GCR INSIGHT

PRIVATE LITIGATION GUIDE

Editors
Nicholas Heaton and Benjamin Holt

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Effect of public proceedings

1 What is your country's primary competition authority?

On 1 April 2014, pursuant to the Enterprise and Regulatory Reform Act 2013, the Competition and Markets Authority (CMA) was created as a new UK-wide competition authority. The CMA took over many of the functions of the Office of Fair Trading (OFT) and the Competition Commission. It is the primary competition authority in England and Wales and, together with various sector-specific regulators (in sectors such as financial services (Financial Conduct Authority), rail (Office of Rail and Road), energy (Ofgem) and communications (Ofcom)), it has concurrent powers to enforce domestic competition law. It also has powers to enforce European competition law with the European Commission (the Commission). For example, the CMA has powers to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of UK or EU prohibitions against anticompetitive agreements and abuses of a dominant position. The position in relation to enforcing breaches of EU law and enforcement of Commission Decisions will change following Brexit and the UK's withdrawal from the EU (see question 60).

The CMA also has responsibility for, among other things, merger clearance, investigating markets and conducting market studies where competition infringements are suspected, bringing criminal proceedings against individuals who commit cartel offences, and powers to enforce a range of consumer protection legislation.

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2 Does your competition authority have investigatory power? Can it bring criminal proceedings based on competition violations?

The CMA has wide powers to investigate suspected breaches of competition law (as do the sector-specific regulators and, in relation to European competition law, the Commission). The CMA can also exercise investigatory powers on behalf of the Commission or other national competition authorities of EU Member States.

The CMA has the power to investigate whether a criminal offence has been committed under Section 188 of the Enterprise Act 2002 and, with the Serious Fraud Office, it has the power to prosecute any criminal offences.

3 Can private antitrust claims proceed parallel to investigations and proceedings brought by competition authorities and criminal prosecutors and appeals from them?

Article 16 of Council Regulation (EC) No. 1/2003 (Regulation 1/2003) prevents a court in an EU Member State from making any decision that runs contrary to that of the Commission. This reflects the judgment of the European Court of Justice in *Masterfoods Ltd v. HB Ice Cream Ltd* (Case C-344/98 [2000] ECR I-11369), which requires the same approach in respect of appeals to the European courts. It is generally accepted by the English courts that they are prevented from giving judgment in competition cases pending the outcome of any related investigation by the Commission and the outcome of any appeals from decisions following investigations. The contentious issue in private damages claims has been how far preparation for trial should proceed pending the outcome of an investigation and appeals.

In a series of cases, the English courts have favoured allowing damages actions to proceed where possible, at least as far as the defendant filing a defence, requiring some disclosure of documents and even as far as service of witness statements and expert reports (see *National Grid v. ABB and Others* [2009] EWHC 1326). This has not been the outcome in every case. In *Morgan Stanley Dean Witter Bank Ltd and Anor v. Visa International Services Association* (2 May 2001), a full and immediate stay of the proceedings was ordered. More recently, in *Secretary of State for Health v. Servier Laboratories* [2012] EWHC 2451, the High Court granted a temporary stay to allow the defendant to focus on the parallel Commission investigation. However, the approach in *National Grid v. ABB and Others* has been followed in most cases, including *WM Morrison Supermarkets Plc and Others v. Mastercard Incorporated and Others* [2013] EWHC 1071 (Comm) and [2013] EWHC 3082 (Comm), in which the Court has twice decided that there should be no immediate stay of the proceedings, and *Infederation Ltd v. Google Inc & Ors* [2013] EWHC 2295 (Ch), in which the Court decided against an immediate stay of the action prior to disclosure, opting for close judicial case management going forward and targeted disclosure by reference to specific issues.

In relation to CMA (previously OFT) decisions, the High Court has a discretion to stay its proceedings pending the outcome of an investigation or appeal and has held that similar considerations apply as under European law (see *Synstar Computer Services v. ICL* [2001] CP Rep 98).

To date, the issue has not arisen in claims made in the Competition Appeal Tribunal (CAT) but, as it will be bound by the EU law requirements not to make decisions running contrary to Commission decisions, it can be expected to adopt a similar approach to that of the High Court. In addition, in respect of claims that arose prior to 1 October 2015, a transitional provision (Rule 119 of the Competition Appeal Tribunal Rules 2015 (the CAT Rules)) applies certain

old rules to the claim and these require a claimant wishing to bring a follow-on claim relying on an existing competition authority decision, to obtain permission from the CAT to bring a claim before the end of any appeals of the relevant decision.

Criminal proceedings in respect of antitrust matters are much less common than civil damages actions. Criminal proceedings can only be brought against individuals under Section 188 of the Enterprise Act 2002, and private antitrust claims are almost exclusively brought against undertakings. A direct overlap between criminal and civil proceedings is, therefore, unlikely. The courts have discretion to stay civil proceedings running in parallel with a criminal prosecution and will exercise this if a defendant would suffer serious prejudice. Typically, preparations for trial of the civil case will be required to proceed, but the civil trial will not be held until after the criminal trial.

4 Is there any mechanism for staying a stand-alone private claim while a related public investigation or proceeding (or an appeal) is pending?

The High Court and the CAT, as part of their general case management powers, can stay proceedings as they see fit. An application for a stay is usually made during the early stages of proceedings, ordinarily before any disclosure is provided.

5 Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have an evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers' decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

When claims are brought following a competition authority decision, the claimant can rely on the decision as proof of a breach of competition law. This only applies to decisions of the UK's competition authorities (i.e., the CMA and the concurrent regulators) or those made by the Commission (discussed further below).

Directive 2014/104/EU on antitrust damages actions (the Damages Directive) was implemented into UK law on 9 March 2017 by the Loss or Damage arising from Competition Infringements (Competition Act 1998) and Other Enactments (Amendment)) Regulations 2017. Following implementation of the Damages Directive, for claims brought on or after 9 March 2017, final decisions made by competition authorities in other EU Member States finding an infringement of EU competition law will constitute prima facie evidence of a breach of competition law rather than being directly binding on UK courts.

Commission decisions are binding on the addressee of that decision (Articles 288 and 297 of the Treaty on the Functioning of the European Union (TFEU)). However, for these purposes it is only the operative part of the decision that is directly binding, which is normally limited to the finding of infringement itself. The individual findings of fact in the preceding recitals are not directly binding; however, an addressee may not be permitted to challenge those findings that form the basis of the infringement finding, as that could be regarded as an abuse of process in that it would involve relitigating those issues (see *Iberian UK v. BPB Industries* [1996] 2 CMLR 601). Commission decisions are not directly binding on those that are not addressees (see *Wegenbouwmaatschappij J Heijmans v. Commission* [2008] ECR II-110 and *Emerson v.*

Morgan Crucible [2011] CAT 4). Commission decisions relating to different facts or parties are not binding, but are admissible evidence and likely to be highly persuasive given their origins (see *Crehan v. Inntrepreneur* [2006] UKHL 38).

The High Court and the CAT are also bound by infringement decisions of the Commission and the CMA (for decisions made after 1 October 2015, this is expressly provided for by Section 58A of the Competition Act 1998). The High Court and the CAT are also bound by decisions of the General Court and the Court of Justice of the European Union (CJEU) on matters of community law.

The status and binding nature of both Commission Decisions and the European Courts judgments will change following Brexit and the UK's withdrawal from the European Union (see question 60). At the time of writing, it is not yet known what, if any, arrangements will be agreed between the UK and the EU. The purpose of the Competition (Amendment etc) (EU Exit) Regulations 2019 (SI 2019 No. 93) (the Competition Brexit SI), which was laid down on 22 January 2019, is to correct the immediate deficiencies in competition legislation arising from a no-deal exit from the EU and will come into force on exit day. The Competition Brexit SI contains transitional provisions that confirm that damages claims may continue to be brought in the UK for breaches of EU competition law that occurred prior to Brexit day (even if the loss suffered occurs only thereafter) and that in such claims, final infringement decisions of the Commission made before Brexit day shall continue to be binding and decisions of other Member State competition authorities made before Brexit day shall continue to be prima facie evidence of the infringement. Infringement decisions made by the Commission after Brexit, even if they relate to conduct prior to Brexit day, will no longer be binding in damages claims in the UK (see also question 60).

Decisions of competition authorities of non-EU countries (and the Commission after Brexit) are not binding and there may even be doubt as to their admissibility in subsequent private antitrust claims in England.

With regard to judgments of the European Courts, those made before Brexit day will continue to be binding on UK courts (except to the extent that in future the English Supreme Court departs from them) and after Brexit, UK courts will not be bound by decisions of the European Courts but may have regard to them (see also Schedule 4, Part 6, Paragraph 15 of the Competition Brexit SI and the new Section 60A of the Competition Act 1998).

6 Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

In relation to claims in which an infringement of EU or UK competition law started before 9 March 2017, leniency applicants are protected only from fines imposed by the relevant competition authority. Some limitations are imposed on these cases in relation to the disclosure of documents created for the purposes of a leniency application (see questions 7 and 8).

On 9 March 2017, the UK implemented Article 11 of the Damages Directive, which changed the position for leniency applicants by limiting the effect of joint and several liability for those who have received immunity under a leniency programme. This limitation of liability applies only to claims relating to an infringement of EU or UK competition law that started on or after 9 March 2017. When it applies, an immunity recipient will not be liable (either alone or jointly) to pay damages in respect of loss or damage suffered by a person as a result of the cartel infringement (whatever the legal basis of the liability) except when the person was a direct or indirect

customer (or provider, in the case of a supplier cartel) of the immunity recipient or where full compensation for the loss or damage cannot be recovered from the other undertakings involved in the cartel infringement. As a result, in most circumstances, an immunity recipient's joint and several liability with other infringers extends only to its direct and indirect purchasers and providers.

In addition, with regard to claims relating to an infringement of EU or UK competition law that started on or after 9 March 2017, the extent of contribution claims against an immunity recipient by other infringers is limited so that it will not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers.

Although current case law (for claims brought before 9 March 2017) provides protection for leniency documents (see questions 7 and 8), the UK's implementation of the Damages Directive provides statutory protection for leniency documents in relation to claims for infringement of EU or UK competition law brought on or after 9 March 2017, ensuring that neither the English courts nor the CAT will make a disclosure order in respect of a cartel leniency statement.

The liability of immunity recipients and protection of leniency applications in Commission investigations will change after the UK's withdrawal from the EU (see question 60). At the time of writing it is not clear what, if any, arrangements will be agreed between the UK and the EU and what changes may be made to UK legislation in this respect. If the UK leaves without a deal, the Competition Brexit SI provides that damages claims may continue to be brought in the UK for breaches of EU competition law that occurred prior to Brexit day (even if the loss suffered occurs only thereafter) and that in such claims, the liability of immunity recipients and the protection of leniency applicants in Commission investigations will remain unchanged by Brexit.

7 Can plaintiffs obtain access to competition authority or prosecutors' files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

Access to Commission files

Before bringing proceedings, a potential claimant or any member of the public may seek access to Commission files through Regulation (EC) No. 1049/2001. There are certain restrictions on disclosure (for example, to prevent the undermining of commercial interests and to protect investigations). The Commission is reluctant to provide access to its investigation files and, in particular, leniency material and so, to date, this has not proved an effective means of accessing this information. In *European Commission v. EnBW Energie Baden-Württemberg AG* (Case C-365/12 P), the Commission's approach was supported by the CJEU, which ruled that the Commission is entitled to presume that disclosure of documents on its files will undermine the protection of the commercial interests of those involved and the protection afforded to the investigations. However, this is a rebuttable presumption; a member of the public requesting the document need only demonstrate that there is an overriding public interest in disclosure of the document or that the specific document that has been requested is not covered by the presumption to succeed. The fact that a claimant wants to use such a document from the Commission's files to bring a private damages action does not in itself rebut the general presumption.

Within proceedings that were commenced before the implementation of the Damages Directive on 9 March 2017, it may be possible to seek disclosure from a defendant who has copies

of documents from the Commission's files as a result of access to file during the investigation. Access to its investigation files is provided by the Commission on strict terms and for a limited purpose, so parties may not feel free to disclose this material freely. The High Court has ordered disclosure in most cases (e.g., *National Grid v. ABB and Others* [2009] EWHC 1326) on confidential terms. In relation to disclosure of leniency documents in particular, see question 8.

In May 2014, the Commission published an opinion it provided to the High Court in *WM Morrison Supermarkets plc and Others v. Mastercard Incorporated and Others*, which addresses disclosure of the Commission files and Commission decisions in damages actions. In that opinion, the Commission confirmed, among other things, that national courts need to assess the situation, on a case-by-case basis, whether there are overriding reasons for refusing the disclosure of documents on the Commission's files that have been provided voluntarily (see also question 8 in relation to *Pfleiderer v. Bundeskartellamt*, Case C-360/09). The Commission confirmed that, if that is the case, it has no objection to the disclosure of confidential versions of Commission decisions provided that adequate protection is given to business secrets and other confidential information, such as through a suitably redacted version of the decision being disclosed into a confidentiality ring. Any disclosure given should be protected to the levels required by Article 339 of the TFEU, Article 28 of Regulation 1/2003 and Article 15(4) of Commission Regulation (EC) No. 773/2004 (Regulation 773/2004).

However, the disclosure and admissibility of documents relating to the Commission's investigations in damages actions has changed following the implementation of the Damages Directive on 9 March 2017. For all proceedings brought on or after 9 March 2017, new rules apply in respect of both the Commission and for UK and other Member States' competition authorities. Under those new rules:

- a court or tribunal must not make a disclosure order in respect of a cartel leniency statement (whether or not it has been withdrawn) or a settlement submission (provided it has not been withdrawn) in competition proceedings; and
- a court or tribunal must not make a disclosure order in respect of a competition authority's investigation materials before the competition authority closes the investigation.

There is some ambiguity as to what documents will come under which categories and it will remain to be seen how the High Court and the CAT will interpret the categories and when a competition authority's proceedings are closed. There appears to be no change to the right to disclose a parties' own pre-existing documents on a Commission file.

In relation to the confidential versions of its Decisions, the Commission has confirmed that it has no objection to them being disclosed, provided that adequate protection is given to business secrets and other confidential information (for example, through a suitably redacted version of the Decision being disclosed into a confidentiality ring). An example of a competition authority Decision being disclosed pursuant to the Damages Directive was in *Wolseley UK Limited and Others v. Fiat Chrysler Automobiles NV and Others* (2018), in which the CAT ordered DAF and Iveco to disclose a redacted version of the confidential version of the Commission's Decision. Any disclosure given should be protected to the levels required by Article 339 of the TFEU, Article 28 of Regulation 1/2003 and Article 15(4) of Regulation 773/2004.

In addition to leniency material, there is a further category of material in competition authority Decisions that may require protection from disclosure. In *Emerald Supplies v. British Airways and others* [2015] EWCA Civ 1024, the Court of Appeal ruled on the question of whether a

court could order the disclosure of the full, unredacted version of the Commission's *Airfreight* decision, albeit within the confines of a confidentiality ring. A number of airlines relied on the judgment of the General Court of the European Union in Case T-474/04, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v. Commission* ([2007] ECR II-4225 (*Pergan*)), which concerned the publication of findings of, or allusions to, liability that could not be challenged before the EU courts, and the incompatibility of that publication with the presumption of innocence that is enshrined in European law. The Court of Appeal held that the protection provided by *Pergan* is absolute, meaning that the national court must afford the same protection as is afforded to the document at EU level.

In cases brought on or after 9 March 2017, the High Court or the CAT is expressly prohibited from ordering a competition authority to disclose documents or information included in a competition authority's file unless those documents cannot reasonably be provided by anyone else. However, it is possible for a party to ask the High Court to seek documents directly from the Commission under Article 15 of Regulation 1/2003. This approach is subject to certain limitations, including protection of confidential information and leniency documents. A formal request under Article 15 was made in *National Grid v. ABB and Others* [2009] EWHC 1326, in which the Commission decided to provide the documents (with leniency material redacted), but the transmission of the documents was prevented by an interim order granted by the General Court (see Case T-164/12 R, *Alstom v. Commission*, Order of the President of the General Court, 29 November 2012). Another, more recent, request was made by Visa Europe in the context of the interchange litigation in respect of data underlying the Commission's final results of its 'Survey on merchants costs of processing cash and card payments' published in March 2015. On this occasion, the Commercial Court granted the application.

The position in relation to disclosure of a Commission file may change following the UK's withdrawal from the EU (see question 60). At the time of writing, it is not clear what, if any, arrangements will be agreed between the UK and the EU. However, if the UK leaves without a deal, the Competition Brexit SI provides that damages claims may continue to be brought in the UK for breaches of EU competition law that occurred prior to Brexit day (even if the loss suffered occurs only thereafter) and that in such claims, rules relating to disclosure of leniency statements, settlement documents and the Commission's file will remain unchanged by Brexit.

Access to CMA files

Information obtained by the CMA as part of its functions is subject to strict protection (see Part 9, Enterprise Act 2002), breach of which can amount to a criminal offence. The prohibition on disclosure is subject to certain disclosure gateways, including disclosure with consent, to allow an authority to fulfil its functions, and for the purposes of a criminal investigation. One further gateway allows the CMA to give disclosure for the purpose of civil litigation, although this excludes certain information, such as that obtained through investigations under the Competition Act 1980, the Competition Act 1998 and the Enterprise Act 2002.

Third parties that receive information during a CMA investigation may not disclose it without the consent of the CMA. The CMA's policy is to firmly resist disclosure of leniency material.

In relation to claims commencing after the implementation of the Damages Directive on 9 March 2017, the limitations on the admissibility and disclosability of documents relating to competition authority investigations described above also apply to CMA investigations.

8 Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

For claims brought before implementation of the Damages Directive on 9 March 2017, the position under EU law is governed by *Pfleiderer v. Bundeskartellamt* (Case C-360/09) (*Pfleiderer*). In *Pfleiderer*, the Court of Justice held that it was necessary for courts in Member States in each case to weigh the interests in favour of disclosure against those against. The English High Court was the first Member State court to apply these principles to disclosure of Commission leniency material in an antitrust damages claim in *National Grid v. ABB and Others* [2009] EWHC 1326 (*National Grid*). In that case, although some limited leniency material was disclosed (including some elements of the confidential version of the Commission's Decision), much of the material was not required to be disclosed. However, the English High Court has not been consistent in its approach in relation to leniency materials when applying *Pfleiderer*. In the *National Grid* claim, the judge looked at each of the contested documents and carried out his 'balancing exercise', document by document. However, in other cases, judges have made decisions in relation to categories of documents, such as in *WH Newson & Others v. IMI and Others*, and in *Silentnight v. Recticel and others* (2017) (*Silentnight*), where the High Court refused to order that the leniency materials should be disclosed, stating that the leniency regime had been set up to prevent those types of statements falling into the hands of third parties and that to disclose them undermined the leniency programme to the detriment of public interest. The judge in *Silentnight* found that the refusal of disclosure would not make it impossible for the claimants to pursue their claim and that there was no need for a document-by-document 'balancing exercise' to reach her conclusion.

In relation to the CMA's own leniency programme, third parties that receive information from the CMA during an investigation may not disclose it without the CMA's consent. The CMA policy is to resist disclosure of leniency information.

As stated above, the current case law for proceedings brought before 9 March 2017 provides qualified protection for leniency documents submitted to the Commission and any UK or other Member State national competition authority. As discussed in more detail in question 7, the UK's implementation of Article 6(6) of the Damages Directive imposes an absolute prohibition on orders requiring the disclosure of leniency corporate statements. Therefore, for proceedings brought on or after 9 March 2017, leniency statements may not be ordered to be disclosed and are not admissible in evidence in competition proceedings (unless not obtained from a competition authority file).

The protection from disclosure of information submitted by leniency application in investigations by the Commission may change after the UK's withdrawal from the EU (see question 60). At the time of writing it is not clear what, if any, arrangements will be agreed between the UK and the EU. However, if the UK leaves without a deal, the Competition Brexit SI provides that damages claims may continue to be brought in the UK for breaches of EU competition law that occurred prior to Brexit day (even if the loss suffered occurs only thereafter) and that in such claims, rules relating to disclosure of leniency statements will remain unchanged by Brexit.

9 Is information submitted in a cartel settlement protected from disclosure?

The position in relation to cartel settlement documents requested in proceedings brought before 9 March 2017 is currently untested in the English courts, but similar considerations are likely to apply to settlement submissions that apply to documents created for leniency applications.

However, for proceedings brought on or after 9 March 2017, following the implementation of the Damages Directive, settlement submissions made to the Commission or any UK or other Member State national competition authority are protected from disclosure (Article 6(6) of the Damages Directive) (see also question 7). National courts may order the disclosure of settlement submissions that have been withdrawn but only after a competition authority, by adopting a Decision or otherwise, has closed its proceedings.

The protection from disclosure of information submitted as part of a settlement of an investigation by the Commission may change after the UK's withdrawal from the EU (see question 60). However, if the UK leaves without a deal, the Competition Brexit SI provides that damages claims may continue to be brought in the UK for breaches of EU competition law that occurred prior to Brexit day (even if the loss suffered occurs only thereafter) and that in such claims, rules relating to disclosure of settlement documents will remain unchanged by Brexit.

10 How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

The fact that a document contains information that is confidential and commercially sensitive is no bar to its disclosure. The courts do recognise, however, that in competition cases in particular, disclosure of such information causes difficulties. The court will take a flexible approach and it will be necessary to justify the limits on disclosure sought. In practice, this is dealt with by the court putting in place 'confidentiality rings', whereby documents containing confidential information must be disclosed but may be reviewed by only a limited number of identified individuals, who are each personally subject to an obligation of confidence owed to the court. Often in practice this may mean that confidential information is disclosed to only external lawyers and experts. Such confidentiality rings have been used in cases, inter alia, where disclosure of material from competition authorities' files has been required.

Commencing a private antitrust action

11 On what grounds does a private antitrust cause of action arise?

Private damages actions arising out of infringements of EU and UK competition law are usually brought as claims for breach of statutory duty. The relevant statutes are the European Communities Act 1972, which enshrines into English law the requirements of Articles 101 and 102 of the TFEU and, in relation to domestic competition law, the Competition Act 1998. Other causes of action could be used if the requirements are met, for example, breach of contract.

Claims may also be based on breaches of foreign competition law (see question 17 for more detail). There have been a number of attempts by claimants to rely on such causes of action in addition to claims for breach of statutory duty (see the *Emerald Supplies and others v. British Airways plc* claim (*Emerald Supplies*), in which the claimants have argued the torts of unlawful means conspiracy and the interference of the claimants' business by unlawful means).

However, to make out a claim for unlawful means conspiracy, it is necessary to demonstrate that the defendant intended to cause damage to the claimant. In *Emerald Supplies*, the Court of Appeal held that the necessary intention to injure is not made out merely because the increased prices resulting from a cartel must be at the expense of customers. It held that 'an intention to injure an identifiable class is not sufficient to establish an intention to injure its constituent members' and that it did not follow from the imposition of higher prices that the claimant, in that case a direct customer, would be harmed because it may pass on any overcharge. In *Emerald Supplies*, the Court of Appeal struck out the claimants' conspiracy claim.

In 2018, the Court of Appeal ruled on the territorial application of Article 101 of the TFEU in relation to sales of cartelised products manufactured and sold outside the EU and the European Economic Area (EEA) (see *iiyama (UK) Ltd v. Samsung Electronics Co Ltd* [2018] EWCA Civ 220 (*iiyama*). In *iiyama*, the Court of Appeal looked at whether losses suffered as a result of indirect sales into the EU at inflated prices by reason of a worldwide cartel are recoverable under Article 101 of the TFEU. The Court had to consider whether the claimants (iiyama) had a real prospect of success in claiming damages in England for losses allegedly suffered by them as a result of the purchase of computer monitors at prices said to be inflated by the operation of a worldwide cartel in one component, namely cathode ray tubes (CRTs). The CRTs contained in the monitors had been first supplied to entities outside the EU and EEA, then incorporated into monitors that were sold down the supply chain to the claimants within the EU and EEA, for onward sale and distribution within the EU and EEA. The Court held that the analysis of the territorial application of Article 101 will depend on an examination of the intended and actual operation of the cartel, and given the fact-heavy nature of such a review, the Court indicated that this should not be determined on a summary basis in which the decision would have to be based on assumed facts. The Court therefore allowed the claim to proceed.

The basis of claims for infringement of EU competition law will not change for infringements that occur before Brexit day (see question 60). At the time of writing, it is not clear what, if any, arrangements will be agreed between the UK and the EU. However, if the UK leaves without a deal, the Competition Brexit SI provides that damages claims may continue to be brought in the UK for breaches of EU competition law that occurred prior to Brexit day (even if the loss suffered occurs only thereafter). In respect of infringements of EU competition law, the UK government published a notice on 13 September 2018 indicating that claimants who wish to pursue claims in UK courts based on alleged breaches of EU competition law that take place after Brexit, may be able to do so on a stand-alone basis, as a foreign tort claim (see further in question 17).

12 What forms of monetary relief may private claimants seek?

The principal monetary relief sought is compensatory damages. Damages are calculated by reference to normal tortious principles so that the damages will put the victim in the same position as if the breach of competition law had not taken place.

Other theories of monetary relief, such as claims for restitution or an account of profits, have been rejected by the English courts (see *Devenish Nutrition Ltd v. Sanofi-Aventis SA* [2008] EWCA Civ 1086 (*Devenish Nutrition*)). Exemplary damages, which are not compensatory but are intended to punish and deter certain conduct, may be claimed in limited circumstances and following implementation of the Damages Directive only if the infringement of EU or UK competition law came to an end before 9 March 2017. One of those circumstances is when

the defendant has deliberately or recklessly infringed the victim's rights, calculating that the damages that he or she might have to pay are outweighed by the gain he or she would make (see *Rookes v. Barnard* [1964] AC 1129). In *Devenish Nutrition*, the Court of Appeal ruled that exemplary damages would not be available in circumstances where the defendant had already been fined by a competition authority for its conduct or if it was a successful leniency applicant.

In practice, it will be rare for a defendant who has infringed competition law but has avoided a fine (other than under a leniency programme) to satisfy the *Rookes v. Barnard* criteria and, therefore, awards of exemplary damages are likely to remain rare.

The CAT has made one award of exemplary damages in *2 Travel v. Cardiff City Transport Services* [2012] CAT 19, in which the defendant was found by the OFT to have engaged in abusive conduct but had not been fined because of exemptions for small businesses. The CAT awarded £60,000 exemplary damages and gave useful guidance as to the circumstances in which it would be appropriate to award exemplary damages. Further guidance was given in *Albion Water Ltd v. Dwr Cymru Cyfyngedig* [2013] CAT 6, in which the CAT declined to award exemplary damages. Exemplary damages will not be available in collective proceedings before the CAT.

Following implementation of the Damages Directive, for claims in which the infringement of EU or UK competition law started on or after 9 March 2017, neither the English court nor the CAT can award exemplary damages in competition proceedings.

It is also possible to claim interest, including (if specific loss can be established) compound interest (see, for example, *Sainsbury's Supermarkets v. Mastercard Incorporated and others* [2016] CAT 11).

13 What forms of non-monetary relief may private claimants seek?

The full range of remedies available to the High Court are available in competition claims. In practice, in addition to interim relief (discussed in question 24), the most common non-monetary final remedies sought will be final injunctions and declarations.

A declaration as to the rights and obligations of the parties may be sought in addition to damages or an injunction. It is a discretionary remedy and will only be available if it will serve some purpose. The court may make negative declarations. An example of a declaration that might be sought is that a contract is void because it infringes competition law.

Injunctions are most commonly sought as an interim remedy, but they can also be a final remedy. Injunctions can be mandatory, requiring a defendant to take a step, or prohibitory, requiring the defendant not to take certain steps, for example, to desist from conduct found to have infringed competition law. Injunctions are a discretionary remedy.

The CAT now has the same powers as the High Court to grant injunctive relief (e.g., requiring infringing behaviour to cease), including interim injunctions that will have the same effect, and can be enforced as if it is an injunction granted by the High Court.

14 Who has standing to bring claims?

The European Court of Justice made clear in *Manfredi v. Lloyd Adriatico* (C-295/04) that claims for compensation arising for infringement of EU competition law were available to any victim of the infringement that has suffered loss. Damages claims should be available to all victims of EU and UK competition law, including direct and indirect purchasers of the goods or services affected by the infringement. The first award of damages to an indirect claimant in the UK was

in *Sainsbury's Supermarkets v. Mastercard Incorporated and others* [2016] CAT 11. While such claimants may face practical difficulties in proving their loss, it is generally accepted that they have standing to sue.

Following the implementation of Article 14 of the Damages Directive, proof of loss has become easier; for proceedings in which the infringement of EU or UK competition law started on or after 9 March 2017, and the indirect purchaser is deemed to have proven that a passing-on to that indirect purchaser occurred, there is a presumption that a cartel causes loss or damage where the indirect purchaser has shown that:

- the defendant has committed an infringement of competition law;
- the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
- the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

Conversely, in its judgment dated 9 October 2018 (*BritNed Development Limited v. ABB LTD and others* [2018] EWHC 2616 (Ch)), the High Court rejected the suggestion that this presumption applies also to conduct that predates the implementation of the Damages Directive.

15 In what forums can private antitrust claims be brought in your country?

The High Court and the CAT both have unlimited jurisdiction to hear private antitrust claims. In addition, the CAT can hear collective or class actions (see question 48).

16 What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

Two EU Regulations apply to determine jurisdiction in respect of claims against defendants domiciled in EU Member States: Regulation (EC) No. 44/2001 (the Brussels Regulation), which applies for judgments given in proceedings instituted before 10 January 2015, and Regulation (EU) No. 1215/2012 (the Recast Brussels Regulation), which applies to proceedings instituted on or after 10 January 2015. The Recast Brussels Regulation repealed the Brussels Regulation, except for judgments and proceedings instituted before 10 January 2015 (Article 66, Recast Brussels Regulation); however, the majority of the substantive provisions of the Brussels Regulation are carried through into the Recast Brussels Regulation. Under both Regulations, the general rule is that a defendant should be sued in the jurisdiction of its domicile. However, there are certain important exceptions to this rule, the most important of which that are relevant to antitrust damages claims are as follows.

If a claimant has claims against entities domiciled in more than one Member State, it can bring all the claims in the courts of any Member State in which one of the defendants is domiciled provided that those claims are so closely connected that it is expedient to hear them together to avoid the risk of irreconcilable judgments from separate proceedings (Article 6(1), Brussels Regulation or Article 8(1), Recast Brussels Regulation).

In relation to tortious claims, a defendant domiciled in a Member State can be sued in the courts of another Member State where the harmful event occurred or may occur (Article 5(3),

Brussels Regulation or Article 7(3), Recast Brussels Regulation). This could be where the damage was sustained or where the event giving rise to the tort took place. If the former basis is relied on, the claim will be limited to the damage suffered in that jurisdiction.

Article 25(1) of the Recast Brussels Regulation provides for the recognition and enforcement of jurisdiction agreements between parties (this applies regardless of the parties' domicile, whereas the equivalent provision of the Brussels Regulation (Article 23(1)) only applies if at least one party is domiciled in a Member State). A claimant and defendant may have entered into a contract relevant to the claim that includes a jurisdiction clause.

Under Article 24 of the Brussels Regulation or Article 26 of the Recast Brussels Regulation, any defendant domiciled in any jurisdiction is deemed to have submitted to the jurisdiction of an EU Member State if he or she enters an appearance in the courts of that Member State, unless that appearance is made only for the purpose of contesting jurisdiction.

Pursuant to Articles 27 and 28 of the Brussels Regulation or Articles 29 and 30 of the Recast Brussels Regulation, when proceedings that involve the same cause of action between the same parties are brought in two Member States, the court that is second seised must stay proceedings until it has been established as to whether the court first seised has jurisdiction. If the jurisdiction of the court that is first seised is established, any court second seised must decline jurisdiction. If the two sets of proceedings are related (but not the same cause of action between the same parties) so as to be so closely connected that it is expedient to hear the claims together to avoid the risk of conflicting judgments, the court second seised may stay proceedings but it is not obliged to do so.

The rules set down in the Recast Brussels Regulation have direct effect in the UK and in other EU Member States (the only exception to this is Denmark, although it has now confirmed that it will implement the Recast Brussels Regulation). The Lugano Convention applies very similar rules for defendants domiciled in Iceland, Norway or Switzerland.

The CJEU's judgment in *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV* (C-352/13) EU:C:2015:335 (ECJ) was the first time that the CJEU had to rule on the application of the Brussels Regulation to competition claims. The CJEU's judgment confirmed that claimants could bring claims jointly against multiple defendants in one Member State, in which only one of the cartelists is domiciled (see Article 6(1)). The CJEU confirmed that this extended to circumstances in which the claimant has withdrawn proceedings against a sole defendant domiciled in that jurisdiction after proceedings had commenced. In addition, the CJEU held that cartel victims can, under Article 5(3) of the Brussels Regulation, bring damages actions at the courts of the Member State where the cartel was entered into – being the place of the harmful events, but only if it is possible to clearly identify that, which in a multinational cartel may often not be the case. Alternatively, a damages action can be brought in the Member State in which the claimant is domiciled, being the place where the relevant harm was suffered, under Article 5(3). This case related to the Brussels Regulation and not the Recast Brussels Regulation; however, as noted above, the substantive rules that this case concerns have been largely carried through into the Recast Brussels Regulation. The case also considered the validity of a jurisdiction clause under Article 23(1). The judgment held that for a jurisdiction clause to apply in cartel damages cases, the contract will need to expressly refer to disputes relating to infringement of competition law, and a general reference will not be sufficient.

In the case of *Vattenfall v. Prysmian and NKT* [2018] EWHC 1694 (Ch), a follow-on damages claim from the Commission's *Power Cables* cartel decision, the claimants in part based their

claim for jurisdiction of the English court by including as defendants two English companies as 'anchor' defendants. The English companies were not themselves addressees of the Commission Decision, but they were subsidiaries of addressees. The defendants sought to strike out the claim against the English companies, as that would remove the jurisdictional basis for the claim against the other defendants, which were not English domiciled. The High Court refused the defendants' application, holding that there was at least a realistic prospect that the anchor defendants were liable for the power cables cartel on the basis that they 'knowingly implemented' it. The Court took an expansive view as to what is meant by 'implementation', stating that this included indirect sales, work on the product itself (such as design and engineering), administrative and marketing support of a company making the sale, and that there was no *de minimis* threshold for sales of cartelised products. In addition, the Court accepted that there should be a low threshold for particularising 'knowledge of implementation' at an early stage of the proceedings because a claimant would face difficulties before all the factual evidence had been disclosed. The case shows the low threshold that a claimant needs to overcome to bring proceedings and defeat jurisdictional challenges.

A national court or tribunal may seek a reference from the CJEU to answer any questions relating to the interpretation of the Recast Brussels Regulation.

The jurisdiction rules described above, based on EU Regulations, may cease to apply after the UK's withdrawal from the EU (see question 60). At the time of writing, it is not clear what, if any, arrangements will be agreed between the UK and the EU and what changes may result. In the event of no arrangements being entered into, the rules described above based on the Recast Brussels Regulations would cease to apply for claims brought post-Brexit against EU-domiciled defendants, and the regime described below (which currently applies only to claims against defendants domiciled in non-EU jurisdictions) would apply.

For defendants domiciled outside a Member State (or Iceland, Norway and Switzerland), claimants may be able to found the jurisdiction in the English courts pursuant to common law rules. Aside from situations in which the parties have agreed to confer jurisdiction on the English courts, claimants can bring their claims in England if they validly serve process on the defendant, or if the defendant enters an appearance before the English courts for purposes other than to challenge jurisdiction.

Process can be validly served either within or outside the jurisdiction, as long as the necessary requirements are met. A claimant can found the jurisdiction by serving the defendant physically in England and Wales, for example, if the defendant has an office or branch within the jurisdiction. If the defendant is outside the jurisdiction, the claimant must seek the permission of the English courts to serve outside the jurisdiction. The courts may grant permission if the claim has a reasonable prospect of success, England is the proper place to bring the claim, and the claim falls within a number of specific categories set out in the Practice Direction 6B.3.1 (PD 6B.3.1) in the Civil Procedure Rules (CPR). Examples of the jurisdictional 'gateways' set out in PD 6B.3.1 of the CPR include circumstances in which the remedy sought is an injunction ordering the defendant to do, or refrain from doing, something within the jurisdiction, in relation to tort claims, where damage was sustained within the jurisdiction or the damage resulted from an act committed within the jurisdiction, or that the defendant is a necessary and proper party to a claim against another defendant. The English court may decline jurisdiction under the common law rules if it considers that another forum is more appropriate to hear the claim.

The English High Court has also stayed a claim for breach of EU competition law to arbitration, holding that the contractual arbitration clauses extended to the tortious claims for breach of competition law because of the links between the contractual relationship and the claim (see *Microsoft Mobile OY (Ltd) v. Sony Europe Ltd* [2017] EWHC 374 (Ch)).

As between the parallel jurisdictions of the High Court and the CAT, this is a matter of choice for claimants, as they will both have largely similar jurisdictions, but only the CAT will be able to hear collective actions. It is also possible for cases to be transferred from the High Court to the CAT, or vice versa. For example, a number of the claims brought in relation to the Commission's *Trucks* cartel decision have been transferred from the High Court to the CAT (see *Veolia Environment SA and Others v. Fiat Chrysler Automobiles NV, Iveco SpA, and Others*, which was transferred to the CAT in July 2018).

17 Can claims be brought based on foreign law? If so, how does the court determine what law applies to the claim?

Generally, claims may be brought based on foreign law and it is clear that claims can be brought based on breaches of European competition law. The position in relation to the competition law of other countries is not entirely clear. The principal objection that might be raised to allowing such claims is that they may amount to the enforcement of a foreign penal law or other public law, which is not permitted.

Any party contending that foreign law should apply must establish this. The test to determine whether foreign law applies in respect of tort claims (and, if so, which law) depends upon the period covered by the claim.

After the UK's withdrawal from the EU (see question 60), EU competition law will be regarded as a foreign law. At the time of writing, it is not clear what, if any, arrangements will be agreed between the UK and the EU and what impact that might have on the status of EU competition law. However, if the UK leaves without a deal, the Competition Brexit SI provides that damages claims may continue to be brought in the UK for breaches of EU competition law that occurred prior to Brexit day (even if the loss suffered occurs only thereafter). In respect of infringements of EU competition law, the UK government published a notice on 13 September 2018 indicating that claimants who wish to pursue claims in UK courts based on alleged breaches of EU competition law that took place after Brexit may be able to do so on a stand-alone basis, as a foreign tort claim.

The applicable law of a claim will be determined by different rules, depending on when the damage occurred. In relation to events giving rise to damage occurring after 11 January 2009, the applicable law will be determined by Regulation (EC) No. 864/2007. This Regulation, known as Rome II, contains provisions specifically concerning claims in relation to restrictions of competition. Article 6(3) provides that the law applicable to such claims shall be the law of the country where the market is, or is likely to be, affected. If the market is likely to be affected in more than one country, a claimant suing in the court of a country in which a defendant is domiciled may choose to base its claim on the law of that court, provided that the market in that country is directly and substantively affected (see *Deutsche Bahn AG v. Mastercard* [2018] EWHC 412 (Ch), in which Rome II was applied in relation to overcharges incurred after 11 January 2009). In the run-up to the UK's exit from the EU, the UK government has legislated to retain Rome II, such that it will apply after the UK's exit essentially as before (see the proposed Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2018, which will come into force on exit day).

The Private International Law (Miscellaneous Provisions) Act 1995 applies to claims relating to the period between 1 May 1996 and 10 January 2009. Under the Act, the applicable law will be the law of the country in which the tort occurred. Broadly speaking, if the tort occurred in more than one country, the law will be that of the country in which the most significant element or elements of the events that constitute the tort occurred. Contrary to the test set out in Rome II, the legal test under the 1995 Act involves weighing up different aspects of the tort to determine the country in which the most significant event or elements of those events occurred. In its *Deutsche Bahn AG v. Mastercard* decision ([2018] EWHC 412 (Ch) (*Deutsche Bahn*)), the High Court found that the restriction of competition on a market was the most significant element of the tort, that took place 'in each of the product and geographical markets where the relevant Claimant(s) operated its retail business' as such; transactions entered into in France, for example, were affected by anticompetitive conduct on the French market and are governed by French law, although the High Court emphasised that each case will turn on its facts.

In respect of acts before 1 May 1996, the position is governed by complex principles established under common law. This was also confirmed in *Deutsche Bahn*, in which the court held that the applicable law for claims relating to this (distant) period was similarly that of the jurisdiction where competition had been restricted. However, pursuant to the 'double actionability' rule under common law, which states that a claim can only succeed if the tort committed in a foreign jurisdiction would be actionable under both the laws of that foreign jurisdiction and under English law, a claimant must satisfy the limitation rules of both English law and the law of the appropriate jurisdiction.

18 Give details of any preliminary requirement for starting a claim. Must plaintiffs post security or pay a filing fee? How is service of claim affected?

Proceedings are commenced in both the High Court and the CAT by filing a claim form. A court fee is also payable on commencing proceedings in the High Court (5 per cent of the value of the claim, capped at £10,000). In the High Court, the details on the form can be relatively general, but shortly thereafter must be expanded. In the CAT, full details of the claim must be provided on the claim form. Once issued, the claim form must be served on the other parties. Service can be effected on companies and individuals in England and Wales by a number of mechanisms, including post, fax and email. For parties outside England and Wales, permission to serve outside the jurisdiction will be required in some circumstances from the High Court and in all cases from the CAT.

19 What is the limitation period for private antitrust claims?

Different limitation periods will apply to claims, depending on when the claim arose and, in some cases, whether the claim is brought in the High Court or the CAT.

Summarised below is the position under English law, but foreign law limitation periods may apply if the claim is governed by foreign law (see *Deutsche Bahn AG and others v. Mastercard* [2016] CAT 14).

High Court

For claims in which the infringement of EU or UK competition law came to end before 9 March 2017, when the Damages Directive was implemented, the position is as follows.

Tort claims governed by English law, including those on which antitrust claims are based, are subject to a primary limitation period of six years running from the date on which the cause of action accrued (Section 2, Limitation Act 1980). A cause of action will accrue only when some damage has been caused. However, if there is deliberate concealment of any fact relevant to the claimant's cause of action, the six-year limitation period will begin to run from the date on which the claimant discovered, or could with reasonable diligence have discovered, the concealment (Section 32, Limitation Act 1980). A deliberate breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment for these purposes. In practice, therefore, in many antitrust cases, such as those arising from a secret cartel, the limitation period might start to run only from the date of the relevant infringement decision of the CMA or the Commission. However, if sufficient relevant information was in the public domain, or otherwise known to the claimant before this date, then the limitation may start to run earlier.

For all claims in which the infringement started on or after 9 March 2017, the implementation of the Damages Directive did not alter the limitation period for claims brought before the High Court, which remains six years, but there are different rules to determine when the period starts to run and the limitation period will be suspended in certain circumstances. The limitation period for such claims will only start to run on the later of the following:

- when the infringement of competition law ceased; or
- when the claimant knew (or could reasonably be expected to know) of the behaviour that amounts to an infringement, that he or she has suffered loss and damage, and the identity of the infringer.

The limitation period is suspended during any competition authority investigation and any subsequent appeals from a decision, and for a period of one year thereafter, for consensual dispute resolution and for collective proceedings.

These changes will substantially extend the limitation periods in many cases because the majority of claims brought in the High Court are follow-on claims that 'follow on' from competition authority decisions.

CAT

Prior to 1 October 2015, the CAT had jurisdiction to hear only claims following on from a prior infringement decision of the Commission or a UK competition authority. The limitation period for such claims was two years from the date when the relevant infringement decision on which the claim is based has become final; that is to say once time for appealing has expired or any appeals have been determined. For these purposes, appeals against only the level of a fine are not relevant (see *BCL Old Co Ltd v. BASF Plc* [2012] UKSC 45). If there has been an infringement jointly by a number of undertakings, for example, a cartel, a judgment of the Supreme Court (*Deutsche Bahn AG and others v. Morgan Advanced Materials Plc (formerly Morgan Crucible Co Plc)* [2014] UKSC 24) decided that any appeal against the finding of an infringement by any other addressee is irrelevant to the limitation period applicable to the non-appealing addressee.

The new CAT Rules came into force on 1 October 2015, changing the limitation period for claims made in the CAT, but transitional provisions (Rule 119) continued to apply the old two-year limitation period to claims that arose prior to 1 October 2015, but in relation to which proceedings had not yet commenced. For all other claims arising after 1 October 2015, the CAT's

limitation period was brought into line with the limitation periods then applying to claims in the High Court. The limitation period for claims in the CAT has also been amended by the implementation of the Damages Directive for claims in which the infringement of EU or UK competition law started on or after 9 March 2017. For such claims, the limitation period in the CAT is the same as in the High Court (see above).

20 Are those time limits procedural or part of the substantive law? What is the effect of their expiry?

Under English law, limitation periods are procedural in nature and their expiry does not extinguish the right, but merely acts as a bar to proceedings if a limitation defence is raised.

21 When does the limitation period start to run?

See question 19.

22 What, if anything, can suspend the running of the limitation period?

Parties can agree standstill or tolling agreements in respect of English law limitation applicable to claims in the High Court, and probably for claims in the CAT, arising after 1 October 2015. For claims arising before 1 October 2015, it appears that standstill or tolling agreements cannot be agreed in respect of the period for bringing damages claims in the CAT (see *Emerson v. Morgan Crucible* [2007] CAT 28). Certain insolvency events may suspend limitation periods.

For claims in which the infringement of EU or UK competition law started on or after 9 March 2017, the implementation of the Damages Directive provides for the suspension of the limitation period during any competition authority investigation (and subsequent appeals), for consensual dispute resolution, and for collective proceedings (see question 19).

23 What pleading standards must the plaintiff meet to start a stand-alone or follow-on claim?

A claimant's pleadings must set out reasonable grounds for a claim and must have a realistic prospect of success, otherwise the claim is liable to be struck out. In practice, in antitrust damages claims, the court has been prepared to take a lenient approach to the level of detail the claimant provides. This is particularly so in claims arising from alleged cartels, in which the court recognises that the claimant is likely to have limited information in relation to the operation of the cartel (see *Toshiba Carrier v. KME* [2012] EWCA Civ 1190).

24 Is interim relief available? What must plaintiffs show for the court to grant interim relief?

Interim relief is available in the High Court and the CAT. In general terms, interim relief will be available if the claimant's case raises a serious issue to be tried and damages would not be an adequate remedy. Injunctions are discretionary remedies and the court will assess whether the balance of convenience favours granting an interim injunction or not, with a view to doing what is least likely to cause injustice if the decision later turns out to be wrong.

CAT

Rule 24 of the CAT Rules gives the CAT the power to make interim orders and to take interim measures. The CAT may make an order on an interim basis, inter alia, granting any remedy that the CAT would have the power to grant in its final decision. In addition, where the CAT considers that it is necessary as a matter of urgency for the purpose of preventing significant damage to a particular person or category of person, or protecting the public interest, the CAT may give such directions as it considers appropriate for that purpose. In exercising its power to grant interim relief, the CAT will take into account all the relevant circumstances, such as the urgency of the matter, the effect on the party making the request if the relief sought is not granted, the effect on competition if the relief is not granted, and the existence and adequacy of any offer of an undertaking as to damages.

High Court

Interim relief is available in the High Court under Rule 25 of the CPR; the most common type is an interim injunction. The applicant must show that there is a serious issue to be tried and that it has a real prospect of succeeding in its claim for a permanent injunction at trial. Once this is established, the court will consider whether, if the applicant were successful at trial, damages would be an adequate remedy (this may not be the case if it would be extremely difficult to quantify damages, or if refusal of the injunction would cause the destruction of the applicant's business), and whether damages under a cross-undertaking by the applicant to the respondent would be an adequate remedy should the respondent win at trial. If the court is in doubt as to the adequacy of damages for either party, it will consider the balance of convenience and the facts of the case and choose the option that involves the least risk of injustice should its decision be wrong. When the factors are evenly balanced, the courts tend to preserve the status quo.

25 What options does the defendant have in responding to the claims and seeking early resolution of the case?

The first step a defendant must take is to acknowledge service of the proceedings. If it wishes to challenge the jurisdiction of the court, it must indicate when it acknowledges service and make its application before taking any other step. If there is no challenge to jurisdiction, the defendant must serve a defence setting out its factual and legal defences. If the defendant has a counterclaim or a related claim against a third party (eg, for contribution), this will usually be made at the same time as filing a defence (although claims can be brought after service of the defence with the court's permission).

A defendant may seek early summary determination of the claim by either applying to strike out the claim on the basis that it discloses no reasonable grounds or by seeking summary judgment on the grounds that the claim has no reasonable prospects of success. In practice, strike-out and summary judgment applications are often combined. To date, the High Court has shown great reluctance to strike out private antitrust damages claims or give summary judgment for the defendant prior to disclosure (see *Toshiba Carrier v. KME* [2012] EWCA Civ 1190) when the Court of Appeal has allowed the action (against UK defendants, as 'anchor defendants' and against non-UK defendants (addressees of cartel decisions)) to proceed in the High Court. However, in a number of recent cases, strike-out applications have been successful. In *Bao Xiang International Garment Center and others v. British Airways plc* ([2015] EWHC 3071),

the High Court decided to strike out the claimants' claim on two bases: first, because unauthorised proceedings had been issued in England and they had not been subsequently ratified, and second, that in itself it was an abuse of process. In *Emerson Electric Co and others v. Morgan Crucible Company PLC* ([2012] EWCA Civ 1559), the Court of Appeal upheld a CAT ruling that found that the action against Mersen UK Portslade Ltd should be struck out as it was not an addressee of the Commission's cartel decision. In *British Airways v. Emerald Supplies Limited & Others* ([2015] EWCA Civ 1024), the Court of Appeal struck out the claimants' claim for the 'economic torts' of unlawful means conspiracy and unlawful interference with trade, while the more conventional claims alleging an infringement of the European competition rules continued.

Disclosure or discovery

26 What types of disclosure or discovery are available? Describe any limitations and the courts' usual practice in ordering disclosure or discovery.

Disclosure in English proceedings is, in practice, almost exclusively by means of disclosure of documents. Other forms of factual enquiry in advance of trial are possible, such as making formal requests for information and, even in limited circumstances, depositions. The evidence of witnesses of fact are served in advance of trial in the form of witness statements, and expert witnesses must serve reports setting out their evidence. Set out below is a brief overview of the scope of documentary disclosure.

High Court

Parties to proceedings are generally required to provide wide-ranging disclosure of documents after the close of pleadings but before the preparation and exchange of witness statements and expert reports. The exact scope of disclosure is a matter for the court in each case but the normal approach is to require the parties to carry out a reasonable search for, and to disclose, all documents that support their case or harm the other party's case, and those that harm their own case or support the other party's case. For these purposes, documents include hard copy documents and all forms of electronic record. This is known as standard disclosure.

There are a range of other approaches available to the court, including disclosure on an issue-by-issue basis (this is common in cartel damages claims), disclosure of documents that could lead to a train of enquiry that may advance the other side's case, or each party disclosing the documents on which it relies and requesting specific disclosure from the other party. Parties may also apply for an order requiring disclosure of specific documents (see *Peugeot SA and others v. NSK Ltd and others* – CAT ruling on specific disclosure [2018] CAT 3).

There are specific provisions setting out detailed guidance on the approach that parties should take to electronic disclosure (PD 31B, CPR).

Orders for disclosure may be made against third parties who are not parties to the case and the court also has the power to order that disclosure be provided before proceedings have started if it would assist with the disposal of the case or reduce cost.

CAT

The CAT has wide powers in respect of disclosure, but broadly follows the approach adopted by the High Court.

The Damages Directive, which was implemented in the UK on 9 March 2017, did not require changes to current disclosure practice in England, which is well established; however, it did provide for the protection from disclosure of certain documents, including leniency documents and investigation materials from a competition authority's file (see questions 7 and 8).

27 How do the courts treat confidential information that might be required to be disclosed or that is responsive to a discovery proceeding? Is such information treated differently for trial?

As to protection of confidential information, see question 10.

Although hearings, including trials, are generally conducted in public, if it is necessary to protect confidential information, the High Court or the CAT can sit in private with only those within the confidentiality ring attending. As there is a strong presumption for hearings to be held in public the court or CAT will need to be persuaded of a genuine need for confidentiality.

28 What protection, if any, do your courts grant attorney–client communications or attorney materials? Are any other forms of privilege recognised?

Parties are not required to give disclosure of privileged documents in civil proceedings in England and Wales. The law of privilege is complex but the main heads of privilege can be summarised in broad terms as follows:

- legal advice privilege: applies to confidential communications passing between a client and his or her lawyer (including in-house lawyers) where the communication came into existence for the purpose of giving or receiving legal advice. For these purposes, cases indicate that a narrow definition of 'client' will be applied by the courts and, if the client is a company, the definition will not extend to all employees;
- litigation privilege: applies to confidential communications between a lawyer and his or her client, or between either the lawyer or the client and a third party, or a document created by the client or his or her lawyer, where the document or communication was made for the dominant purpose of litigation, which must at the time be reasonably contemplated;
- without prejudice privilege: applies to a statement made in a genuine attempt to settle a dispute. It operates to prevent such statements from being adduced in evidence;
- privilege against self-incrimination: prevents a person from being required to disclose documents or provide information that might incriminate him or her in criminal proceedings or expose him or her to a penalty; and
- common interest privilege: generally, privilege will be lost if a privileged document is communicated to a third party. However, the law recognises, in some circumstances, a common interest privilege that preserves the privileged status of a document if it is disclosed on a confidential basis to a third party who has a common interest. However, care should be taken because if the parties' common interest ends and one party brings a claim against the other, neither will be able to claim privilege against the other for documents that were previously disclosed pursuant to the common interest privilege (see *CIA Barca de Panama SA v. George Wimpey & Co Ltd (No. 1)* [1980] 1 Lloyd's Rep 598 and *Singla v. Stockler* [2012] EWHC 1176 (Ch)).

Trial

29 Describe the trial process.

Trials are conducted in public, except in exceptional circumstances. Generally the trial will start with the claimant's advocate making oral opening submissions, followed by opening submissions from the defendants. Witnesses of fact are called by each party in turn, starting with the claimant, and they will be cross-examined by each other party's advocate. This is followed by evidence from the parties' experts. After all the evidence, each party will make oral closing submissions. Oral submission plays a central role, but it is common to have written opening and closing submissions in addition.

30 How is evidence given or admitted at trial?

Witness evidence is provided in the form of a witness statement served before trial; it must be limited to statements of fact, not opinion. Witnesses are normally required to attend court to give evidence in person (although video evidence may be permitted in some circumstances). The witness statement will generally stand as evidence in chief and the witness can then be cross-examined by the advocate for each other party, and may be re-examined by the advocate for the party who called them as a witness. Cross-examination is not limited to the content of the witness statement. It is possible to compel witnesses within the jurisdiction to attend court to give evidence. Evidence may be obtained from witnesses abroad through either the Hague Convention or, within the EU, Council Regulation (EC) No. 1206/2001.

Expert evidence is primarily provided in the form of an expert report. Following an exchange of expert reports, each side may put written questions to the other party's expert, and experts may be ordered to meet to determine the areas on which they agree and disagree. The expert will be required to attend court to be cross-examined and re-examined on the contents of their report.

The court can order experts to give their evidence concurrently (known as hot-tubbing). The court can then hear each expert comment on the other experts' evidence. This form of giving evidence would be led by the judge, with each party's advocate given the opportunity to question the experts subsequently. (This type of hot-tubbing examination of expert witnesses was used by the High Court in *Streetmap.EU Limited v. Google Inc, Google Ireland Limited and Google UK Limited* [2016] EWHC 253 (Ch) and by the CAT in *Socrates Training Limited v. The Law Society* [2017] CAT 10).

Documents may be admitted in evidence and, unless challenged, their authenticity need not be proved.

31 Are experts used in private antitrust litigation in your country? If so, what types of experts, how are they used, and by whom are they chosen or appointed?

Expert evidence is likely to be essential in all private antitrust cases. Typically, expert evidence will be provided by economists, but other experts may be required, such as forensic accounting or industry experts. Permission of the court is required for expert evidence. Generally the parties will each appoint their own expert, but it is possible for a single joint expert to be appointed, although this is exceptional. The primary duty of any expert is to the court, not to the party that has instructed it.

It is important for expert evidence to be properly grounded in the facts that are in evidence before the court. In *BritNed Development Limited v. ABB AB and ABB Ltd* ([2018] EWHC 2616 (Ch) (*BritNed*)), the High Court explicitly rejected the submission that an expert economist with no expertise in a relevant field would be capable of noticing 'the illicit inflation of a direct cost for dubious and not well-founded technical reasons' (Paragraph 261).

32 What must private claimants prove to obtain a final judgment in their favour?

What must be proved will vary depending on the circumstances and the remedy sought. In stand-alone antitrust damages claims, the claimant will need to establish both a breach of competition law and that it caused him or her harm. He or she will also need to establish the quantum of any damages so caused. In a follow-on damages claim, the claimant need not establish a breach of competition law, which is proved by the competition authority decision that an infringement of competition law has occurred. However, the claimant will have to prove that the infringement has caused him or her loss and the amount of that loss.

One of the changes made following the implementation of the Damages Directive is in relation to the quantification of harm for claims when the infringement of EU or UK competition law started on or after 9 March 2017, where there will be a rebuttable presumption (rebuttable by the infringer) that cartel infringements cause harm (Article 17 of the Damages Directive). The intention is to remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages.

The amendments made following implementation of the Damages Directive also provide for claims in which the infringement of EU or UK competition law started on or after 9 March 2017 that, when the existence of a claim for damages or the amount of damages to be awarded depends on whether or to what degree an overcharge paid by a direct purchaser from the infringer has been passed on to an indirect purchaser, in a claim by an indirect purchaser, there is a rebuttable presumption that an overcharge has been passed on to the claimant unless the infringer can prove otherwise.

However, *BritNed* has clarified that this presumption does not apply to cases that predate the entry into force of the Damages Directive in the United Kingdom. The *BritNed* judgment was the first UK follow-on cartel damages claim to reach judgment and provides an example of how an English court might approach proof of loss resulting from a cartel. In *BritNed*, the claimant alleged that it had been overcharged in the amount of approximately €180 million as a result of a cartel in the power cables sector. The High Court concluded that the factual and expert evidence adduced at trial did not fully support BritNed's claim and granted damages of only €13 million to BritNed on account of 'baked-in inefficiencies' due to a lack of competition, and cost savings to ABB resulting from the control of allocation and management of cables supply as a result of the cartel. At the time of writing, this judgment has been appealed but the Court of Appeal has not yet handed down its judgment.

In *BritNed*, the High Court defined 'overcharge' as the difference between the price actually agreed and the price that would have resulted had there been no cartel, 'whoever the party contracting with BritNed would have been in the counter-factual world' (Paragraph 17). The Court also rejected the suggestion that ABB's prior participation in other cartels could be taken into account to assess BritNed's damages. Among other things, the Court recognised that the

ABB employees who were actually involved in negotiating the relevant BritNed contract were not aware of the existence of the cartel, meaning that knowledge of the cartel did not have a direct influence on costs. Overall, the judgment indicates that not every breach of competition law will lead to customers being overcharged on all elements of a contract, arguably raising the bar for claimants to prove that they have suffered any damage caused by anticompetitive activity.

33 Are there any defences unique to private antitrust litigation? If so, which party bears the burden of proving these defences?

There are no defences that are unique to antitrust damages claims, but the passing-on defence is typically raised. In its judgment in *Sainsbury's Supermarkets Limited and Ors v. Mastercard Incorporated and Ors* [2018] EWCA 1536 (Civ), the Court of Appeal held that the burden of proof is on the defendants (in this case Mastercard and Visa) to establish that the claimants passed on their losses to customers. The defendant must establish that there was an identifiable increase in the price of the downstream product that is causally connected to the overcharge. Importantly, it is not necessary for the defendant to identify the class of persons to whom the loss was passed on. Nevertheless, in this case, Mastercard failed to satisfy the Court that there was an identifiable increase in retail prices, so the passed-on defence failed.

For claims in which the infringement of EU or UK competition law started on or after 9 March 2017, the implementation of the Damages Directive confirms that a defendant who relies on the passing-on defence must prove the existence and extent of the passing-on of the overcharge.

Where the existence of a claim or the amount of damages to be awarded depends on whether, or to what degree, an overcharge has been passed on to an indirect purchaser, the indirect purchaser should be regarded as having proven that an overcharge has been passed on to it, where it is able to show prima facie that the passing-on has occurred. This rebuttable presumption applies unless the infringer or defendant can show that the actual loss has not, or not entirely, been passed on to the indirect purchaser.

Additional quantification guidance has been provided to Member States by the Commission in the form of guidelines for national courts on the passing-on of overcharges (the Passing-on Guidelines), which complement the existing EC Practical Guide on Quantifying Harm (published in the Official Journal of the EU on 13 June 2013). The guidelines are non-binding, but set out the economic theories, econometric methods and empirical insights that can be useful for national courts when assessing passing-on, and when estimating the passing-on rate and the loss of profit resulting from any lost business effect in the context of an antitrust damages action. The Passing-on Guidelines are intended to assist judges, and other practitioners who are not economic experts, with guidance on obtaining and assessing economic evidence in relation to passing-on claims.

Following implementation of the Damages Directive, there are limited circumstances in competition claims in which a party's liability might be limited by disapplying the rule of joint and several liability (see question 38).

34 How long do private antitrust cases usually last (not counting appeals)?

It is not possible to specify how long an antitrust case usually lasts. In some cases it is important that the case moves promptly to trial (for example, if the remedy sought is an injunction).

In such cases it is possible for the case to be determined within a year. In follow-on damages claims, it has been common for significant delays to be caused by issues relating to jurisdiction and appeals against the infringement decision on which the claim is based. Also, given the wide-ranging disclosure obligations in England and Wales, the disclosure process, and arguments about what the appropriate scope of disclosure is, often take time to resolve. Therefore, it is not uncommon for antitrust damages cases to take several years to reach trial. As the principles applicable to such cases become more established, it is expected that the procedure will speed up.

A fast-track claims procedure is available in the CAT for appropriate cases. The CAT may decide at any time, either at its own initiative or on the application of a party, to make an order that the proceedings be subject to the fast-track procedure (it cannot apply to class actions). If the fast-track procedure applies, it will have important consequences, as the substantive trial will take place within six months (although judgment will not necessarily be handed down in that period) and any costs a party could be ordered to pay will be capped. This expedited procedure and capped costs exposure is intended for simpler claims and is designed to make claims more accessible to small and medium-sized enterprises (SMEs). A small number of fast-track cases have been brought since they were introduced in October 2015. To date, only two such cases have gone to trial (*Socrates Training Limited v. The Law Society of England and Wales* [2016] CAT 10 and *Achilles Information Limited v. Network Rail Infrastructure Limited*). So far, directions for fast-track cases have tended to heavily limit the extent to which factual and expert evidence can be adduced by the parties, as well as disclosure, and ordered split trials (splitting liability and quantum).

35 Who is the decision-maker at trial?

In the High Court the decision-maker is a single judge. In the CAT, the tribunal is made up of three members – a legally qualified chairman and two other members who have other relevant experience (often in economics).

Damages, costs and funding

36 What is the evidentiary burden on plaintiffs to quantify the damages?

As with other elements of a claim, the claimant must establish the quantification of damages to the satisfaction of the court on the balance of probabilities. It is clear, however, from general case law that the court will not be deterred from awarding damages because it is not possible to quantify the loss precisely and will make the best estimate it can.

However, in the *BritNed* case, the High Court indicated that claimants in cartel follow-on cases must be prepared to prove in detail, through factual and expert evidence, the extent of the overcharge that they allege to have suffered, including by reference to prices they would have paid in the absence of the cartel, whoever the party contracting with them would have been in the counter-factual world. In the *BritNed* decision, the High Court found that the price charged by ABB was in line with the prices for equivalent post-cartel contracts. This decision seemingly has raised the bar for claimants seeking to claim damages in respect of an alleged overcharge. At the time of writing, this judgment has been appealed but the Court of Appeal has not yet handed down judgment.

See also question 32 regarding the rebuttable presumption that cartel infringements cause harm, and the burden of proof regarding indirect purchasers, and question 33 regarding the

passing-on defence following the CAT's decision in *Sainsbury's Supermarkets v. Mastercard Incorporated and others* (in which the CAT held that the burden of proof in respect of passing-on is on the defendant).

37 How are damages calculated?

In antitrust cases, the court will apply the usual tortious approach of assessing damages at the level that would put the claimant in the same position he or she would have been in had no tort been committed. The exact limits of recoverable damage in antitrust damages cases have yet to be established.

The general approach of the court will be to compare the counter-factual circumstances with what actually occurred. In doing so, the court will be heavily dependent on the expert evidence adduced by the parties. The approach used by experts will vary and will often involve econometric techniques. The Commission published guidance in 2013, which courts in Member States may follow in antitrust damages cases. The guidance illustrates and offers insights on the types of harm normally caused by anticompetitive practices and offers an overview of the main methods and techniques available to quantify such harm in practice.

The Damages Directive states that anyone who has suffered harm caused by an infringement can claim full compensation (Article 3). Full compensation should place a person who has suffered harm in the position in which that person would have been had the infringement not been committed. The Damages Directive provides that this should include compensation for actual loss, for gain of which that person has been deprived (loss of profit), plus interest, irrespective of whether those categories are established separately or in combination in national law. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.

However, the concept of full compensation under the Damages Directive is not intended to lead to overcompensation, whether by means of punitive, multiple or other damages (Article 3(3)). National courts are also required to have appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level (such means should also be available in cross-border cases). Given that this is already common practice in UK courts, the UK government decided that there was no requirement to amend UK legislation in this regard.

38 Does your country recognise joint and several liabilities for private antitrust claims?

There has yet to be a decision on this issue and the answer may depend on the circumstances. However, where two or more parties have been involved in a common enterprise that was an infringement of competition law (eg, a cartel), it is generally accepted that they will be jointly and severally liable for the loss caused.

The Damages Directive explicitly provides for joint and several liability for joint infringers. In the UK, it is well accepted that a defendant may be jointly and severally liable, as required by

Article 11 of the Damages Directive, and the UK government decided not to expressly set out the joint and several liability of competition co-infringers in legislation. However, the UK's implementation of the Damages Directive introduced two exemptions to this principle for claims in which the infringement of EU or UK competition law started on or after 9 March 2017: (1) in the case of SMEs (whose market share in the relevant market was below 5 per cent at any time during the infringement of competition law and the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value); and (2) those who have received immunity under a leniency programme (see questions 7 and 8). However, the leniency applicant will still be liable to its direct or indirect purchasers or providers and to other injured parties only when full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

In addition, implementing Article 19 of the Damages Directive, UK legislation stipulates, for claims in which the infringement started on or after 9 March 2017, that following a consensual settlement, the claim of the settling claimant is reduced by the settling defendant's share of the loss and damage regardless of the terms of the settlement. In addition, any other infringer liable for the claim may not bring a contribution claim against the settling infringer, regardless of the terms of the settlement. The result is to ensure that, even after a consensual settlement, the settling defendant does not continue to be jointly and severally liable for the loss to the settling claimant, and should not have to contribute to its non-settling co-defendant's share of the loss. The only derogation from this is if the non-settling infringer cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling claimant may exercise the remaining claim against the settling co-defendant unless there has been agreement to the contrary.

39 Can a defendant seek contribution or indemnity from other defendants, including leniency applicants, or third parties? Does the law make a clear distinction between contribution and indemnity in antitrust cases?

The Civil Liability (Contribution) Act 1978 (the Act) provides that where two or more parties are liable to a claim for the same damage, they have the right to claim an indemnity or contribution to any damages they are liable to pay (either under a settlement or an award of damages). An indemnity or contribution can be claimed against another defendant or a third party.

The amount of the contribution, which could be set at nil or a full indemnity, will be the amount the court considers just and equitable having regard to the extent of that person's responsibility for the damage in question. A contribution can be claimed under the Act against a successful leniency applicant.

For claims in which the infringement of EU or UK competition law started on or after 9 March 2017, the UK's implementation of the Damages Directive makes a number of changes to the operation of the Act. It provides that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the whole of the loss and damage caused by the infringement (taking account of any amounts already paid in a settlement). In addition, the amount of the contribution by an infringer that has been granted immunity from fines under a leniency programme shall not

exceed the amount of the harm it caused to its own direct or indirect purchasers or providers. The only exception to this is if full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

The implementation of the Damages Directive also alters the position in relation to contribution claims in which the infringement of EU or UK competition law started on or after 9 March 2017 and where a co-defendant has already settled (see also question 38). The claim of the settling claimant should be reduced by the settling defendant's share of the loss and damage regardless of the terms of the settlement. Any non-settling co-infringer shall not be permitted to recover contribution for the remaining claim from the settling infringer.

40 Can prevailing parties recover attorneys' and court fees and other costs? How are costs calculated?

The courts have a wide discretion as to whether one party should pay the costs of another and how they should be calculated. As a general rule, the winning party will be entitled to recover its reasonable costs from the losing party. The amount of costs payable will be subject to a detailed assessment by a specialist judge if the amount cannot be agreed, and the amount recovered will commonly be significantly less than the full legal costs incurred. The costs recoverable will generally include legal fees, expert witnesses' fees, court fees and other expenses. In addition, where a party had entered into a conditional fee agreement (CFA) with his or her own lawyer (see question 42) prior to 1 April 2013, the uplift on the lawyer's normal fees may be recoverable from the paying party up to a maximum of 100 per cent. Further, if before 1 April 2013 the winning party had entered into an after-the-event (ATE) insurance policy covering legal costs, the premium for that insurance would be recoverable. The rules that apply to CFAs and ATE insurance arrangements entered into from 1 April 2013 provide that the uplift and premium are (almost always) not recoverable.

41 Are there circumstances where a party's liability to pay costs or ability to recover costs may be limited?

Costs are always at the discretion of the court; therefore, the court may limit the ability of the successful party to recover its costs. It might, for example, not allow recovery of costs in respect of specific issues. In addition, the parties can use settlement offers to try to limit their costs exposure. If a settlement offer complies with certain requirements (set out in Rule 36, CPR for the High Court and Rule 45 of the CAT Rules), it can provide some costs protection even if, ultimately, the party making the offer is unsuccessful at trial.

42 May attorneys act for claimants on a contingency or conditional fee basis? How are such fees calculated?

Since 1 April 2013, lawyers have been able to enter into damage-based agreements (DBAs) with their clients, which, if the claimant is successful, allow the lawyer to recover from the claimant a contingency fee of up to 50 per cent of the damages. Successful claimants will still recover their basic legal fees from defendants in accordance with the usual costs-shifting rule of loser pays, and the claimant will be obliged to pay any shortfall to meet the agreed sum under the terms of the DBA.

CFAs are also permitted. These provide that only if successful will the client pay its own lawyer's fees (or some element of them). If the client is successful, an agreed uplift (of up to

100 per cent) on the normal fees is payable. If the CFA was entered into prior to 1 April 2013, the uplift may be recoverable from the losing party. For CFAs entered into after that date, the uplift is not recoverable from the losing party.

DBAs cannot be used for opt-out class actions in the CAT (see questions 48 and 52), although conditional fee arrangements, third-party funding and ATE insurance will be available. These funding arrangements will all assist the claimants in bringing these types of claims, removing some of the financial risks involved. DBAs will be permitted for opt-in class actions.

43 Is litigation funding lawful in your country? May plaintiffs sell their claims to third parties?

Third-party funding by a professional funder is permitted and is now common in antitrust damages claims. In many circumstances, the sale of claims will be prevented by public policy considerations.

44 May defendants insure themselves against the risk of private antitrust claims? Is after-the-event insurance available for antitrust claims?

Insurance protecting against the risk of anticompetitive conduct is likely to be unenforceable as contrary to public policy. ATE insurance in respect of legal fees and related expenses is available to both claimants and defendants.

Appeal

45 Is there a right to appeal or is permission required?

An appeal from the High Court or the CAT is made to the Court of Appeal. In the High Court, there is no restriction on the subject matter of appeals, but in the CAT, appeals can be made concerning the amount of damages awarded or on a point of law in relation to a decision concerning a finding of infringement of competition law, the grant of an injunction, or the award of damages, but not otherwise.

Permission is required for an appeal from both the High Court or the CAT. In the first instance, an application for permission should be made in the High Court or the CAT. If permission to appeal is not granted, the appellant can apply to the Court of Appeal itself to request permission. Permission to appeal may only be granted if the Court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard.

In relation to competition collective actions before the CAT, appeals may only be brought by the class representative or the defendant. Class members have no right to appeal decisions made in respect of claims included in the collective proceedings. There was doubt as to whether a party could appeal against the CAT's decision on an application for a collective proceedings order (CPO), but the Court of Appeal has confirmed this is possible. The proposed representative in the *Merricks v. Mastercard* proposed class action sought to appeal the CAT's decision to dismiss the proposed £14 billion collective action. Permission was granted by the Court of Appeal, which then overturned the CAT's decision to refuse the CPO. At the time of writing, permission has now been sought for the Court of Appeal's decision to be appealed to the Supreme Court.

46 Who hears appeals? Is further appeal possible?

The first appeal court is the Court of Appeal. A further appeal from the Court of Appeal can be made to the Supreme Court, which is the final appellate court in this jurisdiction (see, for example, the *Merricks v. Mastercard* case referred to in questions 45 and 48). An application for permission to appeal must be made to the Court of Appeal in the first instance, and an application may then be made to the Supreme Court if the Court of Appeal refuses to grant permission. Permission is granted if the appeal raises an arguable point of law of general public importance that ought to be considered by the Supreme Court.

If there is a question of interpretation of European law at any stage of the proceedings in any court of England and Wales, a party can apply for that court (including the Supreme Court) to refer a preliminary question to the CJEU on that point, pursuant to Article 267 of the TFEU. Any court may also make a reference of its own volition. The proceedings before the English court are stayed pending the CJEU's response. The CJEU will then issue a ruling on that question of interpretation, which the English court will apply to the facts of the case.

At the time of writing, the legislation concerning Brexit provides that, after exit day, UK courts will no longer be able to refer matters to the European courts (see Section 6, European Union (Withdrawal) Act 2018). This provision is not yet in force and could change if any arrangement is agreed between the UK and EU.

47 What are the grounds for appeal against a decision of a private enforcement action?

An appeal will be allowed if the decision of the lower court was wrong (which can include an error in law, in fact or in the exercise of its discretion) or was unjust because of a serious procedural or other irregularity in the proceedings. Any appeal is limited to a review of the decision of the lower court, and the parties cannot introduce new evidence or arguments unless the Court of Appeal considers that it would be in the interests of justice to permit it.

Collective, representative and class actions

48 Does your country have a collective, representative or class action process in private antitrust cases? How common are they?

On 1 October 2015, the Consumer Rights Act 2015 introduced for the first time in the UK an opt-out collective actions regime in the CAT especially for antitrust claims.

CAT

The CAT has powers to hear collective proceedings (or class actions) for breach of competition law, on either an opt-out or opt-in basis. In determining whether collective proceedings should be opt-in or opt-out, the CAT Rules provide that the CAT will take into account all matters it thinks fit, including the strength of the claims and whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.

If the CAT approves an opt-out class action, all eligible claimants domiciled in the UK will be included in the action automatically, unless they choose to opt-out. Overseas claimants will not be automatically included in the class, but they may choose expressly to opt-in to the class.

The CAT can also approve claims as an opt-in class action, covering only claimants who choose to join the class action (i.e., a claim in the form that is currently allowed).

To date, eight CPO applications have been issued since the Consumer Rights Act 2015 introduced class actions, but no claim has yet been successfully certified. The first such claim was brought on behalf of the National Pensioners Convention for damages relating to inflated prices for mobility scooters (*Dorothy Gibson v. Pride Mobility Products Ltd* [2017] CAT 9), and was adjourned following faults found with the applicant's case concerning the definition of the proposed classes and the methodology used to formulate them. The claimants subsequently decided not to pursue their application for a CPO.

The second case was *Merricks v. Mastercard*, which is a claim for approximately £14 billion, grouping together claims of around 46 million UK consumers who bought goods and services from UK merchants accepting Mastercard payments between 1992 and 2008. In this case, the CAT refused to grant a CPO, finding, inter alia, that there was 'no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated' and, as a result, the award of aggregate damages that was sought and would then be distributed would not result in damages being paid to individual consumers in accordance with the compensatory principle.

However, the Court of Appeal overturned the CAT's decision in April 2019 and remitted the application to the CAT for reconsideration. In reaching its decision, the Court of Appeal considered the Canadian Supreme Court's decision in *Pro-Sys Consultants Ltd v. Microsoft Corp* (2013), concluding that the function of a tribunal at the certification stage is to be satisfied that the proposed methodology is capable, or offers a realistic prospect, of establishing loss to the class as a whole. By requiring detailed information from the applicant about what data would be available and examining the applicant's experts at a pre-disclosure stage, the Court of Appeal found that the CAT had effectively conducted a mini trial, whereas they were only entitled to determine that the experts' proposed methodology was credible. The Court of Appeal also rejected the CAT's view that the claim was not suitable for a CPO because the proposed methodology of distributing any award would bear little relation to the loss actually suffered by individual members of the class, stating that power to make an aggregate award would be negated in large-scale opt-out proceedings if a calculation of individual loss was a prerequisite. At the time of writing, Mastercard is appealing the Court of Appeal's decision to the Supreme Court.

Pending this appeal, two proposed UK class action claims concerning the *Trucks* cartel have been stayed. Both of these proposed collective proceedings combine follow-on actions for damages arising from the Commission's July 2016 decision in relation to trucks. The first (*UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV and Others*) issued an application to commence collective proceedings on 18 May 2018. This application, seeking permission to act as the class representative on behalf of owners and lessees of more than 600,000 trucks, is made on an opt-out basis, and, in the alternative, on an opt-in basis. The second application (*Road Haulage Association Limited v. Man SE and Others*) was issued on 17 July 2008 and is proposing collective proceedings on an opt-in basis.

At the time of writing, the most recent application for a CPO was issued in the CAT on 29 July 2019 against five investment banks, alleging anticompetitive conduct in the foreign exchange markets. The class is represented by the former chairman of the UK Pensions Regulator, and consists of a broad class of claimants, including asset managers, pension funds, corporates and hedge funds.

High Court

While representative proceedings are permitted in the High Court in limited circumstances, the only case to date to attempt to use the procedure in an antitrust damages claim (*Emerald Supplies Ltd v. British Airways Plc* [2010] EWCA Civ 1284) was rejected by the Court of Appeal.

Proceedings can, and often do, take the form of multiparty claims whereby multiple claimants (numbering several hundred or even thousands) issue proceedings on the same claim form, pursuing the same defendant or defendants.

If a large number of claims that give rise to common or related issues of fact or law are brought in separate proceedings, the High Court can make a group litigation order (GLO) to enable the claims to be case-managed together. The test is not so stringent as to require the claimants to have the same interest in the claims. The GLO will give directions as to the establishment of a register covering all the claims to which the GLO relates. The court may consider it prudent to take certain claims as test claims, which then establish principles for generic issues that are relevant to the wider claims. Any judgment or order is binding on all claims within the GLO, unless the court orders otherwise. GLOs are not commonplace and they have not yet been used in private damages antitrust claims.

49 Who can bring these claims? Can consumer associations bring claims on behalf of consumers? Can trade or professional associations bring claims on behalf of their members?

Collective actions in the CAT can be brought either by a representative claimant or by a third party. The individual or body bringing the class action under the new CAT Rules only has to be 'an appropriate representative' and the CAT will decide whether it is just and reasonable for that person to act as a representative. The representative need not be a member of the proposed class and could, for example, be a representative body, such as a trade or consumer association. The CAT must consider whether the representative would fairly and adequately represent the interest of class members, whether it has any conflict of interest with class members and is able to pay the defendant's costs. It will also look at the capability of the representative to manage the proceedings, whether it has a plan for communicating with and consulting class members, and the arrangements it has made in respect of funding the claim. It is possible for subclasses to be identified and for subclass representatives to be appointed if there are issues that are not common across the entire class.

50 What is the standard for establishing a class or group?

Before a class action can proceed, the CAT will need to make a CPO – effectively certifying the class. This is an important protection for defendants against frivolous or inappropriate claims and is likely to prove a very important part of the litigation. The following must be established:

- the claim must be brought on behalf of an identifiable class;
- each claim included in the class action must raise the same, similar or related issues of fact or law; and
- the claim must be 'suitable' for a collective claim.

In considering what is suitable for a collective claim, the CAT will take into account all matters it thinks fit, including whether a collective claim is an appropriate means for the fair and efficient resolution of the common issues, the cost benefits, the size and nature of the class and whether the claims are suitable for an aggregate award of damages.

The CAT will also consider whether the claim should be an opt-out or opt-in claim and in doing so will consider the strength of the claim and whether an opt-in claim would be practicable.

It remains to be seen how the CAT will apply its very wide discretion given that, to date, no claim has proceeded beyond the class certification stage, but the kinds of claims most likely to be considered suitable for class actions (opt-out claims in particular) are consumer claims, in which the size of the class makes a class action efficient and an opt-in claim impracticable. In addition, a consumer claim is less likely to raise individual issues (such as the extent of passing-on) than a business claim.

It is important to note that the CAT can order that parts of a claim or certain issues in a claim are suitable for collective determination and this may provide a method to bring a collective claim even if aspects of a case are not common.

If an opt-out class is ordered, the outcome of the proceedings will be binding on all those who are members of the class domiciled in the UK and who have not opted out, and those overseas members who have opted in.

51 Are there any other threshold criteria that have to be met?

See question 50.

52 How are damages assessed in these types of actions?

The CAT has the power in suitable cases to make an aggregate award of damages in respect of the class as a whole, without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented class member. Exemplary damages are not available in class actions.

Damages awarded will be paid to the representative (or a third party), from which class members must claim their share within a stated period. Any monies not claimed by class members within the period will be paid to charity, or may be used to meet the representative claimant's legal costs.

The representative claimant will remain exposed to the cost of bringing proceedings that are ultimately unsuccessful, as the general principle of 'loser pays' in English litigation will apply to class actions. In addition, the contingency fees regime, which has recently allowed contingency fees in English litigation for the first time (DBAs – referred to in question 42), cannot be used for opt-out class actions, although conditional fee arrangements, third-party funding and ATE insurance will all be available. These funding arrangements will all assist claimants in bringing these types of claims, removing or mitigating some of the financial risks involved. DBAs will be permitted for opt-in class actions.

53 Describe the process for settling these claims, including how damages or settlement amounts are apportioned and distributed.

The CAT can approve collective settlements, both when a class action has been brought and, significantly, in circumstances in which no class action has been brought (see question 54). A

collective settlement will be approved by the CAT only if it is satisfied that the terms are just and reasonable. In determining this, it must have regard to the amount and terms of the settlement, the class size, the likelihood of a judgment being obtained for a significantly higher sum, the likely duration and costs of the proceedings, and the views of the parties' experts or lawyers, or other any class member. It will be binding on all persons falling within the class described in the collective settlement order, although it will not be binding on a person who opts out of the class action or is not domiciled in the UK and has not opted in.

54 Does your country recognise any form of collective settlement in the absence of such claims being made? If so, how are such settlements given force and can such arrangements cover parties from outside the jurisdiction?

Where no class action has been brought, a would-be representative may apply to be appointed as a settlement class representative and then, once a settlement has been agreed, seek approval of the settlement, which will then be binding on the class members. In these circumstances, the CAT first has to consider the suitability of the proposed settlement class representative and whether the claim would be eligible for a collective claim and then whether it will approve the settlement.

The Consumer Rights Act 2015 also gives the CMA the power to certify voluntary redress schemes submitted by a business that relate to infringements of competition law set out in the Competition Act 1998 or Articles 101 or 102 of the TFEU (see question 55). There is a risk that setting up such a scheme could open up businesses to a potentially significant financial exposure that might not otherwise arise. Businesses will have to weigh up the benefits of setting up the scheme (and any potential penalty reduction that the CMA may consider in light of the infringing party's voluntary provision of redress – see below) and avoiding costly litigation, against the potential exposure that might arise anyway if the potential claimants were left to bring damages claims. The CMA's guidance indicates that it will retain discretion to decide whether a scheme merits a penalty reduction (up to a maximum of 20 per cent), but there is no absolute right to a reduction.

55 Can a competition authority impose mandatory redress schemes or allow voluntary redress schemes?

The Consumer Rights Act 2015 gives the CMA the power to certify voluntary redress schemes submitted by a business that relate to infringements of competition law set out in the Competition Act 1998 or Articles 101 or 102 of the TFEU (including both agreements or concerted practices between businesses that prevent, restrict or distort competition or abuse a business's dominant position). The CMA will also have the power to approve a redress scheme, subject to a condition or conditions requiring the provision of further information about the operation of the scheme (including about the amount or value of compensation to be offered under the scheme or how this will be determined). Once the redress scheme is approved, the compensating party is under a duty to comply with the terms of an approved scheme. The duty is owed to any person entitled to compensation under the terms of the approved scheme. If such a person suffers loss or damage as a result of a breach of the duty, the injured party or the CMA may bring civil proceedings before the court for damages or an injunction.

On 14 August 2015, the CMA issued guidance on the approval of voluntary redress schemes for infringements of competition law. The CMA sees its voluntary redress scheme as a form of alternative dispute resolution and hopes that it will serve as an additional option for businesses to offer, and harmed persons to receive, compensation for loss suffered as a result of a competition law breach with a view to reaching an early compromise and avoiding litigation altogether. A business wishing to set up a voluntary redress scheme may apply to do so after an infringement decision has been issued by the CMA (or the Commission in the period prior to the UK's exit from the EU) or an application can be made where there is no infringement decision yet, but the CMA is investigating conduct that may constitute a breach of the competition rules. Applications during the course of an ongoing CMA competition investigation are, in practice, expected to be submitted after the CMA has issued its statement of objections to parties under investigation, since that is the point at which businesses will have seen the detail of the infringements alleged against them.

Arbitration and ADR

56 Are private antitrust disputes arbitrable under the laws of your country?

As a matter of English law, competition issues are regarded as arbitrable (see, e.g., *ET Plus v. Welter* [2005] EWHC 2115).

57 Will courts generally enforce an agreement to arbitrate an antitrust dispute? What are the exceptions?

The English courts will generally enforce an agreement to arbitrate. The primary issue concerning the enforceability of an arbitration agreement will be whether, as a matter of construction, it covers the dispute that has arisen. The English courts are likely to take a liberal view of this. The English High Court has recently stayed a breach of competition law claim to arbitration, holding that the contractual arbitration clauses extended to the tortious claims for breach of competition law because of the links between the contractual relationship and the claim (see *Microsoft Mobile OY (Ltd) v. Sony Europe Ltd* [2017] EWHC 374 (Ch). It is possible also that an arbitration agreement itself might be unenforceable by virtue of illegality because, for example, the agreement to arbitrate has some anticompetitive effect.

58 Will courts compel or recommend mediation or other forms of alternative dispute resolution before proceeding with a trial? What role do courts have in ADR procedures?

There is strong encouragement to use alternative dispute resolution (ADR) in all cases before the English courts. Parties and their lawyers are obliged to consider it, and it is possible that an unreasonable refusal to enter into an ADR can be penalised by costs orders being made against that party. However, the court will not compel parties to engage in ADR absent a contractual agreement to do so.

Advocacy

59 Describe any notable attempts by policy-makers to increase knowledge of private competition law and to facilitate the pursuit of private antitrust claims?

The Commission has long been a strong advocate of antitrust damages claims in Europe. It has engaged in a long process of discussing proposals to reform the law to facilitate such claims, starting with studies, followed by a Green Paper in 2005 and a White Paper in 2008. This process had to take account of the very different legal systems of each Member State and finally resulted in the Council and the European Parliament reaching agreement on the text of a proposed Directive in March 2014. The Parliament voted to adopt the Directive on 17 April 2014 and the EU Council of Ministers formally adopted it on 10 November 2014 (Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU was published in the Official Journal on 5 December 2014 (OJ 2014 L349/1)). The Directive clarifies the law in a number of areas and introduces reforms intended to provide a right to compensation for those who have suffered harm caused by an infringement of competition law, and to make such claims easier to bring.

The UK regulations to implement the Damages Directive came into force on 9 March 2017. As the UK already has well-established rules governing claims for competition damages that are similar to the regime set out in the Damages Directive, the UK government adopted a light-touch approach to implementation. This meant that, where provisions already met the requirements of the Damages Directive in UK law (both case law and common law), those were left in place and changes were made to legislation and court and CAT Rules to implement those provisions that were not already covered by UK legislation or rules. The UK regulations implemented the Damages Directive as a single regime that has the same procedures whether the original breach was of EU or UK competition law.

Importantly, the implementation of the Damages Directive will not apply retroactively to claims in which a national court was seised prior to 9 March 2017 (the date the Damages Directive entered into force). In addition, the substantive law provisions will not apply to claims in which the infringement started before the date of implementing legislation (even if the infringement straddles the implementation date). Some of the procedural changes, such as the rules for disclosure and use of evidence, will apply for all competition damages claims brought on or after 9 March 2017.

Given that many of the requirements of the Damages Directive are already part of UK law, many of the changes set out in the Damages Directive may have had less effect in England and Wales compared with other Member States.

The UK government is also an advocate for antitrust damages claims and, on 1 October 2015, the Consumer Rights Act 2015 and the new CAT Rules came into force. The objective of the competition law changes brought in by the Consumer Rights Act is to encourage and facilitate private enforcement of competition law in the UK, especially within the CAT.

Prior to the Consumer Rights Act, there had been an almost total absence of private enforcement claims brought on behalf of consumers and small businesses; therefore, the aim of the legislation is to remedy the difficulties faced by claimants and to encourage competition litigation claims to be brought in the CAT. The most significant change is the introduction of US-style opt-out class actions for breach of competition law (see question 48) and the new fast-track claims procedure in the CAT (see question 34).

One of the main aims of these changes is to allow claims to be brought on behalf of end consumers and small businesses where the value of individual claims may otherwise be too small when compared with the costs of bringing a claim, and to provide a mechanism to allow appropriate claims to be dealt with simply and quickly. To date, very few applications for certification of opt-out collective actions have been brought, although at the time of writing, no class has yet been approved by the CAT. A number of fast-track cases have been brought since October 2015, but most have settled and only two have gone to trial.

Other

60 Give details of any notable features of your country's private antitrust enforcement regime not covered above.

There has been a marked increase in the number of private antitrust damages claims brought in the courts of England and Wales in recent years. Most of these claims involve foreign claimants and defendants. The cross-border nature of antitrust infringements means that claimants frequently enjoy a choice of jurisdictions in which they can bring their claims. As a result, a handful of European jurisdictions are emerging as the most attractive, one of which is England and Wales.

The UK voted in a referendum in June 2016 in favour of leaving the European Union. At the time of writing, the date of the UK's withdrawal from the EU is due to be 31 January 2020; however, this date may change and it is currently unclear how Brexit will be implemented and what arrangements, if any, will be agreed between the UK and the EU regarding the withdrawal and the future relationship. At least until such time as the UK actually leaves the EU, the law and procedure relating to such claims will remain unaffected and the UK government will continue to negotiate, implement and apply EU legislation. In addition, the CMA and UK courts continue to be required to follow CJEU Decisions on points of competition law and to take account of Commission Decisions to avoid inconsistent decisions.

The consequences of the UK's withdrawal from the EU will largely be determined by what arrangements, if any, have been agreed between the UK and EU. If there is no Brexit deal, the UK will cease to be part of the EU competition regime, but the UK government is not proposing to make any changes to the UK competition regime beyond those necessary to manage the UK's exit from the EU. Instead, the CMA will continue in its investigatory role for anticompetitive conduct with effects on UK markets. The UK government will make necessary changes to UK law through the EU Withdrawal Act 2018 and statutory instruments made under it. The legislation repeals the European Communities Act 1972, which gives effect to EU law in the UK, from Brexit day; however, it also provides for much of EU law existing at Brexit day to be incorporated into UK law and to remain in force (subject to detailed provisions set out in a series of statutory instruments).

One such instrument is the Competition (Amendment etc) (EU Exit) Regulations 2019, which was laid down by the UK government on 22 January 2019, and sets out detailed provisions relating to competition law. Among other things, it provides that damages claims may continue to be brought in the UK for breaches of EU competition law that occurred prior to Brexit day (even if the loss suffered occurs only thereafter). The UK's implementation of the Damages Directive will continue to apply and little will change from the current position. Commission infringement decisions and European Court judgments made prior to Brexit day will continue to remain binding in damages claims. Commission infringement decisions after exit day, even

if they relate to conduct prior to exit day, will no longer be legally binding; however, the UK government published a notice on 13 September 2018 indicating that claimants who wish to pursue claims in UK courts based on alleged breaches of EU competition law that took place after Brexit should be able to do so on a stand-alone basis, as a foreign tort claim. Courts in England and Wales will not be able to refer questions of EU law to the European Court after Brexit day and will no longer be bound by judgments given by the European Court after Brexit day, although it will still be possible to take such judgments into account.

The UK government has indicated that the current domestic competition regime will remain in place. All businesses operating in the UK will continue to have to comply with UK competition law. Anticompetitive agreements and abuses of a dominant market position that affect competition within the UK will continue to be prohibited. The CMA and sector-specific regulators (such as the Financial Conduct Authority and Ofgem) will continue to investigate possible breaches of UK competition law. Claimants who wish to pursue claims in UK courts based on alleged breaches of EU competition law that took place after exit will be able to do so on a stand-alone basis, as a foreign tort claim (a legal claim in the UK relating to a violation of foreign law).

Appendix 1

About the Authors

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Nicholas Heaton is a partner and the head of Hogan Lovells' competition litigation practice in London. His significant competition litigation practice is focused on claims before the English High Court and the Competition Appeal Tribunal. These claims for damages and injunctive relief arise out of alleged anticompetitive conduct and usually involve multiple international parties. Nicholas's recent experience includes defending substantial claims in relation to Commission infringement decisions relating to power cables, air cargo, CRT glass, carbon graphite, gas insulated switchgears, copper tubes and others. He has been involved in a number of the leading cases in England and Wales including: *National Grid v. ABB and others*; *Toshiba Carrier v. KME*; *Emerson v. Morgan*; *WH Newson v. IMI*, *Emerald Supplies Ltd and others v. British Airways Ltd* and *Deutsche Bahn v. Morgan*. Nicholas often writes on competition actions in the English courts, and is a frequent speaker at conferences focusing on this area of the law. Nicholas is a co-chair of the *GCR* Live Annual Competition Litigation conference and was short listed by *GCR* as litigator of the year in 2015.

Paul Chaplin
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Paul Chaplin is a counsel in the London competition litigation practice of Hogan Lovells. His practice encompasses both domestic and international disputes with a particular focus on cartel damages actions in the English High Court usually involving multiple international parties. Paul's recent competition experience includes advising on some of the leading cases in England and Wales, including *National Grid v. ABB and others (Gas Insulated Switchgear)*, *UK Power Networks v. ABB and others (Gas Insulated Switchgear)*, *Emerald Supplies Limited and others v. British Airways Ltd (Air Cargo)*, *National Grid v .Prysmium and others (Power Cables)* and *DFDS A/S v. Société Coopérative de Production SeaFrance SA and CMA*. He has also advised a large healthcare company in relation to alleged breaches of Article 101 TFEU and the English doctrine of restraint of trade, as well as a number of abuse of dominance and predatory pricing cases.

Paul regularly writes articles on competition actions in the English courts and the impact of forthcoming European and UK legislative changes on the antitrust litigation landscape. He is a regular speaker at conferences focusing on this area of the law.

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – includes a section exploring in depth the key themes such as territoriality, causation and proof of damages, that are common to competition litigation around the world. Part 2 contains invaluable summaries of how competition litigation operates in individual jurisdictions, in an accessible question-and-answer manner. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as China, Mexico and Israel.

As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

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