# Private Antitrust Litigation

In 24 jurisdictions worldwide

*Consulting editor*
**Samantha Mobley**

2015

GETTING THE DEAL THROUGH

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CONTENTS

# Preface

## Private Antitrust Litigation 2015

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**Getting the Deal Through** is delighted to publish the 12th edition of Private Antitrust Litigation, which is available in print, as an e-book, via the GTDT iPad app, and online at www.gettingthedealthrough.com.

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the 24 jurisdictions featured. Our coverage this year includes Denmark, Scotland and Slovakia and new chapters on Antitrust in American Health Care and a Defendant Overview.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Samantha Mobley of Baker & McKenzie LLP, the contributing editor, for her continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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# England & Wales

**Elizabeth Morony and Ben Jasper**

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## Legislation and jurisdiction

**1 How would you summarise the development of private antitrust litigation in your jurisdiction?**

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 regularly 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 particular importance in circumstances where the majority of relevant documentation is likely to be unavailable to all parties to the litigation. Changes made to the disclosure rules for large cases in April 2013 require parties to complete a disclosure questionnaire describing the potentially relevant documents they may have, prior to disclosure being given. This will provide greater transparency about what documents exist, where they are located and the likely cost of retrieving them. 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.

***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 include 'damages-based agreements' (DBAs), which allow the payment of a percentage of recoveries to legal representatives, and '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. Changes to the basic rules for conditional fee arrangements in April 2013 mean that the 'uplift', or success fee, is no longer recoverable in costs from the losing party in most cases (including antitrust cases). Instead, the success fee must be paid from the damages awarded.

In June 2013, the UK government published a draft Consumer Rights Bill which seeks to, among other things, 'make it easier for consumers and businesses to gain access to redress where there has been an infringement of antitrust provisions'. Clause 80 of the Bill, which at the time of writing is progressing through the UK Parliament, will bring into force Schedule 8, which amends both the Competition Act 1998 (CA98) and the EA02 and which, according to the Explanatory Notes to the Bill, has three main aims: to widen the types of competition cases that the CAT hears and to make other changes to the procedure of bringing a private action before the CAT; to provide for opt-out collective actions and opt-out collective settlements; and to provide for voluntary redress schemes.

### New powers for the CAT

The Bill proposes to extend the jurisdiction of the CAT so that it can hear stand-alone claims.

The CAT will have the power to grant injunctions, and a fast-track procedure will be introduced for simpler competition claims in the CAT. The Explanatory Notes to the Bill state that the purpose of the fast track procedure is to enable simpler cases brought by SMEs to be resolved more quickly and at a lower cost.

The limitation periods for the CAT are to be harmonised with those of the High Court of England and Wales, the High Court of Northern Ireland and the Court of Session in Scotland, as appropriate. This means that a six year limitation period will apply to all private action cases in the CAT brought in England and Wales and Northern Ireland, whether stand-alone or follow-on, while in Scotland the limitation period will remain five years, in line with the Scottish Court of Session. While these limitation periods will not apply in relation to claims arising before the commencement of the Act, new provisions relating to opt-out collective actions (see further below) will apply to claims arising before its commencement.

### A new right of collective action

The Bill will introduce a limited opt-out collective actions regime, with safeguards, for competition law. The regime would apply to both follow-on and standalone cases, with cases to be heard only in the CAT.

The Bill contains several safeguards. The CAT will be required to certify whether a collective action brought under the new regime should proceed on an opt-in or opt-out basis.

The underlying claimants in such a case can be either consumers or businesses, or a combination of the two. Claims will be able to be brought either by claimants, or by representatives of claimants where the CAT considers that it is 'just and reasonable' for them to act as a representative. The Explanatory Notes to the Bill state that the amendments will 'enable any appropriate consumer representative body or trade association to bring claims on behalf of consumers or businesses.' There will also be safeguards including a process of judicial certification, the opt-out aspect of a claim only applying to UK-domiciled claimants (potential claimants who are not UK domiciled must opt-in), a prohibition on DBAs, a prohibition on exemplary damages, and the payment of any unclaimed sums to the Access to Justice Foundation.

There is also to be a new opt-out collective settlement regime for competition law in the CAT. Any opt-out settlement will have to be be judicially approved.

The CAT has published draft rules on collective actions which set out detailed procedural rules for collective proceedings and collective settlements in the CAT.

### 2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

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 Inntrepreneur 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 CA98.

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. However, the UK Consumer Rights Bill proposes to extend the jurisdiction of the CAT so that it can also hear stand-alone claims.

Provided jurisdiction is established, any natural or legal person who has suffered loss or damage as a result of an infringement of articles 101 or 102 TFEU or Chapters I or II of the CA98 has standing to bring a claim in the High Court or alternatively the CAT (section 47A CA98) subject to the limitations of bringing a claim in the CAT described further in question 3.

### 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 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. In relation to follow-on damages actions, section 58 (including section 58A) of the CA98 states that the court must accept the decision of the regulator (the Competition and Markets Authority (CMA)) 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). On 1 April 2014, the CMA replaced a number of bodies including the OFT and the Competition Commission and has assumed responsibility for investigating breaches of UK or EU prohibitions against anti-competitive agreements and abuses of dominant positions (Chapters I or II of the CA98 and articles 101 or 102 TFEU). Regulation 1/2003 also provides that national courts may not rule counter to a Commission decision (article 16 of Regulation 1/2003). Note, however, that in *Inntrepreneur 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.

#### 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 was upheld on appeal by the Court of Appeal (*Emerson Electric Co v Mersen UK Portslade Ltd* [2012] EWCA Civ 1559). The Court of Appeal stated that the Commission decision was binding on the CAT on matters of infringement, the UK subsidiary was not in the list of addressees of the decision, the decision contained no finding that a relevant prohibition of competition law had been infringed by the UK subsidiary, the CAT had no jurisdiction to contradict or amend the decision by making its own findings of fact on liability or by adding to the list of addressees a name that the Commission did not include in its list, the CAT had no jurisdiction to determine the section 47A claims against the UK subsidiary since they were not based on the decision, and the fact that the UK subsidiary was a wholly-owned subsidiary of the parent company which was an addressee undertaking did not mean that the UK subsidiary had infringed competition law.

In *2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19, a follow-on damages claim in which the claimant sought damages in relation to the defendant's abuse of its dominant position whereby it had launched a competing bus service with exclusionary and predatory intent (the OFT's (as it then was) *Cardiff Bus* decision), the CAT rejected a strike-out application by the defendant based on the claimant's reliance on certain facts including (among other things) intimidation tactics used by the competing services in relation to which the OFT had not made findings of fact. In so doing, the CAT held that the OFT's infringement decision related to (among other things) the operation of the competing bus service itself and that consequently in order to assess damages flowing from the infringement, the relevant counter-factual scenario was one where the competing service did not operate at all. As a result, if the intimidation claims in relation to the competing service were substantiated, the claimant was entitled to rely upon them in support of its damages claim.

*WH Newson Holding Ltd v IMI plc* [2013] EWCA Civ 1377 was an appeal relating to a follow-on claim based on the *Copper plumbing tubes cartel*. At first instance ([2012] EWHC 3680) the defendants applied to strike out two claims brought by the claimants, based on the tort of conspiracy to use unlawful means, on the basis that the conspiracy claims fell outside the scope of section 47A and could not be determined by the CAT (or in this case the High Court acting under the conditions imposed by section 47A following the transfer of proceedings from the CAT to the High Court by agreement). The first instance court held that section 47A was not limited to the particular cause of action of a claim for breach of statutory duty but that it would not 'generally permit claims to be brought in the CAT for conduct that is distinct from the infringement, even when the infringement is an element that has to be established to complete the cause of action'. While the court struck out one of the conspiracy claims on the basis that the allegation involved a factual inquiry into conduct outside the scope of the underlying decision, it refused to strike out the second conspiracy claim, holding that the relevant element of that claim could be established on the basis of the finding of infringement in the underlying decision alone (although the court did state, without reaching a conclusion, that the position might be different if the claim related to an effects based infringement of competition law, rather than an object based infringement).

On appeal in relation to the second conspiracy claim, the Court of Appeal held that while the High Court had been right to conclude that section 47A could apply to conspiracy claims (provided that the cause of action was based on findings of infringement in the underlying decision), in this particular case it had been wrong to conclude that the second conspiracy claim met this requirement. This was because the underlying decision found that 'IMI intended to distort competition' but did not find that 'IMI group had the requisite intent to injure'. In so doing, Arden LJ rejected the submission made by the respondents that a cause of action could be brought by a claimant 'if it relies on facts not within the Commission's infringement findings but consistent with it'.

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 although the UK governments document 'Private Actions in Competition Law: A consultation on options for reform – government response' (January 2013) contains proposals to permit such transfers either through the making of regulations or by other means.

### 4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction?

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). Currently, 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 limited 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. In *Deutsche Bahn AG and Others v Morgan Advanced Materials PLC (formerly Morgan Crucible Co PLC)* [2013] EWCA Civ 1484, the Court of Appeal, in dismissing applications for permission to appeal, held that under the first limb of article 5(3) there was no basis for an argument that a claimant must be the immediate victim of a harmful event. That would have involved an analysis of the connection between a claimant and the jurisdiction, rather than between the defendant and the jurisdiction. The Brussels Regulation was concerned with the latter. On the facts of the case, all of the alleged damage was damage which occurred in the UK. The court also held that in circumstances where the CAT had expressly directed a party who was contesting jurisdiction to take steps in proceedings, that party would not be 'entering an appearance' for the purpose of article 24 of the Brussels Regulation (see further below) and could continue to contest jurisdiction while at the same time contesting the merits of the case, provided that the intention to contest jurisdiction was shown clearly at the outset.

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 purchasers claiming they were overcharged by the cartel) and therefore tend to be brought as follow-on damages actions following a CMA 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 CMA/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 that 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 cartelists had implemented the cartel in the UK by selling products at cartel prices. These English subsidiaries would, as 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.

*Cooper Tire* confirmed 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 claim is 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.

*Toshiba Carrier UK and Others v KME Yorkshire Limited and Others* [2012] EWCA Civ 1190 was an appeal against unsuccessful strike-out and summary judgment applications by UK anchor defendants on the basis that they were not addressees of a Commission decision ([2011] EWHC 2665). The case related to a claim for damages arising out of the Commission's cartel decision in *Industrial tubes* which was addressed to non-UK entities. The defendants to the claim included KME Yorkshire Ltd, a subsidiary of one of the cartelists, which was not an addressee of the decision. At first instance, the court refused to grant the strike-out and summary judgment applications, holding that the claim raised against the UK defendants was both a follow-on claim and a stand-alone claim. The court also found that, in so far as it was necessary to prove knowledge on the part of the UK defendants as to the cartel agreement or arrangements, an initial failure to plead knowledge had been remedied in correspondence between the parties' solicitors.

The Court of Appeal upheld the first instance judgment. While noting that the claimants' pleaded case was 'far from a model of clear and comprehensive drafting' and that the claim form fired a 'blunderbuss of alternative allegations', the Court of Appeal found that the allegations made by the claimants were sufficient to ground a cause of action against KME Yorkshire Ltd for infringement of article 101, and a corresponding breach of statutory duty, to withstand an application to strike out the claim or for summary judgment in favour of the defendants. This was because acts of implementation of a cartel alone are capable of amounting to concerted practices where they are carried out pursuant to an anti-competitive agreement made between others and with knowledge of that agreement, and the claimants had sufficiently pleaded this stand-alone claim. Regarding the assertion made by the defendants that there was a lack of evidence to support the allegations made against KME Yorkshire Ltd, the Court of Appeal found that the High Court was perfectly entitled to exercise its discretion by refusing summarily to dismiss the claim despite the paucity of evidence to support the allegations, as it was in the nature of anti-competitive arrangements that they are shrouded in secrecy and so it is difficult until after disclosure of documents fairly to assess the strength or otherwise of an allegation that a defendant was a party to, or aware of, the proven anti-competitive conduct of members of the same group of companies. Because the claimants had been found to have made a stand-alone claim against KME Yorkshire Ltd alleging that it participated in and implemented the cartel arrangements with knowledge of the cartel agreement, it was unnecessary to decide whether the anti-competitive acts and intentions of a parent company were to be imputed to its subsidiaries in the context of article 101 TFEU. However, having considered the *Cooper Tire* and *Provimi* judgments, Etherton LJ expressed his own view that it was clear that, 'save in a case where the parent company exercises 'a decisive influence' (in the language of EU jurisprudence) over its subsidiary or the same is true of a non-parent member of the group over another member, there is no scope for imputation of knowledge, intent or unlawful conduct.'

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 *Synthetic 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 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. In *Ryanair Limited v Esso Italiana Srl* [2013] EWCA Civ 1450, Ryanair brought a claim for breach of contract and breach of statutory duty arising from a decision of the Italian competition authority which had found Esso Italiana and others guilty of operating a cartel in relation to the supply of jet fuel to various Italian airports. Ryanair argued that the English courts had jurisdiction in relation to the contractual claim as a result of a non-exclusive jurisdiction clause which provided that for the purposes of 'disputes under this Agreement, each party expressly submits itself to the non-exclusive jurisdiction of the Courts of England'. Ryanair also argued that the English courts had jurisdiction over the breach of statutory duty claim as the infringement of article 101 TFEU was an essential element of the breach of contract claim. The Court of Appeal held that the breach of contract claim had no prospect of success and accordingly the jurisdiction argument in relation to the breach of statutory duty claim was not pursued further. However, the court went on to state that it also saw nothing to justify a finding that the parties to the contract could reasonably be regarded as intending that a pure claim for breach of statutory duty against a cartel of Italian suppliers of fuel oil at Italian airports for breach of EU or Italian law should fall within the jurisdiction provisions of an English law contract.

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 (although note the Court of Appeal's findings in *Deutsche Bahn AG and Others v Morgan Advanced Materials PLC (formerly Morgan Crucible Co PLC)* [2013] EWCA Civ 1484 above).

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.

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 (as it then was) *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 CA98 relating to anti-competitive activity and is duly penalised by the CMA therefore cannot recover the amount of such penalties from its directors or employees whose actions allegedly caused the infringement.

## 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 32 below), in particular given that the unsuccessful party will, as a general rule, be required to pay the winning side's reasonable 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.

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. Changes to the basic rules for CFAs in April 2013 mean that the 'uplift', or success fee, is no longer recoverable in costs from the losing party in most cases (including antitrust cases). Instead, the success fee must be paid from the damages awarded.

DBAs have been introduced as an additional type of funding (as provided for by the Courts and Legal Services Act 1990 (as amended) and the Damages-Based Agreements Regulations 2013). Under these agreements, lawyers can agree to accept a share of the clients' winnings, capped at 50 per cent in commercial cases.

Third-party funding by a professional funder is also an option. 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. Following the changes in April 2013, the after-the-event insurance premium cannot be recovered from the losing party.

### 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 pretrial discovery procedures are available?

#### High Court

Disclosure in the High Court is governed by CPR 31, which until April 2013 provided for three broad categories of disclosure: 'standard' disclosure, 'specific' disclosure, and 'pre-action' disclosure. The new rules now require parties in larger cases to complete a disclosure questionnaire before the disclosure exercise is started, so that the other parties, and the court, are aware of what documents are thought to exist, and where they are located. The parties can then agree, or the court can order, disclosure which is more relevant to the specific case, if necessary. 'Standard' disclosure is still available as one of the options that the parties or the court can choose.

Standard disclosure generally takes place after pleadings have closed, namely, 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. One example of the use of a confidentiality ring is *Nokia Corporation v AU Optronics Corporation & Others* [2012] EWHC 731 a damages claim brought by Nokia against certain companies involved in the manufacture or supply of liquid crystal displays. During the course of the English litigation, Nokia's English legal team obtained material disclosed in US proceedings pursuant to a confidentiality ring. Nokia obtained an order in the English litigation for use of the US disclosure material in a manner reflecting the US confidentiality arrangements. This led to certain parts of Nokia's particulars of claim (which had been amended in light of the material disclosed in the US proceedings) not being able to be shared with the in-house counsel of some of the defendants. The court held that Nokia bore the burden of seeking to adjust the earlier order to allow the in-house counsel of those defendants to view the material.

Specific disclosure can be sought requiring a party to disclose specific documents or categories of documents (CPR 31.12). 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 CMA 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).

The ECJ case C-360/09 *Pfleiderer v Bundeskartellamt* and the judgment of the High Court in *National Grid Electricity Transmission PLC v ABB Ltd and Others* [2012] EWHC 869 have gone some way to clarifying the position in relation to the disclosure of documents submitted to national competition authorities and the European Commission under their respective leniency regimes.

The *Pfleiderer* judgment arose out of a decision of the German national competition authority (the Bundeskartellamt or Federal Cartel Office (FCO)) which found an infringement of article 101 TFEU by a cartel of European manufacturers of decor paper. Following the decision, Pfleiderer, a purchaser of decor paper, applied to the FCO seeking access to the material on its file on the cartel, including documents relating to leniency applications, with a view to bringing follow-on damages actions. The FCO rejected Pfleiderer's request in part and Pfleiderer then brought an action before the Local Bonn Court challenging the FCO's decision, seeking access to the complete file. The Local Court made a reference to the ECJ.

In its judgment, the ECJ stated that in considering an application for access to documents relating to a leniency programme submitted by a person who is seeking to obtain damages from another person who has taken advantage of such a leniency programme, it is necessary to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency. That weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case. As such, the ECJ held that EU law does not preclude a damages claimant from being granted access to documents relating to a leniency procedure but that it is for the courts and tribunals of the member states, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.

The *Pfleiderer* judgment was considered in the English High Court in *National Grid Electricity Transmission PLC v ABB Ltd and Others* [2012] EWHC 869. In the course of the litigation, National Grid applied for disclosure of certain documents which may have contained information supplied in the context of leniency applications. These documents broadly fell within three categories: (i) the confidential version of the Commission's decision; (ii) ABB (the immunity applicant)'s reply to the Commission's statement of objections; and (iii) replies to requests for information made by the Commission. National Grid did not apply for disclosure of the corporate statements themselves.

The judge (Roth J) invited, and received, an amicus curiae observation from the Commission in relation to disclosure of certain leniency documents submitted to it as part of its leniency regime. The observations stated, among other things, that 'the Commission's long-established practice is that the corporate statements specifically prepared for submission under the leniency programme are given protection both during and after its investigation.' Having considered these observations, Roth J held that *Pfleiderer*, which was a decision in relation to the leniency programme of the national competition authority in Germany, equally applied to the Commission's leniency programme and, accordingly, to the disclosure application in issue. He also held that it was not exclusively the Commission's jurisdiction to determine the disclosure of leniency materials submitted to it and that a national court could conduct the *Pfleiderer* balancing exercise, weighing the interest in disclosure as against the need to protect an effective leniency programme.

Roth J held that a number of factors were relevant in the balancing exercise. The first of these was whether such disclosure would increase the leniency applicants' exposure to liability or would put these parties at a relative disadvantage as against the parties that did not cooperate. Roth J stated that he did not think this was a realistic prospect in the circumstances of the case. Second, he considered relevant the potential effect of a disclosure order in this case in deterring potential leniency applicants as regards other cartels that are yet to be uncovered. Third, Roth J considered whether the disclosure sought was proportionate, an argument which he considered in light of whether the information was available from other sources and the relevance of the leniency materials being sought. As regards the first of these, Roth J held in the circumstances of the case, there were no other means available (at least not without excessive difficulty) for National Grid to derive the information. The question of relevance needed to be determined on a document by document basis, an exercise which Roth J subsequently undertook. Ultimately, Roth J ordered only very limited disclosure of the documents requested.

The proposed EU Directive on antitrust damages actions proposes that leniency statements and settlement submissions must be protected from disclosure in damages claims at any time (before or after the file is closed) (article 6(6)). National courts are permitted to order disclosure of other information prepared for the purpose of proceedings of a competition authority and information prepared by the authority in the course of its proceedings, but only after the competition authority has closed its proceedings (article 6(5)). This will include settlement submissions which have been voluntarily withdrawn by a party.

In a related development in the National Grid claim, following an application for specific disclosure by National Grid, Roth J ordered disclosure of certain documents held by the French-domiciled defendants, despite their argument that providing such disclosure would put them at risk of criminal prosecution in France by virtue of the 'French blocking statute' ([2013] EWHC 822). Roth J proceeded on the basis that the production of the documents would infringe the French blocking statute but held that the existence of the blocking statute was not a sufficient reason for not ordering disclosure in this case as the likelihood of any prosecution being brought was very low. This decision, together with a decision arising out of the *Servier* litigation, was upheld on appeal (*Secretary of State for Health and Others v Servier Laboratories Limited and Others; National Grid Electricity Transmission plc v ABB Limited and Others* [2013] EWCA Civ 1234).

**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 Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) (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' (paragraph 18). 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.

The rules on expert evidence are set out in CPR 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 to proceedings (October 2005) (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 confirmed by the ECJ in case C-550/07 *P Akzo Nobel Chemicals Ltd and Akcros 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 CMA investigation, such that any documents produced would be covered by litigation privilege.

In *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 6, the CAT refused an application by the OFT (as it then was) for disclosure of information about Tesco's contacts with potential witnesses and records of discussions with those individuals. In so doing, the CAT stated that the question with regard to litigation privilege was whether the OFT's investigation could properly be classified as adversarial, as opposed to merely investigative or inquisitorial, at the time that Tesco contacted potential witnesses prior to the OFT's *Dairy retail price initiatives* decision. The CAT held that the proceedings were confrontational by the time that Tesco began collecting the material as the OFT had already issued a statement of objections and a supplementary statement of objections and Tesco stood accused of wrongdoing. Accordingly, the administrative procedure was sufficiently adversarial by the time third-party witnesses were contacted that the material Tesco gathered was subject to 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 CMA, 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. 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 threatens 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)). Indeed, in *National Grid Electricity Transmission PLC v ABB Ltd and Others*, the Commission submitted an amicus curiae observation in which it stated that:

> *The willingness of companies to provide comprehensive and candid information is crucial to the success of the leniency programme, which is the most effective tool at the Commission's disposal for the detection of secret cartels. To this end, the Commission's policy has been that undertakings which voluntarily cooperate with DG Competition in revealing cartels should not be put in a significantly worse position in respect of civil claims than other cartel members which refuse any cooperation. In practical terms, this means the Commission's long established practice is that the corporate statements specifically prepared for submission under the leniency programme are given protection both during and after its investigation.*

Furthermore, the European Competition Network (representing EU national competition authorities and the Commission) passed a resolution on the 'Protection of leniency material in the context of civil damages actions' (23 May 2012) in which it stated that the protection of leniency applications was 'fundamental for the effectiveness of anti-cartel enforcement'.

The proposed EU Directive on antitrust damages actions makes it clear that leniency statements and settlement submissions must be protected from disclosure in damages claims at any time (before or after the file is closed) (article 6).

**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 (as it then was) into British Airways and Virgin Atlantic regarding the 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. The OFT subsequently resumed its civil investigation, imposing a fine on British Airways.

**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? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?**

The claimant in a private action is required to prove all the elements of his claim, subject to the fact that a relevant CMA 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 CMA 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. The CMA and the SFO have entered into a memorandum of understanding which outlines the basis on which the CMA and SFO will cooperate when investigating or prosecuting individuals under the criminal cartel offence in circumstances where serious or complex fraud is suspected.

There are no provisions protecting leniency applicants from follow-on damages claims brought in England and Wales.

The CMA and the Commission do not routinely disclose documents obtained in their investigations to private claimants.

**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 3.1(2)(f) allows the court to stay proceedings as part of its general case management powers.

In *WM Morrison Supermarkets plc and Others v MasterCard Incorporated and Others* [2013] EWHC 1071, the claimants claimed damages against MasterCard in respect of alleged losses suffered as a result of intra-EEA and UK arrangements for the setting of multi-lateral interchange fees on MasterCard transactions. The European Commission had adopted an infringement decision in relation to MasterCard's intra-EEA arrangements which was being appealed to the ECJ. No infringement decision had been made in relation to the UK arrangements (an earlier OFT decision had been overturned on appeal). The claim therefore comprised both a follow-on claim (in relation to the intra-EEA arrangements) and a standalone claim (in relation to the UK arrangements).

Certain of the MasterCard defendants made an application for an immediate stay of proceedings until the ECJ appeal had been determined. The court dismissed the application, finding that although a stay would be necessary at some time before trial, the defendants ought to be required to file their defences and then a case management conference held regarding the future progress of the case. This was on the basis that: (i) in the overall scheme of the litigation, the expense to which the defendants would be put in terms of time and money in pleading defences and preparing for a case management conference was relatively modest; (ii) the anti-competitive behaviour complained of began in 1992 and there was a 'pressing need' to proceed with the litigation; (iii) even if the appeal to the ECJ resulted in the annulment of the decision, there was an appreciable chance that the UK claim would continue and so the risk that the defendants might incur wasted costs and expend wasted time for which they were not fully compensated was not compellingly high; (iv) if there was an immediate stay and the appeal to the ECJ was dismissed, the claimants would suffer the prejudice of a considerable delay in having their claims determined for which they might not be fully compensated for by an award of interest. The court refused the application for an immediate stay and ordered that the action should continue to a case management conference (CMC). This was in line with the approach taken by the High Court in *National Grid v ABB and Others* [2009] EWHC 1326. A further application for a stay of proceedings in the MasterCard litigation was rejected by the Court which conducted a similar analysis (*WM Morrison Supermarkets plc and Others v MasterCard Incorporated and Others* [2013] EWHC 3082).

In *Secretary of State for Health v Servier Laboratories Ltd* [2012] EWHC 2761, the defendants applied for a stay of proceedings on the basis that there was a substantial overlap between the claim and an ongoing investigation by the European Commission: both the claims and the Commission's investigation concerned alleged infringements of articles 101 and 102 TFEU in relation to the same product, Perindopril, and the same conduct in relation to that product, namely the enforcement of Perindopril patents and the conclusion of patent settlement agreements with generic companies. The court partially granted the stay until the conclusion of Servier's oral hearing in the Commission investigation. However, it held that it would not be appropriate to order the stay to continue for more than a short period after the end of the oral hearing, after which disclosure could commence (although the court recognised that a trial could only take place after all European proceedings had been exhausted). In a further hearing (unreported), Servier successfully applied to amend the case management directions to postpone the commencement of its disclosure obligations until the conclusion of an appeal in relation to the impact of the French blocking statute (to which see further question 9) on its disclosure obligations in the case.

In *Infederation Ltd v Google Inc and Others* [2013] EWHC 2295, Google sought a stay to proceedings brought by Infederation that alleged that Google had abused its dominant position, on the basis that Google had also offered commitments in response to European Commission preliminary findings that certain of Google's business practices might be considered abusive and it would be disproportionate to embark on standard disclosure in this case as the Commission was expected to clarify its position 'in the very near future'.

In refusing both applications, and ordering limited, targeted, disclosure, Roth J summarised the principles which would govern a court's approach to considering how far it was appropriate to allow an action to progress when there were EU proceedings concerning the same issues ongoing. These principles were: (i) there was no objection as a matter of EU law for the national proceedings to continue to a point short of an actual decision or judgment; (ii) it was in the discretion of the court to determine what steps short of trial should be taken; (iii) that discretion was to be exercised having regard to the overriding objective and the requirement to avoid a decision that was counter to that of the Commission or the EU courts; (iv) it would normally be appropriate to require the defendants to plead a defence; (v) whether further steps should be taken depended on all the circumstances, including, among other things, whether the proceedings were a follow-on action subsequent to a Commission decision or an action brought in parallel to a Commission investigation.

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). 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? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

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 CMA 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'.

The proposed EU Directive on antitrust damages actions proposes that in the case of a cartel infringement, it should be presumed that the infringement caused harm and that the infringing undertaking should have the right to rebut this presumption (article 17(2)).

In relation to passing-on defences, see question 35.

### 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; 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.

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 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 that 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(2)(l)), 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. In *Sainsburys Supermarkets Ltd v Mastercard Inc and Others* [2013] EWHC 4554 (Ch), the court rejected an application for an argument based on ex turpi causa (see question 36) to be tried as a preliminary issue. The court held that such an application involved a balancing of competing factors and in this case it was not clear that, if the preliminary issue was decided in MasterCard's favour, the entire claim would be disposed of. The court stated that irrespective of the outcome of the preliminary issue, there was the real possibility that there might still have to be a trial on the question of infringement and, even if success on the preliminary issue did avoid a substantive trial of the main action, it was entirely possible that that result could be achieved without the extra expense and effort of trying the preliminary issue because of MasterCard's appeal against the relevant Commission infringement decision. Finally, the court regarded the time, expense and evidence required in order to hear the preliminary issue as being potentially substantial.

#### CAT

The duration of proceedings in the CAT will again depend on the circumstances and complexity of the case. To date, only three follow-on actions have reached judgment in the CAT, namely *Enron Coal Services Limited v English Welsh & Scottish Railway Limited* (Case 1106/5/7/08), *2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited* (Case 1178/5/7/11) and *Albion Water Limited v Dŵr Cymru Cyfyngedig*

(Case 1166/5/7/10). In Enron, the claim form was filed in November 2008 and judgment was handed down in December 2009 ([2009] CAT 36). In *2 Travel*, the claim form was filed in January 2011 and judgment was handed down in July 2012 ([2012] CAT 19), while in *Albion*, the claim form was filed in June 2010 and judgment was handed down in March 2013 ([2013] CAT 6).

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.

The UK Consumer Rights Bill proposes the introduction of a fast-track procedure for simpler competition claims in the CAT. The Explanatory Notes to the Bill provide that the purpose of the fast track procedure is to enable simpler cases brought by SMEs to be resolved more quickly and at a lower cost.

**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 CMA 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 (section 32 Limitation Act 1980). 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 CMA 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. In *BCL Old Co Limited and Others v BASF plc and Others* [2012] UKSC 45, the Supreme Court dismissed an appeal by BCL that the consequences of these findings breached the principles of effectiveness and legal certainty.

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. Accordingly, 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 was reversed on appeal by the Court of Appeal ([2012] EWCA Civ 1055) however, in a unanimous judgment, and following an intervention by the European Commission, the Supreme Court set aside the Court of Appeal's judgment, restoring the CAT's judgment and striking out the claims against Morgan Crucible (*Deutsche Bahn AG and others v Morgan Advanced Materials plc* [2014] UKSC 24).

In its amicus curiae observations the Commission stated, among other things, that it considered the Court of Appeal's analysis of the concept of a decision could have jeopardised the coherent application of EU competition law in member states in relation to the exercise of the right to seek damages for losses consequent on breaches of EU competition law and that, in view of the nature and scheme of the CA98, 'decision' should be construed consistent with the concept of a decision in EU law.

The Supreme Court stated that, to understand the nature of a Commission decision, regard must be had to EU law. Accordingly, it held that a Commission decision establishing an infringement of article 101 TFEU constitutes a series of individual decisions addressed to its individual addressees. The only relevant decision establishing infringement of article 101 in relation to an addressee who did not appeal was the original Commission decision. Any appeal against the finding of infringement by any other addressee was irrelevant to the non-appealing addressee.

Accordingly, the limitation period began to run for Morgan from the deadline for filing an appeal to the European courts and expired two years later, and the damages claim brought by Deutsche Bahn AG and others was brought out of time.

The UK Consumer Rights Bill proposes that the limitation periods for the CAT are harmonised with those of the High Court of England and Wales, the High Court of Northern Ireland and the Court of Session in Scotland, as appropriate. This means that a six-year limitation period will apply to all private action cases in the CAT brought in England and Wales and Northern Ireland, whether stand-alone or follow-on, while in Scotland the limitation period will remain five years, in line with the Scottish Court of Session. Whilst these limitation periods will not apply in relation to claims arising before the commencement of the Act, new provisions relating to opt-out collective actions will apply to claims arising before its commencement.

The proposed EU Directive on antitrust damages actions provides that the limitation period for bringing an antitrust damages claim must be at least five years (article 10(3)). It will not begin to run before an injured party knows, or can reasonably be expected to know: (i) the behaviour constituting the infringement; (ii) the qualification of such behaviour as an infringement of EU or national competition law; (iii) the fact that the infringement caused harm to the party; and (iv) the identity of the infringer who caused such harm (article 10(2)). The limitation period is suspended if a competition authority takes action in respect of the infringement. The suspension shall end at the earliest one year after the final infringement decision (article 10(4)). The limitation period should not begin to run before the day on which a continuous or repeated infringement ceases.

**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 multiparty 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 Supplies 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 (as it then was) 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. Few consumers signed up to the action, and the case settled. No other representative actions have been brought in the CAT to date.

The European Commission's draft Recommendation on collective redress mechanisms for violations of EU rights recommends that all member states have collective redress mechanisms for both injunctive relief and compensation caused by violations of EU rights. For collective claims for compensation, the claimant group must be formed on the basis of the express consent of those harmed (ie, on the opt-in principle). Any exception to this should be 'duly justified by reasons of sound administration of justice'. Members of the claimant party should be able to leave, or new members join, the party before final judgment or settlement of the claim.

The UK Consumer Rights Bill proposes the introduction of a limited opt-out collective actions regime, with safeguards, for competition law. The regime would apply to both follow-on and standalone cases, with cases to be heard only in the CAT. These provisions will apply to claims arising before commencement of the Act.

## 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 Supplies 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 CA98 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 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. The UK Consumer Rights Bill proposes the introduction of a limited opt-out collective actions regime, with safeguards, for competition law, while the European Commission's draft Recommendation on collective redress mechanisms for violations of EU rights recommends that all member states have collective redress mechanisms for both injunctive relief and compensation caused by violations of EU rights and that the claimant group must be formed on the basis of the express consent of those harmed, namely, on the opt-in principle. Any exception to this should be 'duly justified by reasons of sound administration of justice'.

## 24 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).

The UK Consumer Rights Bill proposes the introduction of a new opt-out collective settlement regime for competition law in the CAT. Any opt-out settlement will have to be judicially approved.

## 25 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.

**26 Has a plaintiffs' collective-proceeding bar developed?**

There are an increasing number of claimant firms in England and Wales, which is seen as one of the most active jurisdictions in Europe for EU wide antitrust damages claims.

## Remedies

**27 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) 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. Only two follow-on claims in the CAT have resulted in a final award of damages (*2 Travel Group and Albion Water*, discussed further below), although a number of cases in the English courts have addressed the issue. This is not surprising in circumstances where the vast majority of commercial disputes settle before judgment.

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 Tribunal concluded that there was no loss at all because on the counterfactual the claimant would have been no better off.

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 shortcut to the detailed damages assessment necessary in the event damages are awarded. The Commission has also published a Communication and a Practical Guide on quantifying harm in antitrust damages claims (both of which are non-binding). The Practical Guide explains various methods available to quantify antitrust harm and, according to the Commission, is intended to assist national courts and parties involved in actions for damages by making information on quantifying harm caused by infringements of the EU competition rules more widely available.

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 29.

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.

In *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394 the High Court held on a preliminary issue that the claimants were not entitled to exemplary or restitutionary damages, or to an account of profits, in circumstances where fines had been imposed by the regulator for competition law infringements (or reduced or waived in the case of leniency and immunity applicants). On appeal, the Court of Appeal confirmed that the claimants were not entitled to restitutionary damages, or to an account of profits ([2008] EWCA Civ 1086).

However, in *2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19, the CAT held that 2 Travel was entitled to both compensatory and exemplary damages. The CAT approached the compensatory damages assessment on the basis of what the market conditions would have been without the infringement. The CAT awarded damages to 2 Travel for loss of profits from the date the infringement commenced up to the date of 2 Travel's liquidation (the infringement ended shortly thereafter), finding that, 'but for' the infringement, 2 Travel would have made a further profit from its operations. However, the CAT declined to award damages in relation to loss of a capital asset, loss of a commercial opportunity and the costs of 2 Travel's liquidation as these would have been incurred in any event absent the infringement due to pre-existing and ongoing financial and management difficulties. Further, the CAT declined to award damages in relation to wasted management time in dealing with the abuse, as on the facts there was no abnormal waste of time.

In relation to exemplary damages, 2 Travel sought exemplary damages on two counts: (i) 'Oppressive, arbitrary or unconstitutional conduct by servants of the government'; and (ii) 'Conduct calculated to make a profit that may well exceed the compensation payable to the Claimant'. While the CAT rejected a claim under the first ground on the basis that Cardiff City Transport Services did not exercise government functions, it did award damages under the second ground, finding that Cardiff City Transport Services had acted in knowing disregard of an appreciated and unacceptable risk that the chapter II prohibition of the CA98 was either probably or clearly being breached or it had deliberately closed its mind to that risk. The CAT distinguished this case from *Devenish* on the grounds that while there had been a previous OFT (as it then was) decision, like in *Devenish*, Cardiff City Transport Services had been granted immunity from fines by the OFT on the basis of it being conduct of minor significance, rather than pursuant to a leniency regime. As such, the CAT held that there was no policy reason why exemplary damages should not be imposed. Given this distinguishing feature, it appears that exemplary damages will still be unavailable in most follow-on damages cases where a fine has been imposed by the regulator (one which may of course have been reduced or waived in the case of leniency and immunity applicants). The CAT's approach to awarding exemplary damages was to take into account the following factors: that the exemplary damages should bear some relation to the compensatory damages awarded; the economic size of Cardiff City Transport Services; and the fact that Cardiff City Transport Services would no doubt take very full account of the CAT's judgment even if the exemplary damages were quite low given its association with a local authority.

In *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013] CAT 6, Albion brought an action for damages against Dŵr Cymru for losses resulting from Dŵr Cymru's abuse of its dominant position. The CAT had previously determined that the access price at which Dŵr Cymru was offering a common carriage service to carry water through its pipes from a pumping station to the premises of Albion's customer, Shotton Paper, was an abuse of its dominant position. Albion claimed compensatory damages on the basis that if Dŵr Cymru had not abused its dominant position, Albion would have accepted the offer of a reasonable price for common carriage and would have supplied water to Shotton Paper more profitably than it had done and Albion would have won a contract with another company, Corus. It also claimed exemplary damages (a claim permitted as Dŵr Cymru had not been subject to a fine for its infringement of the chapter II prohibition ([2010] CAT 30)).

The CAT granted compensatory damages. In relation to the first compensatory claim, the CAT considered the counterfactual scenario, what would have happened absent the abuse of a dominant position. Dŵr Cymru argued that the counterfactual scenario should assume that the dominant undertaking would have charged as high a price as was lawfully possible. The CAT rejected that submission as 'wrong in principle' and 'entirely impracticable'. The correct approach was to assume that Dŵr Cymru would have offered a reasonable access price. There was a range of lawful access prices that Dŵr Cymru could have offered and the figure in the middle of that range should be taken. Regarding the second compensatory claim for loss of a chance, the CAT also awarded damages as it found that it was highly likely that Corus would have awarded Albion a supply contract. The damages for loss of a chance were however reduced by a third as the CAT could not hold that it was a certainty or near certainty that Corus would have awarded Albion the contract.

In relation to the claim for exemplary damages, the CAT stated that evidence was required that Dŵr Cymru knew that the way the price was calculated was unlawfully excessive or that it did not care whether it was excessive or not. Despite criticising Dŵr Cymru, stating that there was 'a conspicuous and reprehensible failure of corporate governance', the claim for exemplary damages was dismissed on the basis that the evidence did not establish that Dŵr Cymru's failures followed a deliberate decision to close its eyes to the likely result of such an exercise. Nor could it be concluded that the failures evidenced a decision taken in cynical disregard of Albion's rights, or that Dŵr Cymru was reckless as to the risk that the common carriage price might be unlawful. There was insufficient evidence to show that the access price was either clearly or probably unlawful and there was no evidence that Dŵr Cymru had weighed the risks of going ahead with the access price against the likely downside in terms of future compensation payments to Albion.

### 28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

**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 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 to 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 the 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 (as it then was) 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.

### 29 Are punitive or exemplary damages available?

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. Note, however, the CAT's award of exemplary damages in *2 Travel* ([2012] CAT 19) where the defendant had been granted immunity by the OFT (as it then was) on the basis of conduct of minor significance (see question 27). In *Albion Water* [2013] CAT 6 the CAT refused to grant exemplary damages. Although Dŵr Cymru had not been subject to a fine for its infringement of the Chapter II prohibition, the CAT held that it could not conclude on the evidence that Dŵr Cymru had intended to issue an unlawfully excessive price or that it was reckless to that fact. See question 27.

### 30 Is there provision for interest on damages awards and from when does it accrue?

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 CAT Rules and paragraph 18 of the CAT Guide).

**31 Are the fines imposed by competition authorities taken into account when setting 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). Note, however, the CAT's award of exemplary damages in *2 Travel* ([2012] CAT 19) where the defendant had been granted immunity by the OFT (as it then was) on the basis of conduct of minor significance.

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.

**32 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 general rule is that costs follow the event, namely, that the unsuccessful party pays the costs of the successful party (CPR 44.2). 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 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 17 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. In contrast to the provisions in relation to the High Court, in the CAT there is no general rule that costs follow the event.

**33 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 proposed EU Directive on antitrust damages actions provides that member states are required to ensure that undertakings that infringed competition law through joint behaviour are jointly and severally liable for the damage caused by the infringement (article 11(1)). An undertaking which has been granted immunity will only have to pay damages to injured parties other than its direct or indirect purchasers when compensation cannot be obtained from other undertakings that were parties to the infringement. An undertaking may recover a contribution from other undertakings which were parties to the infringement, to be determined by their relative responsibility for the harm caused. However, an undertaking which has been granted immunity will not have to contribute an amount more than the amount of the harm it caused to its own direct or indirect purchasers (article 11(3) to (5)) Small or medium-sized enterprises are liable only to their direct or indirect purchasers if (i) their share in the relevant market was below 5 per cent at any time during the infringement, and (ii) the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause it's assets to lose all their value. This exception does not apply if the small or medium-sized enterprise:

- led the infringement;
- coerced others to participate; or
- has been found to previously infringe competition law (article 11(2)).

**34 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 pl*c [2009] EWHC 741), British Airways was 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 were alleged to have infringed competition law. British Airways sought to join 32 other airlines to this action, not all of which were ultimately addressees of the Commission decision (British Airways later discontinued its attempts to join the airlines that were not 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.

In *WH Newson Holding Ltd v IMI plc* [2013] EWHC 3788 (Ch), a case related to *WH Newson v IMI* (see question 3), the court was required to consider a case management decision regarding disclosure in a contribution claim. The defendants were addressees of the Commission decision in the *Copper plumbing tubes* cartel and had made a contribution claim against Mueller, another addressee of the decision. The claim against Mueller was that two third parties (together, AGA), who were not addressees of the Commission decision, had participated in the cartel through a subsidiary which was subsequently sold to Mueller. At the case management conference the defendants had been ordered to give disclosure to AGA. Mueller objected to this on the grounds that AGA had no liability under section 47A to the claimants and could not therefore be liable for a contribution in respect of the defendants' liability. The High Court found that while proceedings under section 47A in the CAT could only be brought against addressees, this limited jurisdiction of the CAT did not apply to proceedings in the High Court. Rose J held that section 47A does not create 'any new cause of action' instead it provides that the cause of action 'arising from the infringement at the suit of a person who has suffered loss may be brought in the CAT if the conditions set out in section 47A are met'.

**35 Is the 'passing on' defence allowed?**

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 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 proposed EU Directive on antitrust damages actions confirms that a defendant can invoke as a defence the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement. The burden of proof in this respect rests with the defendant who may reasonably require disclosure from the claimant and from third parties (article 13). In relation to claims by indirect purchasers, the proposed Directive requires member states to ensure that, where the existence of a claim for damages or the amount of compensation to be awarded depends on the question whether or to what degree an overcharge was passed on to the claimant, the claimant will have to prove the existence and scope of the pass-on (article 14).

## Update and trends

A number of high-profile damages cases have settled over the last year, including *National Grid Electricity Transmission PLC v ABB Ltd and Others*; *Cooper Tire & Rubber Company Europe Ltd and Others v Shell Chemicals UK Ltd and Others*; and *Dunlop Oil Marine Limited and Others v Dow Chemical Company Limited*.

In June 2013, the UK government published a draft Consumer Rights Bill which seeks to, among other things, 'make it easier for consumers and businesses to gain access to redress where there has been an infringement of antitrust provisions'. Clause 80 of the Bill, which at the time of writing is progressing through the UK Parliament, will bring into force Schedule 8, which amends both the Competition Act 1998 (CA98) and the EA02 and which, according to the Explanatory Notes to the Bill, has three main aims: to widen the types of competition cases that the CAT hears and to make other changes to the procedure of bringing a private action before the CAT; to provide for opt-out collective actions and opt-out collective settlements; and to provide for voluntary redress schemes.

### New powers for the CAT

The Bill proposes to extend the jurisdiction of the CAT so that it can hear stand-alone claims.

The CAT will have the power to grant injunctions, and a fast-track procedure will be introduced for simpler competition claims in the CAT. The Explanatory Notes to the Bill state that the purpose of the fast track procedure is to enable simpler cases brought by SMEs to be resolved more quickly and at a lower cost.

The limitation periods for the CAT are to be harmonised with those of the High Court of England and Wales, the High Court of Northern Ireland and the Court of Session in Scotland, as appropriate. This means that a six year limitation period will apply to all private action cases in the CAT brought in England and Wales and Northern Ireland, whether stand-alone or follow-on, while in Scotland the limitation period will remain five years, in line with the Scottish Court of Session. While these limitation periods will not apply in relation to claims arising before the commencement of the Act, new provisions relating to opt-out collective actions (see further below) will apply to claims arising before its commencement.

### A new right of collective action

The Bill will introduce a limited opt-out collective actions regime, with safeguards, for competition law. The regime would apply to both follow-on and standalone cases, with cases to be heard only in the CAT. The Bill contains several safeguards. The CAT will be required to certify whether a collective action brought under the new regime should proceed on an opt-in or opt-out basis. The underlying claimants in such a case can be either consumers or businesses, or a combination of the two. Claims will be able to be brought either by claimants, or by representatives of claimants where the CAT considers that it is 'just and reasonable' for them to act as a representative. The Explanatory Notes to the Bill state that the amendments will 'enable any appropriate consumer representative body or trade association to bring claims on behalf of consumers or businesses.' There will also be safeguards including a process of judicial certification, the opt-out aspect of a claim only applying to UK-domiciled claimants (potential claimants who are not UK domiciled must opt-in), a prohibition on DBAs, a prohibition on exemplary damages, and the payment of any unclaimed sums to the Access to Justice Foundation. There is also to be a new opt-out collective settlement regime for competition law in the CAT. Any opt-out settlement will have to be be judicially approved.

The CAT has published draft rules on collective actions which set out detailed procedural rules for collective proceedings and collective settlements in the CAT.

### 36 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 *Courage v Crehan* (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 (as it then was) or the costs incurred as a result of the OFT's investigation. An undertaking that infringes provisions of the CA98 relating to anti-competitive activity and is fined by the CMA therefore cannot recover the amount of such penalties from its directors or employees whose actions allegedly caused the infringement.

### 37 Is alternative dispute resolution available?

ADR is available in England and Wales. CPR 1.4(2)(e) 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 antitrust infringement falls within the ambit of a contractual arbitration clause.

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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).

The proposed EU Directive on Antitrust Damages Actions seeks to encourage consensual dispute resolution.

The UK government's proposals 'Private Actions in Competition Law: A consultation on options for reform – government response' (January 2013) also strongly encourages ADR in competition cases, but has stopped short of making it mandatory.

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