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# Antitrust Litigation

## Introduction

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# 2019

# INTRODUCTION

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**Clifford Chance LLP** has an antitrust litigation team that has handled many of the most significant antitrust damages claims over the last 20 years, including leading judgments on issues relating to disclosure, limitation and quantum, as well as group actions. The team is led by four partners, Elizabeth Morony, Luke Tolaini, Matthew Scully and Samantha Ward. The firm's antitrust litigators are commercial litigation experts, all of whom have relevant expertise in other areas, including public law, criminal law, and regulatory disputes. Clifford Chance has acted on

all the major EC and UK financial services competition investigations in the last decade, including representing the immunity applicant in the EC EURIBOR investigation, and has acted in all the FCA's competition investigations to date. Clifford Chance also acts in abuse of dominance litigation and investigations; matters include advising a technology company under investigation by the European Commission, a data analytics company in the context of a claim for refusal to supply against a large publisher, and a fintech startup in the context of a payment systems dispute.

## Contributing Editor



**Elizabeth Morony** is a partner at Clifford Chance in London and leads their global antitrust litigation group. She represents companies in EC and UK cartel investigations and antitrust litigation in the UK and European courts. Her

experience includes representing a bank in the European Commission's investigation into euro interest rate derivatives (EURIBOR) and related litigation, and acting for defendants in claims for damages relating to the gas-insulated switchgear cartel in the High Court, and the electrical and mechanical carbon and graphite products cartel in the Competition Appeal Tribunal and the Supreme Court. Elizabeth is co-chair of the IBA Antitrust Committee.

Antitrust litigation – at least in the form of follow-on damages claims against cartels – is now the norm in most European countries. It has been a standard part of the antitrust enforcement process for even longer in the United States, Australia, Canada and New Zealand. While antitrust litigation continues to grow and embrace new procedures and approaches in those jurisdictions (not least class actions), the focus in terms of developing jurisdictions is now moving to Asia. As China, Japan and Korea are seeing a growth in cartel investigations, so antitrust damages claims in those jurisdictions will start to become more common.

In preparation for Brexit, the UK government has passed statutory changes effective on the day following the UK's exit. These will bring the direct jurisdiction of EU institutions and treaties to an end in the UK and enable the UK courts to diverge from EU competition law post-Brexit. European Commission decisions issued after Brexit will no longer be binding on the UK courts. However, there are a number of grandfathering provisions which will preserve elements of the pre-Brexit framework. Most importantly, decisions of the European Commission issued pre-Brexit will still be binding in the UK courts. In addition, if alleged

breaches of EU competition law took place before Brexit, the UK courts will be required to apply EU law as at exit day.

In Europe, as the competition regulators switch their focus to the big technology companies and increase the number of Article 102 TFEU abuse of dominance investigations, so we are beginning to see a growth in antitrust claims based on Article 102. Such claims are not limited to follow-on damages claims, but encompass standalone damages claims based on Article 102 and/or injunction applications to prevent an alleged abuse of a dominant position, often as a matter of urgency. Such injunction applications are often settled privately, without a court hearing, and never see the light of day. Twenty-plus years ago in England and Wales, Article 102 was probably more commonly relied on in commercial litigation disputes than Article 101 and such litigation is becoming front and centre again.

The majority of cartel damages claims are settled prior to the trial hearing. In the more significant claims in terms of value of sales and quantum claimed, it may take many years to arrive at the point where a principled settlement can be achieved, which is a genuine estimate of the claimant's loss, including an assessment of the extent to which such loss has

been passed on to third parties. Such a principled assessment will require the parties to go through the steps of disclosure of documents, factual witness statements and expert economic reports to quantify the loss suffered (potentially, in addition to interlocutory applications on issues such as jurisdiction and/or limitation). In lower-value claims, parties may consider it worth trying to achieve a settlement in advance of doing the bulk of such work, particularly where the legal costs of years of trial preparation might exceed the value of the claim itself.

Class actions are increasing in popularity in a variety of jurisdictions in Europe, particularly in England and Wales and, most recently with the introduction of new collective action legislation, the Netherlands. The significance of antitrust litigation, both as a type of general commercial litigation and as one of the pillars of competition enforcement, is demonstrated by the fact that procedures are being introduced in some jurisdictions exclusively for antitrust litigation, whether it is the introduction of disclosure of documents across Europe for antitrust damages claims or the introduction of opt-out class actions for antitrust damages claims in England and Wales. There will be numerous examples of, as yet, unidentified procedural issues which will work their way through the courts for some years to come on issues relating to identifying the relevant class or disclosure of documents, particularly in those jurisdictions in which wide-ranging disclosure is an entirely new approach in any form of litigation.

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The presence of specialist (often US) claimant firms in an increasing number of European jurisdictions and the growth in litigation funding generally, but specifically in the context of antitrust damages claims, are having a significant impact on the strategy for managing such claims. US claimant firms have pursued the introduction of class actions with evangelical zeal, positioning themselves as being on the side of the angels standing alongside the competition authorities and against the combined forces of the cartelists. The English courts are struggling with the practical impact of opt-out class actions. In the most prominent collective proceedings in England and Wales, *Walter Merricks CBE v MasterCard*, in which loss is claimed on behalf of an estimated 47 million people, the CAT ruled that the claim was not appropriate to be brought as a collective proceeding. This judgment was overturned by the Court of Appeal, and MasterCard has successfully sought leave to appeal to the UK Supreme Court, which will determine:

- what the CAT may demand of the proposed class representative at the CPO stage, in particular, in respect of evidence for the substantive case, and the standard by which the case's prospects of success should be judged;
- whether an aggregate damages award would have to be distributed on a compensatory basis, and whether this is feasible; and
- whether the CAT should consider distribution of these aggregate damages at the certification stage, or whether it is a matter for determination after trial.

The trucks litigation in the UK is currently stayed pending the outcome of the appeal.

Other jurisdictions which are seeing an increasing volume of antitrust litigation include Israel and some jurisdictions in Latin America, including Argentina, Brazil and Mexico. Israel also has a class action regime and the claimant lawyers are beginning to focus on antitrust claims.

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# Antitrust Litigation

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## Law and Practice

*Contributed by Clifford Chance LLP*

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**Elizabeth Morony** is a partner at Clifford Chance in London and leads their global antitrust litigation group. She represents companies in EC and UK cartel investigations and antitrust litigation in the UK and European courts. Her

experience includes representing a bank in the European Commission's investigation into euro interest rate derivatives (EURIBOR) and related litigation, and acting for defendants in claims for damages relating to the gas-insulated switchgear cartel in the High Court, and the electrical and mechanical carbon and graphite products cartel in the Competition Appeal Tribunal and the Supreme Court. Elizabeth is co-chair of the IBA Antitrust Committee.



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## 1. Overview

### 1.1 Recent Developments in Antitrust Litigation

The jurisdiction of England and Wales has been one of the leading jurisdictions for antitrust litigation in Europe for over 20 years. The combination of a well-regulated jurisdiction for commercial litigation, specialist competition judges and wide-ranging disclosure has attracted numerous EU-wide antitrust claims to the English courts. In addition, the Consumer Rights Act 2015 introduced opt-out collective actions before the Competition Appeal Tribunal (CAT) and there is now a steady flow of applications for Collective Proceedings Orders.

### 1.2 Other Developments

In preparation for Brexit, the UK government has passed statutory changes effective on the day following the UK's exit. These will bring the direct jurisdiction of EU institutions and treaties to an end, enable the UK courts to diverge from EU competition law post-Brexit, and European Commission decisions issued after Brexit will no longer be binding on the UK courts. There are a number of grandfathering provisions which will preserve elements of the pre-Brexit framework, however. For example, decisions of the EC issued pre-Brexit will still be binding in the UK courts. In addition, if alleged breaches of EU competition law took place before Brexit, the UK courts will be required to apply EU law as at exit day.

## 2. The Basis for a Claim

### 2.1 Legal Basis for a Claim

Claims for damages arising from a breach of UK or EU competition law can be brought in the High Court (either in the Chancery Division or the Commercial Court) or before the CAT. In the High Court, claims are based on the tort of breach of statutory duty of Chapters I/II of the UK Competition Act 1998 (CA 1998), and/or section 2(1) of the European Communities Act 1972 (which imports into English law Articles 101/102 of the Treaty on the Functioning of the European Union, or TFEU). Claims for damages before the CAT are based on section 47A CA 1998 and/or section 47B CA 1998. Section 47B forms the basis for collective actions before the CAT.

Claims may either be on a 'standalone' or 'follow-on' basis. In standalone claims, the claimant must establish:

- the anticompetitive conduct of the defendant(s); and
- that the defendant(s)' behaviour caused loss to the claimant.

In follow-on actions, the claimant may rely on a decision by the EC or a UK competition authority (eg, the UK's Competition and Markets Authority, or CMA) to establish that there has been an infringement of competition law. Provided

that the decision is final (ie, all appeals or time limits for making appeals have been exhausted), it will be binding on the English courts, and the claimant is not required to prove the anticompetitive conduct as they would be in a standalone claim. Findings by other EU member state competition authorities on EU competition law are considered *prima facie* evidence of an infringement.

### 2.2 Specialist Courts

Standalone and follow-on claims may be brought in either the High Court, or in the CAT.

The CAT is a specialist body established for the sole purpose of hearing competition disputes. It has its own rules and procedures, as well as specialist judges. Panels of the CAT are typically chaired by a High Court judge, and include two other members who may be lawyers, judges, or alternatively, relevant specialists such as economists or accountants. By contrast, proceedings in the High Court are typically presided over by a single judge who may or may not have specialist competition law expertise.

The powers of the High Court and the CAT are broadly similar; both can make orders for interim measures such as injunctions, and neither has a limit to the compensation it is able to award. However, only the CAT can hear collective actions initiated under section 47B of the CA 1998. Such proceedings are not available in the High Court, although the civil procedure rules (CPR) do permit claims to be combined under a group litigation order, where those claims have 'the same interest'.

The High Court may transfer as much of the proceedings as relate to the infringement of competition law to the CAT. This means that claims can be transferred in whole or in part. The High Court has held that the complexity of the issues involved, the extent to which economic evidence is in issue, as well as cost implications, are all relevant to whether a transfer to the CAT will be ordered. Conversely, CAT rule 71 allows the CAT to transfer a claim to the High Court.

### 2.3 Decisions of National Competition Authorities

Under section 58A CA 1998, decisions of the CMA or of the EC, once final (ie, once all appeals have been exhausted, or the deadlines for making appeals have passed), are binding on English courts as to the existence of an infringement of competition law. In such claims, a claimant need not prove the infringement of competition law, and instead the proceedings will focus solely on the extent of the loss suffered by the claimant, and whether the claimant can establish that the defendant(s) anticompetitive conduct caused the loss claimed.

An infringement decision by another EU member state's national competition authorities (NCAs) on EU competition law will be treated as *prima facie* evidence of an

infringement of EU competition law for the purposes of a claim for damages under paragraph 35 of schedule 8A CA 1998. This is merely evidence, unlike decisions of the CMA or EC, which are binding on the courts as to the existence of an infringement. However, this provision only applies to claims brought on or after 9 March 2017, and will not apply following Brexit.

Under paragraph 4.1 and 4.1A of the EU Competition Law Practice Direction, the UK's competition authorities, as well as the EC, have the right to make written observations and to apply to make oral observations on issues relating to the application of Chapter I or II CA 1998 and/or of Articles 101 or 102 TFEU. This right is derived from Article 15.3 of the EU Competition Regulation (co-operation with national courts). The EC has made such amicus interventions in a handful of cases, including *National Grid Electricity Transmission plc v ABB Ltd* [2012] EWHC 869 (Ch).

## 2.4 Burden and Standard of Proof

In both follow-on and standalone claims, the burden of proof is on the claimant. As set out above, in follow-on claims the infringement decision will establish the existence of the infringement but the claimant will have to prove that the infringement caused them to suffer loss. In a standalone claim, a claimant will have to establish the infringement and that this caused them to suffer loss. The standard of proof, as in civil claims generally, is the 'balance of probabilities'. However, the High Court has indicated that given the seriousness of finding an infringement of competition law, a heightened civil standard may be required such that evidence is 'commensurately cogent and convincing' (see further, *Attheraces v British Horseracing Board* [2005] EWHC 3015 (Ch)).

In addition, for claims where the loss or damage occurred wholly on or after 9 March 2017, there is a rebuttable presumption that cartels cause loss or damage (see Article 17 of the EU Damages Directive and schedule 8A paragraph 13 CA 1998).

If defendants can demonstrate that the alleged damage suffered by the claimant was passed on to the claimant's own customers, then this may constitute a (whole or partial) defence to the claim. This is known as the 'passing-on' defence. The burden of proving the pass-on defence lies with the defendant.

## 2.5 Direct and Indirect Purchasers

As set out in 2.1 *Legal Basis for a Claim*, above, in the High Court claims are based on the tort of breach of statutory duty of Chapters I/II of the CA 1998, and/or section 2(1) of the European Communities Act 1972 (which imports into English law Articles 101/102 of the TFEU). Claims for damages before the CAT are based on section 47A CA 1998 and/or section 47B CA 1998. Section 47B forms the basis for collec-

tive actions. This allows both direct and indirect purchasers to bring claims for their losses.

## 2.6 Timetable

The typical timetable for an antitrust damages claim is around three to five years depending on a variety of factors including the extent of disclosure, the number of witnesses and experts, whether the court or tribunal orders a stay, and whether applications are made for strikeout/summary judgment or for the determination of preliminary issues.

### High Court

In the High Court, a case management conference (CMC) will typically take place after the close of pleadings. The purpose of a CMC is to set a timetable for the litigation including, for example, deadlines for disclosure and the exchange of evidence. Parties may bring applications for the expedition of proceedings (in limited circumstances), and cases can be subject to strikeout or summary judgment applications (see below).

The courts have wide-ranging case management powers to order the trial of preliminary issues which may lead to proceedings being brought to a quicker resolution. For example, in claims alleging an abuse of dominance, courts have tried the question of abuse as a preliminary issue (eg, *Streetmap. Eu Limited v Google Inc and Others* [2016] EWHC 253 (Ch)). In *Deutsche Bahn AG v Morgan Crucible Company plc* [2011] CAT 16, the CAT struck out a claim brought against Morgan on the basis that it was brought out of time. This decision was ultimately upheld by the Supreme Court (*Deutsche Bahn AG v Morgan Advanced Materials plc* [2014] UKSC 24).

### CAT

The timetable of cases before the CAT will be similar to those before the High Court and subject to close case management as described above. However, since 2015, a 'fast-track' procedure has been available in the CAT. If ordered, the main substantive hearing must commence as soon as practicable within six months of the order to fast-track proceedings, and the amount of recoverable costs (see below) will be capped at a level to be determined by the CAT.

An application for fast-track proceedings will be determined with reference to the size of the parties; the time estimate for the main substantive hearing; the complexity of the issues; whether any additional claims have or will be made; the volume of documentary and witness evidence; and the remedy or amount of damages claimed. The CAT has refused to fast-track proceedings where the main hearing was estimated to last two weeks, where disclosure was particularly extensive, and where there was no particular urgency in the case. The CAT has also held that a follow-on damages claim of several years' duration was unlikely to satisfy the criteria of the fast-track procedure.



*Socrates Trading Limited v The Law Society of England and Wales* [2017] CAT 10, was the first case to proceed to trial under the fast-track procedure. The trial as to the existence of an infringement was completed in four days. Each side adduced two factual witnesses and called one economist, whose expert evidence was confined to questions of market definition and dominance. The evidence of the experts was heard concurrently, in a 'hot tub'.

### 3. Class/Collective Actions

#### 3.1 Availability

Procedures for bringing claims on a group or collective basis differ depending on whether such claims are brought in either the High Court or the CAT.

##### High Court

Collective claims have been brought in the High Court as so-called representative actions. CPR 19.6(1) allows a representative action to be brought by a claimant representing themselves and other claimants, where the group have the 'same interest' and have opted in to the action. Representative actions are typically difficult to bring in private antitrust litigation. In *Emerald Supplies Limited v British Airways plc* [2009] EWHC 741 (Ch), the High Court struck out a representative action on behalf of both direct and indirect purchasers on the basis that the criteria for inclusion in the class depended on the outcome of the claim itself, 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 the damages awarded. The Court of Appeal upheld this decision, rejecting the claim as a means of engineering a class-action mechanism where one did not exist. The court held that 'the same interest' required a degree of certainty to constitute a class of persons capable of being represented by one person.

Group litigation orders (GLOs) under CPR 19.11 are available where one or more claims raise 'common or related issues'. In practice, GLOs are rarely used, and have not been used in the context of competition litigation to date.

##### CAT

Collective actions have been available in the CAT since October 2015 for follow-on and standalone antitrust damages claims, following changes implemented by the Consumer Rights Act 2015 (CRA 2015). Claims may be brought on an opt-in or opt-out basis. The collective proceedings must be commenced by a person who proposes to be the representative in the proceedings. The CAT may authorise a claim where it is brought by a representative proposing to bring the claim on behalf of the class. The representative need not be a member of the class, if the CAT considers that it is just

and reasonable for the representative to bring the claim in that capacity.

Collective proceedings will only continue if the CAT makes a collective proceedings order (CPO). The CAT will make a CPO if it is satisfied that the claims are eligible for inclusion in collective proceedings. To be eligible, the claims must raise the same, similar or related issues of fact or law. The CAT will also consider, among other factors, whether collective proceedings are an appropriate means for fair and efficient resolution of the collective issues; whether separate claims of the same or similar nature have already been commenced by members of the class; the class size and nature; whether it is possible to determine for any given person whether they are a member of the class; and whether claims are suitable for an aggregate award of damages.

In making a CPO, the CAT must also decide whether the proceedings should be opt-in or opt-out. The CAT will weigh the strength of the claims, and whether it is practicable for the proceedings to be brought on an opt-in basis, including the estimated damages that class members may recover. Non-UK residents must opt-in to proceedings, even where the CAT has granted a CPO on an opt-out basis. The CAT must order a time by which such parties have to opt-in to proceedings to become part of the class.

In *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9, one of the first CPO applications to be brought, the CAT held that the approach to the certification of claims should be rigorous, and considered that drawing from the American approach to certification of common issues was of limited assistance. The approach under the UK regime was intended to be very different, with either no, or only very limited, disclosure and shorter hearings. The CAT followed the approach in Canada, holding that the expert methodology must be sufficiently credible or plausible to establish some basis for loss across the class.

#### 3.2 Procedure

Collective proceedings in the CAT may continue with CPO. The CAT must be satisfied that the person bringing the proceedings is someone it could authorise to act as the representative, and that the claims are eligible for collective proceedings. They must raise the same, similar or related issues of fact or law.

The most prominent ongoing collective proceedings, *Walter Merricks CBE v MasterCard*, was brought in September 2016 and proposed to combine follow-on actions for damages under section 47A of CA 1998, arising from a decision of the Commission that the MasterCard payment organisation had infringed competition law by setting a minimum price that merchants had to pay to their acquiring bank to accept payment cards in the EEA. The proposed claim, in effect, included an estimated 47 million people. The CAT

ruled that the claim was not appropriate to be brought as a collective proceeding. This judgment was overturned by the Court of Appeal, and MasterCard has successfully sought leave to appeal to the UK Supreme Court, which will determine:

- what the CAT may demand of the proposed class representative at the CPO stage, in particular with respect to evidence for the substantive case, and the standard by which the case's prospects of success should be judged;
- whether an aggregate damages award would have to be distributed on a compensatory basis, and whether this is feasible; and
- whether the CAT should consider distribution of these aggregate damages at the certification stage, or whether it is a matter for determination after trial.

In High Court representative proceedings, the representing claimant must demonstrate that the 'same interest' test is satisfied. The Court of Appeal in *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284 held that this is a high bar in the context of follow-on damages claims. A High Court GLO can be made either on the court's own initiative or on an application by one of the parties. GLOs require 'common or related issues', a concept that is wider than the 'same interest' requirement for representative proceedings.

### 3.3 Settlement

In general, settlement agreements entered into between parties to litigation do not require the consent of the courts. On settlement, the claimant will usually discontinue the claim and there will be a separate, confidential agreement on settlement including costs. In proceedings brought by more than one claimant, the consent of the court may be required to discontinue the claim if consent of other claimants is not obtained.

This general position is subject to the regime for opt-out collective proceedings in the CAT, the settlement of which must be judicially approved. A collective settlement approval order must be issued by the CAT, and applied for by the class representative and the defendant(s) wishing to be bound by the proposed settlement. The application must be supported by evidence on the merits of the settlement, explaining how the collective settlement is to be paid and distributed. The CAT must satisfy itself that its terms are just and reasonable.

If authorised, the settlement will bind all those falling within the class described in the collective proceedings order who were domiciled in the UK and did not opt out, or who were not UK-domiciled and opted in to the collective proceedings.

## 4. Challenging a Claim at an Early Stage

### 4.1 Strikeout/Summary Judgment

Cases in the High Court can be subject to strikeout or summary judgment applications where the claimant or defendant has no real prospect of success or the statements of case disclose no cause for action.

A trial of 'preliminary issues' (see **3.1 Availability**, above) may take place where it may allow the court to dispose of proceedings expeditiously. In *Tesco Stores Ltd and Others v MasterCard* [2015] EWHC 1145 (Ch), the court refused strikeout on the basis that complex questions of law arose which should be decided at trial once the parties had benefit of full disclosure. In this case, the court held that only once arguments over whether the claimants consisted of a single economic entity were determined, could the case proceed to considering where the infringement of competition law arose. This preliminary issue required disclosure to be undertaken for it to be determined.

A party may also obtain summary judgment in the CAT if it can show that:

- the other party has no real prospect of succeeding on or defending the claim; and
- there is no other compelling reason why the case or issue should be disposed of at a substantive hearing.

The CAT can also strike out claims at any stage of the proceedings if:

- the CAT lacks jurisdiction;
- the claim has no reasonable grounds;
- the claimant has pursued vexatious proceedings or applications; or
- a party fails to comply with any rule, direction, practice direction or order of the CAT.

### 4.2 Jurisdiction/Applicable Law

In cases in which the defendant is domiciled in an EU member state, jurisdiction is governed by EU Regulation 1215/2012 (the 'Brussels Regulation'). The Brussels Regulation contains various bases for determining the jurisdiction in which antitrust claims may be brought, including:

- where the defendant is domiciled;
- the place where an obligation under a contract was to be performed;
- in tort, the place where the harmful event occurred (the place where the damage was sustained or the place where the event giving rise to it took place);
- any jurisdiction agreement;
- whether a party submits to a jurisdiction; and
- the jurisdiction of any related actions.

Defendants domiciled in Norway, Switzerland and Iceland are subject to the Lugano Convention, which is similar in its effect.

For defendants domiciled in other jurisdictions, the common-law jurisdiction regime applies, in which the English courts' jurisdiction depends on the defendant being located within England or Wales, unless (on an application) it can be shown that another state's courts are a more appropriate forum. Claimants can apply for permission to serve a defendant domiciled in another jurisdiction if they can show:

- that the claim has a reasonable prospect of success;
- that there is a basis for jurisdiction set out in the CPR; and
- that England and Wales is the proper place to bring the claim.

On the UK leaving the EU, the Hague Convention – to which the UK has now acceded – will supplement the common law rules governing the English courts' approach to jurisdiction. Where parties have an exclusive choice of court agreement in favour of the English courts, the Hague Convention states are obliged to give effect to this choice and enforce English judgments.

### 4.3 Limitation Periods

#### High Court

Rules on limitation differ depending on whether the claim is brought before the High Court or CAT and when the cause of action accrues (ie, when the infringement causes damage to the claimant). New limitation rules apply to claims (whether brought in the High Court or CAT) where the loss or damage took place wholly on or after 9 March 2017 (paragraphs 17 to 26, Schedule 8A, CA 1998), although given the secretive nature of cartels and the length of time it can take to identify them, these new rules are unlikely to apply to many claims for some time. These new limitation rules displace the Limitation Act 1980 in relation to antitrust claims.

For High Court claims where the loss or damage occurred wholly before 9 March 2017, the limitation period is six years from the date on which a cause of action accrues. Where there is deliberate concealment (or fraud), 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. There must either be active and intentional concealment of a fact relevant to a cause of action, or at least intentional concealment by omission of a fact which the defendant knew they were under a duty to disclose. A fact relevant to the claimant's cause of action refers to a fact without which the cause of action would be incomplete. It is not relevant that a defendant has concealed a fact which, if known, would merely strengthen a claimant's case. Follow-on claims, which are issued more than six years after the

date of the underlying infringement decision will certainly be time-barred. However, defendants often argue that claimants either discovered or ought to have discovered any concealment earlier than the publication of the infringement decision, eg, from the date of a press release relating to dawn raids or a statement of objections.

Where the loss or damage occurred wholly on or after 9 March 2017, proceedings may not be brought before a court or tribunal after the end of a six-year limitation period. The limitation period begins with whichever is later – the day on which the infringement ceases, or the claimant's 'day of knowledge'. This is the day on which the claimant first knew or could reasonably be expected to know the identity of the infringer; about the existence of the infringer's behaviour; that the behaviour infringes competition law; and that the claimant has suffered loss or damage due to the infringement. See paragraphs 17 to 26, Schedule 8A, CA 1998. This period may also be suspended in various circumstances, including during investigation by a competition authority or during a consensual dispute resolution process.

#### CAT

The limitation periods that apply in the CAT are complicated and depend on when the cause of action arose. If the cause of action arose before 1 October 2015, under transitional rules the limitation period is two years from the date on which the infringement decision became final or the date on which the cause of action accrued, whichever is later.

The limitation period in the CAT is now the same as that of the High Court, although a number of limited exceptions applies to claims where the cause of action arose before 1 October 2015. In those circumstances, Rules 31(1) to (3) of the old 2003 CAT rules apply (ie, the limitation period is two years from the date on which the infringement decision became final or the date on which the cause of action accrued, whichever is later).

## 5. Disclosure/Discovery

### 5.1 Disclosure/Discovery Procedure

Disclosure generally takes place after the form with particulars of claim, defence and any replies has been served. If standard disclosure is ordered, parties to the litigation must search for and disclose all documents in their control on which they rely, and documents that adversely affect their own case, adversely affect another party's case, or support another party's case. Specific disclosure is commonly ordered in antitrust claims, requiring the disclosure of specific documents or categories of documents. An order for disclosure may also be made requiring non-parties to disclose documents, if the disclosure is likely to support the case and is necessary to dispose of the claim fairly or to save costs.

Pre-action disclosure may be ordered before a claim is issued. Parties are encouraged to agree to exchange pre-action disclosure in order to seek to resolve legal disputes before proceedings are commenced. Pre-action disclosure may be ordered where the documents or classes of documents to be disclosed would fall within the test for standard disclosure and the court believes that pre-action disclosure is desirable to dispose fairly of anticipated proceedings or to assist in the resolution of the dispute without proceedings or at a lower cost. Applications for pre-action disclosure that are overly broad will be refused, so potential claimants should carefully consider the scope of any requests they make.

It is important to note that while there has been a change to the disclosure regime (with the introduction of the Disclosure Pilot in the business and property courts of England and Wales from 1 January 2019), the pilot does not apply to competition law claims, unless otherwise ordered.

See **5.3 Leniency Materials/Settlement Agreements**, below, in relation to leniency statements and settlement submissions.

There is a general restriction on parties not to use documents received during disclosure other than for the purpose of the litigation. However, if those documents are referred to in open court, then this protection may be lost. Confidential and irrelevant material may be redacted, although significant redaction may be resisted by the court. Confidential material may also be protected by way of a ‘confidentiality ring’, in which only specified persons will be permitted to access these documents.

### 5.2 Legal Professional Privilege

Documents may be withheld from inspection on the basis that they are protected by legal professional privilege, which falls into two broad categories:

- legal advice privilege; and
- litigation privilege.

#### Legal Advice Privilege

Legal advice privilege protects communications which are:

- confidential;
- between a client and lawyer; and
- made for the purpose of giving or receiving legal advice.

Confidentiality is key but if a communication has become public, been shared with a third party (on a non-limited waiver basis) or been circulated widely, it may lose that privilege.

The communication must be between lawyer and client, for the purposes of which a ‘lawyer’ includes both external and in-house counsel, who may be qualified in any jurisdic-

tion. The definition of a ‘client’ for the purposes of privilege includes those authorised to give and receive legal advice (following *Three Rivers No 5*), rather than all employees within the undertaking. In *SFO v ENRC* [2018] EWCA Civ 2006, the Court of Appeal held that communications between an employee and the corporation’s lawyers could only be privileged if that employee was tasked with seeking and receiving advice on behalf of the corporation.

#### Litigation Privilege

Litigation privilege applies to confidential communications between a lawyer and client and communications between a lawyer or client and a third party, which come into existence after litigation is contemplated. The communication must be for the sole or dominant purposes of:

- obtaining or giving legal advice in relation to the litigation;
- obtaining evidence to be used in it; or
- obtaining information that may lead to the obtaining of evidence.

In *Tesco Stores v OFT* [2012] CAT 6, the CAT found that proceedings were sufficiently adversarial, at least by the time that the OFT had issued a statement of objections. In *SFO v ENRC* [2018] EWCA Civ 2006, the Court of Appeal found that where the Serious Fraud Office had made the prospect of criminal prosecution clear to the defendant and lawyers had been engaged, there was a basis for concluding that criminal prosecution was in reasonable contemplation.

### 5.3 Leniency Materials/Settlement Agreements

Leniency statements and settlement agreements are protected from disclosure under the EU Damages Directive as implemented under the Regulations in the UK.

For claims issued wholly on or after 9 March 2017, the CA 1998 prohibits a court or tribunal from making a disclosure order in respect of a settlement submission that has not been withdrawn, or a cartel leniency statement. In addition, a competition authority’s investigation materials are not admissible in evidence in competition proceedings at any time before the competition authority has closed the investigation, unless a party obtains them lawfully and other than from the authority’s file.

For cases that were begun prior to 9 March 2017, the position is governed by case law. The ECJ held in *Pfleiderer v Bundeskartellamt* that EU law allows member state courts and tribunals to determine when materials may be disclosed. In *National Grid Electricity Transmission plc v ABB Ltd* [2012] EWHC 869 (Ch), the High Court held that a number of factors were relevant in the balancing exercise between disclosure and confidentiality of leniency and investigation materials. Firstly, the court considered whether such disclosure would increase the leniency applicants’ exposure to

liability or would put these parties at a relative disadvantage compared with the parties that did not co-operate with the investigating authority. Secondly, the court considered whether the potential effect of a disclosure order would deter potential leniency applicants in future investigations. Thirdly, the court considered whether the disclosure sought was proportionate in the circumstances. The judge decided that the question of relevance needed to be determined on the basis of each document and ordered only limited disclosure of those documents requested.

## 6. Witness and Expert Evidence

### 6.1 Witnesses of Fact

Factual evidence in the High Court may take the form of documents or witness evidence. Witness evidence is provided in witness statements (which are exchanged in advance of trial) and oral evidence given at trial. A witness may be cross-examined and re-examined at trial on the basis of their witness statement. The weight given to witness evidence will depend on their credibility, as well as the other circumstances of the case. A party wishing to secure the evidence of a witness present within the jurisdiction, in the form of oral evidence at trial, can also issue a witness summons under CPR 34.31.

#### CAT

The CAT proceeds on the basis that it will “be guided by overall considerations of fairness rather than technical rules of evidence” (*Argos v OFT* [2003] CAT 16). 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. The CAT may also dispense with hearing oral evidence if a written witness statement suffices, or it may limit cross-examination of witnesses. The CAT also has the power to issue a summons requiring a person in the UK to attend as a witness before the CAT and produce documents.

### 6.2 Expert Evidence

Expert evidence in the High Court may only be given with the permission of the court and follows exchange of witness statements from the witnesses of fact. The expert has a duty to the court overriding any obligation to the instructing party. Expert evidence is normally in the form of a written report followed by written questions to the expert and possible cross-examination at trial. Courts may request that experts prepare joint statements which seek to clarify the areas of agreement and disagreement in advance of trial. The court may also order the appointment of a single joint expert (though this is less common in antitrust claims).

There have also been cases where courts have ordered that expert evidence be given concurrently, also known as ‘hot-

tubbing’, which is typically judge-led and results in more limited time for cross-examination by the parties.

The CAT also has similar rules for dealing with expert evidence, and may also appoint its own expert.

## 7. Damages

### 7.1 Assessment of Damages

Damages are awarded on a tortious basis. ECJ case law (*Manfredi v Lloyd Adriatico*, Case C-295/04, [2006] ECR I-6619), requires compensation to be available not only for actual loss but also for lost profit and interest. There is a rebuttable presumption, following the implementation of the EU Damages Directive, that cartels cause harm.

*Britned Development Ltd v ABB and Others* [2018] EWHC 2616 (Ch) found that claimants had to show actionable harm, which required demonstrating a causal link between the infringement and the damages, generally through the ‘but for’ test of causation. The elements of the cause of action have to be proved on the balance of probabilities, and damages, to put the claimant in the position it would have been in had the tort not been committed. A claimant’s inability to prove the exact sum of its loss was not a bar to recovery. The assessment of damages would often involve some estimation and assumption, and the court could take a broad-brush approach based on an understanding of the context in which the harm was suffered. However, the assessment had to be grounded in the evidence.

For claims where the loss or damage suffered was wholly on or after 9 March 2017, a court or tribunal may not award exemplary damages in competition proceedings. However, for claims where loss or damage was before 9 March 2017, punitive and exemplary damages are available in certain limited circumstances in England and Wales. Section 47C of CA 1998 also prevents the CAT from awarding exemplary damages in collective proceedings.

### 7.2 ‘Passing-on’ Defences

Damages awarded to a claimant as a purchaser of a cartelised product may be reduced if the defendant can prove that the overcharge was passed on to the claimant’s own customers.

In *Sainsbury’s v MasterCard* [2016] CAT 11, the CAT held that the pass-on defence is only available for identifiable increases in prices by a firm to its customers; the increase in price must be proven to cause the overcharge. This part of the CAT’s test was upheld on appeal before the Court of Appeal. The CAT also said that the defendant must show on the balance of probabilities that there is another class of claimant, to whom the overcharge has been passed on, in the absence of which the CAT held that a claimant’s damages should not be reduced. This second requirement was cast



in doubt on appeal. The Court of Appeal upheld the CAT's finding that MasterCard's defence failed because no identifiable increase in retail price had been established, still one causally connected to the UK Multilateral interchange fee. In July 2019, MasterCard was given permission to appeal to the UK Supreme Court.

For claims where the loss or damage suffered from an infringement took place wholly on or after 9 March 2017, the claimant is treated as having proved that the overcharge or underpayment was passed on if:

- the defendant infringed competition law;
- there was an overcharge or underpayment as a result of the infringement; and
- the product or service was provided to the customer by the claimant.

This is not a test of strict liability and may be rebutted.

## 7.3 Interest

The English courts have discretion to order pre-judgment interest on damages awarded at the claimant's borrowing rate or a fair commercial rate. If the claimant can show that it has had to pay interest on the debt as a result of its principal losses, the claimant may obtain compound interest. The CAT may also order that interest is payable on damages for any part of the period between the date when the action arose and the date of decision of the award for damages.

## 8. Liability and Contribution

### 8.1 Joint and Several Liability

It is generally understood that defendants in a cartel action are jointly and severally liable. Article 11 of the EU Damages Directive also requires member states to ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law. There is a statutory exception to this position for small and medium-sized enterprises, for infringements of competition law which took place on or after 9 March 2017.

For claims where the loss or damage suffered arising from a cartel took place wholly on or after 9 March 2017, an immunity recipient is not liable (either alone or jointly) to pay damages as a result of the cartel infringement, subject to certain exceptions (paragraph 15, schedule 8A, CA 1998). Those exceptions are if:

- the claimant is unable to obtain full compensation for the loss or damage from other undertakings involved in the cartel infringement;
- the claimant acquired (or provided) a product or service that was the object of the cartel infringement directly or

indirectly from the immunity recipient (or to the immunity recipient);

- the claimant acquired a product or service containing or derived from a product or service that was the object of the cartel infringement indirectly from the immunity recipient; or
- the product or service that was the object of the cartel infringement contained or was derived from a product or service provided by the claimant.

The principle of joint and several liability is also subject to certain modifications in the context of settlements where the infringement of competition law occurred on or after 9 March 2017.

### 8.2 Contribution

In England and Wales, the Civil Liability (Contribution) Act 1978 allows recovery for a contribution from a third party in respect of the same damage as someone held liable, either in the same, or new proceedings. The court may determine how liability between defendants is apportioned. In cases of cartel infringements, the approach that the courts will take to contributory liability is unclear; the court may, for instance, apportion according to perceived cartel member culpability, and/or based on volume of sales. A defendant can still bring a claim for contribution against another party even when it has settled its dispute with the claimant.

Where the loss or damage in a claim took place wholly on or after 9 March 2017, the amount of recoverable contribution must be determined in light of the parties' relative responsibility for the whole of the loss or damage caused by the infringement, taking into account any damages paid by the other person in respect of the loss or damage, in accordance with a settlement between an infringer and a claimant. This is likely to take account of the volume of sales of the parties.

## 9. Other Remedies

### 9.1 Injunctions

Injunctions are available both in the High Court and in the CAT.

#### High Court

Claimants can seek injunctions in the High Court for ongoing or anticipated breaches of competition law. These may be prohibitory, mandatory, or quia timet (relating to future conduct). The applicant must show:

- a good, arguable case;
- that damages would be inadequate to remedy its losses; and
- that the balance of convenience favours ordering the injunction.

Where an interim injunction is sought, a claimant must give a cross-undertaking in damages to cover any loss suffered by the defendant if the applicant were to lose the substantive case which follows. The High Court can also award security for costs.

The timing of an application is a critical issue. In *AAH Pharmaceuticals v Pfizer Limited & Unichem Limited* [2007] EWHC 565 (Ch), 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. Although injunction applications may be made without notice, this is only in exceptional circumstances which must be justified to the court. In such an *ex parte* application (ie, made on a without-notice basis), the applicant bears the burden of full and frank disclosure to the court and, in the absence of the respondent party, must not withhold evidence which is adverse to its case.

### CAT

The CRA 2015 introduced new powers under which the CAT may grant injunctions in individual claims or collective proceedings. An injunction granted by the CAT has the same effect in the High Court, and the CAT must apply the same principles as outlined above. Failure to comply with an injunction allows the CAT to certify the matter to the High Court, which may deal with that person as if they were in contempt. An application for an interim injunction can be made without notice if it appears to the CAT that there are good reasons for not giving notice which must be stated as part of the evidence in support of the application.

### 9.2 Alternative Dispute Resolution

Alternative dispute resolution (ADR) is available and encouraged by the courts in England and Wales, but is not mandatory. Antitrust disputes are arbitrable if the claim alleging an antitrust infringement falls within the ambit of the arbitration clause. The courts have held that antitrust claims are arbitrable. In *Microsoft Mobile v Sony* [2017] EWHC 374 (Ch), the High Court considered the application of an arbitration clause in a tortious claim arising from allegations of anticompetitive conduct and determined that the claim should be stayed under section 9 of the Arbitration Act 1996.

The CAT appears reluctant to embrace ADR. In *Claymore Dairies* [2006] CAT 3, the CAT emphasised that proceedings must protect the public interest. Where parties wish to withdraw their dispute and transfer to private arbitration, it is necessary to obtain the CAT's consent to a stay of the proceedings. However, proceedings can be withdrawn without the tribunal's permission, provided the defendant gives consent. The Damages Directive also seeks to encourage consensual dispute resolution.

## 10. Funding and Costs

### 10.1 Litigation Funding

Conditional fee arrangements (CFAs) are available in England and Wales in which lawyers act on a 'no win, no fee' basis, with provision for a 'success fee' uplift in the event of a successful outcome. CFAs must be in writing and the percentage uplift cannot be more than 100% of the lawyer's normal fees. The uplift is no longer recoverable from the losing party in most cases. If the CFA was entered into before 6 April 2016, then the uplift may be recoverable from the other side.

Damages Based Agreements (DBAs) are also available, under which lawyers can agree to accept a share of the clients' winnings, capped at 50%. DBAs must be on a no win, no fee basis. DBAs are not available in opt-out collective proceedings.

Third-party funding by a professional funder is also available in competition cases. The Court of Appeal has held that professional funders should be liable to pay the costs of opposing parties, capped at the amount of the funding they provided.

Legal expenses insurance or after-the-event insurance are also available to cover costs, although such insurance is normally expensive.

### 10.2 Costs

#### High Court

The general rule in the High Court is that costs follow the event, namely, that the unsuccessful party pays the reasonable 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 a 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 to distinguish between 'pure funders' (who personally have no interest 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, but against professional funders, costs orders may be made to the extent of the funding provided.

Offers to settle can also be made under CPR Part 36, which may have certain costs consequences. For example, a defendant can make a Part 36 Offer and if the claimant accepts,

that ends the litigation. However, if the claimant rejects the offer and succeeds at trial but is awarded less at trial than the amount of the offer, the claimant will generally have to pay the defendant's costs from the 21st day of the offer. A claimant can also make an offer under Part 36. If the defendant refuses the offer and the claimant recovers more at trial, the court can order the defendant to pay a 10% uplift on that sum and interest on all or part of the sum recovered.

### CAT

CAT Rule 104 addresses the issue of costs. It provides that the CAT 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. However, the CAT Rules provide a number of factors that the CAT may take into account when determining the amount of costs. These factors are set out in CAT Rule 104(4) and include:

- the conduct of all parties in relation to the proceedings;
- any schedule of incurred or estimated costs filed by the parties;
- whether a party has succeeded in part of its cases, even if that party has not been wholly successful;
- any admissible offer to settle that is drawn to the CAT's attention, and that is not a settlement offer to which cost consequences apply;
- whether costs were proportionately and reasonably incurred; and
- whether costs are proportionate and reasonable in amount.

The general approach in the CAT is that the appropriate starting point is that the successful party should be awarded its costs (*Albion Water v Dwr Cymru Cyfngedig* [2013] CAT 16).

The CAT Rules also include specific cost consequences relating to the acceptance or rejection of a settlement offer that are similar to those applicable in the High Court under the rules on offers to settle in CPR Part 36. Under the CAT Rules, an offer to settle is labelled a 'Rule 45 Offer'.

In addition, CAT Rule 57(1)(d) states that if any party fails to comply with any direction, the CAT may order that the party (or its representative) be subject to an order for costs as the CAT sees fit.

In June 2016, in *Socrates Trading Limited v The Law Society of England and Wales*, the CAT decided to exercise its powers under Rule 58(2)(b) to cap the level of recoverable costs in the case.

## 11. Appeals

### 11.1 Basis of Appeal

Judgments of the CAT 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. Leave to appeal requires that the lower court's judgment was either wrong or unjust, because of a serious procedural or other irregularity. Appeals are typically only permitted on points of law. They can be made either by a party to the proceedings or by someone who has a sufficient interest in the matter. A further appeal from the Court of Appeal to the Supreme Court 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.

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# Antitrust Litigation

USA

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# 2019

## Law and Practice

*Contributed by Clifford Chance US LLP*

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**Clifford Chance US LLP** is part of a global antitrust powerhouse that coordinates around the world with hubs including London, Dusseldorf, Hong Kong, Beijing, Washington, D.C., Brussels, New York and Paris. The global antitrust practice consists of more than 150 attorneys who provide seamless and integrated antitrust advice to both domestic and multinational clients. The team is led by seasoned antitrust professionals Sharis Pozen, Timothy Cornell and Robert Houck. Cumulatively, these three have over 100 years of antitrust experience which includes private practice, in-house and high-ranking government positions. Our prac-

tice tackles cutting edge antitrust issues, including headline global mergers and investigations. We also provide counsel on evolving areas of antitrust law. Our clients include Philip Morris International, Oracle, General Electric, Henkel, SNAP, Symrise, CVC Capital Partners, Partners Group, FIS, The Carlyle Group, Coca-Cola, NEX, Informa, RBS, Toll Group, Mitsubishi, Barclays, JP Morgan, GSMA, Raytheon, Mubudala, Montagu, and L'Oréal. We would like to thank Brian Yin, a Clifford Chance associate in the Litigation and Dispute Resolution group, for his contribution to the chapter.

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## 1. Overview

### 1.1 Recent Developments in Antitrust Litigation

Private antitrust litigation in the US is a robust and well-developed discipline, featuring a mature and evolving body of case law pursuant to which litigants and courts regularly explore the outer boundaries of private recovery. The US Congress intended this: the federal antitrust laws deliberately contain economic incentives designed to encourage private parties to pursue costly and time-consuming litigation, acting – in the words of the US Supreme Court – as “private attorneys general” to complement the efforts of resource-constrained antitrust enforcement agencies in punishing cartel conduct. [*Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).] Thus, in addition to the US Department of Justice, Antitrust Division (the Division) and the US Federal Trade Commission (FTC), which share principal responsibility for public enforcement of the federal antitrust laws, private litigation is a “chief tool in the antitrust enforcement scheme.” [*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985).] A similar dynamic plays out under the laws of the individual states, which generally authorise the respective state attorneys general to pursue public enforcement of the states’ antitrust laws, while authorising private parties to pursue damages claims. This dynamic can complicate a defendant’s response to antitrust allegations and demands a well-planned strategy for responding to these parallel public and private threats.

### 1.2 Other Developments

This year has seen a number of significant developments in antitrust litigation in the US. Two of the most noteworthy trends are summarised here.

#### ‘No-Poach’ Litigation

While the Division supports private litigation as a tool for antitrust enforcement, it is sensitive to the potential consequences to its own enforcement regime that may arise from the circumstance wherein private plaintiffs – economically incentivised to sue – are doing so under the same Sherman Act provisions that apply to the Division’s enforcement efforts. The Division closely monitors private antitrust cases and will seek to intervene to advocate for its own pro-enforcement posture if the private case – perhaps because of unusual facts or aggressive argument by the parties – threatens to create bad precedent or otherwise impacts one of the Division’s enforcement priorities. This has happened in a number of cases in a wave of private litigation challenging agreements between employers not to poach each other’s employees (known as ‘no-poach’ agreements).

These actions were inspired by a set of DOJ consent agreements on these arrangements, followed by joint guidance the Division and FTC issued in October 2016, announcing the agencies’ intent to pursue no-poach arrangements as criminal per se violations of § 1 of the Sherman Act. The

per se rule applies to a narrow class of concerted actions between competitors – including price-fixing and market division – that courts recognise as “irredeemably” restraining competition, without any assessment of the potential pro-competitive effects of that conduct. As a matter of policy, the Division pursues criminal charges only for per se antitrust violations. Categorisation of a restraint as ‘per se’ is of crucial importance to antitrust defendants in both criminal prosecutions and private litigation because defendants lose the opportunity to argue that the challenged restraint has pro-competitive benefits that justify its implementation (the ‘Rule of Reason’ test). As a result, litigants fiercely contest whether a restraint is a per se violation, particularly when the conduct at issue is at the outer boundary of what the case law recognises as a per se restraint.

After the Division and FTC issued their no-poach guidance in 2016, private plaintiffs, exercising the complementary antitrust enforcement role envisioned by Congress, promptly pursued class actions alleging anticompetitive no-poach arrangements in a variety of settings, ranging from medical school hiring to franchisee-franchisor agreements. Among other things, many of these matters have featured disputes over whether the challenged arrangement falls within the category of no-poach restraints the agencies intend to pursue on a per se basis. The Division, citing its “strong interest in the [] correct application” of the antitrust laws, has filed Statements of Interest in a number of these cases, setting out its views on how the law should be applied. [28 U.S.C. § 517.] The private plaintiffs’ bar will no doubt continue to contribute to the evolution of the no-poach theory of antitrust liability, even as the antitrust enforcement agencies seek to safeguard the bright-line contours of the per se rule.

#### Federal Judge Scrutinises the Division’s Resolution of CVS-Aetna Merger Challenge

The Division has also clashed recently with the federal courts over a perceived threat to the agency’s power to investigate and resolve potential threats to competition resulting from contemplated business combinations. Section 7 of the Clayton Act authorises the Division and FTC to scrutinise – and, if necessary, seek to enjoin – mergers and acquisitions if their completion could “substantially... lessen competition or tend to create a monopoly.” When the agencies’ pre-merger review suggests to them that the transaction could violate Section 7, they may sue in an effort to block the deal’s completion (as the Division tried – and failed – to do in challenging the AT&T-Time Warner deal). The agencies can resolve threatened suits to stop the deal by seeking concessions from the merging parties – including divestitures of some business assets or units – to mitigate the threat of harm caused by the combination. As we note in **2.3 Decisions of National Competition Authorities**, such proposed resolutions are subject to review by the federal courts to ensure that a proposed resolution is in the ‘public interest’, a standard that courts have long applied deferentially. [15 U.S.C. § 16.] But

this year, Judge Leon of the D.C. District Court has sought to clarify the “permissible scope” of this judicial review, in his scrutiny of the Division’s proposed settlement to approve a planned USD69 billion merger between pharmacy retailer CVS and health-care company Aetna. Over the objections of the Division and the merging parties, Judge Leon recently held what was considered an unprecedented evidentiary hearing to test whether the parties’ proposal for Aetna to divest a segment of its business was sufficient to protect the public interest from the potential anticompetitive effects of the merger. Stating that the statute mandates that courts do not simply “rubberstamp” a consent decree proposed by the government, Judge Leon heard evidence from interested parties concerning potential effects of the merger beyond those identified in their applications for court approval of the deal. On September 4, 2019, the court issued a decision that ultimately approved the resolution but that reaffirmed the courts’ authority to review these consent decrees. It remains to be seen whether or how this decision, from an influential district court, will impact the ways in which parties and the government resolve potential antitrust scrutiny of planned business combinations.

## 2. The Basis for a Claim

### 2.1 Legal Basis for a Claim

Section 4 of the Clayton Act authorises damages suits in federal court by “any person” – which includes corporations and other legal entities – “who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.” [15 U.S.C. §§ 7; 15(a).] The federal “antitrust laws” underlying private damages claims include, perhaps most prominently, Section 1 of the Sherman Antitrust Act (prohibiting concerted action that unreasonably restrains trade), and Section 2 (prohibiting single-firm conduct that harms consumers by unreasonably excluding competitors from a market). State antitrust laws vary, but broadly confer private rights of action on a similar basis.

The Clayton Act does not constrain litigants to pursuing only those damages claims that follow on from parallel scrutiny by federal law enforcement. These standalone damages claims – brought by private litigants in the absence of any governmental action against the defendants – are common in US practice. That said, news that antitrust authorities are investigating potential anticompetitive conduct commonly prompts private litigants to quickly initiate parallel damages actions, usually while the underlying investigation remains pending.

### 2.2 Specialist Courts

With the exception of the FTC’s administrative adjudicatory process (described in **2.3 Decisions of National Competition Authorities**), most federal competition matters are resolved in the US federal courts, which have exclusive

jurisdiction over federal antitrust claims. The Clayton Act accords plaintiffs wide latitude in choosing a venue (that is, the US federal district court in which they file suit). Venue is proper under the Clayton Act in any federal district where the defendant “resides or is found or has an agent”, or “transacts business.” [15 U.S.C. §§ 15(a), 22.] The parties may request, or the court may on its own decide, “for the convenience of parties and witnesses” or “in the interest of justice”, to transfer a federal antitrust litigation to a different federal district where the case “might have been brought.” [28 U.S.C. § 1404(a).] It is not unusual for claimants to file parallel antitrust complaints in differing federal districts. When this occurs, the parties may request that the Judicial Panel on Multidistrict Litigation consolidate claims – involving “common questions of fact” – into a single federal district for coordinated pre-trial proceedings. [28 U.S.C. § 1407(a).]

Antitrust claims made under state law may also be heard in federal court if they supplement a federal claim [28 U.S.C. § 1332(a)] or if they meet the requirements of the Class Action Fairness Act of 2005, which significantly expanded the federal courts’ authority to resolve large class actions even if pursued under state law. [28 U.S.C. § 1367(a).]

### 2.3 Decisions of National Competition Authorities

The federal antitrust enforcement agencies retain discretion over their enforcement decisions, but those decisions are generally subject to judicial review in some form. The FTC, as an independent administrative agency, possesses the statutory authority to adjudicate civil claims of ‘unfair competition’ before the agency’s own administrative law judges in trial-type proceedings. Decisions by FTC administrative judges are reviewable by the FTC commissioners, and a losing defendant may appeal the commission’s decision to the federal appeals courts.

By contrast, the Division, as a law enforcement agency, lacks the authority to adjudicate its own disputes, and instead must pursue enforcement actions exclusively in the federal courts. The courts likewise retain oversight of Division settlements of these cases before trial. When the Division concludes a civil antitrust investigation or litigation by settlement (known as a ‘consent decree’), the Antitrust Procedures and Penalties Act obliges the Division to file a complaint and proposed settlement materials in federal court and submit to judicial approval of the settlement’s terms. However, the court’s review is limited to ensuring the settlement is in the “public interest.” [15 U.S.C. § 16.] This has traditionally been interpreted as a highly deferential standard of review, but a recent decision has reaffirmed that the court’s review is not simply a “rubberstamp” for the government’s proposed resolution, see **1.2 Other Developments**. By contrast, a criminal antitrust prosecution – which as a matter of policy, the Division uses to target only ‘hardcore’ per se competition offenses – is overseen in its initial stages by a federal grand jury, which decides whether there is ‘probable cause’ to believe a

crime was committed, justifying the issuance of an indictment. In general, most criminal antitrust defendants plead guilty rather than stand trial. In that circumstance, the trial court has discretion to accept or reject the Division's recommended sentence.

A federal antitrust enforcement action can have important consequences on a parallel private litigation. For example, a final judgment or decree against a defendant in a federal antitrust enforcement action can serve as *prima facie* evidence against that defendant in related private litigation. [15 U.S.C. 16(a).] In addition, the Division periodically intervenes in civil antitrust litigation to request a stay of discovery where the Division believes the exchange of evidence between the parties could undermine the Division's ongoing criminal investigation of one or more defendants. Finally, the Division may intervene in private antitrust litigation as an *amicus curiae* to offer its views on the application of the antitrust laws to a given complaint.

### 2.4 Burden and Standard of Proof

Section 4 of the Clayton Act requires a plaintiff to prove that the defendant(s) violated the antitrust laws and that the plaintiff has been "injured in his business or property" – that is, suffered economic loss – "by reason of" that violation. Plaintiffs in federal antitrust cases must prove each element of their claim by a 'preponderance of the evidence', meaning they must establish through direct or circumstantial evidence that a fact is more likely than not true.

The US Supreme Court has articulated important 'limiting contours' on the right of private plaintiffs to recover treble damages under the Clayton Act, embodied in the requirement that plaintiffs establish the element of 'antitrust standing', which tests whether a particular plaintiff is the appropriate party to recover damages for an established antitrust violation. First, antitrust plaintiffs must demonstrate that they have suffered an 'antitrust injury', that is, an injury "of the type the antitrust laws were intended to prevent." [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).] For example, a retailer that loses its distribution agreement with a manufacturer for refusing to conspire with other retailers to rig bids to sell the manufacturer's products has not suffered antitrust injury. This is because the retailer's harm (lost profits) does not "flow[] from that which makes bid-rigging unlawful" under the antitrust laws (ie, higher prices to consumers). [Gatt Communications, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68 (2d Cir. 2013).] Plaintiffs must also establish they are "efficient enforcers of the antitrust laws", an inquiry that assesses (among other things) the "directness" of the link between the asserted conduct and injury, and the existence of other "more direct" victims. [Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).] These elements are not part of the government's burden in proving an antitrust violation.

### 2.5 Direct and Indirect Purchasers

The US Supreme Court has ruled that 'indirect purchasers' – consumers who do not purchase directly from defendants, but to whom the direct purchaser has passed on the overcharge caused by the defendants' conspiracy – generally lack standing to pursue damages claims under the federal antitrust laws. [Illinois Brick Co. v. Illinois, 431 US 720 (1977).] This decision is rooted in concerns for judicial economy and the challenges in apportioning damages passed from direct to indirect purchasers (and the threat that those challenges could lead to duplicative recovery). That said, there are exceptions to this rule, such as when the direct purchaser is party to the conspiracy. Further, since the Supreme Court announced the bar on federal indirect purchaser claims, a majority of states have enacted what are known as 'Illinois Brick repealer' statutes sanctioning those claims under state law. As a result, antitrust defendants may be forced to litigate in a single federal court against both direct purchasers under federal law and indirect purchasers under various state laws. Though there have been calls for Congress to overturn the Illinois Brick rule, it has not done so. And the US Supreme Court affirmed Illinois Brick's bar on damages suits by indirect purchasers in 2019, the Court's first application of the rule to a digital market. [Apple v. Pepper, 139 S.Ct. 1514 (2019).]

### 2.6 Timetable

The duration of federal antitrust litigation varies dramatically. Most cases are dismissed or resolved before trial. Cases can be dismissed at the pleadings stage with reasonable speed, though claimants may be permitted to re-plead their allegations, and may appeal dismissal. Cases that survive the dismissal stage can go on for years, as the parties exchange evidence, retain experts, dispute class certification (see **3.2 Procedure**) and seek summary judgment before trial (see **4.1 Strikeout/Summary Judgment**). Private antitrust litigation is not automatically suspended (or 'stayed') during a parallel investigation by federal antitrust authorities. The litigants can seek stays of antitrust litigation for reasons common to most federal court litigation, including to raise 'interlocutory' appeals of issues that do not finally resolve the case (see **11.1 Basis of Appeal**).

## 3. Class/Collective Actions

### 3.1 Availability

Class actions are at the heart of private antitrust litigation in the US. Class litigation proceeds on an 'opt-out' basis: members of a 'certified' class are included in the resolution of the claim unless they affirmatively opt to be excluded from it.

### 3.2 Procedure

Any plaintiff suing under the federal antitrust laws may seek to pursue their claims on behalf of a putative class of similarly-situated parties whose injuries at the hands of defend-



ants involve the same set of concerns. To maintain a class, a plaintiff must move for ‘class certification’, establishing by a preponderance of the evidence that the class complies with the requirements of US Federal Rule of Civil Procedure 23. This class-certification review involves a “rigorous analysis” that “will frequently entail overlap with the merits of the plaintiff’s underlying claim.”:

- the class is so “numerous” that simple “joinder” of each class member’s individual complaints into a single litigation would be “impracticable”;
- the class members present questions of fact and law in “common” with one another (ie, that they have “suffered the same injury”);
- the lead plaintiff’s claims are “typical” of those of the class; and
- the lead plaintiff will “fairly and adequately protect the interests of the class.” [Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013).] To begin with, a plaintiff must affirmatively demonstrate that [Fed R. Civ. P. 23(a).]

In addition to those “prerequisites”, a plaintiff must also establish that the putative class meets one of several enumerated bases for certification. Most antitrust class actions seek to proceed on the showing that both common questions of law or fact “predominate” over questions affecting individual members and a class action is “superior” to alternative methods of “fairly and efficiently adjudicating the controversy.” [Fed R. Civ. P. 23(b)(3).]

### 3.3 Settlement

The federal courts encourage parties to settle their disputes rather than litigate and, outside of the class-action setting, parties may stipulate to voluntary dismissal without disclosing the terms of settlement. [Fed R. Civ. P. 41(a)(1)(A)(ii).] But because the resolution of a class action has binding effect on absent class-members who have not opted out, the courts play a significant, multi-stage role in reviewing and approving settlement (or voluntary dismissal) of class claims. This is to ensure that the resolution fairly and adequately protects the rights of all class-members. [Fed. R. Civ. P. 23(e).] The animating concerns underlying these protections are that the lead plaintiff (and their counsel) may accept a settlement that is too small to appropriately compensate the class, and/or fail to take adequate steps to notify class members (hoping to keep whatever funds are not distributed to the class). The settling litigants – though adversaries under a plaintiff’s complaint – must work together to jointly pursue and defend to the court the contours of the proposed settlement.

First, the parties must obtain the court’s preliminary approval of the proposed settlement, by demonstrating both that it would likely be considered fair and adequate under a full review and that it would apply to a class that would satisfy the standards for class certification (described above in **3.2 Procedure**). Next, the parties must provide notice “in

a reasonable manner” to “all class members who would be bound” by the proposed settlement. This notice must allow class members to object to the proposed settlement (on their own or on behalf of others). The court may also require that members of previously certified classes have another chance to opt out. Finally, the court must hold a “fairness hearing” to consider whether the settlement is “fair, reasonable, and adequate,” assessing factors that include:

- the complexity, expense and likely duration of the litigation;
- the reaction of class members to the proposed settlement;
- the risks of establishing liability and damages; and
- a comparison of the settlement fund to the best possible recovery in light of the risks of litigation. [City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), abrogated on other grounds by Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000).]

## 4. Challenging a Claim at an Early Stage

### 4.1 Strikeout/Summary Judgment

Most private antitrust actions in federal court do not reach trial, but instead are either dismissed or settled at pre-trial breakpoints. Early in the case, defendants can seek to have a case dismissed on the grounds of a plaintiff’s failure to plead sufficient factual allegations to support key elements of an antitrust claim. Defendants raise these challenges as a matter of course in most federal litigation, including under the antitrust laws. Defendants can raise a number of pleading defects, including that the claim is untimely, that defendants are not subject to the court’s jurisdiction, that the pleading fails to plausibly allege a claim upon which relief can be granted or that the plaintiffs lack standing to sue in court. [Fed. R. Civ. P. 12.] Courts take these threshold challenges seriously, particularly in light of the significant costs and burdens of discovery in antitrust class actions. In 2007, the Supreme Court clarified that to survive dismissal and proceed to discovery, antitrust plaintiffs must plead a claim that is at least plausible on its face, as opposed to relying on conclusory statements suggesting an antitrust violation is merely possible. [Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).] Of course, because defendants generally cannot recover costs for successfully dismissing an antitrust claim, there is comparatively little disincentive for class plaintiffs to plead even a speculative claim on a contingency basis, in hopes the complaint survives dismissal and opens the door to discovery.

At the end of discovery and before trial, plaintiffs and defendants can ask the court to grant summary judgment on all or part of the claims, which requires the moving party to show that, with the evidence gathered, “there is no genuine dispute as to any material fact” relating to a claim or defence, obviating the need to put that question to the fact-finder at

trial. [Fed. R. Civ. P. 56(a).] Courts evaluate these motions by considering the evidence in the light most favourable to the opposing party and drawing all reasonable inferences in that party's favour. To overcome summary judgment in the antitrust conspiracy context, plaintiffs must present evidence that "tends to exclude the possibility that the alleged conspirators acted independently." [Matsushita Elc. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).] For example, a court may grant summary judgment for defendants in a conspiracy case where there is no direct (or 'smoking gun') evidence of a conspiracy, and the evidence suggests the alleged conspiracy would have been economically irrational. See, eg, [Anderson News, L.L.C. v. American Media, Inc., 899 F.3d 87 (2d Cir. 2018).]

### 4.2 Jurisdiction/Applicable Law

In addition to the venue requirements of the Clayton Act (see 2.2 **Specialist Courts**), plaintiffs must establish that both the defendant(s) and the conduct complained of are subject to the jurisdiction of the US courts. These requirements include both personal and subject matter jurisdiction.

#### Personal Jurisdiction

Personal jurisdiction assesses the court's power to hear cases against particular defendants. As a matter of constitutional due process, the federal courts have the ability to impose liability only as to defendants that maintain sufficient 'minimum contacts' with the forum state. Depending on the strength of a defendant's forum contacts, personal jurisdiction can be general (all-purpose) or specific (conduct-linked). For corporations, in all but the most "exceptional" cases, general jurisdiction will exist only if the defendant is headquartered or incorporated in the forum. [Daimler AG v. Bauman, 134 S. Ct. 746 (2014).] The narrower specific jurisdiction is appropriate only for claims that "arise out of or relate to" a foreign defendant's purposeful contacts with the forum itself (not simply with parties that reside in the forum). [Walden v. Fiore, 134 S. Ct. 1115 (2014).] In the antitrust context, this means plaintiffs must demonstrate their claim against a foreign defendant bears a causal connection to that defendant's forum contacts.

#### Subject Matter Jurisdiction

By contrast, subject matter jurisdiction is the power of the court to hear a given type of claim. In the antitrust context, as courts and litigants grapple with the practical realities of increasingly global supply chains and cross-border finance, this question is frequently considered in terms of the territorial limitations applied to the Sherman Act's bar on conspiracies that restrain trade. The US Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) limits the territorial reach of US antitrust law to domestic or import commerce, and places foreign or export conduct beyond the reach of US courts unless that conduct has a "direct, substantially, and reasonably foreseeable effect" on US commerce and that effect "gives rise to" a US antitrust claim. [15 U.S.C. §

6a.] Whether the causal nexus between foreign conduct and domestic effect is sufficiently direct will depend on the facts and circumstances, including the structure of the market and the relationships of the parties. Appeals courts presently disagree on whether the FTAIA's directness prong requires that the US effect follow as the 'immediate consequence' of the foreign antitrust conduct or whether the domestic effect must only bear a reasonably proximate causal nexus to that conduct. But however the test is expressed, the appeals courts generally appear to agree that the wholly-foreign price fixing and sale of components included in goods sold to US consumers can have a direct effect on US commerce.

### 4.3 Limitation Periods

A private litigant may pursue a claim for damages under the federal antitrust laws within four years after the cause of action has "accrued." [15 U.S.C. § 15b.] An antitrust claim accrues when the defendants' offending conduct causes the claimant to suffer a non-speculative injury. In the case of an ongoing conspiracy, the limitations period runs from each new "overt act" in furtherance of the conspiracy that inflicts new and accumulating injury on the plaintiff. [Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321 (1971).] In rare cases, the theory of 'fraudulent concealment' may equitably 'toll' (ie, pause) the limitations period where defendants have taken affirmative actions to prevent a plaintiff from learning of their cause of action. The limitations period can also be tolled for other statutory reasons, such as a pending government action for the same conduct. [15 U.S.C. 16(i).] In addition, the statute of limitations for a plaintiff who opts out of a purported class action remains tolled during pendency of the class claim. [American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974).] Last year, the Supreme Court clarified that this rule applies only to opt-out plaintiffs who seek to pursue damages claims on their own behalf, and not to plaintiffs who seek to re-assert class claims after a prior class has failed to achieve certification for the same issues. [China Agritech v. Resh, 138 S. Ct. 1800 (2018).]

Limitations periods under state antitrust laws vary from as few as one year to as many as six. A small handful of states do not specify a limitations period for antitrust claims.

## 5. Disclosure/Discovery

### 5.1 Disclosure/Discovery Procedure

The exchange of evidence between parties in federal antitrust litigation is governed by the general rules for discovery in federal court. Those rules contain a permissive standard for what evidence parties may request: "any nonprivileged matter that is relevant to any party's claim or defense," whether or not that information would ultimately be admissible at trial. [Fed. R. Civ. P. 26(b)(1).] Parties may request production of documents and electronically stored information, written responses to questions and requests for admissions, as well



as depositions of witnesses of fact or corporate representatives. Non-US litigants may, in some circumstances, need to provide disclosure that would not be permitted under their own country's laws. In addition, litigants may serve subpoenas seeking discovery from non-litigants.

Under these standards, discovery in US federal litigation is, in general, more burdensome, costly, and time-consuming than in many other jurisdictions. In the antitrust context, discovery can be particularly costly and time-consuming, as large putative classes of plaintiffs raise a variety of complex issues. That said, there are important constraints on the scope of discovery. Since 2015, the federal rules have limited permissible discovery to relevant information that is "proportional to the needs of the case." Parties may resist discovery requests on a variety of grounds, including that the requested materials fail the relevance standard or that compliance would be unduly burdensome under the circumstances.

In addition, the Supreme Court – recognising the practical risk that the burdens of antitrust discovery can push defendants to settle even 'anaemic' cases – has instructed lower courts to take seriously their gatekeeping function at the motion to dismiss stage (see **4.1 Strikeout/Summary Judgment**). In 2007, the Supreme Court clarified that to survive a motion to dismiss an antitrust claim on the pleadings, plaintiffs must set forth specific facts (accepted as true) "plausibly suggesting (not merely consistent with) agreement." [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).] This decision has had the effect of raising the bar on what plaintiffs must allege, frequently before being permitted to request discovery from defendants.

## 5.2 Legal Professional Privilege

The attorney-client privilege protects from the discovery process confidential communications between an attorney and client made for the primary purpose of seeking or providing legal advice. In the corporate setting, the attorney-client privilege extends to communications between attorneys and those employees who "will possess the information needed by the corporation's lawyers" in order to provide sound legal advice, as well as to those employees who "will put into effect" that advice. [*Upjohn Co. v. United States*, 449 U.S. 383 (1981).] Importantly, in-house counsel communications may be protected by attorney-client privilege under US law. Further, the privilege protects attorney-client communications made with a business purpose, so long as at least "one of the significant purposes" of the communication was obtaining or providing legal advice. [*In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014).] And internal corporate communications that do not include attorneys may sometimes remain subject to the privilege, including where those communications reflect an attorney's legal advice or a non-attorney – such as in a compliance or internal audit role – is gathering facts at the direction of an attorney for

the purpose of facilitating the attorney's provision of legal advice to the company.

That said, there are some important limitations on the scope of the privilege protection. For example, only the substance of legal advice (or of a request for advice) is protected. The fact of an attorney-client communication is not protected. Nor are underlying materials or information shared between attorney and client for the purpose of giving or receiving advice protected by the privilege. In addition, a party generally waives privilege protection by failing to maintain the confidentiality of legal advice, including by sharing that advice with third parties. There is no exception to this waiver for voluntary disclosure of privileged communications to the government (though importantly, the US antitrust authorities do not demand an investigative target hand over privileged materials to be seen as cooperative in a government investigation). And the privilege does not protect attorney-client communications made for the purpose of committing or furthering a crime or fraud. [*United States v. Zolin*, 491 U.S. 554 (1989).]

The 'common interest' protection – an exception to the rule that sharing legal advice with third parties results in a privilege waiver – safeguards against the compelled disclosure of communications between parties and their respective counsel when aligned in a common legal interest. There is some disagreement among the federal appeals courts as to whether the common interest protection is limited to communications between parties when threatened by litigation; a number of appeals courts recognise the protection shields the "full range of communications otherwise shielded by the attorney-client privilege" without regard to whether litigation is threatened. [*Schaeffler v. United States*, 806 F.3d 34, 40,42 (2d Cir. 2015).] In federal antitrust litigation, co-defendants regularly invoke the common interest protection to share materials and collaborate on defence strategy. Frequently, co-defendants will sign a joint defence agreement formalising that arrangement (but this step is not strictly required for the common interest protection to apply).

A related protection arises under the 'work-product' doctrine, which shields from disclosure materials "prepared in anticipation of litigation." [*Fed. R. Civ. P. 26(b)(3)*.] It protects both "documents and tangible things" and the "mental impressions, conclusions, opinions, or legal theories of a party's attorney." The work product doctrine is not an absolute bar to compulsory disclosure of qualifying materials. Rather, an adversary may ask the court to compel disclosure of work product by showing that the requesting party has a "substantial need" for the materials in order to prepare its case and that the party cannot, without "undue hardship," obtain through "other means" the "substantial equivalent" of the requested materials. [*Fed. R. Civ. P. 26(b)(3)(A)*]. In practical terms, however, this is a very challenging standard to meet.

### 5.3 Leniency Materials/Settlement Agreements

As described in 2.3 **Decisions of National Competition Authorities**, agreements to settle most forms of enforcement proceedings by the US federal antitrust authorities are typically made public in the course of a federal court's review of the proposed resolution. One exception to this general rule is for parties who qualify for leniency pursuant to the DOJ Antitrust Division's Corporate Leniency Policy. The Leniency Programme, a centrepiece of the Division's criminal cartel enforcement efforts for more than 25 years, accords immunity from criminal antitrust prosecution to corporations that report their role in a per se antitrust violation at an early stage and meet certain other conditions, including cooperating fully with the Division's prosecutions of co-conspirators and making restitution to injured parties. To encourage applicants to come forward, Division policy is to treat as confidential the identity of leniency applicants and the materials they provide. The Division acknowledges it will disclose the identity of a leniency applicant if ordered to do so by a court. But such an order would be unusual. While at least one appeals court has held that the Division must disclose leniency agreements pursuant to requests under the US Freedom of Information Act (FOIA), that court also recognised that details within those materials identifying a leniency recipient could be exempt from FOIA disclosure. [*Stolt-Nielsen Transportation Group Ltd. v. United States*, 534 F.3d 728 (D.C. Cir. 2008).]

That said, a conditional leniency recipient will likely identify itself to plaintiffs in follow-on civil litigation, in an effort to fulfil their restitution obligation under the Leniency Policy by cooperating with plaintiffs and earning the resulting detrebling of damages available under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA). In addition, public companies may face other legal obligations, such as under the securities laws, to disclose their status as the recipient of leniency.

## 6. Witness and Expert Evidence

### 6.1 Witnesses of Fact

Litigants in US federal court may rely on, and compel, testimony from witnesses of fact both before and during trial. Prior to trial, the principal tool for gathering the compulsory testimony of a witness is the deposition, in which the requesting litigant compels the witness to attend an in-person interview to provide sworn testimony in front of a judicial officer. Parties can also request that opposing parties respond to written questions, called 'interrogatories.' In either case, the court may compel the witness to respond under threat of sanction. During trial, there is a general preference for witnesses to provide live testimony so that the factfinder can evaluate the witness's credibility, and so the opposing party can cross-examine the witness. That said, deposition testimony may be admitted into evidence to con-

tradict or impeach testimony given during trial, or in some cases, if a witness is unavailable to testify in court.

### 6.2 Expert Evidence

The rules governing federal court litigation, including antitrust claims, permit parties to rely on expert evidence both before and during trial. In the antitrust context, the parties nearly always rely on one or more experts to establish (or challenge) key issues, including:

- whether a purported class of plaintiffs satisfies the requirements for certification,
- the appropriate contours of the relevant product market,
- a party's market power (or lack thereof), and
- the proper measure of damages.

Expert evidence will generally take the form of a written report prepared and signed by the expert (which must be provided to the opposing party prior to trial) as well as in-person testimony. [Fed. R. Civ. P. 26(a)(2).]

An expert's testimony is admissible as evidence only if the court determines that

- the expert's specialised knowledge will assist the factfinder;
- the testimony is based on sufficient facts or data;
- the testimony is the product of reliable principles and methods; and
- the expert has reliably applied these principles and methods to the facts of the case.

This assessment requires the court to scrutinise the expert's particular methods and their degree of acceptance in the relevant field. [See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).] Before or during trial, parties can challenge the admissibility of opposing expert testimony or dispute the validity of that testimony. Parties may depose opposing experts, cross-examine them at trial, and seek to introduce evidence that purports to conflict with an expert's conclusions.

## 7. Damages

### 7.1 Assessment of Damages

The Clayton Act does not provide for punitive damages. Instead, plaintiffs who suffer antitrust injury may recover three times their actual damages (known as 'treble damages'). For consumer plaintiffs injured by a price-fixing or a market-division cartel, common measures of damages include the amount of the overcharge caused by the conspiracy, measured by identifying the price they would have paid but for the restraint. For competitor plaintiffs injured by a monopolist's exclusionary conduct, a common measure of damages is the plaintiff's resulting lost profits. As with

the other elements of a civil antitrust action, plaintiffs must establish the value of their injury by a preponderance of the evidence standard. The Clayton Act permits damages assessments to be made “in the aggregate” according to “statistical or sampling methods” accepted by the court. [15 U.S.C. § 15d.] In practice, antitrust plaintiffs nearly always rely on an expert to quantify damages according to an accepted model. Plaintiffs must also prove that the damages were not caused by separate and independent factors – ie, they are required to disaggregate the losses caused by the alleged antitrust violation.

A statutory exception to the treble damages rule exists for defendants who successfully receive leniency from prosecution under the Division’s Leniency Policy. Under the ACPERA leniency recipients who provide ‘satisfactory cooperation’ to plaintiffs in follow-on civil litigation may have their damages limited to actual damages, rather than treble damages. Courts have not assessed with any precision what constitutes a defendant’s satisfactory cooperation, but defendants can expect that to receive what is known as ‘ACPERA credit’ they will need to provide evidence to plaintiffs in support of their antitrust claims.

## 7.2 ‘Passing-on’ Defences

As set forth in 2.5 **Direct and Indirect Purchasers**, indirect purchasers lack ‘standing’ to pursue damages claims under the federal antitrust laws. The corollary to this rule is the further limitation that defendants in federal antitrust litigation cannot escape liability by establishing that direct purchasers have passed on to indirect purchasers some or all of an anticompetitive overcharge. [Hanover Shoe v. United Shoe Machinery, 392 U.S. 481 (1968).] That said, a number of the state antitrust laws authorising antitrust claims by indirect purchasers provide that courts should take steps to avoid duplicative recovery, including by apportioning damages between direct and indirect purchasers.

## 7.3 Interest

Section 4 of the Clayton Act enables plaintiffs to recover interest on damages awards. Pre-judgment interest awards are discretionary: a federal district court may award interest on actual damages – but not for the full treble damages available under the antitrust laws – for any period from the date of service of the plaintiff’s pleading to the date of judgment, when just in the circumstances. That standard considers whether defendants acted intentionally to delay resolution of the proceedings. [15 U.S.C. 15(a).] By contrast, post-judgment interest is mandatory: the court must award interest on a damages award until defendant(s) transfer the funds to the plaintiff(s). The interest – at a rate equal to the weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of the judgment – is calculated from the date of the entry of judgment and is compounded annually. [28 U.S.C. 1961.] Each state’s anti-

trust laws provides for post-judgment interest; the law on pre-judgment interest varies from state to state.

# 8. Liability and Contribution

## 8.1 Joint and Several Liability

US antitrust law follows the common law tort principle of joint and several liability, which means each defendant can be responsible for paying the entire damage award for the conspiracy as a whole (not just for damages to purchasers with whom a given defendant transacted).

But as discussed in 5.3 **Leniency Materials/Settlement Agreements** and 7.1 **Assessment of Damages**, successful recipients of leniency from Division antitrust prosecution that provide “satisfactory cooperation” to follow-on litigants may have their civil damages claim limited to actual damages under ACPERA. Such a defendant will not be liable to plaintiffs on a joint-and-several basis for the harm from the entire conspiracy but will, instead, be held liable only for their own harm to the plaintiffs.

## 8.2 Contribution

The US Supreme Court has ruled that a defendant found jointly and severally liable under the federal antitrust laws for treble damages, costs, and attorneys’ fees has no right to seek contribution from co-conspirators for their share of the damages award. [Texas Ind. Inc. v. Radcliffe Materials, Inc., 451 U.S. 630 (1981).] Rather, a single defendant may have to pay the entire damages award for three times the harm caused by the entire conspiracy. A court may subtract from the damages calculation any settlement other defendants have paid to resolve the litigation, but those settlement amounts are likely to reflect a discount to the settling defendants. This dynamic can create pressure on defendants to settle before trial, by exposing non-settling defendants to the risk of bearing a disproportionate share of liability for their role in a multi-party conspiracy. Courts do not permit co-defendants to agree to indemnify each other for liability but have generally upheld agreements between them to pay a proportionate share of any judgment based on – eg, each defendant’s market share.

# 9. Other Remedies

## 9.1 Injunctions

The Clayton Act permits private plaintiffs to sue for injunctive relief against any “threatened loss or damage by a violation of the antitrust laws.” [15 U.S.C. § 26.] To obtain injunctive relief, a plaintiff must show that:

- it has suffered irreparable injury that cannot be compensated for by other remedies, such as monetary damages;

- the balance of hardships between the plaintiff and defendant favour an injunction; and
- the injunction is in the public interest. [eBay Inc. v. MercExchange, LLC, 547 U.S. 388 (2006).]

The Clayton Act also allows plaintiffs to seek interim relief – in the form of a preliminary injunction that can be obtained prior to trial – if the plaintiff is able to show a “likelihood of success on the merits” of its claim. [N. Am. Soccer League, LLC v. United States Soccer Federation, Inc., 883 F.3d 32 (2d Cir. 2018).] A preliminary injunction requires a hearing and notice to the opposing party (although in exceptional circumstances parties can seek a temporary restraining order without such notice or a hearing). [Fed. R. Civ. P. 65.] The party seeking a preliminary injunction must post a security bond to compensate the opposing party if the injunction is found to have been unwarranted. Notably, the bar on damages claims by indirect purchasers under the federal antitrust laws does not extend to claims for injunctive relief.

### 9.2 Alternative Dispute Resolution

Alternative dispute resolution is available in antitrust litigation on similar bases as it is in other federal court litigation. Federal judicial policy is to favour arbitration, as a matter of contract between parties. While the courts cannot compel parties to arbitrate their disputes in the absence of an agreement between them to do so, the courts will rigorously enforce arbitration agreements according to their terms. In recent years, the US Supreme Court has applied that principle to arbitration agreements in boilerplate consumer contracts, in ways that have important consequences to private antitrust litigants. The Court has held that parties may not be compelled to arbitrate on a class-wide basis, in the absence of an agreement to do so. [Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662 (2010).] A year later, the Court invalidated state laws seeking to bar enforcement of class arbitration waivers in consumer agreements. [AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).] These rulings could make it more challenging for consumers to pursue class-wide recovery under the antitrust laws. Indeed, most recently, the Supreme Court affirmed – in the antitrust context – that contractual waiver of class arbitration is enforceable even if the cost of individually arbitrating exceeds a claimant’s potential for recovery. [American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013).]

## 10. Funding and Costs

### 10.1 Litigation Funding

Litigation funding is a developing industry in the US and is perhaps less evolved here than in other jurisdictions. Litigation funding may be available to support civil litigation under the antitrust laws. But funding arrangements may be at risk of challenge under the laws of at least some states, barring ‘champerty’, the practice of acquiring an interest in

pursuing a third party’s cause of action, in exchange for a portion of the proceeds if litigation succeeds. [See –eg, *Boling v. Prospect Funding Holdings LLC*, 771 Fed Appx. 562 (6th Cir. 2019).] Regardless, counsel for plaintiffs pursuing antitrust litigation under federal or state laws on a class-wide basis will likely act for plaintiffs on a contingency basis, receiving compensation only from the proceeds of any recovery to the class.

### 10.2 Costs

The Clayton Act provides that plaintiffs “shall recover” the costs associated with successfully litigating their claim, including “a reasonable attorney’s fee.” [15 U.S.C. 15(a).] In the normal course, plaintiffs’ lawyers acting for a purported class work on contingency and seek to recover a percentage of any court-approved class settlement before trial. By contrast, defendants have no general statutory right to recover their costs of successfully defending a federal antitrust litigation. The lone means of recovering defence costs is for the court to impose monetary sanctions on plaintiffs under the federal rules, for example, based on a finding that plaintiffs (or their attorneys) have asserted frivolous claims or arguments. Sanctions – particularly significant monetary penalties – are exceedingly rare, and an unreliable source of recovery of defence costs. The lack of defence costs to serve as a headwind on speculative antitrust claims is one reason the courts take seriously their gatekeeper role in assessing defendants’ threshold challenges to the sufficiency of an antitrust complaint.

In the normal course, courts will not order a litigant to post security for its opponent’s litigation costs. The exception is that parties seeking preliminary injunctive relief must provide a security in an amount sufficient to pay the costs and damages sustained if the party is found to have been wrongfully enjoined or restrained. [Fed. R. Civ. P. 65.]

## 11. Appeals

### 11.1 Basis of Appeal

A litigant adversely affected by a decision of a federal district court may seek to appeal that decision to an intermediate federal court of appeals. Parties may generally appeal a lower court’s conclusions of law according to a *de novo* standard, under which the appeals court will analyse the legal question without deferring to the district court’s analysis. While an appellant may also challenge a lower court’s findings of fact, the appeals court will apply a far more deferential standard of review, generally leaving fact conclusions undisturbed unless clearly erroneous.

Whether, and when, a party may challenge a district court decision can take on great significance, particularly in complex litigation such as an antitrust class action. A party generally has the right to appeal “final decisions of the district

courts.” [28 U.S.C. § 1291.] A decision is “final” if it “ends the litigation on the merits.” [Caitlin v. United States, 324 U.S. 229 (1945).] The policy of the ‘final judgment rule’ is to promote efficiency and limit delay, by seeking to ensure that, where possible, all challenges to lower court decision are resolved in a single appeal. By contrast, only in limited circumstances will courts permit appeals of ‘interlocutory’ orders that do not finally resolve the dispute. In general, interlocutory appeals are reserved for “controlling questions of law” about which there is “substantial ground for difference of opinion” and resolution of which would “materially advance the ultimate termination of the litigation.” [28 U.S.C. § 1292(b).] The federal rules authorise – but do not require – interlocutory appeal of a decision on class certification. [Fed. R. Civ. P. 23(f).] Parties who lose on appeal may petition the US Supreme Court for final review of the appellate decision, but as a practical matter, Supreme Court review is rarely granted.

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