

in 26 jurisdictions worldwide

2012



Vasil Kisil & Partners



Private Antitrust Litigation 2012

Contributing editor
Samantha Mobley
Baker & McKenzie LLP

Business development managers
Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers
Ellie Notley
Sarah Walsh
Alice Hazard

Marketing assistants
William Bentley
Sarah Savage

Subscriptions manager
Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

Assistant editor
Adam Myers

Editorial assistant
Lydia Gerges

Senior production editor
Jonathan Cowie

Chief subeditor
Jonathan Allen

Subeditors
Caroline Rawson
Davet Hyland
Sarah Morgan

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Private Antitrust Litigation 2012
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

© Law Business Research Ltd 2011
No photocopying: copyright licences
do not apply.
ISSN 1742-2280

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of September 2011, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law
Business
Research

CONTENTS

Introduction <i>Anthony Maton and Scott Campbell</i> Hausfeld & Co LLP	3
Argentina <i>Miguel Ángel De Dios and Federico A Volujewicz</i> De Dios & Goyena	9
Brazil <i>Paulo Brancher and Luiz Eduardo Salles</i> Barretto Ferreira, Kujawski e Brancher	14
Canada <i>David Kent, Martin Low QC and Eric Vallières</i> McMillan LLP	21
China <i>Zhan Hao</i> Grandall Law Firm	27
Czech Republic <i>Lucie Bányaiová</i> Bányaiová Vožehová	34
England & Wales <i>Elizabeth Morony and Anna Morfey</i> Clifford Chance LLP	39
Germany <i>Alexander Rinne</i> Milbank, Tweed, Hadley & McCloy LLP	54
Italy <i>Mario Siragusa, Marco D'Ostuni and Cesare Rizza</i> Cleary Gottlieb Steen & Hamilton LLP	60
Japan <i>Hideto Ishida</i> Anderson Mōri & Tomotsune	68
Korea <i>Sang Mo Ku, Jeong-Ran Lee and Mi-Jung Kim</i> Barun Law	73
Lithuania <i>Ramūnas Audzevičius and Tomas Samulevičius</i> Motieka & Audzevicius	78
Netherlands <i>Frederieke Leeflang and Marc Kuijper</i> Boekel De Nerée	84
Nigeria <i>Ikemefuna Isiekwen and Babatunde Irukera</i> SimmonsCooper Partners	90
Poland <i>Krzysztof Kanton</i> Sołtysiński Kawecki & Szlęzak	95
Portugal <i>Mário Marques Mendes and Pedro Vilarinho Pires</i> Marques Mendes & Associados	100
Romania <i>Sorina Olaru (Cretu) and Georgeta Harapcea</i> Nestor Nestor Diculescu Kingston Petersen	105
Russia <i>Igor Akimov and Ilya Lifshits</i> EDAS Law Firm	111
Scotland <i>Catriona Munro and Jennifer Marshall</i> MacLay Murray & Spens LLP	115
Slovenia <i>Bojan Šporar and Rok Kokalj</i> Rojs, Peljhan, Prelesnik & Partners	123
South Africa <i>Mark Garden and Rutendo Hlatshwayo</i> Edward Nathan Sonnenbergs Inc	128
Spain <i>Juan Jiménez-Laiglesia, Alfonso Ois, Raúl Partido, Jorge Masía and Samuel Rivero</i> DLA Piper Spain SL	135
Sweden <i>Tommy Pettersson, Stefan Perván Lindeborg and Cecilia Beijar</i> Mannheimer Swartling	141
Switzerland <i>Christophe Rapin and Pranvera Këllezi</i> Lachenal & Le Fort	146
Turkey <i>Sahin Ardiyok, Ali Ilıcak and Hilal Utku</i> ACTECON Competition and Regulation Consultancy	151
Ukraine <i>Oleksiy V Filatov and Andriy V Stelmashchuk</i> Vasil Kisil & Partners	157
United States <i>Andrew S Marovitz, Mark McLaughlin and Britt M Miller</i> Mayer Brown LLP	161

England & Wales

Elizabeth Morony and Anna Morfey

Clifford Chance LLP

Legislation and jurisdiction

- 1 How would you summarise the development of private antitrust litigation?

England and Wales has proved to be a popular jurisdiction in which to bring private antitrust claims. In addition to ‘stand-alone’ and ‘follow-on’ actions (the former requiring the claimant to prove the infringement; the latter relying on an infringement decision of the UK or EU competition regulators), competition law issues are also increasingly being invoked in the context of other commercial disputes.

A number of features of the English legal system are attractive to claimants considering where to issue private antitrust proceedings:

- **Disclosure.** The disclosure rules in English litigation are extensive compared to those of most other EU member states. In High Court proceedings, the parties are required to search for and disclose not only documents on which they themselves rely, but also documents that could harm their case and that could assist the other party’s case. In cartel cases, for example, such disclosure is of immense relevance in circumstances where the majority of relevant documentation is likely to be unavailable to all parties to the litigation. While the provisions for disclosure in the Competition Appeal Tribunal (CAT) are more general, typically defendants would similarly need to disclose evidence that is potentially helpful to the claimant.
- **Specialist courts.** The CAT is a specialist competition court which, since the Enterprise Act 2002 (EA02) came into force in June 2003, has had jurisdiction to hear follow-on damages claims. The purpose was to create a specialist forum in which such claims could be brought, with procedural rules more flexible than the Civil Procedure Rules (CPR) applicable in High Court proceedings. That said, follow-on claims (as well as stand-alone actions) can be brought in the High Court. The Competition Law Practice Direction provides for competition litigation in the High Court to be heard in two specific divisions (Chancery and the Commercial Court), with judges in those courts receiving competition law training in an effort to ensure they are sufficiently knowledgeable of the issues.
- **Costs.** While the nature of proceedings in England and Wales can make litigating there more expensive than in other jurisdictions, the general rule in High Court proceedings is that the losing party must pay the successful party’s costs. (In the CAT, there is no such general rule and costs awards are made as the Tribunal sees fit.) Fee arrangements involving payment of a percentage of recoveries are not permitted in relation to contentious work, but ‘conditional fee arrangements’ in which lawyers acting for a claimant are paid nothing or very little in the event of an unsuccessful claim but an ‘uplift’ of up to 100 per cent on their basic fees if they win, have encouraged claimants to issue proceedings here on a relatively low-risk basis in terms of costs.

For these (and numerous other) reasons, claimants have over the years gravitated to England and Wales as a jurisdiction in which to issue proceedings in both stand-alone and follow-on claims. As a consequence, in recent years the law relating to jurisdiction has developed in response to some innovative arguments put forward by claimants keen to issue proceedings here. The two leading cases are *Provimi v Aventis* and *Cooper Tire v Shell Chemicals*.

In *Provimi*, claimants sought damages from parties to the *Vitamins* cartel. In relation to a claim against companies in the Roche group, only the Swiss parent company was an addressee of the Commission’s decision. Nevertheless, the court upheld an argument made by the claimants that an English subsidiary of Roche could be held to have ‘implemented’ the cartel by selling vitamins at the cartel prices, even if it had no knowledge of the cartel itself. This was sufficient to establish the English subsidiary as an ‘anchor defendant’ for jurisdiction, allowing the other entities within the Roche group to be sued in England as co-defendants to the same claim.

The *Cooper Tire* case related to a follow-on action from the Commission’s cartel decision in *Synthetic Rubber*. None of the addressees of the Commission’s decision were English. However, a number of tyre manufacturers who had bought and used synthetic rubber brought an action for damages in the High Court relating to their purchases across Europe, on the basis that English subsidiaries of some (but not all) of the cartellists had implemented the cartel in the UK by selling products at cartel prices. These English subsidiaries would, like in *Provimi*, be able to serve as the ‘anchor defendants’. The Court of Appeal refused to grant a strike-out application lodged by some of the defendants, holding that the claim could be brought in England. In the court’s view, although the anchor defendants were not addressees of the Commission’s decision, the pleadings were sufficiently broadly drafted to encompass the possibility that they had knowledge of, or were party to, the cartel. The court considered that, since cartel agreements tend to be secret by their very nature, the strength or otherwise of the claimant’s argument as to the knowledge possessed by the English subsidiaries could not be assessed until after disclosure.

Having established jurisdiction, another element to bringing a claim in England and Wales is consideration of whether it should be brought in the High Court or the CAT. As noted above, the CAT was established as a specialist competition court. However, the CAT’s popularity has not been what one might have expected, and claimants have tended to favour the High Court as the forum in which to issue proceedings. This has been in no small part due to the limitations inherent in the CAT’s jurisdiction, and to some recent judgments, which combine to militate in favour of the High Court.

In particular, the CAT is only competent to hear follow-on damages claims, which inherently limits the scope of private antitrust litigation that can be brought before it. This limit to the CAT’s competence has been strictly enforced: in *English Welsh and Scottish Railways v Enron Coal Services*, EWS succeeded in having part of a claim against it struck out on the basis that part of the claim did not stem from the regulator’s underlying infringement decision.

Moreover, as a general rule, where an infringement decision is under appeal a follow-on action can only be brought in the CAT with the Tribunal's permission. This is in contrast to the position in the High Court, where claims can be issued even when an appeal is pending. The recent *National Grid* and *Emerald Supplies* cases demonstrate this. *National Grid v ABB and others* involved proceedings against members of the *Gas Insulated Switchgear* cartel. Even though the Commission's decision is being appealed by some (but not all) of the defendants, the claimant has commenced proceedings in the High Court. An application by the defendants for the action to be stayed pending the outcome of the European court appeals was successful, but the court has permitted further pre-trial steps (including some limited disclosure) to be taken in the interim. In *Emerald Supplies Limited v British Airways plc*, the claimants issued proceedings against BA in relation to the Commission's *Airfreight* cartel investigation, even before the Commission's decision was issued. Contrast this with the more restrictive approach of the CAT: in *Emerson and others v Morgan Crucible and others* the claimants were refused permission to bring proceedings against parties to the *Electrical and Mechanical Carbon and Graphite Products* cartel who were appealing the Commission's decision to the European courts. Even in relation to proceedings against Morgan Crucible, in which the immunity applicant did not appeal the decision, the CAT considered that the claimants needed permission before they could bring a claim. (Permission was granted, although the parties subsequently agreed to a stay pending the outcome of the European court appeals.)

These issues have made it somewhat more difficult than perhaps initially anticipated for claims to be brought in the CAT. With the High Court increasingly developing expertise in the field of competition law, it remains to be seen whether the tide will turn in favour of the CAT or whether the High Court will remain the forum of choice for claimants bringing competition law claims.

Mention should also be made of the limitations to the development of private antitrust litigation in England and Wales. Notably, the jurisdiction still suffers from the fact that no final award of damages has yet been made, in either the High Court or the CAT. While this is not surprising (the vast majority of commercial disputes settle before judgment), it nevertheless leaves an element of uncertainty as to quite how damages will be awarded in the competition context. The High Court's assessment of damages in *Crehan v Imntrepreneur Pub Company* differed significantly from that of the Court of Appeal; the issue was eventually rendered moot by the House of Lords' decision that there was no infringement. In *Enron Coal Services v English Welsh and Scottish Railways* the CAT did not consider issues of quantum because it concluded the claimant's case failed on causation. This is an area that will be watched closely in years to come.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Private antitrust actions arising out of an infringement of competition law may be brought in the High Court based on the tort of breach of statutory duty (*Garden Cottage Foods Limited v Milk Marketing Board* [1984] AC 130 at 141; *Crehan v Imntrepreneur Pub Company* [2004] EWCA Civ 637 para 156). The breach is of section 2(1) of the European Communities Act 1972, which imports the provisions of the Treaty (in the competition law context, articles 101 and 102 TFEU) into English law; or of the provisions of chapters I or II of the Competition Act 1998 (CA98). Claims brought in the High Court may also be based on the torts of unlawful interference with trade, conspiracy to defraud or misrepresentation. For example, in *Norris v Government of the United States of America* [2008] UKHL 16, the House of Lords considered that agreements in restraint of trade might be actionable at common law if there are aggravating features present such as fraud or misrepresentation.

Follow-on damages claims brought in the CAT are based on sections 47A and 47B of the CA98 as amended by the EA02. Section

47A provides for private actions for compensation to be brought in the CAT only in circumstances where an infringement decision has already been reached by either the UK or EU competition authorities (ie, follow-on claims). Section 47B provides the basis for representative actions.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The CAT has jurisdiction to deal with follow-on damages actions as provided for in sections 47A and 47B of the CA98. In addition to the CAT, claimants can bring an action in the High Court, usually for breach of statutory duty arising out of a breach of articles 101 or 102 TFEU or chapters I or II of the CA98.

High Court

Both follow-on and stand-alone claims can be brought in the High Court. All claims, whether arising in relation to an infringement of articles 101 or 102 TFEU or of chapters I or II of the CA98, should be brought in the Chancery Division or Commercial Court (see the Competition Practice Direction and CPR Rule 58.1(2)). Under CPR Rule 30.8 and the Competition Law Practice Direction, any competition law claim commenced in the Queen's Bench Division or County Court should be transferred to either the Chancery Division or, where appropriate, the Commercial Court.

Both follow-on and stand-alone claims that relate to infringements of articles 101 and 102 TFEU are based on breach of statutory duty as noted above. In relation to follow-on damages actions, section 58 of the CA98 states that the court must accept the decision of the regulator (the OFT or sectoral regulators in the UK and the European Commission within the EU) as evidence of the infringement, provided the decision is final (ie, no appeal has been lodged against the decision and the time limit for appealing has expired; or all avenues of appeal have been exhausted). Regulation 1/2003 also provides that national courts may not rule counter to a Commission decision (article 16 of Regulation 1/2003 and *Iberian UK Limited v BPB Industries and British Gypsum* [1996] 2 CMLR 601). In the case of follow-on damages actions arising out of a Commission decision, the English courts are also bound by their duty of sincere co-operation (*Days Medical Aids Limited v Pihsiang Machinery Manufacturing Co Limited and WU* [2004] EWCA 993). Note however that in *Imntrepreneur v Crehan* ([2006] UKHL 38) the House of Lords held that although national courts are under a duty of sincere cooperation and must avoid taking decisions that conflict with those of the Commission, they are only bound by Commission decisions insofar as those decisions relate to the same facts and same parties. In other, similar, cases the national courts can take into account the Commission's decision, but they are entitled to reach their own conclusions on the evidence relating to the case before them.

In relation to stand-alone actions, it is the usual provisions of the CPR that will apply and the CA98 and EA02 legislation does not make specific provisions for these actions brought in the High Court.

Claims brought as conspiracy to defraud may also be brought in the High Court.

CAT

Stand-alone claims cannot be brought in the CAT; only follow-on actions for monetary compensation can be brought. These are brought under sections 47A and 47B of the CA98 as inserted by the EA02. In addition, the Court of Appeal has held, in *Enron Coal Services v English Welsh and Scottish Railways* [2011] EWCA Civ 2, that section 58 of the CA98 also applies to proceedings brought in the CAT, unless the Tribunal directs otherwise.

Section 47A applies to persons who have suffered loss or damage as a result of an infringement of UK or EU competition law (chapters I or II of the CA98 or articles 101 or 102 of the TFEU). The limited

nature of the CAT's jurisdiction was emphasised in *English Welsh and Scottish Railways v Enron Coal Services* [2009] EWCA Civ. 647. In that case, the claimant sought (among other things) damages in respect of an alleged overcharge it claimed to have paid, although the underlying infringement decision that was the basis of the claim related only to discriminatory pricing which had potentially put the claimant at a disadvantage when tendering for a contract. The part of the claim relating to the overcharge was struck out by the Court of Appeal, on the basis that it did not form part of the regulator's infringement finding. In *Emerson Electric Co and Others v Morgan Crucible Company Plc and Others* [2011] CAT 4, the CAT also struck out proceedings brought against the UK subsidiary of one of the addressees of the Commission's *Electrical and Mechanical Carbon and Graphite Products* cartel decision, on the basis that there was no decision finding an infringement by the UK subsidiary. The action was not a follow-on claim and the CAT did not have jurisdiction to hear it. The CAT's judgment is on appeal to the Court of Appeal.

Under section 47B, a representative action can be brought by specified bodies on behalf of a number of consumers. The only 'specified body' for section 47B purposes to date is the Consumers' Association, known as 'Which?'.

Transfer between the High Court and the CAT

Section 16 of the EA02 provides for the transfer of damages claims between the High Court and the CAT and vice versa. Specifically, it provides that regulations can be made in order to allow the High Court to transfer cases to the CAT. No such regulations have yet been passed.

4 In what types of antitrust matters are private actions available?

Private actions can be brought in respect of any breach of UK or European competition law (chapters I or II of the CA98 and articles 101 or 102 TFEU respectively). Private actions in the High Court can either be brought as a stand-alone claim (ie, one in which the claimant must show the infringement as well as loss and causation), or as a follow-on action (in which an infringement finding has already been made by the competition regulator at UK or EU level and in respect of which the claimant need only show loss and causation). Only follow-on actions can be brought in the CAT.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

Where the defendant is domiciled in a member state (other than Denmark), jurisdiction will be governed by Council Regulation 44/2001 (the Brussels Regulation). (Defendants domiciled in Denmark are subject to the jurisdiction provisions set out in an agreement with the EU (2005); and defendants domiciled in Norway, Switzerland and Iceland are subject to the provisions of the Lugano Conventions.)

The main provisions of the Brussels Regulation in the context of where competition damages claims can be brought are article 2(1) (the place where the defendant is domiciled); article 5(1) (in contract claims, the place of performance of the obligation under the contract); article 5(3) (in tort claims, the place where the harmful event occurred); article 6(1) (a defendant joining co-defendants to an existing action); article 23 (jurisdiction agreements); article 24 (submission to the jurisdiction); and article 28 (related actions).

Article 2(1) of the Brussels Regulation provides that 'persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state'. Under article 60 of the Regulation, a corporation is 'domiciled' in the UK if it is incorporated or has its registered office in the UK, or its central administration is controlled or exercised in the UK. This is subject to the limited exceptions of articles 22 to 24 (exclusive jurisdiction in certain lim-

ited areas, jurisdiction agreements and submission to the jurisdiction respectively) and article 27 (lis pendens), but also to provisions in articles 5(1), 5(3) and 6.

Article 5(1) relates to contract claims and states that, in matters relating to a contract, a person domiciled in a member state may, in another member state, be sued in the courts for the place of performance of the obligation in question. Unless otherwise agreed, this is the place where the goods were or should have been delivered or, in relation to a contract for services, where the services were or should have been provided. If the obligation being sued for is non-payment, it will be the member state in which payment was due to be made.

Article 5(3) provides that 'a person domiciled in a member state may, in another member state, be sued in matters relating to tort, delict, or quasi-delict in the courts of the place where the harmful event occurred or may occur'. Long-standing EU case law interprets this to give the claimant a choice between the place where the damage was sustained and the place where the event giving rise to it took place. This provision is more relevant to private antitrust litigation than is article 5(1), given that infringements of competition law are treated as torts of breach of statutory duty. In *SanDisk Corporation v Philips Electronics & Ors* [2007] EWHC 332, which related to an article 102 TFEU case, the court held that if the event setting the tort in motion took place in England or Wales, the English courts could have jurisdiction under this provision. In that case, however, the link to the UK was tenuous and the court concluded that jurisdiction could not be established on the facts. In *Cooper Tire & Rubber Company v Shell Chemicals UK Ltd* [2009] EWHC 2609 (upheld on other grounds on appeal in *Cooper Tire & Rubber Company Europe Ltd & Ors v Dow Deutschland Inc & Ors* [2010] EWCA Civ 864), which related to an article 101 TFEU case, the court considered that the mere fact of the first meeting taking place in England and Wales would be insufficient to establish that the 'wrongful act' took place there.

Article 6(1) of the Brussels Regulation provides (in relation to claims against a number of defendants) that claimants can bring a claim in the courts for the place where any one of the defendants is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. This enables a number of defendants from different member states to be sued in one action in England provided one of them (the 'anchor defendant') is domiciled there. It can also be relied on to sue a number of different companies within the same group in England. In reality, the majority of claims involve those brought by companies claiming to have been the victims of a cartel (typically, direct or indirect purchasers claiming they were overcharged by the cartel) and therefore tend to be brought as follow-on damages actions following an OFT or Commission decision finding a breach of chapter I / article 101 TFEU. In such cases, the claimant may want to bring an action against all or some of the addressees of the OFT/Commission decision, so would seek to find an anchor defendant domiciled in England, bring the claim on the basis of article 2(1), and then bring in the remaining addressees on the basis of article 6(1).

The leading case on jurisdiction in this context is *Provimi v Aventis* [2003] EWHC 961. The case arose out of the Commission's 2001 decision in the *Vitamins* cartel. A claim was brought in England by a German claimant (Trouw) against four companies in the Roche group, including the Swiss parent company F Hoffman La Roche AG and three subsidiaries which were English, Swiss and German. Of these, only F Hoffman La Roche was an addressee of the Commission's infringement decision. Jurisdiction was argued as a preliminary issue. The court held that Trouw had an arguable claim that the English subsidiary (Roche Products Limited) had 'implemented' the cartel by selling vitamins at the cartel prices, even if it had no knowledge of the cartel itself. This decision enables proceedings to be brought in England against a number of defendants on the basis of an English anchor defendant which is merely a subsidiary

of one of the addressees of a Commission decision, in circumstances where the subsidiary neither played a direct role in the cartel nor had knowledge of it.

The effect of the judgment in *Provimi* was unsuccessfully challenged in the case of *Cooper Tire & Rubber Company v Shell Chemicals UK Limited* [2009] EWHC 2609. The *Cooper Tire* case related to a follow-on action from the Commission's cartel decision in *Synthetic Rubber*. None of the addressees of the Commission's decision were English. However, a number of tyre manufacturers who had bought and used synthetic rubber brought an action for damages in the High Court relating to their purchases across Europe, on the basis that English subsidiaries of some (but not all) of the cartelist had implemented the cartel in the UK by selling products at cartel prices. These English subsidiaries would, like in *Provimi*, be able to serve as the 'anchor defendants' and a basis on which the other parties to the cartel (with no English subsidiaries) could be brought into the proceedings under article 6(1) of the Brussels Regulation. The Court of Appeal refused to grant a strike-out application lodged by some of the defendants, holding that the claim could be brought in England. In the court's view, although the anchor defendants were not addressees of the Commission's decision, the pleadings were sufficiently broadly drafted to encompass the possibility that they had knowledge of, or were party to, the cartel. The court considered that, since cartel agreements tend to be secret by their very nature, the strength or otherwise of the claimant's argument as to the knowledge possessed by the English subsidiaries could not be assessed until after disclosure. The result is that the English courts will have jurisdiction to hear Europe-wide cartel damages claims where the pleadings allege that an English-domiciled subsidiary of a cartelist implemented the cartel and either had knowledge of, or was party to, the anti-competitive conduct. The Court of Appeal in *Cooper Tire* considered the pleadings to be sufficiently widely drafted to encompass the possibility that the English-domiciled subsidiary implemented or had knowledge of the cartel.

While *Cooper Tire* did not test the application of the *Provimi* judgment, it did confirm the attractiveness of the UK as a jurisdiction in which to bring Europe-wide cartel claims. It appears that, according to the Court of Appeal judgment, provided claimants draft their pleadings to allege knowledge by an English subsidiary of the cartel arrangements (or at least to allow for the possibility), this may be enough to constitute the jurisdictional hook required to bring the claim in the English court. The effect of *Provimi* and *Cooper Tire* is that a claimant seeking damages for loss suffered as a result of a breach of European competition law can sue for its entire loss in the English courts irrespective of where the loss was suffered provided it can identify an English subsidiary of one of the addressees of the decision (which will be assumed to have implemented the anti-competitive conduct), or if its pleadings are sufficiently widely drafted as to allege or allow for the possibility that the English subsidiary had knowledge of or was party to the cartel. This is regardless of whether the claimant had any dealings with the English subsidiary. The English subsidiary does not have to be an addressee of the Commission's decision itself.

England is an attractive jurisdiction for many claimants, and defendants are wise to the liberal scope of jurisdiction under the Brussels Regulation following *Provimi* that will allow claims to be brought here. As a result, defendants are seeking other ways in which the jurisdiction of the English courts might be limited. In this regard, the 'Italian torpedo', typically used in intellectual property cases, has been deployed in competition cases where a defendant seeks to pre-empt a claimant's choice of jurisdiction by commencing proceedings seeking a negative declaration as to liability in another European jurisdiction. Articles 27 and 28 of the Brussels Regulation provide for courts to dismiss or stay proceedings where the same cause of action or a related action is brought in the courts of a different member state. In *Cooper Tire*, in an action following on from the Commission's decision in the *Rubber* cartel, companies belonging

to the Eni Group applied to the Italian courts for a declaration that the cartel did not exist, that the Eni companies had never adopted anti-competitive behaviour in relation to the activities covered by the Commission's decision and that the alleged cartel had had no effect on prices, and that the defendants could not complain that they had suffered damage as a result of the cartel. When subsequently sued in England, the defendants sought to rely on articles 27 and 28 of the Brussels Regulation to dismiss or stay the English proceedings, on the basis that the Italian courts were the courts first seised. The Italian court issued a preliminary ruling on the negative declaration in 2009 stating that it considered the use of the Italian torpedo to be 'unconstitutional'. That ruling has been appealed. In the meantime, in proceedings before the English High Court, the court determined that it did have jurisdiction to hear the claim (brought by the defendants to the Italian proceedings), that the court was not required to grant a stay under article 27 of the Brussels Regulation, and that the court should not exercise its discretion to grant a stay under article 28 of that Regulation (see *Cooper Tire & Rubber Company v Shell Chemicals UK Limited* [2009] EWHC 2609, upheld on appeal in *Cooper Tire & Rubber Company Europe Ltd & Ors v Dow Deutschland Inc & Ors* [2010] EWCA Civ 864).

Article 23 of the Brussels Regulation provides that if parties, one or more of which is domiciled in a member state, have agreed that a court of a member state is to have jurisdiction to settle legal disputes between them, then those courts will have jurisdiction. The Brussels Regulation assumes that, unless the parties have agreed otherwise, that jurisdiction will be exclusive. There are a number of formal requirements for article 23 to apply (eg, the jurisdiction agreement needing to be evidenced in writing or by prior course of dealing, etc). As a number of private antitrust litigation claims in England are brought by direct or indirect customers of parties to a cartel, there may in such cases be contracts in place between the parties (eg, relating to their supply contracts) that specify a jurisdiction clause. Whether the clause is drafted widely enough to fall within the scope of article 23 will be a matter of interpretation. In *Provimi* such a clause which stated that 'any controversies' that could not be settled would be brought before the courts in Switzerland was held not to include disputes over an overcharge on cartel products and therefore did not constitute a jurisdiction clause under article 23. This is a relatively narrow interpretation of article 23 and may limit a claimant's ability to rely on this jurisdiction gateway going forward. Note, however, that the decision was reached on a preliminary issue and leave to appeal was granted although the case settled before the appeal was heard – a higher court may therefore determine the issue differently.

Under article 24 of the Brussels Regulation, any defendant (not only one domiciled in a member state) entering an appearance in the courts of the member state is deemed to submit to that member state's jurisdiction. The exception is where the defendant is appearing to contest the court's jurisdiction, provided it raises the jurisdictional challenge at the first available procedural opportunity under relevant national law. Anything going beyond a challenge to jurisdiction will be considered to be 'entering an appearance' and will therefore be taken as submission under article 24.

The jurisdiction rules of the Brussels Regulation (and Lugano Conventions) only apply to defendants domiciled in a member state or Norway, Switzerland and Iceland (as above). For defendants domiciled in a non-member state, the residual common-law jurisdiction regime will apply. In such cases, jurisdiction depends on whether the defendant is located within England and Wales. If so, the English courts have jurisdiction, although they can stay proceedings on application if it is shown to them that another court that also has jurisdiction is a more appropriate forum. If the defendant is not within England and Wales, the claimant can apply for permission to serve outside the jurisdiction if it can show that the claim has a reasonable prospect of success; that there is a basis for jurisdiction set out in the CPR (including that damage was sustained in the jurisdiction

or as a result of an act committed within the jurisdiction or that the defendant is a necessary and proper party to a claim against another defendant); and that England and Wales is the proper place to bring the claim. In practice, the majority of private antitrust litigation in England and Wales is likely to be brought following on from cartel decisions of the UK or EU competition regulators whose decisions are usually addressed to at least one undertaking within the EU, and therefore with at least one subsidiary domiciled in a member state. Recourse to the common-law jurisdiction regime is therefore only likely to be necessary in a minority of cases.

- 6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Damages actions can be brought against any entity that infringes the competition rules. Actions can therefore be brought against legal entities and against individuals to the extent they are an undertaking and therefore capable of breaching articles 101 and 102 TFEU and chapters I and II of the CA98. As regards defendants from other jurisdictions, as noted above, the Brussels Regulation allows for defendants not domiciled in England and Wales to be sued in the English courts under relevant provisions of that regulation. The *Provimi* and *Cooper Tire* judgments have also been helpful to claimants seeking to bring actions against undertakings domiciled in other jurisdictions (see question 5).

In *Safeway Stores Ltd and others v Twigger and others* [2010] EWCA 1472, Safeway brought an action against its former directors and employees to seek to recoup the amount of an agreed fine that would be paid following settlement in the OFT's *Dairy* investigation. The investigation alleged breaches of chapter I of the CA98 against a number of dairy companies and supermarkets in the UK. The OFT's case was settled in respect of Safeway's liability (which had been the subject of a takeover by Morrisons). It was agreed that Safeway would pay a fine that would be subject to a reduction if it continued to cooperate with the OFT's investigation until the issuance of a decision. Following receipt of the statement of objections but prior to the decision, Safeway issued proceedings against its former directors and employees alleging breach of contract and negligence, and seeking to recover the full amount of the fine from them. The Court of Appeal unanimously held (reversing the decision of Flaux J at first instance) that Safeway's claim should be struck out, holding that the *ex turpi causa maxim* applied to preclude Safeway from seeking to recover from the defendants either the amount of the penalty imposed by the OFT or the costs incurred as a result of the OFT's investigation. An undertaking that infringes provisions of the Competition Act 1998 relating to anti-competitive activity and is duly penalised by the OFT therefore cannot recover the amount of such penalties from its directors or employees whose actions allegedly caused the infringement. This was a novel use of private antitrust litigation to recoup the amount of a fine levied on an infringing undertaking, and the Court of Appeal's judgment was unequivocal in rejecting such an approach.

Private action procedure

- 7 May litigation be funded by third parties? Are contingency fees available?

Costs can be significant in the context of litigation in the English courts (see further question 33 below), in particular given that the unsuccessful party will, as a general rule, be required to pay the winning side's costs. It is therefore important for claimants to ensure they have considered the risk of an adverse costs order, and how they will pay for it, before commencing litigation. While fee arrangements involving payment of a percentage of recoveries are not permitted in relation to contentious work, various alternative funding solutions are available.

Conditional fee arrangements (CFAs) may be entered into in the context of English litigation. CFAs usually involve the lawyers acting on a 'no win, no fee' basis, but with provision for a 'success fee' (ie, their basic fee, plus an uplift) to be paid to them in the event of a successful outcome. To be enforceable, a CFA must comply with section 58 of the Courts and Legal Services Act 1990. In particular, CFAs must be in writing and the percentage uplift cannot be more than 100 per cent.

Third party funding by a professional funder is also an option. The OFT has described this as an 'important potential source of funding' which 'should be encouraged' (OFT Recommendations on Private Actions in Competition Law: Effective Redress for Consumers and Business, OFT 916 November 2007). In the competition law context, *Arkin v Borchard Lines Limited* is an example of the claimant pursuing a claim funded by a professional funder. In that case, the defendant successfully defended the claim and sought an order for the funder to pay their costs (which were in the region of £6 million). The Court of Appeal held that the professional funders should be liable to pay the costs of opposing parties to the extent of the funding provided ([2005] EWCA Civ 655).

Potential litigants may also have legal expenses insurance, or may be able to take out after-the-event insurance to cover their legal costs.

Public funding by the Legal Services Commission is extremely unlikely to be available in the context of private antitrust litigation, as it does not cover funding of 'matters arising out of the carrying on of a business' (Access to Justice Act 1999, section 6(6) and schedule 2). A competition pro bono scheme, established in October 2006, provides advice to individuals and businesses who believe that their rights have been infringed as a result of a breach of competition law, or who are concerned that they may be infringing competition law.

- 8 Are jury trials available?

Jury trials are not available either in the High Court or in the CAT in relation to competition proceedings.

- 9 What pre-trial discovery procedures are available?

In the context of competition litigation there may be an asymmetry between the claimants and defendants in terms of the documentary evidence they hold that is relevant to bringing a claim: claimants are likely to have significantly fewer relevant documents than defendants who were parties to a cartel. The broad disclosure obligations incumbent on parties to English litigation is one of the reasons why England and Wales as a jurisdiction is increasingly favoured by claimants bringing private antitrust actions.

Different procedures are, in theory, applicable in the High Court and the CAT.

High Court

Disclosure in the High Court is governed by CPR part 31, which provides for three broad categories of disclosure: 'standard' disclosure, 'specific' disclosure, and 'pre-action' disclosure.

'Standard' disclosure generally takes place after pleadings have closed, ie, after the claim form, defence and any replies have been served. It requires the parties to the litigation to search for and disclose all documents in their control on which they rely, and documents which adversely affect their own case, adversely affect another party's case, or support another party's case. Privileged documents (see question 11) need to be listed in the disclosure statement but are not disclosed. However, the fact that documents are confidential is not normally a bar to disclosure: concerns of commercial sensitivity are typically dealt with by way of a 'confidentiality ring', whereby only specified persons (eg, external experts, legal advisers, in-house lawyers) will be permitted access to the documents.

'Specific' disclosure can be sought in relation to documents that have not been disclosed as part of standard disclosure (CPR 31.12).

This means that a party is required to disclose specific documents or categories of documents. Disclosure can also be sought from non-parties under CPR 31.17 if a document or class of documents is likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and disclosure is necessary to dispose of the claim fairly or to save costs.

In addition to disclosure in the course of litigation, claimants or potential claimants can ask for 'pre-action' disclosure under CPR 31.16 from someone who is likely to be a party to litigation. CPR 31.16(3) states that pre-action disclosure can only be ordered where the respondent is likely to be a party to subsequent proceedings; the applicant is also likely to be a party to those proceedings; if proceedings had started, the documents or classes of documents of which disclosure is sought would fall within standard disclosure; and disclosure before proceedings have started is desirable either to dispose fairly of anticipated proceedings, to assist the dispute to be resolved without proceedings, or to save costs. Note that even in the case of successful applications for pre-action disclosure, it is normally the applicant who is required to pay the costs of the respondent.

Applications for pre-action disclosure that are overly broad will be refused, so potential claimants should consider carefully the scope of any requests they make. In *Hutchison 3G UK Limited v Vodafone, O2, Orange and T-Mobile* [2008] EWHC 55, the claimant's pre-action disclosure request was refused because it was too broad. That request related to a potential claim under articles 101 and 102 TFEU and was brought in the Commercial Court. The defendants denied there had been any anti-competitive conduct and resisted the applications for pre-action disclosure. The court agreed with them that as a matter of both jurisdiction and discretion the material sought was not necessary for Hutchison 3G to plead its case, that the claim was speculative in terms of liability, that the scale of the disclosure requested was very large and unfocused and was likely to go further than that which would be required under standard disclosure, and that the costs and difficulty of obtaining the documents requested were prohibitive.

The status of leniency applications and settlement agreements with the Commission or OFT has also been the subject of dispute in the context of High Court proceedings in recent years. In relation to leniency applications, a distinction should be drawn between the application itself, and the documentation submitted in support (which will usually be contemporaneous documents, for example, minutes of cartel meetings, evidence of contacts between competitors, etc). Arguably, leniency applications should not be disclosed, since the potential for such disclosure could deter applications from being made and thereby undermine the flow of applications and the Commission's and OFT's leniency regime. At the same time, however, the Commission and OFT want to encourage claimants to bring damages actions against companies involved in anti-competitive conduct. There is a clear divergence between these two policy aims, and to date no decision has been made on the point in High Court proceedings.

CAT

Follow-on damages claims brought in the CAT require claimants to annex to the claim form 'as far as practicable a copy of all essential documents on which the claimant relies' (CAT Rule 32(4)(b)). In practice, as noted above, claimants in follow-on damages actions are likely to rely to a large extent on documents in the hands of the defendant, and on the CAT to order disclosure of them.

In contrast to the specific provisions in the CPR relating to disclosure, however, the CAT Rules are more general. They provide simply that the CAT 'may give directions [...] for the disclosure between, or the production by, the parties of documents or classes of documents' (CAT Rule 19(2)(k)). The CAT therefore has full discretion on the issue of what should be disclosed, by whom, and when. In practice, as with High Court proceedings, it orders disclosure after close of pleadings. As is the case in High Court litigation, privileged

documents are protected from disclosure; and confidentiality rings are also used to ensure commercially sensitive information is ring-fenced as appropriate.

In addition to this 'standard disclosure' in the CAT, it is also possible for parties to request specific disclosure, in particular because the requirement to disclose documents with pleadings only applies to documents supporting the case. In this respect, the CAT has adopted the general rules of disclosure set out in the CPR (see *Aqua Vitae (UK) Limited v DGWS* [2003] CAT 4). In order to obtain specific disclosure, the applicant must specifically identify the documents sought. The application will be rejected if the documents are not relevant and necessary for the fair and just disposal of the proceedings, although the Tribunal will look at the case as a whole (*Albion Water Limited v Water Services Regulation Authority* [2008] CAT 3).

10 What evidence is admissible?

High Court

Factual evidence given in the High Court may stem from documents or witnesses.

In relation to documents, contemporaneous documents can be particularly valuable in relation to allegations of collusive or cartel activity where evidence is sparse. For example, in *Bookmakers Afternoon Greyhound Services Limited & Others v Amalgamated Racing Limited & Others* ([2008] EWHC 2688) the court accepted that 'documents which pointed, even obliquely, to the existence of an agreement or concerted practice had particular weight' (para 18). The rules of hearsay evidence in England and Wales have been considerably relaxed, and it is generally understood that contemporaneous documents can be relied upon as evidence of the truth of their contents (PD 32 paragraph 27.2; in relation to the Commercial Court, appendix 10 of the Commercial Court Guide). Under CPR 32.19 a party is deemed to admit the authenticity of any document disclosed to him or her under CPR 31 unless notice is served requiring the other party to prove the document at trial.

In relation to witness evidence, this is provided in witness statements and oral evidence at trial. Witness statements stand as the witness's evidence in chief (CPR 32.5(2)) with the witness then being cross-examined and re-examined at trial. The weight given to witness evidence will of course depend on the witness's credibility, as well as the other circumstances of the case. A party wishing to secure evidence of a witness present within the jurisdiction to give oral evidence at trial can also issue a witness summons under CPR 34.31 and 34.51.

The rules on expert evidence are set out in CPR part 35 and the Chancery and Commercial Court guides. Expert evidence may only be given with the permission of the court, and follows exchange of witness statements from the witnesses of fact. Under CPR 35.3 the expert is subject to an express duty to help the court on the matters within his or her expertise, and this duty overrides any obligation to the party from whom he has received instructions. Expert evidence tends to be given in the form of a written report (eg, an economist's report defining the relevant market, or a forensic accountant's report on the loss suffered by the claimant). Following exchange of expert reports, written questions may be put to the expert by the other party. Experts will also be subject to cross-examination (and re-examination) at trial.

The court can also order that expert evidence be provided by a single expert appointed jointly (CPR 35.7). This is unlikely to be used much in competition cases, given their complexity.

CAT

In relation to factual evidence in proceedings in the CAT, the Tribunal held in *Argos and Littlewoods v OFT* [2003] CAT 16 that it will 'be guided by overall considerations of fairness rather than technical rules of evidence'. Many factors, including whether the evidence in question is hearsay evidence, can affect the weight it is given (*Aberdeen Journals v OFT* [2003] CAT 11). As in the High Court, factual

evidence in the CAT can include contemporaneous documents and written and oral evidence from witnesses. The CAT's approach to witness statements is to give them such weight as seems appropriate in the circumstances, bearing in mind the extent to which cross-examination has been sought. Under CAT Rule 22, the CAT has the general power to control the evidence placed before it by giving directions as to the issues on which it requires evidence, the nature of the evidence it requires, and the way in which the evidence is to be placed before it.

Expert evidence can be given in the CAT as it can before the High Court. Again, in the context of follow-on damages actions this involves the submission of expert reports, and experts may be cross-examined at trial. As set out in the CPR in relation to High Court proceedings, paragraph 12.9 of the CAT Guide states that the expert is subject to an overriding obligation to the Tribunal to assist on the matters within his or her expertise. Single joint experts may also be appointed in CAT proceedings, although as noted above it is unlikely that they would be in the context of complex follow-on damages claims (CAT Guide paragraph 12.8).

11 What evidence is protected by legal privilege?

There are two types of privilege in English law: legal advice privilege and litigation privilege. They apply in both High Court and CAT proceedings. The practical consequence of a document being privileged is that, while it must be included on a disclosure list (in the High Court), it is protected from disclosure.

Legal advice privilege

Legal advice privilege covers confidential communications between client and lawyer that have been entered into for the purpose of giving or receiving legal advice. There are three elements to this. First, the communication must be confidential – so anything that has come into the public domain or anything that has been circulated widely such that it can no longer be considered 'confidential', will not be privileged. Second, the communication must be between lawyer and client. Under English law, 'lawyer' includes both external and in-house counsel, provided they are authorised persons as defined by the Legal Service Act 2007 (ie, qualified in any jurisdiction). In this respect, English law is different from the position under EU law as recently confirmed by the ECJ in Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*. Following *Three Rivers (No. 5)* [2003] EWCA Civ 474, the definition of 'client' is relatively restricted: in the context of an undertaking it may apply only to a unit or certain specific persons within the undertaking who are instructing the lawyers, rather than all employees within the undertaking. Third, the communication must be made for the purpose of giving or receiving legal advice. For example, communications between a lawyer (internal or external) and persons within the business discussing commercial issues but not providing legal advice in relation to them, will not be privileged.

Litigation privilege

Litigation privilege covers confidential communications between client and lawyer or between one of them and a third party which comes into existence after litigation is contemplated or has been started, and made with a view to obtaining or giving legal advice in relation to the litigation, obtaining evidence to be used in it, or obtaining information which may lead to the obtaining of evidence. These must be the sole or dominant purposes of the communications if they are to attract litigation privilege. This would cover, for example, correspondence with witnesses of fact, experts, reports and drafts etc made in the context of bringing or defending a follow-on damages action. Litigation would probably be considered to be 'in prospect or pending' at the stage of the Commission or OFT investigation, such that any documents produced would be covered by litigation privilege.

Privileged status of leniency applications and settlement agreements?

In relation to follow-on damages arising from a decision of the Commission or the OFT, any document submitted by the parties to the investigation to the regulator has arguably lost its 'confidential' status and may therefore not be privileged. Such documents would form part of the case file and therefore be disclosed to other parties as part of access to file. This may be of particular concern to leniency applicants or those who enter into settlement agreements, and who may face the prospect in follow-on damages actions of being required to disclose the application or agreement. The position taken by the Commission is that, as a matter of public policy, leniency applications must not be disclosed (paragraph 40 of the Leniency Notice (OJ 2006 C298/22)) as to do so risks jeopardising the attractiveness of making an application, and thereby threaten the leniency regime; this is also the position it has adopted in relation to settlement agreements (paragraph 40 of the Settlement Notice (OJ 2008 C167/6)). Article 2 of Regulation 1049/2001 establishes a right of access to documents of the European institutions. However, the Commission has previously refused to disclose confidential versions of its decisions and the contents of its case file, relying on the public policy exceptions to the right of access in article 4(2) of the Regulation. A number of Commission decisions relating to its refusal to disclose documents are currently under appeal to the General Court (T-437/08 *CDC Hydrogen Peroxide v Commission*; Case T-380/08 *Kingdom of Netherlands v Commission*; and Case T-344/08 *EnBW Energie Baden-Württemberg v Commission*).

In *National Grid Electricity Transmission Plc v ABB Ltd and Others* [2011] EWHC 1717 (Ch), the Court ordered the defendants to give disclosure of the contemporaneous documents on the Commission's file, and of responses to the Commission's requests for information, both of which were in those defendants' possession following access to file. However, disclosure was not required to be given of either corporate statements or other documents created for the purpose of a leniency application, or of extracts from such leniency documents contained in other documents.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

Under section 188 of the EA02 only an individual can be found guilty of the criminal cartel offence. Private damages actions, on the other hand, would tend to be brought against the company that has breached competition law.

Private actions are available where there has been a criminal conviction in respect of the same matter. The *Marine Hose* cartel is an example: in January 2009 the Commission fined a number of undertakings for their participation in the cartel, including Dunlop Oil & Marine. Following a plea-bargain process in the US, in June 2008 three Dunlop executives pled guilty and were convicted in the UK for their role in the cartel. In July 2009, the Libyan oil firm Waha Oil Company lodged a claim for damages against Dunlop in the High Court.

In *Marine Hose*, the criminal cases had already concluded by the time the follow-on litigation was brought. This need not necessarily be the case, although where a private action and criminal proceedings are brought at the same time, the private action may be stayed pending the outcome of the criminal proceedings. In the *Passenger Fuel Surcharge* case a civil investigation by the OFT into British Airways and Virgin Atlantic regarding fixing of passenger fuel surcharges on transatlantic routes was stayed pending the outcome of the criminal prosecution it brought against four of the British Airways executives, which collapsed in May 2010. It remains to be seen whether the OFT will press ahead with the civil case.

- 13** Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

The claimant in a private action is required to prove all the elements of his claim, subject to the fact that a relevant OFT or Commission infringement decision will be taken as evidence that the infringement was committed. As such, the claimant will be required to show evidence of loss and causation in a follow-on claim and, in a stand-alone claim, evidence of the infringement as well. The fact that an individual has been convicted of a criminal offence is admissible in civil proceedings in order to prove the infringement has been committed, but this will just be one piece of evidence in establishing the infringement and will not, of course, assist in showing loss or causation.

The EA02 has specific rules governing the admissibility of evidence discovered in criminal proceedings. The OFT and the SFO, the bodies in the UK responsible for investigating the criminal cartel offence, are entitled to disclose information that has come to their attention in the course of a criminal investigation in specified circumstances only. They are not permitted to disclose such information to assist potential claimants seeking damages unless the information has already legitimately been disclosed to the public.

There are no specific provisions protecting leniency applicants from follow-on damages claims brought in England and Wales. In practice, the fact of being a leniency applicant raises two main issues relevant to follow-on claims: when the claim can be brought, and whether the leniency application is disclosable to claimants. The latter issue has been addressed above (see question 11).

As to when a claim can be brought, it is clear that the UK courts (which include the CAT) cannot take decisions running counter to those of the Commission or judgments of the European courts (article 16 of Regulation 1/2003). This might be thought to place a leniency applicant at a disadvantage, insofar as the leniency applicant will not appeal the Commission's decision and the decision therefore becomes binding as against that undertaking at an earlier stage.

In the CAT, proceedings cannot be brought against an undertaking (without permission of the CAT) until the decision is final as against that undertaking (Rule 31 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372)), so the date on which proceedings can be brought against a leniency applicant will be earlier than the date on which proceedings can be brought against parties to the cartel who appeal the decision. The scope of this provision was limited, however, by the Court of Appeal's judgment in *BCL Old Co Ltd & Others v BASF SE & Others* [2009] EWCA Civ 434, in which the court held that the two-year time period for bringing a follow-on claim in the CAT will start to run (and so permission to bring a follow-on claim is not required) where the appeal to the European courts relates only to the fine; only where the appeal relates to the substantive infringement finding does the limitation period not start to run (thereby requiring the CAT's permission to bring a follow-on claim). In *Emerson Electric and others v Morgan Crucible* the claimants were able to commence proceedings against Morgan Crucible (the leniency applicant in the Commission's *Electrical and Mechanical Carbon and Graphite Products* cartel decision), but could not commence proceedings against the other parties to the cartel until they had exhausted their avenues of appeal to the European courts (*Emerson Electric and others v Morgan Crucible* ([2007] CAT 30), judgment of 16 November 2007, and *Emerson and others v Morgan Crucible and others* ([2008] CAT 8)) – although proceedings against Morgan Crucible were stayed by agreement pending the outcome of the appeals.

In the context of High Court proceedings, however, the distinction between leniency applicants and other parties to a cartel appears to be of less significance. In *National Grid v ABB and Others* [2009] EWHC 1326, the court stayed a follow-on claim brought by National Grid against parties to the *Gas Insulated Switchgear* cartel until three months after any appeal against the Commission's

infringement decision had been finally determined. (The court considered, however, that the defendants should serve their defences and that some limited disclosure and other pre-trial steps could be taken in the meantime.) This applied to both the immunity applicant, ABB, and the other parties to the cartel who were defendants in the High Court proceedings.

- 14** In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

National courts are under a duty not to take decisions running counter to those of the European Commission or courts (article 16 of Regulation 1/2003). Where a follow-on damages action is brought in the UK in circumstances where the underlying Commission decision is being appealed to the European courts, defendants may therefore apply for an action to be stayed pending the outcome of the appeal.

In proceedings in the High Court, there is no specific provision relating to competition litigation, but CPR 31.2(f) allows the court to stay proceedings as part of its general case management powers, and CPR part 23 provides for interim applications to be made to the court. Each application will be considered on its merits. As noted above, in *National Grid v ABB and Others* [2009] EWHC 1326 the defendants (which included ABB, the immunity applicant which was not appealing the Commission's decision; and other addressees of the decision, who were appealing) requested a stay of the UK proceedings pending the outcome of appeals to the European courts. The High Court granted the stay (in respect of all the defendants), although it did order certain pre-trial steps to be taken.

In proceedings in the CAT, while the Tribunal has case management powers that allow it to stay proceedings where appropriate (CAT Rule 19.1), the CA98 addresses the issue of potential conflicts between European and national decisions by preventing follow-on claims from being brought until a decision has become 'final' (ie, all avenues of appeal have been exhausted or the time for bringing such appeals has expired), unless the CAT grants permission for the claim to be brought (section 47A(7) of the CA98). As noted above, the outcome of the Court of Appeal's judgment in *BCL Old Co Ltd & Others v BASF SE & Others* [2009] EWCA Civ 434 was that permission to bring a follow-on claim is limited to circumstances where the substance of the infringement finding is being contested, and is not required where an appeal relates only to the fine. In *Emerson I*, the claimant sought to bring a follow on action in the CAT against Morgan Crucible, the leniency applicant in the Commission's infringement case. Other addressees of the decision were appealing the decision, but Morgan Crucible, as the leniency applicant, was not. The CAT held that permission was required to commence proceedings where the underlying infringement decision was being appealed by any of the addressees (*Emerson Electric Co and others v Morgan Crucible and others* [2007] CAT 28). However, in *Emerson II*, the CAT granted permission for the action to be brought against Morgan Crucible – although it indicated that proceedings may be stayed prior to the case coming to trial, and proceedings were in any event stayed against Morgan Crucible by agreement (*Emerson Electric and others v Morgan Crucible* [2007] CAT 30). In *Emerson III*, the claimants went back to the CAT to ask for permission to bring proceedings against the other parties to the Commission's infringement decision who were appealing to the European courts, but permission was refused (*Emerson and others v Morgan Crucible and others* [2008] CAT 8).

- 15** What is the applicable standard of proof for claimants and defendants?

The burden of proof in private antitrust litigation falls on the claimant to establish that there has been an infringement, loss and causation. In relation to the infringement aspect, a decision of the OFT or European Commission (upheld on appeal where applicable) will

be conclusive evidence of the infringement. It therefore falls to the claimant to prove causation and loss in a follow-on damages claim, and to prove the entire infringement as well as causation and loss in the case of a stand-alone claim.

The standard of proof in competition litigation cases, as for all civil claims, is the ‘balance of probabilities’ – ie, more likely than not. The High Court in *Attheraces v British Horseracing Board* [2005] EWHC 3015 held that while the standard of proof is the civil standard of balance of probabilities, the seriousness of an infringement of the competition rules required the proof of evidence to be ‘commensurately cogent and convincing’. This is sometimes referred to as a ‘heightened civil standard’, though it is in fact nothing more than the courts requiring evidence commensurate with the severity of the infringement finding, as is the case in all civil claims.

- 16** What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

High Court

The timetable in the context of a private antitrust action in the High Court will depend on the nature of the proceedings and the complexity of the case. In relation to a follow-on damages case, much will depend on: whether proceedings are stayed (see above); how extensive disclosure is; the number of witnesses; and other such issues. In relation to a stand-alone claim, again the complexity of the issues will largely determine the typical timetable. The practice in high value claims assigned to the ‘multi-track’ procedure under the CPR is to have a case management conference after close of pleadings (CPR 29.3), in which a timetable to trial is agreed or ordered, which sets deadlines for the various stages in the proceedings (eg, disclosure, exchange of witness statements and expert reports). Cases may be expedited where circumstances warrant it (see, for example, the Admiralty and Commercial Courts Guide, section J1), but this will be rare for a damages claim.

In addition to expedition, cases in the High Court can be subject to strike-out or summary judgment applications where the statements of case disclose no cause of action or the claimant or defendant has no real prospect of success (CPR parts 3 and 24). For example, a margin squeeze allegation made under article 101 TFEU was summarily dismissed by the High Court in *Unipart v O2* [2002] EWHC 2549 within three months of the claim being issued. On the other hand, in *Adidas v ITF* [2006] EWHC 1318 the court held the complexity of the competition law issues meant that striking out the claim or defence would be inappropriate.

Issues may also be tried as ‘preliminary issues’ where to do so could allow the court to dispose of proceedings expeditiously (see, for example, the Chancery Guide, paragraph 3.15 and CPR 3.1), by hiving off a specific issue that can be dealt with discretely and that would allow the action to be determined without recourse to a full trial on all the issues.

CAT

The duration of proceedings in the CAT will again depend on the circumstances and complexity of the case. To date, only one follow-on action has reached judgment in the CAT, namely *Enron Coal Services Limited v English Welsh & Scottish Railway Limited* (Case 1106/5/7/08). In that case, the claim form was filed in November 2008 and judgment was handed down in December 2009 ([2009] CAT 36). Contrast this, for example, with the follow-on action in the *Emerson* litigation: the claim was lodged in February 2007, and proceedings are still ongoing.

Collective actions before both the CAT (under section 47B of the CA98) and the High Court may take longer because of increased case management burdens. In the only representative action brought to date in the CAT (*Consumers’ Association v JJB Sports*, following on from the OFT’s *Replica Kit* decision), the claim was lodged in March 2007 but was settled and withdrawn in January 2008.

- 17** What are the relevant limitation periods?

High Court

In civil claims brought in the High Court (which includes private antitrust litigation), the limitation period is six years from the date on which the cause of action accrued (Limitation Act 1980). The cause of action continues to accrue until the date the infringement of competition law ceases, so the limitation period will expire six years from the date on which the infringing conduct ends. Follow-on claims based on Commission or OFT decisions relating to infringing conduct more than six years old would therefore be time-barred. However, where there is deliberate concealment the six-year period will not begin to run until such time as the claimant either discovered the concealment or ought reasonably to have discovered it. In relation to claims pertaining to cartel activity (that is likely to have been secret or concealed, or both), this may depending on the facts of each case extend the limitation period until, for example, the date on which the cartel activity was made public, such as an announcement by the competition regulator that it was investigating the infringement.

CAT

In the CAT, a follow-on claim can be brought up to two years from the later of the date on which the substantive infringement decision becomes final and is no longer appealable, or the date on which the action accrued (section 47A(7) and (8) of the CA98). As such, an infringement decision of the Commission or OFT that is not appealed within the required time limit will become final; where an appeal is lodged the limitation period will not start to run until the appeal has been determined and no further appeals are possible. As noted above, the Court of Appeal in *BCL Old Co v BASF* [2009] EWCA Civ 434 held that there is a distinction between an appeal of an infringement decision that concerns only the imposition of a fine and appeals relating to the substance of the infringement finding. In relation to the former, section 47A does not extend the limitation period (which will therefore start to run from the date on which the deadline to lodge an appeal expired), but if an appeal relates to the substance then the limitation period may be extended (until the appeal has been determined and no further appeal is possible). In a separate judgment in *BCL Old Co v BASF* [2010] EWCA Civ 1258, the Court of Appeal held that the CAT does not have the power to extend the limitation period for follow-on claims brought under section 47A of the CA98. This latter decision is on appeal to the Supreme Court.

In *Deutsche Bahn AG v Morgan Crucible Company plc* [2011] CAT 6, the CAT held that the limitation period must be determined in relation to each defendant individually. As such, the CAT held that an action brought against Morgan Crucible in December 2010 on the basis of the Commission’s *Electrical and Mechanical Carbon and Graphite Products* decision of December 2003 was brought out of time: in circumstances where Morgan Crucible had not appealed the decision, the limitation period in respect of damages claims brought against it began to run from the deadline for filing an appeal to the European courts (in February 2004) and expired two years later (in February 2006). The CAT’s judgment is on appeal to the Court of Appeal.

- 18** What appeals are available? Is appeal available on the facts or on the law?

Judgments of the CAT (section 49(1)(b) of the CA98) and the High Court may be appealed to the Court of Appeal, provided the permission of the lower court or the Court of Appeal has been obtained. CPR 52.11(3) provides that appeals can be made on the basis that the lower court was either wrong, or unjust because of a serious procedural or other irregularity. Appeals can be made either by a party to the proceedings or by someone who has a sufficient interest in the matter. This was widely interpreted by the CAT in *English Welsh and Scottish Railways v Enron Coal Services* [2009] EWCA

Civ 647, where the Court of Appeal held that it had jurisdiction to hear an appeal against the CAT's refusal to strike out part of the claim for damages.

A further appeal from the Court of Appeal to the Supreme Court (formerly the House of Lords) is possible, again provided permission is granted either by the Court of Appeal or the Supreme Court.

In addition to appeals, the High Court or the CAT can stay proceedings and refer a question to the ECJ under the preliminary ruling procedure set out in article 267 TFEU.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Class actions in the US sense (ie, 'opt-out' actions) are not available in England and Wales. However, collective proceedings can be brought in the sense of multi-party claims or 'opt-in' actions by designated bodies (currently, in the UK, the Consumers' Association).

High Court

In the High Court, CPR 19.6(1) allows a representative action to be brought by a claimant representing himself and other claimants, thereby avoiding the need for those persons to issue their own claim form. Representative proceedings can be brought where more than one person has the 'same interest' in a claim and the interested persons must opt in to the action to participate.

It is difficult to bring a representative action in the context of private antitrust litigation, as is shown in *Emerald Supplies Limited v British Airways plc* [2009] EWHC 741. The claimants in that case were cut flower importers who were direct and indirect customers of BA's airfreight services. They alleged that they had paid inflated air freight prices as a result of a price fixing cartel to which BA and other airlines were party, and claimed damages for themselves and other importers of cut flowers who they purported to represent. The High Court struck out the action on the basis that: the class of direct and indirect purchasers was too ill-defined for the purposes of CPR 19.6, as the criteria for inclusion in the class depended on the outcome of the claim itself, ie, whether they were indeed purchasers of services at inflated prices; and the direct and indirect purchasers would not all benefit from the relief sought by the claimant, because of the need for direct purchasers to pass on the overcharge to indirect purchasers in order for the latter to benefit from damages awarded. The Court of Appeal in *Emerald Suppliers Ltd v British Airways plc* [2010] EWCA Civ 1284 confirmed the High Court's decision, rejecting the move to engineer such a class-action mechanism. The Court held that the appellant and those it purported to represent did not all have 'the same interest' required by CPR 19.6: they were not defined in the pleadings with a sufficient degree of certainty to constitute a class of persons with 'the same interest' capable of being represented by the appellant. The potential conflicts arising from the defences that could be raised by British Airways to different claimants reinforced the fact that they did not have 'the same interest' and that the proceedings were not equally beneficial to all those to be represented.

Group litigation orders (GLOs) are also available in the High Court (CPR 19.11). GLOs are made where one or more claims raise 'common or related issues', and are ordered by the court to consolidate proceedings commenced by two or more claimants bringing separate actions. In practice, GLOs are rarely used, and have not been used in the context of competition litigation to date.

CAT

In the CAT, section 47B of the CA98 provides for designated bodies to bring opt-in actions on behalf of consumers. In the UK, the only designated body to date is the Consumers' Association.

Representative actions in the CAT have had limited success to date. Following on from the OFT's decision in *Replica Kit*, the Consumers' Association brought an action in the CAT under section 47B on behalf

of consumers who had purchased the overpriced football shirts. Relatively few consumers signed up to the action, and the case settled. No other representative actions have been brought in the CAT to date.

20 Are collective proceedings mandated by legislation?

In the High Court the applicable rules for collective actions are set out in the Civil Procedure (Amendment) Rules SI 2000 No. 221. The relevant rules of the CPR are set out above. As noted above, a limited form of class action before the CAT is provided for by section 47B of the CA98.

21 If collective proceedings are allowed, is there a certification process? What is the test?

High Court

As there is no equivalent in England and Wales of the US-style (opt-out) class action procedure, nor is there a similar certification process. In relation to representative proceedings, it is necessary for the claimant representing others who have the same interest in the claim to show the 'same interest' test is satisfied. The Court of Appeal's judgment in *Emerald Suppliers Ltd v British Airways plc* [2010] EWCA Civ 1284 has shown that this will be difficult in the context of follow-on damages claims.

In relation to GLOs, an order can be made either of the court's own motion or following a request from a claimant or defendant. GLOs are made where one or more claims raise 'common or related issues', a concept which is wider than the requirement that the persons have the 'same interest' for representative proceedings.

CAT

A claim brought under section 47B of the CA 98 by the Consumers' Association on behalf of two or more consumers requires each consumer to have given his or her consent to the claim, and requires the claims to relate to the same infringement. Beyond this, no specific certification process is required.

22 Have courts certified collective proceedings in antitrust matters?

See above. The Consumers' Association brought the first (and only) representative action under section 47B of the CA98 in the CAT in March 2007, which settled. No other collective proceedings have been brought in the CAT. In the High Court, *Emerald Supplies Limited's* attempt to bring a quasi 'class action' was rejected at first instance – a decision that was upheld by the Court of Appeal.

23 Are 'indirect purchaser claims' permissible in collective and single party proceedings?

In proceedings before both the High Court and the CAT, it is necessary for the claimant to show that it has suffered loss as a result of the infringement in order to recover damages. In principle there is no reason why an indirect purchaser should not be able to bring such a claim, so long as it can evidence its loss. Although no final judgments have been handed down in cases brought by indirect purchasers, the BCL cases involved a claim by an indirect purchaser and, although they settled before the CAT was able to rule on the issue, the indications from the CAT were positive for the claimant. In the CAT, a number of poultry producers have also lodged a damages action against Degussa and others for their role in the *Methionine* cartel, with the poultry firms arguing that the overcharge resulting from the infringement was passed on to them by their suppliers, and that the claimants therefore absorbed that overcharge (*Moy Park Limited & Others v Evonik Degussa GmbH & another*, Case 1147/5/7/09).

That indirect purchasers should be able to claim damages is also consistent with the position taken by the European courts and the Commission's White Paper. The ECJ's judgment in *Manfredi v Lloyd*

Adriatico (Case C-295/04, [2006] ECR I-6619) stated that ‘any individual’ must be able to rely on what is now article 101 TFEU to claim invalidity of an arrangement or practice prohibited under the competition rules, and claim compensation for the harm suffered as a result of the breach. This implies that indirect purchasers should be able to recover damages if they can show they suffered loss resulting from a competition law infringement. In its White Paper, the Commission referred to *Manfredi* and expressly proposed that indirect purchasers should be able to rely on a rebuttable presumption that an illegal overcharge had been passed onto them in its entirety. The White Paper also acknowledged that defendants should be able to rely on a passing-on defence.

24 Can plaintiffs opt out or opt in?

As noted above, representative and group actions in England and Wales require claimants to ‘opt in’ rather than ‘opt out’ of the claim. This is in contrast to, for example, the way claims can be brought in the US.

Both the European Commission’s White Paper and the OFT’s paper entitled ‘Private actions in competition law: effective redress for consumers and business – recommendations’ (November 2007) have effectively proposed that an opt-out mechanism should be adopted, in large part so as to encourage the enforcement of competition law via private antitrust litigation. Both papers are currently on hold.

25 Do collective settlements require judicial authorisation?

Settlement agreements entered into between parties to litigation do not require the consent of the court or CAT. In normal circumstances, the claimant can then withdraw (discontinue) the claim unilaterally. Note, however, that in proceedings brought by more than one claimant, if a settlement is entered into with one of the claimants the consent of either the other claimants or the court is required (CPR 38.2(2)(c)).

Settlements should include a provision for payment of costs, or state that each party is to bear its own costs. In the High Court, where a claimant discontinues the claim, it is required to pay the defendant’s costs (CPR 38.6). In the CAT, a claimant may only withdraw the claim prior to the hearing with the consent of the defendant or with the permission of the president. Where a claim is withdrawn, the Tribunal may make any consequential order it thinks fit (paragraph 14.5 of the CAT Guide to Proceedings).

26 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Claims can be brought separately in England and Wales, Scotland and Northern Ireland. The courts of each jurisdiction cannot order the claims brought in other jurisdictions to be consolidated.

However, if simultaneous proceedings are commenced across the different jurisdictions, it is open to the defendants to challenge the jurisdiction of one of the courts on the basis that the other one is the more appropriate forum for resolution of the dispute. It is also likely to be in the claimant’s interests (in terms of both costs and expediency) to bring their claims in one jurisdiction. This applies not just within the UK but also across Europe, to the extent that it is likely to be more cost effective and efficient for a claim to be heard in one European jurisdiction in relation to losses the claimant suffers as a result of a pan-European infringement of the competition rules. Claimants are wise to these efficiencies: see, for example, the efforts to which the claimant in *Provimi v Aventis* went in order for all its European claims to be heard in the English courts (see question 5).

England and Wales is regarded as a single jurisdiction. It is possible to bring simultaneous proceedings in each of England and Wales, Scotland and Northern Ireland.

27 Has a plaintiffs’ collective-proceeding bar developed?

In England and Wales, at least one specialist claimant firm has been established, which has brought a number of the follow-on damages claims that have been lodged in the English courts.

Remedies

28 What forms of compensation are available and on what basis are they allowed?

Follow-on actions are based on the tort of breach of statutory duty (see question 2 above) and damages are awarded on the tortious basis, ie, the amount of the loss, plus interest. This is in line with ECJ case law (*Manfredi v Lloyd Adriatico*, Case C-295/04, [2006] ECR I-6619) which requires injured persons to be able to seek compensation not only for actual loss but also lost profit and interest. No follow-on claims in the English courts have yet resulted in a final award of damages, although a number of cases have addressed the issue. This is not surprising in circumstances where the vast majority of commercial disputes settle before judgment.

In *Devenish Nutrition v Sanofi Aventis* [2007] EWHC 2394 the High Court held that claimants are entitled to compensatory damages but not to exemplary or restitutionary damages, or to an account of profits, as to make such an award in circumstances where fines have been imposed by the regulator for competition law infringements (or reduced or waived in the case of leniency and immunity applicants) would be inconsistent with the principles of *ne bis in idem*, the principle that national courts should not run counter to decisions of the Commission, or the rule against double jeopardy. On appeal in relation to the restitutionary damages and account of profits issue, the Court of Appeal confirmed that claimants are not entitled to restitutionary damages, or to an account of profits ([2008] EWCA Civ 1086). As such, they are entitled to be compensated for the loss they have suffered, but are not entitled to any further damages that would punish the defendant for its wrongdoing (exemplary damages) or to be awarded the unlawful gain that the defendant made by infringing the competition rules (restitution or account of profits). It remains to be seen whether exemplary damages would be available in stand-alone actions where there has been no prior fine imposed by the Commission or the OFT.

How damages might be calculated in a competition law claim will depend on the facts of the case. In *Crehan v Inntrepreneur Pub Company* [2003] EWHC 1510, the High Court considered that if there had been a breach of the competition rules the damages awarded would have been for losses actually suffered, profits and interest up to the date of the judgment; the Court of Appeal considered this approach to be too speculative and held that damages should be assessed as at the date of loss. In any event, the decision to award damages was overturned by the House of Lords, which did not therefore need to rule on which would have been the correct measure of damages.

In *Arkin v Borchard Lines Limited (No. 4)* [2003] EWHC 687, the judge considered that an assessment of damages would involve considering what loss, if any, the infringement had as a matter of ‘common sense’ directly caused to the claimant (although he held that, on the facts, there had been no breach of the competition rules). For this purpose, it would be necessary to consider the ‘counterfactual’, ie, what the market conditions would have been like without the infringement, and the likely difference between the price actually paid and the price that would have been paid in such a competitive market.

In *Enron Coal Services v English Welsh and Scottish Railways* [2003] EWHC 687 (the only follow-on claim thus far to reach a full trial in the CAT), the Tribunal concluded that there was no loss at all because on the counterfactual the claimant would have been no better off.

Essentially, in relation to quantum, the measure of damages awarded will depend on the nature of the infringement. In relation to a cartel, the damages should be the cartel overcharge, adjusted as necessary for pass-on. In relation to exclusionary abuses, the damages should be the profit that the claimant would have made had it not been excluded from the market or marginalised by the infringing conduct. In December 2009 Oxera published a paper for the European Commission in relation to the calculation of quantum in competition law claims. The paper may be useful to judges awarding damages in such claims, but it is not anticipated that it will provide a short-cut to the detailed damages assessment necessary in the event damages are awarded. Rather, the paper's usefulness in English litigation is likely to be as an indication of the Commission's position, that being just one of the factors the court would take into account in determining the level of damages to be awarded.

In relation to stand-alone claims, compensation may be sought for infringements that must be proved de novo and would be awarded on the same basis as follow-on damages actions noted above. In addition, other 'compensation' may be sought, as to which see question 30.

In the CAT, an order for interim relief was made in *Healthcare at Home v Genzyme* [2006] CAT 29. The case involved a margin squeeze by the supplier of a particular drug; the CAT's judgment specified the percentage discount that should have been applied to the supplier's pricing to ensure a reasonable profit margin. A purchaser claimed the value of the percentage discount against the amount purchased, plus exemplary damages. The CAT considered that, if the claimant could demonstrate the effects of the infringement had continued past the period of infringement found, damages could extend for that longer period. The CAT accepted that lost profit margin was an appropriate measure of damages, and made an interim award based on the likely percentage discount that it would find should have been charged. The case settled before final judgment. Note, however, that the CAT's judgment was handed down in November 2006 (two years before the Court of Appeal's judgment in *Devenish*), and the CAT may find differently if the issue were to arise again.

29 What other forms of remedy are available?

High Court

Aside from damages, claimants can seek injunctions in the High Court in respect of either an ongoing or anticipated breach of competition law (CPR Part 25). Prohibitory injunctions (requiring the defendant to refrain from conduct), mandatory injunctions (requiring a defendant actively to do something) and quia timet injunctions (restraining the defendant from engaging in future actions) are all available. To succeed in being awarded an interim injunction, the applicant must show it has a good arguable case, and that damages would be inadequate to remedy its losses (*American Cyanamid v Ethicon Ltd* [1975] AC 396). Where an interim injunction is sought, it is necessary for the applicant to give a cross-undertaking in damages to cover any loss suffered by the defendant as a result of the injunction in the event of the applicant losing the case.

Timing is a critical issue. In *AAH Pharmaceuticals v Pfizer Limited & Unichem Limited* [2007] EWHC 565, the High Court refused to award an interim injunction in circumstances where eight wholesalers sought to prevent Pfizer terminating supply agreements with them but brought their injunction application a month before implementation of Pfizer's proposals, even though they knew of Pfizer's proposal six months in advance. The last-minute nature of the application and the complexity of the analysis required to establish whether Pfizer's actions were anti-competitive caused the court to refuse the wholesalers' application.

An example of a prohibitory injunction is *Adidas v ITF* [2006] EWHC 1318, in which Adidas successfully argued that the International Tennis Federation's restriction on the size of logos applied to tennis players' uniforms was an abuse of its dominant position and obtained interim relief against the application of the restriction at that year's tournaments. From Adidas' point of view, this allowed it to pursue its objective, ie, changing the rules rather than receiving damages. An example of a mandatory injunction is *Software Cellular Network Ltd v T-Mobile Limited* [2007] EWHC 1790, in which Truphone obtained an injunction obliging T-Mobile to purchase services on the basis that T-Mobile's refusal to activate relevant numbers amounted to an abuse of a dominant position (even though T-Mobile had only a 20-30 per cent market share and there was no precedent for such a refusal to purchase a service being characterised as an abusive refusal to supply).

The High Court can also award security for costs (CPR 25) in certain circumstances where the claimant is outside the jurisdiction.

CAT

Interim relief in the form of interim payments may be sought from the CAT (CAT Rule 46). Such an order would require the defendant to make a payment on account of any damages (excluding costs) for which the CAT may hold the defendant liable. The conditions for such an award to be made are the defendant against whom the order is sought has admitted liability to pay damages to the claimant, and the Tribunal is satisfied that, if the claim were to be heard, the claimant would obtain judgment for a substantial amount of money (excluding costs) against the defendant. In *Healthcare at Home v Genzyme Ltd* [2006] CAT 29 that CAT ordered an interim payment of £2 million to be made to the claimant in the context of proceedings brought following on from an OFT finding that Genzyme had operated an unlawful margin squeeze in breach of chapter II of the CA98.

The CAT can also order security for costs in the context of follow-on damages actions (CAT Rule 45), in circumstances similar to those set out in CPR 25 for claims in the High Court. Indications to date suggest the CAT will consider in particular whether a costs order is ultimately likely to be made: in *BCL Old Co v Aventis* [2005] CAT 2 the Tribunal declined to award security for costs primarily because it was not satisfied there was a substantial likelihood that the defendants would in due course benefit from a costs order.

30 Are punitive or exemplary damages available?

See question 28. Punitive and exemplary damages are available in certain limited circumstances in England and Wales. The ECJ in *Manfredi v Lloyd Adriatico* (Case C-295/04 [2006] ECR I-6619) required that, in accordance with the principle of equivalence, punitive damages must be available in the national courts for breaches of European competition law where they would be so available for breaches of national law.

In relation to exemplary damages, the general principle is that they are not awarded and that damages are compensatory.

In the context of follow-on damages claims, the High Court in *Devenish* [2007] EWHC 2394 refused to award punitive or exemplary damages, where the defendant had already been fined (or granted immunity from or a reduction in fines) by a regulatory authority in respect of the same behaviour. This element of the judgment was not appealed to the Court of Appeal ([2008] EWCA Civ 1086).

31 Is there provision for interest on damages awards?

As noted above, the ECJ in *Manfredi v Lloyd Adriatico* (Case C-295/04 [2006] ECR I-6619) held that interest should be available in respect of claims for damages based on infringements of competition law (the principle of equivalence).

The English courts have discretion to order simple interest on damages awarded. The applicable rate is normally the claimant's borrowing rate, as assessed by the court. In the absence of such evidence a fair commercial rate would be applied. In addition, the claimant can obtain compound interest if it can prove actual losses (eg, if it can show that it has in fact had to borrow money and pay interest on it).

The CAT may also order that interest is payable on damages awarded by it for all or any part of the period between the date when the action arose and the date of decision of the award for damages. Unless the CAT directs otherwise, the rate of interest must not exceed 8 per cent. In practice, like the High Court, the CAT will usually apply the claimant's cost of borrowing (see Rule 56 of the Competition Appeal Tribunal Rules 2003 and paragraph 18 of the CAT Guide to Proceedings).

32 Are the fines imposed by competition authorities taken into account when settling damages?

The High Court's judgment in *Devenish Nutrition Limited v Sanofi Aventis and others* [2007] EWHC 2394 shows that where fines have been imposed by competition authorities (or not imposed because the defendant was a leniency applicant), neither punitive or exemplary damages, nor restitution or account of profits, will be available in follow-on damages claims. The Court of Appeal upheld the judgment as regards restitution or account of profits ([2008] EWCA Civ 10).

As the normal measure of damages in the English court is compensatory, the fact that fines have been imposed by the competition regulator would not normally lead to a reduction in the damages awarded. In the absence of final judgments of the courts or the CAT awarding damages, however, the degree to which hefty fines are taken into account remains to be seen.

33 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

High Court

The rules on costs in the High Court are set out in CPR 43 to 48 and the accompanying Practice Directions. The basic rule is that costs follow the event, ie, the unsuccessful party pays the costs of the successful party (CPR 44.3(2)(a)). However, the courts have a general discretion in awarding costs, and will have regard to all the circumstances of the case including: the conduct of the parties; whether a party was partially successful; and any payment into court or settlement offer that is drawn to the court's attention. Note that even where a costs order is made, the successful party is generally only likely to recover around two thirds of its costs.

In exceptional cases, a successful party may seek a costs order against a third party, for example if a third party has helped to fund litigation on behalf of the losing party. However, following *Arkin v Borchard Lines Limited* [2005] EWCA Civ 655 it is necessary in this regard to distinguish between 'pure funders' (who have no interest personally in the litigation and do not stand to benefit from it) and professional funders. The court in *Arkin* held that costs orders would not be made against pure funders; against professional funders costs orders may be made to the extent of the funding provided.

In addition, in rare cases a 'wasted costs' order may be made to hold legal representatives personally liable for costs. Wasted costs orders are imposed to punish lawyers for wasting the court's time, for example in cases of serious improper, unreasonable or negligent acts or omissions in the course of the litigation.

CAT

CAT Rule 55 and paragraph 16 of the CAT Guide address the issue of costs. They provide that the Tribunal may, at its discretion, make any order it thinks fit in relation to the payment of costs. This is in

contrast to the provisions in relation to the High Court: in the CAT there is no general rule that costs follow the event.

In *Emerson Electric v Morgan Crucible*, a costs order was made in favour of proposed defendants who succeeded in opposing the claimant's application for permission to make a follow-on damages claim before the end of the period referred to in section 47A(8)(b) of the CA98 ([2008] CAT 8 (permission); [2008] CAT 28 (costs)). The CAT ordered that the claimants should pay the proposed defendants sums representing 50 per cent of the proposed defendants' costs of the applications for permission.

34 Is liability imposed on a joint and several basis?

Although the point has not been decided, it is generally understood that in cases before both the CAT and the High Court, liability is likely to be joint and several in respect of defendants in a cartel action.

The Commission's White Paper and the OFT's paper entitled 'Private actions in competition law: effective redress for consumers and business – recommendations' (November 2007) have both raised the possibility of removing joint and several liability for infringers who have been granted leniency, so as not to discourage whistle-blowing and risk jeopardising the effectiveness of the leniency regime. Neither of these papers has yet led to any changes in English law, and the White Paper's proposals are currently on hold.

35 Is there a possibility for contribution and indemnity among defendants?

In England and Wales there is provision for contribution proceedings to be brought under the Civil Liability (Contribution) Act 1978, which allows any person liable for damage suffered by another to recover a contribution from a third party who is also liable in respect of the same damage. Contribution proceedings may be brought by a defendant joining another party or parties to the action, or by bringing contribution proceedings against them after judgment has been made. In relation to the *Emerald Supplies* case (*Emerald Supplies and another v British Airways Plc* [2009] EWHC 741), British Airways is being sued in the High Court for damages allegedly sustained by the claimants in relation to a cartel in which British Airways and a number of other airlines are alleged to have infringed competition law. Prior to the issuance of the Commission's cartel decision, British Airways sought to join 32 other airlines to this action, not all of which were ultimately addressees of the Commission decision.

How liability is apportioned between defendants is a matter for the court, which will make such award as it considers just and equitable in light of each person's actual responsibility. It remains to be seen whether the court will consider parties to a cartel to be liable in equal proportions, or whether damages will be apportioned – for example according to 'culpability' in relation to the operation of the cartel (eg, if one party was the ringleader), or according to the amount of sales each party made to the claimant.

36 Is the 'passing on' defence allowed?

See questions 15, 23 and 28. It is generally understood that the passing-on defence, if it can be proved in fact (and perhaps with the assistance of expert evidence), is available to defendants, though there has been no definitive judgment on this point to date.

The judgment of the ECJ in *Manfredi v Lloyd Adriatico* (Case C-295/04 [2006] ECR I-6619) holding that indirect claims should be permitted indicates that, logically, the passing-on defence should be permitted. In addition, the Commission's White Paper (COM (2008) 165 final) acknowledged that a presumption that an overcharge has been passed on (something the White Paper advocated) also logically suggests that the passing-on defence should be allowed.

Update and trends

Disclosure of documents is one of the attractions of litigating antitrust cases in England and Wales, and a number of cases are currently pending in the English courts concerning access to categories of documents sought by claimants, primarily in follow-on claims. The recent Order in *National Grid Electricity Transmission Plc v ABB Ltd and Others* [2011] EWHC 1717 (Ch) shows that corporate statements and other documents prepared for the purposes of a leniency application remain protected against disclosure, in line with the Commission's policy that such documents should not be available to claimants in order not to undermine its leniency programme. Contemporaneous documents from the Commission's file do, however, have to be disclosed. The High Court in *National Grid* also allowed the claimant to amend its application for disclosure in order to seek, among other things, the confidential version of the Commission's decision and documents (other than corporate statements) submitted to the Commission by the leniency applicant – such as its response to the Commission's requests for information and to the statement of objections. These issues will be addressed at a hearing in November 2011. On the issue of access to the corporate statements and leniency documents, the Court also wrote to the Commission pursuant to article 15 of Regulation 1/2003 to ask (among other things) whether, in the Commission's view, the ECJ's ruling in *Pfleiderer* applies, directly or by analogy, to disclosure of leniency materials in the context of a decision by the Commission.

Another issue that has again arisen recently is the scope of the CAT's jurisdiction to hear follow-on damages claims under section 47A

of the CA98. In March 2011, the CAT struck out a claim against the UK subsidiary of one of the addressees of the Commission's *Electrical and Mechanical Carbon and Graphite Products* cartel decision, on the basis that there was no decision finding an infringement by the UK subsidiary. The action was not a follow-on claim and the CAT therefore held that it did not have jurisdiction (*Emerson Electric Co and Others v Morgan Crucible Company Plc and Others* [2011] CAT 4). Then in May 2011, the CAT struck out a claim against Morgan Crucible brought by several European railway companies again following the Commission's *Electrical and Mechanical Carbon and Graphite Products* cartel decision. This was on the basis of limitation rather than jurisdiction: the CAT held that since Morgan Crucible had not appealed the 2003 decision, the two-year limitation period in respect of damages claims brought against it began to run from the deadline for filing an appeal to the European courts (in February 2004) and expired two years later (in February 2006). In a departure from its previous judgment in *Emerson I*, the CAT held that the limitation period must be determined in relation to each defendant individually, and so the action brought against Morgan Crucible in December 2010 was out of time (*Deutsche Bahn AG v Morgan Crucible Company plc* [2011] CAT 6). Both judgments show that the CAT takes seriously the limits to its remit for hearing follow-on damages claims; claimants choosing the CAT over the High Court as a forum for such claims will therefore need to ensure their claim meets the strict criteria of section 47A or risk being disappointed.

In the CAT, the passing-on defence was considered in an interlocutory decision regarding security for costs in the BCL cases (Case No. 1028/5/7/04), but the matter was not decided in the CAT's judgment. The *Enron Coal Services v English Welsh and Scottish Railways* case ([2003] EWHC 687) failed because the claimant had been unable, on the facts, to show that it suffered loss attributable to the defendant's conduct (ie, the claim failed on causation), not because of any passing-on defence that the defendant successfully made.

- 37** Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

In English law the *ex turpi causa* doctrine means that a person may not benefit from relief (eg, damages) where to do so would enable him to benefit from his own illegality. This would prevent a claimant from recovering damages in respect of his own illegal activity. In *Gibbs Mew v Gemmell* [1999] ECC 97 the court held that a party to an anti-competitive agreement under what is now article 101(1) TFEU is prevented from recovering damages in respect of loss suffered as a result of that agreement. That judgment predates the ECJ's judgment in *Crehan v Courage* (Case C-453/99, [2001] ECR I-6297) which held that a party to a contract that infringes

article 101 TFEU can rely on a breach of that provision to obtain relief before a national court despite the existence of a national rule denying a person the right to rely on his own 'illegality' to obtain damages, in circumstances where the parties are not in positions of equivalent bargaining power.

In relation to the *Safeway* litigation, in which Safeway issued proceedings against its former directors and employees alleging breach of contract and negligence, seeking to recover the full amount of the fine from its directors and employees, the defendants applied for the claim to be struck out on the basis of *ex turpi causa* on the basis that Safeway had to rely on its own illegality (ie, the infringing conduct) in order to bring the claim. Although the application was refused at first instance (*Safeway Stores Ltd & Others v Twigger & Others* [2010] EWHC 11), the Court of Appeal was unanimous in holding that Safeway's claim should be struck out (*Safeway Stores Ltd & Others v Twigger & Others* [2010] EWCA Civ 1472). The court concluded that the *ex turpi causa* maxim applied to preclude Safeway from seeking to recover from the defendants either the amount of the penalty imposed by the OFT or the costs incurred as a result of the OFT's investigation. An undertaking that infringes provisions of the Competition Act 1998 relating to anti-competitive activity and is fined by the OFT therefore cannot recover the amount of such penal-

CLIFFORD CHANCE

Elizabeth Morony
Anna Morfey

elizabeth.morony@cliffordchance.com
anna.morfey@cliffordchance.com

10 Upper Bank Street
London
E14 5JJ
United Kingdom

Tel: +44 20 7006 1000
Fax: +44 20 7006 5555
www.cliffordchance.com

ties from its directors or employees whose actions allegedly caused the infringement.

38 Is alternative dispute resolution available?

Alternative dispute resolution (ADR) is available in England and Wales. CPR 1.4 specifically refers to ADR, and requires the court to further the overriding objective by actively managing cases, with active case management including ‘encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.’

Competition law issues are arbitrable if the claim alleging an anti-trust infringement falls within the ambit of a contractual arbitration clause: in *ET plus SA v Welter* [2005] EWHC 2115 the High Court considered that there was no realistic doubt that antitrust claims were arbitrable; and the Court of Appeal in *Attheraces Limited v*

British Horseracing Board [2007] EWCA Civ 38 has also emphasised the positive benefits of arbitrating competition disputes.

The CAT appears to be less willing to embrace arbitration. In *Claymore Dairies v OFT* (2006 CAT 3) the Tribunal emphasised the public law nature of the CA98, ie, that proceedings before the Tribunal are there also to protect the public interest. Where parties in the CAT wish to withdraw their dispute and transfer to private arbitration, it is necessary to obtain the Tribunal’s consent to a stay of the proceedings – although proceedings can be withdrawn without the Tribunal’s permission, provided the defendant gives consent (see paragraph 14.5 of the CAT Guide to Proceedings).

The Commission’s White Paper does not mention arbitration, although the Commission has in the past endorsed commercial arbitration as a means of enforcing competition commitments, in particular in the merger control context.



Annual volumes published on:

Air Transport	Labour & Employment
Anti-Corruption Regulation	Licensing
Arbitration	Life Sciences
Banking Regulation	Merger Control
Cartel Regulation	Mergers & Acquisitions
Climate Regulation	Mining
Construction	Oil Regulation
Copyright	Patents
Corporate Governance	Pharmaceutical Antitrust
Corporate Immigration	Private Antitrust Litigation
Dispute Resolution	Private Equity
Dominance	Product Liability
e-Commerce	Product Recall
Electricity Regulation	Project Finance
Enforcement of Foreign Judgments	Public Procurement
Environment	Real Estate
Foreign Investment and National Security	Restructuring & Insolvency
Franchise	Right of Publicity
Gas Regulation	Securities Finance
Insurance & Reinsurance	Shipping
Intellectual Property & Antitrust	Tax on Inbound Investment
	Telecoms and Media
	Trademarks
	Vertical Agreements

**For more information or to
purchase books, please visit:**
www.gettingthedealthrough.com



The Official Research Partner of
the International Bar Association



Strategic research partners of
the ABA International section