# The Private Competition Enforcement Review

Ninth Edition

Editor
Ilene Knable Gotts

Law Business Research

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# The Private Competition Enforcement Review

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Ilene Knable Gotts

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# EDITOR'S PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia has been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: Brazil has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the last decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on') to public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent

(e.g., Nigeria) and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. Also, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government is undertaking a comprehensive review and is now considering the implementation of significant changes to its private enforcement law. The most significant developments, though, are in Europe as the EU Member States prepare legislative changes to implement the EU's directive on private enforcement into their national laws. The most significant areas to be standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period, and privilege. Member States are likely to continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculation. Even without this directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there have been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a 'preferred' jurisdiction for commencing private competition claims. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have also taken steps to facilitate collective action or class-action legislation. In China, consumer associations are likely to become more active in the future in bringing actions to serve the 'public interest'.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages

awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, for example, Germany and Sweden). Some jurisdictions, such as Hungary, seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the

Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct. And in Israel a court recently recognised the right to obtain additional damages on the basis of 'unjust enrichment' law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions have not been available except to organisations formed to represent consumer members; a new class action law will come into effect by 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that

discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney-client, attorney work product or joint work product privileges in Japan; limited recognition of privilege in Germany; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

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Wachtell, Lipton, Rosen & Katz
New York
February 2016

# Chapter 11

# ENGLAND & WALES

*Peter Scott, Mark Simpson and James Flett*[1]

## I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

England and Wales continues to grow as a leading jurisdiction for antitrust litigation in Europe.[2] This is, in particular, the case for claims that 'follow-on' from infringement decisions by the European Commission and the Consumer and Markets Authority (CMA) but a similar increase is also evident in stand-alone actions between commercial parties.[3]

It remains the case that there is still no final judgment in a cartel damages 'follow-on' claim in England. The high-profile *Cooper Tire*[4] and *National Grid*[5] cases settled in 2014 at points very late in the process – the remaining defendant in the *Cooper Tire* claim in respect of the *Rubber* cartel (Dow Chemical) settled only during trial and the defendants to the *National Grid* claim in respect of the *Gas Insulated Switchgear* cartel settled the week before the trial was due to start.

Nonetheless, other prominent claims are progressing through the courts, including a substantial claim by many high street retailers and supermarkets against MasterCard

1 Peter Scott and Mark Simpson are partners and James Flett is a senior associate at Norton Rose Fulbright LLP. The authors acknowledge the contribution of Amanda Town of Norton Rose Fulbright LLP to the eighth edition.

2 References throughout this chapter to 'England' should be read to mean England and Wales.

3 See, for example, the recent case of *Dahabshiil Transfer Services Limited v. Barclays Bank plc; Harada Ltd & Berkeley Credit and Guarantee Limited v. Barclays Bank plc* [2013] EWHC 3379 (Ch).

4 *Cooper Tire and Rubber Company Europe Ltd and others v. Dow Deutschland Inc and others*; *Cooper Tire and Rubber Company and others v. Shell Chemicals UK Limited and others*.

5 *National Grid Electricity Transmission plc v. ABB Ltd and others* [2013] EWHC 822 (Ch).

and Visa in respect of interchange fees. These and many other actions could have been brought in a number of potential jurisdictions in the EU, but where there is a choice of jurisdiction, England is established as a claimant's forum of choice.[6] Much of this activity is attributable to features of the English system that make it an attractive jurisdiction for bringing private claims: the ease with which claims can be issued, the permissive approach taken by the English courts to the rules that govern jurisdiction, wide and early disclosure of documents, the expertise of the judiciary assigned to competition claims, active case management and the prospect of costs recovery.

Yet these features only partially explain why England has seen such a marked increase in these types of claims and of competition litigation more generally. Perhaps more fundamentally, there is an increasing recognition by corporate entities – and it is actively encouraged by the European Commission and the CMA – that where they are the victim of a competition law infringement, they should take private action in the courts to recover losses. Indeed, a combination of the economic downturn and innovative fee arrangements by certain firms of solicitors specialising in these types of claims (who might offer no-win, no-fee conditional fee arrangements or 'damages-based agreements', coupled with the possibility of third-party funding, which reduce the risk associated with litigation for claimants) has created an environment where follow-on claims can be an attractive business proposition.

The High Court – for the moment – is the preferred forum for issuing proceedings, despite the existence of the Competition Appeal Tribunal (CAT) as a specialist body with specific jurisdiction concerning follow-on damages claims. This preference has been due to the relative ease of issuing proceedings in the High Court in comparison with the CAT, and the confidence that litigants have in High Court judges to deal with complex commercial litigation. It is also influenced by a string of recent decisions on procedural points, in which the CAT and the Court of Appeal have narrowly interpreted the CAT's jurisdiction and its power to grant special permission to bring claims.

However, this position changed following the entry into force of the Consumer Rights Act 2015 on 1 October 2015. The Act removed a number of limitations on the jurisdiction of the CAT over competition claims and this should establish its prominence as the primary venue for private competition litigation in England. In particular, the CAT can now hear stand-alone claims (i.e., claims that are not based on a prior infringement finding) and applications for injunctions (rather than just damages claims). This means claims will be able to be started in the CAT prior to a decision of a competition regulator.

6 For example, there are claims that have been, or still are, afoot in the English courts in relation to European Commission cartel decisions concerning marine hoses, vitamins, carbon and graphite products, synthetic rubber, paraffin waxes, gas insulated switchgears, LCD screens, methionine, air cargo, industrial bags, construction recruitment services, copper plumbing tubes, copper fittings, interchange, animal-feed phosphates, automotive glass, smart card chips, domestic-size gas meters and even Italian jet fuel; and in relation to abuse of dominance decisions concerning water supply, bus services, heartburn medicine and hypertension medicine.

The most controversial change in the Consumer Rights Act is the introduction of an 'opt-out' procedure for collective actions for competition claims, a significant expansion on the limited collective redress regime that it replaces. This innovation is significant in its contrast with the 'opt-in' regime recommended by the European Commission in its Recommendation on collective redress.[7] This is likely to further increase the attraction of the English courts to potential claimants (although the uncertainty surrounding the transitional limitation rules that apply to this new regime may have the effect that claims are not issued until they are clarified).

Meanwhile, at EU level, the European Parliament has approved a new directive on antitrust damages actions (the EU Damages Directive),[8] which entered into force on 26 December 2014 following approval by the European Council. The EU Damages Directive requires EU Member States to meet a minimum legislative standard for competition litigation within two years. The EU Damages Directive will not have as significant an effect in England as in some other Member States because in most areas (including disclosure of documents and limitation) the position in England is currently advanced beyond the standard that is mandated by the Directive. However, the EU Damages Directive does nonetheless make some important changes that will require the UK government to propose further legislative amendments, such as the introduction of a rebuttable presumption that cartels cause harm and the exclusion of companies that have been granted 100 per cent immunity from the principle of joint and several liability for the loss caused by a competition law infringement.

While the precise impact of these reforms on the state of private enforcement of competition law in England remains difficult to predict, what seems certain is that activity in this area will continue to increase as we have noted in previous editions.

## II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

### i Basis of action

Private actions for breach of EU or UK competition rules can be commenced in the High Court or in the specialist CAT. In the High Court, proceedings can be issued in either the Chancery Division or the Commercial Court.[9]

7 As set out in the European Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

8 Directive of the European Parliament and of the Council of certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union (2014/104/EU).

9 There is provision for transfer of competition claims between the High Court and the CAT, and vice versa: see Civil Procedure Rules (CPR), Rule 30 and CAT Rules, Rule 48. The High Court recently adopted this process in *Sainsbury's v. Mastercard* [2015] EWHC 3472 (Ch) when it concluded that the case was appropriate for transfer to the CAT.

Claims in the High Court are most commonly brought on the basis of the tort of breach of statutory duty, being a breach of the duty not to act contrary to the competition rules set out in Chapters I and II of the Competition Act 1998 or Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).[10] However, it is open to claimants to found their claims on alternative bases. For example the High Court has ruled that there is no reason why follow-on competition law claims should always be structured as a claim for breach of statutory duty and that follow-on actions could, alternatively, be founded on a 'conspiracy to use unlawful means'.[11]

Claims in the CAT are brought under Section 47A of the Competition Act, which permits a person who has suffered loss or damage as a result of a competition law infringement to bring an action for damages or any other monetary claim. The Consumer Rights Act has amended Section 47A to give the CAT a new power to order injunctions.

### ii Follow-on and stand-alone actions

***Follow-on actions***

'Follow-on' actions can be started in the High Court or the CAT where there is a pre-existing infringement decision of the European Commission, the CMA or one of the UK sectoral regulators in respect of a breach of EU or UK competition law. The CAT's jurisdiction had previously been limited to follow-on claims – such that a claim cannot be made in the CAT until a decision by a competition authority has established that the prohibition in question has been infringed. However, the Consumer Rights Act has extended the CAT's jurisdiction to allow it to hear stand-alone claims, either as issued in the CAT or as referred to the CAT from the High Court under the currently dormant procedure empowered by Section 16 of the Enterprise Act 2002. The Consumer

10 The obligations on undertakings not to infringe Articles 101 and 102 are 'enforceable Community rights' under Section 2(1) of the European Communities Act 1972, which provides for their legal effect and enforceability in the United Kingdom.

11 *WH Newson Holding v. IMI and others* [2012] EWHC 3680 (Ch), judgment of 19 December 2012 – although following the decision of the Court of Appeal in *Emerald Supplies Limited v. British Airways PLC* [2015] EWCA Civ. 1024, the circumstances in which this cause of action is available will be more limited. The conspiracy claim in *Emerald Supplies* was struck out on the basis of a lack of intent to injure the claimants. The Court of Appeal held that there could be no intention to injure where there are multiple layers of a supply chain such that the defendant was 'not even sure that the claimant will suffer any loss at all'. This means that a conspiracy claim will only succeed if the claimant can show (1) that it is unable to pass on any overcharge, or (2) that it is both an end consumer and direct purchaser of the cartelised product. We expect the claimants to appeal the Court of Appeal judgment to the Supreme Court.

Rights Act has also extended the CAT's jurisdiction so it may grant other forms of relief including injunctive relief and has introduced a new fast-track procedure for certain cases.[12]

There have now been a number of follow-on actions commenced in the High Court and a smaller number in the CAT, although a case is yet to result in a final judgment.[13]

***Stand-alone actions***

Stand-alone actions based on a breach of EU or UK competition law remain relatively rare and few have been successfully pursued to trial. In the absence of a pre-existing decision by a competition authority, alleged competition infringements have more frequently been pleaded as a defence to claims on other grounds (e.g., intellectual property infringements), including in applications for summary judgment.[14]

To date, only one stand-alone claim has been successful in the High Court, although it was subsequently overturned by the Court of Appeal (*Attheraces Limited v. The British Horseracing Board*).[15] However, this lack of apparent success has not deterred stand-alone claims altogether. There are a number of prominent cases which, although technically stand-alone claims, still rely on an anticipated finding of an infringement by the European Commission. For example, in *Toshiba Carrier UK Limited and others v. KME Yorkshire Limited and others*[16] actions were brought against defendants that were not addressees of the European Commission's cartel decision. The High Court (and subsequently the Court of Appeal) allowed the claims to proceed as the claimants had alleged sufficiently clearly that KME Yorkshire Ltd had participated in, and implemented, the cartel arrangements, with knowledge of the cartel agreement.[17]

Despite the limited number of stand-alone cases, the High Court has granted interim injunctions in cases alleging competition law breaches, including in *Dahabshiil Transfer Services Limited v. Barclays Bank plc; Harada Ltd & Berkeley Credit and Guarantee Limited v. Barclays Bank plc*,[18] *Adidas-Salomon v. Draper*[19] and *Software Cellular Network*

12 The first fast-track stand-alone injunction application was issued in the CAT in late 2015 – *NCRQ Ltd v. Institution of Occupational Safety and Health* (Case No.: 1242/5/7/15).

13 The *Cooper Tire* claim settled during trial.

14 For example, in *Jones v. Ricoh UK Limited* [2010] EWHC 1743 (Ch), the High Court granted summary judgment for the defendant on the basis that the agreement between the parties underlying the dispute was void and unenforceable by virtue of Article 101 of the TFEU.

15 [2007] EWCA Civ 38, judgment of 2 February 2007.

16 *Toshiba Carrier UK Ltd and others v. KME Yorkshire Ltd and others* [2011] EWHC 2665 (Ch), judgment of October 2011.

17 [2012] EWCA Civ 1190, judgment of 13 September 2012.

18 [2013] EWHC 3379 (Ch).

19 [2006] EWHC 1318 (Ch).

*Limited v. T-Mobile (UK) Limited*.[20] None of these cases proceeded to a full trial.[21] However, these cases are rare because of the challenges applicants face in competition law cases in meeting the standard for injunctive relief ('a real prospect of success' at trial) without the support of an infringement decision by a competition authority. This is particularly the case in abuse of dominance cases, where applicants will need to file sophisticated economic evidence to prove market definition in relation to the alleged abusive conduct.[22]

The Consumer Rights Act gives the CAT a new power to order injunctions but claimants will face the same issues making their case for an interim injunction in the CAT.

### iii Limitation

Proceedings in the High Court are subject to the general rule on limitation that applies to tort claims, which requires that a claim must be brought within six years from the date on which the cause of action accrued.[23] The limitation period for tort claims starts from the date on which the damage was suffered by the claimant, but it is generally accepted that one of the exceptions to the general rule will apply to claims relating to cartels or other 'secret' activities, where the period of limitation will not begin to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it.[24] In follow-on damages cases, this may not be until a competition authority has announced a decision or reached a settlement with a cartel participant. The operation of the limitation provisions – and in particular the operation of the deliberate concealment exception in Section 32(1)(b) was recently considered by the High Court in *Arcadia v. Visa*.[25] This is a claim for damages by a number of high street retailers against Visa, claiming that by setting multilateral interchange fees paid by banks within the Visa transaction system Visa had infringed competition law. The claim sought to recover damages for excessive fees going back to 1977. The court held that the limitation rules applied and excluded much of the claim. In particular, the exception to the six-year limitation rule for wilful 'concealment' of relevant facts should be construed narrowly

20 [2007] EWHC 1790 (Ch).

21 Competition law grounds were also relevant to injunctions granted in two earlier cases: *Jobserve Limited v. Network Multimedia Television Limited* [2001] UKCLR 814 (upheld by the Court of Appeal [2002] UKCLR 184) and *LauritzenCool AB v. Lady Navigation Inc* [2004] EWHC 2607 (upheld by the Court of Appeal [2005] EWCA Civ 579).

22 See *Chemistree Homecare Ltd v. AbbVie Ltd* [2013] EWHC 264 (Ch), judgment of 11 February 2013.

23 Limitation Act 1980, Section 2. Contribution claims are subject to a two-year limitation period from the date on which that right accrued under the Civil Liability (Contribution) Act 1978 (i.e., the date of judgment, arbitration award or settlement agreement, whichever applies – Limitation Act 1980, Section 10).

24 Section 32 of the Limitation Act 1980.

25 *Arcadia Group Brands Ltd and others v. Visa Inc and others* [2014] EWHC 3561 (Comm).

and only applies to facts that are essential to the cause of action. Concealment of facts that improve a claimant's claim but without which the claim could still be pleaded is insufficient to postpone the limitation period. This decision is currently under appeal.[26]

The *Arcadia v. Visa* judgment – where the fact that interchange fees were set by Visa was always well known by merchants – is of limited application to cartel cases as, by the very nature of cartels, the key facts as to their existence and effects will be unknown until they are uncovered. But what the judgment does suggest is that if a claimant has enough facts to support the pleading of a *prima facie* cause of action it would be advisable to do so as soon as possible rather than waiting for further facts to emerge. Where jurisdiction is not in issue, claimants may therefore be expected to have proactive recourse to the procedures in the CPR to make requests for information and pre-action disclosure in order to advance their claim.

There were previously special limitation rules that applied in the CAT that had the effect of making the High Court the favourable forum for claimants. The position has now been harmonised with that of the High Court by the Consumer Rights Act, which introduced a new Section 47E of the Competition Act. This means that the limitation period in the CAT is now six years from the date on which the cause of action accrued.

In addition, the Consumer Rights Act includes new limitation provisions for collective actions under Section 47B of the Competition Act. The standard six-year limitation period will be suspended when a collective claim is issued. This is because a collective claim will only be allowed to proceed once it has obtained approval in the form of a collective proceedings order from the court (i.e., similar to 'certification' in the US and Canadian systems). This process will take some time and in the absence of a suspension rule could result in the limitation period for an individual claim expiring in the period between issue of a collective claim and issue of the collective proceedings order by the court. This means that individuals should not be required to issue protective claims under Section 47A to protect the limitation position in the event that the collective proceedings fail.

However, the Consumer Rights Act also contains a transitional rule whereby the old limitation rules continue to apply to claims 'arising' before 1 October 2015. The limitation rule provides that these claims can be made within a period of two years beginning from the later of (1) the date on which the decision can no longer be appealed (including the determination of any appeals), or (2) the date on which the action accrued.[27] Arguably this has the effect that claims relating to pre-1 October 2015 cartels can only be commenced in the CAT once the infringement decision has become final, unless the CAT grants special permission.[28] It is unclear how the CAT will apply these limitation rules; this uncertainty is likely to deter claims until it is resolved.

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26 A3/2014/3813 *Arcadia Group Brands Limited & ors v. Visa Inc. & ors*.

27 CAT Rules, Rule 31.

28 The operation of the old CAT limitation rules has been highly contentious with significant litigation on whether claims are out of time. Three cases clarified the issue: (1) *Emerson Electric v. Morgan Crucible* [2007] CAT 30; (2) *BCL Old Co v. BASF* [2008] CAT 24; [2009] EWCA Civ 434; and (3) *Deutsche Bahn v. Morgan Crucible* [2011] CAT 16. We have

The EU Damages Directive also includes provisions for the harmonisation of minimum limitation periods, requiring Member States to implement at least a five-year limitation period starting from the date on which the party had the possibility to discover that it had suffered harm from an infringement. The existing English limitation rules already exceed this requirement. However, the Directive contains additional provisions which will require implementation at UK level: (1) that the five-year limitation period should be suspended for the period of a competition authority's investigation, and (2) in any event, that claims should not be time-barred provided they are brought within one year after any infringement decision.

In relation to claims in the High Court, parties to potential litigation may be able to suspend time for the purposes of limitation by entering into a standstill or 'tolling' agreement.

## III EXTRATERRITORIALITY

### i Founding jurisdiction in the English courts

A foreign-domiciled defendant served with a claim issued in the English courts can indicate an intention to challenge the jurisdiction when acknowledging service. The jurisdictional challenge will then be heard at a preliminary hearing.

Whether the English courts (including the CAT) have jurisdiction to hear a private action concerning an infringement of competition law will, in general, be determined by the relevant EU law rules, as set out in Regulation 1215/2012 (the Judgments Regulation).[29] The general rule under the Judgments Regulation is that a defendant domiciled in an EU Member State should be sued in the courts of that Member State (Article 4). Two relevant exceptions apply to this general rule, allowing the possibility in certain circumstances of a competition claim being brought in the English courts against a defendant domiciled outside the UK and in another EU Member State – these exceptions are found in Article 7(2) and Article 8(1) of the Judgments Regulation.

Article 7(2) applies to tort claims, which will include a competition claim for breach of statutory duty. It provides that a defendant domiciled in a Member State can be sued in the courts of 'the place where the harmful event occurred or may occur'. General

not described this case law in detail in this chapter because it has been superseded by the Consumer Rights Act. Please refer to the seventh edition of this publication for a detailed discussion.

29 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Jurisdiction concerning claims against EFTA countries that are not also EU Member States will be determined according to the rules set out in the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which are substantively equivalent to those set out in the Judgments Regulation. For non-EU or EFTA-domiciled defendants, the jurisdiction of the English courts will be determined by the private international law rules found in the common law and the CPR that apply to applications to serve claims outside the UK.

tort case law has interpreted this phrase to mean the place where the damage occurred or the place where the event giving rise to the damage occurred. The application of Article 7(2) (then 5(3)) was considered in *Cooper Tire v. Shell* – a claim by a consortium of tyre manufacturers against 23 defendants said to have been involved in, or to have implemented, the synthetic rubber cartel. In hearing an application challenging jurisdiction, the High Court briefly considered the then Article 5(3) and commented that in the context of a Europe-wide cartel where cartel meetings (the event giving rise to the damage) took place in several countries, it would be difficult to contend that the place where the harmful event occurred was England, as the harmful events took place in a number of countries.[30] The court therefore considered that the claimants could only rely on the then Article 5(3) in relation to the place where the damage caused by the cartel occurred. However, were jurisdiction established on that basis, that would only be in respect of the damage that occurred in England (i.e., concerning sales in England).

The English courts have demonstrated a more liberal approach to the application of Article 8(1) to establish jurisdiction over follow-on claims against defendants domiciled in other Member States. Article 8(1) provides that where the jurisdiction of the English courts has been established over one defendant (e.g., under Article 4), additional defendants domiciled in other Member States can also be sued in England in the same action, provided the claims are 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'. The High Court's interpretation of this phrase in follow-on damages cases has allowed claimants to bring claims against all EU-domiciled cartel participants based on the identification of a single 'anchor' defendant in the jurisdiction, although there are now signs that the High Court could in the future apply greater scrutiny to the anchor defendant's link to the infringement.

The application of Article 8(1) (previously 6(1)) in follow-on cases was first considered in the context of a jurisdictional challenge in an interim hearing on a strike out application in *Provimi v. Roche*[31] – an action following on from the European Commission's 2001 *Vitamins* cartel decision. The claimants sought to rely on the UK subsidiaries of non-UK parent companies as Article 2 (anchor) defendants, so that jurisdiction could be established against the parent companies that were addressees of the Commission decision using the then Article 6(1). The UK subsidiaries were not addressees of the decision, and had not at any time had a trading relationship with the claimants. The High Court held that there was 'a good arguable case' that the 'so closely connected/risk of irreconcilable judgments' test was met in the context of a cartel follow-on action that named the members of a cartel as co-defendants, in particular because the claims for damages against the defendants arose out of the same cartel finding. More controversially, the High Court accepted that it was arguable that such claims could seek to recover losses against defendants that were subsidiaries of the parent

30 [2009] EWHC 2609 (Comm). The claimants had argued that the fact that the first and last cartel meetings had taken place in London was sufficient for the harmful event to have occurred in England.

31 *Provimi Ltd v. Roche Products Ltd and other actions* [2003] EWHC 961 (Comm).

companies addressed by the European Commission infringement decision, on the basis that they were part of the same 'undertaking' and so could be said to have (perhaps unknowingly) 'implemented' the cartel in England.[32] This allowed the claimants to claim against the English subsidiary (as the anchor defendant under Article 4 (then Article 2)) in the absence of any assertion about a trading relationship.

This approach was followed in the *Cooper Tire* case where the claimants sought to establish jurisdiction against non-English addressees of the European Commission's decision using the then Article 6(1) through including three anchor defendants that were domiciled in England and subsidiaries of the cartel participants (but not themselves addressees of the decision). The High Court confirmed that it was arguable that a subsidiary of a party named in an infringement decision could be liable in a follow-on damages claim even where it was not party to, or aware of, the infringement of competition law but based on mere implementation of the cartel arrangements. Specifically, the court held that the claimants had demonstrated that the anchor defendants had sold synthetic rubber within the jurisdiction, which provided a sufficiently arguable case that they had implemented the cartel arrangements. The defendants' subsequent appeal was dismissed as the claimants had alleged that each of the anchor defendant subsidiaries were party to the infringing arrangements. The Court of Appeal was able to side-step the issue of whether a subsidiary of a party named in an infringement decision could be potentially liable even where it was not party to or aware of an infringement of competition law. However, the Court observed that had implementation without knowledge been the sole allegation then it would have been inclined to make a reference to the ECJ.[33]

The point was considered again by the Court of Appeal in *Toshiba Carrier v. KME*.[34] The claimants attempted to found jurisdiction against the non-UK companies named in the European Commission's 2003 *Copper Tubes* cartel decision by including three English subsidiaries (which were not addressees of the decision). This was challenged by the defendants. At first instance, the High Court – following *Provimi* and *Cooper Tire* – found against the defendants and concluded that there was jurisdiction to hear the claims against the non-English defendants.[35] The case was subsequently appealed to the Court of Appeal, which upheld the High Court's decision on the basis that the claimants had alleged sufficiently clearly in their pleadings that, although the companies in question were not addressees of the infringement finding, they had participated in and implemented the cartel arrangements with knowledge of the cartel.[36]

The High Court's relatively liberal approach to jurisdiction has not been followed by the CAT. In the follow-on action of *Emerson Electric v. Morgan Crucible* (*Emerson IV*)[37] an English subsidiary (Mersen UK Portslade) of a non-English addressee of the

32 Under the EU concept of 'undertaking' parents and subsidiaries within a corporate group are considered part of a single economic entity for the purposes of competition law.

33 [2010] EWCA Civ 864.

34 Claim No. HC09C04733, High Court (Chancery Division).

35 [2011] EWCH 2665 (Ch).

36 [2012] EWCA Civ 1190.

37 [2011] CAT 4.

European Commission's decision in the *Carbon and Graphite Products* cartel applied to the CAT to dismiss certain claims for damages against it. The English subsidiary argued that there was no infringement decision against it on which the claimants could base their claims and furthermore that it was not referred to anywhere in the European Commission decision.[38] The CAT agreed and struck out the claim, subsequently refusing the claimants permission to appeal its judgment. Although the claimants were granted permission to appeal by the Court of Appeal on 11 October 2011, the decision to strike out the claim against Mersen UK was upheld on 28 November 2012.[39] Ultimately, on 1 May 2013, the CAT published a Supreme Court order consenting to the withdrawal by the applicants of their application to appeal, after a settlement was reached.[40] The judgment of the Court of Appeal upholding the CAT's decision in *Emerson IV* illustrates the limited application of Article 6(1) for founding jurisdiction in the CAT by identifying English subsidiaries that can be used as anchor defendants to found jurisdiction under Article 6(1) for claims against non-English addressees of a European Commission cartel decision. This follows from the (current) limitation of the CAT's jurisdiction in relation to follow-on claims, which requires that the subsidiary itself must have been found to infringe Article 101. The CAT's approach can be expected to change when it obtains jurisdiction to hear stand-alone claims in October 2015.

### ii Resisting jurisdiction of the English courts

The *lis pendens* provisions in the Judgments Regulation provide scope for a potential defendant to a competition action to issue declaratory proceedings pre-emptively in another jurisdiction (an 'Italian torpedo') and frustrate a claimant's attempt to bring the action in England.[41] Under Article 29, where proceedings involving the same cause of action between the same parties are brought in the courts of different Member States, any court other than the court first seized must stay its proceedings. This principle has been applied by the English courts without controversy in other contexts. Article 30 sets out a similar requirement in relation to related actions (i.e., not between the same parties) in the courts of different Member States, providing that any court other than the court first seized has the discretion to stay its own proceedings pending the outcome of the action in the first court seized.

38 The basis for the subsidiary's application was that pursuant to Subsection 47A(6)(d) of the Competition Act 1998, no claim for damages under Section 47A could be brought against it unless the European Commission had decided that it had infringed Article 101(1) TFEU.

39 *Emerson Electric Co & Ors v. Mersen UK Portslade Ltd* [2012] EWCA Civ 1559, judgment of 28 November 2012.

40 [2013] Case 1077/5/7/07, Supreme Court order of 15 April 2013.

41 The fear of pre-emptive action means that claimants will rarely send a letter before action to bring the claim to the attention of potential defendants (as would be expected in most commercial disputes as part of the 'pre-action protocol'). Rather, the normal course of action is to issue proceedings and only then seek to engage with the named defendants, usually offering agreement to a stay of proceedings to explore the possibility of an early settlement.

The application of the *lis pendens* provisions was considered by the High Court and the Court of Appeal in *Cooper Tire*. Upon becoming aware of a potential action in England, one of the cartel participants named in the Commission's decision issued proceedings in Italy seeking a negative declaratory judgment.[42] The claimants then issued proceedings in England against the other cartel participants and a slew of subsidiaries. One of the defendants in the English proceedings subsequently sought a stay on the basis of *lis pendens* pending the outcome of the Italian proceedings (i.e., under Article 30 (then Article 28), on the basis that the actions were related). The High Court accepted that there was a risk of irreconcilable judgments but declined to order a stay because the matters relevant to exercising its discretion under the then Article 28 weighed against doing so. In particular, the risk of irreconcilable judgments could not be avoided by a stay as some of the defendants had submitted to the English jurisdiction and those proceedings would continue. Further, the High Court considered that the delays in the Italian system meant it was more likely that the English court would arrive at a substantive decision before the case was finally decided in Italy. The approach of the High Court (subsequently approved by the Court of Appeal) suggests that the English courts will be reluctant to let a torpedo sink a damages claim unless the stricter terms of Article 29 apply to remove its discretion (i.e., the claim would need to be a mirror image both in substance and in identity of parties).

The Judgments Regulation might also allow jurisdiction to be resisted where a jurisdiction clause in a contract provides for the jurisdiction of the courts of another Member State (Article 25). The application of this provision to competition actions was considered in *Provimi*, where some of the vitamins supply contracts included exclusive jurisdiction clauses naming courts in other Member States. However, the High Court concluded that by referring to 'disputes arising out of' the sales contracts, those clauses were too narrow to cover cartel damages claims. This suggests that a jurisdiction clause could only be relied on to oust the jurisdiction of the English courts if it unambiguously refers to competition or tort claims (or both).[43]

### iii Applicable law

An issue related to, but separate from, jurisdiction is 'applicable law', which arises in a case involving a tort that contains a foreign element. 'Applicable law' refers to the court's choice of which law to apply in determining the substance of a claim. Although this subject is complex, it is worth summarising the considerations that apply in determining applicable law in the context of competition law claims.

Applicable law can arise as an issue in competition law actions because infringements (e.g., cartels) can often have effects in more than one jurisdiction and the national laws that apply to their determination can vary considerably between different

42 The application in Italy sought a declaration that: (1) there was no cartel; (2) if there was, the applicant was not a party to the cartel; or (3) even if the applicant was involved in a cartel, the tyre manufacturers had not suffered any loss.

43 Any clause relied upon to found jurisdiction in the English courts for a competition claim would therefore need to be tightly drafted to ensure it covers a competition action.

Member States. This makes the question of which law should be applied to questions of substantive law – for example, issues such as causation, attribution of liability, the nature of the remedies that can be awarded and rules relating to settlements[44] – an important consideration for claimants and defendants that can provide incentives for 'applicable law shopping'. Two particular issues where there are significant divergences in the laws of Member States could turn on applicable law in competition law claims: limitation (where applicable periods in the EU range from one year to anything up to 10 years or more); and passing on (which has been expressly accepted as applying in the law of some Member States, and may be more uncertain in others). For both issues, a court's acceptance of one law over another could effectively extinguish a claim, although an English court is yet to consider arguments that a foreign law should apply to a competition law claim brought in the jurisdiction.

The choice of law rules has now been harmonised across the EU by the Rome II Regulation.[45] Rome II includes a specific provision for competition law claims. This provides a general rule that the applicable law shall be the law of the country where the market is, or is likely to be, affected.[46] Most importantly for the purposes of infringements that might have effects in, or defendants from, multiple EU Member States, this rule is subject to an exception so that the applicable law may be the law of the forum in the case of either the market affected being in more than one country, or where there are co-defendants, for example where Article 8(1) of the Judgments Regulation has been employed.[47] In both situations the claimant can choose to base the claim on the law of the forum, as long the market of the Member State of that court has also been 'directly and substantially affected'.

However, the rule provided by Rome II has had little practical relevance to cases before the English courts to date as it only applies to damage that has occurred after 10 January 2009.[48] It will therefore be some time before Rome II is applied by the courts. The question of applicable law in the cases currently before the English courts – in many cases relating to cartels found to have operated as far back as the 1980s – falls to be determined under the English tort law rules on choice of law, which are a mix of common law and statute. In summary, claims relating to conduct and damage prior to 1 May 1996 will be determined under the common law rule of 'double actionability',[49]

44 While EU law confers rights on individuals to seek redress for harm caused by infringements of EU competition law rules (rights which are 'directly effective') (see Section IV, *supra*) the manner in which those rights are enforceable before national courts is a matter for each Member State's national laws.

45 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal L199/40.

46 Regulation (EC) No. 864/2007, Article 6(a).

47 Regulation (EC) No. 864/2007, Article 6(b).

48 Regulation (EC) No. 864/2007, Article 31 and 32.

49 'Double actionability' means that in order for a foreign law to be applied it must be established that the defendant's conduct is actionable under both the law of the forum and

while conduct and damage that occurred between 1 May 1996 and the entry into force of Rome II on 11 January 2009 will be determined under the Private International Law (Miscellaneous Provisions) Act 1996.[50]

## IV STANDING

Any person who has suffered loss or damage as a result of an infringement of either UK or EU competition law may bring a claim for damages in the CAT (Competition Act, Section 47A). The same criterion applies to claims before the High Court on the basis that the law of tort applicable to breach of statutory duty confers a right of action on any persons harmed by a breach that is directly enforceable.

Most obviously, this will include direct purchasers of a product whose price was inflated as a result of a competition law infringement and competitors excluded from a market. Also, the ability of indirect purchasers to bring claims has not, to date, been disputed in the English courts.[51] In *Devenish Nutrition v. Sanofi-Aventis*[52] – a claim by indirect purchasers of animal vitamins following the Commission's 2001 *Vitamins* cartel decision – it was assumed in interim proceedings on points of law that indirect purchasers were entitled to claim damages, including before the Court of Appeal. In *BCL Old Co v. BASF* – a similar claim by indirect purchasers – the defendants did not challenge the standing of the indirect purchasers to bring the claims, although the CAT and the Court of Appeal held that the claim was time-barred. There has been at least one subsequent case in the CAT where indirect purchasers have brought claims and this point is yet to be disputed.[53]

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the law of the place where the conduct or damage occurred. This rule is, however, subject to an exception that gives the court the discretion to make a different choice where the issues arising in the action have their most significant connection to a particular law.

50 The Private International Law (Miscellaneous Provisions) Act 1996 abolished the common law rule of double actionability and essentially provides for a general rule that the law of the place where the conduct or damage occurred should apply, subject to an exception for situations where the most substantial connection is with the law of another jurisdiction.

51 Indeed, as a matter of EU law, the ECJ's decision in *Manfredi v. Lloyd Adriatico* [2006] ECR I-6619 – where the ECJ held that any person who has suffered actual loss must be entitled to compensation before a national court – arguably requires that standing extend to indirect purchasers. This position has since been codified by the Damages Directive which Member States are required to implement by 27 December 2016.

52 [2008] EWCA Civ 1086.

53 For example, in *Moy Park v. Evonik Degussa* (Case No. 1147/5/7/09), the claimants brought a claim for damages in the CAT following the European Commission's decision in the methionine (animal feed) cartel. The claimants argued that they were indirect purchasers of the methionine from the addressees of the European Commission's decision, or their subsidiaries, as the claimants absorbed the resulting overcharge from the cartel activities through the claimants' suppliers. It appears that a settlement was reached before the issue was considered by the CAT so the question remains open.

The ECJ's judgment in *Courage v. Crehan*[54] dealt with a claim for damages by a party to an anti-competitive agreement against another party to that agreement. It held that where one party bears 'significant responsibility' for the infringement of competition law, that party is likely to be barred from making a claim under the principle of English law that a person should not be permitted to claim where it arises from his or her own illegal act (*ex turpi causa non oritur actio*). However, on the facts of *Crehan*, the claim was allowed to proceed.

Certain designated groups can also have standing to bring representative actions for damages before the CAT (see Section VII, *infra*).

## V THE PROCESS OF DISCOVERY

### i General obligation of disclosure

Generally, all parties to civil proceedings before the courts in England must give disclosure of those documents relevant to the case.[55] The ability to inspect a defendant's documents is potentially attractive to a claimant in proving its case and is one of the features of the English court system that makes England a popular forum, in particular, for follow-on damages actions.[56] However, disclosure is a double-edged sword, as the claimant must also disclose relevant documents, which might allow a defendant to challenge causation or make out the passing-on defence, or both (see Sections VIII and IX, *infra*).

The disclosure obligation continues throughout the proceedings and extends to documents that are created following the commencement of legal proceedings unless they are protected by privilege (see Section XI, *infra*).

The timing for disclosure in follow-on actions was the subject of dispute in *National Grid v. ABB*, a continuing claim relying on the European Commission's 2007 decision concerning the gas-insulated switchgear cartel.[57] The High Court refused to order a stay of proceedings until the outcome of appeals against the European Commission's decision, ruling that procedural steps up to trial, including disclosure, should take place before a *Masterfoods* stay[58] is imposed. The consequence of this decision is that claims before the High Court can be expected to proceed at least to disclosure while appeals to the European courts remain unresolved.

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54 [2001] ECR I-6297.

55 Under CPR 31.6, a party is required to disclose: (1) documents on which it relies; (2) documents that either adversely affect its own case, adversely affect another party's case or support another party's case; and (3) documents that are required to be disclosed by a relevant practice direction. A party's standard disclosure obligation is to conduct a reasonable search for documents that are or have been under its control that fall within the aforementioned categories: CPR 31.7.

56 Although the EU Damages Directive requires all Member States to introduce at least limited disclosure rules.

57 *National Grid Electricity Transmission plc v. ABB Ltd* [2009] EWHC 1326 (Ch).

58 A '*Masterfoods* stay' refers to the judgment of the ECJ in *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369, in which the court emphasised, in accordance with the duty of

In a case management ruling in *National Grid v. ABB* on 4 July 2011, the High Court granted an application by the claimant for two of the 23 defendants to disclose certain documents obtained from the European Commission's file despite acknowledging the possibility that the Commission might reopen its investigation into the gas-insulated switchgear cartel if the defendants were successful in their appeals to the ECJ.[59] The High Court held that disclosure between parties to English court proceedings, under the protection of a confidentiality ring, would not undermine a European Commission investigation.

### ii Pre-action disclosure

Even before proceedings are afoot, disclosure may be ordered against any person that is likely to be a party to the legal proceedings, at the discretion of the court, in circumstances where the court considers that this is desirable to dispose fairly of the claim, assist the resolution of the dispute without proceedings, or save costs.[60] There is no scope to apply for pre-action disclosure of documents that would fall outside the respondent's duty under standard disclosure had the proceedings commenced. Pre-action disclosure may be of particular relevance in competition cases in which a defendant's anti-competitive conduct tends to have been concealed and a potential claimant may require documents from a potential defendant to establish whether it was affected by the infringement.

In *Trouw UK v. Mitsui*[61] the court stressed that pre-action disclosure should only be available in exceptional circumstances and that the main purpose of the procedure is to avoid litigation. This approach was followed in *Hutchison 3G v. O2*,[62] where the court refused an application for pre-action disclosure by H3G – the smallest player and most recent entrant into the UK mobile phone market – against its competitor mobile network operators. H3G sought broad pre-action disclosure to support a potential claim that the other operators were engaging in anti-competitive practices to prevent mobile number portability rules being liberalised. The application was refused on the ground that it was not possible for the court to be satisfied that the evidence requested would fall within the scope of standard disclosure. In any event, the court doubted that pre-action disclosure would serve a useful purpose as the claimant had admitted that it could plead its claim without pre-action disclosure, which would have been disproportionately expensive.

### iii Third-party disclosure

The English courts have the power to order disclosure against a non-party to proceedings in circumstances where this is considered necessary to dispose fairly of the claim or to save

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sincere cooperation under Article 10 of the Treaty establishing the European Community, that a national court is under an obligation to stay its proceedings in circumstances where the outcome of the dispute before it depends on the validity of the European Commission decision.

59 [2011] EWHC 1717 (Ch).

60 CPR 31.16(3)(d).

61 [2007] EWHC 863 (Comm).

62 *Hutchison 3G UK Ltd v. O2 (UK) Ltd* [2008] EWHC 55 (Comm).

costs.[63] An applicant must satisfy the court that each document or class of documents sought is likely either to support the case of the applicant or to affect adversely the case of another party to proceedings.

On its face, this is an onerous standard for an applicant to meet, but the courts have applied the test liberally in other (non-competition law) contexts, and have shown that they are prepared to consider the class of documents sought rather than each document in isolation.[64]

### iv Disclosure in the CAT

The CAT operates a more flexible procedure. Although its discretion to order disclosure is generally exercised, there are examples of cases where it has refused to do so. In *Claymore Dairies Ltd v. OFT*[65] the CAT stressed that disclosure is not automatic and should only be ordered where the CAT is satisfied that it is 'necessary, relevant and proportionate to determine the issues before it'. Claymore Dairies sought access to the Office of Fair Trading's (OFT, the CMA's predecessor) file following a closed investigation by the OFT into the alleged abusive conduct of a competitor. The CAT found that disclosure was not necessary or proportionate given the confidential nature of the information (relating to the claimant's closest competitor) and the fact that the claimant was able, in any event, to advance a detailed pleaded case without further information.

### v Treatment of confidential documents

Confidentiality is not a bar to disclosure of documents either in the High Court or the CAT. However, it is relevant to the court's discretion in making disclosure orders. In competition cases, the parties are commonly competitors and the disclosure of confidential information might therefore be damaging to the disclosing parties' business interests. The English courts are sympathetic to this and confidentiality rings are routinely set up to restrict the number of individuals permitted to review confidential information (commonly limited to counsel, external solicitors and experts).

### vi Responses to European Commission information requests

In the application for disclosure in the *National Grid* case, the claimant sought disclosure of the responses to the European Commission's information requests of two defendants and certain material under the defendants' control obtained as a result of their access to the European Commission's file during the Commission's administrative proceedings. The High Court granted the application for disclosure on the basis that additional protection would be granted to the confidential information through a confidentiality ring.[66]

63 CPR 31.17.

64 *Three Rivers DC v. Bank of England* [2002] EWCA Civ 1182.

65 [2004] CAT 16.

66 [2011] EWHC 1717 (Ch).

### vii Disclosure of leniency documents

In the same case, and following the ECJ judgment in *Pfleiderer v. Bundeskartellamt*[67] – which held that there is no absolute protection for leniency material, but that the court should perform a balancing act between competing interests – *National Grid* also sought disclosure of the confidential version of the European Commission's infringement decision from the defendants together with documents that may have included leniency material.[68] The Commission wrote to the High Court making observations on the application in light of *Pfleiderer* under Article 15(3) of EU Regulation 1/2003.[69] It took the view that 'corporate statements' (voluntary statements made by a company specifically for its application for leniency) should not be disclosed given the importance of leniency applications to the competition enforcement regime. For 'other documents' (such as replies to a request for information), the Commission submitted that national courts should, on a case-by-case basis, balance the respective interests of the parties involved and consider whether disclosure would increase the leniency applicants' exposure to liability compared with the liability of non-cooperating parties.

The High Court held that the Commission should not have exclusive jurisdiction to determine the disclosure of leniency materials submitted under its leniency programme as it is less well placed than the national court to assess the relevance and importance of the disclosure being sought.[70] Mr Justice Roth treated the Commission decision differently from the other requested documents. On the basis that the findings of the Commission are likely to be binding on the court, Mr Justice Roth took the view that the court (and consequently the claimant) should see some (but not all) of the confidential parts of the decision. He considered that any confidentiality concerns could be met by restricting disclosure to a narrow confidentiality ring and, in any event, disclosure would not affect a leniency applicant's defence to the damages claim. In respect of each of the other documents, the court conducted the balancing exercise prescribed by the ECJ in *Pfleiderer* (i.e., balancing the importance of disclosure against the need to maintain an effective leniency programme). Disclosure was ordered of some limited extracts of the responses by the leniency applicants to the Commission's information requests, which provided an explanation of documents supplied as part of the leniency application, the way the cartel operated and the nature of the discussions at cartel meetings. Two

67 In *Pfleiderer AG v. Bundeskartellamt* (Case C-360/09) [2011] WLR (D) 196 the ECJ held that, in principle, no person who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages should be prevented from being granted access to documents relating to the leniency procedure involving the addressee of the infringement finding. However, the conditions under which such access should be permitted or refused should be determined by the national courts and tribunals of the individual Member States on the basis of national law and having regard to both protecting the leniency regime and facilitating damages claims.

68 [2011] EWHC 1717 (Ch).

69 'National Grid Electricity Transmission plc v. ABB', Observations of the European Commission pursuant to Article 15(3) Regulation 1/2003, November 2011.

70 [2012] EWHC 869 (Ch).

defendants – Alstom and Areva – subsequently applied to the EU General Court in a bid to prevent disclosure. They argued that the European Commission was wrong to provide the High Court with their responses to the statement of objections.[71] The General Court suspended transmission of the confidential documents to the High Court[72] as, weighing the various interests involved, it considered that this would have the least impact on the proceedings as it would maintain the status quo. In June 2014, a week before the case was scheduled to go to trial, National Grid reached an out-of-court settlement with members of the cartel, including ABB, Siemens and Alstom.

British Airways was recently ordered at first instance[73] to disclose the full unredacted version of the Commission's cartel decision to a select group of the claimants' advisers, within a confidentiality ring (a standard mechanism in the English process for allowing limited disclosure of confidential information). British Airways has been the target of several damages actions in the UK as customers of the airline seek compensation for the excessive prices they paid as a result of anti-competitive conduct. The Commission had taken over four years to publish the non-confidential version of its decision. The High Court considered that this delay was unacceptable and that the 'molasses like approach' of the Commission to confidentiality representations was causing unreasonable delays to the claimants' claims. The Court of Appeal overturned the High Court judgment on the basis that the protection of third parties' rights to defence must be protected[74] in line with the General Court decision in *Pergan*.[75] The Court held that disclosure can only be made – even within a confidentiality ring – once *Pergan* material has been redacted.

The ECJ has recently had several opportunities to consider the question of whether information obtained by a competition authority in the course of a cartel investigation may be disclosed in subsequent damages actions in national courts. In *Bundeswettbewerbsbehörde v. Donau Chemie AG and others*[76] the ECJ held that disclosure of documents should be assessed on a case-by-case basis and that the risk that disclosing such documents could undermine a leniency programme is 'liable to justify the non-disclosure' of the documents in question. The ECJ made it clear that Member States should not draft national legislation that would hinder the effective enforcement of the competition rules or the rights of claimants to seek damages.

The EU Damages Directive contains provisions designed to resolve any uncertainty in this area and to facilitate damages claims by victims of antitrust violations. It limits disclosure of evidence held in the file of a competition authority. In particular, leniency

71 Case T-164/12, *Alstom and others v. Commission* (2012/C 165/54), Official Journal C 165/32, 9 June 2012.

72 Case T-164/12 R, *Alstom v. Commission*, Order of the President of the General Court, 29 November 2012.

73 *Emerald Supplies Limited and others v. British Airways PLC* [2014] EWHC 3513 (Ch)

74 *Emerald Supplies Limited v British Airways PLC* [2015] EWCA Civ. 1024

75 Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH v. Commission* [2007] ECR II-4225.

76 C-536/11 *Bundeswettbewerbsbehörde v. Donau Chemie AG and others*, judgment of 6 June 2013.

statements and settlement submissions will be immune from disclosure. Documents that have been prepared specifically for the purpose of the enforcement proceedings, or that the competition authority has drawn up in the course of its proceedings will be immune from disclosure until after the competition authority has closed its proceedings.

In the meantime, uncertainty remains as to the extent of disclosure that claimants can expect to obtain through a disclosure order. Although claimants are dependent on the discretion of the judge in carrying out the balancing act prescribed in *Pfleiderer* they will be encouraged that there are prospects before an English court for obtaining access to official documents held by defendants to assist in supporting the detail of a claim for damages.

### viii Application of the French 'blocking statute'

In a recent decision in the *National Grid* case,[77] Mr Justice Roth ruled on the application of the so-called French blocking statute before the English courts. The French blocking statute[78] prohibits 'any person to request, search for or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of establishing evidence in view of foreign judicial or administrative proceedings'.

The French defendants in the *National Grid* case (i.e., members of the Alstom group and Areva) had sought to resist disclosure of documents on the basis that disclosure would constitute a breach of the blocking statute and would put them at risk of criminal prosecution in France. It is well established that an English court has the discretion to order disclosure even where such disclosure might violate foreign law and the claimant applied to the court on this basis. Mr Justice Roth ruled that the French defendants are not subject to a real risk of prosecution under the blocking statute, and concluded that disclosure should be provided. An application by the claimants to lodge an appeal at the Supreme Court concerning the French blocking statute has since been refused.[79]

## VI USE OF EXPERTS

Parties are entitled to apply to the court to appoint an expert to provide evidence on technical matters.[80] The court has control over the extent and form of expert evidence and will restrict expert evidence to cases where it will genuinely assist the trial judge in determining the matters at issue.[81] In contrast to witnesses of fact, whose evidence must be confined to their knowledge of the facts of the case, expert witnesses are entitled to express opinions.

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77 *National Grid Electricity Transmission plc v. ABB Limited and others* [2013] EWHC 822 (Ch).

78 French Law No. 68-678 of 26 July 1968 (as subsequently modified).

79 *Secretary of State for Health v. Servier Laboratories Limited and National Grid Electricity Transmission plc v. ABB Limited* [2013] EWCA Civ 1234, judgment dated 22 October 2013.

80 CPR Part 35.

81 *JP Morgan Chase Bank v. Springwell Navigational Corporation* [2006] EWHC 2755 (Comm); *Zeid v. Credit Suisse* [2011] EWHC 716 (Comm).

The expert's primary duty is to assist the court, which overrides any duty that the expert owes to the party that is paying him or her.[82] An expert's report must contain details of the instructions that the expert has received, which are not privileged against disclosure.[83]

Expert evidence is of particular relevance in competition law cases as economic analysis will often go to the heart of competition law questions. Expert evidence is commonly adduced on issues such as market definition, causation and the loss suffered as a result of an infringement (and, in particular in follow-on actions, whether this loss was passed on to subsequent purchasers).

The court encourages discussions between experts away from court, for example in the context of discussions attempting to settle the litigation. Experts are also encouraged to produce a joint statement setting out areas of agreement and areas of disagreement together with reasons for their disagreement.[84]

## VII CLASS ACTIONS

Class actions – in the US sense of the term – are a new development in England. The Consumer Rights Act introduced an 'opt-out' collective action regime (effective 1 October 2015), allowing competition law claims to be brought on behalf of a defined set of claimants (excluding those claimants that expressly opt out). Previously the English litigation procedural rules had provided only limited scope for group actions in competition law cases.[85] This new regime contrasts with the more conservative approach recommended by the European Commission, which has set out a series of non-binding principles for collective redress mechanisms in Member States,[86] but on an 'opt-in' basis.

The Consumer Rights Act introduced an 'opt-out' collective action regime for both stand-alone and follow-on competition law claims brought before the CAT. This allows a representative claimant to bring a claim for damages in the CAT on behalf of all persons and entities that fall within a defined class (with the exception of those persons that explicitly 'opt out'), thereby expanding the old position under Section 47B of the

82 CPR 35.3.

83 CPR 35.10(3), CAT Guide to Proceedings 12.10.

84 CPR 35.12(3).

85 Under the old Section 47B of the Competition Act 1998 and through the representative action and group litigation order procedures under Part 19 of the CPR. The English courts had resisted attempts to use the more limited collective action proceedings that are available to establish US-style claims, where a group of claimants purports to bring an action on behalf of a general class who have not individually consented to representation: see, for example, the High Court judgment in *Emerald Supplies v. British Airways* [2009] EWHC 741 (Ch), a decision upheld on appeal by the Court of Appeal ([2010] EWCA Civ 1284).

86 Commission Recommendation on common principles for injunctive and compensatory collective redress mechanism in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

Competition Act (which allowed only the Consumer Association, 'Which?', to bring claims and only on an opt-in basis) and is designed to address the perceived inadequacies of that procedure.

Consumer claims can be brought under the new procedure where they raise the same, similar or related issues of fact or law. We expect that a key battleground will be how the class of claimants is approved. Representative bodies will seek to claim on behalf of the broadest possible group of claimants. The CAT will then be required to rule on whether: (1) the class of claimants is adequately defined; and (2) all claimants will have the same interests throughout the claim. The representative body will be required to advertise the action to enable potential class members to 'opt out'. Foreign (i.e., non-UK based parties) will not be caught by the opt-out nature of a collective action and will need to expressly 'opt in' to the claim.

In terms of safeguards against unmeritorious claims, the Consumer Rights Act applies the standard costs rules such that the losing party will be required to pay the successful party's costs. As a further safeguard, damages-based fee arrangements will be prohibited for collective actions and exemplary damages will not be recoverable.

Although the new regime will expand the list of bodies that can act as representatives and issue a collective action, there will still be significant restrictions. The CAT will only authorise a person to act as a representative if it is 'just and equitable' to do so. It is likely that this will restrict representatives to claimants and representative trade associations. Law firms and litigation funders will not be entitled to act as representatives.

The Consumer Rights Act also includes a settlement procedure. This provides a mechanism whereby the representative body can obtain approval from the CAT for settlements on an opt-out basis.

As explained in Section II.iii, *supra*, the old CAT limitation rules apply to collective claims 'arising' before 1 October 2015. It is unclear how the CAT will apply these rules but it adds an additional element of uncertainty that may discourage claimants from issuing claims relating to conduct that took place before 1 October 2015.

The issue of collective redress, and in particular the proposal of an opt-out system, has led to much debate in the UK. Notwithstanding the checks and balances in place to discourage unmeritorious claims – which may blunt the commercial incentives for claimant-focused law firms to take the risks associated with bringing such claims – it seems probable that a test case will be brought under the new regime in due course. How any such action proceeds in practice will be critical to the future prospects for collective actions for competition claims to establish in England.

### i EU-wide reform

On 11 June 2013, the European Commission published a Recommendation on collective actions setting out a series of non-binding principles for compensatory collective redress in respect of infringements of EU law rights (i.e., not limited to breaches of competition law), which it believes should be common across Member States. The Recommendation

was that actions for collective redress should be on an opt-in basis other than in exceptional circumstances.[87] The Recommendation, together with the EU Damages Directive, follows a series of papers and consultations on the subject.[88]

## VIII CALCULATING DAMAGES

### i Availability of damages

Claimants can seek to recover damages for losses suffered as a result of anticompetitive conduct, including for lost profits, and interest on those losses. This is in line with the ECJ's statement in *Manfredi v. Lloyd Adriatico*[89] that any person harmed by anticompetitive behaviour can claim compensation where there is a causal relationship between the harm and the infringement of EU competition rules.

*Devenish Nutrition v. Sanofi-Aventis*[90] – a follow-on action for damages pursuant to the European Commission's 2001 *Vitamins* cartel decision – remains the leading case in this area. It confirmed that the appropriate measure for the calculation of damages in competition law claims in England should be tort-based compensatory damages (which aim to put the claimant in the position it would have been in 'but for' the infringement).

In *Devenish* the claimants argued that the calculation of compensatory damages was too difficult, and that other types of relief, including restitution (in the form of an account of profits made by the defendants) and exemplary damages (i.e., an award of damages to punish the defendant and deter it from repeating the behaviour) should be available to the claimants.

The High Court and the Court of Appeal both rejected these arguments, emphasising that the English courts are willing to take a 'pragmatic view of the degree of certainty with which damages must be pleaded and proved'.[91] Arguably, the complications inherent in the largely counterfactual calculation of compensatory damages should not therefore be a bar to recovery in competition actions.

As regards exemplary damages, the High Court in *Devenish* noted that a fine imposed by a competition authority for an infringement of competition law served the same punitive and deterrent purpose. In view of the principles of *ne bis in idem* in EU

87 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU).

88 These include the February 2011 consultation, to identify common legal principles on collective redress for potential application in all Member States, the 2005 Green Paper, the 2008 White Paper and the proposed Directive of 11 June 2013 on damages actions for breach of the EC antitrust rules. All included proposals to lower the hurdles consumers face in pursuing claims for damages, including through measures to support a coherent approach to collective redress in Europe.

89 [2006] ECR I-6619.

90 [2007] EWHC 2394 (Ch); [2008] EWCA Civ 1086.

91 Lewison J in the High Court; [2007] EWHC 2394 (Ch), paragraph 30, the Court of Appeal endorsing his approach.

law, and double jeopardy in English law, the High Court considered that exemplary damages were unlikely to be available where a competition claim was being brought on the back of an infringement decision by a competition authority.

Notwithstanding this limitation, two judgments – *Albion Water Limited v. Dŵr Cymru Cyfyngedig*[92] and *2 Travel Group v. Cardiff City Transport*[93] – demonstrate that the CAT is willing to award exemplary damages in circumstances where an authority has already ruled on anti-competitive conduct and a fine has not been imposed. It it is perhaps more likely that exemplary damages will be sought in stand-alone actions, where no investigation has been carried out by a competition authority.

The Court of Appeal in *Devenish* determined that an award of restitution in the form of an account of profits (to award the claimant the profits the defendant has earned from its breach) is generally not available in competition law claims.[94] Interestingly, in *Albion Water*, at application stage, the CAT refused to strike out the claims for restitutionary damages in respect of those parts of the claim that the CAT did not consider to be 'unarguable'.[95] However, at trial the CAT ultimately rejected this aspect of the claim. The position remains uncertain, but, even if restitution was found to be available, such damages would probably only be awarded where compensatory damages are considered inadequate (which may be only in limited circumstances given the views of the Court of Appeal in the *Devenish* case).

An additional measure of compensatory damages that might be available before the English courts is so-called 'umbrella' damages (i.e., compensation for the loss caused by a person not party to the cartel who, as a result of the increased market prices, raises their own prices by more than they would have done in the absence of the cartel). Such losses are claimed not against the party that supplied the relevant goods or services but against the cartel members. This question was the subject of a reference by an Austrian court to the ECJ,[96] which held that a victim of umbrella pricing may obtain compensation for the loss caused by an increase in the prices charged by market participants that were not members of the cartel if it can demonstrate that that price increase was caused by the cartel. An English court is likely to adopt a similar approach, awarding 'umbrella' damages where a claimant can establish causation between the unlawful activity and effects on prices set by non-cartel parties, in line with the general approach to compensatory damages under the English system.

In resisting a claim for compensatory damages, a defendant may seek to challenge causation and argue that 'but for' its actions the claimant would still have suffered loss. Two types of causation defence have typically been relied on to date. First, in *Arkin*

92 [2010] CAT 30.

93 *2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited* [2012] CAT 19.

94 It was held that a restitutionary award could only be made in exceptional circumstances and one of the Lord Justices expressed doubt that a cartel could satisfy this requirement.

95 [2010] CAT 30, paragraph 25.

96 C-557/12, request for a preliminary ruling from the Oberster Gerichtshof (Austria), judgment of 5 June 2014.

*v. Borchard*[97] the defendant argued that the losses claimed arose from the claimant's mismanagement of its affairs. In that case, it was held that the claimant's failure to leave the market and its price cutting was so unreasonable and incomprehensible that it represented an intervening cause, such that it was the predominant cause of the losses the claimant suffered. By contrast, in *Crehan v. Inntrepreneur Pub Company*[98] the High Court rejected a similar argument that Mr Crehan's downturn in sales was caused by mismanagement, as this could not have made him responsible for the effects of a network of restrictive agreements. Second, defendants may seek to argue that an external cause, such as a downturn in general market conditions, was responsible for the claimant's losses (as the defendant also argued in *Crehan v. Inntrepreneur*).

**ii Approaches to quantification**

The quantification of damages in cartel cases will inevitably involve a number of complex issues, in particular concerning the most appropriate economic approach.

*Crehan v. Inntrepreneur* remains the only competition case where an award of final damages has been made (although the (then) House of Lords subsequently quashed the award on appeal). There has been one award of interim damages in a competition case by the CAT in *Healthcare at Home v. Genzyme*[99] (subsequently settled), but the calculation made was a relatively straightforward estimate of lost profits based on a margin squeeze, which took the supplier's pricing and applied the discount that should have been available to wholesale purchasers.

Recent cases have shown that the English courts are likely to prefer a 'but for' approach to the assessment of damages, as outlined in *Arkin v. Borchard*. In that case, although it concluded that there was no breach of competition law, the High Court suggested that any damages should be assessed by comparing a hypothetical scenario based on the situation immediately prior to the infringement and asking what, 'as a matter of common sense', was the loss directly caused by the infringement.[100] Using this approach, the English courts can be expected to favour a comparison of the market conditions observed during the infringement period with a reconstruction of the market conditions that might have prevailed in the absence of the infringement. For example, in a cartel follow-on action, it is likely that this would involve an economic analysis of the price paid by the claimant and hypothetical 'but for' prices based on prices observed before or after the existence of the cartel or as observed in a comparable market.[101]

97 [2003] EWHC 687 (Comm).

98 [2003] EWHC 1510 (Ch).

99 [2006] CAT 29. English procedure provides for the possibility of an order for an interim payment of damages, both in the High Court and the CAT: see CPR 25.7 and CAT Rules, Rule 41(5).

100 [2003] EWHC 1510 (Ch), paragraph 591.

101 The European Commission has published a Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU – C(2013) 3440, 11 June 2013 –

### iii Interest

Interest can make a significant difference to the total quantum of damages, in particular in follow-on claims where the infringement may have continued for many years.

In *Manfredi* the ECJ held that interest must be available in respect of claims for damages based on infringements of competition law. The general rule under English procedure is that the court has the discretion to award simple interest on all or any part of the damages awarded, for all or any part of the period from the date on which the cause of action accrued to the date of judgment.[102]

The court has the discretion to award interest at either the judgment rate or the commercial rate.[103] The commercial rate is usually applied by the English courts as this seeks to compensate the claimant for the time value of money that it has lost at the rate at which the claimant typically borrows money. Where the claimant's typical borrowing rate is unclear, the court will apply 'a fair commercial rate' – typically the Bank of England base rate plus 1 per cent.[104]

Claimants in cartel damages actions tend to claim compound interest. There is no authority directly on point concerning whether compound interest is available in a cartel damages action. However, claims for compound interest are likely to rely on the judgment of the (then) House of Lords in *Sempra Metals v. Inland Revenue*.[105] In that case – which concerned a claim in restitution for overpaid tax – the Lords made an award of compound interest to deprive the defendant of its unjust enrichment. The judgment also contained non-binding *obiter dicta* suggesting that compound interest might be available in a claim for breach of statutory duty provided certain requirements are satisfied. The Lords expressed the view that the burden of proving that compound interest should be recoverable rests on the claimant, which is required to particularise and prove its interest loss. Although the application of this principle to competition claims is untested, a claimant in a cartel damages action would probably have to prove that it had to borrow to fund the overcharge that resulted in loss that should be compensated at a compound rate of interest.

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together with a practical guide. This is not binding on national courts but provides practical methods and techniques to assist national courts as well as claimants and defendants when calculating damages.

102 Section 35A of the Senior Courts Act 1981.

103 The judgment rate is a statutory rate of interest that is prescribed in the Judgment Debts (Rate of Interest) Order 1993, which for interest on damages incurred after 1 April 1993 would be awarded at 8 per cent per annum.

104 However, a small number of cases in other (non-competition law) areas have shown that there is a possibility of the courts using their discretion to award interest at a higher rate to claimants that have a high cost of borrowing (see for example *Claymore Services Limited v. Nautilus Properties Limited* [2007] EWHC 805 (TCC)).

105 [2007] UKHL 34.

### iv Costs

Under the English system the successful party will normally be awarded its costs, in particular where the losing party has made a Part 36 offer that the successful party has failed to match or beat at trial[106] (see Section XII, *infra*), although the courts have discretion as to the amount that should be paid. In a typical case, the successful party can expect to regain approximately two-thirds of actual costs incurred. This can vary depending on how the parties conduct themselves. The CAT adopts a similar approach, although it is less prescriptive and can often award less to the successful party than the High Court.

The Civil Procedure Rules enable defendants to apply for an order granting 'security for costs' to protect a defendant from the risk that a claimant is unable to pay a costs order should the claim fail. A defendant to any claim, including a Part 20 claim (i.e., a counterclaim or a contribution claim) may apply for an order for security for costs under CPR 25.12. Such an order requires the claimant to deposit money with the court or provide a guarantee as security for the defendant's costs. The High Court may award security for costs if it is satisfied, having regard to all circumstances of the case, that it is just to make such an order and provided certain conditions are satisfied.[107] The most common conditions are that the claimant is resident out of the jurisdiction (and not domiciled in an EU or EFTA contracting state) or that the claimant is a company and there is reason to believe it will be unable to pay the defendant's costs if ordered to do so.

Similar rules apply in the CAT,[108] which has considered recent applications for security for costs in *BCL Old Co v. Aventis*[109] and *Albion Water Limited v. Dŵr Cymru Cyfyngedig*.[110]

The general costs rules in England have recently undergone significant reform. The government enacted the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in response to recommendations from Lord Justice Jackson.[111] The Act includes provisions that abolish the recoverability in costs awards of success fees under conditional fee arrangements and of 'after the event' insurance premiums from unsuccessful opponents under costs orders. The concession for claimants is that contingency fees (through so-called 'damages-based agreements') are now permitted, and the courts have the ability to apply a premium to damages awards where a defendant fails to beat a claimant's settlement offer. There is also a provision for unsuccessful claimants to pay only a proportion of defendants' costs provided they have acted reasonably. The costs rules for collective actions are more restrictive.

106 CPR 44.3(2).

107 These are detailed in CPR 25.12 to 25.15.

108 Defendants must establish that one or more of the factors listed in Rule 45(a) to (g) of the CAT Rules applies.

109 [2005] CAT 2.

110 [2013] CAT 6.

111 The 'Jackson Review' was commissioned by the Master of the Rolls, Lord Neuberger, to investigate how concerns about the costs of civil litigation and access to justice might be addressed. The final report was published in January 2010.

## IX PASS-ON DEFENCES

Under the compensatory measure of damages, claimants in the English courts can only recover damages that represent their actual, unmitigated losses. The defendant may be able to claim that the claimant in fact suffered no loss, as it passed on the effects of the infringement (e.g., an overcharge) to its own customers. The burden of proof is on the defendant to show that the claimant mitigated its loss in this way.

There is currently no precedent in the English courts for the availability of the passing-on defence.

However, although the question of whether the passing-on defence is available under English law was not the subject of the appeal, in the *Devenish* case the Court of Appeal remarked that if the claimant has in fact passed a charge on to its customers 'there is no very obvious reason why the profit made by the defendants (albeit undeserved and wrongful) should be transferred to the claimant without the claimant being obliged to transfer it down the line to those who have actually suffered the loss'. The ECJ cases of *Manfredi* and *Courage v. Crehan* have also been cited as supporting the view that the defence will be recognised in England.

The EU Damages Directive recognises the ability of the defendant to rely on the passing-on defence, provided it is legally possible for the end user (i.e., the customer to whom the cost was passed on) to claim compensation. It remains to be seen whether the UK government believes it will need to legislate to implement this aspect of the Directive. Its view may be that the law is already compliant. For example, in its response to the BIS Consultation, the UK government stated its view that, under general principles of English tort law, there is no reason why the passing-on defence should not apply and that its application would be better addressed through judicial consideration than via legislation at UK level.[112]

## X FOLLOW-ON LITIGATION

Section 58A of the Competition Act provides that the English courts are to be bound in a subsequent damages action by a prior infringement decision by the CMA or the CAT, provided the decision is no longer appealable. This reflects the position under EU law in relation to infringement decisions by the European Commission, in particular as set out in the duty on national courts under Article 16(1) of Regulation 1/2003 not to rule counter to a decision that has established an infringement of EU competition law.

There are, however, limits to the binding force of prior infringement decisions on the English courts. For example, in *Inntrepreneur v. Crehan*, the House of Lords ruled that a court is not required to follow a prior decision that relates to an agreement different from the subject of the claim, even if the surrounding facts are similar. In such cases, the competition authority's observations may be relevant as evidence, but this does not excuse the court from undertaking its own factual enquiries. Previously, the Court

112 Private actions in competition law: a consultation on options for reform – government response, paragraph 4.38.

of Appeal emphasised that when awarding damages the jurisdiction of the CAT was inherently limited by the infringement finding established by the relevant decision and did not extend to allowing the CAT to make a finding of infringement (see *Enron Coal Services v. English Welsh & Scottish Railway*[113]). However, the Consumer Rights Act has now brought the CAT into line with the High Court.

In terms of awards against parties that have already been fined by a competition authority or benefited from immunity under a leniency programme, there is no restriction on private litigants seeking to recover damages for loss, as long as there is no risk of double jeopardy as established in the *Albion Water* case.

## XI PRIVILEGES

Privilege is recognised in England as a right that entitles a party to withhold evidence, whether oral or written, from production during the course of regulatory or legal proceedings. It is particularly important in the context of litigation brought in the High Court or the CAT, where the fact that documents contain confidential information, business secrets or otherwise damaging or sensitive material does not prevent their disclosure, whereas privilege is an absolute bar.

The rules on privilege have developed under the common law, but despite the House of Lords having considered certain aspects of privilege in the leading case of *Three Rivers DC v. Bank of England*[114] the law remains in an uncertain and unsatisfactory state in some key respects.

Legal advice privilege applies to all direct and confidential communications between client and lawyer that are created for the purpose of giving or obtaining legal advice, and to documents which evidence such communications provided that they are directly related to the performance by the lawyer of his or her professional duty as legal adviser of the client. This description raises some fundamental and difficult issues concerning the scope of privilege in English litigation.

First, the scope of the 'client' is difficult to define. It was held by the Court of Appeal in *Three Rivers (No. 5)*[115] that where a corporate entity instructs a lawyer, the client will not be the entity itself, but rather only the persons within the entity who are personally responsible for instructing the lawyer and receiving the advice. This restrictive interpretation means that care must be exercised by companies instructing lawyers to ensure that all those people within the organisation who will be dealing with the lawyer are sufficiently identified as the 'client'.[116]

113 [2009] EWCA Civ 647; [2011] EWCA Civ 2.

114 [2004] UKHL 48.

115 [2003] EWCA Civ 474.

116 Nevertheless, to the extent that privileged advice is disclosed to company directors, this does not invoke any waiver of the company's privilege because the directors receive and act on that advice as the mind and directing will of the corporate entity: *Bank of Nova Scotia v. Hellenic Mutual War Risks (the 'Good Luck')* [1992] 2 Lloyds Rep 540.

Second, the scope of 'legal advice' has been clarified by the House of Lords in *Three Rivers*, which affirmed that 'legal advice' should extend to include advice about what should prudently or sensibly be done in the relevant legal context (thereby reversing the earlier Court of Appeal decision that took a very narrow approach as to what amounted to legal advice). If the communications directly relate to the performance by a solicitor of his or her professional duty as legal adviser of his or her client (despite the fact that they do not contain advice on matters of law), they will form part of a 'continuum of communication' and fall within the scope of legal advice privilege.

Third, under English law, the 'lawyer' encompasses both external and in-house counsel.[117] This position can be contrasted with the EU law position confirmed by the ECJ decision in *Akzo Nobel Chemicals v. European Commission*, in which it was confirmed that in the context of a competition investigation by the European Commission legal professional privilege does not cover exchanges within a corporate group with in-house counsel.[118] The conflict between this position and the wider privilege recognised in England could lead to tension concerning the disclosure of in-house legal advice in the context of follow-on claims. For example, the European Commission, as part of its investigation, might seize documents concerning legal advice from in-house counsel to other parts of the business being investigated. In light of the possibility of disclosure of documents held on the Commission's file following the *Pfleiderer* and *National Grid* decisions, it is possible that claimants may attempt to have such advice disclosed in any damages actions in the English courts. Although the advice would usually be privileged under English law, a necessary prerequisite is that the communication is confidential and there might be an argument that this has been compromised by the European Commission taking the documents into its possession and possibly relying on them in any decision.

Litigation privilege applies to confidential communications made after proceedings were commenced or contemplated between a lawyer and either a client or a third party, provided that the sole or dominant purpose of the communication was for seeking or giving advice or obtaining evidence in relation to the litigation. The key question in this context is what amounts to 'proceedings'. The conservative assumption has been that courts would not extend litigation privilege (beyond court and arbitration proceedings before a tribunal exercising judicial functions) to documents that came into existence for the purpose of a regulatory inquiry or investigation. However, in the recent case of *Tesco Stores Ltd v. Office of Fair Trading*[119] the CAT held that from the point an investigation could be properly classified as adversarial – as opposed to merely investigative or inquisitorial – material gathered could be subject to litigation privilege. In *Tesco*, the proceedings were classified as adversarial on the facts of the case – the OFT had already issued a statement of objections. *Tesco* does not provide certainty as to the point at which an investigation becomes adversarial so caution is advisable, especially in

117 This is provided that they are qualified in any jurisdiction as under the Legal Service Act 2007.

118 Case C-550/07.

119 [2012] CAT 6.

the early stages of an investigation. Until an investigation can be classified as adversarial, documentation falling outside the scope of legal advice between lawyer and client – for example, economic reports and even some leniency-related material – is unlikely to be privileged and could therefore be disclosed in any subsequent follow-on litigation in England.[120]

In addition to legal professional privilege (the name often given to legal advice privilege and litigation privilege), common interest privilege and joint privilege may apply in situations where privileged material is created or shared between two or more parties – meaning these forms of privilege could apply in multiple-party competition cases (e.g., follow-on actions naming all the addressees of a competition authority's decision as defendants). Joint privilege requires different parties to instruct the same lawyer (and thereby share the same privilege in the advice), whereas common interest privilege applies where the parties have a shared or similar interest, most often in litigation, but also in other situations (where legal advice to one of the parties might be shared with others with the same interest). In addition, there is a privilege against self-incrimination, and communications made 'without prejudice' are also protected under a type of privilege.

Where one party to an investigation decides not to appeal any infringement decision, it may be concerned that otherwise privileged material relating to that party might be disclosed. This situation occurred in *Imperial Tobacco Group v. OFT*.[121] Sainsbury's – which was granted immunity from fines under the OFT's leniency programme – applied to intervene in the appeal against the OFT's tobacco pricing decision[122] to challenge any use in the proceedings of any documents over which it claimed privilege. The CAT granted its application on the basis that Sainsbury's was deemed to have a sufficient interest to intervene.

## XII SETTLEMENT PROCEDURES

Competition law cases begun in the English courts have typically been settled rather than proceeded to trial. Uncertainty over proving causation and loss and around a number of legal issues (e.g., the availability of a passing-on defence) has undoubtedly encouraged parties to settle. The high costs of litigation coupled with the adverse cost rules are also likely to have weighed on the minds of litigants.

For claims in the High Court, Part 36 of the CPR creates costs-based incentives for parties to settle disputes. A claimant may offer to settle for a certain monetary amount, and frame this offer as a formal Part 36 offer. If the claimant subsequently obtains judgment for the same or a higher amount, it will be entitled to recover its costs from the date the offer expired on the indemnity basis rather than the standard basis (i.e., with the benefit of any doubt as to whether costs have been reasonably incurred

120 *Wheeler v. Le Marchant* (1881) 17 ChD 675, where the Court of Appeal held that privilege did not extend to letters between the client's solicitors and the client's surveyors at a time when no dispute had arisen.

121 [2010] CAT 24.

122 Pursuant to Rule 16 of the CAT Rules.

being resolved in the claimant's favour) with more generous interest awarded on the judgment amount and costs (being up to 10 per cent over the Bank of England base rate). A defendant can also make a Part 36 offer, which will enable it to recover its costs on the standard basis if the claimant succeeds at trial but fails to better that offer. The CAT Rules include a similar procedure but this only allows formal offers to be made by defendants.[123]

The terms and even the fact of a settlement agreement in competition cases will almost always be made on a without prejudice basis and be confidential. Consequently, it is difficult to form a picture of the way in which claims have been settled in England. Discontinued claims that have been settled include claims relating to the European Commission's cartel decisions concerning vitamins, methionine and seamless steel tubes (to name a few). Settlements in the US can also have a bearing on companies and individuals in the UK. For example, in the British Airways passenger fuel surcharge cartel settlement the Californian Appeal Court determined that the settlement could apply to UK-based consumers.[124]

In some cases, a single defendant may settle proceedings early, leaving the other defendants to continue to contest the claim. This occurred in *Cooper Tire v. Shell*, where Shell settled before the resolution of the jurisdiction challenge, leaving the other defendants in the litigation. This also occurred in the *Emerson* case, where one of the claimants, Robert Bosch, withdrew its claim for damages against one of the defendants, SGL Carbon, after reaching a settlement, the details of which remain confidential.[125]

The Consumer Rights Act includes provision for alternative dispute resolution in collective claims, by way of a statutory 'voluntary redress scheme'. Under this procedure, the CMA would approve a voluntarily agreed scheme for compensation to be paid by alleged infringers to a class of victims of a competition law infringement. As an incentive to alleged infringers to agree to such a scheme and to do so at an early point, the UK competition authority would be entitled to take it into account in reducing any fines imposed on the infringing parties.

123 A defendant can offer to settle the dispute by making a payment into the CAT. If the claimant does not accept the defendant's offer to settle, and does not better the defendant's offer at a substantive hearing, the CAT will probably order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted (likely to be 14 days before the hearing). The CAT Rules state that such costs may bear interest and will be assessed on an indemnity basis. Where a claimant makes an offer to settle that is not a payment into the CAT, which is not bettered by the claimant in a substantive hearing, the CAT Rules state that the CAT may take this into account when assessing costs: CAT Rules, Rule 43(10).

124 The court based its decision on the fact that the defendants had not contested jurisdiction, that the settlement was an opt-in settlement (rather than the opt-out system more usually seen in the US) and that there had been no similar UK-based case pending.

125 CAT Order dated 7 February 2011. However, as the claim was also brought by other claimants, SGL Carbon remains a defendant to the *Emerson* proceedings.

As already noted, the Consumer Rights Act also introduced a new 'opt-out' collective settlement regime for competition law cases in the CAT. This procedure complements the collective action mechanism, and is intended to give businesses the opportunity to settle cases out of court at an early stage of proceedings even if proceedings had initially been brought as separate claims.

## XIII ARBITRATION

As with other commercial disputes, competition claims can be resolved through alternative dispute resolution, including arbitration and mediation.

### i Arbitration

Arbitration can be undertaken in accordance with the mechanisms set out in the Arbitration Act 1996. The courts will stay proceedings in favour of arbitration where there is evidence that the dispute is subject to a valid arbitration agreement.[126]

The *Eurotunnel*[127] case made it clear that competition claims are capable of being arbitrated. The High Court held that 'there is no realistic doubt that such 'competition' or 'antitrust' claims are arbitrable; the issue is whether they come within the scope of the arbitration clause, as a matter of its true construction'.[128] The successful party in arbitration may apply to the court for an order to enforce the award as if it were a judgment of the court. The grounds on which a party can appeal against the ruling of an arbitration based in England are limited to appeals on a point of law[129] or for serious irregularity[130] (i.e., where the decision is contrary to public policy[131]). It is also conceivable that an English arbitration award could be challenged by a party seeking a declaration that, to the extent that it does not take account of relevant competition law issues, the award itself infringes competition law.

### ii Mediation

In the case management process the High Court and the CAT will encourage the parties to mediate to seek to avoid the costs of litigation. The courts may make costs orders that depart from the usual principle that the successful party recovers its costs, penalising the

126 For competition claims, the arbitration doctrine of 'separability' might also be relevant: an arbitration clause will not be deemed invalid if the agreement containing the clause is rendered void (e.g., if Article 101(2) of the TFEU applies to otherwise provide that the agreement is null and void).

127 *ET Plus SA v. Welter* [2005] EWHC 2115 (Comm).

128 Ibid., paragraph 51.

129 Section 69 of the Arbitration Act 1996.

130 Section 68 of the Arbitration Act 1996.

131 *Eco Swiss China Time v. Benetton Ltd* [1999] ECR I-3055.

party that succeeds at trial where that party at an earlier point has unreasonably refused to mediate,[132] especially where that party has ignored judicial encouragement to do so. The CAT expressly encourages mediation in its rules.[133]

The court may order a stay to allow a window for mediation to take place. Mediation – which is generally a non-binding process – is not covered by a statutory framework and is carried out by rules agreed between the parties. A mediated resolution will be recorded in an agreement, which will be enforceable between the parties as a binding contract.

In April 2011, CPR 78.24 came into effect to give the court the power to make an order that a cross-border mediation settlement agreement[134] is enforceable on a cross-border basis in the absence of court proceedings. This is an important development as parties to follow-on proceedings from an infringement finding by the European Commission may be domiciled across the EU, making it difficult to enforce mediation settlement agreements. However, an order under the new CPR 78.24 will only be made if the parties to the mediation settlement agreement are not domiciled in the same EU Member State and if the parties give explicit consent to the application for the order and are domiciled in EU Member States. This means it will be important for consent for enforcement to be included in mediation settlement agreements in cases involving parties from different Member States.

## XIV INDEMNIFICATION AND CONTRIBUTION

Although not yet formally confirmed by any case, liability for competition law infringements – both before the High Court and the CAT – is almost certainly on the basis of joint and several liability, which means that a claimant might elect to sue only one (or all) of the addressees of the relevant decision for the entirety of the loss suffered as a result of the anti-competitive conduct.[135] To date, most follow-on actions have been initiated against a number of defendants, in some cases all of the addressees of the relevant decision and in others only those defendants from whom the claimants had purchased cartelised products.[136]

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132 *Dunnett v. Railtrack plc* [2002] EWCA Civ 303.

133 CAT Rules, Rule 44(3).

134 Defined as being a written agreement resulting from mediation of a relevant dispute.

135 To safeguard the effectiveness of the leniency regime, the European Commission has included provision in the EU Damages Directive limiting the immunity recipient's liability to the harm it caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. The leniency applicant will no longer be jointly and severally liable for the entire harm caused by the cartel which is likely to have an impact on claimant strategy in selecting defendants.

136 The application of joint and several liability to competition claims is yet to be confirmed in England as a multi-defendant action has not (as yet) gone to full trial. However, the general principles from tort law can be expected to apply, which means that a single defendant could be held responsible for all of the losses caused by a competition law infringement. It

A recently observed tactic is for a claimant to sue just one (or two) defendants and force that defendant to join others to the action to seek a contribution in respect of any damages that might be awarded.[137] This leaves the defendant singled out to initiate contribution actions under Part 20 of the CPR.

The Civil Liability (Contribution) Act 1978 provides that any person liable in respect of any damage suffered by another person may recover a contribution from any other person liable in respect of the same damage.[138] The court then has discretion to award such contribution as it considers just and equitable having regard to each person's responsibility for the damage.[139]

Contribution claims can be made in the context of the primary action, where they may be consolidated and heard together, or after judgment in the main action.[140] Alternatively, a contribution may be sought even where a party has already settled the claim with the claimant.[141]

How contribution might be assessed in a cartel damages action is yet to be considered by an English court but the High Court and the CAT are likely to look to apply the principles developed in respect of other types of civil claims to assist a court in exercising its discretion to assess contributions, including looking at: (1) the extent to which a party has profited from the wrongdoing; (2) the causative potency of each wrongdoer's actions with regard to the claimant's loss; and (3) relative degrees of blameworthiness. The position will change following the implementation of the EU Damages Directive which prescribes that there are limitations to the leniency applicant's joint and several liability. The leniency applicant is only jointly and severally liable to its direct or indirect purchasers and to other injured parties where full compensation cannot be obtained from the other undertakings involved in the same infringement of competition law.[142]

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remains to be seen how the English courts will divide damages between multiple defendants and whether they will entertain arguments that a defendant can avoid or reduce its liability because its own role was very minor or did not directly cause the claimant's loss. In its response to the BIS consultation, the government considered that it is an area where action at European level would be preferable, both for reasons of consistency and effectiveness, as well as in terms of providing certainty for those considering applying for leniency.

137 For example, this tactic has been employed in follow-on actions initiated in the High Court in respect of the European Commission's decisions in respect of the *Air Cargo* cartel, the *Paraffin Waxes* cartel and the *Smart Card Chip* cartel.

138 Section 1(1) of the Civil Liability (Contribution) Act 1978.

139 Section 2(1) of the Civil Liability (Contribution) Act 1978.

140 A two-year limitation period applies to contribution claims in Section 10 of the High Court: Limitation Act 1980.

141 Section 1(4) of the Civil Liability (Contribution) Act 1978.

142 A company found to have committed a competition law infringement cannot look to recover the resulting fine from the individuals that were involved in the wrongdoing – *Safeway Stores v. Twigger* [2010] EWCA Civ 1472.

## XV FUTURE DEVELOPMENTS AND OUTLOOK

The Consumer Rights Act has made some significant changes to the landscape of private enforcement in England. We expect these changes to result in further growth in the number of claims issued in the English courts in the coming years. This growth is likely to be seen in two areas in particular, tracking the most significant aspects of the Consumer Rights Act for competition claims: (1) the CAT will finally assume its long-anticipated mantel as the major venue for competition actions in the UK, which follows from the broadening of the CAT's jurisdiction to include stand-alone as well as follow-on cases and its new power to grant injunctions; and (2) the introduction of an 'opt-out' collective actions regime for competition law claims promises to entice enough interest for test cases, and success could encourage a steady flow of cases.

The introduction of an 'opt-out' collective action procedure remains controversial. Arguments that this will introduce the perceived excesses of the US 'class action' system persist and will undoubtedly remain an underlying concern for many as the first cases are put together and make their way through the system. This may itself create considerable satellite litigation as the system is tested and the rules are bedded down. With its expanded jurisdiction, a large number of claims could eventuate and the CAT could be very busy indeed, which may also have resource implications for the CAT.

In the meantime, despite the continued upswing in activity in the English courts, we continue to await a final award of damages in a competition claim. Although a number of cases continue to progress through the courts, a number are stayed or proceeding relatively slowly and the prospects for a full trial of a follow-on action in the next 12 months is uncertain.

A number of important legal issues remain to be finally determined: for example, how principles such as parent-subsidiary liability, joint and several liability and contribution – well understood in the context of other types of civil disputes – will be applied to competition claims. These issues may be dealt with in preliminary hearings in the near future, particularly given the approach taken in several cases of claimants electing to sue only one or a limited number of cartel members (rather than all those involved in the cartel) for all of the loss caused by the cartel, thereby forcing the named defendants to issue contribution proceedings against the other cartelists.

## Appendix 1

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Peter Scott is a partner at Norton Rose Fulbright LLP, based in London, where he heads the antitrust and competition team. Peter specialises in all areas of contentious competition law work. He has experience of acting in a number of leading and high-profile competition law cases, including both stand-alone and 'follow-on' claims before the High Court and the Competition Appeal Tribunal, appeals to the General Court and the Court of Justice in Luxembourg, as well as arbitration cases and investigations by the competition authorities. Peter is currently acting for a number of companies in claims that follow on from decisions by the European Commission, on both the claimant and defendant side.

Peter has been recognised in all of the leading legal directories, including in *Chambers UK* as a tier 1 practictioner (as 'a trusted advisor', 'shrewd, diligent and thoughtful' and for his 'great ability to get to the essential point in double quick time') and *The Legal 500* (as a 'very commercial' contentious specialist).

Peter trained with Norton Rose Fulbright LLP and spent the first six years of his career as a commercial litigator before joining the antitrust and competition practice group in 2005, being made a partner two years later. He is a solicitor advocate and obtained his higher rights of audience in 2002.

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Mark has experience in competition cases before the English High Court (Commercial Court and Chancery), in the Competition Appeal Tribunal and before the CMA (and its predecessor, the Competition Commission) and the European Commission. He has been involved in a range of follow-on damages cases over the last 10 years, representing both defendants and claimants, and is currently advising on a number of ongoing proceedings issued in the English courts.

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