The International Comparative Legal Guide to:

Competition Litigation 2016

8th Edition

A practical cross-border insight into competition litigation work

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EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Competition Litigation.*

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of competition litigation.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting competition litigation, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in competition litigation in 36 jurisdictions.

All chapters are written by leading competition litigation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Euan Burrows and Mark Clarke of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 General

1.1 Please identify the scope of claims that may be brought in England & Wales for breach of competition law.

The principal statute which governs the scope of claims for a breach of competition law in England & Wales is the Competition Act 1998 ("**1998 Act**").

Competition Act 1998

The 1998 Act contains two prohibitions on anti-competitive activity, known as the Chapter I Prohibition (section 2 of the 1998 Act) and the Chapter II Prohibition (section 18 of the 1998 Act) (together the "**Prohibitions**"). These Prohibitions closely reflect the well-known prohibitions in Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**") (formerly Articles 81 and 82 of the EC Treaty), save that those Articles are concerned with anti-competitive activity which has an effect on trade between Member States of the European Union ("**EU**") rather than on domestic trade.

Chapter I Prohibition

The Chapter I Prohibition prohibits agreements between undertakings, decisions by associations of undertakings and/or concerted practices which:

(a) may affect trade in the UK (or a substantial part of it); or

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

Examples of the types of agreements which will infringe the Chapter I Prohibition include those which:

(a) directly or indirectly fix purchase or sale prices, or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations.

Consistent with the approach adopted by the TFEU, and Article 101(3) in particular, section 3 of the 1998 Act specifies a number of exclusions from the Chapter I Prohibition. Under section 9 of the 1998 Act, exemptions from the Chapter I Prohibition may be obtained if certain criteria are met. We consider this further in relation to question 5.1 below.

Chapter II Prohibition

The Chapter II Prohibition provides that conduct on the part of one or more undertakings which amounts to an abuse of a dominant position in a market is prohibited, if it may affect trade within the UK (or a substantial part of it). In particular, conduct may constitute such an abuse if it consists of:

(a) directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties; or

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations.

Articles 101 and 102 of the TFEU

In addition to the above, since the modernisation of the enforcement of EU competition law throughout the EU pursuant to Regulation 1/2003 (the "**Modernisation Regulation**"), national courts and competition authorities have jurisdiction to apply Articles 101 and 102 of the TFEU directly. Accordingly, allegations of anti-competitive conduct said to have an actual or potential effect on trade between Member States (rather than just domestic trade) may be heard in the English courts, which are required to apply Articles 101 and 102 in determining the question before them.

Enforcing infringements of competition law

As a matter of English law, a breach of the Prohibitions or Articles 101 or 102 of the TFEU gives rise to a generic cause of action known as a "breach of statutory duty". The English courts have the power to grant a range of remedies (see further question 3.1 below). The principal remedies are: (i) damages (where the relevant breach has caused the claimant to suffer loss or damage); (ii) a judicial declaration that a contract, or certain behaviour, breaches the Prohibitions and/or Articles 101/102; and/or (iii) injunctive relief.

Under certain circumstances, the Prohibitions and/or Articles 101/102 may be available to defendants as a "shield" to claims. This is on the basis that the claimant is pursuing a claim which, in whole or part, is founded upon an illegal basis. For example, where a claimant brings an action to enforce a contract, a defendant may seek to argue that the claim fails because the contract is unenforceable as it infringes one of the Prohibitions and/or Articles 101/102.

The 1998 Act introduced rights of action which are specific to competition law infringements. Section 47A and section 47B in particular create alternative mechanisms for seeking "follow-on" damages where the competition authorities have determined that a breach has taken place and issued an infringement decision (i.e., the claimant relies on the prior infringement decision to establish liability – see further question 1.4 below). Both of these mechanisms will be significantly expanded with effect from 1 October 2015, when Schedule 8 of the Consumer Rights Act 2015 (the "**2015 Act**") comes into force. The reforms introduced by the 2015 Act are intended to make it easier for claimants to bring damages actions in England and Wales in respect of infringements of either UK or EU competition law, in particular by expanding the jurisdiction of the Competition Appeal Tribunal ("**CAT**") to hear so-called "stand-alone" claims (i.e., where there has been no prior infringement decision from a competition regulator and the claimant must prove the existence of the competition law infringement as well as its loss), as well as "follow-on" claims, and introducing a new "opt-out" collective actions regime. These reforms are discussed further in response to questions 1.4 and 1.5.

1.2 What is the legal basis for bringing an action for breach of competition law?

With respect to UK competition law, the legal basis for bringing an action is section 47A and section 47B of the 1998 Act.

As to EU competition law, section 2(1) of the European Communities Act 1972 provides the statutory basis for the rights and obligations provided under the TFEU to be directly enforceable and effective in the English legal system. In addition, Articles 101 and 102 of the TFEU have been held to have direct effect in all Member States in any event, including the UK (*Garden Cottage Foods -v- Milk Marketing Board* [1984] AC 130 and *Courage -v- Crehan* [2001] ECR I-6297).

Following the Modernisation Regulation, jurisdiction to apply Articles 101 and 102 of the TFEU has also been granted to national courts and competition authorities of Member States (in addition to the European Commission). Claimants can therefore directly rely on Articles 101 and 102 of the TFEU in the English courts. In practice, this has led to claimants pleading the 1998 Act and the TFEU in the alternative.

A breach of competition law may also give rise to one or more additional causes of action under English law – section 47A(1) of the 1998 Act is broadly framed and expressly covers not only "any claim for damages" but also "any claim for a sum of money". Note, however, that although section 47A(1) is broadly framed, it should not be extended too far, i.e., it is not intended to expand the CAT's remit to any monetary claim which a person who has suffered loss or damages as a result of a breach of competition law may bring in civil proceedings. In *WH Newson Holding Ltd and others v IMI Plc and others* [2013] EWHC Civ 1377 (relating to the copper tubes cartel) the Court of Appeal confirmed that in addition to the claimants' action for breach of statutory duty under Article 101 TFEU and/or section 2(1) of the European Communities Act, section 47A of the 1998 Act also permits a claimant to bring a claim for the tort of conspiracy, provided that all the ingredients of the cause of action can be established by infringement findings in the European Commission's decision. By way of further example, in *Emerald Supplies Ltd and Others -v- British Airways Plc* [2014] EWHC 3513 (Ch) and [2014] EWHC 3514 (Ch) (the air cargo cartel case), the claimants brought claims on the following three grounds: (i) breach of statutory duty under Article 101 TFEU and Article 53 of the EEA Agreement; (ii) interference with the claimants' businesses by unlawful means; and (iii) involvement in a conspiracy to injure the claimants by unlawful means.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims in England is derived from: (i) statute; (ii) a developing common law; and (iii) EU law. The 1998 Act imports many elements of EU competition law, both in terms of substantive rules and procedure. Indeed, section 60 of the 1998 Act expressly requires that questions arising in relation to competition law are dealt with by national competition authorities and the courts in a manner which is consistent with the treatment of corresponding questions arising under EU competition law. This has had the notable effect of importing EU jurisprudence in respect of competition law matters, including Articles 101 and 102 of the TFEU, directly into the English courts.

1.4 Are there specialist courts in England & Wales to which competition law cases are assigned?

In March 2000, pursuant to the 1998 Act, a specialist competition tribunal known as the CAT was set up. The CAT operates as a judicial body and consists of a President, members forming a panel of Chairmen, and members forming a panel of ordinary members. For the purpose of hearing and determining applications and appeals before it, the CAT consists of a Chairman and two other members. The President and Chairmen are qualified lawyers whereas the ordinary members are drawn from a diverse range of professions, including accountants, economists, public servants and business people as well as lawyers.

Since June 2003, the CAT has had the jurisdiction to determine:

(a) "follow-on" claims, i.e., claims for damages where the issue of liability has been determined by virtue of an infringement decision issued by a competent competition authority and there is no appeal pending;

(b) appeals against competition law infringement decisions issued by the Competition and Markets Authority ("**CMA**") (or, prior to 1 April 2014, its predecessor, the Office of Fair Trading ("**OFT**")), or the sectoral regulators such as Ofcom; and

(c) the judicial review of other decisions taken by the CMA, such as decisions relating to merger control or market investigations.

In light of the CAT's specialist expertise, it had been argued that it was not appropriate (or efficient) to limit the scope of its jurisdiction to the above types of case, and that its role should be expanded so as to make it the main venue for all competition cases in England and Wales. This has been recognised by the UK Government in the 2015 Act (see question 1.1 above). As noted above, the scope of the CAT's jurisdiction will be significantly expanded with effect from 1 October 2015, so as to allow it to hear "stand-alone" as well as "follow-on" competition cases. In addition, the UK Government has decided that regulations should be made under the powers provided for in section 16 of the Enterprise Act 2002 to enable the transfer of competition claims from the High Court to the CAT. It is also worth briefly noting in this regard that a consultation was published in June 2013 on options for the reform of the competition and regulatory appeals framework, including proposals that would significantly change the basis on which appeals against infringement decisions can be brought. The UK Government's response to that consultation has not yet been published. However, there is no suggestion that appeals would cease to be heard by the CAT (the detail of that consultation and the potential changes is outside the scope of this chapter).

Under the current regime, which applies until 1 October 2015, any claims relating to an alleged infringement of Article 101 or 102 TFEU, or the Prohibitions, that are not "follow-on" claims, must be commenced in the High Court in London (pursuant to a Practice Direction of the English Civil Procedure Rules ("**CPR**")). These claims will be assigned, in the ordinary course, to the Chancery Division of the High Court (although cases may also be brought in the Commercial Court). The Judges in the Chancery Division have undertaken specialist training in dealing with competition law claims and the Chancery Division has developed a specialist understanding of competition law cases. All Chancery Division Judges are also Chairmen of the CAT. However, the High Court may (on its own initiative or following an application by any of the parties) transfer any part of proceedings before it to the CAT, if, for instance, the CAT has previously made a decision on a similar claim, or if there is a similar claim under section 47A of the 1998 Act based on the same infringement currently before the CAT (CPR Part 30, paragraphs 8.3 and 8.4).

After 1 October 2015, it is intended that the CAT will become the specialist forum for both "follow-on" and "stand-alone damages" actions relating to infringements of UK or EU competition law, as well as continuing to hear appeals against CMA infringement decisions and applications for judicial review of CMA decisions in relation to mergers and market investigations. This is likely to result in a significant increase in workload for the CAT, which will require a corresponding increase in resources. It will remain open to claimants to bring a competition damages claim in the High Court, but it is expected that the CAT will generally be the preferred forum (as discussed further in response to question 6.1, the 2015 Act provides for the limitation periods for bringing a claim to be aligned so they will be the same for claims brought in either forum, thereby removing what has, to date, been a key consideration in respect of choice of forum).

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

Any legal person with capacity who has suffered or is likely to suffer loss or damage as a result of a breach of UK or EU competition law is entitled to bring a claim for damages or an injunction, either in the High Court or before the CAT (CPR EU Competition Law Practice Direction). Accordingly, the usual list of potential claimants applies as in any action: individuals; companies; partnerships; limited partnerships; and so on.

High Court

As noted above, proceedings in the High Court can be initiated either as a "stand-alone" action (where there has been no prior infringement decision by a competition authority), or as a "follow-on" action (where there has been such a decision).

CPR 19.1 – 19.5

With regard to claims by multiple claimants, under the CPR, in theory any number of claimants (or defendants) can be joined as parties to a single claim (CPR 19.1 – 19.5). The requirement is that the claims can conveniently be disposed of in the same proceedings. Where this is the case, the claimants must work together and present in relation to the common elements of their claims a joint case throughout the course of the proceedings (unless the court orders otherwise).

In circumstances where a group of claimants has incurred damages as a result of a single infringement (for example, by virtue of their having purchased cartelised products at an overcharge), it should be easy for the claimants to demonstrate that their claims can conveniently be disposed of in a single damages action. As is commonly the case, such proceedings would be brought against one or more of the addressees of the relevant infringement decision (there is no need to sue all addressees as liability is joint and several). Moreover, if additional purchasers of cartel products are identified at a later stage in the proceedings, CPR 19.2 provides that they may be added to the proceedings (with the court's permission). Alternatively, additional claimants can issue fresh proceedings and, if appropriate, these proceedings can formally be consolidated with the existing proceedings (see, for example, *W.H. Newson Holding Limited & Ors -v- IMI plc & Ors* (HC12B02085 consolidated with HC12F03701)).

Although the multiparty claims procedure under CPR 19.1 – 19.5 was not set up specifically to deal with collective actions (unlike GLOs and representative actions, see below), it has been used to good effect as a mechanism for collective redress in competition cases in the context of larger business-claimants or those that have suffered a greater level of damage.

Representative actions

It is possible to bring a representative action on behalf of parties who have "the same interest" in a claim under CPR 19.6(1). However, this procedure has never been used successfully to date in a competition law context.

In April 2009, the English High Court struck out an attempt by a direct purchaser claiming damages in a "stand-alone" action to bring a representative action on behalf of all other direct or indirect purchasers of the cartelised (freight) services (*Emerald Supplies Ltd -v- British Airways Plc* [2009] EWHC 741(Ch)). On 18 November 2010, the Court of Appeal upheld the High Court decision, refusing permission for a representative action for damages to be brought by the claimants on behalf of direct and indirect purchasers of air cargo services from British Airways.

The difficulty faced by the claimant in this case was that a fundamental requirement of a representative action under CPR 19.6 is that those who are represented must have the "same interest" in the action, and it must be possible to say of any person that they qualify for membership of the represented class by virtue of having the "same interest" at all stages in proceedings. It is not enough that the class will become identifiable when judgment is given.

Unlike with "follow-on" actions, the claimants in the *Emerald Supplies* case were not able to identify whether a person would qualify for damages (and would therefore have the "same interest" in the claim at all stages in the proceedings as the other members of the class) until a decision was made on the issue of whether competition law had been infringed. Until the question of liability was tried and judgment given, the claim could not be brought as a representative action under CPR 19.6. It is generally considered that, following this decision, the possibility of using the representative action procedure to facilitate class actions for breaches of EU and UK competition law has been closed off.

Group Litigation Orders

A potential alternative under the CPR is to bring a claim involving multiple claimants under a Group Litigation Order ("**GLO**"), where a number of claims have "*common or related issues of fact or law*" (CPR 19.10 and 19.11). Indeed, a GLO was suggested at first instance by the Chancellor in *Emerald Supplies Ltd & Anr -v- British Airways Plc* [2009] EWHC 741 (Ch), paragraph 38 – "[f]*urther, the avoidance of multiple actions based on the same or similar facts can equally well be achieved by a Group Litigation Order made under CPR Rule 19.11. The existing 178 additional claimants and any others who seek to join in after the publication of the European Commission's investigation are more conveniently accommodated under that procedure.*" All claimants wishing to join the group litigation must apply to be entered onto the group register (i.e., they must "opt in") by a date specified by the court.

Judgment on one or more of the GLO issues then binds all of the claimants on the group register. A GLO will not be permitted if the court considers it more appropriate that the claims are consolidated or brought by way of a representative action. Whilst over 85 GLOs have been granted since they were introduced in May 2000, only one has ever been issued in a competition case (*Prentice -v- Daimler Chrysler*, a case which ultimately settled).

CAT

There are two forms of damages claim that may be brought before the CAT.

Under section 47A of the 1998 Act, any person who has suffered loss or damage as a result of an infringement of competition law may bring a claim for damages before the CAT in respect of that loss or damage. However under the current regime, in place until 1 October 2015, unlike the High Court, the CAT can only consider "follow-on" actions. It should also be noted that the ability of the CAT to go beyond the findings of the initial infringement decision relied upon is extremely limited under the current law (*English Welsh & Scottish Railway -v- Enron Coal Services Limited* [2009] EWCA Civ 647). This has therefore limited the scope of claims which can be heard by the CAT under section 47A of the 1998 Act – i.e., it is not sufficient to rely on findings of fact which could arguably amount to an infringement. However, from 1 October 2015 the jurisdiction of the CAT will be expanded by the 2015 Act, to enable it to hear claims for damages in both "follow on" and "stand-alone" actions, which may be brought by either individuals or businesses.

Under section 47B of the 1998 Act, a collective "follow-on" damages action for breach of competition law may be brought in the CAT on behalf of multiple named consumer claimants (so-called "consumer claims") by a body authorised by the UK Government for this purpose. At present, only the Consumers' Association (also known as *Which?*) has been granted such authority. (*Which?* successfully negotiated a settlement in respect of its price-fixing claim in the CAT against JJB Sports. Its claim was the first, and so far the only, "follow-on" action by a representative body on behalf of consumers brought under section 47B of the 1998 Act.)

As noted above, the current regime only allows for "follow-on" collective damages actions to be brought under section 47B. In addition, such collective actions can only be brought on behalf of consumers on an "opt in" basis (i.e., on behalf of named consumers who have taken active steps to opt into the action). That being so, it is not possible to bring an action on behalf of a defined class of consumers or on behalf of "consumers at large" on an "opt out" basis (whereby members of the class are automatically included if they fall within the definition of the relevant class, unless they actively choose to "opt out" of the action).

However, from 1 October 2015 the scope of the collective actions regime will be significantly expanded, such that collective actions under section 47B of the 1998 Act will be available to businesses as well as consumers, in "stand-alone" as well as "follow-on" cases, and, most controversially, on an "opt out" basis (although this will only be applicable to UK-domiciled members of the relevant class). Pursuant to these provisions, it will be possible to bring a claim on the basis of an estimation of the total number of potential claimants, with individual claimants only needing to come forward after the quantification of damages stage to collect their share of the total amount of damages awarded.

Concerns were raised in response to the consultation issued by the Department for Business, Innovation and Skills, the ("**BIS Proposals**") on the options for reform that such a model could lead to an increase in vexatious or unmeritorious claims, but the UK Government nonetheless decided to proceed on this basis, arguing that the safeguards included in the 2015 Act are sufficient to address these concerns. These safeguards include: (i) a certification process pursuant to which the CAT will be required to certify a collective action before it is permitted to proceed; (ii) a prohibition on exemplary damages; (iii) the application of the "loser-pays" principle in respect of costs (i.e., those who bring unsuccessful cases will be liable for costs); and (iv) a prohibition on the use of contingency fees in "opt out" collective actions (see questions 3.2 and 8.2 below). In March 2014, the CAT published draft procedural rules for collective proceedings (and collective settlements) in the CAT, which provide more detail on the proposed procedures. A public consultation on these draft rules and other draft revised CAT procedural rules on other aspects of proceedings ("**Draft CAT Rules 2015**") closed on 3 April 2015 and it is anticipated that the final version of the rules will be published shortly, prior to the new regime coming into force on 1 October 2015.

The Draft CAT Rules 2015 envisage that the CAT will have a considerable degree of discretion in determining whether a person should be authorised to act as a representative in a particular case. Draft Rule 6(1) provides that the CAT may authorise a person to act as a class representative only where it considers that it is "*just and reasonable*" to do so. Draft Rule 6(2) sets out a list of factors which the CAT will take into account when making this decision, including any potential conflict of interest, the proposed representative's ability to pay the defendant's recoverable costs if ordered to do so, and the proposed representative's plans in relation to governance and consultation.

The reforms to the collective actions regime set out in the 2015 Act should also be viewed against the background of the wider current debate at both UK and EU level on the question of collective redress.

On 11 June 2013, the European Commission published its long awaited (non-binding) recommendation on collective redress mechanisms in EU Member States ("**EU Recommendation**"). At first sight, there may appear to be some tension between the approach adopted by the UK Government in the 2015 Act in respect of competition collective actions and the principles set out in the EU Recommendation. In particular, the European Commission recommended that collective actions should, as a general rule, be designed on an "opt in" basis. However, it is important to note that the EU Recommendation expressly envisages that an alternative approach may be adopted where this can be "*justified by reasons of sound administration of justice*". It is understood that the UK Government considers that given that the current "opt in" regime has been shown not to be a successful model for enabling victims of competition law infringements to claim compensation, the introduction of a tightly controlled "opt out" regime for competition claims is permitted on the basis of sound administration of justice.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The English law governing the proper jurisdiction of a claim is governed by Regulation (EU) No 1215/2012 ("**Brussels Regulation**") of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast) (which replaced the previous version, Regulation (EU) 44/2001, with effect from 10 January 2015) and case law. This question is always a matter for careful consideration on a case-by-case basis. However, in summary, a defendant may be sued in the English courts if it is domiciled there. Alternatively, a defendant may be sued in the English courts if the anti-competitive behaviour, which is the subject of the complaint, is alleged to have occurred there. A defendant may also be sued in the English courts if the relevant damage itself occurred, or will occur, there. If these criteria are met then it is likely, on the face of it, that the English courts will have jurisdiction.

Although Article 4 of the Brussels Regulation stipulates that a claimant should normally sue a defendant in the Member State in which the defendant is domiciled, there is an exception under Article 8 which provides that a claimant can sue elsewhere if the defendant is one of a number of defendants and it is desirable to determine all claims together to avoid irreconcilable judgments. For example, in the case of a pan-EU cartel where one of the cartelists is domiciled in the UK and the rest are domiciled in various other jurisdictions throughout Europe, a claimant could rely on Article 8 to bring its claim in England and Wales.

In recent years, the question has arisen as to whether a claimant can bring a claim in England and Wales on the basis that a UK subsidiary of one of the named addressees of the infringement decision was itself implicated in the cartel and thus liable for a breach of competition law, even though the subsidiary was not a named addressee of the infringement decision itself. In other words, can a damages claim be "anchored" in the UK via a UK subsidiary, even if none of the addressees of the infringement decision are domiciled in the UK?

Different answers to this question have been given by the CAT and the High Court. In *Emerson Electric Co & Ors -v- Mersen UK Portslade Ltd* [2012] EWCA Civ 1559 the Court of Appeal upheld the CAT's ruling that there must be a UK-based addressee of the infringement decision to give the CAT jurisdiction to hear a "follow-on" claim under section 47A of the 1998 Act. By contrast, in the High Court, it is currently possible to anchor a claim via a UK-based subsidiary of an addressee of a European Commission infringement decision.

In *Provimi -v- Aventis* [2003] EWHC 961, the High Court permitted a claim to be brought against UK subsidiaries who were not addressees of the infringement decision, even though they did not know about the cartel which their parent companies were party to, on the basis that the subsidiaries had "implemented" the cartel agreed by the parent companies (by selling the cartelised products). Subsequently in *Cooper Tire and Rubber Company Europe Ltd & Ors -v- Dow Deutschland Inc & Ors* [2010] EWCA Civ 864 and *Toshiba Carrier UK & Ors -v- KME Yorkshire & Ors* [2012] EWCA Civ 1190, the Court of Appeal cast doubt on the *Provimi* decision, suggesting that at least knowledge of the cartel by the anchor subsidiary should be shown, although in both of those cases the point did not actually fall to be determined.

In *Toshiba Carrier*, as well as pleading a standard "follow-on" claim, the claimants' particulars of claim lodged before the High Court also included an alleged "stand-alone" claim against the relevant UK-based subsidiary which was being used as the "anchor defendant". Significantly, the Court of Appeal concluded that, due to the inclusion of such "stand-alone" claim, the proceedings should not be struck out on jurisdictional grounds (even though the particulars of claim were said to be very badly drafted, and there was some confusion about the "stand-alone" element of the claim). The Supreme Court refused permission to appeal in March 2013.

In light of these decisions, it would seem that, in order to maximise the chance of securing jurisdiction in the UK in circumstances where there is no UK-based addressee of an infringement decision, a claimant should bring its claim in the High Court against a UK-based subsidiary of an addressee of the infringement decision, include in it some form of "stand-alone" claim (even if it is not a strong claim) alongside the "follow-on" claim, and then join the other defendants to the proceedings. It remains to be seen whether the reforms outlined in response to question 1.5 above, which will expand the jurisdiction of the CAT to hear "stand-alone" as well as "follow-on" claims, will enable a similar approach to be taken before the CAT in the future.

It is interesting to note in this regard that the ECJ recently held that claimants should be permitted to rely on an anchor defendant to assert jurisdiction, and maintain that jurisdiction claim even if the claimants subsequently settle the claim against the anchor defendant but wish to proceed against the other defendants, unless there is "*firm evidence*" (to be determined by the national court) to support the conclusion that the claimants deliberately tried to circumvent the usual rules relating to bringing the claim where a defendant is domiciled (see Case C-352/13 *Cartel Damage Claims Hydrogen Peroxide SA -v- Akzo Nobel and others* (EU:C:2015:335)).

If the defendant is domiciled outside the EU, different rules apply. These rules derive from the English common law. They provide that a defendant can be sued in England if it is served with the claim form in England. This is possible in circumstances where the defendant has a place of business in England, or if it is present in the jurisdiction for another purpose (even briefly) and is served with a claim form during that time. With regard to the latter example, it should be noted that there is a good chance that jurisdiction will successfully be challenged, if it is found that there is no real connection between the claim and England. A defendant may also be sued in England if the damage occurred, or resulted from an act committed, within the jurisdiction. However, even if these factors are satisfied, the English courts have discretion as to whether to accept jurisdiction or not. The courts must be satisfied that the claimant has a serious case to be tried, and that the English courts are the most appropriate forum for the dispute.

1.7 Does England & Wales have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction and if so, why?

England and Wales has become a popular jurisdiction for bringing private antitrust actions and, within Europe, it is widely recognised as a favourable jurisdiction for potential claimants. Primarily, the reasons for this are that the English courts have a reputation of dealing with complex cases efficiently and effectively, and the English legal system is considered to facilitate the way in which a claim can be brought. In particular, the English courts have a flexible and, in some respects, generous approach to establishing jurisdiction (see question 1.6 above) and the relevant procedural rules provide for an extensive disclosure regime (see question 4.5 below), both of which make it easier, compared to many other European jurisdictions, for claimants to pursue their claims in England and Wales. Moreover, whilst the costs of litigating in England and Wales can be very high, the "costs-shifting" rules (whereby the loser pays a significant proportion of the winner's costs) make England and Wales a preferred jurisdiction for claimants from a costs perspective. Recent changes to the rules on the funding of litigation (see section 8 below) and pending reforms to collective damages actions for infringements of competition law (see question 1.5 above and question 11.3 below) are likely to make England and Wales an even more attractive jurisdiction for claimants. It remains to be seen whether the implementation of the EU Directive on antitrust damages actions ("**EU Damages Directive**") will make any difference in terms of other jurisdictions becoming more attractive than they currently are (see further chapter 1 on the likely impact of the EU Damages Directive).

1.8 Is the judicial process adversarial or inquisitorial?

The procedure in both the High Court and the CAT is adversarial.

That said, both the courts and the CAT have significant case management powers and may make procedural orders (such as for the disclosure or provision of special documents or information) or raise issues for parties to deal with on their own initiative if they consider it will assist in the resolution of the case.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim remedies are available from the English courts (see question 2.2).

The CAT also has the power to award interim relief in relation to any case before it – it is empowered to grant any remedy by way of interim relief that could have been ordered by way of final remedy, where such action is considered necessary and urgent either: (i) to prevent "serious irreparable harm" to a particular person or category of persons; or (ii) to protect the public interest. This power is very similar to the power vested in the English courts under CPR 25 (see question 2.2). In competition cases, the final remedy most commonly sought is damages, but other final equitable remedies are also available. In "follow-on" actions, the CAT therefore has the power to award interim damages in the event it is satisfied, before the final hearing, that at least the amount awarded by way of interim damages will be awarded to the claimant in its final judgment. At the time of writing, the CAT has exercised this power to award interim damages in just one case: *Healthcare At Home -v- Genzyme* [2006] CAT 29. In the past, appellants have also called upon the CAT to exercise its interim powers in the context of its role as an appellate body dealing with public enforcement decisions by the OFT (the predecessor to the current CMA). In particular, appellants have sought an order suspending the implementation of the remedy ordered by the OFT pending appeal.

As things currently stand, the CAT cannot grant permanent injunctions as a final remedy and thus cannot grant interim injunctions. However, as part of the reforms introduced by the 2015 Act, from 1 October 2015 the CAT will have the power to grant both permanent injunctions as a final remedy and interim injunctions. An injunction granted by the CAT will have the same effect and will be enforceable as if it had been granted by the High Court. In deciding whether to grant an injunction, the CAT is expected to apply largely the same principles which the High Court would apply (see question 2.2), although the detail of the CAT's approach to its new powers is not set out in the Draft CAT Rules 2015 and is expected to be included in its revised Guide to Proceedings (which has not been published at the time of writing). Note, however, draft Rule 67(5) of the Draft CAT Rules 2015 which provides that the CAT may grant an interim injunction in relation to a claim which is subject to the fast-track procedure either without requiring an undertaking as to damages, or imposing a cap on the amount that will be required to be paid under any such undertaking.

For completeness, we note that, pursuant to Article 8 of the Modernisation Regulation, interim measures may also be ordered by the European Commission in cases of urgency due to the risk of serious and irreparable damage to competition and on the basis of a *prima facie* finding of infringement. The Modernisation Regulation also provides for the possibility of competition authorities of Member States ordering interim measures in relation to breaches of Articles 101 and 102, a power which is implemented in England and Wales through the 1998 Act.

In addition, the CMA has power to grant interim relief in respect of alleged infringements of the Prohibitions, as well as alleged infringements of Articles 101 and/or 102. Note in this regard that, as part of the wider reforms to the UK competition law regime implemented in April 2014, a new lower threshold now applies to requests for interim relief from the CMA, such that interim relief is available where the CMA considers it necessary to act urgently to prevent "significant damage" to a person or category of persons, rather than "serious irreparable harm". It has been queried whether the same test should be applied by the CAT in the context of granting interim injunctions under its new powers, but this is not addressed in the Draft CAT Rules 2015. It remains to be seen what approach will be advocated in the anticipated revised Guide to Proceedings.

2.2 What interim remedies are available and under what conditions will a court grant them?

The English courts may order many types of interim remedy – see Part 25 of the CPR. The most relevant for the purposes of this chapter is likely to be interim injunctions.

The conditions to be satisfied by any applicant for an interim injunction, whether in respect of a competition law action or otherwise, are, in summary, as follows:

- it must have a good arguable claim to rights it is seeking to protect;
- there must be a serious question to be tried arising from the activity of the potential defendant;
- if the application is made without notice to the respondent/defendant, full and frank disclosure must be given by the applicant of anything which it thinks may be relevant for the court to know;
- the court will ask itself whether damages alone would constitute an adequate remedy;
- the court will also ask itself whether more harm would be done by granting the injunction than by refusing it (the balance of convenience test); and
- in almost all cases, the applicant will need to make a cross undertaking in damages (whether the application is made with or without notice). This means that if, in due course, the court decides that any injunction that is granted was not justified, the applicant may be ordered to pay the costs and damages suffered by the defendant in having to deal with the injunction that was obtained.

The award of an interim injunction is an equitable remedy, i.e., it is a matter for the court's discretion. The injunction may be "prohibitory", i.e., to prevent the defendant from commencing or continuing behaviour which infringes competition law, or "mandatory" – i.e., to require the defendant to take certain steps (for example, a dominant undertaking that has unlawfully refused to supply the claimant may be required to recommence supply, pending final determination of the dispute).

As noted above in response to question 2.1, under the current rules, the CAT may only grant any remedy by way of interim relief that it has the power to make by way of final remedy. Currently this means that the CAT cannot grant interim injunctions. However, its powers will be expanded with effect from 1 October 2015, as discussed above.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

(a) Damages

A remedy in damages is available to a party which can establish that on the balance of probabilities: (i) it has suffered loss as a result of a breach of competition law by the defendant; (ii) the defendant's conduct caused the losses claimed; and (iii) the damage was not too remote. Damages awards can be granted by both the CAT and the High Court.

A question which has recently arisen is whether a claim for damages should be permitted in circumstances where the claimant has arguably also participated (through a related group company) in the alleged infringement (i.e., the application of the *ex turpi causa* maxim). In April 2015, the High Court concluded that a claim brought by Tesco Stores against MasterCard (in connection with alleged infringements of competition law relating to use of multilateral interchange fees) should not be struck out, even though Tesco Bank was allegedly party to the infringement. The High Court considered that the issues relating to whether Tesco Bank and Tesco Stores formed the same economic unit (and even if they did, whether Tesco Stores had any liability for Tesco Bank's actions) were complex, and required full consideration of all facts and evidence (not all of which was available at the time of the strike out application) at trial (*Tesco Stores Ltd and others -v- MasterCard Incorporated and others* [2015] EWHC 1145 (Ch)). These issues could potentially have a significant impact on the level of damages (if any) awarded, but at the time of writing judgment is still pending.

(b) Injunctions

Injunctions are always discretionary and may not be granted in circumstances where, for example, the claimant's conduct can be criticised, the claimant has delayed in bringing proceedings, and/or the observance of the injunction would require constant supervision. For example, in a case where the parties had been hoping to obtain interim measures from the OFT (the predecessor to the CMA) to prevent an alleged anti-competitive agreement from being put into effect, the English High Court refused to grant an injunction in circumstances where the parties had made their application to the High Court very late and only once it was clear that the OFT was not going to take action (*AAH -v- Pfizer* [2007] EWHC 565). As noted previously, under the current rules, only the High Court can grant injunctions and not the CAT, but this position will change on 1 October 2015 when the 2015 Act enters into force.

(c) Alternative remedies

As English tort law currently stands, the only remedy generally available for breach of statutory duty is compensatory damages. Other alternative equitable remedies such as restoration, account of profits and exemplary damages are not normally available (see for example *Devenish Nutrition Ltd & Ors -v- Sanofi-Aventis SA (France) & Ors* [2007] EWHC 2394 (Ch), [2008] EWCA Civ 1086). However, the case of *2 Travel Group PLC (in liquidation) -v- Cardiff City Transport Services Limited* [2012] CAT 19 has demonstrated that exemplary damages may be available in exceptional circumstances (see question 3.2 below).

(d) Declaratory relief

A claimant may seek a declaration that a particular agreement, or certain conduct on the part of the defendant, is or would constitute a breach of competition law.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

A claimant who suffers loss as a result of an infringement of EU or UK competition law can bring a claim for damages. Both the High Court and CAT can hear such claims.

Compensatory damages

Damages are generally awarded on a compensatory basis, i.e., to enable a claimant to recover, insofar as money can, the losses suffered as a result of the defendant's breach of competition law. When considering the level of its damages award, the court will consider whether the damages (or part of them) could be seen as too remote from the breach. The determination of the quantum of damage in competition claims is usually a challenging issue, particularly in unfair/excessive price cases where, in order to secure a remedy, the court of competent jurisdiction is, in effect, being asked to set a particular price (i.e., a "fair" one).

Exemplary damages

In principle, English courts can also order the payment of exemplary damages, although in practice, they will only do so in exceptional circumstances (and have done so in only one competition case to date).

In the case of *Devenish Nutrition Ltd & Ors -v- Sanofi-Aventis SA (France) & Ors* [2007] EWHC 2394 (Ch), [2008] EWCA Civ 1086, the High Court held that exemplary damages cannot be recovered if the defendant has already been fined by a competition authority. The High Court reasoned that, since a financial penalty had already been imposed on the defendant through the public enforcement process, it would be unjust to "punish" it again through the imposition of exemplary damages (this decision was upheld by the Court of Appeal).

However, in the more recent case of *2 Travel Group PLC (in liquidation) -v- Cardiff City Transport Services Limited* [2012] CAT 19, the CAT held that where the defendant has *not* already been fined by a regulator (or benefitted from immunity under a leniency programme) then exemplary damages may be awarded in exceptional circumstances, *viz*, where the defendant has behaved "*outrageously*" with "*cynical disregard*" for the claimant's rights, and was aware that its conduct was probably or clearly unlawful. *2 Travel Group PLC* is thus far the only case where the CAT has awarded exemplary damages (£33,818.79 plus interest), as other cases have settled prior to hearing.

In practice, *2 Travel Group PLC* provides a high threshold which is likely to be difficult to meet in most cases, as illustrated by *Albion Water Limited -v- Dŵr Cymru Cyfyngedig* [2013] CAT 6. In that case, the CAT found that a failure by Welsh Water to engage in any meaningful way at a senior level with important pricing decisions was not sufficient to meet the "cynical disregard" test.

In relation to collective damages before the CAT, the 2015 Act provides that the CAT may not award exemplary damages in collective actions (Schedule 8, Part 1, 6(1)).

Pass-on

Where the claimant may have "passed-on" some or all of the loss to its own purchasers, a defendant may assert this by way of a "defence" to the alleged claim, and argue that, to the extent that the loss has been passed-on, the claimant has not suffered a loss for which it should be compensated (or at the very least that the level of damages claimed ought to be significantly reduced to take account of such pass-on). The validity of this so-called "passing-on" defence has not yet been finally determined by the English courts but, in the context of the consultation on the BIS Proposals, the UK Government concluded that the defence should, in principle, be available in accordance with the general principles of English tort law, and that it was not therefore necessary to expressly legislate on this issue. This question has since been resolved at EU level in the recently finalised EU Damages Directive, which provides that the "passing-on" defence should be available in all EU Member States, subject to certain restrictions (see question 5.2).

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Yes, in relation to exemplary damages claims. Following *Devenish Nutrition*, where fines have already been imposed (or the undertaking in question escaped the imposition of a fine as a result of having been granted immunity), there will be no award of exemplary damages. It should be noted in this regard that, in the *2 Travel Group* case, no fine had been imposed on Cardiff Bus owing to the application of the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000.

As to claims for compensation, and the impact a fine may have on the quantum of that compensation, the English courts have not had the opportunity to issue a relevant judgment.

4 Evidence

4.1 What is the standard of proof?

The applicable standard under English law is the civil standard of proof, i.e., the "balance of probabilities". It is worth noting, however, that the CAT has held that the standard of proof for public enforcement has to reflect the fact that competition prohibitions are quasi-criminal. In *Napp Pharmaceutical Holdings Ltd and Subsidiaries -v- Director General of Fair Trading* ([2002] CAT 1, at paragraph 109) it was held that there must be "*strong and compelling evidence of an infringement*".

4.2 Who bears the evidential burden of proof?

In "stand-alone" cases involving an alleged breach of the Chapter I Prohibition or Article 101, where there is no prior infringement decision by a competition authority, the burden of proof as to the existence of the infringement is split. It is for the claimant to show that the agreement in question *prima facie* infringes the Chapter I Prohibition/Article 101(1), but it falls to the defendant to show that the agreement is not prohibited because it falls within a legal exception under section 3 of the 1998 Act/Article 101(3). If the existence of the infringement is established, the burden of proof is on the claimant to prove that it suffered loss as a result (i.e., causation and quantum).

In "follow-on" cases, the existence of the infringement is already established by the prior infringement decision of the competition authority. However, the claimant still bears the burden of proving the loss it suffered as a result of the infringement.

The practical burden which the claimant faces of proving a *prima facie* infringement of competition law in a "stand-alone" case is a heavy one, particularly because in practice it is commonly the party that is alleged to have breached the law (the defendant) which will, at least prior to disclosure (see question 4.5 below), possess the relevant documentary evidence relating to the alleged breach. As a result, it is often easier for a claimant to obtain an award of damages in "follow-on" actions than in "stand-alone" actions (although "follow-on" actions are by no means straightforward).

Where the passing-on defence is invoked (see question 3.2 above and question 5.2 below), Article 13 of the EU Damages Directive (to be implemented into English law by 27 December 2016) provides that the burden of proving it lies with the defendant. If the existence of the claim for damages or the amount of compensation to be awarded depends on whether – or to what degree – an overcharge was passed-on to the claimant (for example, in the case of a claim by an indirect purchaser) the burden of proof lies with the claimant. In this context, Article 14(2) provides that pass-on is deemed to have been proven in respect of a claim by an indirect purchaser where it can be shown that: (i) the defendant infringed competition law; (ii) that infringement led to an overcharge for the direct purchaser; and (iii) the claimant purchased the goods or services which were the subject of the infringement (or goods or services derived from them), unless the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not passed-on to the indirect purchaser. It remains to be seen how national courts will grapple with these rather complex rules where "mixed" claims are brought involving both direct and indirect purchasers. Article 15 of the EU Damages Directive simply states that national courts should be capable of taking "due account" of claims at different levels of the supply chain in assessing whether the burden of proof is satisfied, but this is likely to give rise to difficult questions in practice.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in England & Wales?

Under English law, there is no presumption of loss and the quantum of damages needs to be proven using the ordinary principles of loss and causation, supported by the relatively wide scope of English law disclosure obligations. The consultation on the BIS Proposals asked whether a rebuttable presumption of loss should be introduced into cartel cases, but the UK Government's response, dated January 2013, concluded that such a presumption should not be introduced. The reasons given including that: it "would be a departure from the normal English law position that loss must be proven"; it would be unlikely to save time; it may lead to spurious claims; and "it was unnecessary as claimants are already able to access the information they [need] by means of the UK's rules on disclosure".

The EU Damages Directive introduces a rebuttable presumption that cartel infringements cause harm which will need to be implemented into English law by 27 December 2016. However, there is no presumption as to the quantification of the harm caused, so it will remain the case that the claimant must prove quantum in order to recover damages.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The evidence relied upon by the parties to proceedings under the 1998 Act will be adduced by way of documentary evidence, the testimony of witnesses of fact recorded in written statements, and expert witnesses if required. Both the factual and expert witnesses are then subject to cross-examination at trial. Hearsay may also be advanced as evidence, although less weight will be given to such evidence by the court.

In the English courts, documentary evidence commonly forms the backbone of the evidence adduced by the parties. The rules governing the disclosure of documentary evidence are in CPR 31. The term "document" is construed widely and includes all notes, records, tapes, other electronic media or anything on which evidence or information is recorded in an intelligible manner.

Expert evidence is generally admissible if it is provided by a suitably qualified and independent expert on a matter which lies within the scope of his expertise.

The court will control the scope of evidence by inviting the parties to identify the issues which divide them and on which evidence is required. Where both parties appoint experts (rather than appointing a joint expert, which is rare in competition cases), the court will generally require experts to prepare reports and, following exchange, to meet and establish the areas of agreement and disagreement between them (following which they usually produce a "joint expert statement"). The extent of the economic analysis typically required in competition cases means that the presence of economists as expert witnesses is commonplace.

The approach of the CAT is similar to that of the High Court, although paragraph 12.1 of its Guide to Proceedings (2005) states that "*strict rules of evidence do not apply before the Tribunal. The Tribunal will be guided by overall considerations of fairness, rather than technical rules of evidence*", citing *Argos and Littlewoods -v- OFT* [2003] CAT 16 at [105]; *Claymore -v- OFT* [2003] CAT 18; and *Aberdeen Journals -v- OFT* [2003] CAT 11 at [126] to [134]. The CAT may, therefore, be relatively more informal than the High Court, although in practice the approach of both is very similar. It remains to be seen whether any further guidance will be provided in a revised version of the CAT's Guide to Proceedings which is expected to be published alongside the new CAT Rules once these are finalised (although no draft version of a revised Guide to Proceedings has been published for consultation at the time of writing).

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Disclosure under the CPR is the process whereby a party to proceedings is obliged to disclose to the other party the existence of documents which are or have been in his control and which support his case, are adverse to his case, or support the other side's case.

In the High Court, disclosure is given by the exchange of lists of documents. This takes place after the parties have formally stated their case but before the exchange of witness and expert evidence. Parties are then entitled to inspect and take copies of the documents disclosed, except documents over which privilege is claimed (CPR 31).

Disclosure has traditionally been perceived as relatively generous in England and Wales. Recent reforms to the CPR, which came into effect on 1 April 2013, seek to make the disclosure process more focused and efficient. However, the CPR still assist claimants in requiring both parties to produce and serve a Disclosure Report describing documents that exist or may exist that are or may be relevant to the matters in issue in the case. If the extent of disclosure cannot be agreed, the court will order disclosure, having regard to the costs estimates and the Disclosure Reports filed by the parties. This may require that disclosure be given on a number of bases. Included in the range of options is a more limited approach, requiring each party only to disclose those documents on which it relies, together with a request for specific documents or disclosure on an issue-by-issue basis. At the other end of the spectrum, the court may order "standard disclosure" (i.e., all documents relevant to the issues at hand whether or not they assist or are adverse to a party's case) or a "broader train of inquiry" disclosure (requiring disclosure of documents which may help advance or damage a party's case).

Business secrets or confidential documents are not protected from production to the other side *per se*. However, particularly in Chapter I Prohibition cases, or disputes involving significant players in a market, it is well understood that the imposition of "standard disclosure" would, without safeguards, lead to the exchange of information between competitors which might itself constitute a breach of competition law. The first safeguard is a rule that restricts the use of disclosed documents to the purpose of the proceedings alone, and for no other purpose. Disclosed documents are in any event confidential to those proceedings (unless and until they are referred to in court, whereupon they can become the subject of public records).

In addition, "confidentiality ring" arrangements may be made. This may mean that parties themselves are not privy to their adversary's documents and it is only their lawyers and expert witnesses who can review the full extent of the other side's disclosure. In both the High Court and the CAT, the concern over preservation of confidentiality can lead to an inflation of paperwork with confidential and non-confidential versions of documents proliferating, adding to overall cost.

In addition, parties, including third parties (such as contribution defendants and/or those cartelists which have not been sued), may be compelled to disclose documents by way of a court order.

The CAT too has powers to order disclosure (CAT Rules 2003, Rule 19(2)(k)) and will order such disclosure to the extent it considers it necessary for the just, expeditious and economical conduct of the case. The CAT is well used to assisting parties in structuring confidentiality ring arrangements. It is also common practice to hold hearings in private – in whole or in part – where commercial confidentiality issues arise.

Where documents are protected by legal professional privilege, they may be withheld from inspection and are not required to be produced as evidence, either in court or in the CAT, unless a party takes the unusual step of waiving privilege in its communications. Note that, unlike under EU law, the English law of privilege can extend to communications with "in-house" lawyers who are employed by the business which they advise.

(a) Documents that can be obtained before proceedings have begun

An application for disclosure of documents prior to the start of proceedings in the High Court is permitted under certain circumstances – see CPR 31.16 on pre-action disclosure.

The CAT has no power to order pre-action disclosure.

(b) Documents that can be obtained during proceedings from the other party

The court may require parties to disclose documents at any stage of the proceedings. Disclosure is a continuing obligation (CPR 31.11) on parties to litigation. If a party to the proceedings discovers or creates relevant documents relating to the dispute at any time during the proceedings, it must notify the other parties and give supplemental disclosure.

The CAT will order disclosure if it thinks it is necessary or relevant to the proceedings.

(c) Documents that can be obtained from other parties (including competition authorities)

A party to proceedings in the High Court may apply for disclosure against a non-party (CPR 31.17). The court may make such an order under certain circumstances – see CPR 31.17. The CAT can also order non-parties to give evidence or produce documents (CAT Rules 2003, Rule 19(2)(d) and 23(1)(b)).

Such orders for disclosure may be addressed to competition authorities and, pursuant to Article 6 of the EU Damages Directive, the CMA (and other national competition authorities) may, as a general rule, be required by national courts to disclose relevant evidence included in its case file, provided that the evidence in question cannot reasonably be obtained from another party to the proceedings or a third party. However, the EU Damages Directive provides absolute protection from disclosure for certain "black-list" documents, namely, leniency corporate statements and settlement submissions (see further question 10.2 below). In addition, limited protection is granted to a further set of "grey-list" documents, namely: information prepared specifically for proceedings of a competition authority; information that the competition authority has drawn up and sent to parties in the course of proceedings; and settlement submissions that have been withdrawn. Such "grey-list" documents can only be ordered to be disclosed after the competition authority has formally closed its proceedings by adopting a decision or otherwise.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

In the English courts, if a witness is reluctant, or unwilling, to attend trial, attendance can be compelled by issuing and serving a witness summons (CPR 34.2 – 34.7). Issuing a witness summons is purely administrative, and a fee must be paid. Service must be effected personally and not less than seven days before the witness is required to attend court. There are two types of witness summons: (i) to attend court to give oral testimony; or (ii) merely to attend court to produce a document(s). There are criminal sanctions for failure to appear; namely, fines and imprisonment.

Factual and expert witnesses can expect to be subject to cross-examination by the other side's advocate.

The CAT too has the power to summon witnesses. In particular, the CAT has the specific power to give directions as to the examination or cross-examination of witnesses (CAT Rules 2003 Rule 19(2)(g)). The CAT also has the power to limit cross-examination of witnesses to any extent or in any manner it deems appropriate (CAT Rules 2003 Rule 51(4)).

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue "follow-on" claims for damages in the courts?

Yes, in relation to infringement decisions by the European Commission or the CMA. "Follow-on" actions commenced as a result of a decision by the European Commission or the CMA may be brought either in the High Court or in the CAT. The advantage of a "follow-on" action, of course, is that the claimant does not need to establish that the defendant has infringed competition law – liability is established by the fact of the decision of the European Commission or the CMA.

In relation to European Commission infringement decisions, Article 16(1) of the Modernisation Regulation provides that such decisions are binding on national courts on the issue of liability.

In relation to CMA infringement decisions, section 58A of the 1998 Act provides that findings of fact made by the CMA in the course of an investigation are binding in the High Court in relation to civil proceedings for infringement of the Prohibitions or Articles 101 and 102 (section 58 of the 1998 Act), and that, once the relevant period for appeal has expired or any appeal has run its course, CMA and CAT infringement decisions are binding in relation to High Court actions for damages (or other monetary claims).

As to proceedings before the CAT, the Court of Appeal decision in *Enron Coal Services Limited -v- English Welsh & Scottish Railway* [2011] EWCA Civ 2 confirmed that in "follow-on" claims under section 47A of the 1998 Act, the CAT is normally bound by all findings of fact made by the competition regulator in the course of its investigation leading to the infringement decision being relied upon (and not just the findings of fact that constitute the elements of the demonstrated infringement). This position is also reflected in the 2015 Act, which provides that the CAT, like other courts, is bound by final infringement decisions (when appeals are no longer possible) and findings of fact by the CMA (unless it directs otherwise).

With regard to decisions of a foreign national competition authority, under the normal practice of the English courts, decisions of a foreign regulator or court are treated as admissible evidence, but will not be legally binding on the issue of liability, which remains a matter for the English courts to decide. This was confirmed recently in *Ferrexpo -v- Gilson Investments* [2012] EWHC 721, where the High Court also held that it was not possible to assess what weight should properly be attached to a decision of another court without going into the facts itself. This position is reflected in the compromise reached in Article 9 of the EU Damages Directive, which provides that where a national competition authority decision is being relied upon before the court of another EU Member State, it will constitute "at least *prima facie* evidence" that an infringement has occurred, rather than constituting legally binding proof of liability.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

See question 4.5 above.

4.9 Is there provision for the national competition authority in England & Wales (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Article 15 of the Modernisation Regulation provides for the possibility that national competition authorities and/or the European Commission may assist national courts as *amicus curiae* ("friend of the court") on issues relating to Articles 101 or 102 of the TFEU.

Article 15(3) states (in relation to the European Commission) that where the coherent application of Article 101 or Article 102 so requires, the European Commission, acting on its own initiative, may submit written observations to national courts. With the permission of the court in question, it may also make oral observations. The European Commission published its first *amicus curiae* observations in 2006 in a case before the Paris Court of Appeal and since then, according to the Directorate General for Competition (DG Competition) website, it has made further observations in nine cases across the EU. In relation to cases heard before the English courts, the European Commission made *amicus curiae* observations in the *National Grid* case regarding the disclosure of leniency documents (see question 10.2 below).

Currently, under the CPR, the CMA is notified of competition claims before the High Court and has *amicus curiae* rights in relation to such claims, but it does not have these rights in relation to competition claims before the CAT. In its response to the BIS Proposals, the OFT (the predecessor to the CMA) indicated that it considered it should be given these rights in relation to CAT claims, but this has not been addressed in either the 2015 Act or the Draft CAT Rules 2015.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

In Article 101 TFEU cases, there is a defence to the prohibition set out in Article 101(1) under Article 101(3). The burden of proof in relation to Article 101(3) is upon the defendant seeking to rely upon it as a defence. Article 101(3) is not a public interest defence as such, but the exemption it provides is available where it is possible to show that the *prima facie* restriction of competition which infringes Article 101(1) is outweighed by the pro-competitive effects of the agreement in question. Article 101(3) contains four limbs. It must be shown that:

- the agreement contributes towards the production or distribution of goods or towards economic or technical progress;
- the agreement allows consumers a fair share of the resulting benefits (for example by using cost efficiencies to reduce prices);
- no restrictions are imposed which are not indispensable to the attainment of those objectives; and
- the parties are not able, through the agreement, to eliminate competition in relation to a substantial part of the products in question.

A corresponding exemption is available under the Chapter I Prohibition. In relation to both Article 101(3) and its equivalent under the 1998 Act, it is no longer necessary to notify agreements to the European Commission or the CMA in order to benefit from the exemption. Since 1 May 2004, these legal exceptions apply automatically to any agreement which fulfils the conditions of exemption.

A defence of objective justification is available under Chapter II and Article 102, where it can be shown that the actions taken were not abusive because they were objectively justified. For example, it would be an objective justification to an allegation of abusive discrimination for charging different prices to different customers for similar transactions to show that the higher volumes ordered by customer 'A' created bulk order cost efficiencies which allowed for a lower price per unit than for the lower volume ordered by customer 'B'.

These defences cannot be pleaded in "follow-on" actions where the question of liability is effectively closed (as noted above, infringement decisions of the CMA and the European Commission are binding on the CAT and High Court in relation to a "follow-on" action for damages). Concepts such as *force majeure*, consent and necessity are relevant, but only to breach of contract in English law.

5.2 Is the "passing-on" defence available and do indirect purchasers have legal standing to sue?

"Pass-on" is often characterised as a "defence" to an overcharge claim, although, arguably, this is not in fact the case. Rather, it is a reflection of the principle that an infringing supplier can seek to defend itself against claims by a purchaser by arguing that the purchaser/claimant has "passed-on" to its own customers all or part of the loss that it has suffered as a result of the anti-competitive arrangements (by way of, for example, higher prices). The result may be that it has not actually suffered any direct loss.

It has not yet been decided by the High Court as to whether the "passing-on" defence is in fact permitted as a matter of English law. However, under the general principles of tort law, it would seem that there is no reason why it should not be permissible and the Court of Appeal's decision in *Emerald Supplies -v- British Airways* [2010] EWCA Civ 1284 acknowledged that British Airways could plead the "passing-on" defence against some members of the class. Although the defence was not actually pleaded in that instance, the judgment of the court implied that such a defence was available. The position has since been clarified by the EU Damages Directive, which provides that defendants should be permitted to rely on the defence of "passing-on" but should also bear the burden of proof in this context (see question 4.2 above).

Indirect purchasers have legal standing to sue and, once implemented into English law, Article 14(2) of the EU Damages Directive is likely to make it much easier for them to do so. As discussed above in response to question 4.2, Article 14(2) provides that pass-on is deemed to have been proven in respect of a claim by an indirect purchaser where it can be shown that: (i) the defendant infringed competition law; (ii) that infringement led to an overcharge for the direct purchaser; and (iii) the claimant purchased the goods or services which were the subject of the infringement (or goods or services derived from them), unless the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not passed-on to the indirect purchaser.

It is clear that the "passing-on" defence has the potential to play a significant role in private competition actions in determining which cases get brought, the evidence likely to be requested to assemble a case and ultimately the outcome and award of damages. It has also been suggested by Sir Peter Roth (President of the CAT and an English High Court judge) that the complex rules set out in the EU Damages Directive in relation to the shifting burden of proof in this context may also introduce a strategic element to "mixed" claims involving both direct and indirect purchasers, with defendants potentially seeking to ensure that claims by indirect purchasers are heard first, so as to establish pass-on for the purposes of a particular set of proceedings.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

For claims commenced in the English High Court, CPR Parts 19 and 20 provide mechanisms for defendants to be able to join in and claim contributions from, or indemnities against, other cartel participants. CPR Part 19.4 states that, following the service of a claim form, a defendant may make an application for the court's permission to add other cartel participants. Note that a cartel participant will not be added unless his consent has been provided and filed with the court. Following addition of other cartel participants, CPR Part 20.6 enables a defendant who has filed an acknowledgement of service or a defence to make a further claim for contribution or indemnity against the other cartelists party to the action.

As explained in response to question 1.4 above, it is intended that the CAT will become the preferred forum for both "follow-on" and "stand-alone" damages actions relating to infringements of UK or EU competition law. Therefore although CPR Parts 19 and 20 have traditionally provided the means for defendants to join other cartelists to claims against them, Rule 35 of the CAT Rules 2003, and draft Rule 38 of the Draft CAT Rules 2015 (likely to come into force on or shortly after 1 October 2015) are expected to increase in usage and prominence. Draft Rule 38 of the Draft CAT Rules 2015 is more expansive in the power afforded to the Tribunal than its predecessor Rule 35 of the CAT Rules 2003.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

There is generally a six-year time limit for bringing an action in the English High Court. Time starts to run from the date on which the cause of action accrued (section 2 of the Limitation Act 1980) (i.e., from when the wrongful act caused the damage in issue). This time period can, however, be extended where there has been deliberate concealment (section 32)1(b) Limitation Act 1980). This is often at issue in relation to cases involving price fixing and secret cartels.

In October 2014, the question of limitation in the context of a competition damages claim was first tested in the High Court in *Arcadia Group Brands Ltd and others -v- Visa Inc and others* [2014] EWHC 3561 (Comm). The case was brought by high street retailers seeking damages for breaches of European and English law in relation to Visa's practice in relation to multilateral interchange fees. Visa applied to strike out parts of the claimants' claims in so far as they alleged infringement of competition law more than six years prior to when the action was brought (i.e., the limitation period had expired). The claimants, however, contended (relying on section 32(1)(b) of the Limitation Act 1980) that they did not know, or could not with reasonable diligence have discovered, the relevant infringement before the expiry of the limitation period. It was held that the claimants could not rely on section 32(1)(b) of the Limitation Act 1980, which allows extension of a limitation period where facts relevant to a claimant's case have been deliberately concealed. The facts relevant to the claimants' claims were discoverable based on information from the European Commission and the OFT. The strike out order was unanimously upheld by the Court of Appeal in August 2015 ([2015] EWCA Civ 883). This case highlights the importance of bringing a competition claim as soon as claimants have sufficient information plead a *prima facie* case.

Damages claims in the CAT under section 47A or 47B must currently be brought within two years of the date on which the cause of action accrued, or within two years from: (i) the expiry of the period for appealing the relevant decision relied upon; or (ii) the conclusion of any appeal process.

It is worth noting that the operation of the two-year limitation period in the CAT has been challenged in a number of cases. In *BCL Old Co Limited & Ors -v- BASF SE & Ors* [2012] UKSC 45, the Supreme Court held that the deadline for bringing an action is not extended by a pending challenge against the penalty that has been imposed (as opposed to an appeal against the substantive infringement finding). In *Deutsche Bahn AG & Ors -v- Morgan Advanced Materials Plc (formerly Morgan Crucible Company Plc)* [2014] UKSC 24, the Supreme Court was asked to rule on the question of whether the limitation period for claims brought in the CAT is suspended until all appeals on the existence of a particular competition infringement have been concluded, or whether, if one of the addressees of the decision chooses not to appeal against the substantive decision (for example, due to its having been granted immunity under a leniency programme), the limitation period may start to run against that particular undertaking before the other cartelists' appeals have been concluded. The Supreme Court held (reversing the Court of Appeal's judgment on this point) that the limitation period for bringing a damages action is not suspended or extended by appeals by other addressees of an infringement decision. A damages action against a non-appealing addressee of the infringement decision must be brought within two years of the expiry of their right to appeal, on the basis that the outcome of any appeals against the substance of the infringement decision lodged by other addressees will not have any effect on the findings of infringement against the non-appealing addressee. In the light of this judgment, leniency applicants may face an increased risk of becoming targets for early damages claims by those who believe they have suffered loss as a result of a cartel, and could potentially be held jointly and severally liable for all losses caused to the claimant(s) as a result of the infringement (despite the limited protection offered by Article 11 of the EU Damages Directive in this regard).

As mentioned above in response to question 1.4, the 2015 Act introduces new rules with regard to limitation periods for damages actions under section 47A and 47B of the 1998 Act in order to align the limitation periods with those applicable in the High Court, i.e., six years (five years in the case of proceedings in Scotland, as this is the limitation period which applies to claims before the Court of Session in Scotland). In addition, further specific provisions have been introduced in relation to collective actions, whereby the limitation period in relation to a claim made under section 47A will be suspended from the date on which collective proceedings are commenced. The section 47A limitation period will resume: (i) if the CAT declines to make a collective proceedings order; (ii) if the claim is not eligible for inclusion in the collective claim; (iii) if the CAT rejects the collective claim; or (iv) if it is withdrawn or otherwise disposed of without an adjudication on the merits. The purpose of these specific rules for collective actions is to discourage parties from commencing separate section 47A claims as well as participating in collective claims under section 47B.

There still, however, remains a lack of clarity as to how these provisions will operate in practice. In particular, the 2015 Act does not expressly address the question of whether the new limitation period would be suspended where there is an ongoing investigation by a competition authority or pending appeals against an infringement decision (as required by Article 10 of the EU Damages Directive) and if so, how the issue raised in the *Deutsche Bahn* appeal referred to above should be dealt with (i.e., does an infringement decision become "final" on an addressee-by-addressee basis, or only once all appeals by any of the addressees have been exhausted?). This latter point is not addressed in the Draft CAT Rules 2015 or the EU Damages Directive either.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

English High Court

Generally, first instance High Court proceedings can be expected to take around two years to complete, from issuing a claim form to attending trial. Much will depend on: (i) the number of witnesses; (ii) the volume of disclosure; (iii) the legal and economic complexities in the case; and (iv) the need for expert evidence.

It is possible to obtain an order to expedite the proceedings. It is also generally possible to apply for a "speedy trial" order which can significantly reduce the lead-time to trial. It will be a matter of discretion by the judge as to whether he considers it appropriate or not to expedite matters or order a speedy trial. In *Purple Parking Limited and Meteor Parking Limited -v- Heathrow Airport Limited* [2011] EWHC 987 (Ch), a case in relation to an abuse of dominant position, the judge ordered that the case be dealt with on an expedited basis. The High Court handed down a judgment 10 months after the proceedings had commenced. This case is cited as an example of a relatively small company obtaining rapid redress against anti-competitive behaviour from the High Court.

Although in theory competition cases may be dealt with by obtaining summary judgment from the court, it will be a rare case indeed where judgment will be made prior to a full examination of the facts of the case.

CAT

It is more difficult to make general comments about the length of time taken to reach final judgment for competition law claims in the CAT, because to date only two claims for damages before the CAT have actually reached a final judgment: *2 Travel Group PLC (in liquidation) -v- Cardiff City Transport Services Limited* [2012] CAT 19; and *Albion Water Limited -v- Dŵr Cymru Cyfyngedig* [2013] CAT 6 (all other cases have settled or are still pending). These proceedings lasted, respectively, 18 months and slightly less than three years. This is broadly similar to tightly managed actions in the High Court.

Like the High Court, the CAT has the power to award summary judgments in damages actions (CAT Rules 2003, Rule 41), but to date it has never done so.

It should be noted that the 2015 Act provides for the introduction of a quicker, cheaper and simpler "fast track" route for suitable claims in the CAT, primarily focused on providing fast access to injunctive relief and enabling simpler cases to be resolved more quickly and cheaply. The BIS Proposals originally envisaged that this new fast track route would be limited to claims brought by small and medium enterprises but, in light of responses to the consultation, the UK Government concluded that the new procedure should, in principle, be available to all types of claimant, provided the case in question is suitable for the fast track approach. The factors relevant to determining whether a particular case is suitable for the fast track route are set out at draft Rule 57 of the Draft CAT Rules 2015. These factors include: (i) whether the time estimate for the final hearing is three days or less; (ii) the complexity and novelty of the issues involved; (iii) the scale and nature of the documentary evidence involved; and (iv) the number of witnesses involved.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

In the High Court, it is open to the claimant to discontinue proceedings at any stage, upon filing a notice of discontinuance to the court and upon serving a copy on every other party to the proceedings (CPR 38). In the ordinary course, where a party discontinues its action prior to judgment it is liable to pay the reasonable costs incurred by the other parties up to that point. A claimant does not generally require the permission of the court to discontinue all, only a part, of the proceedings it has issued. Permission is required, however, if the court has previously granted an interim injunction, is in receipt of an interim payment, or any party to the proceedings has given undertakings to the court.

Once proceedings have been issued, it is necessary to notify the court if a settlement has been reached.

Under Rule 42 of the CAT Rules 2003, a claimant may withdraw a claim for damages only with the consent of the defendant, or with the permission of the CAT President or, if the case has proceeded to a hearing, the Tribunal. A claimant may withdraw an appeal of a competition authority's decision only with the permission of the Tribunal.

In relation to the collective settlement of a collective action for antitrust damages, the 2015 Act introduces new sections 49A and 49B into the 1998 Act which would give the CAT the power to review and approve any proposed collective settlement where a collective proceedings order has been (or could be) made.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted and if so on what basis?

The 2015 Act introduces new procedures in relation to collective settlements.

Where a collective proceedings order has been made in relation to "opt-out" collective proceedings, from 1 October 2015 onwards, the CAT may make a collective settlement order (binding all persons covered by the order based in the UK who did not "opt-out" and those not based in the UK if they "opted-in") if it is satisfied that its terms are just and reasonable. The representative body and the defendant(s) must apply to the CAT for approval of any proposed collective settlement, providing both details of the claims to be settled and the proposed terms of the settlement.

The representative body and proposed defendant(s) may also make an application to the CAT for a collective settlement order where a collective proceedings order has not been made. Note that before the CAT can make an order to approve a settlement, it must first make a collective settlement order. This order must include authorisation from the claimants' representative and a description of a class of persons with eligible claims. As above, the CAT must be satisfied that the terms of the collective settlement order are just and reasonable; and it is binding on all persons falling within the class of persons described in the collective settlement order (save those who have "opted-out" if in the UK and those who did not "opt-in" if based outside the UK).

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The general rule in the High Court is that the unsuccessful party to the proceedings will be ordered to pay the reasonable costs of the successful party. The jurisdiction to award costs lies solely with the court and judges are free to exercise their discretion. For hearings of less than one day, costs awards are commonly ordered summarily, upon application. A typical final costs order, however, will not state the proportion of costs to be awarded, but merely the fact that costs have been awarded to the successful party either in whole or as to part only of the proceedings.

The parties then face a negotiation over the costs to be paid, or a detailed assessment process conducted by a costs judge. As a rule of thumb, a successful party can expect to receive approximately two-thirds of his reasonable costs upon detailed assessment by a costs judge.

In the CAT, the award of costs is within the Tribunal's discretion. If the CAT makes an order for costs to be paid by a party, the actual amount paid in respect of costs is usually negotiated between the parties. If a figure cannot be agreed, costs will be subjected to an assessment.

It is notable that the CAT has decided not to award costs against an unsuccessful party in a number of appeal cases so as not to discourage appeals as a matter of policy.

In January 2012, Lord Justice Jackson published a detailed review of the costs of litigation ("**Jackson Report**") which contained a number of recommendations in relation to costs in civil litigation (including collective redress actions). Among other topics, the Jackson Report considered whether the rules on costs shifting and costs capping should be amended in certain circumstances. A number of these recommendations were accepted by the UK Government and incorporated into the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO 2012**"), which received Royal Assent on 1 May 2012 and came into force in April 2013. Since April 2013 the normal costs shifting principle (i.e., "the loser pays") in personal injury claims has changed and this may soon be extended to other types of claim (although in relation to competition collective actions the UK Government has stated that the normal costs shifting principle will be maintained). In addition, judges now have greater discretion on whether to cap costs, which they were previously only permitted to do in exceptional circumstances.

8.2 Are lawyers permitted to act on a contingency fee basis?

Damages-based agreements

The use of contingency fees (i.e., where the lawyers' fees are related to the damages awarded, not the work done) was the subject of considerable scrutiny in the Jackson Report. Under LASPO 2012, the use of such "damages-based agreements" ("**DBAs**") was extended post-1 April 2013 to all general civil litigation (except criminal or family proceedings) where conditional fee agreements (see below) are permitted (previously, DBAs were only permitted in contentious employment or non-contentious matters). In general commercial litigation, the contingency amount (i.e., the percentage of the client's damages award that the lawyer is entitled to receive in the event of success) is capped at 50 per cent of the sums recovered. The Damages-Based Agreements Regulations 2013 set out how DBAs will work in practice.

However, paragraph 37 of Schedule 8 of the 2015 Act provides for an exception to the permitted use of DBAs in relation to "opt out" collective proceedings relating to competition law claims.

Conditional fee agreements

The use of conditional fee agreements ("**CFAs**"), whereby the client pays different amounts for the legal services depending on the outcome of the case, is permitted for contentious work (including competition litigation) subject to specific terms and conditions. CFAs can be structured in different ways so that the amount the client pays will vary. However, there is a limit on the uplift that the solicitor can charge in the event of success, which is currently set at 100 per cent.

Currently, CFAs are available to fund High Court litigation and arbitration and can be used by claimants and defendants. Both solicitors and barristers are able to accept instructions on a conditional fee basis.

The use of CFAs is currently also permitted in the CAT by virtue of Rule 65 of the CAT Rules 2003. Draft Rule 112 of the Draft CAT Rules 2015 provides that the rules on funding arrangements made under paragraphs 58 and 58A of Part II of the Courts and Legal Service Act 1990 which specify: (i) the criteria that must be fulfilled in order for a CFA to be enforceable; and (ii) the proceedings which cannot be the subject of an enforceable CFA) will apply to cases in the CAT; and further that a party that has entered into a CFA must notify the CAT of the existence of the CFA.

When LASPO 2012 came into force in April 2013, CFA success fees ceased to be recoverable from the other side in the event of a success (a success fee is an additional amount payable for legal services, over and above the amount that would normally be payable if there was no CFA, payable on success). Any CFA success fee in respect of a CFA entered into after 1 April 2013 shall now be paid by the CFA-funded party rather than by the losing party (CFA success fees remain recoverable from the other side in respect of CFAs entered into before 1 April 2013 and in certain types of case (but not in competition claims)). The hope is that this will give the CFA-funded party a financial incentive to keep costs down.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of litigation in England has historically been strongly discouraged by way of common law rules against maintenance and champerty. However, over time, inroads have been made into these principles and the English judiciary is now adopting a more pragmatic and liberal approach to third party funding. The OFT (now replaced by the CMA) considered that the major obstacle to bringing competition actions was the cost and took the view that third party funding was an important potential source of funding which should be encouraged. It appears that the CMA takes a similar view.

Provided that the funding agreement does not give the funder the right to control the action or give it an interest in the action itself (as opposed to a share of the proceeds), the funding agreement should not be in breach of the maintenance and champerty rules.

Recent years have seen significant growth in the litigation funding industry. This growth looks set to continue. The Financial Services Authority (now replaced by the Financial Conduct Authority) gave its approval to certain brokers to offer third party funding in support of private litigation. With such political backing, there are an increasing number of financial institutions that are prepared to share the financial risk of commercial disputes. Although statistics are not publicly available, there have been indications from those in the industry that third party funding of competition damages claims is taking place, particularly in "follow-on" cases which are deemed to be lower risk.

That said, concerns have been raised in relation to the lack of transparency in the third party funding market and the risk that funders may not have sufficient capital to fund cases. The debate is now therefore focusing on whether third party funders should be regulated and what can be done to avoid further cases like *Excalibur Ventures LLC -v- Texas Keystone Inc & Ors* [2013] EWHC 4278 (Comm), in which Excalibur lost its claim for US$1.6 billion and only two of the three third party funders, who were required to pick up a portion of the £23.1 million costs bill, remained solvent.

A voluntary code of conduct was published by the Association of Litigation Funders ("**ALF**") in November 2011, and in January 2012 the Jackson Report recommended that, if the third party funding market does expand, there should be further consideration of whether statutory regulation would be more appropriate. Possibly with this in mind, the ALF announced in February 2013 that it was going to call for stricter rules for third party funders to improve protection for litigants. In February 2014, the ALF announced that it had introduced a new requirement for its members to hold at least £2 million in capital to fund cases (this requirement has met with criticism from a number of ALF members). It has also established direct accountability in respect of subsidiaries and associated entities of funders. In addition, in April 2014 there were reports that Argentum Capital Limited had left the ALF following "intense questioning" by the ALF board.

9 Appeal

9.1 Can decisions of the court be appealed?

Appeal from the High Court

Appeals can be made by a party from High Court to the Court of Appeal on a point of law. Permission to appeal must be obtained either from the High Court or the Court of Appeal. It is possible to appeal further to the Supreme Court but only with the permission of the Supreme Court itself.

Appeal from the CAT

Appeals from the CAT are permitted under section 49 of the 1998 Act. Although such appeals concern the CAT's judgment in respect of its public enforcement role, appeals in respect of damages awards under section 47A or section 47B of the 1998 Act are also permitted.

10 Leniency

10.1 Is leniency offered by a national competition authority in England & Wales? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The CMA is prepared to offer lenient treatment to businesses that come forward with information about a cartel in which they are involved. Under the UK leniency programme, successful leniency applicants may be able to avoid a penalty for infringement of competition law altogether (i.e., immunity) or alternatively obtain a reduction in the amount of fine imposed by the CMA. Leniency granted by the CMA does not provide immunity from any penalty that may be imposed on the business by other competition authorities outside the UK, such as the European Commission or other national competition authorities, although it may be possible to secure immunity or leniency via a separate application to those authorities.

However, any grant of immunity or leniency in respect of fines imposed by the CMA under the public enforcement regime does not extend to protection from civil claims for damages brought by victims of the infringement (and the position is the same under the European Commission's leniency regime). Indeed, a leniency applicant can often find that it is the main initial target for damages claims, given that it was required to admit liability for the infringement as a condition of being granted immunity/leniency (and in the UK this risk is likely to increase following the Supreme Court decision in the *Deutsche Bahn* case, discussed above in response to question 6.1).

A limited degree of protection will be offered to immunity recipients by Article 11 of the EU Damages Directive, once implemented into English law, which provides they will generally only be liable to compensate their own direct and indirect purchasers, rather than being jointly and severally liable with the other cartelists for the whole of the loss caused to the claimant(s). However, this protection will not apply if the other co-infringers are unable to compensate the remaining claimants. In practice this could mean that immunity recipients have to wait a number of years to determine the full extent of their liability (see further, chapter 1).

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

An applicant for leniency, whether successful or unsuccessful, cannot currently refuse to disclose documents in a subsequent civil claim purely on the basis that they were provided for the purposes of a leniency application. In actions for damages brought before the English courts, the usual disclosure rules will apply (see question 4.5 above). The English High Court has previously ruled in favour of disclosing limited extracts from leniency documents in the case of *National Grid Electricity Transmission Plc -v- ABB & Ors* [2012] EWCH 869 (precise details of what was considered to be disclosable are unfortunately not in the public domain, and the case settled in June 2014).

However, as previously noted in response to question 4.4 above, once the EU Damages Directive is implemented into English law, the courts will be required to grant absolute protection from disclosure for corporate leniency statements, rather than carrying out the "balancing exercise" between competing interests advocated by the ECJ in Case C-360/09 *Pfleiderer AG -v- Bundeskartellamt* (EU:C:2011:389) and Case C-536/11 – *Bundeswettbewerbsbehörde -v- Donau Chemie AG and others* (EU:C:2013:366) in relation to such statements.

Nonetheless, the English courts will still be required to weigh up competing interests when assessing the proportionality of disclosure of other types of documents – including other documents connected to a leniency application which do not fall within the definition of protected "leniency statements" for the purposes of Article 6(6) of the EU Damages Directive. It is worth noting in this regard that the need to safeguard the effectiveness of public enforcement of competition law is expressly included in the list of matters to be taken into account as part of the proportionality assessment when disclosure is sought of any other documents on a competition authority's file.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

Once implemented into national law, the EU Damages Directive will inevitably have an impact on antitrust damages actions in the England and Wales, but the impact is likely to be less than in some other Member States as the existing English rules already meet (or are very close to) many of the requirements of the EU Damages Directive. For example, the principle of joint and several liability is already applied by the national courts, disclosure rules are already very wide, and decisions of the national competition authority are already binding on the CAT and national courts in "follow-on" actions.

However, the EU Damages Directive is likely to require some amendments to national procedure in England and Wales. In particular:

- The disclosure requirements of the EU Damages Directive will require some aspects of the existing English disclosure rules to be amended (for example, in respect of absolute protection for corporate leniency statements and settlement submissions). It is possible that English courts may be required to adopt a slightly more restrictive approach in some cases than they do at present (for example, it is unclear whether the limited extracts from leniency documents which were ordered to be disclosed by Roth J in *National Grid Electricity Transmission Plc -v- ABB & Ors* would all still be disclosed under the new regime). However, Member States are generally permitted to adopt wider rules than those set out in the EU Damages Directive, and it is anticipated that England and Wales will continue to have one of the broadest disclosure regimes in the EU.
- Limitation periods applicable to antitrust damages actions brought in England and Wales are likely to need to be adjusted slightly to reflect the requirements of the EU Damages Directive. Under the 2015 Act, from 1 October 2015 limitation periods will be set at six years from the date on which the cause of action accrues in both the High Court and the CAT. Whilst this complies with the minimum five-year limitation period required by the EU Damages Directive, additional provisions will be required to suspend limitation periods during an investigation by the European Commission or CMA and until at least one year after any infringement decision has become "final" (or proceedings are otherwise terminated). The English courts may in future be required to make a reference to the ECJ for a preliminary ruling as to what is meant by "final" in this context (see the response to question 6.1 above).

The impact of the EU Damages Directive in the UK is discussed further in chapter 1.

11.2 Have any steps been taken yet to implement the EU Directive on Antitrust Damages Actions in England & Wales?

The impact of the EU Damages Directive will vary widely across EU Member States. In those countries such as the UK, where antitrust damages claims are already regularly brought before national courts and national laws are developed, the reforms detailed in the EU Damages Directive are likely to have a limited impact. Against this background, the UK Government has yet to take any steps to implement the EU Damages Directive. However, a consultation is likely to take place during 2015, with a view to proposing and finalising legislation in the UK Parliament in advance of the December 2016 implementation deadline.

11.3 Are there any other proposed reforms in England & Wales relating to competition litigation?

The 2015 Act is a significant reform of competition litigation in England and Wales. The key changes which will be introduced on 1 October 2015 are as follows:

- Expansion of the CAT's jurisdiction so as to permit it to hear "stand-alone" as well as "follow-on" actions.
- Alignment of the limitation period applicable in claims bought before the CAT with the limitation period applicable in claims before the High Court (six years from the date on which the cause of actions accrues).
- Introduction of a fast-track procedure in the CAT for suitable cases (intended in particular for use in claims brought by SMEs).
- Permitting the CAT grant interim injunctions in appropriate cases.
- Introduction of a new "opt-out" collective actions regime for antitrust damages actions, which will enable claims to be brought on behalf of all claimants in a particular class, rather than each individual needing actively to "opt-in" to join the proceedings (as is the case under the existing regime). This will be complemented by a new collective settlements regime, under which settlements will be approved by the CAT.
- Encouragement of voluntary redress schemes which, subject to approval by the CMA, could lead to a reduction in fines imposed by the CMA in an infringement decision.

The effects of the 2015 Act permeate throughout the English competition sphere. For instance, on 2 March 2015, the CMA published for consultation draft guidance on the exercise of its new powers (granted under the 2015 Act) to certify voluntary redress schemes and proposals for companies who implement voluntary redress schemes which have been approved by the CMA to get up to 10 per cent discount on fines.

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