

## SCHEDULE 1

Regulation 2

### CLAIMS IN RESPECT OF LOSS OR DAMAGE ARISING FROM INFRINGEMENTS OF COMPETITION LAW

1. Chapter 4 of Part 1 of the Competition Act 1998 (appeals, proceedings before the Competition Appeal Tribunal and settlements relating to infringements of competition law) is amended as follows.

2. For the Chapter heading(1) substitute “Appeals before the Tribunal(2) and proceedings and settlements relating to infringements of competition law”.

3. After section 47E(3) insert—

*“Further provision about claims in respect of loss or damage before a court or the Tribunal*

#### **47F Further provision about claims in respect of loss or damage before a court or the Tribunal**

Schedule 8A makes further provision about claims in respect of loss or damage before a court or the Tribunal.”

4. After Schedule 8 insert—

“SCHEDULE 8A

Section 47F

### FURTHER PROVISION ABOUT CLAIMS IN RESPECT OF LOSS OR DAMAGE BEFORE A COURT OR THE TRIBUNAL

## PART 1

### INTERPRETATION

1. This Part of this Schedule contains definitions and other provisions about interpretation which apply for the purposes of this Schedule.

#### **Competition law etc**

2.—(1) “Competition law” means—

- (a) the Chapter I prohibition(4),
- (b) the Chapter II prohibition,
- (c) the prohibition in Article 101(1), and
- (d) the prohibition in Article 102.

(2) “Competition claim” means a claim in respect of loss or damage arising from an infringement of competition law (whatever the legal basis of the claim) which is made by or on behalf of—

- (a) the person who suffered the loss or damage, or

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(1) The heading was substituted by Consumer Rights Act 2015 c. 15Sch. 8(1) para.2.

(2) “the Tribunal” is defined in section 59(1) of the Competition Act 1998 (c. 41), as amended by the Enterprise Act 2002 (c. 40) Schedule 5, paragraph 6(b).

(3) Section 47E was inserted by the Consumer Rights Act 2015 (c. 15), Schedule 8(1), paragraph 8(1).

(4) “the Chapter I prohibition”, “the Chapter II prohibition”, “Article 101(1)” and “Article 102” are all defined in section 59 of the Competition Act 1998. Relevant amendments were made to section 59 by S.I. 2012/1809.

**Draft Legislation:** This is a draft item of legislation. This draft has since been made as a UK Statutory Instrument: *The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 No. 385*

- (b) a person who has acquired that person's right to make the claim (whether by operation of law or otherwise).
- (3) "Competition damages claim" means a competition claim to the extent that it is a claim for damages.
- (4) "Competition proceedings" means proceedings before a court or the Tribunal to the extent that they relate to a competition claim.
- (5) Where the context requires, references to an infringement of competition law and to loss or damage (however expressed) include an alleged infringement and alleged loss or damage.

### Competition authority etc

- 3.—(1) "Competition authority" means—
- (a) the CMA<sup>(5)</sup>,
  - (b) a regulator<sup>(6)</sup>, so far as it exercises functions under Part 1 of this Act concurrently with the CMA,
  - (c) the Commission<sup>(7)</sup>, and
  - (d) a member State competition authority.
- (2) A "member State competition authority" means an authority designated by a member State other than the United Kingdom, under Article 35 of the EC Competition Regulation<sup>(8)</sup>, as being responsible for the application of Article 101 and Article 102 of the Treaty<sup>(9)</sup>.
- (3) "Investigation materials", in relation to a competition authority, means—
- (a) information prepared by a person (other than a competition authority) for the purpose of an investigation by the competition authority into an infringement of competition law;
  - (b) information sent by the competition authority, during the course of such an investigation, to an undertaking which is the subject of the investigation;
  - (c) a settlement submission which has been withdrawn.
- (4) Subsections (3) and (4) of section 58A<sup>(10)</sup> apply for the purposes of determining when a decision of the CMA, a regulator or the Commission becomes "final".
- (5) A decision of a member State competition authority becomes "final"—
- (a) when the time for appealing against it expires without an appeal having been brought, or
  - (b) where an appeal has been brought against the decision, when—
    - (i) the appeal and any further appeal in relation to the decision has been decided or has otherwise ended, and
    - (ii) the time for appealing against the result of the appeal or further appeal has expired without another appeal having been brought.
- (6) Where the law of a member State other than the United Kingdom requires or enables a member State competition authority to bring proceedings before a court of the member State in

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(5) The CMA is defined in section 59 of the Competition Act 1998 (c. 41), as amended by Enterprise and Regulatory Reform Act 2013 (c. 24) Schedule 5(1), paragraph 38(2)(a).

(6) "regulator" is defined in section 54(1) of the Competition Act 1998.

(7) "the Commission" is defined in section 59(1) of the Competition Act 1998 as amended by the Enterprise and Regulatory Reform Act 2013 (c. 24) Schedule 5(3), paragraph 221.

(8) "the EC Competition Regulation" is defined in section 59(1) of the Competition Act 1998 as inserted by S.I. 2004/1261, Schedule 1, paragraph 35(2)(d).

(9) "The Treaty" is defined in section 59(1) of the Competition Act 1998 (c. 41) as amended by S.I. 2012/1809, Schedule 1, paragraph 1.

(10) Section 58A was substituted by the Consumer Rights Act 2015 (c. 15), Schedule 8(1), paragraph 14(1).

relation to an infringement of Article 101(1) or Article 102, rather than making a decision itself in relation to the infringement—

- (a) references to an investigation by a competition authority into an infringement of competition law include such proceedings brought by the member State competition authority;
- (b) references to a competition authority closing an investigation include the termination of such proceedings by the member State competition authority or by another person, except where the competition authority's investigation of the infringement continues after the proceedings terminate;
- (c) references to a decision of a competition authority include a decision of a court in such proceedings;
- (d) sub-paragraph (5) applies in relation to a decision of a court in such proceedings as it applies in relation to a decision of a member State competition authority.

### **Cartels**

4.—(1) “Cartel” means an agreement or concerted practice between two or more competitors aimed at—

- (a) co-ordinating their competitive behaviour in a market, or
- (b) otherwise influencing competition in a market,

through practices such as (but not limited to) those listed in sub-paragraph (2).

(2) Those practices are—

- (a) fixing or co-ordinating purchase or selling prices or other trading conditions, including in relation to intellectual property rights,
- (b) allocating production or sales quotas, and
- (c) sharing markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors.

(3) “Cartel leniency programme” means a programme operated by a competition authority under which—

- (a) an undertaking that has participated in a cartel may provide the competition authority with information about the cartel and the undertaking's involvement in it, and
- (b) if it does so voluntarily and independently of the other cartel members, the competition authority may give the undertaking immunity from, or a reduction in, a financial penalty which would otherwise be payable by the undertaking for its participation in the cartel.

(4) “Cartel leniency statement” means a set of information provided, orally or in writing, to a competition authority by or on behalf of a person which—

- (a) consists of information about a cartel and the person's role in relation to the cartel,
- (b) is provided voluntarily, and
- (c) is provided specifically for the purposes of the competition authority's cartel leniency programme,

excluding any pre-existing information.

(5) For the purposes of sub-paragraph (4)—

- (a) “pre-existing information” means information that exists irrespective of a competition authority's investigations, and
- (b) the fact that information is in a competition authority's file does not prevent it from being pre-existing information.

(6) References to a cartel leniency statement include—

- (a) a part of a cartel leniency statement,
- (b) a quotation from a cartel leniency statement,
- (c) all or part of a record of a cartel leniency statement, and
- (d) a copy of all or part of a cartel leniency statement or of a record of such a statement.

(7) On the application of a claimant in competition proceedings, a court or the Tribunal may, in accordance with procedural rules, determine whether information is a cartel leniency statement.

(8) For the purposes of making a determination under sub-paragraph (7), the court or the Tribunal may—

- (a) take evidence from the author of the document, and
- (b) obtain assistance from a competition authority,

but may not obtain assistance from anyone else.

#### **Settlement submission to a competition authority**

**5.—**(1) “Settlement submission” means a statement made, orally or in writing, to a competition authority by or on behalf of an undertaking—

- (a) which states—
  - (i) that the undertaking accepts that it has infringed competition law, or
  - (ii) that the undertaking does not accept that it has infringed competition law but will not dispute a decision of the competition authority that it has done so,
- (b) which is made voluntarily, and
- (c) which is made for the sole purpose of allowing the competition authority to follow a simplified or expedited procedure in connection with the infringement.

(2) References to a settlement submission include—

- (a) a part of a settlement submission,
- (b) a quotation from a settlement submission,
- (c) all or part of a record of a settlement submission, and
- (d) a copy of all or part of a settlement submission or of a record of such a submission.

(3) On the application of a claimant in competition proceedings, a court or the Tribunal may, in accordance with procedural rules, determine whether a document is a settlement submission.

(4) For the purposes of making a determination under sub-paragraph (3), the court or the Tribunal may—

- (a) take evidence from the author of the document, and
- (b) obtain assistance from a competition authority,

but may not obtain assistance from anyone else.

#### **Consensual dispute resolution process**

**6.—**(1) “Consensual dispute resolution process” means arbitration, mediation or any other process enabling parties to a dispute to resolve it out of court.

(2) A dispute is resolved “out of court” even if the process involves a court or the Tribunal approving what the parties agree or declaring their agreement binding.

### **Other definitions**

7.—(1) “Court” means—

- (a) the High Court or the Court of Appeal in England and Wales,
- (b) the sheriff or the Court of Session,
- (c) the High Court or the Court of Appeal in Northern Ireland, or
- (d) the Supreme Court,

except in paragraphs 3(6) and 35.

(2) “Damages” includes any sum of money (other than costs or expenses) which may be awarded in respect of a competition claim.

(3) “Procedural rules” means—

- (a) in relation to proceedings before a court, rules of court, and
- (b) in relation to proceedings before the Tribunal, Tribunal rules.

(4) “Undertaking” includes an association of undertakings.

## **PART 2**

### **PASSING ON**

#### **Overcharges and underpayments**

8. For the purposes of this Part of this Schedule—

- (a) there is an overcharge as a result of an infringement of competition law if, when a product or service is acquired directly from the infringer, the price actually paid exceeds the price that would have been paid in the absence of the infringement, and
- (b) there is an underpayment as a result of an infringement of competition law if, when a product or service is provided directly to the infringer, the price actually paid is less than the amount that would have been paid in the absence of the infringement.

#### **Burden of proof where an overcharge is passed on to an indirect purchaser**

9.—(1) Sub-paragraph (2) applies where—

- (a) there is an overcharge as a result of an infringement of competition law, and
- (b) a competition claim is made in respect of loss or damage which—
  - (i) arises, directly or indirectly, from the overcharge, and
  - (ii) was suffered by a person who acquired a product or service indirectly from the infringer (“the injured person”).

(2) The claimant is to be treated as having proved that the overcharge was passed on to the claimant if the claimant proves that—

- (a) the defendant infringed competition law,
- (b) as a result of the infringement, there was an overcharge when a person acquired a product or service directly from the defendant, and
- (c) the claimant subsequently acquired—
  - (i) the product or service mentioned in paragraph (b), or

(ii) a product or service derived from or containing the product or service mentioned in paragraph (b).

(3) Sub-paragraph (2) does not apply if the defendant proves that the overcharge, or part of it, was not passed on to the claimant.

(4) Where the claimant is not the injured person, the following are to be read as references to the injured person—

- (a) the second reference to the claimant in the opening words of sub-paragraph (2), and
- (b) the references to the claimant in sub-paragraphs (2)(c) and (3).

(5) Where the defendant is not the infringer, the references in sub-paragraph (2)(a) and (b) to the defendant are to be read as references to the infringer.

#### **Burden of proof where an underpayment is passed on to an indirect provider**

**10.**—(1) Sub-paragraph (2) applies where—

- (a) there is an underpayment as a result of an infringement of competition law, and
- (b) a competition claim is made in respect of loss or damage which—
  - (i) arises, directly or indirectly, from the underpayment, and
  - (ii) was suffered by a person who provided a product or service indirectly to the infringer (“the injured person”).

(2) The claimant is to be treated as having proved that the underpayment was passed on to the claimant if the claimant proves that—

- (a) the defendant infringed competition law,
- (b) as a result of the infringement, there was an underpayment when a person provided a product or service directly to the defendant, and
- (c) the product or service mentioned in paragraph (b)—
  - (i) was provided to the person by the claimant, or
  - (ii) contained or was derived from a product or service provided by the claimant.

(3) Sub-paragraph (2) does not apply if the defendant proves that the underpayment, or part of it, was not passed on to the claimant.

(4) Where the claimant is not the injured person, the following are to be read as references to the injured person—

- (a) the second reference to the claimant in the opening words of sub-paragraph (2), and
- (b) the references to the claimant in sub-paragraphs (2)(c) and (3).

(5) Where the defendant is not the infringer, the references in sub-paragraph (2)(a) and (b) to the defendant are to be read as references to the infringer.

#### **Burden of proof where an overcharge or underpayment is passed on by the claimant**

**11.**—(1) This paragraph applies where—

- (a) there is an overcharge or underpayment as a result of an infringement of competition law,
- (b) a person makes a competition claim in respect of loss or damage which arises, directly or indirectly, from the overcharge or underpayment, and
- (c) in its defence, the defendant claims that the claimant passed on all or part of the overcharge or underpayment to another person.

- (2) The defendant has the burden of proving—
  - (a) that the claimant passed on the overcharge or underpayment, and
  - (b) the extent to which the claimant did so.
- (3) Where the competition claim is made by someone other than the person who suffered the loss or damage (“the injured person”), the references in sub-paragraphs (1)(c) and (2) to the claimant are to be read as references to the injured person.

## PART 3

### SMALL AND MEDIUM-SIZED ENTERPRISES

#### **Liability of small and medium-sized enterprises**

- 12.**—(1) Sub-paragraph (3) applies where—
- (a) an undertaking participated in an infringement of competition law with one or more other undertakings,
  - (b) throughout the period of the infringement, the undertaking’s share of the relevant market (or, if there was more than one, each relevant market) was less than 5%,
  - (c) but for this paragraph, the undertaking’s liability to pay damages in respect of the infringement (whatever the legal basis of the liability) would irretrievably jeopardise its economic viability and cause its assets to lose all their value, and
  - (d) the undertaking is a small or medium-sized enterprise.
- (2) Sub-paragraph (3) does not apply where—
- (a) the undertaking led the infringement,
  - (b) the undertaking coerced one or more of the other undertakings to participate in the infringement, or
  - (c) the undertaking has previously been found to have infringed competition law.
- (3) The undertaking is not liable (either alone or jointly) to pay damages in respect of loss or damage suffered by a person as a result of the infringement of competition law (whatever the legal basis of the liability) except where—
- (a) the person acquired a product or service that was the object of the infringement directly or indirectly from the undertaking, or
  - (b) the person acquired a product or service containing or derived from a product or service that was the object of the infringement indirectly from the undertaking.
- (4) The reference in sub-paragraph (1)(c) to the effect of the undertaking’s liability to pay damages is to its effect taking account of the undertaking’s other liabilities.
- (5) In this paragraph “small or medium-sized enterprise” means a small or medium-sized enterprise as defined in the Annex to Commission Recommendation (EC) No. 2003/361 of 6 May 2003<sup>(11)</sup>.

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(11) OJ L 124, 20.5.2003, p.36.

## PART 4

### CARTELS

#### **Presumption that cartels cause harm**

**13.** For the purposes of competition proceedings, it is to be presumed, unless the contrary is proved, that a cartel causes loss or damage.

#### **Immunity recipients**

**14.**—(1) Paragraphs 15 and 16 apply where—

- (a) undertakings have infringed the Chapter I prohibition or the prohibition in Article 101(1) by participating in a cartel, and
- (b) in respect of its participation in the infringement (the “cartel infringement”), an undertaking has been granted immunity from financial penalties under a cartel leniency programme.

(2) The undertaking mentioned in sub-paragraph (1)(b) is referred to in paragraphs 15 and 16 as “an immunity recipient”.

#### **Liability of immunity recipients**

**15.** An immunity recipient is not liable (either alone or jointly) to pay damages in respect of loss or damage suffered by a person as a result of the cartel infringement (whatever the legal basis of the liability) except where—

- (a) the person acquired a product or service that was the object of the cartel infringement directly or indirectly from the immunity recipient,
- (b) the person acquired a product or service containing or derived from a product or service that was the object of the cartel infringement indirectly from the immunity recipient,
- (c) the person provided a product or service that was the object of the cartel infringement directly or indirectly to the immunity recipient,
- (d) a product or service that was the object of the cartel infringement contained or was derived from a product or service provided by the person, or
- (e) the person is unable to obtain full compensation for the loss or damage from other undertakings involved in the cartel infringement.

#### **Contribution between participants in cartels**

**16.**—(1) Sub-paragraph (2) applies in relation to proceedings to recover contribution under section 1 of the Civil Liability (Contribution) Act 1978<sup>(12)</sup> or section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940<sup>(13)</sup> where contribution is to be recovered—

- (a) in respect of loss or damage suffered by a person as a result of a cartel infringement, and
- (b) from a person who is an immunity recipient in relation to the cartel infringement.

(2) The amount of contribution that the immunity recipient may be required to pay may not exceed the amount of the loss or damage the immunity recipient caused to—

- (a) persons who acquired products or services that were the object of the cartel infringement directly or indirectly from the immunity recipient,

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<sup>(12)</sup> 1978 c. 47.

<sup>(13)</sup> 1940 c.42 (3 & 4 Geo 6).



- (b) persons who acquired products or services containing or derived from products or services that were the object of the cartel infringement indirectly from the immunity recipient,
  - (c) persons who provided products or services that were the object of the cartel infringement directly or indirectly to the immunity recipient, and
  - (d) persons who provided—
    - (i) products or services that were subsequently contained in products or services that were the object of the cartel infringement, or
    - (ii) products or services from which products or services that were the object of the cartel infringement were subsequently derived.
- (3) The following have effect subject to sub-paragraph (2)—
- (a) section 2(1) of the Civil Liability (Contribution) Act 1978 (assessment of contribution);
  - (b) section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (contribution among joint wrongdoers).

## PART 5

### LIMITATION AND PRESCRIPTIVE PERIODS

#### Time limits for bringing competition proceedings

17.—(1) Under the law of England and Wales and the law of Northern Ireland, proceedings in respect of a competition claim may not be brought before a court or the Tribunal after the end of the limitation period for the claim determined in accordance with this Part of this Schedule.

(2) Under the law of Scotland—

- (a) proceedings in respect of a competition claim may not be brought before a court or the Tribunal after the end of the prescriptive period for the claim determined in accordance with this Part of this Schedule, and
- (b) accordingly, an obligation in respect of the loss or damage that is the subject of the claim is extinguished,

except where the subsistence of the obligation in relation to which the claim is made was relevantly acknowledged before the end of that period.

(3) Section 6 of the Prescription and Limitation (Scotland) Act 1973<sup>(14)</sup> (extinction of obligations by prescriptive periods of 5 years) does not apply in relation to an obligation described in sub-paragraph (2).

(4) The following provisions of the Prescription and Limitation (Scotland) Act 1973 apply for the purposes of, or in relation to, sub-paragraph (2) as they apply for the purposes of, or in relation to, section 6 of that Act—

- (a) section 10 (relevant acknowledgment)<sup>(15)</sup>;
- (b) section 13 (prohibition of contracting out)<sup>(16)</sup>;
- (c) section 14(1)(c) and (d) (computation of prescriptive periods).

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<sup>(14)</sup> 1973 c. 52.

<sup>(15)</sup> Section 10 was amended by the Prescription and Limitation (Scotland) Act 1984 (c. 45), section 6(1), Schedule 1, paragraph 4.

<sup>(16)</sup> Section 13 was amended by the Prescription and Limitation (Scotland) Act 1984 (c. 45), section 6(1), Schedule 1, paragraph 5.

### **Length of limitation or prescriptive period**

- 18.**—(1) The limitation period is 6 years.
- (2) The prescriptive period is 5 years.
- (3) But see—
- (a) the provision in paragraphs 20 to 25 for the running of the period to be suspended in certain circumstances, and
  - (b) paragraph 23(5), which extends the period in certain circumstances.

### **Beginning of limitation or prescriptive period**

- 19.**—(1) The limitation or prescriptive period for a competition claim against an infringer begins with the later of—
- (a) the day on which the infringement of competition law that is the subject of the claim ceases, and
  - (b) the claimant’s day of knowledge.
- (2) “The claimant’s day of knowledge” is the day on which the claimant first knows or could reasonably be expected to know—
- (a) of the infringer’s behaviour,
  - (b) that the behaviour constitutes an infringement of competition law,
  - (c) that the claimant has suffered loss or damage arising from that infringement, and
  - (d) the identity of the infringer.
- (3) Where the claimant has acquired the right to make the competition claim from another person (whether by operation of law or otherwise) —
- (a) the reference in sub-paragraph (2) to the day on which the claimant first knows or could reasonably be expected to know something is to be read as a reference to the first day on which either the claimant or a person in whom the cause of action was previously vested first knows or could reasonably be expected to know it, and
  - (b) the reference to the claimant in sub-paragraph (2)(c) is to be read as a reference to the injured person.
- (4) In sub-paragraph (3), “injured person”, in relation to a competition claim, means a person who suffered the loss or damage that is the subject of the claim.
- (5) Where a person (“P”) has acquired an infringer’s liability in respect of an infringement of competition law from another person (whether by operation of law or otherwise)—
- (a) the reference to an infringer in sub-paragraph (1) is to be read as a reference to P, but
  - (b) the references to the infringer in sub-paragraph (2) are to be read as references to the original infringer.
- (6) The references in sub-paragraphs (2) and (3) to a person knowing something are to a person having sufficient knowledge of it to bring competition proceedings.
- (7) This paragraph has effect subject to the provision in paragraphs 20 to 25, which defers the beginning of the limitation or prescriptive period in certain circumstances.

### **Effect of disability on beginning of limitation period: England and Wales and Northern Ireland**

**20.**—(1) This paragraph applies if the claimant in relation to a competition claim is under a disability on the day on which, but for this paragraph, the limitation period for the claim would begin.

(2) In England and Wales and Northern Ireland, the limitation period for the claim begins with the earlier of—

- (a) the day on which the claimant ceases to be under a disability, and
- (b) the day on which the claimant dies.

(3) Where—

- (a) the claimant has acquired the right to make the competition claim from another person (whether by operation of law or otherwise), and
- (b) but for this paragraph, the limitation period would begin on the day specified in paragraph 19(2),

the references to the claimant in sub-paragraphs (1) and (2) of this paragraph are to be read as references to the person by reference to whose knowledge that day would fall to be determined in accordance with paragraph 19(3).

(4) In England and Wales, references in this paragraph to a person being “under a disability” have the same meaning as in the Limitation Act 1980 (see section 38(2) of that Act<sup>(17)</sup>).

(5) In Northern Ireland, references in this paragraph to a person being “under a disability” have the same meaning as in the Limitation (Northern Ireland) Order 1989<sup>(18)</sup> ([S.I. 1989/1339 \(N.I. 11\)](#)) (see article 47 of that Order).

### **Suspension during investigation by competition authority**

**21.**—(1) Where a competition authority investigates an infringement of competition law, the period of the investigation is not to be counted when calculating whether the limitation or prescriptive period for a competition claim in respect of loss or damage arising from the infringement has expired.

(2) The period of an investigation by a competition authority begins when the competition authority takes the first formal step in the investigation.

(3) The period of an investigation by a competition authority ends—

- (a) if the competition authority makes a decision in relation to the infringement as a result of the investigation, at the end of the period of one year beginning with the day on which the decision becomes final, and
- (b) otherwise, at the end of the period of one year beginning with the day on which the competition authority closes the investigation.

### **Suspension during consensual dispute resolution process**

**22.**—(1) This paragraph applies where—

- (a) a dispute arising from an infringement of competition law is the subject of a consensual dispute resolution process,
- (b) a competition claim is made which arises from the dispute, and
- (c) the claimant and the defendant participated in the consensual dispute resolution process.

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<sup>(17)</sup> 1980 c. 58. Section 38(2) was amended by the Mental Capacity Act 2005, Schedule 6, paragraph 25(a).

<sup>(18)</sup> [S.I. 1989/1339 \(N.I. 11\)](#).

(2) The period of the consensual dispute resolution process is not to be counted when calculating whether the limitation or prescriptive period for the claim expired.

(3) The period of a consensual dispute resolution process in relation to a dispute begins with the first day on which either of the following occurs—

- (a) the claimant and the defendant (with or without others) enter into an agreement to engage in the process in respect of the dispute, or
- (b) the claimant and the defendant submit the dispute to the person who is to run the process.

(4) The period of a consensual dispute resolution process ends with the first day on which one of the following occurs —

- (a) the claimant and the defendant reach an agreement to resolve the dispute;
- (b) where the process is the subject of an agreement or rules, the process comes to an end in accordance with the agreement or rules;
- (c) the claimant or defendant notifies the other that it has withdrawn from the process;
- (d) the claimant or the defendant asks the other to confirm that it wishes to continue with the process and does not receive a response within the period of 14 days beginning with the day on which the request is made;
- (e) the claimant and the defendant are notified that the person to whom they submitted the dispute refuses to deal with it;
- (f) the claimant and defendant are notified that the person running the process cannot continue to act in relation to the dispute and fail to agree to submit the dispute to another person within the period of 14 days beginning with the day on which they are notified.

(5) Where the competition claim is made in collective proceedings, the references to the claimant in sub-paragraphs (1)(c), (3) and (4) are to be read as references to the claimant or the representative.

(6) Where the claimant has acquired the right to make the competition claim from another person (whether by operation of law or otherwise), the references to the claimant in sub-paragraphs (1)(c), (3), (4) and (5) are to be read as references to the claimant or a person in whom the cause of action was previously vested.

(7) Where the defendant has acquired the infringer’s liability in respect of the infringement of competition law from another person (whether by operation of law or otherwise), the references to the defendant in sub-paragraphs (1)(c), (3) and (4) are to be read as references to the defendant or a person who has previously held the liability.

### **Suspension during collective proceedings**

**23.**—(1) Where a competition claim is made in collective proceedings at the commencement of those proceedings (“the section 47B claim”)(**19**), this paragraph applies for the purpose of determining the limitation or prescriptive period for the claim if it is subsequently made in proceedings under section 47A.

(2) The period of the collective proceedings is not to be counted when calculating whether the limitation or prescriptive period has expired.

(3) The period of collective proceedings begins with the day on which the collective proceedings are commenced.

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(19) Section 47B of the Competition Act 1998 (c. 41) makes provision for collective proceedings before the Tribunal and was substituted by the Consumer Rights Act 2015 (c. 15), Schedule 8(1), paragraph 5(1). Section 47A was substituted by the Consumer Rights Act 2015, Schedule 8(1), paragraph 4(1).

(4) The period of collective proceedings ends with the first day on which one 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 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.

(5) Where—

- (a) there is a period of collective proceedings in relation to a competition claim, and
- (b) but for this sub-paragraph, the limitation or prescriptive period would expire before the end of the period of 6 months beginning with the day after the day on which the period of collective proceedings ends,

the limitation or prescriptive period for the claim is to be treated as expiring at the end of that 6 month period.

#### **Suspension of prescriptive period during period of disability: Scotland**

**24.**—(1) This paragraph applies if the injured person in relation to a competition claim is under legal disability for a period at any time.

(2) In Scotland, the period during which the injured person is under legal disability is not to be counted when calculating whether the prescriptive period for the claim has expired.

(3) References in this paragraph to a person being “under legal disability” have the same meaning as in the Prescription and Limitation (Scotland) Act 1973 (see section 15(1) of that Act)(**20**).

(4) In this paragraph, “injured person”, in relation to a competition claim, means a person who suffered the loss or damages that is the subject of the claim.

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(20) 1973 c. 52, to which there are amendments not relevant to these Regulations.

### **Continuity of limitation or prescriptive period**

**25.** For the purposes of calculating whether the limitation or prescriptive period for a competition claim has expired, a period described in paragraph 21, 22, 23 or 24 is not to be regarded as separating the time immediately before it from the time immediately after it.

### **New claims in pending actions: England and Wales and Northern Ireland**

- 26.**—(1) In section 35 of the Limitation Act 1980 (new claims in pending actions)**(21)**—
- (a) subsection (1) applies for the purposes of this Part of this Schedule as it applies for the purposes of that Act, and
  - (b) subsections (3) to (8) apply in relation to a competition claim that is a new claim and to competition proceedings as they apply in relation to other new claims and proceedings.
- (2) In Article 73 of the Limitation (Northern Ireland) Order 1989 (S.I. 1989/1339 (N.I. 11)) (new claims in pending actions)—
- (a) paragraph (1) applies for the purposes of this Part of this Schedule as it applies for the purposes of that Order, and
  - (b) paragraphs (2) to (7) apply in relation to a competition claim that is a new claim and to competition proceedings as they apply in relation to other new claims and proceedings.

## **PART 6**

### **DISCLOSURE ETC**

#### **Disclosure orders**

- 27.**—(1) For the purposes of this Part of this Schedule (and subject to sub-paragraph (2)), a court or the Tribunal makes a disclosure order in respect of something if—
- (a) in England and Wales or Northern Ireland, it orders its disclosure or production in accordance with procedural rules, or
  - (b) in Scotland, it grants commission and diligence for its recovery or makes an order in respect of it under section 1 of the Administration of Justice (Scotland) Act 1972 (inspection of documents etc)**(22)**.
- (2) A court or the Tribunal does not make a disclosure order in respect of something if it does something described in sub-paragraph (1) for the purposes of enabling a court or the Tribunal to determine whether it is a cartel leniency statement or a settlement submission.

#### **Restriction in relation to settlement submissions and cartel leniency statements**

- 28.** For the purposes of competition proceedings, a court or the Tribunal must not make a disclosure order in respect of—
- (a) a settlement submission which has not been withdrawn, or
  - (b) a cartel leniency statement (whether or not it has been withdrawn).

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**(21)** Section 35 was amended by the Crown and Courts Act 2013 (c. 22), Schedule 9(3), paragraph 102, and by the Supreme Court Act 1981 (c. 54), section 152(4) and Schedule 7.

**(22)** 1972 c. 59. Section 1 was amended by: the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73), section 19 and Schedule 2, paragraph 15; the Courts Reform (Scotland) Act 2014 (asp 18), Schedule 5, paragraphs 12 and 29; and S.S.I. 2015/150.

### **Restriction in relation to investigation materials**

**29.** For the purposes of competition proceedings, a court or the Tribunal must not make a disclosure order in respect of a competition authority's investigation materials before the day on which the competition authority closes the investigation to which those materials relate.

### **Restriction in relation to material in a competition authority's file**

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

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

### **Power of High Court in Northern Ireland to order disclosure etc by non-parties**

**31.—**(1) On the application of a party to competition proceedings, where it appears to the High Court in Northern Ireland that evidence relevant to the proceedings is likely to be in the possession, custody or power of a person who is not a party to the proceedings, the court may order the person—

- (a) to disclose whether such evidence is in the person's possession, custody or power, and
- (b) if it is, to produce it—
  - (i) to the applicant, or
  - (ii) on such conditions as may be specified in the order, to the applicant's legal adviser or other professional adviser.

(2) An order under sub-paragraph (1) must not be made if the court considers that compliance with it would be likely to be injurious to the public interest.

(3) Rules of court may make provision specifying circumstances in which a court may or may not make an order under sub-paragraph (1).

(4) The power under sub-paragraph (3) includes power to make incidental, supplementary and consequential provision.

(5) Sub-paragraph (1) is without prejudice to the exercise by the High Court in Northern Ireland of any power to make orders which is exercisable apart from this paragraph.

## **PART 7**

### **USE OF EVIDENCE**

#### **Cartel leniency statements and settlement submissions**

**32.—**(1) A settlement submission which has not been withdrawn is not admissible in evidence in competition proceedings.

(2) A cartel leniency statement is not admissible in evidence in competition proceedings (whether or not it has been withdrawn).

(3) The prohibitions in sub-paragraphs (1) and (2) do not apply if a party to the proceedings obtained the submission or statement—

- (a) lawfully, and
- (b) otherwise than from a competition authority's file.

### **Investigation materials**

**33.**—(1) A competition authority’s investigation materials are not admissible in evidence in competition proceedings at any time before the competition authority has closed the investigation to which those materials relate.

(2) The prohibition in sub-paragraph (1) does not apply if a party to the proceedings obtained the materials—

- (a) lawfully, and
- (b) otherwise than from a competition authority’s file.

### **Material obtained from a competition authority’s file**

**34.** Documents or information obtained by a person (“P”) from a competition authority’s file are admissible in evidence in competition proceedings only where—

- (a) the proceedings relate, entirely or partly, to a competition claim made by P or by a person who has acquired P’s right to make the claim (whether by operation of law or otherwise), and
- (b) none of the prohibitions in paragraphs 32 and 33 applies.

### **Decisions of member State competition authorities**

**35.**—(1) For the purposes of competition proceedings, a final decision of a member State competition authority or review court that there has been an infringement of Article 101(1) or Article 102 by an undertaking is prima facie evidence of the infringement.

(2) “Review court” means a court of a member State other than the United Kingdom which—

- (a) hears appeals in connection with a decision of a competition authority of the member State that there has been an infringement of Article 101(1) or Article 102, or
- (b) reviews judgments made by another court of the member State in connection with such decisions,

and paragraph 3(5) (when a decision becomes final) applies in relation to a decision of a review court as it applies in relation to a decision of a member State competition authority.

## **PART 8**

### **EXEMPLARY DAMAGES**

#### **Exemplary damages**

**36.** A court or the Tribunal may not award exemplary damages in competition proceedings.

## **PART 9**

### **CONTRIBUTION AND CONSENSUAL SETTLEMENTS**

#### **Consensual settlement**

**37.** In this Part of this Schedule, “consensual settlement” means an agreement relating to a dispute about loss or damage arising from an infringement of competition law which—

- (a) is reached through a consensual dispute resolution process,



- (b) is made between—
  - (i) an infringer or a person who has acquired an infringer’s liability in respect of the infringement (whether by operation of law or otherwise) (“the settling infringer”), and
  - (ii) a person who suffered the loss or damage or a person who has acquired such a person’s right to make a claim in respect of the loss or damage (whether by operation of law or otherwise) (“the settling complainant”), and
- (c) entirely resolves the dispute between the settling infringer and the settling complainant.

#### **Assessment of contribution**

**38.**—(1) This paragraph applies in relation to proceedings to recover contribution under section 1 of the Civil Liability (Contribution) Act 1978<sup>(23)</sup> or section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940<sup>(24)</sup> where contribution is to be recovered in respect of loss or damage suffered by a person as a result of an infringement of competition law.

(2) The amount of contribution that one person liable in respect of the loss or damage may recover from another must be determined in the light of their relative responsibility for the whole of the loss or damage caused by the infringement.

(3) The determination of that amount must take into account any damages paid by the other person in respect of the loss or damage in accordance with a consensual settlement.

(4) The following have effect subject to this paragraph—

- (a) section 2(1) of the Civil Liability (Contribution) Act 1978 (assessment of contribution);
- (b) section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (contribution among joint wrongdoers).

#### **Effect of consensual settlement on the amount of a claim**

**39.**—(1) Where loss or damage arising from an infringement of competition law is the subject of—

- (a) a consensual settlement, and
- (b) a competition damages claim by the settling complainant,

the amount of the settling complainant’s claim is reduced by the settling infringer’s share of the loss or damage.

(2) Sub-paragraph (1) has effect regardless of the terms of the consensual settlement.

#### **Effect of consensual settlement for the settling infringer**

**40.**—(1) Where loss or damage arising from an infringement of competition law is the subject of a consensual settlement, the settling complainant ceases to have a right of action against the settling infringer in respect of the loss or damage.

(2) Sub-paragraph (1) has effect regardless of the terms of the consensual settlement.

(3) Sub-paragraphs (1) and (2) do not apply where—

- (a) an undertaking other than the settling infringer is liable to pay damages to the settling complainant in respect of loss or damage which arises from the infringement,

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<sup>(23)</sup> 1978 c. 47.

<sup>(24)</sup> 1940 c.42 (3 & 4 Geo 6).

**Draft Legislation:** This is a draft item of legislation. This draft has since been made as a UK Statutory Instrument: *The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 No. 385*

- (b) that undertaking is (or, if there is more than one, those undertakings are) unable to pay damages corresponding to the outstanding amount of the settling complainant's claim, and
- (c) the settling infringer's liability for that amount is not expressly excluded by the terms of the consensual settlement.

#### **Effect of consensual settlement on contribution between defendants**

**41.**—(1) Where—

- (a) loss or damage arising from an infringement of competition law is the subject of a consensual settlement,
- (b) it is also the subject of a competition damages claim by the settling complainant, and
- (b) an undertaking other than the settling infringer is liable to pay damages to the settling complainant in respect of the loss or damage that is the subject of the claim,

that undertaking may not recover contribution from the settling infringer in respect of the loss or damage under section 1 of the Civil Liability (Contribution) Act 1978 or section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

(2) Sub-paragraph (1) has effect regardless of the terms of the consensual settlement.

(3) The following have effect subject to this paragraph—

- (a) section 1 of the Civil Liability (Contribution) Act 1978;
- (b) section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

## **PART 10**

### **APPLICATION**

**42.**—(1) Parts 2 to 5, 8 and 9 of this Schedule apply in relation to competition claims, competition proceedings, claims for contribution arising from competition claims and proceedings relating to such claims only to the extent that the claims and proceedings relate to loss or damage suffered on or after the relevant day as a result of an infringement of competition law that takes place on or after that day.

(2) Where an infringement of competition law takes place over a period of 2 or more days it is to be taken for the purposes of sub-paragraph (1) to have taken place on the first of those days

**43.** The following provisions of this Schedule apply only in relation to proceedings on a competition claim in relation to which the first proceedings before a court or the Tribunal began on or after the relevant day—

- (a) paragraphs 4(7) and (8) and 5(3) and (4);
- (b) Parts 6 and 7.

**44.** In this Part of this Schedule “the relevant day” means the day on which the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 come into force.”

**5.** The amendments made by this Schedule bind the Crown in accordance with section 73 of the Competition Act 1998(25).

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(25) Section 73 was amended by [S.I. 2004/1261](#), Schedule 1, paragraph 46.

## SCHEDULE 2

Regulation 3

### MINOR AND CONSEQUENTIAL AMENDMENTS

#### Competition Act 1998 (c. 41)

1. Chapter 4 of Part 1 of the Competition Act 1998 (appeals, proceedings before the Competition Appeal Tribunal and settlements relating to infringements of competition law) is amended as follows.

2. For the heading before section 46(26) substitute “Appeals before the Tribunal”.

3. Before section 47A(27) insert—

*“Claims for loss or damage: proceedings before the Tribunal”.*

4.—(1) In section 47C(28) (collective proceedings: damages and costs), omit subsection (1) (no exemplary damages).

(2) That subsection continues to apply in relation to collective proceedings to the extent that paragraph 36 of Schedule 8A to the Competition Act 1998 does not apply to them (see Part 10 of that Schedule) (and see the further saving in paragraph 10 of this Schedule).

5.—(1) Omit section 47E(29) (limitation or prescriptive periods for proceedings under section 47A and collective proceedings).

(2) That section continues to apply in respect of claims to which section 47A of the Competition Act 1998 applies to the extent that Part 5 of Schedule 8A to that Act does not apply to them (see Part 10 of that Schedule) (and see the further saving in paragraph 10 of this Schedule).

6. After section 47F (inserted by Schedule 1 to these Regulations) insert—

*“Further appeals from the Tribunal”.*

7. In the heading of section 49, at the end insert “from the Tribunal”.

8.—(1) Section 58A(30) (infringement decisions) is amended as follows.

(2) In subsection (3), for paragraphs (b) to (d) substitute—

“or

(b) where an appeal has been brought against the decision, when—

(i) the appeal and any further appeal in relation to the decision has been decided or has otherwise ended, and

(ii) the time for appealing against the result of the appeal or further appeal has expired without another appeal having been brought.”

(3) In subsection (4), for paragraph (b) substitute—

“(b) where such an appeal has been brought against the decision, when—

(26) Section 46 was amended by the Enterprise Act 2002 (c. 40) Schedule 5, paragraph 2(a), by S.I. 2004/1261 Schedule 1, paragraph 29(2), by S.I. 2012/1809, Schedule 1, Part 1, paragraph 1 and by the Enterprise and Regulatory Reform Act 2013 (c. 24), Schedule 5, Part 1, paragraph 26.

(27) Section 47A was substituted by the Consumer Rights Act 2015 (c. 15), Schedule 8, Part 1, paragraph 4(1).

(28) Section 47C was inserted by the Consumer Rights Act 2015, Schedule 8, Part 1, paragraph 6.

(29) Section 47E was inserted by the Consumer Rights Act 2015, Schedule 8, Part 1, paragraph 8(1).

(30) Section 58A was substituted by the Consumer Rights Act 2015, Schedule 8, Part 1, paragraph 14(1).

**Draft Legislation:** This is a draft item of legislation. This draft has since been made as a UK Statutory Instrument: *The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 No. 385*

- (i) the appeal and any further appeal in the European Court in relation to the decision has been decided or has otherwise ended, and
- (ii) the time for appealing against the result of the appeal or further appeal in the European Court has expired without another appeal having been brought.”

(4) The amendments made by this paragraph apply only in relation to a claim in respect of an infringement decision in relation to which the first proceedings before a court or the Tribunal began on or after the day on which these Regulations come into force.

9.—(1) Section 59 (interpretation) is amended as follows.

(2) In subsection (1), in the definition of “the court”(31), after “60” insert “and Schedule 8A”.

(3) In subsection (1A)(32), after “Scotland,” insert ““claimant” is to be read as “pursuer” and”.

### **Transport Act 2000 (c. 38)**

10.—(1) In paragraph 23(2)(c) of Schedule 10 to the Transport Act 2000(33) (competition test in relation to buses: application of provisions of the Competition Act 1998), at the end insert “, except section 47F and Schedule 8A”.

(2) The provisions applied by paragraph 23 of that Schedule continue to include sections 47C(1) and 47E of the Competition Act 1998, despite the repeal of those provisions by this Schedule.

### **Enterprise Act 2002 (c. 40)**

11.—(1) In paragraph 11(2)(a) of Schedule 4 to the Enterprise Act 2002(34) (Competition Appeal Tribunal rules: provision as to period within which and manner in which proceedings are to be brought), for “section 47E(3) to (6) of that Act” substitute “paragraph 23 of Schedule 8A to that Act”.

(2) The amendment made by sub-paragraph (1) does not apply in respect of rules relating to claims under section 47A of the Competition Act 1998 to the extent that section 47E of that Act continues to apply to the claims.

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(31) The definition of “the court” in section 59 was amended by the Consumer Rights Act 2015, Schedule 8, Part 1, paragraph 15(3).

(32) Section 59(1A) was inserted by the Consumer Rights Act 2015, Schedule 8, Part 1, paragraph 15(4).

(33) 2000 c. 38. Paragraph 23 of Schedule 10 to the Transport Act 2000 (c. 38) was inserted by the Local Transport Act 2008 (c. 26), Schedule 2, paragraph 15.

(34) 2002 c. 40. Paragraph 11(2)(a) of Schedule 4 was amended by the Consumer Rights Act 2015 (c. 15), Schedule 8, Part 2, paragraph 29.