE 10

Section 93

SECONDARY TICKETING: FINANCIAL PENALTIES

Notice of intent

1 (1) Before imposing a financial penalty on a person for a breach of a duty or prohibition imposed by Chapter 5 of Part 3, an enforcement authority must serve a notice on the person of its proposal to do so (a "notice of intent").

(2) The notice of intent must be served before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the person's breach, subject to sub-paragraph (3).

(3) If the person is in breach of the duty or prohibition on that day, and the breach continues beyond the end of that day, the notice of intent may be served—

(a) at any time when the breach is continuing, or

(b) within the period of 6 months beginning with the last day on which the breach occurs.

(4) The notice of intent must set out—

(a) the amount of the proposed financial penalty,

(b) the reasons for proposing to impose the penalty, and

(c) information about the right to make representations under paragraph 2.

Right to make representations

2 A person on whom a notice of intent is served may, within the period of 28 days beginning with the day after that on which the notice was sent, make written representations to the enforcement authority about the proposal to impose a financial penalty on the person.

Final notice

3 (1) After the end of the period mentioned in paragraph 2 the enforcement authority must—

(a) decide whether to impose a financial penalty on the person, and

(b) if it decides to do so, decide the amount of the penalty.

(2) If the authority decides to impose a financial penalty on the person, it must serve a notice on the person (a "final notice") imposing that penalty.

(3) The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was sent.

(4) The final notice must set out—

(a) the amount of the financial penalty,

(b) the reasons for imposing the penalty,

(c) information about how to pay the penalty,

(d) the period for payment of the penalty,

(e) information about rights of appeal, and

(f) the consequences of failure to comply with the notice.

Withdrawal or amendment of notice

4 (1) The enforcement authority may at any time—

(a) withdraw a notice of intent or final notice, or

(b) reduce the amount specified in a notice of intent or final notice.

(2) The power in sub-paragraph (1) is to be exercised by giving notice in writing to the person on whom the notice was served.

Appeals

5 (1) A person on whom a final notice is served may appeal against that notice—

(a) in England and Wales and Scotland, to the First-tier Tribunal;

(b) in Northern Ireland, to a county court.

(2) The grounds for an appeal under this paragraph are that—

(a) the decision to impose a financial penalty was based on an error of fact,

(b) the decision was wrong in law,

(c) the amount of the financial penalty is unreasonable, or

(d) the decision was unreasonable for any other reason.

(3) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(4) On an appeal under this paragraph the First-tier Tribunal or the court may quash, confirm or vary the final notice.

(5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than £5,000.

Recovery of financial penalty

6 (1) This paragraph applies if a person does not pay the whole or any part of a financial penalty which, in accordance with this Schedule, the person is liable to pay.

(2) In England and Wales the local weights and measures authority which imposed the financial penalty may recover the penalty or part on the order of the county court as if it were payable under an order of that court.

(3) In Scotland the penalty may be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

(4) In Northern Ireland the Department of Enterprise, Trade and Investment may recover the penalty or part on the order of a county court as if it were payable under an order of that court.

(5) In proceedings before the court for the recovery of a financial penalty or part of a financial penalty, a certificate which is—

(a) signed by the chief finance officer of the local weights and measures authority which imposed the penalty or (as the case may be) issued by the Department of Enterprise, Trade and Investment, and

(b) states that the amount due has not been received by a date specified in the certificate,

is conclusive evidence of that fact.

(6) A certificate to that effect and purporting to be so signed or issued is to be treated as being so signed or issued unless the contrary is proved.

(7) A local weights and measures authority may use the proceeds of a financial penalty for the purposes of any of its functions (whether or not the function is expressed to be a function of a local weights and measures authority).

(8) In this paragraph "chief finance officer" has the same meaning as in section 5 of the Local Government and Housing Act 1989.

Printed in the UK by The Stationery Office Limited under the authority and superintendence of Carol Tullo, Controller of Her Majesty's Stationery Office and Queen's Printer of Acts of Parliament

3/2015 49019 19585

EYES ACROSS THE ATLANTIC: COORDINATION AND MANAGEMENT OF GLOBAL PRIVATE ANTITRUST LITIGATION

by James L McGinnis
Oliver Heinisch

Sheppard, Mullin, Richter & Hampton

April 14, 2017

I. Introduction

In years past, the focus of private international antitrust disputes was the United States. Over a century of experience, treble damages, class actions and the American rule for attorneys' fees – plus robust enforcement by the Antitrust Division – have combined to make the United States the natural hub for private cases.

That is probably still true today, but to a lesser extent because emerging private remedies and processes have made European jurisdictions much more viable, and U.S. courts are taking an increasingly close look at the limits of their jurisdiction. The result is litigation increasing across newly empowered jurisdictions: sophisticated and well informed coordination, case management and overarching strategy now are critical.

II. Evolving Jurisdictions and New Remedies

While the focus of this piece is coordination of global private antitrust litigation, it is probably worthwhile briefly to address the developments that brought us to where we are today.[1]

In the U.S., rapidly multiplying decisions are clarifying in the otherwise fuzzy outlines of the Foreign Trade Antitrust Improvement Act ("FTAIA"). The FTAIA governs and limits U.S. courts' jurisdiction over a defendant's sales. In today's evolving world of manufacturing and procurement, these have become critical gateway questions: What overcharges are subject to U.S. jurisdiction and treble damage remedies? What commerce must be pursued elsewhere?

At the risk of grossly oversimplifying a complex subject, one emerging principle seems to be that overcharges on foreign sales of component products to foreign subsidiaries of U.S. companies will not be recoverable in the U.S., and sales outside the U.S. of finished products containing those components also will not be subject to U.S. jurisdiction. *See Motorola Mobility, LLC v. AU Optronics Corp.* 775 F/3d 816 (7th Cir. 2015). Claimants must look to other courts for their remedies. Of course, there are nearly infinite variations of these kinds of distribution channels, and results can be hard to predict.

---

[1] These are addressed more fully by the same authors in "The Rapidly Changing Landscape of Private Global Antitrust Litigation: Increasingly Serious Implications for U.S. Practitioners", Competition, Vol. 25, No. 2, Fall 2016, pp. 1-19, at 2-14. Several sections of this paper first appeared in that publication.

The consequence, at a minimum, is that jurisdictions outside the U.S. are increasingly important. At the same time, remedies in the U.K. and E.U. are becoming much more attractive and procedurally accessible.[2]

The evolution of private antitrust cases outside the U.S. has been driven by at least the following developments:

1) The European Court ruled in 2001 that anyone can claim compensation for injury caused by an infringement of competition law;[3]

2) In 2003, European Regulation 1/2003/EC made European Commission decisions binding on national courts of member states;[4]

3) In 2013, the Europe Commission adopted a non-binding recommendation for collective redress and in 2014, the Commission mandated revisions to natural laws to ensure uniform rules across member states;[5] and

4) The U.K. enacted the Consumer Rights Act of 2015 that includes a collective redress process.[6]

The Commission's 2014 Directive mandated several important minimum requirements:

1) Disclosure of evidence – while leniency statements and settlement submissions are to remain protected, courts can order proportionate

---

2 Of course, there is a critical third option – arbitration. Many vendor contracts have arbitration clauses of various kinds, and these typically embrace antitrust disputes. The subject of arbitration has its own issues and complexity, but arbitrations typically are relatively quick and foreclose most grounds of review. Arbitrators may also take an expansive view of commerce subject to their scrutiny.

3 Case C-453/99 *Courage Ltd v Crehan* [2001] ECR 1-6297, *see* also C-295/04 Vincenzo Manfredi [2006] ECR I-6619.

4 Official Journal L 001, 04/01/2003 P. 0001 - 0025.

5 Recommendation of 11 June 2013 on common principles for injunctive and compensator collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 11.6.2013 CM(2013) 401 final.

6 CRA 15.

disclosure of relevant evidence. For many member states, this kind of discovery is new;[7]

2) Pass-on – the defense claiming that an overcharge was passed on can be asserted, and the burden of proof lies with the defendant; [8]

3) Joint and several liability – defendants jointly responsible are jointly and severally liable, but the plaintiff can sue a single infringer leaving the infringer to seek contribution;[9] and

4) For indirect customers there is a rebuttable presumption that overcharges were passed on to indirect customers.[10]

The critical subject of quantification of damages remains subject to national laws, but the Directive clearly states – as is the case in the U.S. – that the burden of proof cannot render the recovery of damages impossible or excessively difficult.[11] Unlike the U.S., however, where damages for antitrust violations are explicitly intended to serve a punitive as well as compensatory purpose, damages in the E.U. go no further than addressing harm caused by the infringement.

Importantly, the Commission has also adopted a non-binding Communication on the quantification of damages. As is typically true in the U.S., the basic analysis is to compare a counter-factual scenario – assuming no infringement – with what happened in the infringed market.[12]

---

7 Directive 2014/104/EU Of The European Parliament And Of The Council of 26 November 2014, Recitals 15-33, Chapter II.

8 Directive 2014/104/EU OF The European Parliament And Of The Council of 26 November 2014, Recitals 39-44, Chapter IV.

9 *Id.* Recitals 37, 38, Chapter III, Article 11.

10 *Id.* Recital 44, Article 14.

11 *Id.* Recitals 45-46, Article 17.

12 *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, OFFICIAL JOURNAL OF THE EUROPEAN UNION (2013/C 1607/07), p. 19, June 23, 2013.

The bottom line, then, is that the kinds of damages recoverable in the U.S. since enactment of the Sherman Act in 1890 are largely available in the E.U. but for the trebling component, and procedures for collective actions are multiplying. [13]

What does all of this mean, then, for private litigation outside the U.S.? Clearly, some remedies are available now that were not before, and the procedures are somewhat more user-friendly. But will all of these enhancements also change what have traditionally been the favored venues for litigation outside the U.S.? In the short run, probably not. The European courts with the deepest and longest experience are likely to remain the forums of choice. Experience, and the data points of rulings and results are always critical.

For that reason, Germany, the U.K. and The Netherlands are likely to remain the jurisdictions of choice. What follows are examples of recent developments in these jurisdictions that demonstrate the growth of the experience in private damages cases.

Germany

On July 16, 2016, the German authorities issued a draft set of rules intended to comply with the Commission's 2014 Directive. On March 31, 2017, the German legislator adopted[14] the new Act Against Restraints of Competition. Germany has been a pioneer in private antitrust actions so its laws already were broadly similar to what the Directive required. Nonetheless, the new Section 33 of the German Act Against Restraints of Competition now details the right to full compensation for victims of competition infringements. Also, the law includes an express, though rebuttable, presumption of harm from cartel activity. As required by the Directive, the German statute provides for indirect purchaser standing and a presumption that direct purchasers passed on the overcharge. Courts will be permitted to evaluate the pass on rate. As is the case in the U.S., pass on cannot be used defensively against the direct purchaser.

Parts of the German law exceed what the Directive requires. The Directive leaves to national courts the decision whether or not to permit discovery. The new statute, by contrast, grants the parties a substantive right to discover documents and obtain information, with the exception of leniency documents and settlement agreements. In this instance, Germany's implementation of the Directive

---

13 CRA 15.

14 https://www.bundestag.de/dokumente/textarchiv/2017/kw10-de-kartell/493842

effectively will result in important changes in German discovery practice. Discovery has never been allowed before in cartel damages cases in Germany.

Germany's implementation of the Directive is likely to build on the current momentum for private antitrust litigation in German courts. While discovery is likely to remain more limited than in the U.S., other aspects of German procedure will be increasingly familiar to U.S. practitioners. The new rules will no doubt further increase the attractiveness of German courts for businesses to claim damages. However, the lack of detailed rules on collective redress will continue to be a significant hurdle for consumers as so far only legally recognized associations are able to bring collective damages actions. For example, the Cartel Damage Claims Consulting SCRL[15] ("CDC"), an antitrust claims aggregation vehicle established under the laws of Belgium, has lodged several class actions in German courts. The CDC has the purpose of offering victims of illegal cartels an effective method of obtaining compensation, but so far its results have been mixed.

In 2015, a case brought by CDC was dismissed by the Higher Regional Court of Düsseldorf on the basis that (1) the Belgian litigation vehicle did not have sufficient funds to cover the legal costs of its opponents, (2) the transfer was against public morals, and (3) certain claims were transferred to CDC before it was registered to give legal advice.[16] Also, on 24 January 2017, a Regional Court of Mannheim rejected a EUR 138 million claim against cement maker Heidelberg Cement for damages stemming from two regional cement market sharing cartels.[17] The Court ruled that CDC's claim was time-barred and that the limitation period had not been suspended in the course of the proceedings. The claim followed a decision of the Bundeskartellamt (BKartA) in 2003 in which six cement makers were fined a total of EUR 661 million for allocating customers and making quota agreements. The decision was confirmed by the Federal Supreme Court in Karlsruhe in 2013. On March 21, 2017, CDC announced that it is challenging the judgment of the Regional Court of Mannheim before the Higher Regional Court of Karlsruhe.

Also, in March 2017, a German industry body for food transportation companies announced that it will prepare a joint damages claim over a 14 year-long EU truck

---

15 Société coopérative à responsabilité limitée.

16 Landgericht Duesseldorf, Urteil vom 17. Dezember 2013 37 O 200/09 and Oberlandesgericht Duesseldorf.

17 Landgericht Mannheim, 2 O 195/15.

cartel. The logistics trade association, the Bundesverband Güterkraftverkehr Logistik und Entsorgung (BGL), invited all interested market players to join the action. The damages claims are based on the European Commission's decision of July 2016, in which four truck makers were fined EUR 2.9 billion. The European Commission has found that companies that purchased trucks larger than 6 tons between 1997 and 2011 colluded on truck pricing and on passing on the costs of compliance with stricter emission rules. The industry body will act as a platform that bundles separate claims together in a lawsuit.

In addition to these collective claims, German courts are addressing non-collective damages claims even outside the area of cartels. On January 24, 2017, the Federal Supreme Court in Karlsruhe ruled that the Higher Regional Court of Frankfurt incorrectly assessed a private damages claim in 2014 that sought EUR 400m from Telekom Deutschland.[18] The Federal Supreme Court returned the case to the lower instance court, which has to re-evaluate the details of Kabel Deutschland's case to establish if there was an antitrust infringement. Kabel Deutschland filed a compensation claim arguing that the network owner Telekom Deutschland abused its dominance by setting excessive fees for access to its cable network.

On 21 December 2016, the Dortmund Regional Court ruled that seven members of a German bid-rigging cartel that affected railway tracks, switches and sleepers are liable to pay compensation to an unnamed public rail firm following a damages claim by the latter.[19] The defendants were among the companies the BKartA fined a total of EUR 97.64m in July 2013 for their participation in the cartel.

U.K.

As earlier noted, a critically important addition to U.K. remedies was the collective redress mechanism enacted in the Consumer Rights Act 2015.[20] The Competition Appeal Tribunal ("CAT"), a specialized court in London, has exclusive jurisdiction over collective action proceedings.[21] The CAT serves as a gateway by granting a collective proceedings order ("CPO") and certifying the

---

18 BGH, KZR 2/15.

19 Landgericht Dortmund, 8 O 90/14 [Kart].

20 CRA 15.

21 *See* CAT Guide to Proceedings 2015.

claims that may be brought.[22] In order to grant a CPO, there must be an "identifiable class",[23] claims must raise common issues,[24] and claims must be "suitable" for collective proceedings.[25] One important distinction from U.S. practice is that the Competition Appeal Tribunal decides not only whether the case can proceed on all collective acts but also whether it will proceed on an opt-in or opt-out basis. In other words, the CAT will decide whether a claimant needs to affirmatively choose to be included, or, conversely to be excluded, as is true in the U.S. Two fundamental questions, however, remain to be answered that have been at the heart of U.S. class action litigation for many years: what will the standards or burden of proof be for granting a CPO and how will the standards be analyzed?

Very recently, the CAT supplied some initial answers. In *Dorothy Gibson v. Pride Mobility Products Limited*, the CAT held a three-day hearing on an application for a collective proceedings order (CPO)[26]. The Tribunal reviewed witness statements and detailed expert reports. Importantly, the Tribunal also heard live testimony from the Applicant's expert, and questioned him extensively.[27]

As for the standards to be applied, the Tribunal had this to say:

> 1. This was not a mini-trial and the essential question is whether the Applicant has established a sufficiently sound and proper basis to proceed, having regard to the statutory criteria.[28]
>
> 2. We accept that the approach of the CAT to certification of claims for a CPO should be rigorous and that we cannot simply take at face value whatever may be said on behalf of the Applicant.[29]

---

22 CAT rule 79.

23 CAT guide section 6.37.

24 CAT rule 73(2).

25 CAT rule 79(2)(a)-(g).

26 Case No.: 1257/7/7/16 31 March 2017.

27 *Id.,* ¶ 23, 24

28 *Id.* ¶ 24

29 *Id.,* ¶ 102

> 3. …. We consider the US approach to certification of common issues for the purpose of class actions is of limited assistance (citing the ABA antitrust Class Action Handbook (2010) at p. 33 detailing the length and expense of class action litigation as a 'multi-year, multi-million dollar proposition.')[30]
>
> 4. The approach under the UK region of collective proceedings is intended to be very different, with either no or very limited disclosure and shorter hearings held within months of the claim form being served.[31]

The CAT explicitly rejected the argument that "the court should weigh the competing expert evidence added by both sides and apply a robust or vigorous standard" and instead adopted the view that the expert methodology, must be:

> … sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that if an overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (*i.e.*, that passing on has occurred).[32]

While the CAT obviously was at pains to distinguish U.K. process from U.S. practice, we may well question whether the distinction is without a difference. A three-day evidentiary hearing with extensive live expert testimony would be very unusual in the U.S. And, while explicitly eschewing a "rigorous analysis" standard, the CAT in practical terms did exactly that. The result was that the case was adjourned for the proceedings so that the Applicant's economist could address the definition of sub-classes and estimate losses on that basis.

More instructive rulings are on the horizon. In September, 2016, for example, U.K. consumers filed an $18.7 billion collective action against MasterCard. The claim is that 46 million U.K. customers overpaid interchange fees from 1992 to 2008. This case will be closely watched and also is likely to generate precedents that impact the future of collective actions in the U.K.

---

30 *Id.*

31 *Id.,* ¶ 104

32 *Id.,* ¶ 105

U.K. private case law also is developing in single plaintiff cases. Currently there are over 14 private cases pending in front of the CAT alone, including injunctive relief cases relating to abuse of dominance allegations.

Last year, the U.K. CAT issued a judgment[33] in a single plaintiff case that was its first stand-alone action since it was empowered to hear them by the new rules on antitrust damages action.[34] The *MasterCard* case is important in several ways. It was not only the first case of many multilateral interchange fee cases but also the first in which the CAT awarded damages in a case under Article 101 of the Treaty of the Functioning of the European Union TFEU and Chapter I of the Competition Act of 1998, both of which prohibit anticompetitive agreements. In determining damages, the CAT admittedly used a "broad axe".[35] The CAT first calculated the overcharge by comparing the actual interchange fee paid by plaintiff Sainsbury with the highest lawful interchange fee it could have been charged in the but-for world. It then turned to pass on and mitigation defenses both of which failed. The result was an award of £68.8 million plus interest. On November 22, 2016, MasterCard was refused leave to appeal any aspects of a key liability and damages ruling in Sainsbury's claim that the company's UK interchange fees were unlawful. The CAT found MasterCard lacked sufficient grounds of success to appeal its judgment of July 14, 2017.[36]

The *MasterCard* case also was the first decision of a U.K. court explicitly addressing pass-on.[37] The CAT defined pass-on as an aspect of the process of the assessment of damage rather than a defense.[38] It also established strict conditions that must be satisfied for pass-on to be established and reduce a damages award. First, there must be identifiable increases in prices by a firm to its customers. Second, the increase in price must be causally connected with the overcharge.

---

33 *Sainsbury's Supermarket Ltd. v. MasterCard Inc.*, Case 1241/5/7/15 (T), July 14,2016, [2016] CAT 11.

34 *See* Section II.B.2, *supra*.

35 *Supra*, footnote 10, para 424 (3).

36 Sainsbury's Supermarkets Ltd Claimant -and- (1) MasterCard Incorporated (2) MasterCard International Incorporated (3) MasterCard Europe Sa Defendants, [2016] Cat 23, 1241/5/7/15(t) in the Competition Appeal Tribunal of England and Wales.

37 Pass-on was recognized by European Courts in cases such as *Courage v Crehan* and *Manfredi*, *see* footnote 4 and many subsequent cases. It is a well-known concept in many civil law jurisdictions.

38 *See supra*, footnote 10, para 484. Similar position taken by the German Federal Court in 2011: BGH, judgment of 28 June 2011 - KZR 75/10).

Third, on the balance of probability, another class of claimant, downstream of the claimant must exist to whom the overcharge was passed on. The last condition was included in order to address the risk that any potential claim become either so fragmented or impossible to prove that the end result would be that the defendant retained the overcharge instead of a successful claimant.[39] The court also perceived this as necessary in order not to render recovery of compensation "impossible or excessively difficult" as stipulated by the Directive.[40] These conditions may amount to the U.K.'s implementation of the Directive's concept of pass-on. MasterCard has asked for permission to appeal the judgment.

On January 30, 2017, the High Court in London ruled in favor of MasterCard in a damages claim brought by British retailers against its multilateral interchange fees (MIF).[41] The Court held that the level of fees charged to merchants on each transaction paid with a MasterCard branded card was appropriate in light of the benefits derived for retailers. The retailers, including Asda, B&Q and Wm Morrison, were seeking to recoup their losses from MIF fees charged between 2006 and 2014.

The Netherlands

Dutch courts also have been active in attracting antitrust damages litigation, including collective actions. These courts have a reputation for flexibility, possibly a virtue in a new and growing area of law, and the expertise of these courts continues to expand. In February of this year, the Netherlands adopted the Directive. A draft bill has recently been submitted to the Dutch Parliament that, if passed in its current form, would introduce a collective opt-out system for cartel and other damages and substantially strengthen current rules on collective action which do not allow for the award of collective damages.[42]

The Dutch experience has generated notable decisions in several areas. The Netherlands so far is the only EU member state where a collective settlement of

---

39 *Supra*, footnote 18, para 484 (4).

40 *See supra* footnote 10.

41 High Court of Justice, *Asda Stores Ors v MasterCard Incorporated Ors.*, 2017 EWHC 93 (Comm).

42 https://www.government.nl/latest/news/2016/11/16/legislative-proposal-presented-to-the-dutch-second-chamber-about-collective-compensation-actions

mass claims can be declared binding on an entire class on an opt-out basis.[43] Recent cases in the Netherlands also have confirmed the availability of the pass-on defense in antitrust damages action[44] and that parent companies are not liable for damages arising from antitrust infringements committed by their subsidiaries. That ruling stands in contrast to other case law in Europe.

Current cases relate to the European Commission's Paraffin Wax cartel decision,[45] the Sodium Chlorate[46] and the Air Cargo[47] cartels.

Brexit Impacts

Because the U.K. is now arguably the most sophisticated jurisdiction for antitrust damages actions, an obvious question arises: What impact will Brexit have? Assuming a hard Brexit (withdrawal from the EU with no application of EU law), the impact could be significant though it will not likely be felt until the parameters of Brexit are known. Rules for antitrust damages, however, will not be on the agenda anytime soon.[48] This uncertainty alone may impact forum choices.

Post Brexit, plaintiffs could be more inclined to choose the EU over the U.K. for litigation unless the rules are similar to what they are now. For example, if European Commission decisions are no longer binding on U.K. judges, there would be an incentive to litigate where they are. The same would be true if European law and rules on the allocation of jurisdiction and the enforcement of judgments (*e.g.*, Brussels Regulation[49]) no longer apply. The Brussels Regulation

---

43 Wet Collectieve Afwikkeling Massaschade (WCAM) (Dutch Act on Collective Settlement of Mass Claims) of 2005, *see* Articles 907-910 of Book 7 of the Dutch Civil Code and Article 1013 of the Dutch Code of Civil Procedure or Wetboek van Burgerlijke Rechtsvordering.

44 July 8, 2016, the Dutch Supreme Court, *TenneT v. ABB.*

45 Case COMP/39181 – Candle Waxes.

46 C/13/500953/HA ZA 11-2560.

47 C/13/553534/HA RK 13-353 (Claim was brought by Claims Funding Europe Limited (CFE) a special purpose vehicle).

48 The Article 50 negotiations will only deal with the parameters of the exit. Competition law is likely not even on this agenda and will be discussed once Brexit has occurred.

49 Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 1/03/2002 and Regulation (EU) 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 (Recast) which applies to legal proceedings and judgments of the time after 10 January 2015.

successfully regulates and facilitates the cross-border enforcement of judgments in relation to civil and commercial matters. The Regulation also deals with jurisdiction of courts including over claims relating to defendants not domiciled in their jurisdiction.

Brexit might also affect U.K. courts' willingness to assert jurisdiction over all of the worldwide parties in a cartel case. Recent cartel damages claims have proceeded in the U.K. without a strong connection of the cartel to the U.K. Companies not domiciled in the U.K. (or the EU) were brought into the jurisdiction on the basis of a so-called "anchor defendant" (the primary defendant domiciled in the U.K. chosen for the ostensible purpose of bringing the claim before a U.K. court). Even if U.K. common law rules would allow jurisdiction in the absence of the Brussels Regulation, the question will be whether the U.K. courts continue to provide the one-stop-shop a plaintiff might desire. It is unclear whether these differences would discourage so called stand-alone actions which do not rely on prior infringement findings.

While foreign jurisdictions are still catching up, the bottom line is that the U.S. is no longer the only important forum. There are still no treble damages, no contingent fee arrangements, and the English rule for attorney's fees still prevails. However, the ability to recover for worldwide sales and more user-friendly procedural rules are healthy incentives for sophisticated plaintiffs.

III. Coordination and Case Management

So if it is clear that cases are likely to be filed in the U.S., U.K., Germany and possibly elsewhere, what does that mean for decisions, strategies and coordination of the litigation?

A. Coordination

Obviously, close coordination among counsel is essential. But coordination in itself presents legal issues. A routine practice in the U.S. is for lawyers on the same side to enter into joint defense or common interest arrangements, often memorialized in writing. That practice is much less common elsewhere. The validity of a joint defense agreement among U.S., U.K. and EU counsel has not

been litigated and is an open question. The common interest privilege, however, has been recognized.[50]

Of course, the information disclosed in such an arrangement must be protectable as privileged. The exchange of non-privileged material among parties with a common interest cannot confer a privilege where one does not otherwise exist. Note also that the EU does not recognize a privilege for in house lawyer communications.[51] Privilege also does not apply to in-house counsel in France, the Netherlands, Austria and Sweden, among other jurisdictions.

The subject of coordination also necessarily raises the question of whether international litigation is best handled by one law firm, or more. Certainly, there are times when national court and language issues may require more than one law firm. But if there is a choice, are there coordination issues that need to be considered? Assume, for example, that some materials are discoverable in one case and fully protected in another. Would a single law firm find it more difficult to address ethical issues and conflicts than two firms? Would two firms find it easier to navigate among potential discovery and protective order issues?

1. **Discovery**

As for the subjects of coordination, discovery is an obvious example. Lawyers faced with widely varying discovery rules in different jurisdictions will focus on these questions immediately: What parts of the U.S. discovery record could be produced in foreign cases? Are there parts of the foreign case discovery that would not normally be reached by even the broad U.S. discovery procedure – but might be imported into a U.S. case because they are discoverable abroad? How might discovery in a court system become available in an arbitration proceeding?

In U.S. courts, a very early order of business is the circulation of a protective order that controls disclosure of discovery materials. Commonly, protective orders limit use of confidential documents to "this case." Could that language be changed to "this case or any other case with fundamentally similar allegations," *i.e.*, cases filed elsewhere? Arguments for and against opening up the typical language are not difficult to frame. A defendant might begin with the idea that non-U.S. cases should be governed by their discovery laws not, as a practical

---

50 *See Winterthur Swiss Insurance Company and another v. AG (Manchester) Ltd.* EWHD 839 (2006); *Buttes Gas and Oil Co. v. Hammel* (No. 3) QB223, CA (1981).

51 *See* Case C-550/07, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission* (2010).

matter, by what is discoverable in the U.S. The response could be equally obvious: let the other court decide what it wishes to consider, rather than foreclosing the issue by walling off discovery in the U.S. case.

This discussion also assumes another court would honor a U.S. protective order or enter one of its own for the documents at issue. Is there any basis for that assumption? At present, there is very little law on this subject nor is there reason to believe that all judges in other jurisdictions would rule in the same way. Protective orders, of course, are supposed only to shield confidential documents with proprietary information in them. Both plaintiffs and defendants would be wise to pay close attention to confidentiality designations.

Also implicit in this discussion has been the view that U.S. discovery always is broader than anywhere else and the litigation will concern the extent to which extensive U.S. discovery can be used elsewhere. But could there be information discoverable internationally that would not be discoverable in the U.S. but for its production in another jurisdiction? And would that court shield that discovery from use elsewhere? These are new issues, and the reach of U.S. discovery is sufficiently broad that the question might be more academic than practical. Perhaps a court in the E.U., however, would have a different calculation of the burden of producing materials situated in that jurisdiction, and those materials might then be brought before a U.S. court.

As noted earlier, corporate immunity and witness statements provided to the European Commission and other national authorities are not discoverable there. Whether they can be discovered in the U.S. has been hotly contested with the European authorities frequently providing amicus statements opposing discovery.[52]

---

[52] *See*, *e.g.*, Letter of Georg De Bronett, EU Comm'n, *In re Vitamins Antitrust Litig.,* 2002 U.S. Dist. LEXIS 26490 (D.D.C. Jan. 23, 2002) ("[T]he effectiveness of the EU antitrust procedures could indeed be seriously undermined" if leniency communications were discoverable); *In re Rubber Chemicals Antitrust Litig.*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007) (citing to the EC's brief opposing discovery of confidential EC materials); Decl. of P. Lowe, *In re Flat Glass Antitrust Litig.*, No. 08-180 Dkt, 200-3 (Oct. 7, 2009) (disclosure "could seriously undermine the effectiveness of the Commission's and other authorities' antitrust enforcement actions" and "authorizing discovery in American litigation of documents that are strictly confidential under European competition law would be highly detrimental to the sovereign interests and public policies of the European Union"); Mem. of Law of *Amicus Curiae* the European Comm'n i/s/o Defendants' Objections, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 1:05-md-01720 Dkt. 1372 (E.D.N.Y. March 19, 2010) (objecting to production of

The law requires a multi-factor comity analysis, and some U.S. Courts have recently denied discovery of confidential leniency communications and non-public EC decisions.[53] An earlier case reached a different result.[54]

The implications for case management and coordination are obvious. Plaintiff's counsel in the U.K. and E.U. member states no doubt are alert to the opportunities for developing their cases and making arguments to their courts that are informed by discovery only available in the U.S. Witness testimony can only be compelled for a U.S. case. And, U.S. courts readily order extensive global electronic document discovery.

No doubt defense counsel are also keen to understand how U.S. discovery could be used elsewhere and perhaps to confine U.S. discovery to U.S. cases.

2. Case Schedules and Progression

The interplay of U.S. discovery rules and cases elsewhere might be the most obvious area of immediate concern. How might the discovery issues and other considerations impact case scheduling? Are there ways to sequence events in multi-jurisdictional cases to best advantage? In the U.S., these kinds of case management issues often are addressed in the federal courts through the multi-district litigation process. A proliferation of cases with similar issues can be sent

---

confidential investigation materials: "These documents are confidential under the laws of the EU and were provided to Visa and MasterCard by the Commission on the explicit condition that they maintain the confidentiality of those documents. Their production would hinder the European Commission's ongoing ability to detect and investigate unlawful, anticompetitive activities."); Letter of European Comm'n, *In re Cathode Ray Tube (CRT) Litig.*, Case 3:07-cv-05944-SC Dkt. 2449 (N.D. Cal. March 26, 2014) (objecting to disclosure of non-final unredacted findings because it would, *inter alia*, undermine the EC's leniency program which requires confidentiality to be effective). The EC has submitted similar amicus briefs to National Courts arguing that corporate leniency statements should not be discoverable. *See*, *e.g.*, Observations of the European Comm'n Pursuant to Art. 15(3) of Reg. 1/2003, *National Grid Electricity Transmissions PLC v. ABB Ltd. et al.*, In the High Court of Justice Chancery Div., March. 11, 2011.

[53] *See*, *e.g.*, *In re Rubber Chem. Antitrust Litig.*, 486 F.Supp.2d 1078 (N.D. Cal. 2007) (denying discovery of a leniency applicant's confidential communications with the EC); Order Denying Motion to Compel, *In re Cathode Ray Tube (CRT) Litig.*, Case 3:07-cv-05944-SC Dkt. 2463 (N.D. Cal. March 26, 2014); Order Denying Direct Action Plaintiffs' Renewed Motion to Compel Production of the European Commission Decision; *id.* Dkt. 3133 (N.D. Cal. Nov. 20, 2014).

[54] *In re Vitamin Antitrust Litig.*, 2002 U.S. Dist. LEXIS 26490 (D.D.C. January 23, 2002) (allowing discovery of submissions to foreign competition authorities).

to the same federal judge specifically for the purpose of arriving at a single, efficient schedule for discovery and pre-trial proceedings. This Multi-District Litigation process is common for cases that generate many similar class actions. *See* 28 U.S.C. § 1407:

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.

Upon motion, a seven judge Judicial Panel on Multi-District Litigation will decide whether cases should be litigated together and, if so, where. Typically, the number and complexity of the cases are central considerations. The goal is to avoid the risk of conflicting rulings and eliminate duplicative effort, especially in discovery. *See, e.g., In re Starmed Health Personnel, Inc. Fair Labor Standards Act Litig.,* 317 F. Supp. 2d 1380 (J.P.M.L. 2004) (ordering consolidation to eliminate duplicative discovery and conserve judicial resources). As for the location of the MDL proceeding, the location of the evidence is a key but not necessarily dispositive factor. *See, e.g., Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices and Product Liability Litig.,* 704 F. Supp. 2d 1379 (J.P.M.L. 2010) (recognizing that the Central District of California would be the most appropriate transferred district as Toyota was headquartered there as were expert witnesses and documents).

While case schedules vary widely, an MDL case schedule might look like what follows. A major variable not shown here is whether or not the Department of Justice seeks, or the parties' advocate, a stay of the proceedings. Sometimes stays are granted, sometimes not. Their length also is highly variable with a range typically falling between six and twelve months. A hypothetical U.S. price-fixing MDL class action schedule beginning January 1, 2018, might look like this:

Event Dates	**Actions**
YEAR 1:	
January 1, 2018	First class action filed.

Event Dates	**Actions**
March 1, 2018	All class actions filed.
April 1, 2018	Motions to coordinate cases filed before the Judicial Panel on Multi-District Litigation Panel of 7 federal judges.
June 1, 2018	Hearing before MDL Panel.
July 1,2018	Ruling by MDL Panel; transfer to selected District Court
August 1, 2018	First status conference held.
September 1, 2018 – December 31, 2018	Consolidated Amended Complaints filed; pleading motions filed; rulings issued.
YEAR 2:	
January 1, 2019 – July 1, 2019	Discovery begins of class representatives and liability witnesses. Direct action cases filed by large customers in various jurisdictions; State Attorneys General cases filed in their home state courts.
July 1, 2019 – November 1, 2019	Class certification motions filed; class expert discovery conducted; oppositions filed.

Event Dates	**Actions**
November 1, 2019 – December 31, 2019	Class certification hearings held; decisions issued.
YEAR 3:	
January 1, 2020 – July 1, 2020	Liability discovery completed.
July 1, 2020 – November 1, 2020	Expert reports filed; expert discovery; liability motions filed.
November 1, 2020 – December 31, 2020	Motions heard; Direct action cases sent back to home jurisdictions.
YEAR 4:	
January 1, 2021 – May 1, 2021	Final pre-trial proceedings; witness lists, document lists exchanged; final pre-trial hearing.
May 15, 2021 – August 15, 2021	Class action trial.

There are nearly infinite variations of this kind of schedule, but 3½ years from filing of the first class action to the conclusion of a class action trial, if any, is probably a fair average. Then, disposition of direct action cases by large customers, and State Attorneys General can take two more years. Direct action cases are sent back for trial to the jurisdictions where they were originally filed. State Attorneys General always file cases in their home state courts and utilize discovery generated in the MDL process.

There is no mechanism similar to MDL coordination for multi-jurisdictional cases in the E.U., and no process for coordinating U.S. and European cases.

Moreover, the timing considerations for U.K. or E.U. cases are very different from those in the U.S. In the U.S., class actions typically are filed very quickly with a view to establishing priority of a federal jurisdiction and leadership roles for plaintiffs' counsel.

The counsel selection issue is not relevant in the E.U. In some cases, claimants might want the benefit of European Commission decisions and statement before filing. In others, they might wish to follow along closely with the U.S. cases.

The lack of a formal cross-border coordination mechanism leaves these kinds of issues at present to the arguments and ingenuity of counsel in each case. Perhaps momentum will build in Europe for a coordination mechanism if it becomes common for similar cases to be filed in different member states. As cases proliferate on both sides of the Atlantic, it should become more common for judges on each side to be informed of developments and scheduling needs elsewhere. But at the moment, those kinds of presentations are rare. Whether judges in distant jurisdictions would be receptive to the notion of managing their cases with an eye to efficient litigation of an international dispute of course is an entirely different question.

The inclination of arbitrators to fit their proceedings in with ongoing litigation in the court system is another key variable.

3. Witness Coordination – Experts

The subject of coordination necessarily includes witnesses. Simply coordinating depositions in the U.S. is an ongoing and often vexing task in the kinds of cases where over 100 depositions are common. Because jurisdictions outside the U.S. do not rely as heavily on live testimony, juggling most witnesses among jurisdictions may not be required – with one notable exception. Experts, especially economists, are key witnesses everywhere. The topics of their testimony could be similar or even identical in some kinds of international cases. In a price-fixing case, the issues would be: Was there an overcharge and, if so, what sales were impacted? Would it, therefore, be wise to use the same expert for all of the cases?

Using a single expert surely is cheaper than paying for two or more.[55] But how many economists have true transatlantic reputations and are equally comfortable in U.S. and foreign litigation? Economists based in the U.K. or Europe rarely have experience with the intensive scrutiny of expert opinions that is typical of U.S. antitrust litigation. U.S. expert reports run to hundreds of pages. Often the reports are highly technical and filled with complex econometric studies. Lengthy depositions are the norm. At the same time, coordinating opinions of multiple economists on the same or similar subjects is challenging. It is difficult to see how the opinions of an expert in a U.K. case, for example, would not become known in the U.S. and turned into yet another source of expert discovery. And vice versa.

4. Collateral Impact of Factual Findings

Counsel must be keenly aware of potential collateral effects of judgments from different courts. Generally speaking, the doctrine of comity allows U.S. courts to recognize foreign judgments if the party against whom the judgment will be used had the opportunity for a full and fair hearing, the foreign court had jurisdiction, and it does not contravene U.S. public policy.[56] Once a U.S. court recognizes a foreign judgment, it may have collateral estoppel effects exactly like a domestic judgment. The next question is whether the scope of the preclusive effect is governed by U.S. law or the law of the foreign nation.[57] In short, the rules governing the preclusive effect of foreign judgments are complex.[58] Let it suffice to say that practitioners must beware of the potential collateral impact of foreign judgments as the U.K. and EU member states become increasingly common jurisdictions for private antitrust actions.

Foreign courts may similarly recognize U.S. judgments and, under certain conditions, give those judgments preclusive effects. German courts, for example, would give effect to foreign judgments if they are recognized under the conditions

---

55 The U.S. trend currently is to break up economic issues, particularly for class certification, among multiple economists.

56 *Hilton v. Guyot*, 159 U.S. 113 (1895).

57 *See*, *e.g.*, *Alfadda v. Fenn*, 966 F. Supp. 1317 (S.D.N.Y. 1997) (applying U.S. law); *U.S. v. Kashamu*, 656 F.3d 679 (7th Cir. 2011) (suggesting that the foreign court's preclusion rules apply).

58 *See Restatement (Fourth) of Foreign Relations Law of United States Jurisdiction* (Tentative Draft No. 2 March 22, 2016).

of the civil procedure code.[59] However, judgments can only have effect in Germany if those effects are recognized under German law. Treble damage judgments are a well-known exception for that reason. In Germany as well as in Japan, foreign judgments containing treble damages and punitive damages are not enforceable.[60] Whether other elements of judgments containing findings on treble damages retain effect is an unresolved question under German law. Generally, German courts would recognize procedural as well as substantive effects of a foreign judgment. The law is complex in particular on the question of whether effects will be broader than among the parties. A detailed assessment of this complex topic is beyond the scope of this piece.

With the increasing frequency of parallel damages proceedings around the world, more useful precedents likely will emerge. In the meantime, awareness of this issue is critical.

B. Settlement

Resolution of multi-jurisdictional litigation also calls for a coordinated approach. The complexity of settlement analysis has increased in equal measure to the proliferation of worldwide remedies. In years past, that calculation was much simpler: What are the sales in the case? What is the overcharge? What is the strength of the liability case? Now, both the U.S. FTAIA jurisdictional analysis and settlement value of foreign cases must be added to the mix, as well as timing considerations stemming from the speed of proceedings in foreign jurisdictions (or arbitrations).

Normally, global settlements are desirable – is that still true? A plaintiff might consider a potentially quicker U.S. treble damage process as useful to drive a global settlement that includes both treble damage value and worldwide sales value (albeit without treble damages). Perhaps a defendant would prefer the opposite course: settle the treble damage case and let the foreign cases develop on their own, in particular at this point in time where a number of key concepts are still being developed by national judges which shifts the burden of these early cases to the plaintiffs.

---

59 *See* German Civil Procedure Code (Zivilprozessordnung), par. 328.

60 *Bundesgerichtshof [BGH] [Federal Court of Justice]* June 4, 1992, 118 BGHZ 312 (Ger.); *Ore. State Union No-sokon v. Mansei Ko-gyo Co.*, 51 Minsu 2573 (Sup. Ct., July 11, 1997).

The enforceability of global settlement agreements is another new and critical question.

IV. Coordination and Case Management Goals

To a degree, discussion of these areas of concern reveals what case management goals the parties might have both for efficiency and maximum procedural advantage. Plaintiffs and defendants' interests may collide at times, but there should be areas where all parties share the same interests – and could convince courts to adopt their views. A shared desire for efficiency and cost savings should produce agreement for at least the following goals:

1. Counsel in all cases should understand schedules, timetables and events in all relevant jurisdictions.

2. Major events should not take place at the same time.

3. Discovery tasks should be undertaken only once. Perhaps there could be a central document storage system for materials that are allowed to be used in all cases, provided this can be brought in line with the stricter EU data protection rules.

4. Similarly, maximum use of technology should be planned with discussion of cost-sharing.

5. Representations to different courts must be consistent. Judges (and arbitrators) should be kept informed of events elsewhere to the extent necessary.

Beyond these non-controversial goals, others are more difficult to pin down. Would it be possible for factual issues to be litigated only once, with the results treated as decided for all cases? Could the parties reach agreement on basic, critical facts such as the amount of commerce, and which court has jurisdiction over what sales? Could expert testimony also be crafted for use in all cases?

No doubt these concepts are the starting point, not the end for sophisticated and efficient management of international antitrust litigation.

V. Conclusion

For many years, practitioners have understood that competition enforcement authorities coordinate their efforts, and a plan to deal with many or all of them is necessary. Now the same is true for private damages actions that will add many more variables to what are already complex disputes. Collective actions and private damages actions throughout the EU's member states now have joined an already crowded field of U.S. class actions, direct customer actions and states' Attorney General cases. The need for close coordination among these cases and global dispute management has grown in equal measure. With the right focus and cooperation among counsel, there should be no shortage of opportunities for making litigation of even the most complex international matters more efficient and streamlined.

COLLECTIVE REDRESS FOR ANTITRUST DAMAGES IN THE EUROPEAN UNION: IS THIS A REALITY NOW?

Damien Geradin[*]

INTRODUCTION

Private antitrust litigation has always played a major role in the United States, making private litigants the primary enforcers of antitrust rules. Even when the antitrust agencies (i.e., the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC")) intervene, their decisions (in the case of the FTC) or the judgments that result from their intervention (in the case of the DOJ) often generate subsequent litigation where private plaintiffs seek to obtain damages from antitrust infringers.[1]

In contrast, private antitrust litigation has historically played a more minor role in the European Union ("EU"). The European Commission ("Commission") or the national competition authorities take the vast majority of enforcement actions and, until recently, follow-on actions by private plaintiffs were few and far between. Private antitrust litigation is, however, bound to play a greater role in the EU as a result of legislative developments, including the 2014 Directive on actions for damages from competition law infringements ("Damages Directive").[2] While competition authorities are likely to remain the driving force of competition law enforcement in the years to come, follow-on litigation has significantly increased in recent years and has a bright future ahead. For instance, while there were only 18 ongoing damages claims in 2009, the number had increased to 59 by 2015.[3]

---

[*] Founding Partner, EDGE Legal, Brussels; Professor of Competition Law & Economics, Tilburg University and Professor of Law, George Mason University School of Law; Visiting Professor of Law, University College London. Email: dgeradin@edgelegal.eu

[1] *See, e.g.*, Douglas H. Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 J. COMPETITION L. & ECON. 427, 429 (2005) (quoting 15 U.S.C. § 15(a) (2000) (providing that persons injured by antitrust violations may recover treble damages in federal district courts)) (citing 15 U.S.C. § 26 (2000) (providing that persons so injured may seek injunctions in federal district courts and recover costs and attorneys' fees)).

[2] Directive 2014/104, of the European Parliament and the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1 [hereinafter Damages Directive].

[3] Reena A. Gambhir, Private Enforcement and Damages Directive: The Claimant's Perspective, PowerPoint Presentation Delivered at the George Mason Law Review's 18th Annual Antitrust Symposium (Feb. 19, 2015) (on file with author).

Collective redress mechanisms are also being developed in the EU as a number of Member States have adopted statutes providing for such mechanisms. In 2013, the Commission adopted a Collective Redress Recommendation on common principles for injunctive and compensatory collective redress mechanisms concerning violations of rights granted under EU law ("Recommendation").[4] This Recommendation not only covers breach of rights under EU competition law, but also covers EU legislation in the fields of consumer protection, environment protection, protection of personal data, financial services legislation, and investor protection. The Recommendation takes a conservative approach to collective redress, largely due to the fear that Member States may adopt mechanisms that trigger unmeritorious litigation. Many in the EU believe that the U.S. class action regime has led to excessive litigation by entrepreneurial lawyers that, in the end, produce limited benefits to victims while creating significant costs to society.[5] As will be seen, however, this view is questionable because U.S. district courts, which must certify class actions, have recently exercised a more rigorous analysis of the claims presented to them.[6] In addition, by opting for an "opt in" regime and the "loser pays" principle, while not authorizing contingency fees and punitive damages, the Recommendation may have made it harder for victims with small claims (i.e., individual consumers that have been overcharged for goods) to obtain compensation for the harm suffered.[7]

Against this background, this short essay discusses the Commission's Recommendation along with the various national legislative measures that address collective redress mechanisms and contrasts these initiatives with the U.S. class action system. Part I briefly discusses the main features of the Damages Directive in order to set the framework under which private damages actions will develop in the EU. Part II then summarizes the main features of the U.S. class action regime and contrasts this regime with the approach proposed by the Commission in its Recommendation on collective redress. Part II argues that the Recommendation takes an excessively cautious attitude that, if followed by the Member States, will likely impede rather than enhance redress for small claims in the future. Part II concludes by discussing the recently adopted U.K. Consumer Act, which is the most ambitious collective regime adopted so far.

---

[4] Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law, 2013 O.J. (L 201) 60 [hereinafter Redress Recommendation].

[5] *See* Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 180 (2009).

[6] See infra Part II.A.

[7] See infra Part II.B.

I. THE EU DIRECTIVE ON ACTIONS FOR DAMAGES FROM COMPETITION LAW INFRINGEMENTS

Europe's journey towards encouraging and facilitating private antitrust claims essentially started with the Court of Justice of the EU's ("CJEU") ruling in the *Crehan* case in 2001.[8] In *Crehan*, the CJEU held that private antitrust litigation contributes to effective competition law enforcement and that "victims" should have the right to seek compensation for harm suffered as a result of anti-competitive behavior.[9] The CJEU also stressed that, in the absence of EU legislation on the matter, each Member State should set up its own legal framework for antitrust damages claims and ensure that its national regime would not render damages claims excessively difficult or practically impossible.[10]

A. *The Aftermath of* Crehan

In the aftermath of *Crehan*, the Commission started looking more closely into ways to bring more effective civil redress in the competition law field. First, it commissioned a study designed to identify existing obstacles to effective private enforcement in the EU.[11] Released in 2004, the study report concluded that national regimes on antitrust damages actions showed "astonishing diversity" and "total underdevelopment."[12] The Commission followed-up with a Green Paper in 2005, taking the view that the "underdevelopment" of antitrust damages litigation resulted primarily from procedural and other legal obstacles.[13] The Commission proposed a number of options to address these obstacles and facilitate damages claims, and invited comments from the public.

Building on these initial efforts, the Commission issued a White Paper in 2008, proposing policy choices and measures to facilitate antitrust dam-

---

8 Case C-453/99, Courage Ltd. v. Crehan, 2001 E.C.R. I-6297.

9 *Id.* at I-6323 to -6324, ¶¶ 26-28; *see also* Assimakis P. Komninos, *New Prospects for Private Enforcement of EC Competition Law:* Courage v. Crehan *and the Community Right to Damages*, 39 COMMON MKT. L. REV. 447, 468-69 (2002) (discussing the *Crehan* court's recognition that allowing persons to seek redress for antitrust violations strengthens antitrust laws).

10 *Crehan,* 2001 E.C.R. at I-6324, ¶ 29.

11 DENIS WAELBROECK ET AL., STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES 26 (2004), http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

12 *Id*. at 1.

13 *See Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final (Dec. 19, 2005); *Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, at 12-16, SEC (2005) 1732 (Dec. 19, 2005).

ages claims.[14] The Commission advocated for mechanisms to make claims more effective, while respecting European legal systems and traditions. For instance, the Commission proposed to fully compensate victims via single damages, as opposed to multiple damages. Other proposed measures concerned, inter alia, collective redress, protection of corporate leniency statements, and improved access to evidence under judges' control. After proposing these measures, the Commission started preparing a directive on private antitrust litigation. However, some of the Commission's contemplated proposals raised concerns from other stakeholders, notably the European Parliament. In particular, the European Parliament pressed that it must be involved in any legislative activity touching upon collective redress.[15] The Commission ultimately renounced its presentation of the draft directive.

While the Commission's plans for a Directive on antitrust damages claims were temporarily stalled, a growing number of damages claims started to be filed in the Member States, particularly in Germany, the Netherlands, and the United Kingdom given that these jurisdictions have a number of features that were attractive to claimants.[16] Among these jurisdictions, the United Kingdom has recently become the most active antitrust litigation center in Europe. As noted above, the number of claims, usually taking the form of follow-on actions, dramatically increased in the last few years, although the number still lags behind the United States.[17]

B. *The Damages Directive*

In June 2013, the Commission released its long-awaited legislative "package" on antitrust damages claims. The Commission's objective with this package was clear: to strike a balance between (1) ensuring effective enforcement of the rights of those harmed by anti-competitive conduct across the EU and (2) preserving the effectiveness of the Commission's and national competition authorities' enforcement activities, their leniency programs in particular.[18]

---

14 *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules,* at 4, COM (2008) 165 final (Apr. 2, 2008).

15 Report on the White Paper on Damages Actions for Breach of the EC Antitrust Rules, ¶ 23, at 8, EUR. PARL. DOC. A6-0123 (2009).

16 *See* Damien Geradin & Laurie-Anne Grelier, *Cartel Damages Claims in the European Union: Have We Only Seen the Tip of the Iceberg?*, *in* 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE *LIBER AMICORUM* 257, 257 (Nicolas Charbit et al. eds., 2014), http://ssrn.com/abstract=2362386.

17 *See* Gambhir, *supra* note 3.

18 *See Proposal for a Directive of the European Parliament and 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*, at 2-4, COM (2013) 404 final (June 11, 2013).

This package contained two main documents: the draft of the Damages Directive adopted in November 2014 and the Recommendation on collective redress that concerns all breaches of EU law, including violations of EU competition law.[19] This Section briefly discusses the Damages Directive while the next part of the essay examines the Collective Redress Recommendation with a greater degree of attention.

One of the reasons that led the Commission to propose the Damages Directive was that, while the CJEU had recognized the right for victims of antitrust infringements to be compensated for the harm suffered, very few victims had actually obtained compensation due to national procedural obstacles and legal uncertainty. For instance, access to evidence is a critical element when bringing an action for damages, but disclosure rules were inadequate in most Member States. Moreover, the procedural rules governing damages litigation were widely divergent across the EU, and as a result, the probability of victims obtaining compensation largely depended on the Member State where they happened to be located.[20] The Commission thus determined that a directive setting common principles, while leaving flexibility to the Member States to determine how to implement the principles, needed to be adopted for damages actions from competition law infringements in the EU.

The main features of this Directive are highlighted hereafter:

First, the Damages Directive provides that Member States must ensure that anyone who has suffered harm through an infringement of competition law has a right to full compensation.[21] The Directive defines "full compensation" expansively to cover not only actual loss, but also loss of profits and payment of interest from the time the harm occurred until compensation is paid.[22] Importantly, the Directive provides that compensation should not lead to "over-compensation," including by means of punitive damages.[23] Thus, unlike U.S. antitrust law, the Directive does not conceive damages as a tool to punish and deter those who breach competition rules. As will be seen in Part II below, the lack of treble damages reduces the size of the damage awards that victims may obtain and thus may impact the incentives for lawyers or third-party funders to bring collective actions against companies that have breached EU competition laws.[24]

Second, upon request of a claimant, the national courts can order the defendant or a third-party to disclose relevant evidence which lies under

---

19 The package also contained a document on the quantification of harm in antitrust infringements. *See Commission Staff Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, at 8-9, SWD (2013) 205 (June 11, 2013).

20 *See* Damages Directive, *supra* note 2, recital 7, at 2.

21 *Id.* art. 3(1), at 12.

22 *Id.* art. 3(2), at 12.

23 *Id.* art. 3(3), at 12.

24 *See infra* Part II.C.

their control, subject to a series of conditions. Insufficient access to evidence is indeed one of the major barriers to damages claims in some Member States.[25] To obtain access, the claimant must provide a "reasoned justification" containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages.[26] The claimant must circumscribe the requested evidence or categories of evidence as precisely and as narrowly as possible in the reasoned justification, and the national courts must limit the disclosure of evidence to that which is proportionate, hence avoiding "fishing expeditions."[27] Thus, the Directive seeks to prevent situations where parties unnecessarily exchange an extremely large number of documents. Member States must ensure that national courts ordering the disclosure of such information have at their disposal effective measures to protect against the disclosure of unnecessary information during the proceedings (e.g., the possibility of redacting some sensitive passages in documents, conducting in-camera sessions, etc.).[28] A similar regime applies to the disclosure of evidence requests made by the defendant.[29]

In addition to the above standard rules, special rules apply to the disclosure of evidence included in the file of a competition authority. Key to maintaining the incentives of infringers to voluntarily collaborate with the Commission,[30] the Directive provides that leniency statements and settlement submissions can never be disclosed.[31] To prevent harm to the Commission's leniency program, which many consider the most effective tool in detecting cartel activities, the Commission needed to maintain certainty that these documents would never be disclosed.[32] In addition, three categories of evidence can only be disclosed once the investigation is closed: (1) information prepared by a person specifically for the proceedings of a competition authority (such as replies to questionnaires sent by the authority); (2) information drawn up by the authority and sent to the parties (such as a statement of objections); and (3) settlement submissions that have been withdrawn.[33] Finally, additional restrictions apply on the disclosure and subsequent use of evidence in the file of a competition authority.[34]

Third, the Directive provides that the finding of infringement in a final decision from a national competition authority constitutes irrefutable proof of infringement before national courts in the same Member State as the

---

25 *See* Damages Directive, *supra* note 2, recital 14, at 3.

26 *Id.* art. 5(1), at 12.

27 *Id.* recital 23, at 4, arts. 5(2)-(3), at 12.

28 *Id.* art. 5(4), at 12.

29 *Id.* art. 5(1), at 12.

30 *Id.* recital 26, at 5.

31 Damages Directive, *supra* note 2, art. 6(6), at 13.

32 *See* Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, ¶ 6, 2006 O.J. (C 298) 17, 17.

33 Damages Directive, *supra* note 2, art. 6(5), at 13.

34 *Id.* art. 7, at 14.

competition authority and at least prima facie evidence of the infringement before national courts in other Member States.[35] The Commission designed this provision to facilitate the task of claimants, who can thus piggyback on the decision of national competition authorities to establish that defendants have infringed competition law.

As to the limitation period for actions for damages, the period cannot begin to run before the infringement has ceased,[36] as well as before the claimant knows or can be expected to know of (1) the behavior and the fact that it constitutes an infringement; (2) the fact that the behavior caused the claimant harm; and (3) the identity of the infringer.[37] The limitation period should last five years and should be suspended (or interrupted) during the investigation by a competition authority.[38] As to the latter point, the suspension is to last at least one year after the infringement decision is final or proceedings are otherwise terminated.[39]

Fourth, undertakings that have infringed competition law through joint behavior are jointly and severally liable for the harm caused (i.e., each co-infringer is liable to compensate for the entire harm, and an injured party has the right to require full compensation from any of the co-infringers until the injured party is fully compensated).[40] Courts must determine the amount of contribution between the co-infringers based on their relative responsibility for the harm caused.[41] Further, special liability rules apply to immunity recipients, once again to avoid damages claims that interfere with the companies' incentives to collaborate with the Commission.[42]

Fifth, a defendant in an action for damages should be able to invoke as a defense the fact that the claimant passed-on the whole or part of the overcharge resulting from the competition law infringement to its customers (the so-called "pass-on" defense).[43] The burden of proving that the claimant passed-on the overcharge should, however, rest with the defendant, who may reasonably require disclosure from the claimant or from third parties.[44] When the claimant is an indirect purchaser, courts will regard the claimant as having proved that an overcharge paid by the direct purchaser has passed-on to its level when the claimant is able to make a prima facie case

---

35 *Id.* arts. 9(1)-(2), at 14-15.
36 *Id.* art. 10(2), at 15.
37 *Id.*
38 *Id.* arts. 10(3)-(4), at 15.
39 Damages Directive, *supra* note 2, art. 10(4), at 15.
40 *Id.* art. 11(1), at 15.
41 *Id.* art. 11(5), at 16.
42 *Id.* art. 11(6), at 16.
43 *Id.* art. 13, at 16.
44 *Id.*

that such passing-on has occurred.[45] The infringer, however, can rebut the pass-on presumption.[46]

Finally, as to the quantification of the harm, the directive provides that neither the burden nor the standard of proof required for the quantification of harm should render the exercise of the right to damages practically impossible or excessively difficult.[47] The national courts should also have the power to estimate the amount of harm if a claimant can establish harm but cannot precisely quantify the harm based on the available evidence due to practical impossibility or excessive difficulty.[48] In order to remedy the information asymmetry and the difficulty of quantifying harm, the Directive provides that cartel infringements are presumed to cause harm, although the infringer should have the right to rebut that presumption.[49]

In sum, the Damages Directive seeks to achieve a balance between different objectives. It clearly aims to facilitate private actions for antitrust damages while protecting the rights of defense of the defendants. The Directive also seeks to ensure that the disclosure of the evidence that claimants need to prove their claims does not jeopardize the enforcement of competition rules by competition authorities, by for instance, protecting leniency applications and withdrawn proposed settlements by companies engaged in cartel behavior. In other words, damages claims should be facilitated, but they should not interfere with the public enforcement of competition rules.

While the Damages Directive will certainly help corporate victims (i.e., buyers of intermediary products that suppliers have overcharged) to obtain redress, the framework does little for individual consumers (i.e., "mom-and-pop" shoppers), as their harm will generally be too small to justify the costs of litigation. It is for that reason that, in parallel with the Damages Directive, the Commission elaborated the Collective Redress Recommendation to which this paper now turns.

II. THE COLLECTIVE REDRESS RECOMMENDATION

Collective redress mechanisms are necessary to ensure that consumers are able to obtain compensation for the harm they suffer as a result of competition law infringements.[50] The challenge when designing such mecha-

---

45 Damages Directive, *supra* note 2, art. 14(2), at 16-17.

46 *Id.*

47 *Id.* art. 17(1), at 17.

48 *Id.*

49 *Id.* art. 17(2), at 17.

50 Collective redress is defined as a "procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action." *Communication from the Commission to the European Parliament, the Council, the European*

nisms is to ensure that they will not trigger large amounts of unmeritorious litigation. As noted above, corporate and government stakeholders in the EU share a widely held belief that the U.S. class actions regime is not the right fit for Europe.[51] Whether this belief is well-founded or not, it has fundamentally influenced the design of the collective action regimes adopted at Member States level, as well as the Commission's Collective Redress Recommendation.

This Part is divided in three sections. First, Section A defines some concepts that are central to collective redress regimes by reference to the U.S. class action regime, the most developed collective redress scheme in the world. Section B then analyzes the Commission's Collective Redress Recommendation. Section C discusses the issue of whether the Recommendation's proposed regime creates sufficient financial incentives to launch collective actions. Finally, Section D examines the recently adopted U.K. Consumers Bill, which introduces a novel, more ambitious, approach to collective redress in the United Kingdom.

A. *Collective Redress—The Main Features of the U.S. Class Action Regime*

The U.S. class action regime provides a solution to the economic obstacle faced by individual claimants whose claims are too small to support the cost of litigation: aggregating a large number of individual claims into a single action.[52] The prospect of recovering the large damage awards that may result from these aggregated claims in turn attracts law firms willing to pay for all of the costs of litigation from their own pockets in return for a share of the class recovery when the action is successful.[53]

The U.S. class action regime has been a subject of controversy both within and outside the United States.[54] On the one hand, this regime pre-

---

Economic and Social Committee and the Committee of the Regions: Towards a European Horizontal Framework for Collective Redress, at 4, COM (2013) 401 final (June 11, 2013).

[51] *Id*. at 3 ("For the Commission, any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European growth, while ensuring effective access to justice. Therefore, they must not attract abusive litigation or have effects detrimental to respondents regardless of the results of the proceedings. Examples of such adverse effects can be seen in particular in 'class actions' as known in the United States."); *id.* at 8 ("'Class actions' in the US legal system are the best known example of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation.").

[52] For excellent, although slightly dated, discussion of the ins and outs of class actions in the United States, see Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States, Presented at Debates Over Group Litigation in Comparative Perspective (July 21-22, 2000), https://law.duke.edu/grouplit/papers/classactionalexander.pdf.

[53] *Id.* at 2.

[54] *See* Issacharoff & Miller, *supra* note 5, at 180.

sents a series of advantages. First, it allows individual consumers who may have small claims to obtain some monetary compensation for the damages caused by the defendants. Second, by aggregating a large number of claims into a single action, class actions are generally efficient by allowing defendants to save the time, energy, and resources required to litigate hundreds or thousands of individual claims.[55] Finally, class actions may have a deterrent effect as infringers will often have to pay stiff damages to claimants, notably due to the treble damages allowed in antitrust actions.[56]

On the other hand, critics of the U.S. class actions regime argue that plaintiff law firms leverage the significant risks class actions create to defendants to extract large settlements from them, regardless of whether or not their claims are meritorious.[57] This practice may in turn incentivize lawyers to file unmeritorious claims in the expectation that risk-averse defendants will prefer to settle for a reasonable amount of money rather than face the minor, but catastrophic, risk of paying extremely large damages if these actions go to trial and succeed.[58] In addition, some observe that individual claimants may only obtain minimal rewards, generally a few dollars, or even in some case a coupon for a good or service that they will not necessarily be able or willing to use.[59] Class actions would thus essentially benefit plaintiff lawyers rather than the victims of the illegal conduct.

Although these criticisms are not entirely unfounded, an important observation is that Rule 23 of the U.S. Federal Rules of Civil Procedure disciplines class actions, allowing only reasonable, well-grounded actions to proceed.

First, Rule 23(a) requires that actions meet the requirements of "numerosity" (i.e., the class must be "so numerous that joinder of all members is impracticable"), "commonality" (i.e., the action must raise "questions of law or fact common to the class"), "typicality" (i.e., one or more persons who are members of the class may sue on its behalf if their claims are "typical of the claims . . . of the class"), and "adequacy of representation" (i.e., these persons "will fairly and adequately protect the interests of the class").[60]

Second, if the action meets the Rule 23(a) requirements, it must fall under one of the categories of actions listed in Rule 23(b). Most actions for monetary damages fall under Rule 23(b)(3), which requires that the actions

---

55 *Id.* at 182-83.

56 *See* 15 U.S.C. § 15(a) (2012); Alexander, *supra* note 52, at 1.

57 Ian Simmons & Alexander Okuliar, *Private Enforcement of the U.S. Antitrust Laws Through Class Actions*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: COMPETITION LITIGATION 2009, at 10, 10 (Arundel McDougall & James Levy eds. 2009), http://www.omm.com/files/upload/simmonsokuliar.pdf.

58 *Id*.

59 Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395, 1395 (2005).

60 FED. R. CIV. P. 23(a).

meet two additional requirements. First, the questions of law and fact that are common to the class must "predominate" over individual questions.[61] In addition, class treatment must be "superior to other available methods for fairly and efficiently adjudicating the controversy."[62] In this respect, courts will have to take into account the "manageability" of the class action.

Third, Rule 23(c) provides that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."[63] Class certification is typically the defining moment in a class action. If the court certifies the class, the action can proceed to discovery and resolution on the merits. Thus, class certification will typically incentivize defendants to settle the action rather than litigate the case. If the court does not certify the class, the action will typically collapse, as the individual claims are too small to justify the cost of litigation. While historically most courts favored class certification, in more recent years, appellate level courts have required that district courts perform a more rigorous analysis of the class certification factors.[64] For instance, in *In re Hydrogen Peroxide Antitrust Litigation*,[65] the 3rd Circuit established that the evidence and arguments a district court considers in the class certification decision call for "rigorous analysis,"[66] and that "[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met."[67] Similarly, in *Comcast Corp. v. Berhend*,[68] the Supreme Court found that:

> By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis.[69]

Thus, district courts must act as true gatekeepers of the certification process to ensure that, in practice, actions meet the requirements contained in Rule 23 of the U.S. Federal Rules of Civil Procedure.

---

61 *See* FED. R. CIV. P. 23(b)(3).

62 *Id.*

63 FED. R. CIV. P. 23(c)(1)(A).

64 *See, e.g.*, Comcast Corp. v. Behrend, 135 S. Ct. 1426, 1428-29 (2013) (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 318 (3d Cir. 2008).

65 552 F.3d 305 (3d Cir. 2008).

66 *Id.* at 318.

67 *Id.* at 316.

68 133 S. Ct. 1426 (2013).

69 *Id.* at 1432-33.

Fourth, in Rule 23(b) cases, courts must direct notice to the members of the class that the court has certified a class action on their behalf. The notice must inform class members of their rights to "opt out" of the class action. If they do not want to be part of the class, they can either decide to file their own suit or let their claims expire. When claims are small, however, individual actions are illusory and only a few members of the class will typically opt-out. This opt-out regime differs from the "opt-in" regime that other nations have adopted, where claimants must voluntarily elect to be part of the class. The opt-out regime facilitates the creation of large classes and thus the funding of the class action litigation.

Finally, pursuant to Rule 23(e), parties may not dismiss or settle a class action without notice to the class and the approval of the court. This requirement protects class members against inadequate settlements that arise when representative lawyers pursue their own economic interests rather than those of the class. Class action lawyers may, for instance, face temptation to agree to an early settlement, which will generate a large fee for the amount of work done on the case. As one commentator has noted, the "class counsel's economic interest is in maximizing their effective hourly fee."[70] In that case, the district court may simply refuse to approve the settlement and force class counsel to return to the Court with a more attractive deal for the claimants.[71]

Finally, one should note that two important features of U.S. class actions do not have any equivalent in Europe. First, with respect to antitrust actions, the Clayton Act permits plaintiffs to recover treble damages (i.e., three times the amount of the actual/compensatory damages).[72] This remedy, of course, attracts class actions lawyers as it significantly increases the amount that they may recover. Thus, an important difference between the private actions for antitrust damages in the U.S. and EU systems is that the former's damages actions maintain both compensatory and deterrent functions, while the latter's actions only focus on ensuring compensation for the damage actually incurred. Second, in U.S. actions, each side typically bears its own costs, regardless of who wins. This practice differs from the "loser pays" principle that generally applies in Europe. The "loser pays" rule increases the difficulty of bringing class actions, as plaintiff lawyers would need to factor in the risks of having to pay the defendant's costs. Part II.C

---

70 *See* Alexander, *supra* note 52, at 17.

71 *E.g.*, Opinion and Order Denying Without Prejudice Motion for Final Approval of Proposed Settlement at 17-18, Allen v. Dairy Farmers of Am., Inc., No. 5:09-cv-230 (D. Vt. Mar. 31, 2015) ("Analyzing the *Grinnell* factors collectively, the court cannot find that the Proposed Settlement's monetary relief of $50 million is on its face inadequate or unreasonable. However, when this amount is considered from the class's perspective, in light of the broad Proposed Release, and the absence of what the remaining Subclass Representatives contend is meaningful injunctive relief, the receipt of approximately $4,000 per dairy farm could reasonably be perceived as a modest recovery.").

72 15 U.S.C. § 15(a) (2012).

provides an example equation that plaintiff lawyers may use when deciding to bring a lawsuit.

B. *The Collective Redress Recommendation*

"Collective redress" is not a new issue in the European Union. First, prior to the Recommendation, some Member States had developed collective redress mechanisms with various degrees of sophistication. Collective redress actions remained, however, marginal in the Member States due to the features of these systems (essentially based on the "opt-in" approach). Second, the Commission's Green and White papers on antitrust damages action, respectively adopted in 2005 and 2008, included policy suggestions on antitrust-specific collective redress.[73] In addition, in 2008, the Commission published a Green Paper on consumer collective redress,[74] and in 2011, it carried out a public consultation entitled "Towards a Coherent European Approach to Collective Redress."[75] Finally, the European Parliament adopted a resolution bearing the same title in February 2012.[76]

These various documents expressed a clear hostility towards the U.S. class action regime, which many Europeans perceive as a source of excessive litigation and unmeritorious claims. Whether or not this hostility is justified is a difficult question as class actions are controversial even within the United States. Part II.A, however, has shown that U.S. courts now carry out a more rigorous analysis of the evidence at the certification stage than they did in the past, filtering out claims that have little or no chance of success or for which other forms of litigation may be more appropriate.[77] Some aspects of the U.S. litigation regime, such as parties paying their own costs or treble damages in antitrust cases, are also alien to the European system, making class actions an unlikely source of inspiration for the development of collective redress in the European Union.

Against this background, this section summarizes the main features of the Commission's Recommendation.

First, the Recommendation is not a binding act on the Member States. As its name indicates, it merely *recommends* a series of principles regarding collective redress that should apply commonly across the EU. Unlike the Damages Directive, the Commission cannot condemn Member States for failing to implement these principles, although the Commission expects that

---

73 *See supra* Part I.B.

74 *Commission Green Paper on Consumer Collective Redress*, COM (2008) 794 final (Nov. 27, 2008).

75 *Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress*, SEC (2011) 173 final (Feb. 4, 2011).

76 Resolution of 2 February 2012 on "Towards a Coherent European Approach to Collective Redress," EUR. PARL. DOC. P7_TA(2012)0021 (2012).

77 *See supra* Part II.A.

the Member States will generally follow the principles as they largely reflect the legal traditions of the Member States. In addition, the Recommendation takes the form of a horizontal framework whose principles apply to claims regarding rights granted under EU law in a variety of areas, such as consumer protection, competition, data protection, environmental protection, etc.[78] Thus, although these principles apply to collective redress for antitrust claims, they are not specific to the competition law field.

Second, in terms of standing to bring collective actions, the Recommendation provides that Member States should designate "representative entities" to bring "representative actions" on the basis of clearly defined conditions of eligibility.[79] According to the Recommendation, the conditions should at least require that (1) the entity have a "non-profit making character"; (2) a "direct relationship" between the main aims of the entity and the rights granted under EU law that are deemed to have been violated; and (3) the entity should have sufficient expertise and resources to "represent multiple claimants acting in their best interests."[80] The Recommendation does not, however, prevent Member States from maintaining other forms of collective actions, such as group actions, where the action can be brought jointly by those who have suffered the harm. The Recommendation, however, leaves it to the Member States to address issues of standing in such cases, as these issues are generally more straightforward.[81]

Third, in terms of admissibility, the Recommendation provides that Member States "should provide for verification at the earliest possible stages of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued."[82] Because of the restrictive features of collective redress mechanisms recommended by the Commission, the number of unmeritorious claims is likely to more be limited than it is in the United States. In any event, however, weeding out such claims as early as possible in the litigation process remains an important goal in both systems.

Fourth, in terms of funding collective actions, the Recommendation provides that, subject to some exceptions,[83] Member States should not permit contingency fees, which risk creating an incentive in favor of litigation that is "unnecessary from the point of view of the interest of any of the parties."[84] The Recommendation thus proposes a litigation-funding model that vastly differs from the model based on contingency fees used in U.S. class actions. The Recommendation nevertheless allows third-party funding for

---

78 *See* Redress Recommendation, *supra* note 4, recital 7, at 60.

79 *Id.* ¶ 4, at 62.

80 *Id.* ¶¶ 4(a)-(c), at 62-63.

81 *Id.* recital 17, at 61.

82 *Id.* ¶ 8, at 63.

83 *See id.* ¶ 30, at 64.

84 Redress Recommendation, *supra* note 4, ¶ 29, at 64.

representative actions under strict conditions. There can be no conflict of interest between the third-party funder and the claiming party and its members, and the third-party must have sufficient resources to meet its financial commitments to the claimant party initiating the procedure, as well as to cover any adverse costs should the collective redress procedure fail.[85]

Private third-party funding is developing in Europe with a variety of firms, such as IMF Bentham,[86] Claims Funding International,[87] Caprica,[88] and Harbour Litigation Funding,[89] who now offer funding for litigation in the U.K. and in Europe. The Recommendation, however, provides for the imposition of additional rules when a private third-party funds an action for collective redress. For instance, a private third-party funder may not "seek to influence procedural decisions of the claimant party, including on settlements."[90] Moreover, its remuneration or the interest it charges cannot vary based on the amount of the settlement reached or the compensation awarded "unless the funding arrangement is regulated by a public authority to ensure the interests of the parties."[91]

Fifth, the Recommendation provides that Member States should follow the "loser pays" principle, whereby "the party that loses a collective redress action reimburses necessary legal costs borne by the winning party."[92] This recommendation can represent an insurmountable problem for insufficiently-funded third-parties initiating collective actions on behalf of victims of infringement. For instance, in December 2013, the Düsseldorf District Court dismissed follow-on damage claims by a special purpose vehicle, Cartel Damage Claims ("CDC").[93] CDC had brought damages claims

---

85 *Id.* ¶¶ 14-15, at 63.

86 Bentham Europe "provides funding to plaintiffs for large scale commercial disputes in the UK and Europe. It offers law firms and their clients the benefits of strong financial backing and risk mitigation, extensive experience in litigation funding and a proven record of success unmatched globally by any other commercial litigation funder." *About Bentham Europe*, BENTHAM IMF, http://www.benthamimf.com/about-us/bentham-europe (last visited Aug. 6, 2015).

87 Claims Funding International (CFI) is an Irish litigation company that "provide[s] individuals and companies with easy access to justice. . . . [when] the cost of litigation would otherwise be too onerous." *Claims Funding International*, CLAIMS FUNDING EUR., http://www.claimsfundingeurope.eu/about-us/partners/claims-funding-international/ (last visited Aug. 6, 2015).

88 Caprica Litigation Funding provides "a cost effective third party litigation funding solution for lawyers' fees and disbursements on a non-recourse basis." *What We Do*, CAPRICA, http://www.caprica.co.uk/ (last visited June 8, 2015).

89 Harbour provides litigation funding "to finance part, or all, of the costs of any type of commercial litigation or arbitration. In return Harbour receives a share of the proceeds of the case but only if there is a successful outcome." *Welcome to Harbour Litigation Funding*, HARBOUR LITIG. FUNDING, http://www.harbourlitigationfunding.com/ (last visited Aug. 6, 2015).

90 Redress Recommendation, *supra* note 4, ¶ 16(a), at 63.

91 *Id.* ¶ 32, at 65.

92 *Id.* ¶ 13, at 63.

93 *Düsseldorf Court Dismisses CDC Damage Claims in Antitrust Follow-on Action*, ALERT MEMORANDUM (Cleary Gottlieb Steen & Hamilton LLP, Frankfurt, Ger.), Jan. 8, 2014, at 1,

against various German cement producers following an infringement decision by the German Federal Cartel Office.[94] The District Court dismissed the claims on two main grounds. First, the assignments of damage claims to CDC were in violation of German law to the extent they were made at a time (i.e., prior to June 2008) when such assignments were not allowed. Second and more importantly, the District Court determined that these assignments violated public policy as, under the German loser pays provisions of the Civil Procedure Code, the losing party is required to pay the court fees and reimburse the winning side for its costs, and CDC was insufficiently funded to cover such costs.

Sixth, in terms of compensatory damages, the "opt-in" principle should guide the formation of the claimant party (i.e., the natural or legal persons claiming harm must provide express consent to join the claimant party).[95] Exceptions to this principle, by law or court order, "should be duly justified by reasons of sound administration of justice."[96] Although Member States have traditionally utilized the opt-in system to develop collective redress regimes, some Member States utilize regimes that allow for some form of opting-out.[97] Yet, the Recommendation provides that the opt-in principle should be the rule, subject to exceptions.

The opt-in should cause the claimant party to be smaller than it would be under an "opt-out" system since individual victims with small claims may lack sufficient incentives to take "positive" steps to join the claiming party.[98] It may also make the funding of collective actions more difficult.[99] The general lack of responsiveness of the victims of mass harm is illustrated by the fact that, in the United States, consumer class actions rarely see more than a small percentage (less than 10%) of the class members to file a claim after a settlement is approved, even though they are entitled to an award.[100]

Moreover, anecdotal evidence suggests that when individual claims are small, creating a sufficiently large group of claimants to make the action

---

http://www.cgsh.com/files/News/45e15064-1e93-4c43-bbb2-4c70560d4958/Presentation/NewsAttachment/6399233c-20d3-42b1-8021-4cd96542fe14/D%c3%bcsseldorf%20Court%20Dismisses%20CDC%20Damage%20Claims%20in%20Antitrust%20Follow-on%20Action.pdf.

94 *See id.*

95 Redress Recommendation, *supra* note 4, ¶ 21, at 64.

96 *Id.*

97 Robert Gaudet, Jr., *Turning a Blind Eye: The Commission's Rejection of Opt-out Class Actions Overlooks Swedish, Norwegian, Danish and Dutch Experience*, 30 EUR. COMPETITION L. REV. 107, 107 (2009).

98 On the downsides of the opt-in system, see Charlotte Leskinen, *Collective Actions: Rethinking Funding and National Cost Rules*, 8 THE COMPETITION L. REV. 87 (2011).

99 *See infra* Part II.C.

100 Douglas H. Ginsburg, Collective Actions in Europe: The View from the United States, PowerPoint Presentation Delivered at the AECLJ Annual Conference (June 13, 2014) (on file with the author).

worthwhile may be difficult. For instance, in 2006, the French consumers' association UFC Que Choisir brought a damages claim against three mobile communication operators following on a cartel decision from the French Competition Authority.[101] Despite considerable efforts, UFC Que Choisir only managed to aggregate claims for 12,350 consumers although the infringement potentially affected 20 million consumers. The association spent nearly 2,000 hours preparing the action and incurred €500,000 of legal expenses for a claim amounting overall to €750,000. In the end, French courts rejected the action.[102] Similarly, in 2007, the U.K. consumers' association Which?, which was the only association entitled to bring collective actions on behalf of consumers, brought proceedings against JJB Sports for overcharging consumers for replica football shirts as a result of a price-fixing cartel.[103] Despite a major media campaign, Which? only managed to collect claims for 600 consumers. In the end, it negotiated a settlement where consumers who had bought the shirts received £20 in compensation for each shirt.[104] Given the difficulty experienced in collecting claims, Which? never brought a collective action on behalf of overcharged consumers again.

Finally, the Recommendation provides that the compensation awarded to the victims "should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions."[105] In addition, "punitive damages" leading to overcompensation of the claimants should be prohibited.[106] Once again, the approach taken in the Recommendation differs from U.S. litigation where in a number of fields, such as antitrust, defendants can face treble damages.

In sum, the Recommendation urges Member States to adopt collective redress mechanisms to allow natural and legal persons to seek redress in "mass harm" situations. Further, the Recommendation preconizes key features that are quite distinct from those that characterize the U.S. class action system. The Commission chose this different path largely due to the fear shared by European corporate and government stakeholders that U.S. class actions lead to over-litigation and unmeritorious claims. The risk of over-litigation is, however, linked to what make U.S. class actions such as an effective mechanism in bringing creators of mass harm to pay for their wrongdoing, which is that it offers strong financial incentives to entrepreneurial law firms to pursue such actions.

---

101 Study by the Directorate-General for Internal Policies: Collective Redress in Antitrust, PARL. EUR. DOC. 475.120 (2012), at 36 [hereinafter Study: Collective Redress].

102 *Id.*

103 Id.

104 *Id.*

105 Redress Recommendation, *supra* note 4, ¶ 31, at 64-65.

106 *Id.*

C. *Does the Recommendation Create Sufficient Financial Incentives for Collective Actions?*[107]

While the Recommendation seeks to stimulate collective redress by urging Member States to adopt legal regimes that make redress possible and practicable, the question still remains whether the recommended approach will offer sufficient financial incentives to launch these actions. This essay addresses this question by using simple numerical examples, contrasting the economics of U.S. class actions with the economics of the approach that the Commission recommends.

In very simple terms, under the U.S. system, a plaintiff law firm will likely bring an action when the

[Probability of winning] x [Number of claimants] x [Damages from each claim] x [3 (treble damages)] x [25% (average fee)]

exceeds the

[Total costs incurred in bringing the claim (costs of providing notice to claimants, opportunity costs of time spent on the case, costs of hiring experts, etc.)]

To numerically illustrate the above, this essay makes the following assumptions: (1) the probability of winning the action is 80%; (2) there are 100,000 claimants; (3) the damage from each claim is $50; (4) the law firm would collect 25% of the amount recovered; and (5) the costs incurred in bringing the claims are expected to be $2,000,000. Because *80% x 100,000 x $50 x 3 x 25% = $3,000,000 > $2,000,000*, the firm will likely bring this action.

The collective redress approach promoted in the Recommendation, however, dramatically impacts the above equation, and thus the incentives to bring actions, because the "opt-in" mechanism will drastically reduce the number of claimants, especially when they have small individual claims and the absence of treble damages will diminish the amount of the possible award. In addition, because of the "loser pays" principle applied in the EU, the law firm (i.e., third-party funder) will have to factor in its calculations the risk of paying the costs of the defendants if the action goes to trial and is unsuccessful. Finally, given the strict conditions that apply to third-party funding, the level of compensation that private funders will be able to obtain is not entirely clear. Thus, under the EU system, a private law firm will bring an action if the

---

107 What follows draws on Ginsburg, *supra* note 100.

[Probability of winning] x [Number of claimants] x [Damages from each claim] x [25% (average fee)]

exceeds the

[Costs incurred in bringing the claim + Costs of defendants] x [1 – Probability of winning]

Based on the above observations, this essay makes the following assumptions: (1) the number of claimants is lower due to the opt-in system, decreasing to 10,000; (2) the costs of bringing the action are estimated at $2,000,000; and (3) the costs of defending the claims are estimated at $3,000,000. Because *80% x 10,000 x $50 x 25% = $100,000 < $1,000,000 = [1 – 80%] x [$2,000,000 + $3,000,000]*, the firm will not bring the action.

In practice, this calculation shows that the approach preconized by the Recommendation will generally lead to fewer actions being brought than under the U.S. class action regime. The actions that claimants will bring should typically involve scenarios where (1) the claimants have a significant chance of winning (e.g., a follow-on action); (2) the private law firm can easily identify potential claimants; (3) the individual claims are reasonably significant; and (4) the private law firm can bring the action at a reasonable cost (e.g., because the action is not excessively complex and may not require the hiring of economic experts, etc.). The "loser pays" principle should also encourage firms to bring cases that can settle relatively easily, and thus reduce the risks of losing in court, given the financial risks that defendants face.

For example, assume that a national competition authority has adopted a decision condemning cement producers for price fixing and market sharing. Law Firm A contemplates the idea of bringing a collective action on behalf of the construction companies who purchased overpriced cement from cartelists during the infringement period. There are 1,000 affected construction companies and assume that 50% will opt-in. On average these companies suffered a $20,000 prejudice. The chance of winning stands at 90% and the costs of bringing the action amount to $2,000,000, whereas the costs of defending against the action are estimated at $3,000,000. In this scenario, because *90% x 500 x $20,000 x 25% = $2,250,000 > $500,000 = [1 – 90%] x [$2,000,000 + $3,000,000]*, Law Firm A will likely bring the action.

In the above scenario, Law Firm A will likely initiate the action because the claimants are easy to identify and each of them has a significant claim, and thus the incentive to "opt in" even if this requires handling some paperwork.

In contrast, in scenarios involving a large number of players, each having small claims, law firms will likely not bring actions. To demonstrate,

assume that a national competition authority has adopted a decision condemning consumer care companies for fixing the price of certain types of soap. Law Firm A is contemplating the prospect of bringing a collective action on behalf of the consumers who have purchased overpriced soap during the infringement period. There are 500,000 overcharged customers and on average they have suffered a $20 prejudice. Because of the smallness of their individual claim, Law Firm A expects that only 10% of them will opt-in, thus totaling 50,000 overcharged customers. The chance of winning stands at 90% and the cost of bringing the action amounts to $2,000,000, whereas Law Firm A estimates the cost of defending against the action at $3,000,000. In this scenario, because *90% x 50,000 x $20 x 25% = $225,000 < $500,000 = [1 – 90%] x [$2,000,000 + $3,000,000]*, Law Firm A will not bring the action.

One can, of course, ask whether or not one should be concerned that these actions may not be brought. The answer depends on the perspective that one takes. On the one hand, one could find it regrettable that individual consumers will often be unable to recover the overcharge they have paid to unscrupulous sellers. At the end of the day, individual consumers deserve compensation as much as larger actors. Even if the amount they obtain is small, any amount of compensation may help those with modest means. On the other hand, the U.S. class action regime suggests that, even when the class action is successful in recovering a sizeable sum from the defendants, most users do not bother collecting their awards given the smallness of their individual claims. In such cases, the main beneficiary of the action is the plaintiff law firm or the private third-party funder. In this type of case, consumer organizations should probably step in through representative actions, although this essay has shown, with the actions brought by Que Choisir in France and Which? in the U.K., that these organizations may find it unattractive to pursue such claims under an opt-in regime.[108] Although consumer organizations may be able to bring actions at a lower cost than private law firms and pursue them even if the planned return is not significant, their resources are limited and must be managed carefully.

Thus, the question still remains, is the Recommendation's approach unduly restrictive? As this essay has shown, federal district courts must now rigorously analyze the compatibility of the claims under Rule 23 of the U.S. Federal Rules of Civil Procedure, acting as gatekeepers against unmeritorious claims.[109] They can also reject settlements that are not in the interest of the class members, hence ensuring that plaintiff law firms act in the interests of class members. From that standpoint, there is no reason why European judges could not also act as gatekeepers if proper procedures are put into place.

---

108 *See* Study: Collective Redress, *supra* note 101.

109 *See* Arianna Andreangeli, *Collective Redress in EU Competition Law: An Open Question with Many Possible Solutions*, 35 WORLD COMPETITION 529, 545-46 (2012).

Another question that remains is whether some of the assumptions that guided the Commission in its Recommendation are truly realistic. For instance, the Recommendation's general hostility toward contingency fees on the ground that the use of such fee arrangements might lead to "abusive litigation"[110] fails to recognize that contingency fees are the most effective means to fund collective actions.[111] In addition, research has revealed that contingency fees better align the interests of lawyers with their clients,[112] and that contingency fees reduce the amount of wasteful proceedings.[113] Further, a broad trend in the legal industry is arising where clients wish for law firms to abandon hourly fees for other forms of value-based compensation.[114] One should finally note that a number of EU Member States have relaxed their restrictions against contingency fees.[115]

D. *The U.K. Consumer Rights Act 2015*

Since the adoption of the Recommendation, some Member States have adopted new collective redress regimes. For instance, the French parliament adopted a Consumer Act in 2014.[116] It allows actions for follow-on damages, but consumers can only file actions through government-approved consumer groups. The French regime also employs the opt-in system.

Also in 2014, the Belgian parliament adopted a Collective Redress Act, which provides for a system where consumer organizations meeting

---

110 *See* Redress Recommendation, *supra* note 4, recital 15, at 61, ¶ 30, at 64.

111 *See* Issacharoff & Miller, *supra* note 5, at 198-99 ("The contingency fee permits the attorney to fund the litigation and thus overcomes problems of liquidity that may make it impossible for an individual to pursue his rights. Attorneys are good litigation funders. As legal specialists, they have the ability to assess the value of suits. They will thus tend to direct valuable resources (their time and energy) to cases that offer the largest expected benefit for class members and society as a whole. Because attorneys handle numerous lawsuits, moreover, they can achieve portfolio diversification in ways not possible for ordinary clients, who are usually involved in only one. And attorneys tend to have better liquidity than consumers. They finance cases through their own efforts. If bank financing is required, they are probably better than their clients at obtaining loans at favorable rates. Accordingly, the contingent fee can generate effective funding of class action litigation. Essentially all U.S. class actions are funded with contingent fees.").

112 *See, e.g.*, A. Mitchell Polinsky & Daniel L. Rubinfeld, *A Note on Settlements Under the Contingent Fee Method of Compensating Lawyers*, 22 INT'L REV. L. & ECON. 217, 217-25 (2002), http://ssrn.com/abstract=286055.

113 *See, e.g.*, Eric Helland & Alexander Tabarrok, *Contingency Fees, Settlements Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 J. L. ECON. & ORG. 517, 540 (2003).

114 *See* Catherine Ho, *Is This the Death of Hourly Rates at Law Firms?*, WASH. POST, Apr. 13, 2014, *available at* http://www.washingtonpost.com/business/capitalbusiness/is-this-the-death-of-hourly-rates-at-law-firms/2014/04/11/a5697018-be97-11e3-b195-dd0c1174052c_story.html.

115 *See* Leskinen, *supra* note 98, at 98 (discussing England and Wales).

116 Loi 2014-344 du 17 mars 2014 relative à la consummation [Law 2014-344 of Mar. 17, 2014 on the Consumption], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], Mar. 18, 2014, p. 5400.

certain criteria can initiate collective actions.[117] The Belgian system does not allow for punitive damages or contingency fees, and before filing an action, parties must attempt a mandatory dispute settlement process. Because judges decide whether the action will utilize an opt-in or opt-out approach, the Belgian regime goes beyond the approach recommended by the Commission.

The most important development, however, is the adoption of the U.K. Consumer Rights Act 2015, which obtained royal assent on March 26, 2015 and is expected to enter into force on October 1, 2015.[118] For the purposes of this essay, the relevant part of the Act is Schedule 8, which brings significant changes to the Competition Act 1998 with regard to private actions in competition law. Section 47B provides that claimants may bring proceedings before the Competition Appeals Tribunal ("CAT") combining two or more claims for damages. Collective proceedings must be initiated by "a person who proposes to be the representative in those proceedings"[119] and can only be pursued if the CAT makes a "collective proceedings order."[120] The CAT may authorize any person to act as the representative of the proposed class, regardless of whether that person falls within the class of persons to be represented. However, the CAT must determine that "it is just and reasonable for that person to act as a representative in those proceedings."[121] In order to be eligible for inclusion in collective proceedings, the CAT must determine that "they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings."[122]

Further, the CAT must state in the collective proceedings order whether the collective proceeding follow either the opt- in or opt- out regime. Similar to the Belgian regime, the CAT must decide thus which of these two approaches applies to the collective action at hand. The Act nevertheless contains a number of safeguards designed to prevent abusive litigation. For instance, the CAT may not award "exemplary damages" in collective proceedings.[123] Moreover, a "damages-based" agreement (i.e., a contingency

---

117 Loi portant insertion d'un titre 2 "De l'action en réparation collective" au livre XVII "Procédures juridictionnelles particulières" du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique [An Act to Insert a Title 2 "From the Collective Redress Action" in Book XVII "Special Court Proceedings" of the Code of Economic Integration of Duty and Definitions Specific to the Seventeenth Book in the Code Book 1 Economic Law] of Mar. 28 2014, MONITEUR BELGE [M.B.][Official Gazette of Belgium], Apr. 29, 2014, 35201.

118 Consumer Rights Act, 2015, c. 15 (U.K.).

119 Consumer Rights Act, 2015, c. 15, sch. 8, ¶ 5(1) (U.K.) (substituting a replacement § 47B(2) into the Competition Act 1998).

120 *Id.* (substituting a replacement § 47B(4) into the Competition Act 1998).

121 *Id.* (substituting a replacement § 47B(8)(b) into the Competition Act 1998).

122 *Id.* (substituting a replacement § 47B(6) into the Competition Act 1998).

123 Consumer Rights Act, 2015, c. 15, sch. 8, ¶ 6 (U.K.) (inserting a new § 47C(1) into the Competition Act 1998).

fee) is unenforceable if it relates to opt-out collective proceedings, although the CAT will permit this type of agreement for damages actions brought by individual businesses or other claimants.

Although the U.K. regime does not provide for some of the incentives that facilitate the funding of class actions in the United States, simply allowing the CAT to decide that a collective action should be pursued under an opt-out basis represents a significant progress compared to the EU Collective Redress Recommendation. This flexibility should facilitate collective actions in situations involving a large number of consumers with small claims. Time will tell, of course, the extent to which the CAT will be willing to authorize opt-out actions.

CONCLUSION

Private actions for antitrust damages have clearly become a reality in the EU, and the implementation of the Damages Directive by the Member States will further stimulate such actions. The Collective Redress Recommendation also urges the Member States to adopt regimes facilitating collective actions. The Commission's anxiety to avoid the alleged excesses of U.S. class actions has translated into a set of principles that fail to recognize that collective actions will not proceed in the absence of financial incentives. The Recommendation's aversion toward the opt-out system raises significant obstacles to the funding of collective actions when a large number of consumers hold small individual claims. From this viewpoint, the approach adopted by the U.K. Consumer Rights Act, which gives the CAT discretion in determining whether to allow for a collective action to proceed on an opt-out basis, is preferable because, in some cases, no action will be economically viable under an opt-in regime.

Contingency fees, or at least some form of third-party funding, are also often necessary to fund collective actions. No evidence supports the conclusion that contingency fees necessarily lead to unmeritorious claims as they force plaintiff law firms or third-party funders to carefully analyze the likelihood of success of the actions they contemplate launching. That is not necessarily the case under an hourly fees system as it gives law firms an incentive to generate as much more billable work as possible.

From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally

Deborah R. Hensler[1]

I. INTRODUCTION

In recent years, as the U.S. Supreme Court has steadily closed the courthouse doors to class actions in the United States,[2] an increasing number of foreign jurisdictions have adopted some form of representative group proceeding along the lines of a modern class action. Perhaps not surprisingly given the roots of the American class action in England's medieval group litigation,[3] outside the United States, class action procedures were adopted in the common-law jurisdictions of Australia and Canada before most civil law jurisdictions followed suit (Quebec, the Francophone Canadian province that is governed by civil law, is the exception to this generalization: it adopted a class action

---

1. Judge John W. Ford Professor of Dispute Resolution, Stanford Law School. This essay draws on my contributions to the co-edited book, CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION (Deborah Hensler, Christopher Hodges & Ianika Tzankova eds., 2016) [hereinafter CLASS ACTIONS IN CONTEXT].

2. *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013); Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097 (2013). Cases interpreting FED. R. CIV. P. 23 certification requirements in a more restrictive fashion than previous holdings or otherwise restricting plaintiffs' ability to proceed in a class form include Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (vacating certification of a class of female employees, applying a heightened commonality standard); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (vacating certification of an anti-trust class, on the grounds that the damage model did not fit the class definition); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (upholding the validity of an arbitration clause denying consumers' right to proceed in class form); and Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (holding that prohibiting class members from proceeding in a collective arbitration procedure when such a prohibition effectively denies plaintiffs the ability to vindicate their rights is not sufficient to void the arbitration provision). Arguably, in more recent cases, a majority of Supreme Court justices have rejected efforts to further restrict rights of plaintiffs to proceed in class form. *E.g.*, Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) (maintaining "fraud on the market" as a substitution for individual reliance in securities litigation, thereby allowing plaintiffs to offer proof of commonality); Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016) (holding that representative plaintiff's rejection of an offer of settlement does not automatically moot the litigation).

3. *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (describing the modern class action's relationship with medieval group litigation).

procedure in 1978).[4] Australia and Canada will both celebrate the twenty-fifth anniversary of their class action procedures in 2017, twenty-five years after the 1966 birth of the modern U.S. class action. However, the spread of class action procedures globally began in earnest in the 2000s. Today, at least thirty-five jurisdictions in addition to Australia, Canada, and the United States, including twenty-one of the twenty-five largest economies in the world, permit class actions for some or all legal claims (See Table 1).[5] These procedures are authorized by statute, rule, or, in some instances, by constitutions or judicial decisions. The procedures differ in many respects; their common feature is that they allow one or a few persons or entities to represent a large number of similarly situated claimants in a legal action seeking a substantive remedy. This procedural form differs sharply from traditional court-based dispute resolution, involving one or a few claimants suing one or a few defendants for relief. It also differs from traditional joinder, in which multiple parties are before the court. Typically, in a representative class action, save for the class representative, the class members are "absent parties."

In this essay, I discuss the possible reasons for this remarkable diffusion of a "legal transplant," identify the key features of the procedures that influence the extent and nature of their application, discuss alternatives to class actions such as aggregated group proceedings and administrative compensation schemes, and consider the implications for the future of the global expansion of collective litigation.

4. W.A. Bogart, *Questioning Litigation's Role—Courts and Class Actions in Canada*, 62 Ind. L.J. 665, 685–89 (1987).

5. *See generally* CLASS ACTIONS IN CONTEXT, *supra* note 1. There is no official compendium of jurisdictions with class actions. With colleagues in Europe, I have been monitoring the spread of class actions over the last decade.

Table 1

COUNTRIES THAT HAVE ADOPTED A CLASS ACTION FOR ONE OR MORE TYPES OF LEGAL CLAIMS

NORTH AMERICA	CENTRAL & SOUTH AMERICA	EUROPE[6] & THE MIDDLE EAST	AFRICA	ASIA & AUSTRALASIA
Canada	Argentina	Belgium	South Africa	Australia
Mexico	Bolivia	Bulgaria		China
United States	Brazil	Denmark		Indonesia
	Chile	England & Wales		Japan
	Costa Rica	Finland		South Korea
	Colombia	France		Taiwan
	Ecuador	Israel		Thailand
	Panama	Italy		
	Peru	Lithuania		
	Uruguay	Netherlands		
	Venezuela	Norway		
		Poland		
		Portugal		
		Spain		
		Sweden		
		Ukraine		

6. The European Commission has adopted non-binding "Principles on Collective Redress," the term adopted in Europe to distinguish their approach to collective litigation from the American class action. *See Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU)*, OFFICIAL JOURNAL OF THE EUROPEAN UNION (July 26, 2013) [hereinafter *European Commissions Principles on Collective Redress*], http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN.

II. WHAT EXPLAINS THE SPREAD OF CLASS ACTIONS?

Because the modern class action was first adopted in the United States and because most jurisdictions that have adopted the class action in the last decade refer to the "American class action" as a model, if not to emulate then to avoid, it is reasonable to view class actions outside the United States as "legal transplants." There is rich literature on the global diffusion of ideas and practices generally, and the diffusion of legal policies and practices in particular.[7] Scholars have proposed a variety of explanations for such diffusion, including coercion by external forces, simple emulation, rational policy making, and competition. No one has yet undertaken a systematic analysis of the causes for the spread of class actions, but it appears to be the result of a mix of factors including some but not all of the above.

Imperialists took their legal norms and practices to the nations they conquered, often adapting them so as to serve their own interests. There is no example, however, of a country that has adopted a class action procedure as a result of coercion by external forces; to the extent that external forces have been at work, it has been to *oppose* the adoption of a class action in a new jurisdiction.[8] There is some evidence of simple emulation in the timing of class action adoption: once one country in a region has adopted a class action, it appears to be more likely that others will follow. For example, an early wave of adoption of class actions in Northern Europe was only recently followed by a similar wave in Western Europe, and the pattern is now extending itself in Central and Eastern Europe and in Asia. It is not clear that all these waves of adoption were responsive to particular policy challenges. However, these patterns might be explained by rational decision-making in which a country facing a problem for which a class action might offer a solution

---

7. *See generally* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974); MICHELE GRAZIADEI, *Comparative Law as the Study of Transplants and Receptions, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2006); Frank Dobbin, Beth Simmons & Geoffrey Garrett, *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 ANN. REV. OF SOC. 449 (2007). Although Watson is often cited as the first to propose the term "legal transplant," he objected to its use to describe the spread of legal concepts that spread gradually, rather than as a result of an abrupt decision.

8. Deborah Hensler, *Can Private Class Actions Enforce Marketplace Regulations? Do They? Should They?*, *in* COMPARATIVE LAW AND REGULATION: NATIONAL, INTERNATIONAL AND TRANSNATIONAL PERSPECTIVES (Francesca Bignami & David Waring eds., 2016) [hereinafter Hensler, *Enforce Marketplace Regulations*]. On the campaign by the U.S. Chamber of Commerce to forestall adoption of class actions outside the United States, *see* Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DEPAUL L. REV. 499 (2014) [hereinafter Hensler *Third-Party Financing*].

looks to its neighbors for an example of successful policy adoption and implementation. The rise of mass claims, which by their nature require a collective approach to resolution, is likely an example of the sort of challenge that inspires problem-solving efforts.[9] The regional spread of class actions might also be explained by competition, however; when the Netherlands adopted a creative approach to settling mass claims collectively and advertised itself as the preferred forum for such settlements, it led to discussions in the United Kingdom about assuring that its courts did not lose "business" to the Dutch.[10] Not as frequently discussed in the legal transplant literature is the role of legal education. The rise of LLM programs in American law schools targeting international students has inadvertently provided the opportunity for thousands of foreign legal practitioners to learn about the U.S. class action.[11] Promoting the adoption of a new high-profile procedure upon their return to their home jurisdictions may convey special status and lead to new professional opportunities for these (mostly young) practitioners.[12]

The role of mass claims in propelling the adoption of class actions should not be underestimated. In the United States, courts frequently manage mass claims by informal and formal aggregation (e.g. the federal multi-district litigation procedure authorized by 28 U.S.C. § 1407 and its state look-alikes)[13] rather than class actions, particularly in personal injury and property damage litigation that cannot meet the predominance requirement for certification of damage class actions under FED. R. CIV. P. 23(b)(3). Most other jurisdictions do not have formal procedures for aggregating individual claims (other than the class action), and the case management demands of both informal and formal claim aggregation are discomforting to judges.[14]

---

9. On the rise of mass claims, *see* Deborah Hensler, *Justice for the Masses? Aggregate Litigation & its Alternatives*, 143 DAEDULUS 73, 73–82 (2014) [hereinafter Hensler, *Justice for the Masses*], *see also* Deborah Hensler, *How Economic Globalisation is Helping to Construct a Private Transnational Legal Order*, *in* THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW (Sam Muller et al. eds., 2011).

10. Hensler, *Enforce Marketplace Regulations*, *supra* note 8, at 241.

11. *Id.* at 242.

12. For discussion of how diffusion of legal practices internationally may convey power and social status to practitioners, *see* Yves Dezalay & Bryant G. Garth, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1st ed. 1996).

13. Hensler, *Justice for the Masses*, *supra* note 9, at 73–82.

14. *See generally* Ianika N. Tzankova, *Case Management: The Stepchild of Mass Claim Dispute Resolution*, 19 UNIF. L. REV. 329 (2014). For a discussion of case management in U.S. courts, *see* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010).

Today, in most democratic industrialized countries when serious injuries or substantial financial losses give rise to mass claims, litigation ensues.[15] In most jurisdictions, class actions were adopted chiefly to facilitate resolving such claims.[16] However, facilitating meritorious claims that would *not* otherwise be litigated because the amounts at issue are too small has contributed to the adoption of class actions in some jurisdictions. Canada and Australia are two jurisdictions whose class action jurisprudence highlights access to justice concerns;[17] access to justice for small value consumer claims also helped propel the adoption of the European Principles on Collective Redress.[18] In contrast, opposition to the adoption of class action procedures in many jurisdictions is grounded on beliefs that providing such a procedure will encourage a "flood of frivolous litigation,"[19] often perceived as comprising small value claims.

Another possible objective of class actions, private enforcement of public regulations (the so-called "private attorney general" theory) is more contentious. The notion of using private litigation to supplement legal enforcement by government agencies is familiar to common law jurists and legal practitioners and to scholars trained in the economic analysis of law, which highlights the deterrence function of civil litigation.[20] But it is anathema to many in civil law jurisdictions that have a long tradition of reliance on public institutions to ensure legal compliance. In recognition of this, during years of European Union controversy over the adoption of class actions, representative collective procedures were christened "collective redress" mechanisms, and the

---

15. For a discussion of the cultural phenomena of mass claiming, *see* Byron Stier & Ianika Tzankova, *The Culture of Collective Litigation: A Comparative Analysis*, *in* CLASS ACTIONS IN CONTEXT, *supra* note 1.

16. *See e.g.,* Ianika Tzankova & Daan Lunsingh Scheurleer, *The Netherlands*, *in* THE GLOBALIZATION OF CLASS ACTIONS (Deborah R. Hensler, Christopher Hodges, & Magdalena Tulibacka eds., 2009); *see also* CLASS ACTIONS IN CONTEXT, *supra* note 1, at 391–93.

17. P. Dawson Nominees Pty. Ltd. v. Multiplex Ltd. [2007] 242 ALR 111 (Federal Court of Australia) (Austl.); Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 (Can.).

18. *European Commissions Principles on Collective Redress*, *supra* note 6.

19. John Beisner, Jessica Miller, & Gary Rubin, *Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM (2009), http://www.instituteforlegalreform.com/uploads/sites/1/thirdpartylitigationfinancing.pdf.

20. *See* CLASS ACTIONS IN CONTEXT, *supra* note 1, at 271–72 (briefly discussing deterrence theory as it applies to the private enforcement objective of class actions, including citations to key literature and court decisions). Although scholars and lobbyists argue over the appropriate boundary to set between public and private enforcement, qualitative case studies of litigation arising after mass injuries or losses occur indicate that responses are almost always a mix of public and private action. *Id.* at 259–78 (highlighting the interaction of public and private enforcement observed in qualitative case studies of litigation in multiple jurisdictions).

European Commission's Principles on Collective Redress caution against (but do not entirely prohibit) using private class actions for regulatory enforcement.[21]

III. VARIATIONS IN CLASS ACTION DESIGN

Not all class actions are created equal. The key features of class action design differ significantly, reflecting both the differences in policy objectives discussed above and differences in jurisdictions' legal history and culture. Moreover, the legal regimes in which class actions operate also differ in important respects. Together these differences in procedural features and legal regimes shape the implementation of class actions and their outcomes.

Four differentiating features of class actions have proved most important: substantive scope, rules on standing of class representatives, whether class members need to proactively join or proactively exclude themselves from the collective litigation ("opt-in" versus "opt-out") and availability of monetary remedies.

Logically, when authority to proceed in class form is trans-substantive or authorized for many different types of legal claims it is more likely that class actions will be filed in court. Alternatively, when the use of class actions is limited to a single area of law, the procedure will only be used for claims grounded on that law. Australia, Canada, and the United States are examples of jurisdictions with trans-substantive class action procedural rules; Israel's procedure is not formally trans-substantive but its use is authorized for a wide range of case types. Belgium, Chile, France, and Japan are examples of jurisdictions that have adopted class actions for consumer claims. England recently adopted a class action procedure for anti-competition (antitrust) claims. Taiwan authorizes class actions for shareholder claims.[22] There is some evidence that once a legislature (or the judiciary) authorizes a class action for one type of claim, the procedure may later be used for other types of claims. Israel's and France's current class action regimes reflect

---

21. *European Commissions Principles on Collective Redress*, *supra* note 6. The European Commission engaged in long years of controversy over the question of whether to adopt a directive mandating the adoption of a class action procedure by member states, during which the Commission (and lobbyists) produced multiple reports and tentative recommendations. Unable to reach consensus, in June 2013 the Commission issued a set of recommended principles for designing collective litigation mechanisms throughout the EU. *See id.*

22. Germany's group litigation procedure (the KapMuG), which is not a class action, is authorized for shareholder claims.

this sort of historical expansion.[23] The Netherlands' unique collective settlement procedure (the WCAM) was adopted to provide a mechanism for resolving product liability claims arising out of health injuries associated with the DES drug but was rapidly adopted for use in shareholder cases.[24]

Table 2

Key Design Features of Class Actions

	Facilitate Class Actions	**Restrict Class Actions**
Scope	Trans-substantive	One or a few areas of law
Standing	Representative Class Member	Authorized organizations or public officials
Becoming a Class Member	Opt-out	Opt-in
Remedies	Monetary damages as well as injunctive or declaratory relief	Injunctive or declaratory relief only

Procedures for determining whether it is appropriate for a substantively eligible complaint to proceed in class form differ among jurisdictions. Canada and the United States have formal certification procedures[25], which in the United States have become so strict in recent years that the certification process may turn into a mini-trial of the merits. Australia does not require that a judge certify a complaint before it can proceed in class form, but if a defendant challenges class treatment it will set off a judicial inquiry into whether the characteristics of the case —numerous plaintiffs, common issues, etc.—are such that class treatment is appropriate.[26] In civil law jurisdictions, perhaps because of

23. Deborah Hensler, *The Globalization of Class Actions: An Overview*, *in* THE GLOBALIZATION OF CLASS ACTIONS, *supra* note 16 (reporting features of different countries' class-action regimes) [hereinafter Hensler, *Overview*].

24. Deborah Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 311–13 (2011).

25. Jasminka Kalajdzic, W. A. Bogart & Ian Mathews, *Canada*, *in* THE GLOBALIZATION OF CLASS ACTIONS, *supra* note 16. In the United States, FED. R. CIV. P. 23 specifies the requirements for certifying federal class actions.

26. Vince Morabito, *Australia*, *in* THE GLOBALIZATION OF CLASS ACTIONS, *supra* note 16.

the recency of adoption of class action procedures, the rules for determining whether a case should proceed in class form seem sketchier.

All of the common-law jurisdictions that have adopted class actions to date permit class members (individuals or entities such as businesses) to offer themselves as representatives of the class, subject to a judge's determination that the representative's claims are typical of other class members and that they can adequately represent the class members' interests. In jurisdictions that require certification, adequacy of representation is frequently interpreted as referring to the availability of financial resources to prosecute the claim—a substantial issue when the class is suing a well-resourced domestic or multinational corporation—and the engagement of legal counsel with expertise in class litigation. However, a court's inquiry into adequacy may also raise the question of whether the class members' interests are sufficiently homogeneous that the proposed class representative can represent them without a conflict. In *Amchem Products Inc. v. Windsor* the U.S. Supreme Court ruled that a class of asbestos exposed victims were situated so differently that they could not be adequately represented by the proposed representative.[27] The holding seemed to sound the death knell for all personal injury class actions going forward, but by suggesting that creating separately represented "sub-classes" might solve the problem of adverse interests within a class, the court left a door open that some class actions have been able to march through.[28]

Civil law jurisdictions that have adopted class action procedures have generally limited standing to represent the class either to public officials or quasi-public agencies (the approach of Brazil, Denmark, and Taiwan) or to pre-existing associations or special purpose foundations (the approach of Belgium, France, the Netherlands, and Japan).[29] The theory behind these choices seems to be that class members represented by private lawyers are more likely to be susceptible to principal-agent conflicts, leading to settlements of claims that will advantage the representative plaintiff over the class or the class counsel over class members (or both). However, experience shows that public officials are susceptible to political pressures to bring or reject bringing class

27. Amchem Products Inc. v. Windsor, 521 U.S. 591, 625–28 (1997).

28. *See In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 421 (2016) (upholding class certification and approval of a settlement of NFL Players' personal injury litigation).

29. *See generally,* Hensler, *Overview*, *supra* note 23 (reporting features of different countries' class-action regimes). Chile is an example of a jurisdiction that confers standing on both a public agency and individual class members.

actions,[30] and that non-profit associations and special purpose foundations are subject to conflicts of interest as well.[31] In brief, agency problems are inherent in all forms of collective litigation.[32]

Common law and civil law jurisdictions also differ with regard to preference for "opt-out" versus "opt-in" class action procedures. Australia, Canada, Israel, and the United States all have opt-out procedures for civil damages class actions, while most of western and northern European jurisdictions have adopted opt-in procedures, and the European Commission's recommended principles for so-called collective redress mechanisms sternly admonish member states to eschew opt-out procedures.[33] Notwithstanding this advice, some civil law jurisdictions such as Spain—a relatively early adopter—and Lithuania and Poland—more recent adopters—have chosen the opt-out approach. The Netherlands' unique collective settlement mechanism (WCAM)—which is available only to claimants and defendants who have agreed to settle before approaching the court—is also an opt-out mechanism. The principled argument against opt-out class actions is that claimants run the risk of losing their right to bring a claim if they are unaware that they have been included in a certified class that has disposed of all class members' claims. Requirements to provide extensive notice, both on an individual and mass basis, are intended to mitigate this problem,[34] but as a practical matter there will always be a possibility that some class members are swept into an opt-out class action without realizing that this has occurred. Notwithstanding the importance of these normative and practical concerns, in reality opposition to opt-out class actions is driven

---

30. *See* Agustin Barroilhet, *Self-Interested Gatekeeping? Clashes Between Public and Private Enforcers in two Chilean Class Actions*, *in* CLASS ACTIONS IN CONTEXT, *supra* note 1; *see also* Kuo-Chang Huang, *Using Associations as a Vehicle for Class Action: The Case of Taiwan*, *in* CLASS ACTIONS IN CONTEXT, *supra* note 1.

31. Ianika Tzankova, *Everything You Wanted to Know about Dutch Foundations but Never Dared to Ask: A Checklist for Investors*, TILBURG LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES (Feb. 10, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730618. For examples of recent Dutch Foundations established to seek damages on behalf of investors, *see* BP INVESTOR CLAIMS FOUNDATION, https://bpinvestorfoundation.com/, *and* THE VOLKSWAGEN INVESTOR SETTLEMENT FOUNDATION, http://volkswageninvestorsettlement.com/governance/.
See also Ianika Tzankova, *Collective Redress in Vie d'Or: A Reflection on a European Cultural Phenomenon*, *in* CLASS ACTIONS IN CONTEXT, *supra* note 1, at 117–36

32. While agency issues may also arise in litigation between single represented parties, there is good reason to believe that the potential for conflict between class counsel and the class they represent is greater, because of the difficulty absent parties face in monitoring their representatives.

33. *See European Commissions Principles on Collective Redress, supra* note 6.

34. On the relationship of due process to notice in class actions in U.S. law, see Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

largely by interest group politics: sophisticated parties understand that opt-out classes are likely to be larger than opt-in classes because (as demonstrated by empirical studies[35]) individuals are less likely to proactively take steps to join an activity than to passively allow themselves to be included in the activity. As a result, opt-out class actions give the class (and class counsel) more leverage against defendants.

Finally, all jurisdictions that provide for collective litigation offer injunctive or declaratory relief as a remedy, but many restrict class members' ability to collect money damages.[36] The rationale for the restriction on money damages relates to the rationale for opt-in provisions: if money is at stake, class members arguably have a greater stake in pursuing an individual claim. The politics of the debate over remedies also matches the politics of the debate over opt-out versus opt-in: if those who have suffered a loss as a result of a defendant's legal violation can band together to pursue a remedy, they are more likely to be successful; hence, permission to proceed collectively increases the likelihood that defendants will be called to account for bad behavior.[37] Moreover, when there is an expectation of money damages, entrepreneurial lawyers, membership organizations, and special purpose foundations are all more likely to believe it is worthwhile to invest resources in pursuing legal claims.

Allowing money damages in class actions creates challenges when the class is large and when losses vary among class members. Even when common issues of law and fact justify collective treatment, allocating damages obtained at trial or in settlement to individual class

---

35. Health and education policy researchers have conducted systematic research on differences in participation rates using active (i.e. opt-in) versus passive (i.e. opt-out) consent. Generally, researchers find higher participation rates under passive consent conditions albeit little differences in the characteristics of the participant groups. *See, e.g.* Suzanne Spence et al. *Does the use of passive or active consent affect consent or completion rates, or dietary data quality? Repeat cross-sectional survey among school children aged 11–12 years*, 2015 BMJ OPEN (Jan. 13, 2015), http://bmjopen.bmj.com/content/5/1/e006457.info.

36. *See generally* Hensler, *Overview*, *supra* note 23.

37. This understanding produced the drive in the United States to include arbitration provisions prohibiting any form of collective proceeding in a wide range of consumer, employment, and other business contracts. In the past decade, the U.S. Supreme Court has upheld such contractual provisions. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (upholding the validity of an arbitration clause denying consumers' right to proceed in class form); *see also* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (holding that prohibiting class members from proceeding in a collective arbitration procedure when such a prohibition effectively denies plaintiffs the ability to vindicate their rights is not sufficient to void the arbitration provision). In Europe, including mandatory arbitration clauses in form contracts is considered a violation of the European Convention on Human Rights.

members may impose logistical challenges. Precise eligibility and loss determination rules must be designed and communicated to class members and systems devised for delivering payments. In some circumstances in the United States, plaintiff and defense counsel have collaborated on designing special purpose facilities for delivering compensation to mass tort claimants.[38]

However, in consumer class actions and other financial damage class actions, it appears more common for the parties or lawyers to contract with for-profit claims administration companies to administer class settlements. Civil law judges have little experience addressing the distribution of monetary compensation, which may contribute to wariness in civil law jurisdictions about permitting class actions for money damages. Ironically, the politics in Europe that have promoted the use of class actions for "collective redress" rather than regulatory enforcement may promote the development of effective approaches to delivering compensation to claimants in mass litigation, which might in turn encourage more jurisdictions to expand class action remedies to include money damages.

Taken together, broad authorization for class actions, rules granting standing to class members, opt-out provisions, and availability of money damages all make it more likely that class action procedures will actually be used in the jurisdictions that have adopted them, rather than remain simply "law on the books." At least as important as each of these features, however, is the legal financing regime within which the class action procedure must operate.[39] Class actions, like all complex lawsuits, are expensive. Without adequate resources, class representatives, whether individuals or associations (and even whether private or public), cannot effectively prosecute class actions and are therefore unlikely to even attempt to use the procedure.

United States legal financing rules are the most favorable to class litigation: lawyers are permitted to bring class actions on a speculative basis, meaning that they can invest their own resources and if successful

---

38. *See generally* Mark A. Peterson*, Giving Away Money: Comparative Comments on Claims Resolution Facilities*, 53 LAW & CONTEMP. PROB. 113, (1990) (describing these special purpose facilities); Deborah Hensler, *Assessing Claims Resolution Facilities: What We Need to Know*, 54 LAW & CONTEMP. PROB. 175 (1991); *Deborah Hensler, Alternative Courts? Litigation-Induced Claims Resolution Facilities*, 57 STAN. L. REV. 1429 (2005); Francis McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005).

39. For comparative information on fee regimes, *see* NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE (Mark Tuil & Louis Visscher eds., 2010) *and* THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE (Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka eds., 2010).

earn a premium on their investment. [40] Moreover, under the "American fee rule" that specifies that each side will bear its own litigation costs, neither the class nor class counsel faces the threat of adverse costs. Under equitable fee doctrine, if the class prevails all of the class members will pay a share of attorney fees and expenses proportionate to the damages they obtain, eliminating the potential for free-riding. Bringing a class action is still a high-stakes investment for lawyers, since if defendants prevail the class counsel will receive nothing to cover his or her time or expenses. Furthermore, the class counsel is not permitted to set his or her own fee, because in class actions, unlike ordinary civil litigation, the judge decides what the prevailing class counsel will receive.[41] Nonetheless, an experienced class action litigator can expect to achieve financial success by carefully selecting and prosecuting class actions.[42]

This is less true in other jurisdictions. In most Canadian provinces, class counsel may charge contingent fees (although judges provide some oversight of fee arrangements), but class members do face adverse costs. In a few Canadian provinces, including Ontario and Quebec, public funds have been established to take on the risk of adverse costs. The funds are replenished by charging successful class members a small fraction of the total award or settlement for the class.[43]

In Australia, lawyers are allowed to represent a class representative on a "no win, no pay" basis but are barred from charging fees based on the amount obtained for the class and the class representative faces adverse costs if the defendant prevails. Successful class counsel may receive an "upcharge" on their hourly fees but that is limited to twenty-five percent. The class representative is legally responsible for the full adverse costs if defendants prevail and class members other than the representative have no obligation to contribute to paying class counsel if the class prevails, creating an obvious "free-rider" problem.[44] In most

---

40. On funding of U.S. class actions generally, *see* THE GLOBALIZATION OF CLASS ACTIONS, *supra* note 16, at 22–23.

41. FED. R. CIV. P. 23(h). Depending on fee doctrine within the federal circuit, in federal courts class counsel fees will either be awarded on a percentage-of-fund basis or on a "lodestar" basis (hours x hourly rate x multiplier). Across all federal class action settlements in recent years, class counsel fees averaged about twenty-two percent of negotiated settlement funds, with the percent declining as the size of the fund increased. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. OF EMPIRICAL LEGAL STUD. 248 (2010) *and* Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. OF EMPIRICAL LEGAL STUD. 811 (2010).

42. Hensler, *Overview*, *supra* note 23, at 23–24.

43. *Id.* at 24.

44. *Id.*

civil law jurisdictions, there is no provision for "no win, no pay" legal representation of the class; class counsel must charge on an hourly basis (although in some jurisdictions "success fees" are permitted on top of hourly charges), the class representative faces adverse costs and there is no scheme for avoiding free-rider problems.[45]

As a result of legal financing regimes, the prospects for class actions in many jurisdictions seem grim, however friendly to claimants the class action procedures themselves may appear. The reality, however, is considerably more propitious: in response to restrictions on fees and to adverse cost rules, third-party funders have appeared, first in Australia and now in Europe, Canada, and even the United States (where such financing seems least necessary). These third-party funders take different forms and apply different protocols, but in class actions the general approach is for third-parties to contract with individual class members to pay lawyer fees (while the litigation is ongoing) and take on the risk of adverse costs.[46] In return, the class members agree to pay the funders a hefty share of any damages they obtain; as the funders are not themselves lawyers, they are not barred from charging such contingent fees and in most jurisdictions to date their charges have not been regulated. Third-party financers are themselves funded by hedge funds, high-value individuals, and others looking for attractive investment opportunities that are not correlated with trends in the capital markets. Third-party funding works well in opt-in class action regimes where class members must identify themselves in order to join the litigation and in regimes where standing is limited to pre-existing associations (for which third-party funding may operate like a line of credit) and special purpose foundations that are legally authorized to enter into such financing agreements. In formally opt-out regimes where class members have standing to represent the class, the practical effect of third-party funding is to convert the class action to an opt-in procedure.[47]

Another "work-around" that has emerged in jurisdictions with

---

45. *Id.* at 22–23.

46. In the United States, third-party funders have generally asserted they will not fund class actions, perhaps in an effort to insure their preferred commercial corporate clients that the funders are not a threat. *See* Hensler, *Third-Party Financing*, *supra* note 8, at 505. However, over time this negative perspective on funding class actions may erode.

47. In Australia, third-party funding was challenged on the basis that it turned what was intended as an opt-out regime into an opt-in regime. However, the high court upheld the practice on the grounds that it provided access to the court in situations where opt-out class actions were financially too risky. *Campbell's Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) HCA 41(Austl.); *Fostif Pty Ltd v. Campbell's Cash and Carry Pty Ltd* (2005) NSWCA 83(Austl.); *Multiplex Funds Management Limited Pty Ltd v. P. Dawson Nominees Pty Ltd* (2007) FCAFC 2000 (Austl.).

restrictive class action procedures or legal financing regimes—and also in some jurisdictions that forbid class actions altogether—is for a collection agent to offer to purchase the claims of individual claimants. Once claims are assigned to it, the agent can appear in court as a single plaintiff. Funding for entities that have adopted this litigation model is also being provided by third-party funders that invest in class actions.[48]

Other aspects of legal regimes also may hinder or hamper the use of class action procedures. The availability of damages beyond mere compensation—for example, punitive damages or disgorgement of profits or statutory damages that allow a multiplier of actual damages such as "treble damages" under United States anti-trust doctrine—increase the incentive to file class actions. The potential in the United States for a jury trial—however remote—may also increase the incentive to file a class action where the likelihood of a favorable jury verdict seems great.

IV. ALTERNATIVES TO CLASS ACTIONS: GROUP PROCEEDINGS AND ADMINISTRATIVE SCHEMES

In the United States mass claims that arise out of the same facts and law are usually collected and transferred to a single court and judge for pre-trial management purposes under the federal multi-district litigation statute (MDL).[49] Once the transferee judge has ruled on significant substantive motions, including motions to dismiss, motions for summary judgment, and motions for class certification, as well as admissibility of expert evidence and key documents, the litigation usually settles.[50] The

48. *See Online Platform Launched for European Customer Claims against Volksvagen*, (April 24, 2016), http://www.hausfeld.com/news/eu/online-platform-launched-for-european-customer-claims-against-volkswagen. Michael Hausfeld, a leading American class action lawyer, has successfully used this strategy for anti-competition (anti-trust) litigation in Europe. His firm is acting for those who assign their claims to the advertised collecting entity; funding to Hausfeld is provided by Burford Capital, a leading third-party litigation funder headquartered in New York.

49. 28 U.S.C. § 1407 (2012). Several states have adopted similar rules for consolidating cases filed in different courts but arising out of the same facts. These state rules are frequently referred to as "coordination rules" *See, e.g.*,

22 N.Y. Comp. Codes R. & Regs. Tit, 22 §202.69; Cal. Civ. Proc. Code §404; Tex. R. Jud. Admin. 13; Ill. Sup. Ct. R. 384. In New Jersey they are referred to as "multicounty litigation rules." N.J. Rules of Civil Practice, 4:38A.

50. *See, e.g.* Martin Redish & Julie Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process and the Dangers of Procedural Collectivism*, 95 B.U. L. Rev 109, 128–29 (2015). Under the provisions of 28 U.S.C. § 1407 and the U.S. Supreme Court's holding in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), cases that are not settled either individually or as a result of an aggregate resolution must be returned to the district courts in which they were filed for final resolution.

Group Litigation Order (GLO) in England plays a similar role in that jurisdiction.[51]

The United States MDL provides an alternative scheme for aggregating mass claims when class certification is deemed inappropriate. Since its inception in 1968, the number and scope of MDLs has grown,[52] perhaps in part in response to restrictions on certifying class actions for mass injury claims imposed by the U.S. Supreme Court. In Germany, steadfast opposition to the adoption of a class action procedure to address mass claims led to the adoption of the Capital Market Investors Model Proceeding" (Kapitalanlegermusterverfahrensgesetz, popularly known as the KapMuG).[53] Shareholders' lawsuits arising out of the same facts and law can be entered in a register in a single court. A single "model" case is then selected for the court to investigate and decide. As that case works its way through the judicial process, action in all other cases on the register is stayed and the limitation period is tolled. The liability decision in the model case binds all cases on the register but remedies must be pursued subsequently on an individual basis. Unlike the United States MDL and the English GLO, both of which were intended to streamline pre-trial preparation of similar cases, the German procedure focuses on deciding the model case, a process that under German's civil law encompasses multiple decision-making stages, all directed by the judge. (Under the KapMuG, the case may also move frequently between the trial and appellate courts as key trial court decisions are appealed to the higher court.) In practice, the MDL, GLO and KapMuG share the tactic of selecting one or a few cases for trial (called "bellwether cases"

---

51. CHRISTOPHER HODGES, MULTI-PARTY ACTIONS 29–46 (2001).

52. According to John Rabiej of the Duke Law School Center for Judicial Studies, "In 2014, there [were] 117,647 *non-asbestos cases* in MDLs representing 36% of the total U.S. pending civil caseload. Excluding prisoner and social security actions from the U.S. pending civil caseload, which typically (though not always) take little time of article III judges, the 117,647 non-asbestos cases in MDLs represent about *45% of the U.S. totals."* Letter from John Rabiej, Duke Law School Center for Judicial Studies, to Deborah Hensler, Stanford Law School (August 29, 2014) (emphasis in original) (on file with author). The proportion of pending cases that are part of a consolidated proceeding may somewhat overestimate the importance of MDL litigation since MDL litigation typically pends for a longer time than ordinary civil litigation. The rate of MDL denials has increased recently. Whether this portends a sea change in the judiciary's willingness to aggregate multi-district cases or is merely a random deviation remains to be seen. Amanda Bronstad, *Multidistrict Litigation Panels Increasing Denials Reflect Heightened Scrutiny*, NAT'L L.J. (July 18, 2016), http://www.nationallawjournal.com/id=1202762777589/Multidistrict-Litigation-Panels-Increasing-Denials-Reflect-Heightened-Scrutiny?slreturn=20160901165935.

53. For a description of the history and implementation of the KapMuG scheme, see Axel Halfmeier, *Litigation Without End? The Deutsche Telekom Case and the German Approach to Private Enforcement of Securities Law, in* CLASS ACTIONS IN CONTEXT, *supra* note 1, at 279–98.

in the United States) and using the outcomes in those trials either to determine or influence the outcomes in all other cases in the group.

An alternative to class actions and group proceedings in many jurisdictions is to create publicly or privately subsidized administrative compensation schemes for mass claims. Japan has a long tradition of establishing administrative compensation schemes for mass catastrophic injuries.[54] Several European countries have compensated asbestos disease victims through administrative schemes.[55] The United States also has a long tradition of establishing special administrative compensation funds for victims of disease and government mistreatment,[56] including coal miners suffering from black lung disease[57] and victims of radioactive weapons' testing.[58]

In some recent instances in Europe, corporations have funded administrative compensation schemes at the direction of regulatory authorities. For example, in 2015, the Belgian financial market regulator ordered financial institutions that had sold interest rate swaps to small and medium-sized enterprises (SMEs) that suffered financial losses as a result of these purchases to establish a program to compensate the SMEs "as a commercial gesture."[59] In the Netherlands, where the financial regulator lacks the authority to issue an order compelling financial institutions to establish such a compensation scheme, it instead recommended to the Ministry of Finance that a "committee of

54. *See, e.g.*, MINISTRY OF THE ENVIRONMENT: JAPAN, LESSONS LEARNED FROM MINAMATA DISEASE AND MERCURY (Sept. 2013), https://www.env.go.jp/chemi/tmms/pr-m/mat01/en_full.pdf; Eric Feldman, *Compensating the Victims of Japan's 3-11 Fukushima Disaster*, 16 ASIAN-PAC. L. & POL'Y J. 127 (2015); OECD NUCLEAR ENERGY AGENCY, JAPAN'S COMPENSATION SYSTEM FOR NUCLEAR DAMAGE AS RELATED TO THE TEPCO DAICHI NUCLEAR ACCIDENT (2012), https://www.oecd-nea.org/law/fukushima/7089-fukushima-compensation-system-pp.pdf.

55. Albert Azagra-Malo, *Asbestos Injuries Compensation Funds in France and Belgium*, SSRN (July 23, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371453.

56. *See, e.g.*, Michele L. Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 289 (2013).

57. Sandy Smith, *Dirty Little Secret: A Backlog of Miners' Claims Leaves Miners Waiting for Help*, EHS TODAY (April 14, 2015), http://ehstoday.com/msha/dirty-little-secret-backlog-black-lung-claims-leaves-miners-waiting-help.

58. Jessica Boehm, *64 Years After Nuclear Tests, Some Downwinders Still Wait for Compensation*, CRONKITE NEWS (January 28, 2015), http://cronkitenewsonline.com/2015/01/64-years-after-nuclear-tests-some-downwinders-still-wait-for-compensation/.

59. Correspondence with Prof. Stefaan Voet, Katholick University of Leuven (Belgium), October 4, 2016 (on file with author). Interest-rate swaps are tradeable derivative instruments that allow borrowers and lenders to exchange fixed-rate interest obligations for floating interest rate obligations. Depending on fluctuations in interest rates either the borrower or lender may benefit from the exchange ("swap"). Like most financial instruments traded on the market, these derivatives carry substantial risks. When small and medium-sized business enterprises got into trouble as a result of purchasing interest rate swaps from financial institutions, questions were raised in Belgium, the Netherlands and the U.K. about whether the transactions violated legal rules.

independent experts" be established to design a scheme and order the financial institutions to implement it.[60] In another example, the European Commission accepted the offer of Deutsche Bahn (DB)—the German national railway company—to settle a competition (anti-trust) action brought by the Commission by changing DB's pricing structure and reducing prices on railroads that were negatively affected by DB's allegedly anti-competitive behavior. Commentators have referred to this as an example of "regulatory redress"—i.e. compensation ordered by public regulators in lieu of or in addition to other sanctions.[61]

Although promoted as more efficient (and perhaps fairer) approaches to delivering compensation to victims of external forces and events, a consistent pattern of complaints across administrative programs established to assist different sorts of victims in different countries suggests that in practice such programs often struggle to serve the purposes for which they are intended. Often the number of eligible recipients who come forward as well as their needs exceed estimates (frequently developed in the absence of comprehensive data on how many people were injured and to what degree). Programs subsidized by government are frequently underfunded and funding problems can increase as programs drag on beyond the expected date of termination. Programs initially funded by private entities may appeal for government assistance when the initial appropriation to support the fund runs out.[62]

The widely-perceived success of the 9/11 compensation program,

---

60. Femke de Vries & Bonne van Hattam, Address at the Groningen Centre for European Financial Services Law conference: *Financial Supervision and Civil Liability in Mass Damage Cases: The Case of Interest Rate Swaps in the Netherlands and the U.K.*, (September 30, 2016).

61. Deutsche Bahn I, case no. 39678, http://ec.europa.eu/competition/elojade/isef/index.cfm. *See also* European Commission, *Press Release. Antitrust: Commission accepts legally binding commitments from Deutsche Bahn concerning pricing of traction current in Germany* (December 18, 2013), http://europa.eu/rapid/press-release_IP-13-1289_en.htm. The price reduction was intended to compensate the other railroad companies for elevated prices during the period before DB's new policies would significantly affect market pricing, *not* for the fact that they had paid higher prices in the past because of DB's anti-competitive practices.

62. For example, in 1970, Grunenthal, the German manufacturer of Contergan, a drug marketed to pregnant women as a remedy for "morning sickness" that was soon linked with birth defects, created a special purpose foundation to provide compensation to victims. The foundation was initially funded with a grant from Grunenthal of 100 million Deutsche Marks, plus a contribution by the German government of 300 million Deutsche Marks. As victims continued to come forward over the years, the foundation's funds were depleted and the government was pressured to step in to provide ongoing funding. In response to political pressure from victims in the past few years, Grunenthal agreed to contribute another 50 million Euros. Contergan was known as Thalidomide in the United States, where the U.S. Food and Drug Agency refused approval to market and distribute it. I am grateful to Prof. Axel Halfmeier of Leuphana University (Germany) for providing the information on the German Contergan compensation scheme (correspondence on file with author).

established and subsidized by the U.S. federal government to compensate families of the victims of the terrorist attacks, seems to have renewed interest in administrative compensation schemes as an alternative to litigation for mass claims. Kenneth Feinberg, the Special Master who designed and managed the 9/11 compensation program, has since been called upon by corporate defendants to design programs offering compensation to victims of the British Petroleum Oil Spill in the Gulf of Mexico and the General Motors ignition switch defect.[63] The attractiveness of this new breed of no-fault systems in which corporations without conceding legal liability offer compensation to victims in an effort to limit the corporation's ultimate financial responsibility as well as reputational loss appears to be growing. When news of Volkswagen's scheme to fool emissions control equipment into thinking their diesel-powered cars complied with air quality standards burst on the scene, Volkswagen of America announced that it had hired Feinberg to manage a compensation facility along the lines of the BP claims facility that he administered for the British petroleum corporation.[64] No doubt reflecting the fact that such schemes are only attractive to corporations when the threat of private litigation or public enforcement is real, Volkswagen's German parent company asserted that it has no plans to offer German consumers similar access to compensation.

A third alternative to class actions that has been promoted in Europe in an effort to divert political attention from litigation solutions is alternative dispute resolution outside court systems. Although the European Commission to date has been unable to reach consensus on a mandate for member states to adopt class action procedures, in May 2013 the Commission issued a mandate directing member states to establish by July 2015 alternative dispute resolution procedures for resolving

63. Ross Barkan, *Meet Ken Feinberg: The Master of Disasters*, NEW YORK OBSERVER (March 9, 2016), http://observer.com/2016/03/meet-ken-feinberg-the-master-of-disasters/. Feinberg also administered government-sponsored programs for victims of the Boston Marathon bombings and victims of mass shootings in schools and entertainment venues.

64. Chris Woodyard, *Volkswagen Hires Kenneth Feinberg to Handle Diesel Cases*, USA TODAY (December 18, 2015), http://www.usatoday.com/story/money/cars/2015/12/17/volkswagen-kenneth-feinberg/77495258/; Martine Powers, *Ken Feinberg on VW: I will Have Ultimate Authority*, POLITICO (January 25, 2016), http://www.politico.com/tipsheets/morning-transportation/2016/01/kenneth-feinberg-on-vw-i-will-have-ultimate-authority-more-takata-inflators-deemed-defective-dmv-survives-the-snowpocalypse-212326; *Ken Feinberg on the Volkswagen Compensation Fund Process,* BLOOMBERG NEWS (February 12, 2016), http://www.bloomberg.com/news/videos/2016-02-12/ken-feinberg-on-the-volkswagen-compensation-fund-process.

consumer disputes outside their court systems.[65] The lengthy directive (which was accompanied by a directive to establish on-line dispute resolution mechanisms for cross-border online purchases) spelled out in great detail the issues member states need to consider in designing procedures to assure their fairness to consumers and traders.[66] Among the advocates for the consumer ADR directive were corporate lobbyists who hoped that the mandate would impede the development of a European Commission directive for member states to adopt class action procedures for economic disputes.

Studies published in the run-up to the adoption of the consumer ADR directive uncovered a host of existing out-of-court dispute resolution mechanisms in European countries, operated by private businesses, trade associations, and public entities.[67] As is true also in the United States, assembling data to assess the performance of these mechanisms was difficult, perhaps contributing to the provisions in the European Commission's consumer ADR directive mandating the collection and publication of performance statistics.[68] Missing from the published research is any discussion of the existing mechanisms' ability to deal with mass claims that arise within relatively short time periods (as in the Volkswagen debacle). Anecdotal evidence from the United States suggests that like courts,[69] out-of-court dispute resolution mechanisms struggle to dispose of such claims expeditiously, for much the same reasons as challenge court dispute resolution systems.

---

65. 2013 O.J. (L 165) 32013L0011, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011

66. Interestingly, in the light of the U.S. Supreme Court jurisprudence upholding mandatory pre-dispute arbitration clauses in adhesive contracts—including clauses that bar claimants from proceeding collectively in any forum—the European Commission's directive specifies that an "agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialized and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute." Directive 2013/11/EU, of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165) 63, 74–75.

67. CHRISTOPHER HODGES ET. AL., CONSUMER ADR IN EUROPE (2012).

68. 2013 O.J. (L 165) at 77.

69. *See, e.g.*, DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 339–98 (2000) (describing the inability of corporate complaint resolution mechanisms to address customers' complaints about property damage due to faulty construction products when the mechanisms received massive numbers of such complaints).

V. CONSEQUENCES

Given the sharp and protracted controversy that has accompanied the introduction of class actions in virtually all jurisdictions,[70] and the important concerns that have been raised about potential uses and abuses of collective litigation, one might expect that jurisdictions would be carefully tallying the frequency and circumstances in which class actions are filed and collecting systematic information about class action outcomes.[71] Alas, that is not the case. To my knowledge, no jurisdiction publishes official statistics on the number of complaints filed in which plaintiffs seek to proceed collectively. No one knows how many class actions are filed annually in federal or state courts in the United States, much less the characteristics or outcomes of these cases.[72] Professors Vince Morabito and Alon Klement have compiled comprehensive databases on the number class filings in Australia[73] and Israel[74]

---

70. Stefaan Voet, Deborah Hensler & Vince Morabito, *Class Actions Across the Atlantic: From Guarded Interest to European Policy*, *in process* (on file with author).

71. One might imagine a jurisdiction deciding to adopt a class action on a "trial" basis and commission research to study objective and subjective outcomes. This type of research was commissioned by state and federal courts in the United States to assess the consequences of alternative dispute resolution procedures, and by Congress in 1990 to assess the outcomes of the Civil Justice Reform Act of 1990 (a package of civil procedure reforms intended to expedite civil litigation and reduce its expense). For a review of empirical research on alternative dispute resolution programs, see Deborah Hensler, *Our Courts, Ourselves: How ADR is Transforming the U.S. Court System*, 108 PENN STATE L. REV. 165 (2003). On research commissioned by Congress to evaluate the consequences of the Civil Justice Reform Act, see JAMES KAKALIK ET AL., AN EVALUATION OF CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1990). However, investing in serious research on civil procedure reform seems to have gone out of favor in the United States.

72. On the lack of empirical data on U.S. class actions and reasons for this lack, see Deborah Hensler, *Happy 50th Anniversary, Rule 23! Shouldn't We Know You Better After All This Time?*, U. PENN. L. REV. (forthcoming).

73. Vince Morabito, *An Empirical Study Of Australia's Class Action Regimes, First Report: Class Action Facts And Figures*, (Dec. 2009), http://globalclassactions.stanford.edu/sites/default/files/documents/Australia_Empirical_Morabito_2009_Dec.pdf; Vince Morabito, *An Empirical Study Of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions And Class Representatives*, (Sept. 2010), http://globalclassactions.stanford.edu/sites/default/files/documents/Vince%20Morabito%202nd%20Report.pdf [hereinafter Morabito 2010]; Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Third Report: Class Action Facts and Figures—Five Years Later* (Nov. 14, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2523275 [hereinafter Morabito 2014]; Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia*, (Aug. 3, 2016).

74. Alon Klement et al., *Class Actions in Israel—An Empirical Perspective*, (2014), http://elyon1.court.gov.il/heb/Research%20Division/doc%5C25122014.pdf [hereinafter Klement 2014]. *See also* Alon Klement & Keren Weinshall, *Cost Benefit Analysis of Class Actions: An Israeli Perspective*, 172 J. OF INSTITUTIONAL AND THEORETICAL ECON. 75 (2016).

respectively, which permit observation of trends in filings and provide some additional data on the characteristics of their cases and outcomes. Professors Theodore Eisenberg and Geoffrey Miller[75] and Brian Fitzpatrick[76] have compiled comprehensive databases on federal class action settlements and attorney fee awards that permit analysis of the relationship between negotiated settlement amounts and fee awards and differences in settlements and fees across different case types. Several private entities monitor filings of shareholder (securities) class actions in Australia, Canada and the United States. But some private databases are unrepresentative or incomplete and because the data do not have a government imprimatur they are subject to challenge, particularly when relied on in heated debates over adopting or amending collective procedures.

Morabito found that from 1992 (when Australia's federal class action statute became effective) to 2014, 329 class actions were filed, an average of fifteen per year. Annual filings diminished in the second half of this period, by comparison to the earlier period, and the composition of the class action caseload shifted, so that in the more recent period shareholder suits predominated. The shift to shareholder suits likely reflects the increasing importance of third-party funding in Australia's class action practice. Class action filings appear to represent less than 1 percent of all federal civil filings in Australia.[77]

Klement found that from 2008 (when Israel's comprehensive class action statute became effective) to 2012 (the most recent year for which he compiled data), annual class action filings rose steadily, peaking at 820. A total of 2,004 class action lawsuits were filed from 2007–2012. Consumer cases accounted for about three-quarters of the Israeli class action caseload.[78]

Surprisingly, the per capita rate of class action filings appeared higher in Israel than in the United States.[79] A decade ago, I estimated the number of class actions filed in the federal and state courts in the United

---

75. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. OF EMPIRICAL LEGAL STUD. 248 (2010).

76. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. OF EMPIRICAL LEGAL STUD. 811 (2010).

77. Hensler, *Enforce Marketplace Regulations*, *supra* note 8, at 251, 253 (summarizing Morabito 2010 and Morabito 2014, *supra* note 59). Contrary to claims by the U.S. Chamber of Commerce, there is no evidence that third-party funding has increased the frequency of ordinary or class action lawsuits. Hensler, *Third-Party Financing*, *supra* note 8, at 499, 524.

78. Hensler, *Enforce Marketplace Regulations*, *supra* note 8, at 252–53 (summarizing Klement 2014, *supra* note 60).

79. *Id.* at 252.

States by piecing together incomplete data; according to that estimate, about 6,500 class action complaints were then being filed, about one percent of the total civil damage caseload in state and federal courts.[80]

Data from civil law jurisdictions regarding cases filed under their more recently enacted class action and group proceedings statutes are sparse. Tzankova and associates report that there have been between 300 and 400 cases filed under the Netherland's collective litigation statute (which does not provide monetary remedies) since its inception in 1995, and 9 petitions for approval of collective settlements negotiated under its collective settlement statute (WCAM) (which does provide money damages) since it was enacted in 2005.[81] Halfmeier reports that there have been about twenty five cases filed using the German KapMuG procedure since it was adopted in 2005, most of which are still in process.[82]

Taken together these data suggest that in common law jurisdictions class actions are used sparingly (relative to the size of national caseloads of civil damage litigation) and tend to rise and fall in response to broader economic trends, as well as with precedential decisions. There is no evidence of class actions overwhelming any country's civil justice system. The small numbers of class actions and other collective proceedings filed in civil law jurisdictions likely reflect the combined effects of recent adoption and financial disincentives to bring such cases. As time goes on, those jurisdictions might or might not experience a rising tide of collective lawsuits.

Mere numbers of class actions filed by jurisdiction do not of course suffice to evaluate the merits and demerits of collective litigation, nor whether some forms of collective procedure are more effective at delivering compensation, produce fairer outcomes for claimants and

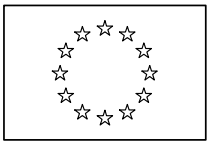
---

80. *Id.* (summarizing Deborah Hensler, *Using Class Actions to Enforce Consumer Law*, *in* DEBORAH HENSLER, HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW, (Geraint Howells et. al. eds., 2010). The appendix to Hensler, *Third-Party Financing*, *supra* note 8, explains how I constructed this estimate. Recent research suggests that only a fraction of U.S. class action filings in the United States are ever certified as class actions, indicating that the number of cases that are disposed of in class form is far smaller than the total number of class complaints filed. Reviewing data for different types of caseloads, I found certification rates ranging from about thirteen percent for class complaints arising from tort and contract law to fifty percent for securities class action complaints. Hensler, *Enforce Marketplace Regulations*, *supra* note 8, Table 4,. I have not been able to find comprehensive data on Canadian class actions either in the federal or provincial systems.

81. Correspondence with Prof. Ianika Tzankova, Tilburg University (Netherlands), October 2016 (on file with author).

82. Correspondence with Prof. Axel Halfmeier, Leuphana University (Germany) October 2016 (on file with author).

defendants or—in jurisdictions that perceive private litigation as properly supplementing regulatory enforcement—contribute positively to regulating the behavior of market actors. The globalization of class actions has produced a "natural experiment" of the type that law and economic scholars frequently rely on to assess the outcomes of alternative legal policies. Unfortunately, we have yet to see such research on the consequences of adopting class action procedures either here in the United States or in other parts of the world.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2.4.2008
COM(2008) 165 final

WHITE PAPER on

Damages actions for breach of the EC antitrust rules

{SEC(2008) 404}
{SEC(2008) 405}
{SEC(2008) 406}

WHITE PAPER on

Damages actions for breach of the EC antitrust rules

1. PURPOSE AND SCOPE OF THE WHITE PAPER

1.1. Why a White Paper on damages actions for breaches of the EC antitrust rules?

Any citizen or business who suffers harm as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) must be able to claim reparation from the party who caused the damage. This **right of victims to compensation** is guaranteed by **Community law**, as the European Court of Justice recalled in 2001 and 2006.[1]

Despite the requirement to establish an effective legal framework turning exercising the right to damages into a realistic possibility, and although there have recently been some signs of improvement in certain Member States, **to date in practice victims of EC antitrust infringements only rarely obtain reparation** of the harm suffered. The amount of compensation that these victims are forgoing is in the range of several billion euros a year.[2]

In its 2005 Green Paper, the Commission concluded that this failure is largely due to **various legal and procedural hurdles** in the Member States' rules governing actions for antitrust damages before national courts. Indeed, such antitrust damages cases display a number of particular characteristics that are often insufficiently addressed by traditional rules on civil liability and procedure. This gives rise to a great deal of **legal uncertainty**.[3] These particularities include the very complex factual and economic analysis required, the frequent inaccessibility and concealment of crucial evidence in the hands of defendants and the often unfavourable risk/reward balance for claimants.

The **current ineffectiveness of antitrust damages actions** is best addressed by a combination of measures at both Community and national levels, in order to achieve effective minimum protection of the victims' right to damages under Articles 81 and 82 in every Member State and a more level playing field and greater legal certainty across the EU.

The European Parliament[4] concurred with the findings in the Green Paper, as did other stakeholders, and called upon the Commission to prepare a White Paper with detailed proposals to address the obstacles to effective antitrust damages actions.

1.2. Objectives, guiding principles and scope of the White Paper

This White Paper considers and puts forward proposals for policy choices and specific measures that would ensure, more than is the case today, that **all victims** of infringements of

---

1 Case C-453/99, *Courage and Crehan,* [2001] ECR I-6297, and Joined Cases C-295−298/04, *Manfredi*, [2006] ECR I-6619.

2 See section 2.2 of the Impact Assessment Report (IAR).

3 See *ibid*., section 2.3.

4 Resolution of 25 April 2007 (2006/2207(INI)).

EC competition law **have access to effective redress mechanisms so that they can be fully compensated** for the harm they suffered.

This White Paper is to be read in conjunction with two Commission staff working documents: (a) a Commission staff working paper on EC antitrust damages actions ("the SWP") which explains in greater detail the considerations underlying the White Paper and also provides a concise overview of the already existing *acquis communautaire*; and (b) an Impact Assessment Report (the "IAR") analysing the potential benefits and costs of various policy options, and an executive summary of this report.

The **primary objective** of this White Paper is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. **Full compensation** is, therefore, the first and foremost guiding principle.

More effective compensation mechanisms mean that the costs of antitrust infringements would be borne by the infringers, and not by the victims and law-abiding businesses. Effective remedies for private parties also increase the likelihood that a greater number of illegal restrictions of competition will be detected and that the infringers will be held liable.[5] Improving compensatory justice would therefore **inherently** also produce beneficial effects in terms of **deterrence** of future infringements and greater compliance with EC antitrust rules. Safeguarding undistorted competition is an integral part of the internal market and important for implementing the Lisbon strategy. A competition culture contributes to better allocation of resources, greater economic efficiency, increased innovation and lower prices.

The Commission followed the further guiding principle that the legal framework for more effective antitrust damages actions should be based on a genuinely European approach. The policy choices proposed in this White Paper therefore consist of **balanced measures** that are rooted in **European legal culture** and **traditions**.

Another important guiding principle of the Commission's policy is to **preserve strong public enforcement** of Articles 81 and 82 by the Commission and the competition authorities of the Member States. Accordingly, the measures put forward in this White Paper are designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement.

In view of the foregoing and in line with the requirement set out by the Court of Justice that *any* victim of antitrust infringements must be able to exercise his right to compensation effectively, the issues addressed in the White Paper concern, in principle, **all categories of victim**, **all types of breach** of Articles 81 and 82 and **all sectors of the economy**. The Commission also considers it appropriate that the policy should cover both actions for damages which do, and actions which do not, rely on a prior finding of an infringement by a competition authority.

[5] See the IAR, section 2.1.

2. THE PROPOSED MEASURES AND POLICY CHOICES

2.1. Standing: indirect purchasers and collective redress

In the context of legal standing to bring an action, the Commission welcomes the confirmation by the Court of Justice that **"any individual"** who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts.[6] This principle also applies to **indirect purchasers**, i.e. purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered considerable harm because an illegal overcharge was passed on to them along the distribution chain.

With respect to **collective redress**, the Commission considers that there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements. Individual consumers, but also small businesses, especially those who have suffered **scattered and relatively low-value damage**, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. As a result, many of these victims currently **remain uncompensated**. At the rare occasions where a multitude of individual actions are brought in relation to the same infringement, **procedural inefficiencies** arise, for claimants, defendants and the judicial system alike.

The Commission therefore suggests[7] a combination of two complementary mechanisms of collective redress to address effectively those issues in the field of antitrust:

- **representative actions**, which are brought **by qualified entities**, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims. These entities are either (i) officially designated in advance or (ii) certified on an *ad hoc* basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members; and

- **opt-in collective actions**, in which victims **expressly decide** to combine their individual claims for harm they suffered into one single action.

Considering that qualified entities will not be able or willing to pursue every claim, it is necessary that these two types of action **complement** each other to ensure effective collective redress for victims of antitrust infringements. In addition, it is important that victims are not deprived of their right to bring an individual action for damages if they so wish. However, safeguards should be put in place to avoid that the same harm is compensated more than once.

These suggestions on damages actions in the field of antitrust are part of the Commission's wider initiative to strengthen collective redress mechanisms in the EU and may develop further within this context.

2.2. Access to evidence: disclosure *inter partes*

Competition cases are particularly fact-intensive. Much of the **key evidence** necessary for proving a case for antitrust damages is often **concealed** and, being **held by the defendant** or by third parties, is usually not known in sufficient detail to the claimant.

---

6 *Manfredi* (see footnote 1), point 61.

7 For the underlying reasons see Chapter 2 of the SWP.

Whilst it is essential to overcome this structural **information asymmetry** and to improve victims' access to relevant evidence, it is also important to **avoid the negative effects** of **overly broad** and burdensome disclosure obligations, including the **risk of abuses**.

The Commission therefore suggests that across the EU a **minimum level of disclosure *inter partes*** for EC antitrust damages cases should be ensured. Building on the approach in the Intellectual Property Directive (Directive 2004/48/EC), access to evidence should be based on **fact-pleading** and **strict judicial control** of the plausibility of the claim and the proportionality of the disclosure request. The Commission therefore suggests[8] that:

- national courts should, under **specific conditions**, have the power to order parties to proceedings or third parties to **disclose precise categories of relevant evidence**;

- **conditions** for a disclosure order **should include** that the claimant has:

  - **presented all the facts** and **means of evidence** that are **reasonably available** to him, provided that these show **plausible grounds** to suspect that he suffered harm as a result of an infringement of competition rules by the defendant;

  - shown to the satisfaction of the court that he is **unable**, applying all efforts that can reasonably be expected, **otherwise to produce the requested evidence**;

  - specified sufficiently **precise categories** of evidence to be disclosed; and

  - satisfied the court that the envisaged disclosure measure is both **relevant** to the case and **necessary** and **proportionate**;

- adequate protection should be given to corporate statements by leniency applicants and to the investigations of competition authorities;

- to prevent **destruction of relevant evidence** or **refusal** to comply with a disclosure order, courts should have the power to impose sufficiently **deterrent sanctions**, including the option to draw adverse inferences in the civil proceedings for damages.

2.3. Binding effect of NCA decisions

Whenever the **European Commission** finds a breach of Article 81 or 82 of the EC Treaty, victims of the infringement can, by virtue of established case law and Article 16(1) of Regulation 1/2003, rely on this decision as binding proof in civil proceedings for damages. For **decisions** by national competition authorities (**NCAs**) finding a breach of Article 81 or 82, similar rules currently exist in only some Member States.

The Commission sees no reason why a final decision[9] on Article 81 or 82 taken by an NCA in the European Competition Network (ECN), and a final judgment by a review court upholding

---

[8] For the underlying reasons see Chapter 3 of the SWP.

[9] In all Member States, NCA decisions are subject to judicial review. NCA decisions are considered *final* when they can no longer be reviewed, i.e. decisions that were not appealed within the applicable time limits and thus accepted by their addressees, and those that were confirmed by the competent review courts.

the NCA decision or itself finding an infringement, should not be accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damages cases.

A rule to this effect would ensure a more **consistent application** of Articles 81 and 82 by different national bodies and increase **legal certainty**. It would also significantly increase the **effectiveness** and **procedural efficiency** of actions for antitrust damages: if defendants can call into question their own breach of Article 81 or 82 established in a decision by an NCA and, possibly, confirmed by a review court, the courts seized with an action for damages are required to re-examine the facts and legal issues already investigated and assessed by a specialised public authority (and a review court). Such duplication of factual and legal analysis leads to considerable extra costs, duration and imponderability for the victim's action for damages.

The Commission therefore suggests[10] the following rule:

- national courts that have to rule in actions for damages on practices under Article 81 or 82 on which **an NCA** in the ECN has already given a **final decision** finding an infringement of those articles, or on which **a review court** has given a **final judgment** upholding the NCA decision or itself finding an infringement, **cannot take decisions running counter** to any such decision or ruling.

This obligation should apply without prejudice to the right, and possible obligation, of national courts to seek clarification on the interpretation of Article 81 or 82 under Article 234 of the EC Treaty.

The rule set out above confers binding effect only on decisions that are final, i.e. where the defendant has **exhausted all appeal avenues**, and relates only to the **same practices and same undertaking(s)** for which the NCA or the review court found an infringement.

2.4. Fault requirement

If the breach of Article 81 or 82 **has been proven**, Member States take diverse approaches concerning the requirement of **fault** to obtain damages.

Some Member States require no fault at all as a condition for an antitrust damages claim, or irrebuttably presume the existence of fault once an infringement has been proven. The Commission sees no policy grounds against such an approach.

As regards the other Member States, the Court's case law on the conditions of civil liability for breaches of directly applicable Treaty rules, such as Articles 81 and 82, and the principle of effectiveness suggest that any fault requirements under national law would have to be limited. The Commission sees no reasons to relieve infringers from liability on grounds of absence of fault other than in cases where the infringer made an excusable error.

The Commission therefore suggests[11] a measure to make it clear, for Member States that require fault to be proven, that:

---

[10] For the underlying reasons see Chapter 4 of the SWP.

[11] For the underlying reasons see Chapter 5 of the SWP.

- once the victim has **shown a breach of Article 81 or 82**, the **infringer should be liable for damages caused unless he demonstrates** that the infringement was the result of a genuinely **excusable error**;

- an error would be **excusable** if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.

2.5. Damages

The Commission welcomes the confirmation by the Court of Justice of the **types of harm** for which victims of antitrust infringements should be able to obtain compensation.[12] The Court emphasised that victims must, as a minimum, receive **full compensation** of the **real value of the loss suffered**. The entitlement to full compensation therefore extends not only to the **actual loss** due to an anti-competitive price increase, but also to the **loss of profit** as a result of any reduction in sales and encompasses a **right to interest**.

For reasons of legal certainty and to raise awareness amongst potential infringers and victims, the Commission suggests **codifying** in a Community legislative instrument the **current *acquis communautaire*** on the scope of damages that victims of antitrust infringements can recover.

Once the scope of damages is clear, the ***quantum*** of these damages must be **calculated**. This calculation, implying a comparison with the economic situation of the victim in the **hypothetical scenario** of a competitive market, is often a very cumbersome exercise. It can become **excessively difficult** or even practically impossible, if the idea that the exact amount of the harm suffered must always be precisely calculated is strictly applied. Moreover, far-reaching calculation requirements can be disproportionate to the amount of damage suffered.

To **facilitate** the **calculation of damages**, the Commission therefore intends:[13]

- to draw up a framework with pragmatic, non-binding guidance for **quantification** of damages in antitrust cases, e.g. by means of **approximate methods of calculation** or **simplified rules on estimating** the loss.

2.6. Passing-on overcharges

If the direct customer of the infringer fully or partially passed on the illegal overcharge to his own customers (the indirect purchasers), several legal issues can arise. At present, these create a great degree of legal uncertainty and difficulties in antitrust damages actions.

Problems arise, on the one hand, if the **infringer** invokes the passing-on of overcharges **as a defence** against a damages claimant, arguing that the claimant suffered no loss because he passed on the price increase to his customers.

The Commission recalls the Court's emphasis on the **compensatory principle** and its premise that **damages** should be **available to any injured person** who can show a sufficient causal link with the infringement. Against this background, infringers should be allowed to invoke the possibility that the overcharge might have been passed on. Indeed, to deny this defence

---

12 *Manfredi* (see footnote 1), points 95 and 97.

13 For the underlying reasons see Chapter 6 of the SWP.

could result in **unjust enrichment** of purchasers who passed on the overcharge and in undue **multiple compensation** for the illegal overcharge by the defendant. The Commission therefore suggests[14] that:

- **defendants** should be **entitled to invoke the passing-on defence** against a claim for compensation of the overcharge. The standard of proof for this defence should be not lower than the standard imposed on the claimant to prove the damage.

Difficulties also arise, on the other hand, if an **indirect purchaser** invokes the passing-on of overcharges as a basis **to show the harm suffered**. Purchasers at, or near the end of the distribution chain are often those most harmed by antitrust infringements, but given their **distance from the infringement** they find it particularly difficult to produce sufficient proof of the existence and extent of passing-on of the illegal overcharge along the distribution chain. If such claimants are unable to produce this proof, they will **not be compensated** and the infringer, who may have successfully used the passing-on defence against another claimant upstream, would retain an **unjust enrichment**.

To avoid such scenario, the Commission therefore proposes to lighten the victim's burden and suggests[15] that:

- indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

In the case of joint, parallel or consecutive actions brought by purchasers at different points in the distribution chain, national courts are encouraged to make full use of all mechanisms at their disposal under national, Community and international law in order to avoid under- and over-compensation of the harm caused by an infringement of competition law.

2.7. Limitation periods

While limitation periods play an important role in providing **legal certainty**, they can also be a considerable **obstacle** to recovery of damages, both in stand-alone and follow-on cases.

As regards the **commencement of limitation periods**, victims can face practical difficulties in the event of a continuous or repeated infringement or when they cannot reasonably have been aware of the infringement. The latter occurs frequently in relation to the most serious and harmful competition law infringements, such as cartels, which often remain covert both during and after their lifespan.

The Commission therefore suggests[16] that the limitation period should **not start to run**:

- in the case of a **continuous or repeated infringement**, before the day on which the **infringement ceases**;

- before the victim of the infringement can **reasonably** be expected to **have knowledge of the infringement** and **of the harm** it caused him.

---

14 For the underlying reasons see Chapter 7 of the SWP.

15 For the underlying reasons see *ibid*.

16 For the underlying reasons see Chapter 8 of the SWP.

To keep open the possibility of follow-on actions, measures should be taken to avoid limitation periods expiring while **public enforcement** of the competition rules by competition authorities (and review courts) is **still ongoing**. To this end, the Commission prefers the option of a **new limitation period,** which starts once a competition authority or a review court adopts an infringement decision, over the option of **suspending the limitation period** during the public proceedings.

In the latter case, claimants (and defendants) will sometimes find it **difficult** to **calculate** the remaining period **precisely**, given that the opening and closure of proceedings by competition authorities are not always publicly known. Moreover, if a suspension were to commence at a very late stage of the limitation period, there may **not be enough time** left to prepare a claim.

The Commission therefore suggests[17] that:

- a **new limitation period** of at least **two years** should start once the **infringement decision** on which a follow-on claimant relies has become **final**.

2.8. Costs of damages actions

The **costs** associated with antitrust damages actions, and also the **cost allocation rules**, can be a decisive disincentive to bringing an antitrust damages claim, given that these actions may be particularly costly and are generally more complex and time-consuming than other kinds of civil action.

The Commission considers that it would be useful for Member States to reflect on their cost rules and to examine the practices existing across the EU, in order to **allow meritorious actions** where costs would otherwise prevent claims being brought, particularly by claimants whose financial situation is significantly weaker than that of the defendant.

Due consideration should be given to mechanisms fostering **early resolution of cases**, e.g. by settlements. This could significantly reduce or eliminate litigation costs for the parties and also the costs for the judicial system.

Member States could also consider introducing, where appropriate, limits on the level of **court fees** applicable to antitrust damages actions.

Finally, Member States are invited to reflect on their **cost allocation rules** in order to reduce the uncertainty for potential claimants about the costs for which they may be liable. The "loser pays" principle, which prevails in the EU Member States, plays an important function in filtering out unmeritorious cases. However, under certain circumstances, this principle could also discourage victims with meritorious claims. National courts may therefore have to be empowered to derogate from this principle, for example by guaranteeing that an unsuccessful claimant will not have to bear the defendants' costs that were unreasonably or vexatiously incurred or are otherwise excessive.

The Commission therefore encourages[18] Member States:

- to design procedural rules fostering **settlements**, as a way to reduce costs;

---

17 For the underlying reasons see *ibid*.

18 For the underlying reasons see Chapter 9 of the SWP.

- to set **court fees** in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims;

- to give national courts the possibility of issuing **cost orders** derogating, in certain justified cases, from the normal cost rules, preferably upfront in the proceedings. Such cost orders would guarantee that the claimant, even if unsuccessful, would not have to bear all costs incurred by the other party.

2.9. Interaction between leniency programmes and actions for damages

It is important, for both public and private enforcement, to ensure that leniency programmes are attractive.

Adequate **protection against disclosure in private actions for damages** must be ensured for **corporate statements** submitted by a leniency applicant in order to avoid placing the applicant in a less favourable situation than the co-infringers. Otherwise, the threat of disclosure of the confession submitted by a leniency applicant could have a negative influence on the quality of his submissions, or even dissuade an infringer from applying for leniency altogether.

The Commission therefore suggests[19] that such protection should apply:

- to all **corporate statements** submitted **by all applicants for leniency** in relation to a breach of Article 81 of the EC Treaty (also where national antitrust law is applied in parallel);

- regardless of whether the application for leniency is accepted, is rejected or leads to no decision by the competition authority.

This protection applies where disclosure is ordered by a court, be it **before or after adoption of a decision** by the competition authority. Voluntary disclosure of corporate statements by applicants for immunity and reduction of fines should be precluded at least until a statement of objections has been issued.

A further measure to ensure that leniency programmes continue to be fully attractive could be to limit the civil liability of successful immunity applicants. The Commission therefore puts forward for further consideration[20] the possibility of limiting the **civil liability of the immunity recipient to claims by his direct and indirect contractual partners**. This would help to make the scope of damages to be paid by immunity recipients more predictable and more limited, without unduly sheltering them from civil liability for their participation in an infringement. The immunity recipient would have to bear the burden of proving the extent to which his liability would be limited. However, consideration should be given, in particular, to the need for such a measure and the impact it would have on the full compensation of victims of cartels and on the position of the co-infringers, especially other leniency applicants.

---

19 For the underlying reasons see Chapter 10, section B.1 of the SWP.

20 For the underlying reasons see Chapter 10, section B.2 of the SWP.

The Commission invites comments on this White Paper. They may be sent, by 15 July 2008, either by e-mail to:

comp-damages-actions@ec.europa.eu

or by post to:

European Commission
Directorate-General for Competition, Unit A 5
Damages actions for breach of the EC antitrust rules
B-1049 Brussels.

It is standard practice within DG Competition to publish submissions received in response to a public consultation. However, it is possible to request that submissions, or parts thereof, remain confidential. Should this be the case, please indicate clearly on the front page of your submission that it should not be made public and also send a non-confidential version of your submission to DG Competition for publication.

Beijing Law Review, 2014, 5, 155-162
Published Online September 2014 in SciRes. http://www.scirp.org/journal/blr
http://dx.doi.org/10.4236/blr.2014.53015

Collective Actions in the European Union—American or European Model?

Verica Trstenjak[1,2], Petra Weingerl[3]

[1]Faculty of Law, University of Vienna, Vienna, Austria
[2]Max Planck Institute for International, European and Regulatory Procedural Law, Luxembourg City, Luxembourg
[3]Faculty of Law, University of Oxford, Oxford, UK
Email: verica.trstenjak@gmail.com, petrawww@gmail.com

Received 3 June 2014; revised 1 July 2014; accepted 25 July 2014

Abstract

Collective redress is a procedural mechanism that allows for reasons of procedural economy and efficiency of enforcement many similar legal claims to be combined into a single court action. Consumers and investors encounter problems with the enforcement of their rights through the individual redress, especially in times of the financial crisis. If a substantial number of harmed individuals decide not to pursue their, usually low, claims, the unduly gained profits of the opposite party can be extremely high. Thus, collective redress mechanisms can represent better option for consumers and investors, as their claims tend to be much less burdensome in case of the collective action. However, such mechanisms can trigger the abuse of the procedures, with the most commonly quoted threat being the example of American regulation of class actions. Negative characteristics of American model are the reasons that EU decided to shape its own concept of collective redress mechanisms. The binding act in this field in the EU is directive on injunctions for the protection of consumers' interests; however, there is no binding act yet regarding compensatory actions. In June 2013, the European Commission published the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. It is not binding on Member States, however, it can serve as a guideline to improve their existing legislations, especially the regulation of collective compensatory actions. In so doing, consumers and investors might be given the possibility to use more efficient mechanism to compensate the harm suffered.

Keywords

Access to Justice, Collective Redress Mechanisms, Injunctive Relief, Compensatory Relief, Consumers, Investors, Opt-In, Opt-Out, The European Commission's Recommendation

How to cite this paper: Trstenjak, V., & Weingerl, P. (2014). Collective Actions in the European Union—American or European Model? *Beijing Law Review, 5,* 155-162. http://dx.doi.org/10.4236/blr.2014.53015

1. Introduction

Collective redress mechanisms are recently gaining in importance and are frequently put on the agenda of the European institutions[1], currently being at the heart of European debate (Cafaggi & Micklitz, 2009), and numerous conferences (for example last year's European Jurists Forum in Barcelona), especially due to the financial crisis and linked very large number of aggrieved investors in banks, investment funds, consumers, etc., harmed by the same or similar harmful practice. Said harmful practices are the most common in the field of financial services legislation and investor protection, consumer protection, competition, environment protection and protection of personal data.[2] Collective redress is a procedural mechanism that allows for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action.[3] This term encompasses two forms of collective redress. It can take the form of injunctive relief, where cessation of the unlawful practice is sought, or compensatory relief, aiming at obtaining compensation for damage suffered.[4]

The right to an effective remedy before a court or a tribunal in case of violation of rights and freedoms guaranteed by the law of the European Union (hereinafter EU) is one of the fundamental rights, enshrined in Article 47 of the Charter of Fundamental Rights of the EU.[5] Access to justice is a major challenge in the EU consumer law, becoming more pressing with growing cross-border purchases (Benöhr, 2013a). Nevertheless, consumers and investors encounter problems with the enforcement of their rights through the individual redress. The shortcomings of the individual redress lie in the fact that harmed consumers and investors often do not decide to pursue actions in courts, as they are deterred due to high costs of litigation (often higher than the value of the claim) and lengthy procedures.[6] Often, the costs of pursuing the claim are higher than the expected benefits (Van der Bergh, 2013; Tzakas, 2011). The weakness on the side of consumers and small investors is also the imbalance of power and information asymmetry. If a substantial number of harmed individuals decide not to pursue their, usually low, claims, the unduly gained profits of the opposite party can be extremely high.

Due to these disadvantages of individual redress, collective redress mechanisms can represent better option for consumers and investors, as their claims tend to be much less burdensome in the case of the collective action. Moreover, collective redress may also increase the prospect of success for consumers (Benöhr, 2013b). They are also less burdensome for the courts, which might otherwise face the possibility of overload with individual claims. However, such mechanisms can trigger the abuse of the procedures, with the most commonly quoted threat being the example of the American regulation of class actions, where lawyers have a right to the so called contingency fees, which are tight to the success in the dispute, and also punitive damages are allowed (Micklitz & Stadler, 2008). Such regulation, which attracts abusive litigation, would have a negative impact on the economic activities of EU businesses according to the European Commission, especially through harming their reputation in case of unfounded claims and by imposing undue financial burden on them.[7] Europe adheres strongly to the "loser pays costs" rule which largely bans contingency fees, has almost no juries or punitive damages in civil cases, and has far more limited approach to disclosure of documentary evidence in civil law procedures (Hodges, 2010). Thus, negative characteristics of American model are the reason that EU decided to shape its own concept of collective redress mechanisms.

[1]With the term "European Institutions" are meant institutions of the European Union: the European Parliament, the European Council, the Council of the European Union (simply called "Council"), the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors. In this field the European Commission adopted White Paper on Damages actions for breach of the EC antitrust rules (COM(2008) 165 final) and Green Paper on Consumer Collective Redress (COM(2008) 794 final). The European Parliament adopted resolution towards a coherent European approach to collective redress (2011/2089(INI)) in 2012. The binding act in this field is Directive 2009/22 on injunctions for the protection of consumers' interests (OJ L 110/30, 1 May 2009). There is no binding act yet regarding compensatory actions, however, the European Commission has published the proposal of the directive in the field of competition law. Nevertheless, this directive does not oblige Member States to regulate collective compensatory actions.

[2]See recital 7 of the Preamble of the Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (hereinafter Recommendation), C (2013) 3593/3.

[3]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress" (hereinafter Commission Communication), COM(2013) 401 final, p. 4.

[4]Ibid.

[5]OJ C 83/389, 30 March 2010.

[6]See Recital 9 of the Preamble of the Recommendation.

[7]See also Commission Communication, p. 7.

2. Types of Collective Redress Mechanisms

2.1. Types of Collective Redress Mechanisms Based on the Linkage of the Plaintiffs

Different types of collective redress mechanisms are known as regards the type of combining claims. We can divide them according to the linkage among the plaintiffs (for example consumers or investors), *inter alia*, into representative actions, group actions and test case procedures.

With respect to the first type, representative action, the legitimized qualified subject, *i.e.* representative organisation, can file representative actions, for example consumer protection organisation on behalf of consumers. Such claims are already regulated in the EU, however, only as far as injunctive relief is concerned, and not also actions for damages.

The second type is group action, which is filed by the member of the group on behalf of certain group of harmful individuals. Unlike in representative actions filed by associations, in group actions, an exactly definable category of persons brings a joint action to enforce individual claims together. The main motive is that not all the affected persons need to carry out the procedure by themselves (Micklitz & Stadler, 2008). They have the possibility to entitle one single individual member of the group to represent the group during the lawsuit.

The third type of collective redress mechanisms is test case procedure, which serves for the adjudication on one typical case, which becomes precedent for future cases. Consumers whose claims fulfil the requirements of a test case can subscribe to a register maintained by the acting claimant of the test case. The particularity of such a case is that the court chooses only one claim and bases its decision on this, which binds all the registered claims. Test case procedures offer the opportunity to have legal questions relevant for a number of claims clarified by the court at once, and can thus reduce litigation costs (Benöhr, 2013a). As an example, German legislator passed a bill governing test cases concerning the protection of investors (KapMuG) (Micklitz & Stadler, 2008).

The most famous and the most commonly discussed in the literature are class actions pursuant to the American model. As aforementioned, EU decided not to follow the American model that opens up possibilities for abuse of litigation.

2.2. Types of Collective Redress Mechanisms Based on the Type of Claim

All these types of actions can be either in the form of injunctive relief or compensatory relief. In the field of collective injunctive relief EU already adopted Directive on injunctions for the protection of consumers' interests (hereinafter Directive on injunctions).[8] As a result of the Directive on injunctions, qualified consumer protection authorities and consumer organisations are authorised to commence proceedings before the courts or public authorities in all Member States to request the prohibition of practices that infringe national and EU consumer protection rules.[9] With the collective injunction the organisations can seek an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement measures such as the publication of the decision, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement, an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decision.[10]

EU law does not govern collective compensatory actions yet.[11] With this action harmed individuals request damages for the harm done. Collective compensatory actions are already regulated in some Member States; some of them using the opt-in system and other opt-out system, whereas some Member States do not regulate them yet. This marks a new trend in recognizing consumer protection as a collective procedural right (Benöhr, 2013a). So far, they are regulated in 16 out of 28 Member States.[12] Therefore, there are several differences in this field in the regulations across Member States, allegedly representing an obstacle in filing claims of harmed

[8]Directive 2009/22/EC on injunctions for the protection of consumers' interests, OJ L 110, 1 May 2009.
[9]Commission Communication, p. 4.
[10]Article 2 of Directive on Injunctions.
[11]In June 2013 the European Commission adopted the proposal of the Directive 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 (COM(2013) 404 final), which leaves the regulation of collective compensatory actions to Member States. This proposal is accompanied by Recommendation.
[12]See the European Commission's document overview of existing collective redress schemes in EU Member States (IP/A/IMCO/NT/2011-16).

individuals, and thus leading to restricted access to justice and consequently to unjustified gains of the wrong-doers. Collective compensatory action is already introduced in the Netherlands, where several famous cases have been adjudicated so far (for example Dexia[13] with more than 300.000 harmed individuals) (Trstenjak, 2013; van Boom, 2009; van der Heijden, 2010; Kortmann, 2011). In Germany, where for example several thousand small investors were claiming compensatory damages from the Deutsche Telekom, such claims are handled through test case procedures (Micklitz & Stadler, 2008).

2.3. Types of Collective Redress Mechanisms Based on the Inclusion of the Individuals in the Procedure

Individual consumers, investors and businesses can be included in these actions on the basis of the opt-in or opt-out principle. Pursuant to the opt-in principle, collective action is filed on behalf of several victims who expressly decide to combine their individual claims in a single action. This model is recommended by European Commission in its Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, presented in the next chapter, although in the Green Paper on Consumer Collective Redress from 2008 the opt-out principle is mentioned. Under this system the persons concerned must make themselves known and expressly ask to be part of the action before the decision is delivered (Sorabji, Napier, & Musgrove, 2008). Such system is unquestionably in conformity with the principle of party disposition ("*principe dispositif*", "*Dispositionsmaxime*"), which underlies the procedural traditions of most of the civil law countries, emanating from the right of each person to commence and end judicial proceedings (Tzakas, 2011).

Pursuant to the opt-out principle the group is composed of all individuals who belong to the defined group and claim to have been harmed by the same or similar infringement unless they actively opt out of the group and thereby prevent the binding effect of the judgment, as in this model judgment is binding on all individuals that belong to the defined group except for those who explicitly opted out.[14] Thus, in other words, in such system claim is able to be instituted by a representative claimant on behalf of a class of persons, who share common grievances with the representative and who are not individually identified at the outset but who are merely described (Muhleron, 2009). Such regulation of collective redress actions is found for example in the Netherlands, Portugal and Denmark. It is the exception, and not the rule, across the twenty-eight European Member States (Muhleron, 2009).

In the opt-in model, the judgment is binding on those who opted in, while all other individuals potentially harmed by the same or similar infringement remain free to pursue their damages claims individually. Conversely, in the opt-out model, the judgment is binding on all individuals that belong to the defined group except for those who explicitly opted out.[15]

The European Commission emphasizes in the Green Paper that opt-out solutions might mitigate some of the difficulties of the opt-in systems, which could be burdensome and cost-intensive for consumer organizations which have to do preparatory work such as identifying consumers, establishing the facts of each case, as well as running the case and communicating with each plaintiff. They may also face difficulties in obtaining a sufficiently high number of consumers opting-in in the case of very low value damage, where consumers are less likely to act. However, they do not involve the risk of promoting excessive or unmeritorious claims.[16]

3. Collective Redress in the EU Legislation and the Case Law of the CJEU

Some European directives already regulate some forms of collective redress in relation to consumer protection, for example Directive 93/13 on unfair terms in consumer contracts,[17] which obliges Member States in Article 7 to ensure that persons or organizations, having a legitimate interest under national law in protecting consumers, are authorized to take action before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms. These legal remedies may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations, which use or rec-

[13]The issue in the case *Dexia* from 2007 was the financial loss caused by retail investment products.
[14]See Commission Communication, p. 11.
[15]See Green Paper on Consumer Collective Redress, COM(2008) 794 final, p. 3.
[16]See points 54 - 55 of the Green Paper on Consumer Collective Redress, COM(2008) 794 final.
[17]Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21/04/1993.

ommend the use of the same general contractual terms or similar terms.

Another directive governing collective redress in consumer protection area is Directive 2006/114 concerning misleading and comparative advertising, which provides in Article 5 that Member States shall ensure that adequate and effective means exist to combat misleading advertising and enforce compliance with the provisions on comparative advertising in the interests of traders and competitors. Such means shall include legal action against such advertising or the possibility to bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings. Member States may decide whether these legal facilities may be directed separately or jointly against a number of traders from the same economic sector.

Further, similar provision contains also Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market.

Collective redress is commonly dealt with also by the Court of Justice of the EU (hereinafter CJEU) in the preliminary reference procedures. One example is the case *Invitel*[18], with the legal dispute in the main proceedings concerning the fairness of a not individually negotiated term in a consumer contract within the meaning of Directive 93/13 (Trstenjak, 2013). In this case, the CJEU held that it is for the national courts of EU Member States, ruling on an action for an injunction, brought in the public interest and on behalf of consumers by a body appointed by national law, to assess the unfair nature of a term included in the general business conditions of consumer contracts by which a seller or supplier provides for a unilateral amendment of fees connected with the service to be provided. The CJEU emphasized that, although Directive 93/13 does not accomplish a full harmonization of the consequences of a term being found to be unfair within the meaning of the Directive, Articles 7(1) and (2) set a duty for the Member States to ensure, as a minimum standard, that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers, which must include the possibility for persons or organizations having a legitimate interest under national law in protecting consumers to take action in order to obtain a judicial decision as to whether general contract terms are unfair and, where appropriate, to have them prohibited (for more detailed analysis see Trstenjak, 2013).

4. European Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law

In June 2013 the European Commission published the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (hereinafter Recommendation).[19] Although the professional public expected the proposal of the directive, the European Commission issued (only) the recommendation.

The aim of the Recommendation[20] is to facilitate access to justice in relation to violations of rights under EU law and to that end to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions[21] of the Member States and safeguarding against abuse.[22] The Recommendation is, *inter alia*, the result of the conclusions the European Commission made on the basis of the public consultation "Towards a coherent European approach to collective redress", carried out in 2011. The European Commission is emphasising the importance of the horizontal approach for quite some time now, as the collective redress mechanisms have been regulated only sectorial in the past, and only injunction relief.[23] In 2012 also the European Parliament addressed the Commission with the Resolution to prepare the proposal that would represent horizontal framework for collective redress, relying on the common set of principles.[24]

[18]Case C-472/10, *Invitel*, Judgment of the Court delivered on 26 April 2013.

[19]Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3593/3.

[20]The European Commission adopts recommendations pursuant to Article 292 of Treaty on Functioning of the European Union (hereinafter TFEU). Article 290 TFEU provides that recommendations are not binding.

[21]This is reconciled with the requirement of Article 67(1) TFEU, according to which the Union, while establishing a European area of freedom, justice and security, is asked to respect the different legal systems and traditions of the Member States, in particular in areas (such as procedural law) which are well established at national level while being rather new at EU (see COM(2013) 401 final, p. 3).

[22]Recital 10 of the Preamble of the Recommendation.

[23]Collective injunctive relief in the consumer law is regulated. With regard to collective compensatory actions European Commission published the proposal of the directive in the field of competition law, however, this proposal does not foresee collective actions as obligatory for Member States.

[24]See 2011/2089 (INI).

The aim of the Recommendation, which is applicable to both types of collective redress mechanisms, for injunctive relief and for compensatory relief, is to ensure the holistic horizontal approach in the field of collective redress mechanism in EU. It recommends to the Member States to ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive.[25]

4.1. Principles Common to Injunctive and Compensatory Collective Redress

Among the principles common to injunctive and compensatory collective redress, the European Commission gives the recommendations regarding standing to bring a representative action, admissibility, information on a collective redress action, reimbursement of legal costs of the winning party, funding and cross-border cases. The Recommendation suggests that the Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. Such entities should have a non-profit making character, there should be a direct relationship between the main objectives of the entity and the rights granted under EU law that are claimed to have been violated in respect of which the action is brought and the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

The Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party ("loser pays principle"). Moreover, the Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems. A key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively.

It is crucial for the collective redress that consumer are informed about a claimed violation of rights granted under EU law and intention to seek an injunction to stop it as well as about a mass harm situation and intention to pursue an action for damages in the form of collective redress, therefore the European Commission included also recommendations on information on a collective redress action. The dissemination methods should take into account the particular circumstances of the mass harm situation concerned, the freedom of expression, the right to information, and the right to protection of the reputation or the company value of a defendant before its responsibility for the alleged violation or harm is established by the final judgment of the court.

4.2. Recommendations for Collective Injunctive Relief

As the collective injunctive relief is already regulated at the EU level with the Directive on injunctive relief, the Recommendation contains only two special principles concerning this category of collective redress mechanisms. These principles are expedient procedures for claims for injunctive orders and efficient enforcement of injunctive orders.

4.3. Recommendations for Collective Compensatory Relief

The European Commission has proposed more detailed recommendations on collective compensatory actions, as Member States have different regulations of compensatory actions that should be harmonised to facilitate access to justice. The predominant principle is that the claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed (opt-in principle). Natural or legal persons claiming to have been harmed in the same mass harm situation should be able to join the claimant party at any time before the judgment is given or the case is otherwise validly settled. The defendant should be informed about the composition of the claimant party and about any changes therein. European representative action, based on the opt-in principle, is different from the American class action, based on opt-out principle.

The special emphasis in the Recommendation is given to encouragement of alternative dispute resolution mechanisms, both at the pre-trial stage and during civil trial, taking into account also the requirements of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

[25]Point 2 of the Recommendation.

4.4. Emphasis on Prevention of Abusive Litigation

The crucial emphasis is given to prevention of abusive litigation, as the European Commission wants to avoid negative characteristics of the American class action system, where lawyers themselves look for the potential plaintiffs, and commonly force companies to settle due to negative publicity, although sometimes unjustifiably.[26] The European Commission recommends to the Member States to ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties and that they should not permit contingency fees which risk creating such an incentive. Moreover, also punitive damages, leading to overcompensation in favour of the claimant party should be prohibited.

The Recommendation contains also the principle related to collective follow-up actions, pursuant to which Member States should ensure that in fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of Union law, collective redress actions should, as a general rule, only start after any proceedings of the public authority, which were launched before commencement of the private action, have been concluded definitively. The Member States should ensure that in the case of follow-on actions, the persons who claim to have been harmed are not prevented from seeking compensation due to the expiry of limitation or prescription periods before the definitive conclusion of the proceedings by the public authority. It is important to ensure consistency between the final decision concerning that violation and the outcome of the collective redress action.

The European Commission suggests to the Member States to establish a national registry of collective redress actions, which should be available free of charge to any interested person through electronic means and otherwise.

The Member States should implement the principles set out in the Recommendation in national collective redress systems in 2 years following its publication. The European Commission should then assess the implementation of the Recommendation on the basis of practical experience in 4 years after the publication, in particular evaluating its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, the competitiveness of the economy of the EU and consumer trust.

5. Conclusion

The number of cases in which large number of consumers, investors and other individuals are harmed by the same unlawful act is growing in times of the financial crisis. As the individual redress is usually ineffective in such cases, the European Commission recommends to the Member States to introduce the systems of collective redress mechanisms, which would encompass injunctive relief as well as compensatory relief. As the national regulations are based on different legal traditions, it is crucial for the improvement of the access to justice that those systems rely on the common set of principles across the whole EU. In so doing, the crucial components are the principle of consent (opt-in principle) and the aim to prevent the abusive litigation, thereby prohibiting contingency fees and punitive damages.

The Recommendation is not binding on Member State, therefore we can only hope that they will take it into account and improve their existing legislations, especially with respect to the regulation of collective compensatory actions, so that harmed consumers and investors have the possibility to use the efficient mechanism to compensate the harm done.

References

Benöhr, I. (2013a). Consumer Dispute Resolution after the Lisbon Treaty: Collective Actions and Alternative Procedures. *Journal of Consumer Policy, 36, 87-110*. http://dx.doi.org/10.1007/s10603-012-9202-0

Benöhr, I. (2013b). *EU Consumer Law and Human Rights*. Oxford: Oxford University Press. http://dx.doi.org/10.1093/acprof:oso/9780199651979.001.0001

Cafaggi, F., & Micklitz, H.-W. (2009). *New Frontiers of Consumer Protection: The Interplay between Private and Public Enforcement*. Mortsel: Intersentia.

Hodges, C. (2010). Collective Redress in Europe: The New Model. *Civil Justice Quarterly*, 370-395.

[26]Contingency fees are extremely high in the event of the success, as they are paid based on the high percentage out of total damages.

Kortmann, J., & Bredenoord-Spoek, M. (2011). The Netherlands: A Hotspot for Class Actions? *Global Competition Litigation Review*, *4*, 13.

Micklitz, H.-W., & Stadler, A. (2006). The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure. *European Business Law Review*, *5*, 1473-1503.

Muhleron, R. (2009). The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis. *Columbia Journal of European Law*, *15*, 409-454.

Sorabji, J., Napier, M., & Musgrove, R. (2014). Developing a More Efficient and Effective Procedure for Collective Actions, Final Report, a Series of Recommendations to the Lord Chancellor. http://www.ucl.ac.uk/laws/judicial-institute/files/Improving_Access_to_Justice_through_Collective_Actions_-_final_report.pdf

Trstenjak, V. (2013). Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU from the Perspective of Insurance Law. *European Review of Private Law*, *2*, 451-478.

Trstenjak, V. (2013). The Protection of the Consumer in the Financial Products Market. In *European Jurists' Forum 2013.* Barcelona.

Tzakas, L. D.-P. (2011). Effective Collective Redress in Antitrust and Consumer Protection Matters: A Panacea or a Chimera? *Common Market Law Review*, *48*, 1125-1174.

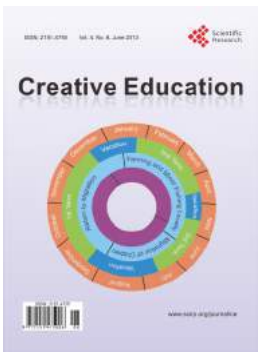
van Boom, W. H. (2009). Collective Settlement of Mass Claims in the Netherlands. In M. Casper, A. Janssen, P. Pohlmann, & R. Schulze (Eds.), *Auf dem Weg zu einer europäischen Sammelklage* (pp. 171-192)*?* München: Sellier.

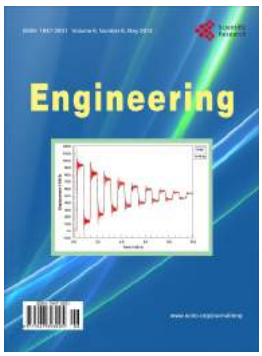
Van der Bergh, R. (2013). Private Enforcement of European Competition Law and the Persisting Collective Action Problem. *Maastricht Journal*, *20*, 12-34.

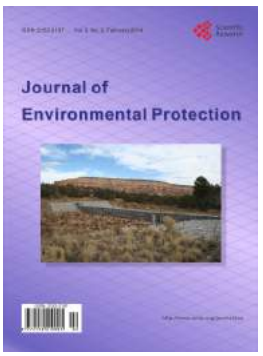
van der Heijden, M.-J. (2010). Class Actions/Les Action Collectives. *Electronic Journal of Comparative Law*, *14.3*. http://www.ejcl.org/143/art143-18.pdf

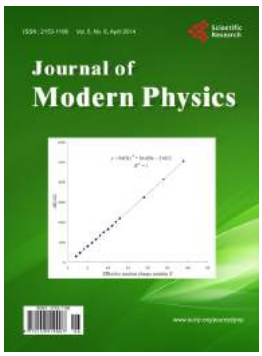
Scientific Research Publishing (SCIRP) is one of the largest Open Access journal publishers. It is currently publishing more than 200 open access, online, peer-reviewed journals covering a wide range of academic disciplines. SCIRP serves the worldwide academic communities and contributes to the progress and application of science with its publication.

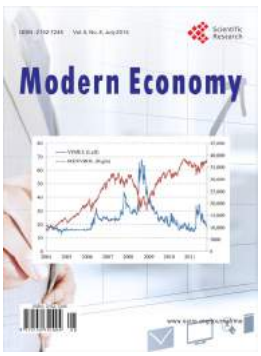
Other selected journals from SCIRP are listed as below. Submit your manuscript to us via either submit@scirp.org or Online Submission Portal.

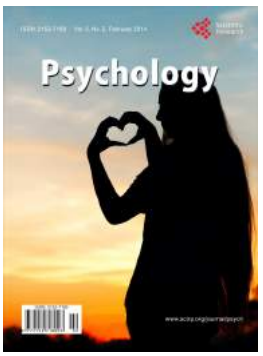










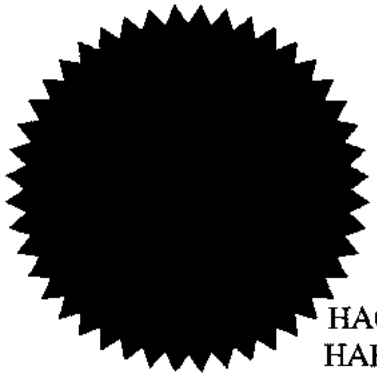


Court File No.: CV-12-17511

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE	)	MONDAY, THE 6TH DAY
	)	
TERRENCE PATTERSON	)	OF OCTOBER, 2014

BETWEEN:



NANCY JEAN ADAMS

Plaintiff

and

APPLE INC., HACHETTE BOOK GROUP CANADA LTD.,
HACHETTE BOOK GROUP, INC., HARPERCOLLINS CANADA LIMITED,
HARPERCOLLINS PUBLISHERS, INC., MACMILLAN PUBLISHERS, INC.,
PENGUIN GROUP (USA), INC., PEARSON CANADA INC.,
c.o.b. as PENGUIN GROUP (CANADA), and
SIMON & SCHUSTER CANADA, a division of CBS CANADA HOLDINGS CO.

Defendants

Proceedings under the *Class Proceedings Act, 1992*

ORDER
(SETTLEMENT APPROVAL)

THIS MOTION made by the Plaintiff, Nancy Jean Adams, for an order approving the Agreement made between the Plaintiff and others, and the Defendants Hachette Book Group Canada Ltd., Hachette Book Group Inc., HarperCollins Canada Limited, HarperCollins Publishers, LLC, Macmillan Publishers, Inc., Penguin Group (USA) LLC (formerly, Penguin Group (USA), Inc.), Penguin Canada Books Inc., and Simon & Schuster Canada, a division of CBS Canada Holdings Co. (collectively, the

"Settling Defendants"), dated May 8, 2014 (the "Agreement") was heard this 6th day of October, 2014 at Windsor, Ontario.

ON READING the pleadings and materials filed in relation to this motion, including the Agreement between the Plaintiff and the Settling Defendants (collectively, the "Settling Parties") and the affidavit of Nancy Jean Adams and the affidavit of Heather Rumble Peterson in support of this approval motion;

AND WHEREAS the deadline for opting out of the National Proceeding has passed and no National Settlement Class Member has validly opted out;

AND WHEREAS the deadline for objecting to the Agreement has passed, and there have been no written objections to the Agreement and no National Settlement Class Member appeared to object to the Agreement;

AND ON HEARING submissions of counsel for the Settling Parties;

AND ON BEING ADVISED that the Settling Parties consent to this Order;

AND ON BEING ADVISED that the non-settling defendant, Apple, Inc. ("Apple") takes no position on this Order;

1. THIS COURT ORDERS AND DECLARES that, except to the extent they are modified by this Order, the definitions set out in the Agreement which is

attached as Schedule "A" to this Order, apply to and are incorporated into this Order.

2. THIS COURT DECLARES that the Agreement is fair, reasonable and in the best interests of the National Settlement Class.

3. THIS COURT ORDERS that the Agreement is hereby approved pursuant to section 29 of the *Class Proceedings Act, 1992* and shall be implemented and enforced in accordance with its terms and the terms of this Order.

4. THIS COURT ORDERS AND DECLARES that the Agreement is incorporated by reference into and forms part of this Order.

5. THIS COURT ORDERS that in the event of a conflict between this Order and the Agreement, this Order shall prevail.

6. THIS COURT ORDERS AND DECLARES that this Order, including the Agreement, is binding upon each member of the National Settlement Class who does not validly opt out of the National Proceeding, including those persons who are minors or mentally incapable and the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure* are dispensed with in respect of the National Proceeding.

7. THIS COURT ORDERS AND DECLARES that, upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever, finally and absolutely released the Releasees from the Released Claims.

8. THIS COURT ORDERS that, each Releasor shall not now or hereafter institute, continue, maintain, assert, participate in or be involved with either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any action, suit, cause of action, claim or demand against any Releasee or against any other Person who may claim contribution or indemnity, or other claims over for relief, from any Releasee in respect of the Released Claims, except for the continuation of the Canadian Proceedings against a Non-Settling Defendant or named or unnamed co-conspirators who are not Releasees in the National Proceeding.

9. THIS COURT ORDERS AND DECLARES that, upon the Effective Date, any member of the National Settlement Class who has not validly opted out shall be deemed to have consented to the dismissal without costs of any action or proceeding he, she or it has commenced in Canada or elsewhere, against any Releasee or against any other Person who may claim contribution or indemnity, or other claims over for relief, from any Releasee in respect of the Released Claims, except for the continuation of the Canadian Proceedings against a Non-Settling Defendant or named or unnamed co-conspirators who are not Releasees in the National Proceeding.

10. THIS COURT ORDERS AND DECLARES that, upon the Effective Date, any action or proceeding brought in Ontario by any member of the National Settlement Class who has not validly opted out of the National Proceeding shall be dismissed without costs against any Releasee or against any other Person who may claim contribution or indemnity, or other claims over for relief, from any Releasee in respect of the Released Claims, except for the continuation of the Canadian Proceedings against a Non-Settling Defendant or named or unnamed co-conspirators who are not Releasees in the National Proceeding.

11. THIS COURT ORDERS AND DECLARES that the use of the terms "Releasors" and "Released Claims" in this Order does not constitute a release of claims by those members of the National Settlement Class who are resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors.

12. THIS COURT ORDERS AND DECLARES that each member of the National Settlement Class who is resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors covenants and undertakes not to make any claim in any way nor to threaten, commence, or continue any proceeding in any jurisdiction against the Releasees in respect of or in relation to the Released Claims.

13. THIS COURT ORDERS AND DECLARES that all claims for contribution, indemnity or other claims over, whether asserted, unasserted or asserted in a

representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims which were or could have been brought in the National Proceeding by the Non-Settling Defendant or any other Person or party (excepting (i) a claim by a Releasee against any Person excluded in writing from the definition of Releasees, (ii) a claim by a Releasee pursuant to a policy of insurance, provided any such claim involves no right of subrogation against a Non-Settling Defendant, and (iii) a claim in respect of a Person who has validly and timely opted-out of the National Settlement Class) are barred, prohibited and enjoined in accordance with the terms of this order.

14. THIS COURT ORDERS AND DECLARES that, if, in the absence of paragraph 13 above, the Ontario Court determines that there is a right of contribution, indemnity or other claims over, whether in equity or in law, by statute or otherwise:

(a) the National Settlement Class shall not be entitled to claim or recover from any Non-Settling Defendant that portion of any damages (including punitive damages, if any), restitutionary award, disgorgement of profits, interest and costs (including investigative costs claimed pursuant to s.36 of the *Competition Act)* that corresponds to the Proportionate Liability of the Releasees proven at trial or otherwise; and

(b) the Ontario Court shall determine the Proportionate Liability of the Releasees at the trial or other disposition of the National Proceeding, whether or not the Releasees appear at the trial or other disposition, and the Proportionate Liability of the Releasees shall be determined as if the Releasees are parties to the National Proceeding, and any determination by the Ontario Court in respect of the Proportionate Liability of the Releasees shall not be binding on the Releasees.

15. THIS COURT ORDERS AND DECLARES that the plaintiff shall, as part of its affidavit of documents in this action, produce to the Non-Settling Defendant documents made available to the plaintiff in accordance with s. 3.3 of the Agreement.

16. THIS COURT ORDERS AND DECLARES that subject to paragraphs 17 and 18 hereof, a Non-Settling Defendant may, on motion to the Ontario Court brought on at least sixty (60) days' notice to the Settling Defendants, and not unless and until the National Proceeding against the Non-Settling Defendant has been certified and all appeal rights have been exhausted or expired, seek an order in the National Proceeding for the following:

(a) documentary discovery and an affidavit of documents in accordance with the *Ontario Rules of Civil Procedure* from any of the Settling Defendants;

(b) oral discovery of a representative of any of the Settling Defendants;

(c) leave to serve a request to admit on any of the Settling Defendants in respect of factual matters; and/or

(d) the production of a representative of any of the Settling Defendants to testify at trial.

17. THIS COURT ORDERS AND DECLARES that the Settling Defendants retain all rights to oppose such motion(s) brought under paragraph 16 of this Order, and shall not be deemed to have agreed or acknowledged that any Non-Settling Defendant is entitled to such relief.

18. THIS COURT ORDERS AND DECLARES that a Non-Settling Defendant may effect service of the motion(s) referred to in paragraph 16 above on any of the Settling Defendants by service on counsel of record for that Settling Defendant in the National Proceeding.

19. THIS COURT ORDERS AND DECLARES that, to the extent that an order pursuant to paragraph 16 above is made and discovery is provided by a Settling Defendant to a Non-Settling Defendant, a copy of all discovery provided, whether oral, or documentary in nature, shall also promptly be provided by the Settling Defendant to Class Counsel and to the other Settling Defendants.

20. THIS COURT ORDERS AND DECLARES that, for purposes of administration and enforcement of this Order and the Agreement, the Ontario Court will retain an ongoing supervisory role and the Settling Defendants acknowledge the jurisdiction of the Ontario Court and attorn to the jurisdiction of the Ontario Court solely for the purpose of implementing, administering and enforcing the Agreement and this Order and subject to the terms and conditions set out in the Agreement and this Order.

21. THIS COURT ORDERS AND DECLARES that except as provided herein, this Order does not affect any claims or causes of action that any member of the National Settlement Class has or may have against the Non-Settling Defendant or named or unnamed co-conspirators who are not Releasees in the National Proceeding.

22. THIS COURT ORDERS AND DECLARES that no Releasee shall have any responsibility or liability relating to the administration of the Agreement or the Distribution Protocol or the administration, investment, or distribution of the Trust Account.

23. THIS COURT ORDERS AND DECLARES that, subject to the provisions of the Agreement, the Settlement Amount, plus accrued interest less any monies paid out pursuant to the Agreement, shall be held in trust for the benefit of the Settlement Classes, pending further order of the Approval Courts.

24. THIS COURT ORDERS AND DECLARES that the terms of this Order shall not be effective unless and until the Agreement is approved by the Quebec Court and the BC Proceeding has been discontinued, and shall have no force and effect if such approval and discontinuance are not both obtained.

25. THIS COURT ORDERS AND DECLARES that in the event that the Agreement is terminated by the Plaintiff or all of the Settling Defendants in accordance with its terms or otherwise fails to take effect for any reason:

(a) all orders made in respect of the Agreement, including this Order, shall be set aside as of the date made and shall be deemed as having no force and effect and shall be without prejudice to any position the Parties may assert in the future; and

(b) each party to the National Proceeding shall be restored to their respective position in the National Proceeding as it existed immediately prior to the execution of the Agreement.

26. THIS COURT ORDERS AND DECLARES that if the Agreement is terminated by or, as it relates to some but not all of the Settling Defendants in accordance with its terms, all orders made in respect of the Agreement, including this Order, shall be retroactively amended so that they are of no force and effect as against the Settling Defendants who have terminated the Agreement.

27. THIS COURT ORDERS AND DECLARES that if the Agreement is terminated as it relates to some or all of the Settling Defendants, Class Counsel shall repay to each such terminating Settling Defendant its Settlement Amount Share plus all accrued interest thereon, less a proportionate share of all costs of the Notices and translations incurred to the date of such repayment, within thirty (30) days of receipt of a termination notice pursuant to section 13.1(2) of the Agreement.

28. THIS COURT ORDERS AND DECLARES that on notice to the Approval Courts, but without further order of the Approval Courts, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions in the Agreement.

29. THIS COURT ORDERS AND DECLARES that, except as aforesaid, upon the Effective Date, the National Proceeding be and is hereby dismissed against the Settling Defendants without costs and with prejudice.

ENTERED at / INSCRIT à TORONTO
ON / LE: JAN 25 2013
PER / PAR:
1217567v5

[redacted]
JUSTICE

CANADIAN E-BOOK CLASS ACTION
NATIONAL SETTLEMENT AGREEMENT

Made as of May 8, 2014

Between

WAYNE VAN TASSEL, NANCY JEAN ADAMS and ANTOINE PONTBRIAND

(collectively, the "Plaintiffs")

and

HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., HARPERCOLLINS CANADA LIMITED, HARPERCOLLINS PUBLISHERS, L.L.C., MACMILLAN PUBLISHERS, INC., PENGUIN GROUP (USA) LLC (formerly PENGUIN GROUP (USA), INC.), PENGUIN CANADA BOOKS, INC., and SIMON & SCHUSTER CANADA, a division of CBS CANADA HOLDINGS CO.

(collectively, the "Settling Defendants")

TABLE OF CONTENTS

CANADIAN E-BOOK CLASS ACTION
NATIONAL SETTLEMENT AGREEMENT

RECITALS

A. WHEREAS the Plaintiffs have commenced the Canadian Proceedings in the Courts and allege that the Defendants, including the Settling Defendants, participated in the Alleged Conspiracy, and the Plaintiffs claim class-wide damages as a result of the Alleged Conspiracy, as well as equitable relief;

B. AND WHEREAS the Settling Defendants expressly deny that they have engaged in the Alleged Conspiracy or other unlawful conduct and believe that they are not liable in respect of the Alleged Conspiracy or at all, and believe they have good and reasonable defences in respect of the claims advanced in the Canadian Proceedings;

C. AND WHEREAS, despite their belief that they are not liable in respect of the Alleged Conspiracy and that they have good and reasonable defences in respect of the claims advanced in the Canadian Proceedings, the Settling Defendants have negotiated and entered into this Agreement to avoid the further expense, inconvenience, and burden of litigating the Canadian Proceedings and any other present or future litigation arising out of the facts that gave rise to them, to avoid the risks inherent in uncertain, complex and protracted litigation and to achieve final resolutions of all claims asserted or which could have been asserted against the Settling Defendants and the Releasees by the Plaintiffs on their own behalf and on behalf of the Settlement Classes in relation to the Alleged Conspiracy, as it relates to the sales of E-Books in Canada during the Settlement Class Period;

D. AND WHEREAS counsel for the Settling Defendants and other Releasees have engaged in extensive arm's-length settlement discussions and negotiations with Class Counsel in respect of this Agreement;

E. AND WHEREAS as a result of these settlement discussions and negotiations, the Settling Defendants and the Plaintiffs have entered into this Agreement, which embodies all of the terms and conditions of the settlement between the Settling Defendants and the Plaintiffs, both individually and on behalf of the Settlement Classes;

F. AND WHEREAS as part of this resolution, the Settling Defendants have each agreed to make a settlement payment for the benefit of the Settlement Classes;

G. AND WHEREAS as part of this resolution, the Settling Defendants have agreed to cooperate with the Plaintiffs and Class Counsel as particularized in this Agreement;

H. AND WHEREAS the Plaintiffs have agreed to accept this settlement, in part, because of the value of the Settlement Amount and the cooperation the Settling Defendants have agreed to render or make available to the Plaintiffs and/or Class Counsel pursuant to this Agreement, as well as the attendant risks of litigation in light of the potential defences that would be asserted by the Settling Defendants;

I. AND WHEREAS the Plaintiffs and Class Counsel have reviewed and fully understand the terms of this Agreement and, based on their analyses of the facts and law applicable to the Plaintiffs' claims, and having regard to the proposed disposal of the Canadian Proceedings against the Settling Defendants, the value of the Settlement Amount and the cooperation to be provided by the Settling Defendants, the burdens and expense associated with prosecuting the Canadian Proceedings, including the risks and uncertainties associated with trials and appeals, the Plaintiffs and Class Counsel have concluded that this Agreement is fair, reasonable and in the best interests of the Plaintiffs and the Settlement Classes;

J. AND WHEREAS the Plaintiffs and the Settlement Classes intend to fully and completely settle and resolve the claims advanced in the Canadian Proceedings as against the Settling Defendants and the other Releasees, as they relate to the sales of E-Books in Canada during the Settlement Class Period, on the Effective Date pursuant to this Agreement;

K. AND WHEREAS the Parties therefore wish to, and hereby do, finally resolve on a nation-wide basis, without admission of liability, the Canadian Proceedings as against the Settling Defendants and the other Releasees, as they relate to the sales of E-Books during the Settlement Class Period;

L. AND WHEREAS for the purposes of settlement only and contingent on approval of the Approval Courts as provided for in this Agreement, the Parties have consented to

authorization of the Quebec Proceeding as a class proceeding and certification of the National Proceeding as a national class proceeding;

M. AND WHEREAS for the purposes of settlement only and contingent on approval by the Approval Courts as provided for in this Agreement, the Parties have consented to the Approval Orders and the Discontinuance Order;

NOW THEREFORE, in consideration of the covenants, agreements and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed by the Parties that the Canadian Proceedings against the Settling Defendants be settled and discontinued (in the case of the BC Proceeding), dismissed (in the case of the National Proceeding) and settled by way of homologated transaction (in the case of the Quebec Proceeding) with prejudice and without costs, subject to the approval of the Approval Courts, on the following terms and conditions:

SECTION 1 - DEFINITIONS

For the purpose of this Agreement only, including the Recitals and Schedules hereto:

(1) ***Administration Expenses*** mean all fees, disbursements, expenses, costs, taxes and any other amounts incurred or payable by the Plaintiffs, Class Counsel or otherwise for the approval, implementation and operation of this Agreement, including the costs of notices, translations, claims administration, and any amount owing to the Fonds d'aide aux recours collectifs of the Province of Quebec, but excluding Class Counsel Fees.

(2) ***Agreement*** means this national settlement agreement, including the recitals and schedules.

(3) ***Alleged Conspiracy*** means the alleged unlawful conspiracy by the Defendants, including the Settling Defendants, to fix, maintain, increase or control the price of E-Books sold by them in Canada, contrary to Part VI of the *Competition Act*, the common law and the Civil Code of Quebec.

(4) ***Apple*** means the Defendant Apple Inc.

(5) ***Approval Courts*** mean the Ontario Court and the Quebec Court.

(6) ***Approval Orders*** means orders of the Ontario Court and Quebec Court in the forms attached as Schedule A approving this Agreement, declaring it to be binding upon all Settlement Class Members, dismissing the National Proceeding and homologating the transaction in the Quebec Proceeding against the Settling Defendants, with prejudice and without costs.

(7) ***BC Court*** means the Supreme Court of British Columbia.

(8) ***BC Plaintiff*** means the plaintiff in the BC Proceeding.

(9) ***BC Proceeding*** means the proceeding commenced by Wayne Van Tassel in the form of an action filed in the BC Court (Vancouver Registry), Court File No. S-122529, on April 5, 2012.

(10) ***Canadian Proceedings*** mean the National Proceeding, the Québec Proceeding and the BC Proceeding.

(11) ***Certification and Authorization Orders*** means the order of the Ontario Court in the form attached as Schedule B certifying the National Proceeding as a national class proceeding and the judgment of the Quebec Court in the form attached as Schedule B authorizing the Quebec Proceeding as a class proceeding, in each case as against the Settling Defendants only, for the purpose of giving effect to and implementing this Agreement, and approving a Notice of Certification, Authorization and Settlement Approval Hearing.

(12) ***Claims Administrator*** means a Person proposed by Class Counsel and appointed by the Approval Courts to administer the Agreement, including any claims process, in accordance with the provisions of this Agreement and any Distribution Protocol, and any employees of such Person.

(13) ***Class Counsel*** means Branch MacMaster LLP, Sutts Strosberg LLP, Law Office of Andrew J. Morganti, and Sylvestre Fafard Painchaud SENCRL.

(14) ***Class Counsel Fees*** means the fees, disbursements, costs, and all other applicable taxes or charges of Class Counsel, including without limitation any applicable GST, PST, HST or QST.

(15) ***Common Issue*** means: Did the Settling Defendants, or any of them, conspire with each other or others to fix, maintain, increase or control the price of E-Books in Canada during the Settlement Class Period?

(16) ***Courts*** mean the Ontario Court, the Québec Court and the BC Court.

(17) ***Defendant(s)*** means, individually or collectively, the individuals or entities now or in the future named as a defendant in the Canadian Proceedings.

(18) ***Discontinuance Order*** means the order made by the BC Court in the form attached as Schedule C discontinuing the BC Proceeding as against the Settling Defendants with prejudice and without costs.

(19) ***Distribution Protocol*** means the plan to be developed by Class Counsel for holding or distributing the Net Settlement Amount and accrued interest, in whole or part, which may include holding the Net Settlement Amount in trust pending resolution of the Canadian Proceedings, as approved by the Approval Courts on notice to the Settling Defendants.

(20) ***Document*** means any paper, computer or electronic record, or other material within the scope of Rule 1.03(1) and Rule 30.01(1) of the Ontario *Rules of Civil Procedure* and any copies, reproductions or summaries of the foregoing, including microfilm copies and computer images.

(21) ***E-Book(s)*** means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-Books. For purposes of this Agreement, the term E-Book does not include (1) an audio book, even if delivered and stored digitally; (2) a standalone specialized software application or "app" sold through an "app store" rather than through an E-Book store (e.g., through Apple Inc.'s "App Store" rather than through its "iBookstore" or "iTunes") and not designed to be executed or read by or through a dedicated E-Book reading

device; or (3) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book.

(22) ***Effective Date*** means the next calendar day after the day on which all appellate rights with respect to the Approval Orders and the Discontinuance Order have expired or the Approval Orders and the Discontinuance Order, as applicable, are affirmed upon a final disposition of all appeals.

(23) ***eRetailer*** means any Person that lawfully sells or seeks to lawfully sell E-Books to consumers in Canada, or through which a Defendant under an agency agreement sells E-Books to consumers, excluding Persons whose primary business is book publishing.

(24) ***Excluded Person*** means each Defendant, the directors and officers of each Defendant, the subsidiaries or affiliates of each Defendant, the entities in which each Defendant or any of that Defendant's subsidiaries or affiliates have a controlling interest and the legal representatives, heirs, successors and assigns of each of the foregoing.

(25) ***Hachette*** means Hachette Book Group Canada Ltd. and Hachette Book Group, Inc.

(26) ***Harper Collins*** means HarperCollins Canada Limited and HarperCollins Publishers L.L.C.

(27) ***Macmillan*** means Holtzbrink Publishers LLC d/b/a Macmillan and Macmillan Publishers, Inc.

(28) ***National Proceeding*** means the proceeding commenced by Nancy Jean Adams in the form of a Notice of Action filed in the Ontario Court (Windsor Registry), Court File No. CV-12-17511, on February 23, 2012.

(29) ***National Settlement Class*** means all Persons in Canada who purchased E-Books during the Settlement Class Period, except the Excluded Persons, Persons who are included in the Quebec Settlement Class, and Persons who validly Opt-Out of the National Settlement Class in accordance with the Certification Order.

(30) ***Net Settlement Amount*** means the amount remaining from the Settlement Amount plus any interest that accrues thereon after deduction of Class Counsel Fees, Administration Expenses and any other amounts that may be approved by the Ontario Court.

(31) ***Non-Settling Defendant*** means Apple, any Settling Defendant that has terminated this Agreement pursuant to its terms, and any future Defendant that is not one of the Settling Defendants or a Releasee.

(32) ***Notice of Certification, Authorization and Settlement Approval Hearing*** means the form or forms of notice attached hereto as Schedule D, or such other form or forms as may be agreed to by the Plaintiffs and the Settling Defendants and approved by the Approval Courts, which informs the Settlement Classes of: (i) the principal elements of this Agreement, including the procedure to be followed by the members to prove their claims, (ii) the certification of the National Proceeding as a national class proceeding and the authorization of the Quebec Proceeding as a class proceeding, (iii) the dates and locations of the Settlement Approval Hearings, and (iv) the right to present arguments to the Approval Courts.

(33) ***Notice of Distribution*** means any form or forms of notice as may be approved by the Approval Courts, which informs the Settlement Classes of the manner of distribution of the Net Settlement Amount including any claims process by which Settlement Class Members may apply to obtain compensation from the Net Settlement Amount.

(34) ***Notices*** mean the Notice of Certification, Authorization and Settlement Approval Hearings, the Notice of Distribution, and any other notice that may be issued pursuant to an order of the Approval Courts.

(35) ***Ontario Court*** means the Ontario Superior Court of Justice.

(36) ***Ontario Plaintiff*** means the plaintiff in the National Proceeding.

(37) ***Opt-Out Period*** means the period of time commencing on the date on which the Notice of Certification, Authorization and Settlement Approval Hearing is first

published and ending sixty (60) days thereafter, or such other date agreed upon by the Parties and ordered by the Approval Courts.

(38) ***Penguin*** means Penguin Group (USA) LLC (formerly Penguin Group (USA), Inc.) and Penguin Canada Books, Inc.

(39) ***Parties*** mean the Plaintiffs, the Settlement Class Members and the Settling Defendants.

(40) ***Person*** means an individual, corporation, partnership, limited partnership, limited liability company, association, joint stock company, joint venture, estate, legal representative, trust, trustee, executor, beneficiary, unincorporated association, government or any political subdivision or agency thereof, member, manager and any other business or legal entity and their heirs, predecessors, successors, representatives, or assignees.

(41) ***Plaintiffs*** mean the plaintiffs in the Canadian Proceedings.

(42) ***Proportionate Liability*** means the proportion of any judgment that, had they not settled, the Courts would have apportioned to the Releasees.

(43) ***Quebec Court*** means the Superior Court of Quebec.

(44) ***Quebec Plaintiff*** means the petitioner in the Quebec Proceeding.

(45) ***Quebec Proceeding*** means the proceeding commenced by Antoine Pontbriand, in the form of an application for authorization (la Requête pour obtenir l'autorisation d'exercer un recours collectif) filed in the Quebec Superior Court, Court File No. 500-06-000595-120 (Montreal) on February 24, 2012.

(46) ***Quebec Settlement Class*** means all individuals resident in Quebec and all legal Persons in Quebec established for a private interest, partnership or association in the Province of Quebec which at all times since February 24, 2013 have had no more than fifty persons bound to it by contact of employment or under its direction or control, who purchased E-Books during the Settlement Class Period except Excluded Persons,

Persons who are in the National Settlement Class and Persons who validly Opt-Out of the Quebec Settlement Class in accordance with the Authorization judgment.

(47) ***Released Claims*** mean any and all manner of claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, whether personal or subrogated, for damages of any kind, including without limitation compensatory, punitive or other damages, liabilities of any nature whatsoever, including interest, costs, expenses, class administration expenses (including Administration Expenses), penalties, and lawyers' fees (including Class Counsel Fees), known or unknown, suspected or unsuspected, foreseen or unforeseen, actual or contingent, and liquidated or unliquidated, in law, under statute or in equity, that the Releasors, or any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have, relating in any way to any conduct occurring anywhere, from the beginning of time to the end of the Settlement Class Period, in respect of the Alleged Conspiracy as it relates to the sales of E-Books in Canada during the Settlement Class Period which was alleged (or which could have been alleged) in the Canadian Proceedings including, without limitation, any such claims which have been asserted, would have been asserted, or could have been asserted, directly or indirectly, whether in Canada or elsewhere, as a result of or in connection with the Alleged Conspiracy or any other alleged unlawful or anti-competitive conduct connected with the sale of E-Books in Canada during the Settlement Class Period. For greater certainty, nothing herein shall be construed to release any claims arising from any alleged product defect, breach of contract, breach of warranty or similar claims between the Parties relating to E-Books, or relating to the sale of E-Books after the end of the Settlement Class Period.

(48) ***Releasees*** mean, jointly and severally, individually and collectively, the Settling Defendants and all of their respective present and former, direct and indirect, parents, subsidiaries, divisions, affiliates, partners, insurers, and all other Persons, partnerships or corporations with whom any of the former have been, or are now, affiliated or otherwise related, and all of their respective past, present and future officers, directors, employees, agents, shareholders, members and managers, attorneys, trustees, servants and representatives (subject to such particular inclusions or exclusions of

individuals as may be specified in writing by the Settling Defendants in their sole discretion prior to the Effective Date); and the predecessors, successors, heirs, executors, administrators and assigns of each of the foregoing, excluding always the Non-Settling Defendants and any affiliates of the Non-Settling Defendants.

(49) ***Releasors*** mean, jointly and severally, individually and collectively, the Plaintiffs and the Settlement Class Members and their respective parents, subsidiaries, predecessors, successors, heirs, executors, administrators, insurers, and assigns.

(50) ***Settlement Amount*** means the total sum of CDN $3.175 million comprised of each Settling Defendant's respective Settlement Amount Share.

(51) ***Settlement Amount Share*** means the sum of CDN $635,000 to be paid by each of the Settling Defendants.

(52) ***Settlement Approval Hearings*** means the hearings of the motions to be brought by the Ontario Plaintiff in the Ontario Court and the Quebec Plaintiff in the Quebec Court for the Approval Orders.

(53) ***Settlement Classes*** mean the National Settlement Class and the Quebec Settlement Class.

(54) ***Settlement Class Member(s)*** means, individually or collectively, any member or members of the National Settlement Class or the Quebec Settlement Class.

(55) ***Settlement Class Period*** means the period of time extending from April 1, 2010 up to and including the last day of the Opt-Out Period;

(56) **Settling Defendants** means, individually or collectively, Hachette, HarperCollins, Macmillan, Penguin and Simon Schuster.

(57) **Simon & Schuster** means Simon & Schuster Canada, a division of CBS Canada Holdings Co.

(58) ***Trust Account*** means an interest bearing trust account at a Canadian Schedule 1 bank under the control of Class Counsel for the benefit of Settlement Class Members.

(59) ***US Court*** means the United States District Court, Southern District of New York.

(60) ***US Proceedings*** mean the proceedings commenced in the US Court entitled *United States of America v. Apple, Inc. et al.*, 12-cv-02826-DLC (S.D.N.Y.), and *In Re Electronic Books Antitrust Litigation*, 11-md-02293-DLC (S.D.N.Y.).

SECTION 2- SETTLEMENT APPROVAL

2.1 Best Efforts

(1) The Parties shall use their best efforts to effectuate this Agreement, including securing the Certification and Authorization Orders, Approval Orders and Discontinuance Order in accordance with this Agreement.

2.2 Motions Certifying the National Proceeding, Authorizing the Quebec Proceeding and Approving Notice

(1) At a time mutually agreed to by the Plaintiffs and the Settling Defendants after this Agreement is executed, and which is as soon as practicable, the Ontario Plaintiff and the Quebec Plaintiff shall each bring a motion or application before their respective Approval Courts for Certification and Authorization Orders.

(2) The Certification and Authorization Orders shall be substantially in the forms set out in Schedule B to this Agreement.

2.3 Motions for Approval of Settlement

(1) Following receipt of the Certification and Authorization Orders and the expiration of the Opt-Out Period and at a time mutually agreed to by the Plaintiffs and the Settling Defendants which is as soon as practicable, the Ontario Plaintiff and the Quebec Plaintiff each shall bring a motion or application before their respective Approval Court for Approval Orders approving this Agreement, dismissing the National Proceeding and

homologating the transaction in the Quebec Proceeding, respectively, as against the Settling Defendants with prejudice and without costs.

(2) The Approval Orders shall be substantially in the forms set out in Schedule A to this Agreement.

2.4 Discontinuance Order

(1) Following receipt of the Certification and Authorization Orders and the expiration of the Opt-Out Period, the BC Plaintiffs shall bring an application before the BC Court seeking the Discontinuance Order.

(2) The Discontinuance Order shall be substantially in the form set out in Schedule C to the Agreement.

SECTION 3 - SETTLEMENT BENEFITS

3.1 Payment of Settlement Amount

(1) Within forty-five (45) days of the execution of this Agreement by the Parties, each of the Settling Defendants shall pay its Settlement Amount Share to Class Counsel to be held in the Trust Account in accordance with the terms of this Agreement.

(2) The obligation of each Settling Defendant in respect of the Settlement Amount is only to pay its respective Settlement Amount Share. However, it is a material term of this Agreement that the Plaintiffs have the right to terminate this Agreement if the Settlement Amount is not paid in full.

(3) Class Counsel shall maintain the Trust Account as provided for in this Agreement. Class Counsel shall not pay out all or any part of the monies in the Trust Account, except in accordance with this Agreement or in accordance with an order of the Approval Courts, obtained with notice to the Settling Defendants, after all appeal rights in respect of the Approval Orders have either lapsed or been exhausted.

3.2 Taxes and Interest

(1) Except as hereinafter provided, all interest earned on the Settlement Amount shall accrue to the benefit of the Settlement Class Members and shall become and remain part of the Trust Account.

(2) Subject to section 3.2(3), all taxes payable on any interest which accrues on the Settlement Amount in the Trust Account or otherwise in relation to the Settlement Amount shall be the responsibility of the Settlement Classes. Class Counsel shall be solely responsible to fulfill all tax reporting and payment requirements arising from the Settlement Amount in the Trust Account, including any obligation to report taxable income and make tax payments. All taxes (including interest and penalties) due with respect to the income earned on the Settlement Amount shall be paid from the Trust Account.

(3) The Settling Defendants shall have no responsibility to make any filings relating to the Trust Account and will have no responsibility to pay tax on any income earned by the Settlement Amount or pay any taxes on the monies in the Trust Account, unless this Agreement is terminated in respect of one or more Settling Defendants, in which case the interest earned on the Settlement Amount Share in the Trust Account attributable to such terminating Settling Defendant shall be paid to such Settling Defendant(s) who, in such case, shall be responsible for the payment of all taxes on such interest.

3.3 Cooperation

(1) To the extent not previously provided to the Plaintiffs and subject to the limitations set forth in this Agreement, the Settling Defendants agree to provide the following cooperation to Class Counsel.

(2) Each Settling Defendant will produce to the Canadian Plaintiffs the documents produced by them or their related corporate entities to the US Department of Justice, Attorneys General, and private class counsel in the US Proceedings along with a production log (if one already exists) in the same form produced in these matters, with no additional processing required. The production and use of such documents will be subject to the same or substantially similar terms as the protective order issued with

respect to these documents in the US Proceedings. Upon a request by the Canadian Plaintiffs, which will not occur more than 6 months before a scheduled trial date, if any, the Settling Defendants will provide for the authentication of any business records in this production pursuant to a single request made to each of the Settling Defendants.

(3) It is understood that the Canadian Plaintiffs may motion the US Court to permit them to intervene into the US Proceedings for the purposes of becoming parties to the US protective order and confidentiality agreement in order to obtain copies of the deposition transcripts and other discovery exchanged between the parties in the US Proceedings. The Settling Defendants will not oppose any such application, provided that it accords with the terms set out in this Agreement. Class Counsel agree to provide copies of their application materials requesting copies of documents and/or transcripts to counsel for the Settling Defendants no less than two (2) weeks in advance of the application.

(4) The Settling Defendants' obligation to cooperate as set out in this section 3.3 shall not be affected by the release provisions contained in section 6 of this Agreement.

(5) Nothing in this Agreement shall alter any evidentiary rights the Plaintiffs may possess pursuant to the Courts' usual rules of procedure in relation to the Settling Defendants as non-parties to the Canadian Proceedings.

SECTION 4 - DISTRIBUTION OF SETTLEMENT AMOUNT AND INTEREST

4.1 Distribution Protocol

(1) At a time solely within the discretion of Class Counsel, including in conjunction with the Settlement Approval Hearings or at a later date when the claims advanced against a Non-Settling Defendant are resolved by settlement or court order, the Ontario Plaintiff and the Quebec Plaintiff will seek an order by motion on notice to the Settling Defendants from their respective Approval Courts approving a Distribution Protocol. Approval of this Agreement is not conditional on the approval of any particular form of Distribution Protocol, or the timing of same.

(2) The Settling Defendants acknowledge and agree that:

(a) the Plaintiffs, under the supervision of the Approval Courts, shall be solely

responsible for the preparation of the Distribution Protocol;

(b) on notice to the Settling Defendants, but subject only to approval by the Approval Courts (provided that the Settling Defendants may make submissions to the Approval Courts regarding the Distribution Protocol only insofar as they are directly affected), the Distribution Protocol may provide for distribution of the Net Settlement Amount and any accrued interest to Settlement Class Members either directly or indirectly (cy-pres), may use credits or gift certificates as part of the distribution; and

(c) the total number of E-books purchased by each Settlement Class Member does not need to be a factor in such distribution.

4.2 No Responsibility for Administration or Fees

(1) The Settling Defendants shall not have any responsibility, financial obligations or liability whatsoever with respect to the implementation, administration and oversight of the Distribution Protocol and/or the investment, distribution or administration of monies in the Trust Account including, but not limited to, Administration Expenses and Class Counsel Fees.

(2) Notwithstanding section 4.2(1), if requested by the Plaintiffs for purposes of the Distribution Protocol, the Settling Defendants will facilitate an introduction to the eRetailers Kobo, Amazon, Google and Sony.

SECTION 5 – OPTING-OUT

5.1 Procedure

(1) A Person may opt-out of the National Proceeding or the Quebec Proceeding by sending a signed opt-out request form by pre-paid mail, courier or fax to Class Counsel at an address and coordinates to be identified in the Notice of Certification, Authorization and Settlement Approval Hearing.

(2) Opt-out requests must contain:

(a) a statement requesting that the Person opting out be excluded from the relevant Settlement Class; and

(b) the full name, current address and telephone number of the Person who is opting out and any former names which are relevant to its purchase of E-Books in Canada during the Settlement Class Period.

(3) An opt-out request will only be effective if the executed opt-out request is postmarked or faxed on or before the end of the Opt-Out Period.

(4) Opt-out request forms will be available on the websites of Class Counsel, and can also be obtained by mail, email or fax by contacting Class Counsel, or as otherwise ordered by an Approval Court.

5.2 Opt-Out Report

(1) Within twenty-one (21) days of the end of the Opt-Out Period, Class Counsel shall notify the Settling Defendants of each Person, if any, who has opted out of the National Proceeding and Quebec Proceeding.

SECTION 6 - RELEASES, DISMISSAL AND TRANSACTION HOMOLOGATION

6.1 Release of Releasees

(1) Upon the Effective Date, and in consideration of payment of the Settlement Amount and for other valuable consideration set forth in this Agreement, the Releasors forever and absolutely release the Releasees from the Released Claims.

6.2 Covenant Not To Sue

(1) Notwithstanding section 6.1(1), for any Settlement Class Members resident in any province or territory where the release of one tortfeasor is a release of all other tortfeasors, the Releasors do not release the Releasees but instead covenant and undertake not to sue or make any claim in any way or, either directly or indirectly, to threaten, commence, participate in, encourage, facilitate, or continue any proceeding in any jurisdiction against the Releasees in respect of or in relation to the Released

Claims.

6.3 No Further Claims

(1) The Releasors shall not now or hereafter institute, continue, maintain, assert, participate in or be involved with, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any action, suit, cause of action, claim or demand against any Releasee or against any other Person who may claim contribution or indemnity, or other claims over for relief, from any Releasee in respect of any Released Claims (including those which relate to or arise from the Alleged Conspiracy as it relates to the sale of E-Books in Canada during the Settlement Class Period), except for the continued prosecution of the Canadian Proceedings against a Non-Settling Defendant.

6.4 Disposition of the Canadian Proceedings

(1) Upon the Effective Date, the National Proceeding shall be dismissed and the Quebec Proceeding shall be settled by homologation of transaction, with prejudice and without costs as against the Settling Defendants.

(2) Upon the Effective Date, the BC Proceeding shall be discontinued with prejudice and without costs as against the Settling Defendants.

6.5 Claims Against Other Entities Reserved

(1) Except as provided herein, this Agreement does not settle, compromise, release or limit in any way whatsoever any claim by Settlement Class Members against any Person other than the Releasees.

SECTION 7 - BAR ORDER AND OTHER CLAIMS

7.1 Bar Order - Ontario

(1) Subject to section 6.2, the Ontario Plaintiff shall seek an order from the Ontario Court providing for the following:

(a) All claims for contribution, indemnity or other claims over, whether asserted, unasserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims which were or could have been brought in the Canadian Proceedings by the Non-Settling Defendant or any other Person or party, against a Releasee, or by a Releasee against a Non-Settling Defendant or any other Person or party (excepting (i) a claim by a Releasee against any Person excluded in writing from the definition of Releasees; (ii) a claim by a Releasee pursuant to a policy of insurance, provided any such claim involves no right of subrogation against a Non-Settling Defendant; and (iii) a claim in respect of a Person who has validly and timely opted-out of the Settlement Classes) are barred, prohibited and enjoined in accordance with the terms of this section.

(b) If a Court determines that there is a right of contribution and indemnity or other claim over, whether in equity or in law, by statute or otherwise:

(i) the National Settlement Class Members shall not be entitled to claim or recover from the Non-Settling Defendant that portion of any damages (including punitive damages, if any), restitutionary award, disgorgement of profits, interest and costs (including investigative costs claimed pursuant to section 36 of the *Competition Act*) that corresponds to the Proportionate Liability of the Releasees proven at trial or otherwise; and

(ii) the Courts shall have full authority to determine the Proportionate Liability of the Releasees at the trial or other disposition of the Canadian Proceeding, whether or not the Releasees appear at the trial or other disposition and the Proportionate Liability of the Releasees shall be determined as if the Releasees are parties to the Canadian Proceeding, and any determination by the Courts in respect of the Proportionate Liability of the Releasees shall not be binding on the Releasees.

(c) The Non-Settling Defendant may, on motion to the Ontario Court brought on at least sixty (60) days' notice to the Settling Defendants, and not unless and until the National Proceeding against the Non-Settling Defendant has been certified and all appeal rights have been exhausted or expired, seek an order in the National Proceeding for the following:

(i) documentary discovery and an affidavit of documents in accordance with the Ontario *Rules of Civil Procedure* from any of the Settling Defendants;

(ii) oral discovery of a representative of any of the Settling Defendants;

(iii) leave to serve a request to admit on any of the Settling Defendants in respect of factual matters; and/or

(iv) the production of a representative of any of the Settling Defendants to testify at trial.

(2) The Settling Defendants retain all rights to oppose such motion(s) brought under section 7.1(1)(c) and shall not by the terms hereof be deemed to have agreed or acknowledged that any Non-Settling Defendant is entitled to such relief.

(3) A Non-Settling Defendant may serve the motion(s) referred to in section 7.1(1)(c) on any of the Settling Defendants by service on counsel of record for that Settling Defendant in the National Proceeding.

(4) To the extent that an order described in section 7.1(1)(c) is granted and discovery is provided by a Settling Defendant to a Non-Settling Defendant, a copy of all discovery provided, whether oral or documentary in nature, shall also promptly be provided by the Settling Defendant to Class Counsel and the other Settling Defendants.

7.2 Quebec

The Plaintiff in the Quebec Proceeding shall seek an order from the Quebec Court providing for the following:

(a) the Plaintiff in Quebec and the Quebec Settlement Class members expressly waive and renounce the benefit of solidarity against the Non-Settling Defendant with respect to the facts and deeds of the Settling Defendants;

(b) the Quebec Plaintiff and the Quebec Settlement Class members shall henceforth only be able to claim and recover damages, including punitive damages, attributable to the conduct of and/or sales by the Non-Settling Defendant;

(c) any action in warranty or other joinder of parties to obtain any contribution or indemnity from the Settling Defendants or relating to the Released Claims shall be inadmissible and void in the context of the Quebec Proceeding; and

(d) that any future right by the Non-Settling Defendant to examine on discovery a representative of the Settling Defendants will be determined according to the provisions of the *Code of Civil Procedure*, and the Settling Defendants reserve their right to oppose such an examination under the *Code of Civil Procedure*.

SECTION 8 - EFFECT OF SETTLEMENT

8.1 No Admission of Liability

(1) The Plaintiffs and the Settling Defendants expressly reserve all of their rights if this Agreement is not approved, is terminated or otherwise fails to take effect for any reason. Further, whether or not this Agreement is finally approved, is terminated, or otherwise fails to take effect for any reason, this Agreement and anything contained herein, and any and all negotiations, Documents, discussions and proceedings associated with this Agreement, and any action taken to carry out this Agreement, shall not be deemed, construed or interpreted to be an admission of any violation of any

statute or law, or of any wrongdoing or liability by the Settling Defendants or by any Releasee, or of the truth of any of the claims or allegations contained in the Canadian Proceedings or any other pleading filed by the Plaintiffs or any other Person.

8.2 Agreement Not Evidence

(1) Whether or not it is terminated, this Agreement and anything contained herein, and any and all negotiations, Documents, discussions and proceedings associated with this Agreement, and any action taken to carry out this Agreement, shall not be referred to, offered as evidence or received in evidence in any present, pending or future civil, criminal or administrative action or proceeding, except: (i) by the Parties in a proceeding to approve or enforce this Agreement; (ii) by a Releasee to defend against the assertion of any Released Claims; (iii) by a Releasee in any insurance-related proceeding; or (iv) as otherwise required by law or as provided in this Agreement.

8.3 No Further Litigation

(1) No Class Counsel may hereafter institute, continue, maintain, assert, participate in or be involved with, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any action, suit, cause of action, claim or demand against any Releasee or against any other Person who may claim contribution or indemnity, or other claims over for relief, from any Releasee which relates to or arises from the Alleged Conspiracy or Released Claims except for the continued prosecution of the Canadian Proceedings against the Non-Settling Defendant.

(2) Section 8.3(1) of this Agreement shall be inoperative to the extent that it requires any lawyer who is a member of the Law Society of British Columbia (the "LSBC") to breach his or her obligations under Rule 4.7 of the LSBC's Professional Conduct Handbook by refraining from participation or involvement in any claim or action in a British Columbia court. This section shall not affect or render inoperative any other section or provision of this Agreement.

(3) No Plaintiff, no Settlement Class Member, nor any Class Counsel may divulge to any Person or use for any purpose any information, including, without limitation, any

Documents provided pursuant to section 3.3, obtained in the course of the Canadian Proceedings or the negotiation and preparation of this Agreement, except as otherwise expressly permitted under this Agreement, if such information is otherwise publicly available, or as otherwise ordered by a court in Canada.

SECTION 9 - CERTIFICATION OR AUTHORIZATION FOR SETTLEMENT ONLY

9.1 Settlement Classes and Common Issue

(1) The Parties agree that the National Proceeding and the Quebec Proceeding shall be certified or authorized solely for purposes of settlement of the Canadian Proceedings against the Settling Defendants and the approval of this Agreement by the Approval Courts.

(2) The Plaintiffs agree that, for settlement purposes, the only common issue that they will seek to define is the Common Issue and the only classes that they will assert are the National Settlement Class and the Quebec Settlement Class in the National Proceeding and the Quebec Proceeding, respectively. The Plaintiffs acknowledge that the Settling Defendants agree to the definition of the Common Issue for purposes of settlement only.

9.2 Certification and Authorization Without Prejudice

(1) In the event that this Agreement is not finally approved, is terminated in accordance with its terms or otherwise fails to take effect, this Agreement shall, subject to an agreement by the Parties to the contrary, be null and void and of no force and effect and any order certifying or authorizing a class proceeding shall be set aside and the Parties agree that all Parties shall be put in the position they were in before this Agreement was executed and nothing in this Agreement shall prejudice any position that any of the Parties or any Releasee may take on any issue in the Canadian Proceedings or any other litigation.

SECTION 10 - NOTICE TO NATIONAL SETTLEMENT CLASS

10.1 Notice Required

(1) The proposed Settlement Classes shall be given the following Notices: (i) Notice of Certification, Authorization and Settlement Approval Hearing; (ii) Notice of Distribution; and (iii) any other notice that may be required by the Approval Courts or the BC Court.

(2) All Notices will be provided to the Settling Defendants for their approval as to form and content no less than two (2) weeks before any motion for approval to an Approval Court or the BC Court.

10.2 Dissemination of Notice

(1) The Ontario Plaintiff and the Quebec Plaintiff shall on a motion to their respective Approval Courts on notice to the Settling Defendants, seek approval of the plan for the dissemination of Notices in the form attached hereto as Schedule D.

SECTION 11 - ADMINISTRATION AND IMPLEMENTATION

11.1 Mechanics of Administration

(1) The mechanics of the implementation and administration of this Agreement and the Distribution Protocol shall be approved by the Approval Courts on a motion brought by Class Counsel on notice to the Settling Defendants.

SECTION 12 - CLASS COUNSEL FEES AND ADMINISTRATION EXPENSES

(1) Except as provided in section 12(2), the Releasees shall not be liable for any fees, disbursements or taxes, including but not limited to Class Counsel Fees and Administration Expenses and including any fees, disbursements or taxes of the Plaintiffs' or any Settlement Class Member's respective lawyers, experts, advisors, agents, or representatives.

(2) Class Counsel may pay subject to approval from the Approval Courts, the costs of the Notices referred to in section 10.1 and translation of this Agreement from the Trust Account as incurred.

(3) Class Counsel may on notice to the Settling Defendants seek the Approval Courts' approval of Class Counsel Fees and Administration Expenses contemporaneous with seeking the Approval Orders, or at such other time as they shall determine in their sole discretion. Class Counsel may also seek the Approval Courts' approval to hold and/or use the Settlement Amount in whole or part for prosecution of the Canadian Proceedings against Non-Settling Defendants and/or for provision of indemnification to the Plaintiffs for adverse costs awards in lieu of third party funding.

(4) Except as provided in section 12(2), any Administration Expenses and Class Counsel Fees may only be paid out of the Trust Account after the Effective Date.

(5) The failure of an Approval Court to approve a request for Class Counsel Fees or Administration Expenses has no impact or effect on the rights and obligations of the Parties to this Agreement and shall not be grounds for termination of the Agreement.

SECTION 13 - TERMINATION OF SETTLEMENT AGREEMENT

13.1 Right of Termination

(1) The Plaintiffs or each Settling Defendant may terminate this Agreement as it relates to it in the event that:

(a) any Approval Court declines to grant a Certification Order or Authorization Order substantially in the form attached as Schedule B in the National Proceeding or the Quebec Proceeding or if any such Certification Order or Authorization Order is overturned or reversed in whole or in part on appeal;

(b) any Approval Court declines to grant the Approval Orders substantially in the form of Schedule A or if any such Approval Order is overturned or reversed in whole or in part on appeal;

(c) the Discontinuance Order in substantially the form of Schedule C obtained in accordance with this Agreement is not approved by the BC Court or is overturned or reversed in whole or in part on appeal; or

(d) the total number of E-books purchased during the Settlement Class Period by Persons who opt-out of the National Proceeding and the Quebec Proceeding exceeds 10% of total number of E-books sold by the Settling Defendants during the Settlement Class Period.

(2) In addition, and as provided in section 3.1(2) of this Agreement, the Plaintiffs have the right to terminate this Agreement if the Settlement Amount is not paid in full within 45 days of the execution of this Agreement by the Parties.

(3) To exercise a right of termination under section 13.1(1), a terminating party shall deliver a written notice of termination pursuant to section 14.16 of this Agreement within thirty (30) days of the ground for termination becoming known to the terminating party. Upon delivery of such a written notice, this Agreement shall be terminated, shall be null and void and have no further force or effect, and shall not be binding on the Parties except as provided for in sections 13.1(4) and13.1(5).

(4) The exercise of a right of termination by one Settling Defendant shall only terminate this Agreement as between the Plaintiffs and that Settling Defendant and shall have no force or effect as against the other Settling Defendants and shall not terminate this Agreement or otherwise impact the rights and obligations of the Plaintiffs and the other Settling Defendants who have not terminated this Agreement.

(5) If more than one Settling Defendant elects to terminate this Agreement or if the Settlement Amount is not paid in full, the Plaintiffs will have the option, at their sole discretion, to:

(a) terminate the Agreement in full as between all Parties, or

(b) agree that the Agreement is terminated only as between the Plaintiffs and those Settling Defendants who exercised the right of termination or who failed to pay their Settlement Amount Share, and that the terminations

shall not impact the rights and obligations of the Plaintiffs and the other Settling Defendants who did not terminate this Agreement or who paid their Settlement Amount Share.

13.2 If Settlement Agreement is Terminated

(1) If this Agreement is not approved, is terminated by the Plaintiffs or all of the Settling Defendants in accordance with its terms or otherwise fails to take effect for any reason, all orders made in respect of this Agreement shall be set aside and shall be deemed as having no force and effect and shall be without prejudice to any position the Parties may assert in the future.

(2) If this Agreement is terminated by or in relation to some but not all of the Settling Defendants in accordance with its terms, all orders made in respect of this Agreement shall be amended so that they are of no force and effect as against those Settling Defendants who have terminated this Agreement or in relation to whom this Agreement was terminated.

(3) The Plaintiffs and the Settling Defendants who have terminated this Agreement or against whom this Agreement was terminated shall negotiate in good faith to determine a new timetable if the Canadian Proceedings are to continue against those Settling Defendants who have terminated this Agreement or against whom this Agreement was terminated.

13.3 Allocation of Monies in the Trust Account Following Termination

(1) If this Agreement is terminated as it relates to some or all of the Settling Defendants, Class Counsel shall pay to each such terminating Settling Defendant its Settlement Amount Share plus all accrued interest thereon, less a proportionate share of all costs of the Notices and translations incurred to the date of such payment, within thirty (30) days of receipt of a termination notice pursuant to section 13.1(3).

13.4 Survival of Provisions After Termination

(1) If this Agreement is terminated or otherwise fails to take effect for any reason, the

provisions of sections 3.2(3), 8.1, 8.2, 9.2, 12(1), 12(2) and 13 and the definitions applicable thereto shall survive the termination and continue in full force and effect. The definitions shall survive only for the limited purpose of the interpretation of these surviving sections within the meaning of this Agreement. All other provisions of this Agreement and all other obligations pursuant to this Agreement shall cease immediately.

SECTION 14 - MISCELLANEOUS

14.1 Releasees Have No Liability for Administration

(1) The Releasees have no responsibility for and no liability whatsoever with respect to the administration of this Agreement or the Distribution Protocol.

14.2 Motions for Directions

(1) The Settling Defendants or the Plaintiffs may apply to the Approval Courts for directions in respect of the interpretation, implementation and administration of this Agreement.

(2) The Settling Defendants or the Plaintiffs may apply to the Approval Courts for directions in respect of any Distribution Protocol.

(3) All motions contemplated by this Agreement shall be on notice to the Plaintiffs and the Settling Defendants.

14.3 Headings, etc.

(1) In this Agreement:

(a) the division of the Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement; and

(b) the terms "this Agreement", "hereof", "hereunder", "herein" and similar expressions refer to this Agreement and not to any particular section or other portion of this Agreement.

14.4 Computation of Time

(1) In the computation of time in this Agreement, except where a contrary intention appears,

(a) where there is a reference to a number of days between two events, the number of days shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, including all calendar days; and

(b) only in the case where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday.

14.5 Ongoing Jurisdiction

(1) The Approval Courts jointly shall retain exclusive jurisdiction over this Agreement and the Parties hereto (including the Settlement Class Members), Class Counsel Fees and Administration Expenses.

14.6 Governing Law

(1) This Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario.

14.7 Entire Agreement

(1) This Agreement constitutes the entire agreement among the Parties, and supersedes all prior and contemporaneous understandings, undertakings, negotiations, representations, promises, agreements, agreements in principle and memoranda of understanding in connection herewith. None of the Parties will be bound by any prior obligations, conditions or representations with respect to the subject matter of this Agreement, unless expressly incorporated herein.

14.8 Amendments

(1) This Agreement may not be modified or amended except in writing and on consent of all Parties hereto and the modifications or amendments shall only be

effective if the Approval Courts approve any such material modification or amendment made after the Approval Orders have been granted.

14.9 Binding Effect

(1) This Agreement shall be binding upon, and enure to the benefit of, the Plaintiffs, the Settling Defendants, the Settlement Class Members, the Releasors, the Releasees, and all of their successors and assigns. Without limiting the generality of the foregoing, each and every covenant and agreement made herein by the Plaintiffs shall be binding upon all Releasors and each and every covenant and agreement made herein by the Settling Defendants shall be binding upon all of the Releasees.

14.10 Counterparts

(1) This Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and a facsimile or PDF signature shall be deemed an original signature for purposes of executing this Agreement.

14.11 Interpretation

(1) This Agreement has been the subject of negotiations and discussions among the Parties, each of which has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Agreement shall have no force and effect. The Parties further agree that the language contained in or not contained in previous drafts of this Agreement, or any agreement in principle, all have no bearing upon the proper interpretation of this Agreement.

14.12 Language

(1) The Parties acknowledge that they have required and consented that this Agreement and all related documents be prepared in English; les parties reconnaissent avoir consenti à ce que la présente convention et tous les documents connexes soient rédigés en anglais. Nevertheless, the Class Counsel shall prepare a French translation

of this Agreement including the Schedules and may recoup the costs of translation from the Trust Account. In the event of any dispute as to the interpretation or application of this Agreement, the English version shall prevail.

14.13 Transaction

(1) This Agreement constitutes a transaction in accordance with Articles 2631 and following of the *Civil Code of Quebec*, and the parties are hereby renouncing to any errors of fact, of law and/or of calculation.

14.14 Recitals

(1) The recitals to this Agreement are true and form part of the Agreement.

14.15 Schedules

(1) The Schedules annexed hereto form part of this Agreement.

14.16 Notice

(1) Any and all notices, requests, directives, or communications required by this Agreement shall be in writing and shall, unless otherwise expressly provided herein, be given personally, by express courier, by postage prepaid mail, by facsimile transmission, or by email PDF files, and shall be addressed as follows:

FOR THE PLAINTIFFS AND FOR CLASS COUNSEL:

Heather Rumble Peterson

SUTTS STROSBERG LLP

600 – 251 Goyeau Street
Windsor, ON N9A 6V4
Tel: 519-561-6216
Fax: 519-258-9527
Email:
hpeterson@strosbergco.com

Ward Branch

BRANCH MACMASTER LLP

1410 - 777 Hornby Street
Vancouver, BC V7G 3E2
Tel: 604-654-2966
Fax: 604-684-3429
Email: wbranch@branmac.com

Andrew Morganti

LAW OFFICE OF ANDREW J.

Normand Painchaud

SYLVESTRE FAFARD PAINCHAUD

MORGANTI

119 Spadina Avenue, Suite 604
Toronto, ON M5V 2L1
Tel: 416-800-2171
Fax: 416-800-2171
Email:
amorgani@morgantilegal.com

SENCRL

740 Avenue Atwater
Montreal, QC H4C 2G9
Tel: 514-937-2881 Ext. 228
Fax: 514-937-6529
Email: n.painchaud@sfpadvocats.ca

FOR THE SETTLING DEFENDANTS:

For Hachette Book Group Canada Ltd. and Hachette Book Group, Inc.:

Linda M. Plumpton

TORYS LLP

79 Wellington Street W
Suite 3000, Box 270, TD Centre
Toronto, ON M5K 1N2
Tel: 416-865-8193
Fax: 416-865-7380
Email: lplumpton@torys.com

For HarperCollins Canada Limited and HarperCollins Publishers, LLC.:

Katherine L. Kay

STIKEMAN ELLIOTT LLP

5300 Commerce Court West

199 Bay Street
Toronto, ON M5L 1B9
Tel: 416-869-5507
Fax: 416-947-0866
Email: kkay@stikeman.com

For Holtzbrink Publishers LLC d/b/a Macmillan and **Macmillan Publishers, Inc.:**Michael Eizenga

BENNETT JONES LLP

3400 One First Canadian Place
PO Box 130
Toronto, ON M5X 1A4
Tel: 416-777-4879
Fax: 416-863-1716
Email:
eizengam@bennetjones.com

For Penguin Group (USA), LLC and Penguin Canada Books, Inc.:
David Kent

McMILLAN LLP

Brookfield Place, Suite 440
181 Bay Street
Toronto, ON M5J 2T3
Tel: 416-865-7143
Fax: 416-865-7048
Email: david.kent@mcmillan.ca

For Simon & Schuster Canada, a division of CBS Canada Holdings Co.:

Mahmud Jamal

OSLER, HOSKIN & HARCOURT LLP

1 First Canadian Place
Box 50
Toronto, ON M5X 1B8
Tel: 416-862-6764
Fax: 416-862-6666
Email: mjamal@osler.com

14.17 Acknowledgements

(1) Each of the Parties hereby affirms and acknowledges that:

(a) he, she or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein has read and understood this Agreement;

(b) the terms of this Agreement and the effects thereof have been fully explained to him, her or the Party's representative by his, her or its counsel;

(c) he, she or the Party's representative fully understands each term of this Agreement and its effect; and

(d) no Party has relied upon any statement, representation or inducement (whether material, false, negligently made or otherwise) of any other Party, beyond the terms of this Agreement, with respect to the first Party's decision to execute this Agreement.

14.18 Authorized Signatures

(1) Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Agreement on behalf of the Parties identified above their respective signatures below.

14.18 Date of Execution

(1) The Parties have executed this Agreement as of the date on the cover page.

WAYNE VAN TASSEL, NANCY JEAN ADAMS and ANTOINE PONTBRAND, by their counsel

By: [redacted]
Sutts Strosberg LLP
Title: Counsel for the Ontario Plaintiff

By: _____
Law Offices of Andrew J. Morganti
Title: Counsel for the Ontario Plaintiff

By: [redacted]
Branch MacMaster LLP
Title: Counsel for the BC Plaintiff

By: _____
Sylvestre Fafard Painchaud
Title: Counsel for the Quebec Plaintiff

HACHETTE BOOK GROUP CANADA LTD. AND HACHETTE BOOK GROUP, INC., by their counsel

By: _____
Torys LLP

HARPERCOLLINS CANADA LIMITED AND HARPERCOLLINS PUBLISHERS, LLC., by their counsel

By: _____
Stikeman Elliot LLP

14.19 Date of Execution

(1) The Parties have executed this Agreement as of the date on the cover page.

WAYNE VAN TASSEL, NANCY JEAN ADAMS and ANTOINE PONTBRAND, by their counsel

By: _____
Sutts Strosberg LLP
Title: Counsel for the Ontario Plaintiff

By: [redacted]
Law Offices of Andrew J. Morganti
Title: Counsel for the Ontario Plaintiff

By: _____
Branch MacMaster LLP
Title: Counsel for the BC Plaintiff

By: _____
Sylvestre Fafard Painchaud
Title: Counsel for the Quebec Plaintiff

HACHETTE BOOK GROUP CANADA LTD. AND HACHETTE BOOK GROUP, INC., by their counsel

By: _____
Torys LLP

HARPERCOLLINS CANADA LIMITED AND HARPERCOLLINS PUBLISHERS, LLC., by their counsel

By: _____
Stikeman Elliot LLP

14.19 Date of Execution

(1) The Parties have executed this Agreement as of the date on the cover page.

WAYNE VAN TASSEL, NANCY JEAN ADAMS and ANTOINE PONTBRAND, by their counsel

By: _____
Sutts Strosberg LLP
Title: Counsel for the Ontario Plaintiff

By: _____
Law Offices of Andrew J. Morganti
Title: Counsel for the Ontario Plaintiff

By: [redacted]
Branch MacMaster LLP
Title: Counsel for the BC Plaintiff

By: [redacted]
Sylvestre Fafard Painchaud
Title: Counsel for the Quebec Plaintiff

HACHETTE BOOK GROUP CANADA LTD. AND HACHETTE BOOK GROUP, INC., by their counsel

By: _____
Torys LLP

HARPERCOLLINS CANADA LIMITED AND HARPERCOLLINS PUBLISHERS, LLC., by their counsel

By: _____
Stikeman Elliot LLP

14.19 Date of Execution

(1) The Parties have executed this Agreement as of the date on the cover page.

WAYNE VAN TASSEL, NANCY JEAN ADAMS and ANTOINE PONTBRAND, by their counsel

By: _____
Sutts Strosberg LLP
Title: Counsel for the Ontario Plaintiff

By: _____
Law Offices of Andrew J. Morganti
Title: Counsel for the Ontario Plaintiff

By: [redacted]
Branch MacMaster LLP
Title: Counsel for the BC Plaintiff

By: _____
Sylvestre Fafard Painchaud
Title: Counsel for the Quebec Plaintiff

HACHETTE BOOK GROUP CANADA LTD. AND HACHETTE BOOK GROUP, INC., by their counsel

By: [redacted]
Torys LLP

HARPERCOLLINS CANADA LIMITED AND HARPERCOLLINS PUBLISHERS, LLC., by their counsel

By: _____
Stikeman Elliot LLP

14.19 Date of Execution

(1) The Parties have executed this Agreement as of the date on the cover page.

WAYNE VAN TASSEL, NANCY JEAN ADAMS and ANTOINE PONTBRAND, by their counsel

By: _____
Sutts Strosberg LLP
Title: Counsel for the Ontario Plaintiff

By: _____
Law Offices of Andrew J. Morganti
Title: Counsel for the Ontario Plaintiff

By: [redacted]
Branch MacMaster LLP
Title: Counsel for the BC Plaintiff

By: _____
Sylvestre Fafard Painchaud
Title: Counsel for the Quebec Plaintiff

HACHETTE BOOK GROUP CANADA LTD. AND HACHETTE BOOK GROUP, INC., by their counsel

By: _____
Torys LLP

HARPERCOLLINS CANADA LIMITED AND HARPERCOLLINS PUBLISHERS, LLC., by their counsel

By: [redacted]
Stikeman Elliot LLP [redacted]

HOLTZBRINK PUBLISHERS LLC d/b/a MACMILLAN and **MACMILLAN PUBLISHERS, INC.**, by their counsel

By: [redacted]
Bennett Jones LLP

PENGUIN GROUP (USA) LLC and PENGUIN CANADA BOOKS, INC., by their counsel

By: _____
McMillan LLP

SIMON & SCHUSTER CANADA, a division of CBS Canada Holdings Co., by its counsel

By: _____
Osler, Hoskin & Harcourt LLP

HOLTZBRINK PUBLISHERS LLC d/b/a MACMILLAN and **MACMILLAN PUBLISHERS, INC.**, by their counsel

By: _____
Bennett Jones LLP

PENGUIN GROUP (USA) LLC and PENGUIN CANADA BOOKS, INC., by their counsel

By: [redacted]
McMillan LLP

SIMON & SCHUSTER CANADA, a division of CBS Canada Holdings Co., by its counsel

By: _____
Osler, Hoskin & Harcourt LLP

HOLTZBRINK PUBLISHERS LLC *d/b/a* **MACMILLAN** and **MACMILLAN PUBLISHERS, INC.**, by their counsel

By: _____
Bennett Jones LLP

PENGUIN GROUP (USA) LLC and PENGUIN CANADA BOOKS, INC., by their counsel

By: _____
McMillan LLP

SIMON & SCHUSTER CANADA, a division of CBS Canada Holdings Co., by its counsel

By: [redacted]
Osler, Hoskin & Harcourt LLP [redacted]

SCHEDULE A

Schedule A

Draft ON and QC Orders Approving Agreement

Court File No. CV-12-17511

ONTARIO
SUPERIOR COURT OF JUSTICE

The Honourable	)	, the	day
Justice Patterson	)	of	, 2014

Between:

NANCY JEAN ADAMS

Plaintiff

and:

APPLE INC., HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., HARPERCOLLINS CANADA LIMITED, HARPERCOLLINS PUBLISHERS, INC., MACMILLAN PUBLISHERS, INC., **PENGUIN GROUP (USA) LLC (formerly,** PENGUIN GROUP (USA), INC.), PENGUIN CANADA BOOKS, INC., and, SIMON & SCHUSTER CANADA, a division of CBS CANADA HOLDINGS CO.

Defendants

Proceedings under the *Class Proceedings Act*, 1992

ORDER

(SETTLEMENT APPROVAL)

THIS MOTION made by the Plaintiff, Nancy Jean Adams, for an order approving the Agreement made between the Plaintiff and others, and the Defendants Hachette Book Group Canada Ltd., Hachette Book Group Inc., HarperCollins Canada Limited, HarperCollins Publishers, LLC, Macmillan Publishers, Inc., Penguin Group (USA) LLC (formerly, Penguin Group (USA), Inc.), Penguin Canada Books Inc., and Simon & Schuster Canada, a division of CBS Canada Holdings Co. (collectively, the "Settling Defendants"), dated ♦ (the "Agreement") was heard this <date> at ♦ Ontario.

ON READING the pleadings and materials filed in relation to this motion, including the Agreement between the Plaintiff and the Settling Defendants (collectively, the "Settling Parties") and the <affidavits in support of approval motion>;

AND WHEREAS the deadline for opting out of the National Proceeding has passed and no National Settlement Class Member has validly opted out;

AND WHEREAS the deadline for objecting to the Agreement has passed, and there have been no written objections to the Agreement and no National Settlement Class Member appeared to object to the Agreement;

AND ON HEARING submissions of counsel for the Settling Parties;

AND ON BEING ADVISED that the Settling Parties consent to this Order;

AND ON BEING ADVISED that the non-settling defendant, Apple, Inc. ("Apple") takes no position on this Order;

1. THIS COURT ORDERS AND DECLARES that, except to the extent they are modified by this Order, the definitions set out in the Agreement which is attached as Schedule "A" to this Order, apply to and are incorporated into this Order.

2. THIS COURT DECLARES that the Agreement is fair, reasonable and in the best interests of the National Settlement Class.

3. THIS COURT ORDERS that the Agreement is hereby approved pursuant to section 29 of the *Class Proceedings Act, 1992* and shall be implemented and enforced in accordance with its terms and the terms of this Order.

4. THIS COURT ORDERS AND DECLARES that the Agreement is incorporated by reference into and forms part of this Order.

5. THIS COURT ORDERS that in the event of a conflict between this Order and the Agreement, this Order shall prevail.

6. THIS COURT ORDERS AND DECLARES that this Order, including the Agreement, is binding upon each member of the National Settlement Class who does not validly opt out of the National Proceeding, including those persons who are minors or mentally incapable and the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure* are dispensed with in respect of the National Proceeding.

7. THIS COURT ORDERS AND DECLARES that, upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever, finally and absolutely released the Releasees from the Released Claims.

8. THIS COURT ORDERS that, each Releasor shall not now or hereafter institute, continue, maintain, assert, participate in or be involved with either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any action, suit, cause of action, claim or demand against any Releasee or against any other Person who may claim contribution or indemnity, or other claims over for relief, from any Releasee in respect of the Released Claims, except for the continuation of the Canadian Proceedings against a Non-Settling Defendant or named or unnamed co-conspirators who are not Releasees in the National Proceeding.

9. THIS COURT ORDERS AND DECLARES that, upon the Effective Date, any member of the National Settlement Class who has not validly opted out shall be deemed to have consented to the dismissal without costs of any action or proceeding he, she or it has commenced in Canada or elsewhere, against any Releasee or against any other Person who may claim contribution or indemnity, or other claims over for relief, from any Releasee in respect of the Released Claims, except for the continuation of the Canadian Proceedings against a Non-Settling Defendant or named or unnamed co-conspirators who are not Releasees in the National Proceeding.

10. THIS COURT ORDERS AND DECLARES that, upon the Effective Date, any action or proceeding brought in Ontario by any member of the National Settlement Class who has not validly opted out of the National Proceeding shall be dismissed without costs against any Releasee or against any other Person who may claim contribution or indemnity, or other claims over for relief, from any Releasee in respect of the Released Claims, except for the continuation of the Canadian Proceedings against a Non-Settling Defendant or named or unnamed co-conspirators who are not Releasees in the National Proceeding.

11. THIS COURT ORDERS AND DECLARES that the use of the terms "Releasors" and "Released Claims" in this Order does not constitute a release of claims by those members of the National Settlement Class who are resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors.

12. THIS COURT ORDERS AND DECLARES that each member of the National Settlement Class who is resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors covenants and undertakes not to make any claim in any way nor to threaten, commence, or continue any proceeding in any jurisdiction against the Releasees in respect of or in relation to the Released Claims.

13. THIS COURT ORDERS AND DECLARES that all claims for contribution, indemnity or other claims over, whether asserted, unasserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims which were or could have been brought in the National Proceeding by the Non-Settling Defendant or any other Person or party (excepting (i) a claim by a Releasee against any Person excluded in writing from the definition of Releasees, (ii) a claim by a Releasee pursuant to a policy of insurance, provided any such claim involves no right of subrogation against a Non-Settling Defendant, and (iii) a claim in respect of a Person who has validly and timely opted-out of the National Settlement Class) are barred, prohibited and enjoined.

14. THIS COURT ORDERS AND DECLARES that, if, in the absence of paragraph 13 above, the Ontario Court determines that there is a right of contribution, indemnity or other claims over, whether in equity or in law, by statute or otherwise:

    (a) the National Settlement Class shall not be entitled to claim or recover from any Non-Settling Defendant that portion of any damages (including punitive damages, if any), restitutionary award, disgorgement of profits, interest and costs (including investigative costs claimed pursuant to s.36 of the *Competition Act)* that corresponds to the Proportionate Liability of the Releasees proven at trial or otherwise; and

    (b) the Ontario Court shall have full authority to determine the Proportionate Liability of the Releasees at the trial or other disposition of the National Proceeding, whether or not the Releasees appear at the trial or other disposition, and the Proportionate Liability of the Releasees shall be determined as if the Releasees are parties to the National Proceeding, and any determination by the Ontario Court in respect of the Proportionate Liability of the Releasees shall not be binding on the Releasees.

15. THIS COURT ORDERS AND DECLARES that subject to paragraph 16 hereof, a Non-Settling Defendant may, on motion to the Ontario Court brought on at least sixty (60) days' notice to the Settling Defendants, and not unless and until the National Proceeding against the Non-Settling Defendant has been certified and all appeal rights have been exhausted or expired, seek an order in the National Proceeding for the following:

    (a) documentary discovery and an affidavit of documents in accordance with the *Ontario Rules of Civil Procedure* from any of the Settling Defendants;

    (b) oral discovery of a representative of any of the Settling Defendants;

(c) leave to serve a request to admit on any of the Settling Defendants in respect of factual matters; and/or

(d) the production of a representative of any of the Settling Defendants to testify at trial.

16. THIS COURT ORDERS AND DECLARES that the Settling Defendants retain all rights to oppose such motion(s) brought under paragraph 15 of this Order, and shall not be deemed to have agreed or acknowledged that any Non-Settling Defendant is entitled to such relief.

17. THIS COURT ORDERS AND DECLARES that a Non-Settling Defendant may effect service of the motion(s) referred to in paragraph 15 above on any of the Settling Defendants by service on counsel of record for that Settling Defendant in the National Proceeding.

18. THIS COURT ORDERS AND DECLARES that, to the extent that an order pursuant to paragraph 15 above is made and discovery is provided by a Settling Defendant to a Non-Settling Defendant, a copy of all discovery provided, whether oral, or documentary in nature, shall also promptly be provided by the Settling Defendant to Class Counsel and to the other Settling Defendants.

19. THIS COURT ORDERS AND DECLARES that, for purposes of administration and enforcement of this Order and the Agreement, the Ontario Court will retain an ongoing supervisory role and the Settling Defendants acknowledge the jurisdiction of the Ontario Court and attorn to the jurisdiction of the Ontario Court solely for the purpose of implementing, administering and enforcing the Agreement and this Order and subject to the terms and conditions set out in the Agreement and this Order.

20. THIS COURT ORDERS that ♦ be and is appointed as the Claims Administrator.

21. THIS COURT ORDERS AND DECLARES that except as provided herein, this Order does not affect any claims or causes of action that any member of the National Settlement Class has or may have against the Non-Settling Defendant or named or unnamed co-conspirators who are not Releasees in the National Proceeding.

22. THIS COURT ORDERS AND DECLARES that no Releasee shall have any responsibility or liability relating to the administration of the Agreement or the Distribution Protocol or the administration, investment, or distribution of the Trust Account.

23. THIS COURT ORDERS AND DECLARES that, subject to the provisions of the Agreement, the Settlement Amount, plus accrued interest less any monies paid out pursuant to the Agreement, shall be held in trust for the benefit of the Settlement Classes, pending further order of the Approval Courts.

24. THIS COURT ORDERS AND DECLARES that the terms of this Order shall not be effective unless and until the Agreement is approved by the Quebec Court and the BC Proceeding has been discontinued, and shall have no force and effect if such approval and discontinuance are not both obtained.

25. THIS COURT ORDERS AND DECLARES that in the event that the Agreement is terminated by the Plaintiff or all of the Settling Defendants in accordance with its terms or otherwise fails to take effect for any reason:

    (a) all orders made in respect of the Agreement, including this Order, shall be set aside as of the date made and shall be deemed as having no force and effect and shall be without prejudice to any position the Parties may assert in the future; and

    (b) each party to the National Proceeding shall be restored to their respective position in the National Proceeding as it existed immediately prior to the execution of the Agreement.

26. THIS COURT ORDERS AND DECLARES that if the Agreement is terminated by or, as it relates to some but not all of the Settling Defendants in accordance with its terms, all orders made in respect of the Agreement, including this Order, shall be retroactively amended so that they are of no force and effect as against the Settling Defendants who have terminated the Agreement.

27. THIS COURT ORDERS AND DECLARES that if the Agreement is terminated as it relates to some or all of the Settling Defendants, Class Counsel shall repay to each such terminating Settling Defendant its Settlement Amount Share plus all accrued interest thereon, less a proportionate share of all costs of the Notices and translations incurred to the date of such repayment, within thirty (30) days of receipt of a termination notice pursuant to section 13.1(3) of the Agreement.

28. THIS COURT ORDERS AND DECLARES that on notice to the Approval Courts, but without further order of the Approval Courts, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions in the Agreement.

29. THIS COURT ORDERS AND DECLARES that, except as aforesaid, upon the Effective Date, the National Proceeding be and is hereby dismissed against the Settling Defendants without costs and with prejudice.

Date <>

THE HONOURABLE JUSTICE PATTERSON

Schedule A

Draft ON and QC Orders Approving Agreement

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Class Action)

N°: 500-06-000595-120

ANTOINE PONTBRIAND
Plaintiff

vs.

APPLE INC.

HACHETTE BOOK GROUP INC.

HACHETTE BOOK GROUP CANADA INC.

HARPERCOLLINS PUBLISHERS INC.

HARPERCOLLINS CANADA LTD.

MACMILLAN PUBLISHERS INC.

PENGUIN GROUP (USA) INC.

PEARSON CANADA INC. (PENGUIN GROUP CANADA)

SIMON & SCHUSTER CANADA, a division of CBS CANADA HOLDINGS CO.

Defendants

JUDGMENT APPROVING A SETTLEMENT AGREEMENT

THIS JUDGMENT is made pursuant to a motion for the approval of a proposed settlement agreement (the "Agreement") between Plaintiff Antoine Pontbriand and others and Defendants Hachette Book Group Canada Ltd., Hachette Book Group Inc., HarperCollins Canada Limited, HarperCollins Publishers, LLC, Macmillan Publishers, Inc., Penguin Group (USA), Inc., Penguin Canada Inc. c.o.b.a. Penguin Group (Canada), and Simon & Schuster Canada, a division of CBS Canada Holdings Co. (collectively, the "Settling Defendants");

ON READING the motions and exhibits filed, including the Agreement between the Plaintiff and the Settling Defendants (collectively, the "Settling Parties");

AND WHEREAS the deadline for objecting to the Agreement has passed, and there have been no written objections to the Agreement and no Quebec Settlement Class Member appeared to object to the Agreement;

AND ON HEARING submissions of counsel for the Settling Parties;

AND ON BEING ADVISED that the Settling Parties consent to this Order;

AND ON BEING ADVISED that the non-settling defendant, Apple, Inc. ("Apple") takes no position on this Order:

1- Except to the extent they are modified by this Order, the definitions set out in the Agreement which is attached as Schedule "A" to this Order, apply to and are incorporated into this Order;

2- THIS COURT DECLARES that the Agreement is fair, reasonable and in the best interests of the Quebec Settlement Class.

3- THIS COURT ORDERS that the Agreement is hereby approved and shall be implemented and enforced in accordance with its terms and the terms of this Order;

4- THIS COURT ORDERS that in the event of a conflict between this Judgment and the Agreement, this Judgment shall prevail;

5- THIS COURT ORDERS AND DECLARES that the Agreement is incorporated by reference into and forms part of this Order;

6- THIS COURT ORDERS AND DECLARES that, upon the Effective Date, any action or proceeding brought in Quebec by any member of the Quebec Settlement Class who has not validly opted out of the Quebec Proceeding shall be dismissed against the Releasees, without costs and with prejudice;

7- THIS COURT ORDERS AND DECLARES that this Order, including the Agreement, is binding upon each member of the Quebec Settlement Class who does not validly opt out of the Quebec Proceeding;

8- THIS COURT ORDERS AND DECLARES that, upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever, finally and absolutely released the Releasees from the Released Claims;

9- THIS COURT ORDERS that each Releasor shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in

Quebec or elsewhere, on their own behalf or on behalf of any class or any other Person, any action, suit, cause of action, claim or demand against any Releasee or against any other Person who may claim contribution or indemnity, or other claims over for relief, from any Releasee in respect of the Released Claims, except for the continuation of the Canadian Proceedings against a Non-Settling Defendant or named or unnamed co-conspirators who are not Releasees in the Quebec Proceeding;

10- THIS COURT ORDERS AND DECLARES that:

a) the Plaintiff and the Quebec Settlement Class members expressly waive and renounce the benefit of solidarity against the Non-Settling Defendant with respect to the facts and deeds of the Settling Defendants;

b) the Plaintiff and the Quebec Settlement Class members shall henceforth only be able to claim and recover damages, including punitive damages, attributable to the conduct of and/or sales by the Non-Settling Defendant;

c) any action in warranty or other joinder of parties to obtain any contribution or indemnity from the Settling Defendants or relating to the Released Claims shall be inadmissible and void in the context of the Quebec Proceeding; and

d) any future right by the Non-Settling Defendant to examine on discovery a representative of the Settling Defendants will be determined according to the provisions of the *Code of Civil Procedure*, and the Settling Defendants reserve their right to oppose such an examination under the *Code of Civil Procedure*.

11- THIS COURT ORDERS AND DECLARES that the Settling Defendants retain all rights to oppose motion(s) brought under paragraph 10 d) of this Judgment, and shall not be deemed to have agreed or acknowledged that any Non-Settling Defendant is entitled to such relief;

12- THIS COURT ORDERS AND DECLARES that the Non-Settling Defendant may effect service of the motion(s) referred to in paragraph 10 d) above on any of the Settling Defendants by service on counsel of record for that Settling Defendant in the Quebec Proceeding;

13- THIS COURT ORDERS AND DECLARES that, to the extent that a Judgment pursuant to paragraph 10 d) above is made and discovery is provided by a Settling Defendant to the Non-Settling Defendant, a copy of all discovery provided, whether oral, or documentary in nature, shall also promptly be provided by the Settling Defendant to Class Counsel and to the other Settling Defendants;

14- THIS COURT ORDERS AND DECLARES that, for purposes of administration and enforcement of this Judgement and the Agreement,

the Quebec Court will retain an ongoing supervisory role and the Settling Defendants acknowledge the jurisdiction of the Quebec Court and attorn to the jurisdiction of the Quebec Court solely for the purpose of implementing, administering and enforcing the Agreement and this Judgement and subject to the terms and conditions set out in the Agreement and this Judgment;

15- THIS COURT ORDERS that ♦ be and is appointed as the Claims Administrator;

16- THIS COURT ORDERS AND DECLARES that except as provided herein, this Judgement does not affect any claims or causes of action that any member of the Quebec Settlement Class has or may have against the Non-Settling Defendant or named or unnamed co-conspirators who are not Releasees in the Quebec Proceeding;

17- THIS COURT ORDERS AND DECLARES that no Releasee shall have any responsibility or liability relating to the administration of the Agreement or the Distribution Protocol or the administration, investment, or distribution of the Trust Account;

18- THIS COURT ORDERS AND DECLARES that, subject to the provisions of the Agreement, the Settlement Amount, plus accrued interest less any monies paid out pursuant to the Agreement, shall be held in trust for the benefit of the Settlement Classes, pending further Judgment of the Approval Courts;

19- THIS COURT ORDERS AND DECLARES that the terms of this Judgment shall not be effective unless and until the Agreement is approved by the Ontario Court and the BC Proceeding has been discontinued, and shall have no force and effect if such approval and discontinuance are not both obtained;

20- THIS COURT ORDERS AND DECLARES that in the event that the Agreement is terminated by or, as it relates to the Plaintiff or all of the Settling Defendants in accordance with its terms or otherwise fails to take effect for any reason:

(a) all orders made in respect of the Agreement, including this Judgment, shall be set aside as of the date made and shall be deemed as having no force and effect and shall be without prejudice to any position the Parties may assert in the future; and

(b) each party to the Quebec Proceeding shall be restored to their respective position in the Quebec Proceeding as it existed immediately prior to the execution of the Agreement.

21- THIS COURT ORDERS AND DECLARES that if the Agreement is terminated by or as it relates to some but not all of the Settling Defendants in accordance with its terms, all orders and Judgments made in respect of the Agreement, including this

Judgment, shall be retroactively amended so that they are of no force and effect as against the Settling Defendants who have terminated the Agreement;

22- THIS COURT ORDERS AND DECLARES that if the Agreement is terminated as it relates to some or all of the Settling Defendants, Class Counsel shall repay to each such terminating Settling Defendant its Settlement Amount Share plus all accrued interest thereon, less a proportionate share of all costs of the Notices and translations incurred to the date of such repayment, within thirty (30) days of receipt of a termination notice pursuant to section 13.1(3) of the Agreement;

23- THIS COURT ORDERS AND DECLARES that on notice to the Approval Courts, but without further Judgment of the Approval Courts, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions in the Agreement;

24- THIS COURT ORDERS AND DECLARES that the levies of the *Fonds d'aide au recours collectif* shall be paid to it pursuant to the law;

25- THIS COURT ORDERS AND DECLARES that the Agreement is a transaction as per the Quebec civil Code, and that such transaction be and is hereby homologated; and

26- THIS COURT ORDERS AND DECLARES that this Judgment is without costs and with prejudice.

SCHEDULE B

Schedule B

Certification and Pre-Approval Notice Orders

Court File No. CV-12-17511

The Honourable Justice Patterson	)	, the day of , 2014

ONTARIO
SUPERIOR COURT OF JUSTICE

Between:

NANCY JEAN ADAMS

Plaintiff

and:

APPLE INC., HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., HARPERCOLLINS CANADA LIMITED, HARPERCOLLINS PUBLISHERS, INC., MACMILLAN PUBLISHERS, INC., PENGUIN GROUP (USA) LLC (formerly PENGUIN GROUP (USA), INC.), PENGUIN CANADA BOOKS, INC. and SIMON & SCHUSTER CANADA, a division of CBS CANADA HOLDINGS CO.

Defendants

Proceedings under the *Class Proceedings Act*, 1992

ORDER

(CERTIFICATION AND PRE-APPROVAL NOTICE)

THIS MOTION made by the Plaintiff, Nancy Jean Adams, for an order certifying this action as a class proceeding for settlement purposes only as against the Defendants Hachette Book Group Canada Ltd., Hachette Book Group Inc., HarperCollins Canada Limited, HarperCollins Publishers, LLC, Macmillan Publishers, Inc., Penguin Group (USA) LLC (formerly Penguin Group (USA), Inc.), Penguin Canada Books, Inc., Simon & Schuster Canada, a division of CBS Canada Holdings Co., (collectively, the "Settling Defendants") and for an order approving the form of Notice of Certification and

Settlement Approval Hearings (the "Pre-Approval Notice") and the means by which the Pre-Approval Notice will be disseminated (the "Plan of Dissemination"), was heard on <> at ♦ Ontario.

ON READING the pleadings and materials filed and on hearing the submissions of counsel for the Plaintiff and for the Settling Defendants;

AND ON BEING ADVISED THAT the Plaintiff has entered into an Agreement with the Settling Defendants (collectively, the "Settling Parties") dated <> (the "Agreement");

AND ON BEING ADVISED that the Settling Parties consent to this Order;

AND ON BEING ADVISED that the non-settling defendant, Apple, Inc. ("Apple"), takes no position on this motion;

1. THIS COURT ORDERS that, except to the extent that they are modified by this Order, the definitions set out in the Agreement, which is attached as **Schedule "A"** to this Order, apply to and are incorporated into this Order.

2. THIS COURT ORDERS that the National Proceeding is certified as a class proceeding as against the Settling Defendants for settlement purposes only.

3. THIS COURT ORDERS that the National Settlement Class is defined as:

> All persons in Canada who purchased E-Books during the Settlement Class Period, except the Excluded Persons, Persons who are included in the Quebec Settlement Class, and Persons who validly opt-out of the National Settlement Class in accordance with this Order.

4. THIS COURT ORDERS that Nancy Jean Adams is appointed as the representative plaintiff for the National Settlement Class.

5. THIS COURT ORDERS that the following issue is common to the National Settlement Class:

> Did the Settling Defendants, or any of them, conspire with each other or others to fix, maintain, increase or control the price of E-Books in Canada during the Settlement Class Period?

6. THIS COURT ORDERS that Sutts Strosberg LLP is appointed as the Opt Out Administrator.

7. THIS COURT ORDERS that any member of the National Settlement Class who wishes to opt-out of the National Proceeding must do so by sending a signed written election to opt-out, together with the information required in the Agreement, to the Opt Out Administrator, postmarked or faxed on or before the end of the Opt Out Period.

8. THIS COURT ORDERS that any member of the National Settlement Class who has validly opted-out of the National Proceeding is not bound by the Agreement and will not be entitled to receive any share of benefits payable in connection with same, and will cease to be a putative class member in the continuing action against the Non-Settling Defendant.

9. THIS COURT ORDERS that any member of the National Settlement Class who has not validly opted-out of the National Proceeding is bound by the Agreement.

10. THIS COURT ORDERS that the hearing to approve the Agreement shall take place on <date>.

11. THIS COURT ORDERS that the Pre-Approval Notice is hereby approved substantially in the form attached hereto as **Schedule "B"**.

12. THIS COURT ORDERS that the Plan of Dissemination is hereby approved in the form attached hereto as **Schedule "C"**.

13. THIS COURT ORDERS that the Pre-Approval Notice shall be disseminated in accordance with the Plan of Dissemination.

14. THIS COURT ORDERS that this Order, including, without limiting the generality of the foregoing, the certification of the National Proceeding against the Settling Defendants and the definitions of the National Settlement Class, Settlement Class Period and Common Issue, is without prejudice to any position any Non-Settling Defendant may take in this or any other proceeding on any issue, including the issue of whether the National Proceeding should be certified as a class proceeding as against a Non-Settling Defendant. For greater certainty, this Order, the Ontario Court's reasons in support of this Order and the certification of the National Proceeding against any Settling Defendants for settlement purposes only are not binding on and shall have no effect on the Ontario Court's ruling in the continuing prosecution of the National Proceeding or any other proceeding as against a Non-Settling Defendant. Notwithstanding the foregoing, the Non-Settling Defendant may not rely, cite or refer to all or any part of this Order or any reasons given by the Ontario Court in support of this Order, and may not assert a deficiency in the notice plan and /or opt-out process set out in this Order, as a basis to oppose the Plaintiff's motion to approve the Agreement, including without limitation as a basis to oppose the proposed bar order contained in the Agreement.

Date: <>

THE HONOURABLE JUSTICE
PATTERSON

Schedule B

Certification and Pre-Approval Notice Orders

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Class Action)

N°: 500-06-000595-120

ANTOINE PONTBRIAND
Petitioner

vs.

APPLE INC.

HACHETTE BOOK GROUP INC.

HACHETTE BOOK GROUP CANADA INC.

HARPERCOLLINS PUBLISHERS INC.

HARPERCOLLINS CANADA LTD.

MACMILLAN PUBLISHERS INC.

PENGUIN GROUP (USA) INC.

PEARSON CANADA INC. (PENGUIN GROUP CANADA)

SIMON & SCHUSTER CANADA, a division of CBS CANADA HOLDINGS CO..

Respondents

JUDGMENT AUTHORIZING A CLASS ACTION AND APPROVING A NOTICE OF HEARING ON APPROVAL OF A SETTLEMENT AGREEMENT

THIS JUDGMENT is made pursuant to (i) an amended motion for the authorization of a class action by Plaintiff Antoine Pontbriand in the context of a settlement agreement between Plaintiff and others and the Respondents Hachette Book Group Canada Ltd., Hachette Book Group Inc., HarperCollins Canada Limited, HarperCollins Publishers, LLC, Macmillan Publishers, Inc., Penguin Group (USA), Inc., Penguin Canada Inc. c.o.b.a. Penguin Group

(Canada), and Simon & Schuster Canada, a division of CBS Canada Holdings Co. (collectively, the "Settling Defendants") and, (ii) a motion for the approval of the form of a Notice of Hearing on Approval of Settlement Agreement (the "Pre-Approval Notice") and the means by which the Pre-Approval Notice will be disseminated (the "Plan of Dissemination") as regards the proposed settlement agreement between Plaintiff and others and the Settling Defendants;

ON READING the motions and exhibits filed and on hearing the submissions of counsel for the Plaintiff and for the Settling Defendants;

AND ON BEING ADVISED THAT the Plaintiff has entered into a settlement agreement with the Settling Defendants (collectively, the "Settling Parties") dated <> (the "Agreement");

AND ON BEING ADVISED that the Settling Parties consent to this Judgment;

AND ON BEING ADVISED that the non-settling defendant, Apple, Inc. ("Apple") takes no position on this Judgment;

Class Action Authorization

1- THIS COURT ORDERS that, except to the extent that they are modified by this Judgment, the definitions set out in the proposed Agreement, which is attached as **Exhibit R-1** to this Judgment, apply to and are incorporated into this Judgment;

Authorisation

2- In the context of the R-1 proposed Agreement, this Court is satisfied that the criterias of paragraphs a) to d) of section 1003 C.p.c. are met, namely;

a) the recourses of the members raise the following identical, similar or related question of law and fact:

"Did the Settling Defendants, or any of them, conspire with each other or others to fix, maintain, increase or control the price of E-Books in Canada during the Settlement Class Period?"

b) the facts alleged seem to justify the conclusions sought;

c) the composition of the group makes the application of art. 59 or 67 C.C.P. difficult or impracticable;

d) Mr. Antoine Pontbriand is in a position to represent the members adequately;

3- THIS COURT ORDERS therefore that the sought Class Action be and is hereby authorized for settlement purposes only, for the following Group, as against the Settling Defendants:

> "All individuals resident in Quebec and all legal Persons in Quebec established for a private interest, partnership or association in the Province of Quebec which at all times since February 24, 2013 have had no more than fifty persons bound to it by contact of employment or under its direction or control, who purchased E-Books during the Settlement Class Period"

4- THIS COURT ORDERS that the status of representative for the Group be ascribed to Mr. Antoine Pontbriand;

5- THIS COURT ORDERS that any member of the Quebec Settlement Class who wishes to opt-out of the Quebec Proceeding must do so by sending a signed written election to opt-out, together with the information required in the Agreement, to Quebec Class Counsel Sylvestre Fafard Painchaud, postmarked or faxed on or before the end of the Opt Out Period;

6- THIS COURT ORDERS that any member of the Quebec Settlement Class who has validly opted-out of the Quebec Proceeding would not be bound by the Agreement and would not either be entitled to receive any share of benefits payable in connection with same, and will cease to be a putative class member in the continuing action against the Non-Settling Defendant;

7- THIS COURT ORDERS that any member of the Quebec Settlement Class who has not validly opted-out of the Quebec Proceeding will be bound by the Agreement should it be approved;

8- THIS COURT ORDERS that the hearing to approve the Agreement shall take place on <date>;

9- THIS COURT ORDERS that the Pre-Approval Notice is hereby approved substantially in the form attached hereto as **Schedule "B"**;

10- THIS COURT ORDERS that the Plan of Dissemination is hereby approved in the form attached hereto as **Schedule "C"**;

11- THIS COURT ORDERS that the Pre-Approval Notice shall be disseminated in accordance with the Plan of Dissemination;

12- THIS COURT ORDERS that this Judgment, including, without limiting the generality of the foregoing, the authorisation of the Quebec Proceeding against the Settling Defendants and the definitions of the Quebec Settlement Class, Settlement Class Period and Common Issue, is without

prejudice to any position the Non-Settling Defendant may take in this or any other proceeding on any issue, including the issue of whether the Quebec Proceeding should be certified as a class proceeding as against the Non-Settling Defendant. For greater certainty, this Judgment, the Court's reasons in support of this Judgment and the certification of the Quebec Proceeding against the Settling Defendants for settlement purposes only are not binding on and shall have no effect on the Court's ruling in the continuing prosecution of the Quebec Proceeding or any other proceeding as against the Non-Settling Defendant. Notwithstanding the foregoing, the Non-Settling Defendant may not rely, cite or refer to all or any part of this Judgment or any reasons given by the Court in support of this Judgment, and may not assert a deficiency in the notice plan and /or opt-out process set out in this Judgment, as a basis to oppose the Plaintiff's motion to approve the Agreement, including without limitation as a basis to oppose the proposed bar order contained in the Agreement.

SCHEDULE C

Schedule C

Discontinuance Order

No. S-122529
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WAYNE VAN TASSEL

PLAINTIFF

AND:

APPLE INC., HACHETTE BOOK GROUP CANADA LTD.,HACHETTE BOOK GROUP, INC., HARPERCOLLINS CANADA LIMITED, HARPERCOLLINS PUBLISHERS, INC., MACMILLAN PUBLISHERS, INC., PENGUIN GROUP (USA) LLC (formerly PENGUIN GROUP (USA), INC.), PENGUIN CANADA BOOKS, INC. and SIMON & SCHUSTER CANADA, a division of CBS CANADA HOLDINGS CO.

DEFENDANTS

Proceedings pursuant to the *Class Proceedings Act*, RSBC 1996, c. 50

ORDER
(Discontinuance as Against Settling Defendants)

BEFORE THE HONOURABLE <>) <DATE>
)
)

ON THE APPLICATION of the Plaintiff, Wayne Van Tassel, dated <date> coming on for hearing before me at 800 Smithe Street, Vancouver, British Columbia, on <date>, and UPON HEARING:

<counsel>

AND UPON READING the pleadings and materials filed in relation to this application, including <material> and on being advised that the Plaintiff has entered into an agreement with the Defendants, Hachette Book Group Canada Ltd., Hachette Book Group Inc., HarperCollins Canada Limited, HarperCollins Publishers, LLC, Macmillan

Publishers, Inc., Penguin Group (USA) LLC (formerly Penguin Group (USA) Inc.), Penguin Canada Books, Inc., Simon & Schuster Canada, a division of CBS Canada Holdings Co. (collectively, the "Settling Defendants"), dated ♦; and on being advised that the Plaintiff and the Settling Defendants consent to this Order; and on being advised that the Defendant Apple, Inc. takes no position on this Order;

THIS COURT ORDERS that:

1. The action as against the Settling Defendants is hereby discontinued without costs;

2. The discontinuance of this action as against the Settling Defendants shall be with prejudice; and

3. There shall be no costs of this action.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS NOTED ABOVE:

Signature of lawyer for the Plaintiff

[LAWYER NAME]

Signature of lawyer for the Defendants, Hachette Book Group Canada Ltd. and Hachette Book Group Inc.

[LAWYER NAME]

Signature of lawyer for the Defendants, HarperCollins Canada Limited and HarperCollins Publishers, LLC

[LAWYER NAME]

Signature of lawyer for the Defendant, Macmillan Publishers, Inc.

[LAWYER NAME]

Signature of lawyer for the Defendants, Penguin Group (USA) LLC. and Penguin Canada Books, Inc.,

[LAWYER NAME]

Signature of lawyer for the Defendants, Simon & Schuster Canada, a division of CBS Canada Holdings Co.

[LAWYER NAME]

Signature of lawyer for the Defendant, Apple Inc.

[LAWYER NAME]

By the Court

Registrar

Schedule C

Discontinuance Order

No. S-122529
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WAYNE VAN TASSEL

PLAINTIFF

AND:

APPLE INC., HACHETTE BOOK GROUP CANADA LTD.,HACHETTE BOOK GROUP, INC., HARPERCOLLINS CANADA LIMITED, HARPERCOLLINS PUBLISHERS, INC., MACMILLAN PUBLISHERS, INC., PENGUIN GROUP (USA) LLC (formerly PENGUIN GROUP (USA), INC.), PENGUIN CANADA BOOKS, INC. and SIMON & SCHUSTER CANADA, a division of CBS CANADA HOLDINGS CO.

DEFENDANTS

Proceedings pursuant to the *Class Proceedings Act*, RSBC 1996, c. 50

ORDER

(Discontinuance as Against Settling Defendants)

BRANCH MACMASTER LLP
Barristers & Solicitors
1410 – 777 Hornby Street
Vancouver, BC V6Z 1S4

Tel: (604) 654-2999
Fax: (604) 684-3429
Email: lbrasil@branmac.com

SCHEDULE D

E-BOOKS CLASS ACTION

To all persons in Canada who purchased E-Books from April 1, 2010 to <date>

Notice of Certification/Authorization and Proposed Canadian Settlement

THE LAWSUITS

Class action lawsuits were commenced in Ontario, British Columbia and Quebec ("Actions") against Apple Inc. ("Apple") and various publishers of E-books (the "Publishers", particularized below) alleging they conspired to fix, maintain, increase or control the price of E-books sold by them in Canada, contrary to Part VI of the *Competition Act*, the common law and the Civil Code of Quebec (the "Alleged Conspiracy"). The Actions allege that, as a result of the Alleged Conspiracy, the price of E-books sold in Canada from April 1, 2010 to <date> was artificially high, and seek, among other things, reimbursement of the alleged overcharges. The defendants deny those allegations, and the claims have not been proven in Court.

THE PUBLISHERS

The Publishers are **Hachette** Book Group Canada Ltd, Hachette Book Group Inc., **HarperCollins** Canada Limited, HarperCollins Publishers LLC, **Macmillan** Publishers, Inc., **Penguin** Group (USA) LLC (formerly Penguin Group (USA), INC.), Penguin Canada Books, Inc. and **Simon & Schuster** Canada, a division of CBS Canada Holdings Co.

THE PROPOSED SETTLEMENT

A settlement was reached with the Publishers (the "Settlement"). Settlement benefits include payment of $3,175,000 (the "Settlement Proceeds") and cooperation in prosecuting the Actions against Apple. The Settlement must be approved by the Ontario and Quebec Courts ("Courts") to be effective.

CERTIFICATION / AUTHORIZATION

For the purposes of implementing the Settlement, the Actions were certified/authorized as class actions by the Courts in relation only to the Publishers. This means that the determinations made in the Actions will automatically apply to all persons who purchased E-books in Canada between April 1, 2010 and <date>, unless they take steps to exclude themselves from the Actions (see below under "Your Options"). Certification / authorization will be set aside if the Settlement is not approved by all the Courts.

SETTLEMENT APPROVAL HEARINGS

The requests to approve the Settlement will take place in hearings on <date> (Ontario) and <date> (Quebec). At the same time, the Class Lawyers may seek approval of their contingency agreements with the representative plaintiffs and of a fee percentage to be deducted from the Settlement Proceeds with other court-approved costs.

THE SETTLEMENT AFFECTS YOUR RIGHTS

If the Settlement is approved, it will affect all persons in Canada who purchased Ebooks from April 1, 2010 to <date> except those who opt out of the Actions, the Defendants and certain related parties ("Settlement Class Members"). Under the Settlement, Settlement Class Members **RELEASE** the Publishers and other related parties from claims regarding the purchase of Ebooks in Canada from April 1, 2010 to <date>, and commit to discontinue or dismiss other proceedings.

WILL I RECEIVE ANY MONEY AT THIS TIME?

The manner in which the net Settlement Proceeds (after deduction of court approved legal fees and other expenses) will be distributed will be determined at a later date, in particular because the case is continuing against Apple. The net Settlement Proceeds will be held in trust for the benefit of the Settlement Class Members. Once the Courts have approved the method for distributing the net Settlement Proceeds, another notice will be provided and posted online at <website> explaining who is eligible for direct payment and how those persons can apply to receive payment. In the meantime, all purchasers of E-Books in Canada are encouraged to retain proof of purchase of E-Books.

YOUR OPTIONS

If you want to **participate in the Actions and benefit from this Settlement and any later settlements or judgments**, you **do not need to do anything**. All persons in Canada who purchased E-books from April 1, 2010 to <date> are **automatically included.** You can provide your name and contact information to the Class Lawyers so we can provide further updates on the Actions to you and let you know once the Courts approve a plan to distribute the Net Settlement Amounts.

If you **do not want to participate in the Actions, or participate in the Settlement, you must exclude yourself** by completing and sending an Opt Out Form to the Class Lawyers by <date> (the "Opt Out Deadline"). Opt Out Forms are available at <website> or from the Class Lawyers. If you opt out, you will keep any right to bring your own lawsuit but will not receive the benefit of this or future settlements or any judgments in the Actions.If you do not opt out of the Actions by the Opt Out Deadline, you will be bound by the Settlement and will not be able to opt out of the Actions in the future

To **comment on or object** to the Settlement, you must write to one of the Class Lawyers **by <Date>**. Comments and objections will be provided to the Courts, but the Courts cannot change the terms of the Settlement.

DO I NEED TO PAY ANYTHING?

You do not need to pay anything out of your pocket. The plaintiffs and petitioners entered into contingency agreements with the Class Lawyers providing for payment of up to 1/3 of amounts recovered in the Actions and reimbursement of disbursements incurred to prosecute the Actions. The Courts will determine the amount to be paid to the Class Lawyers from the Settlement Proceeds.

HOW DO I CONTACT THE CLASS LAWYERS?

To ask questions about the Settlement or Actions, or register as an E-book purchaser, contact:

- For British Columbia residents: Luciana P. Brasil of Branch MacMaster LLP care of uherlev@branmac.com
- For Quebec residents: Normand Painchaud of Sylvestre Fafard Painchaud care of n.painchaud@sfpavocats.ca
- For all others: Heather Rumble Peterson of Sutts Strosberg LLP care of ebooks@strosbergco.com

This Notice is a summary. For more information about the Settlement or to read the settlement agreement, please visit <website> or contact the Class Lawyers.

ADAMS	v. APPLE INC., et al.
Plaintiff	Defendants

Court File No. CV-12-17511

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT WINDSOR

Proceeding Under the *Class Proceedings Act, 1992*

ORDER

Law Office of Andrew J. Morganti
The Dineen Building
303-140 Yonge Street
Toronto, ON M5C 1X6

Andrew J. Morganti LSUC #57895E
Tel: (416) 800-2171
Fax: (416) 800-2171

Sutts, Strosberg LLP
600 Westcourt Place, 251 Goyeau Street
P.O. Box 670
Windsor ON N9A 6V4

Heather Rumble Peterson LSUC #24671V
Tel.: (519) 258-9333
Fax: (519) 258-9527

Branch MacMaster LLP
Barristers & Solicitors
1410 – 777 Hornby Street
Vancouver, BC V6Z 1S4

Ward K. Branch
Tel.: (604) 654-2966
Fax: (604) 684-3429

Lawyers for the Plaintiff

FILE: 29.059.000
REF: HRP/lw