PRIVATE ANTITRUST LITIGATION

United Kingdom - England & Wales

LEXOLOGY
Getting The Deal Through

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Private Antitrust Litigation

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Quick reference guide enabling side-by-side comparison of local insights into development of private antitrust litigation and applicable legislation; availability of private actions; private action procedure; collective actions; remedies; and recent trends.

Generated 18 July 2023

Table of contents

UPDATE AND TRENDS

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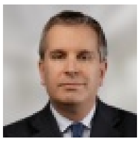

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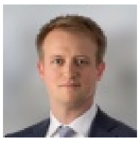

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

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

The jurisdiction of England and Wales has a longstanding history of private antitrust claims based on both UK and EU competition law. Post-Brexit, claims for damages for breach of EU competition law can still be brought in certain circumstances and European Commission decisions reached before the end of the transition period (ie, 31 December 2020) remain binding on UK courts. A number of features of the English legal system are attractive to claimants considering where to issue private antitrust proceedings.

Disclosure

The disclosure rules in English litigation are extensive compared with those of most EU jurisdictions, although the implementation of the EU Directive on antitrust damages actions has introduced more extensive disclosure rules in EU jurisdictions.

In High Court proceedings, the parties are required to make a reasonable and proportionate search for and to disclose not only documents on which they themselves rely, but also documents that could harm their case and that could assist the other party's case. In cartel cases, for example, such disclosure is of particular importance because the majority of relevant documentation is otherwise likely to be unavailable to all parties in the litigation. The parties must complete disclosure questionnaires describing the potentially relevant documents (including electronic documents) they may have prior to disclosure being given. This provides greater transparency about what documents exist, where they are located and the likely cost of retrieving them.

From 1 January 2019, cases in the business and property courts (including the Commercial Court and Chancery Division) have had to comply with the Disclosure Practice Direction (formerly the Disclosure Pilot – see Practice Direction 57AD), which introduces various changes to the disclosure regime. However, Practice Direction 57AD states that the Practice Direction shall not, unless otherwise ordered, apply to competition law claims (as defined in paragraph 2(2) of Schedule 8A to the Competition Act 1998 , CA 1998). The rules for disclosure in the Competition Appeal Tribunal (CAT) are similar to those in the High Court and are set out in the revised Competition Appeal Tribunal Rules (SI 2015 No. 1648) (the CAT Rules).

Specialist courts

Claims for stand-alone and follow-on actions can be brought either in the High Court or the CAT.

In the High Court, proceedings are governed by the Civil Procedural Rules (CPR) and the Competition Law Practice Direction provides for competition litigation in the High Court to be heard in two specific divisions of the Business and Property Courts (the Chancery Division and the Commercial Court), with judges in those courts receiving competition law training.

In the CAT, proceedings are governed by the CAT Rules. Cases are typically heard by a tribunal of three persons drawn from a pool of High Court judges, economists, lawyers or accountants, usually chaired by a judge.

Costs

While the nature of proceedings in England and Wales can make litigating there more expensive than in other jurisdictions, the general rule in High Court proceedings is that the losing party must pay the successful party’s reasonable costs. In the CAT, costs awards are made as the Tribunal sees fit, taking into account a number of factors, including whether a party has succeeded on part of its case, even if that party has not been wholly successful. The appropriate starting point in damages claims is that the successful party should be awarded its reasonable costs.

Fee arrangements (including damages-based agreements, which allow the payment of a percentage of recoveries to legal representatives in return for no fee as the case progresses, and conditional fee arrangements, in which lawyers acting for a claimant are paid nothing or a reduced fee in the event of an unsuccessful claim but an 'uplift' of up to 100 per cent on their basic fees if they win, have encouraged claimants to issue proceedings in England and Wales on a relatively low-risk basis in terms of costs. The uplift, or success fee, is not recoverable in costs from the losing party. Instead, the success fee must be paid by the claimant from the damages awarded. In addition, damages-based agreements are not enforceable if they relate to opt-out collective proceedings.

Widening of the CAT's jurisdiction

In 2015, the CAT's jurisdiction was expanded via amendments to the Enterprise Act 2002 (EA 2002) and the Competition Act 1998 (CA 1998) to allow the CAT to hear stand-alone cases; introduce collective proceedings and procedures for collective settlements; harmonise limitation periods with those of the High Court; provide schemes for voluntary redress approved by the Competition and Markets Authority (CMA); and introduce a fast-track scheme for small or medium-sized enterprises. In addition, a number of changes were introduced by the revision of the CAT Rules. Since the introduction of these powers, the CAT's actions have included:

- the certification of 10 collective proceeding claims, with 14 awaiting certification and 5 which are either discontinued or on appeal;
- judgments which provide clarity as to when the fast-track scheme will be deemed appropriate; and
- the judgment of Walter Hugh Merricks CBE v Mastercard Incorporated and Others [2023] CAT 15 which clarified the position on limitation harmonisation.

The Regulations implementing the Damages Directive

The EU Damages Directive was adopted on 26 November 2014. On 9 March 2017, the Claims in Respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (the 2017 Regulations) came into force, inserting Schedule 8A into the CA 1998. The 2017 Regulations transposed the Damages Directive into domestic UK statute. In broad terms, they confirm that decisions of the Commission and the CMA are binding in respect of the existence of an infringement in damages actions; the passing-on defence for defendants is available; and there is protection against requests to disclose leniency statements and settlement materials.

The 2017 Regulations are also supplemented by a Practice Direction in the Competition Appeal Tribunal (the Practice Direction Relating to Disclosure and Inspection of Evidence in Claims Made Pursuant to Parts 4 and 5 of the CAT Rules).

However, paragraphs 42–44 of Schedule 8A (CA 1998) place limits on the cases to which these parts apply at present. In broad terms, the 2017 Regulations apply only to the extent that the claims and proceedings relate to loss or damage suffered on or after 9 March 2017. If an infringement takes place over two or more days, then it is deemed to take place on the first day. Therefore, with the exception of the rules on disclosure, the use of evidence and determining whether a document is a settlement submission or a leniency statement, these regulations will only apply to claims where an infringement has taken place wholly on or after 9 March 2017. The rules governing disclosure and the use of evidence (including in relation to settlement submissions and leniency statements) apply to proceedings that began on or after 9 March 2017.

Brexit

The United Kingdom formally left the European Union on 31 January 2020, following which it entered into a transition period in which EU law continued to apply and was implemented in the United Kingdom.

Following the ratification of the EU–UK Trade and Cooperation Agreement, signed in December 2020, the transition period concluded on 21 December 2020, and EU law has ceased to apply in the United Kingdom (save in respect of ongoing cases and in certain areas where grandfathering arrangements apply, and in Northern Ireland under the Northern Ireland Protocol).

Prior to its departure, the United Kingdom issued a series of statutory instruments that amended the domestic statute book and brought an end to the direct jurisdiction of the EU institutions in the United Kingdom. The Competition SI includes key changes for private antitrust damages cases in the UK, including the following.

- Section 60 of the CA 1998, which requires consistent interpretation of UK competition law with EU law, has been repealed. This has been replaced with a new section 60A, which requires UK competition authorities and courts or tribunals to ensure there is no inconsistency with EU law as at the end of the transition period when interpreting UK competition law, but allows departure from this EU law where it is considered appropriate in light of certain specified circumstances. Section 60A applies to all UK new competition authority investigations and UK court cases, whether the facts of those cases arose before or after the end of the transition period.
- Sections 47A and 58A of the CA 1998 have been amended so that decisions of the European Commission reached after the end of the transition period will no longer be binding on UK courts in follow-on claims. However, European Commission decisions reached before the end of transition will continue to be binding, including if they only become final (ie, after any appeals have been exhausted) after this date.
- Schedule 4, paragraph 14 of the Competition SI provides transitional provisions that will enable claimants to bring claims for alleged breaches of EU competition law on a stand-alone basis based on conduct that occurred while the United Kingdom was a member state of the EU.
- Schedule 8A, paragraph 35 of the CA 1998 has been amended so that UK courts are not required to treat a decision of an EU member state national competition authority as prima facie evidence of a breach of articles 101 or 102, etc, of the Treaty on the Functioning of the European Union (TFEU). However, decisions of member state national competition authorities reached before the end of the transition period will still constitute prima facie evidence of an infringement (even if they only became final after the United Kingdom's exit). European Commission decisions reached prior to the end of the transition period are binding in the United Kingdom, including for the purposes of follow-on damages claims.

Competition Appeal Tribunal rules and guidance

On 22 April 2022, the UK government announced a consultation to reform the CAT rules governing procedure of cases in the Tribunal. This included a technical review of the CAT rules, working with the Tribunal and other interested parties, to encompass updating and improvement of case management procedures including in the context of private actions and with a view to enhancing the Tribunal's ability to conduct proceedings by electronic means. Following this, the UK government intends to expand the CAT's jurisdiction to include the ability to grant declaratory relief, and give it and other courts discretion to award exemplary damages for breaches of competition law.

In a recent case, Justin Le Patourel v BT PLC [2022] EWCA Civ 593, the Court of Appeal suggested that amendments also be made to the CAT Guide to Proceedings which accompany the CAT rules, in particular in relation to collective proceedings certification.

The CAT has also published numerous Practice Directions including Practice Direction 2/2021 on Trial/ Appeal Witness Statements , the Practice Direction relating to Disclosure and Inspection of Evidence and Practice Direction

2/2022, introducing a bespoke regime for so-called 'Umbrella' Proceedings , allowing multiple cases to be grouped for the purposes of determining and managing common issues.

Law stated - 09 May 2023

Applicable legislation

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

Provided jurisdiction is established, any natural or legal person who has suffered loss or damage as a result of an infringement or alleged infringement of Chapters I or II of the CA 1998, or articles 101 or 102 of the TFEU (occurring prior to 31 December 2020), has standing to bring a claim in the High Court, or alternatively the CAT (section 47A of the CA 1998).

High Court

Private antitrust actions arising out of an infringement of competition law may be brought in the High Court based on the tort of breach of statutory duty (Garden Cottage Foods Limited v Milk Marketing Board [1984] AC 130 at 141 and Crehan v Inntrepreneur Pub Company [2004] EWCA Civ 637 paragraph 156). The breach is of the provisions of Chapters I or II of the CA 1998, or section 2(1) of the European Communities Act 1972 (as preserved by the EU (Withdrawal) Act 2018) in respect of damage occurring prior to 31 December 2020.

CAT

Follow-on and stand-alone damages claims brought in the CAT are based on sections 47A and 47B of the CA 1998, as amended by the EA 2002. Section 47A provides for private actions for compensation to be brought in the CAT where an infringement decision has already been reached by either the UK or (in respect of decisions reached prior to 31 December 2020) EU competition authorities (ie, follow-on claims) or, since 1 October 2015 (following implementation of the CRA 2015), where a claimant brings an action for an 'alleged infringement' of competition law, a stand-alone action.

Section 47B of the CA 1998 allows collective proceedings to be brought in the CAT. A collective proceeding may be commenced by someone proposing to be the class representative. This will combine two or more claims and may be brought on an opt-in or opt-out basis; that is, brought on behalf of each class member without specific consent unless a class member elects to opt out by notifying the representative that his or her claim should not be included in the proceedings. Collective proceedings can be brought on a follow-on or stand-alone basis.

Law stated - 09 May 2023

If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The relevant legislation includes the CA 1998 and the EA 2002, and the relevant courts are the High Court and the CAT. If claims are brought in the High Court, they should be brought in the Business and Property Courts Competition List and assigned to the Chancery Division or the Commercial Court (see the Competition Law Practice Direction and CPR Rule 58.1(2)). Under CPR Rule 30.8 and the Competition Law Practice Direction, any competition law claim commenced in the Queen's Bench Division or the County Court should be transferred to either the Chancery Division or, where appropriate, the Commercial Court.

Transfer between the High Court and the CAT

Damages claims may be transferred between the High Court and the CAT (section 16 of the EA 2002). The Section 16 Enterprise Act 2002 Regulations 2015 (SI 2015/1643) state that where there falls for determination an infringement issue, the High Court may, by order, transfer to the CAT for its determination so much of the proceedings as relates to the infringement issue. Correspondingly, the CAT Rules provide that the CAT may, at any stage of the proceedings, on the request of a party or of its own initiative, and after considering any observations of the parties, direct that all or part of a claim brought under section 47A of the CA 1998 be transferred to the High Court (CAT Rule 71). The CAT Rules also outline the procedure that the claimant must follow where any court has ordered the transfer to the CAT of all or part of any proceedings.

In Sainsbury's Supermarkets Ltd v Mastercard Incorporated [2015] EWHC 3472 (Ch), the High Court considered whether to transfer the case to the CAT, which was unopposed by the parties. In deciding to transfer proceedings to the CAT, Barling J noted that the proceedings were lengthy (nine weeks) and complex, and they would involve considerable economic evidence and argument. There was no risk that, as a result of transfer, the trial window would be jeopardised. In addition, Barling J noted that, as he was available to sit as chair of the CAT panel, the transfer would not result in loss of such familiarity gained of the issues in the proceedings.

In a separate judgment by the Court of Appeal in the same case, the court stated (obiter) on the basis of Barling J's judgment that claims in respect of infringement decisions or alleged infringements of competition law 'should in normal circumstances be transferred to the CAT' (Sainsbury's Supermarkets Ltd v Mastercard Incorporated [2018] EWCA Civ 1536).

In Unwired Planet International Ltd v Huawei Technologies and Others [2016] EWHC 958 (Pat), the claimants issued patent infringement proceedings in the High Court against the defendants and, in response, a number of the defendants brought counterclaims for alleged breaches of competition law. Samsung, one of the defendants, applied to transfer the competition law aspects of the case to the CAT. The High Court noted that such a decision involved the exercise of the court's discretion, taking into account all the circumstances (PD30 paragraph 8.11) and the overriding objective. This meant that saving expense and dealing with the case in a manner proportionate to the value, importance, complexity and position of the parties was relevant, as was dealing with the case expeditiously and fairly and allotting an appropriate share of the court's resources to it.

Birss J found that no transfer should be made without some positive reason for doing so and that the provisions of section 16(2) are expressed in a limited way. Their purpose was not to empower the court to transfer the whole proceedings to the CAT if those proceedings involve an infringement issue; on the contrary, they only empower transfer of so much of those proceedings as relates to the infringement issue to the CAT. In this case, to transfer the competition law aspects to the CAT would leave the interrelated contract claims in the High Court, which would create a recipe for confusion. Therefore, Birss J rejected the application.

Law stated - 09 May 2023

PRIVATE ACTIONS

Availability

In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions can be brought in respect of any breach of UK or EU competition law (Chapters I or II of the Competition Act 1998 (CA 1998) and – for damage arising prior to the end of the Brexit transition period – articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) respectively). Claims can be brought either as a stand-alone claim (ie, one in which the claimant must show the infringement as well as loss and causation) or as a follow-on action (in which an infringement finding has already been made by the competition regulator at UK or EU level and in respect of which the claimant need only show loss and causation).

A relevant finding of infringement by the Commission or the Competition and Markets Authority (CMA) is binding on the High Court or the Competition Appeal Tribunal (CAT), provided that it is final (ie, no appeal has been lodged against the decision and the time limit for appealing has expired; or all avenues of appeal have been exhausted). As such, a claimant will be required to show evidence of loss and causation in a follow-on claim but, in a stand-alone claim, evidence of the infringement as well.

Paragraph 35 of Schedule 8A of the CA 1998 provides that a final decision of an EU member state competition authority or review court that there has been an infringement by an undertaking is prima facie evidence of the infringement. This only applies to claims brought on or after 9 March 2017. Following the United Kingdom's exit from the Brexit transition period, decisions of the European Commission reached after 31 December 2020 are longer binding on the UK courts, and the UK courts no longer have to consider decisions of EU member state national competition authorities as prima facie evidence of an infringement.

In relation to follow-on damages actions, sections 58 and 58A of the CA 1998 state that the court must accept the decision of the CMA or the European Commission as binding, provided the decision is final (ie, no appeal has been lodged against the decision and the time limit for appealing has expired, or all avenues of appeal have been exhausted). Following the United Kingdom's exit from the European Union, the Competition SI states that decisions of the European Commission reached after the transition period (ie, 31 December 2020) are no longer binding on the UK courts.

Law stated - 09 May 2023

Required nexus

What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

For claims brought prior to the conclusion of the UK's Brexit transition period, and where the defendant is domiciled in an EU member state, jurisdiction will be governed by Regulation (EU) No. 1215/2012 (the Brussels Regulation), which replaced the previous Brussels Regulation (EC) No. 44/2001 for cases commenced on or after 10 January 2015. Defendants domiciled in Norway, Switzerland and Iceland are subject to the provisions of the Lugano Convention 2007, which is similar in its terms to the first iteration of the Brussels Regulation. The jurisdiction rules of the Brussels Regulation (and the Lugano Convention 2007) only apply to defendants domiciled in an EU member state or in Norway, Switzerland and Iceland. The jurisdiction rules applicable to claims brought after the end of the UK's Brexit transition period (ie, 31 December 2020) are the same as those governing jurisdiction over non-EU defendants.

For defendants domiciled outside the EU (and inside the EU in respect of claims brought after 31 December 2020), the common law jurisdiction regime will apply. In those cases, jurisdiction depends on whether the defendant is located within England and Wales. If so, the English courts have jurisdiction, although they can stay proceedings on application if it is shown that another court that also has jurisdiction is a more appropriate forum.

If the defendant is not within England and Wales, the claimant can apply for permission to serve proceedings outside the jurisdiction if it can show that the claim has a reasonable prospect of success; that there is a basis for jurisdiction set out in the Civil Procedural Rules (including that damage was sustained in the jurisdiction or as a result of an act committed within the jurisdiction or that the defendant is a necessary and proper party to a claim against another defendant); and that England and Wales is the proper place to bring the claim.

The CAT considered the application of these transitional rules in Epic Games, Inc and Others v Apple Inc and Another and Alphabet Inc, Google LLC and Others [2021] CAT 4. Epic brought claims against both Apple and Google alleging breaches of EU and UK competition law arising from the requirements imposed regarding software applications on the two main operating systems for mobile devices. Both actions named defendant entities in the United States, and in Ireland in the Google action. As the claims were commenced before the end of the transition period under the Withdrawal Agreement, the Brussels Regulation applied to both claims. Claims against EU-domiciled defendants did not therefore require permission from the CAT. However, the Tribunal did consider permission under the common law rules in respect of claims against the US-domiciled entities. Applying the forum conveniens doctrine, Roth J considered that the CAT was not the appropriate forum for claims to proceed against the US defendants in Epic's claim against Apple in light of parallel ongoing US litigation, but did grant permission for Epic's claim to proceed against the US defendants in the Google action on the basis that the US entities were necessary and proper parties to a claim that would otherwise proceed in any event against the EU-domiciled entities.

In Samsung Electronics Co Ltd and others v LG Display Co Ltd [2021] EWHC 1429 (Comm) the claimants sought to bring contribution proceedings against the defendants having settled in full a claim brought by 42 UK local authorities against the liquid crystal display cartel. The court accepted that Samsung’s contribution claim was a claim in tort that fell within the tort gateway, but refused jurisdiction on grounds of forum non conveniens , accepting that Korea or Taiwan was the more appropriate forum as the documents and factual witnesses relevant to deciding the relative responsibility of the parties in the cartel were based there. On appeal ([2022] EWCA Civ 423) the Court of Appeal upheld the High Court's judgment, but stated obiter that if an argument had been raised at first instance that a Commission decision is not binding in the UK on the issue of relative culpability between cartellists, the High Court's view that this issue should be tried in Korea or Taiwan would be mistaken. However, this argument was not raised in the High Court.

On 28 September 2020, the United Kingdom submitted a new instrument of accession to the Hague Convention on Choice of Court Agreements (the Hague Convention) having withdrawn its previous instrument on 31 January 2020. Under the Hague Convention, EU member states must give effect to an exclusive jurisdiction agreement in favour of the English courts.

Following the conclusion of the UK's Brexit transition period, the Brussels Regulation and the Lugano Convention 2007 have ceased to apply in the United Kingdom. The United Kingdom is now bound by the Hague Convention in its own right rather than by virtue of its former EU membership.

On 28 April 2020, the United Kingdom deposited a request for re-accession to the Lugano Convention 2007; however, its application has not been approved by the European Union. This means that the common law rules of jurisdiction will apply in relation to EU member states, as supplemented by the Hague Convention. There remains a possibility – which is disputed – that bilateral treaties between the United Kingdom and individual EU member states (which were ‘superseded’ by the Brussels Convention), will become applicable again.

For claims brought prior to the conclusion of the UK's Brexit transition period, the main provisions of the Brussels Regulation in the context of where competition damages claims can be brought are:

- article 4(1): the place where the defendant is domiciled;
- article 7(1): in contract claims, the place of performance of the obligation under the contract; article 7(2): in tort claims, the place where the harmful event occurred;
- article 8(1): a defendant joining co-defendants to an existing action;
- article 25: jurisdiction agreements;
- article 26: submission to the jurisdiction; and
- article 30: related actions.

Law stated - 09 May 2023

Restrictions

Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Damages actions can be brought against any entity that infringes the competition rules. Actions can, therefore, be brought against legal entities and against individuals to the extent they are an undertaking and, therefore, capable of breaching articles 101 and 102 of the TFEU (in respect of damage that arose prior to 31 December 2020) or Chapters I and II of CA 1998.

In respect of defendants from other jurisdictions, the English Common law rules on jurisdiction (and the grandfathered provisions of the Brussels Regulation) allow for defendants not domiciled in England and Wales to be sued in the English courts.

Law stated - 09 May 2023

PRIVATE ACTION PROCEDURE

Third-party funding

May litigation be funded by third parties? Are contingency fees available?

Yes. Costs can be significant in the context of litigation in the English courts, in particular given that the unsuccessful party will, as a general rule, be required to pay the winning side's reasonable costs. It is, therefore, important for claimants to ensure they consider before commencing litigation both how to fund the litigation and the risk of an adverse costs order. There are a number of potential arrangements that may be available.

Conditional fee arrangements (CFAs) often involve the lawyers acting on a 'no win, no fee' basis, but with provision for a 'success fee' (ie, their basic fee, plus an uplift) to be paid to them in the event of a successful outcome. To be enforceable, a CFA must comply with section 58 of the Courts and Legal Services Act 1990 . In particular, CFAs must be in writing, and the percentage uplift cannot be more than 100 per cent of the lawyer's normal fees and, since April 2013, cannot be recoverable in costs from the losing party.

Under damages-based agreements (DBAs) (as provided for by the Courts and Legal Services Act 1990 (as amended) and the Damages-Based Agreements Regulations 2013), lawyers can agree to accept a share of the clients' winnings, capped at 50 per cent in commercial cases. DBAs must be on a no win, no fee basis, and the lawyer is only entitled to payment if the claimant both wins and recovers the sum awarded to it in damages. A DBA is unenforceable if it relates to collective opt-out proceedings (section 47C(8) of the Competition Act 1998 (CA 1998)), although CFAs are permitted for such claims.

Potential litigants may also have legal expenses insurance or may be able to take out after-the-event insurance to cover their legal costs. However, following changes in April 2013, an after-the-event insurance premium cannot be recovered from the losing party.

Third-party funding by a professional funder is also an option In Arkin v Borchard Lines Limited [2005] EWCA Civ 655, the defendant successfully defended the claim and sought an order for the funder to pay their costs (which were in the region of £6 million). The Court of Appeal held that the professional funders should be liable to pay the costs of opposing parties but capped at the amount of the funding they provided.

Two of the Trucks claims (UK Trucks Claim Ltd v Fiat Chrysler and others [2019] Competition Appeal Tribunal (CAT) 26 and Road Haulage Association Ltd v Man SE and others [2020] CAT 7) came before Roth J in the CAT on funding issues. The CAT had previously ruled that it could hear as a preliminary issue the question whether owing to funding arrangements, either claimant should not be authorised to act as class representative.

The Tribunal rejected arguments made by DAF and others that the funding arrangements constituted DBAs and were unenforceable. It concluded that litigation funders are engaged in the funding of a claim, not the management of the making of a claim, and if they are not engaged in providing claims management services, the funding arrangement does not fall within the definition of a DBA. Other defendants challenged the adequacy of the funding arrangements. The Tribunal considered the funding arrangements for both representatives in some detail, noting that the Road Haulage Association had £27 million in funding, and the UK Trucks Claim had £24 million in funding, both from third-party funders. The Tribunal concluded that it could not find either claimant's budget unrealistic or inadequate and that there was a reasonable prospect that either party could secure additional funding if necessary.

Both claimants had after-the-event insurance policies in place to cover their liability to costs up to £20 million. After a detailed consideration of the insurance arrangements, the Tribunal concluded that the proper approach in a case with such high costs is to determine that the class representative has at the outset the ability to pay a substantial level of adverse costs cover, which should be sufficient for at least a significant part of the proceedings. Authorisation should not be refused on the basis that this might prove insufficient to the end of trial. The issue could be revisited, and the Tribunal could amend the terms of the collective proceedings order accordingly.

The judgment was upheld on appeal to the Court of Appeal (DAF Trucks v RHA Limited and ors [2021] EWCA Civ 299). The issue that the Court of Appeal considered was whether funding arrangements entered into with claimants by third parties who play no part in the conduct of the litigation, but whose remuneration is fixed as a share of damages recovered by the client, are DBAs. The court found that these sorts of arrangements do not constitute 'claims management services' and therefore DBAs, thereby avoiding striking down most of the current litigation funding agreements as unenforceable. The UK Supreme Court granted DAF leave to appeal on 27 May 2022. The appeal was heard on 16 February 2023, and is awaiting judgment.

Law stated - 09 May 2023

Jury trials

Are jury trials available?

Jury trials are not available either in the High Court or in the CAT in relation to competition proceedings.

Law stated - 09 May 2023

Discovery procedures

What pretrial discovery procedures are available?

High Court

Disclosure in the High Court is governed by Rule 31 of the Civil Procedural Rules (CPR). Cases in the Business and Property Courts (including the Commercial Court and Chancery Division) must comply with the Disclosure Practice Direction (formerly the Disclosure Pilot – see Practice Direction 57AD), which introduces various changes to the disclosure regime. However, Practice Direction 57AD states that it shall not, unless otherwise ordered, apply to competition law claims (as defined in paragraph 2(2) of Schedule 8A to the Competition Act 1998, CA 1998).

The CPR require parties in larger cases to complete disclosure questionnaires before the disclosure exercise is started so that the other parties, and the court, are aware of what documents (including electronic documents) are thought to exist and where they are located. The parties can then agree, or the court can order, disclosure that is more relevant to the specific case, if necessary. 'Standard' disclosure is still available as one of the options that the parties or the court can choose.

Standard disclosure

Standard disclosure generally takes place after pleadings have closed, namely after the claim form, particulars of claim, defence and any replies have been served. It requires the parties to the litigation to search for and disclose all documents in their control on which they rely, and documents that adversely affect their own case, adversely affect another party's case or support another party's case. Privileged documents cannot be inspected by the other parties.

However, the fact that documents are confidential is not normally a bar to disclosure: concerns of commercial sensitivity are typically dealt with by way of a 'confidentiality ring', whereby only specified persons (eg, external experts, legal advisers, in-house lawyers) will be permitted access to the documents.

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

In Infederation v Google [2020] EWHC 657 (Ch), the claimant Foundem sought to add an independent expert to existing confidentiality rings agreed in the course of the litigation that related (in part) to the EC's decision in Google Search (Shopping) . In support of an application to strike out part of the claim, Google served evidence from its own software engineers designated as confidential. Referring to the authorities on confidentiality rings, Roth J emphasised that such arrangements should be exceptional, must be limited to the narrowest extent possible and require careful scrutiny by the court to ensure no resulting unfairness. On the facts, and in circumstances where Google was relying on its own technical witnesses of fact, Foundem needed expert assistance to properly understand that evidence. Therefore, the court ordered that the expert should be able to inspect the confidential documents, with an appropriate confidentiality undertaking to the court. It offered Google the alternative of abandoning its reliance on the relevant evidence for the purpose of its application.

Bespoke disclosure

The High Court can also order a bespoke disclosure regime where it finds that a standard disclosure process is not appropriate. In the case of Genius Sports Technologies Ltd v Soft Construct (Malta) Ltd [2022] EWHC 2637 (Ch), the High Court found that a process of 'massive overdisclosure' should be adopted rather than standard disclosure provided the following conditions are satisfied:

- if the standard disclosure process was used, there was a real risk that relevant documents would be missed;
- there was no danger of the process being used to oppress other parties in the litigation (ie, if the receiving party would not be able to review the documents);
- the risk of disclosing privileged material is contained to the levels of any standard disclosure process; and
- confidential material is appropriately protected.

The High Court noted that, with changes in the way that documents are now reviewed shifting from human agents to electronic filtering, there is a risk that important documents would never be looked at by a human agent and a lessened risk that important documents would be hidden if disclosure was over extensive. Under this bespoke regime, the aim of the electronic review was to filter out only those documents that were irrelevant on the broad test set out in Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano (1882) 11 QBD 55 (which included within the scope of discovery documents that, although not helpful or harmful to either party's case in themselves, may fairly lead a party on a train of enquiry relevant to the case), rather than searching to disclose what was relevant.

Specific disclosure and third-party disclosure

Specific disclosure can be sought requiring a party to disclose specific documents or categories of documents (CPR 31.12). Disclosure can also be sought from non-parties under CPR 31.17 if a document or class of documents is likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and disclosure is necessary to dispose of the claim fairly or to save costs.

Pre-action disclosure

In addition to disclosure in the course of litigation, claimants or potential claimants can ask for pre-action disclosure under CPR 31.16 from someone who is likely to be a party to litigation. CPR 31.16(3) sets out the conditions for ordering pre-action disclosure, including that disclosure before proceedings have started is desirable either to dispose fairly of anticipated proceedings, to assist the dispute to be resolved without proceedings or to save costs. Even in the case of successful applications for pre-action disclosure, it is normally the applicant who is required to pay the costs of the respondent.

Applications for pre-action disclosure that are overly broad will be refused, so potential claimants should consider carefully the scope of any requests they make. In Hutchison 3G UK Limited v Vodafone, O2, Orange and T-Mobile [2008] EWHC 55 (Comm), the claimant’s pre-action disclosure request was refused because it was too broad. As a matter of both jurisdiction and discretion, the material sought was not necessary for Hutchison 3G to plead its case, the claim was speculative in terms of liability, the scale of the disclosure requested was very large and unfocused and was likely to go further than what would be required under standard disclosure, and the costs and difficulty of obtaining the documents requested were prohibitive.

Non-disclosure of leniency materials or settlement submissions

For cases that began on or after 9 March 2017, paragraph 28 of Schedule 8A (CA 1998) states that a court or tribunal must not make a disclosure order in respect of a settlement submission that has not been withdrawn or a cartel leniency statement (regardless of whether it has been withdrawn). A cartel leniency statement means information provided, orally or in writing, to a competition authority that comprises information about a cartel and the person’s role in relation to the cartel; is provided voluntarily; and is provided specifically for the purpose of the authority’s cartel leniency programme excluding any pre-existing information. It includes part of or a quotation from a cartel leniency statement, all or part of a record of the statement, or copies of either. Pre-existing information (eg, pre-existing contemporaneous documents) means information that exists irrespective of an authority’s investigations. Upon the application of a claimant, a court or tribunal can determine whether information is a cartel leniency statement.

For cases that began before 9 March 2017, there is no absolute bar on the disclosure of these materials. Instead, it is necessary to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency. That weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case (Pfleiderer v Bundeskartellamt [2011] Case C-360/09). This balancing exercise has been conducted in a number of subsequent cases, including National Grid v ABB [2012] EWHC 869 (Ch) where, ultimately, limited disclosure was provided, and in ABF v Recticel [2017] EWHC 3610 (Ch), where Rose J exercised her discretion not to order the disclosure of either the drafts of the speaking note used in oral leniency submissions to the Commission or the Commission's questions.

Paragraph 32 of Schedule 8A (CA 1998) states that settlement submissions (which have not been withdrawn) or cartel leniency statements (regardless of whether they have been withdrawn) are not admissible in evidence in competition proceedings. However, if a party to the proceedings obtains the statement or submission lawfully and otherwise than from a competition authority's file then these restrictions do not apply.

Paragraph 33 of Schedule 8A (CA 1998) also introduces a restriction over the use of a competition authority's investigation materials. These are defined as information prepared by a person (other than a competition authority) for the purpose of an investigation by the competition authority; information sent by a competition authority during an investigation to the subject of the investigation; or a settlement submission that has been withdrawn.

The disclosure of confidential infringement decisions

In the context of disclosure, disputes may also arise relating to the disclosure of confidential infringement decisions. In Emerald Supplies Ltd v British Airways plc [2015] EWCA Civ 1024, the claimants claimed damage in respect of loss that they alleged was caused by the conduct of British Airways in a cartel in the market for air freight services. The Commission issued the confidential decision in Air Freight on 9 November 2010 but had not, by the time of the hearing, issued a non-confidential version of that decision. The High Court ordered that the unredacted confidential Commission decision, minus leniency material and material for which legal professional privilege was claimed, be disclosed to all parties but subject to a confidentiality ring. The Court of Appeal overturned part of that judgment, particularly in relation to the disclosure of material relating to Pergan (a non-addressee of the EC decision) that had been subject to adverse findings in the decision following the Court of First Instance's judgment in Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission [2007] T474/04.

CAT

Follow-on damages claims brought in the CAT require claimants to annex to the claim form a copy of any infringement decision and copies of any document referred to in the claim form (CAT Rule 30(5)(a)–(b). In practice, claimants in follow-on damages actions are likely to rely to a large extent on documents in the hands of the defendant and on the CAT to order disclosure of them.

Disclosure

The CAT may at any point give directions as to how disclosure is to be given and, in particular, what searches are to be undertaken, in what format documents are to be disclosed and whether disclosure is to take place in stages (CAT Rule 60(3); see also CAT Rule 89 in relation to disclosure in collective proceedings under section 47B of CA 1998). The CAT Rules are supplemented by the CAT Practice Direction relating to Disclosure and Inspection of Evidence 2017 which sets out the CAT's general approach regarding disclosure and inspection of evidence, including the procedure for seeking disclosure from a competition authority regarding their investigation. A party's duty to disclose documents is limited to documents that are or have been in its control. In practice, as with High Court proceedings, the CAT orders disclosure after close of pleadings, and parties may be required to file electronic disclosure questionnaires. As is the case in High Court litigation, privileged documents are protected from disclosure, and confidentiality rings are also used to ensure commercially sensitive information is ring-fenced as appropriate, including from disclosure to the public during and after trial. However, in recent cases, including BGL (Holdings) Limited [2021] CAT 33 and Meta Platforms, Inc. [2022] CAT 17, the CAT emphasised that the principle that proceedings should be held in public as far as possible should inform the conduct of all parties at all stages of the Tribunal's proceedings, and that the paramount objective is to produce a final judgment that is comprehensible to a reasonably interested person, an outsider to the litigation, who wishes to understand precisely why the Tribunal has reached the conclusion that it did.

Specific disclosure and third-party disclosure

It is also possible for the parties to request specific disclosure, in particular because the requirement to disclose documents with pleadings only applies to documents supporting the case.

To obtain specific disclosure, the applicant must specifically identify the documents sought. The application will be rejected if the documents are not relevant and necessary for the fair and just disposal of the proceedings, although the CAT will look at the case as a whole (Albion Water Limited v Water Services Regulation Authority [2008] CAT 3). The Competition Appeal Tribunal Rules (SI 2015 No. 1648) (the CAT Rules) also provide that the CAT can order disclosure from non-parties on similar grounds to the High Court. The CAT may make such an order only if the documents sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and disclosure is necessary to dispose fairly of the claim or to save costs (CAT Rule 63).

Pre-action disclosure

Under the CAT Rules, in addition to disclosure in the course of litigation, claimants or potential claimants can make an application (supported by evidence) to the CAT for disclosure before proceedings have started (CAT Rule 62). For the CAT to make an order, similar requirements to those set out in CPR Part 31 for the High Court apply.

Law stated - 09 May 2023

Admissible evidence

What evidence is admissible?

High Court

Factual evidence in the High Court may take the form of documents or witness evidence.

In relation to documents, contemporaneous documents can be particularly valuable in relation to allegations of collusive or cartel activity where evidence is sparse. For example, in Bookmakers Afternoon Greyhound Services Limited v Amalgamated Racing Limited [2008] EWHC 2688 (Ch), the court accepted that 'documents which pointed, even obliquely, to the existence of an agreement or concerted practice had particular weight' (paragraph 18). Under CPR 32.19 , a party is deemed to admit the authenticity of any document disclosed to him or her under CPR 31 unless notice is served requiring the other party to prove the document at trial.

In relation to witness evidence, this is provided in witness statements and oral evidence at trial. Witness statements stand as the witness's evidence-in-chief (CPR 32.5(2)) with the witness then being cross-examined and re-examined at trial. The weight given to witness evidence depends on the witness's credibility, as well as the other circumstances of the case. A party wishing to secure the evidence of a witness present within the jurisdiction to give oral evidence at trial can also issue a witness summons under CPR 34.31 .

The rules on expert evidence are set out in CPR 35 . Expert evidence may only be given with the permission of the court and follows exchange of witness statements from the witnesses of fact. Under CPR 35.3 the expert is subject to an express duty to help the court on the matters within his or her expertise, and this duty overrides any obligation to the party from whom he or she has received instructions. Expert evidence is given initially in the form of a written report (eg, an economist's report defining the relevant market, or a forensic accountant's report on the loss suffered by the claimant). Following the exchange of expert reports, written questions may be put to the expert by the other party. The experts may also be ordered to meet to identify the issues on which they agree and those on which they disagree, and to report back to the court accordingly (CPR 35.12). Experts will also be subject to cross-examination (and re-examination) at trial.

The court can also order that expert evidence be provided by a single expert appointed jointly (CPR 35.7). This is unlikely to be used much in competition cases, given their complexity.

CAT

In relation to factual evidence in proceedings in the CAT, the Tribunal held in Argos v OFT [2003] CAT 16 that it will 'be guided by overall considerations of fairness rather than technical rules of evidence'. Many factors, including whether the evidence in question is hearsay evidence, can affect the weight it is given (Aberdeen Journals v OFT [2003] CAT 11). As in the High Court, factual evidence in the CAT can include contemporaneous documents and written and oral evidence from witnesses. The CAT's approach to witness statements is to give them such weight as seems appropriate in the circumstances, bearing in mind the extent to which cross-examination has been sought. Under CAT Rule 55, the CAT has the general power to control the evidence placed before it by giving directions in respect of the issues on which it requires evidence, the nature of the evidence it requires and the way in which the evidence is to be placed before it.

The CAT's 2021 practice direction (Practice Direction 2/2021) on witness statements for trial provides that a trial/appeal witness statement must contain only evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial, and to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence-in-chief if they were called to give oral evidence. In addition, a witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial/appeal witness statement. Both the witness and the relevant legal representative must sign a statement of compliance to state they have complied with this practice direction.

Expert evidence can be given in the CAT as it can before the High Court. Again, in the context of follow-on damages actions, this involves the submission of expert reports, and experts may be cross-examined at trial. As set out in the CPR in relation to High Court proceedings, paragraph 7.67 of the CAT Guide to Proceedings (October 2015) (the CAT Guide) states that the expert is subject to an overriding obligation to the CAT to assist on the matters within his or her expertise. Single joint experts may also be appointed in CAT proceedings, although it is unlikely that they would be in the context of complex claims (CAT Guide paragraph 7.66).

In relation to evidence, CAT Rule 55(1) provides that the CAT may give directions, among other things, in respect of the provision by parties of statements of agreed matters, the issues on which it requires evidence and the nature of the evidence that it requires to decide those issues. The CAT may limit cross-examination of witnesses to any extent or in any manner it deems appropriate (CAT Rule 55(6)). The CAT also has the power, at the request of any party, to issue a summons requiring a person in the United Kingdom to attend as a witness before the CAT or answer any questions or produce any documents or other material in their possession or control that are relevant to the proceedings (CAT Rule 56).

The CAT Rules also provide that the CAT may give directions for the appointment and instruction of experts, whether by the CAT or by the parties and the manner in which expert evidence is to be given (CAT Rule 53(2)(e)). The CAT may sometimes organise, before or during the hearing, a structured discussion, in the presence of the CAT, between the parties and their experts in an endeavour to focus on the main points of dispute. This may include, for example, experts being asked to agree joint statements. The CAT may also order that certain evidence of like discipline should be given concurrently ('hot-tubbing', which involves the CAT putting questions to experts in relation to a particular issue as an alternative or supplemented by cross-examination).

Law stated - 09 May 2023

Legal privilege protection

What evidence is protected by legal privilege?

There are two types of privilege in English law: legal advice privilege and litigation privilege. They apply in both High Court and CAT proceedings. The practical consequence of a document being privileged is that, while it must be included on a disclosure list (in the High Court), it cannot be inspected. The CAT Rules provide that where a party inadvertently discloses a privileged document, the party who has seen the document may use it or its contents only with the permission of the CAT (CAT Rule 65).

Legal advice privilege

Legal advice privilege covers confidential communications between client and lawyer for the purpose of giving or receiving legal advice. There are three elements to this.

The communication must be confidential, so anything that has come into the public domain or anything that has been circulated widely such that it can no longer be considered confidential will not be privileged.

The communication must be between lawyer and client. Under English law, 'lawyer' includes both external and in-house counsel, provided they are authorised persons as defined by the Legal Service Act 2007 (ie, qualified in any jurisdiction). In this respect, English law is different from the position under EU law as confirmed by the European Court of Justice (ECJ) in Akzo Nobel Chemicals Ltd v Commission (Case C-550/07 P). Following Three Rivers (No. 5) [2003] EWCA Civ 474, the definition of 'client' may be relatively restricted in some circumstances: in the context of an undertaking it may apply only to a unit or certain specific persons within the undertaking who are instructing the lawyers, rather than all employees within the undertaking. In SFO v ENRC [2018] EWCA Civ 2006, the Court of Appeal would have been in favour of departing from this position had it been open to do so, but it stated that this is a matter that will have to be considered again by the Supreme Court in an appropriate future case.

The communication must be made for the dominant purpose of giving or receiving legal advice (R (Jet2) v CAA [2020] EWCA Civ 35). For example, communications between a lawyer (internal or external) and persons within the business discussing commercial issues but not providing legal advice in relation to them will not be privileged.

In the RBS Rights Issue Litigation [2016] EWHC 3136 (Ch), RBS claimed privilege over transcripts, notes or other records of interviews conducted by or on behalf of RBS's lawyers with employees and ex-employees in relation to two internal investigations. Hilyard J found that the client, for the purposes of privilege, consists only of those employees authorised to seek and receive legal advice from the lawyer, and that legal advice privilege does not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer.

In English law, lawyers' working papers are also privileged. The justification for withholding those documents is that disclosure of them would give the party requesting them a clue to the advice that had been given by the solicitor (Lyell v Kennedy (No. 3) [1884] 27 Ch D 1). Where the selection of documents that a solicitor has copied or assembled betrays the trend of advice that he or she is giving the client, the documents are privileged (Ventouris v Mountain [1991] 1 WLR 607).

In SFO v ENRC [2018] EWCA Civ 2006, the Court of Appeal, following Three Rivers (No. 5), held that communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee had been tasked with seeking and receiving such advice on behalf of the corporation. In doing so, the court acknowledged that confining legal advice privilege to communications passing between the lawyer and the client in this way puts large corporations in a less advantageous position than individuals or small businesses, as the information upon which large corporations seek legal advice is unlikely to be in the hands of the main board of directors or those it appoints to seek and receive legal advice.

Litigation privilege

Litigation privilege covers confidential communications between client and lawyer, or between one of them and a third party, that come into existence after litigation is contemplated or has been started and made with a view to obtaining or giving legal advice in relation to the litigation, obtaining evidence to be used in it or obtaining information that may lead to the obtaining of evidence. These must be the sole or dominant purposes of the communications if they are to attract litigation privilege. This would cover, for example, correspondence with witnesses of fact, experts, reports and drafts made in the context of bringing or defending a competition claim.

Litigation may be considered to be 'in prospect or pending' at the stage of the Commission or the Competition and Markets Authority (CMA) investigation such that any documents produced would be covered by litigation privilege. In Tesco Stores Limited v Office of Fair Trading [2012] CAT 6, the CAT refused an application by the Office of Fair Trading (OFT) (as it then was) for disclosure of information about Tesco's contacts with potential witnesses and records of discussions with those individuals. The CAT held that the proceedings were confrontational by the time that Tesco began collecting the material as the OFT had already issued a statement of objections and a supplementary statement of objections, and Tesco stood accused of wrongdoing. Accordingly, the administrative procedure was sufficiently adversarial by the time third-party witnesses were contacted that the material Tesco gathered was subject to litigation privilege.

In SFO v ENRC [2018] EWCA Civ 2006, the Court of Appeal found that contemplated litigation will include, for example, circumstances where there is a clear threat of criminal investigation. The fact that a defendant could not say with certainty that a prosecution was likely did not in itself prevent proceedings being in reasonable contemplation.

In a case management conference of the Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd 1403/7/7/21 proceedings, the CAT looked into the justifications required when asserting privilege. In these proceedings, Apple had disclosed a number of documents to the CMA but then refused to disclose nearly half of them to the proposed class representative on the basis of privilege. The CAT ordered Apple to further justify its privilege claims but rejected the claimants' request to compel Apple to provide individualised explanations for every single document that has been withheld, noting that further granularity should only be addressed if issues still remained after the disclosure statement was provided.

Joint privilege and common interest privilege

English law also respects joint privilege or common interest privilege. Joint privilege protects communications that come into existence during a joint retainer of the same lawyer by two parties or a sufficiently joint interest by the two parties in the relevant subject matter. Common interest privilege protects a party's privileged material that it has voluntarily shared with another party (pursuant to a common interest in the subject matter) from disclosure to the rest of the world.

Without prejudice privilege

In addition, English law recognises without prejudice privilege. This is founded on the public policy of encouraging litigants to settle disputes before trial. It applies where the communication is genuinely aimed at settlement and where, in the course of negotiation, parties contemplated or might reasonably have contemplated litigation if they could not agree. If it applies, documents relating to negotiations genuinely aimed at settlement are privileged and cannot be given as evidence. This applies to both oral and written communications (Rush & Tompkins Ltd v Greater London Council [1989] 1 AC 1280). This was applied in the CAT in the recent case of Sportradar AG and Others [2022] CAT 29, where the Tribunal determined whether an email inadvertently disclosed fell under without prejudice privilege protection. The CAT found that this email clearly was part of a negotiation aimed at settlement, as it covered matters later settled in a variation deed and that litigation was in contemplation given the issues at stake and the email expressing an intent to 'pursue a different path' if an agreement could not be reached. The email was therefore inadmissible as evidence.

Law stated - 09 May 2023

Criminal conviction

Are private actions available where there has been a criminal conviction in respect of the same matter?

Under section 188 of the Enterprise Act 2002 (EA 2002), only an individual can be found guilty of the criminal cartel offence. Private damages actions, on the other hand, are brought against the company that has breached competition law.

Private actions are available where there has been a criminal conviction in respect of the same matter. The Marine Hose cartel is an example: in January 2009, the Commission fined a number of undertakings for their participation in the cartel, including Dunlop Oil & Marine. Following a plea-bargain process in the United States, in June 2008, three Dunlop executives pleaded guilty and were convicted in the United Kingdom for their role in the cartel. In July 2009, the Libyan oil firm Waha Oil Company lodged a claim for damages against Dunlop in the High Court.

In Marine Hose , the criminal cases had already concluded by the time the follow-on litigation was brought. This need not necessarily be the case, although where a private action and criminal proceedings are brought at the same time, the private action may be stayed pending the outcome of the criminal proceedings. In the Passenger Fuel Surcharge case, a civil investigation by the OFT (as it then was) into British Airways and Virgin Atlantic regarding the fixing of passenger fuel surcharges on transatlantic routes was stayed pending the outcome of the criminal prosecution it brought against four of the British Airways executives, which collapsed in May 2010. The OFT subsequently resumed its civil investigation, imposing a fine on British Airways.

Law stated - 09 May 2023

Utilising of criminal evidence

Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

The fact that an individual has been convicted of a criminal offence is admissible in civil proceedings to prove the infringement has been committed, but this will just be one piece of evidence in establishing the infringement and will not assist in showing loss or causation.

The EA 2002 has specific rules governing the admissibility of evidence discovered in criminal proceedings. The CMA and the Serious Fraud Office (SFO), the bodies in the United Kingdom responsible for investigating criminal cartel offences, are entitled to disclose information that has come to their attention in the course of a criminal investigation in specified circumstances only. They are not permitted to disclose such information to assist potential claimants seeking damages unless the information has already legitimately been disclosed to the public. The CMA and the SFO have entered into a memorandum of understanding that outlines the basis on which the CMA and the SFO will cooperate when investigating or prosecuting individuals under the criminal cartel offence in circumstances where serious or complex fraud is suspected.

For claims where the loss or damage suffered from an infringement takes place before 9 March 2017, there are no statutory provisions protecting leniency or immunity applicants from follow-on damages claims brought in England and Wales. However, for claims where the loss or damage suffered from an infringement takes place on or after 9 March 2017, paragraphs 15 and 16 of Schedule 8A (CA 1998) apply to undertakings that have been granted immunity from financial penalties under a cartel leniency programme.

Paragraph 15 of Schedule 8A (CA 1998) states that an immunity recipient is not 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 liability) except in the following circumstances:

- the person is unable to obtain full compensation for the loss or damage from other undertakings involved in the cartel infringement;
- the person acquired (or provided) a product or service that was the object of the cartel infringement directly or indirectly from the immunity recipient (or to the immunity recipient);
- the person acquired a product or service containing or derived from a product or service that was the object of the cartel infringement indirectly from the immunity recipient; or
- the product or service that was the object of the cartel infringement contained or was derived from a product or service provided by the person.

The CMA and the Commission do not routinely disclose documents obtained in their investigations directly to private claimants. For claims that began on or after 9 March 2017, a court or tribunal must not make a disclosure order addressed to a competition authority in respect of documents or information included in a competition authority's file except where the court or tribunal is satisfied that no one else is reasonably able to provide the document or information (paragraph 30, Schedule 8A of the CA 1998).

Law stated - 09 May 2023

Stay of proceedings

In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

In respect of decisions made prior to 31 December 2020, English courts are under a duty not to take decisions running counter to those of the European Commission or courts (article 16 of Council Regulation (EC) No. 1/2003). Furthermore, a relevant decision of the CMA (or the Commission reached prior to 31 December 2020) is binding on the court, provided that it is final (ie, no appeal has been lodged against the decision and the time limit for appealing has expired; or all avenues of appeal have been exhausted). Where a follow-on damages action is brought in the United Kingdom in circumstances where the underlying CMA or Commission decision is being appealed, defendants may therefore apply for an action to be stayed pending the outcome of the appeal.

High Court

In proceedings in the High Court, there is no specific provision relating to competition litigation, but CPR 3.1(2)(f) allows the court to stay proceedings as part of its general case management powers. In Infederation Ltd v Google Inc

[2013] EWHC 2295 (Ch), Google sought a stay to proceedings brought by Infederation that alleged that Google had abused its dominant position on the basis that Google had also offered commitments in response to European Commission preliminary findings that some of Google's business practices might be considered abusive and it would be disproportionate to embark on standard disclosure in this case as the Commission was expected to clarify its position 'in the very near future'. In refusing both applications, and ordering limited, targeted disclosure, Roth J summarised the principles that would govern a court's approach to considering how far it was appropriate to allow an action to progress when there were EU proceedings concerning the same issues ongoing. These principles were that:

- there was no objection as a matter of EU law for the national proceedings to continue to a point short of an actual decision or judgment;
- it was in the discretion of the court to determine what steps short of trial should be taken;
- that discretion was to be exercised, having regard to the overriding objective and the requirement to avoid a decision that was counter to that of the Commission or the EU courts;
- it would normally be appropriate to require the defendants to plead a defence; and
- whether further steps should be taken depended on all the circumstances, including, among other things, whether the proceedings were a follow-on action subsequent to a Commission decision or an action brought in parallel to a Commission investigation.

The High Court may also stay proceedings where parallel proceedings in another jurisdiction are ongoing, and the UK proceedings (or at least part of them) may be rendered unnecessary as a result of the outcome of those other proceedings. In FDIC v Barclays and others [2022] EWHC 391 (Ch), Sir Anthony Mann ordered a temporary stay pending the outcome of procedural issues ongoing in parallel US proceedings, which may render the UK proceedings unnecessary.

CAT

In proceedings in the CAT, the Tribunal has case management powers that allow it to stay proceedings where appropriate (CAT Rule 51(2)(k)) for section 47A of the CA 1998 claims; see also Rule 85(1)(k) for collective proceedings under section 47B of the CA 1998). In addition, section 58A of the CA 1998 (as amended by the Consumer Rights Act 2015 (CRA 2015)) states that in respect of claims brought on the basis of an infringement decision of the Commission (reached prior to 31 December 2020) or the CMA (follow-on claims), the CAT will be bound by that decision once it has become 'final' (ie, all avenues of appeal have been exhausted or the time for bringing such appeals has expired) (Emerson v Morgan Crucible [2008] CAT 8).

The CAT may also order a stay in proceedings pending the outcome of an appeal in a related case; see David Courtney Boyle & Edward John Vermeer v Govia Thameslink Railway Limited & Others [2021] CAT 38, where the CAT considered but did not grant an application for a stay pending the outcome of an appeal in related collective proceedings in Justin Gutmann v London & South Eastern Railway Limited [2021] CAT 31.

Law stated - 09 May 2023

Standard of proof

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

The burden of proof in private antitrust litigation falls on the claimant to establish that there has been an infringement, loss and causation. In relation to the infringement aspect, a decision of the CMA or European Commission (reached prior to 31 December 2020) will be binding on the court, provided that it is final (ie, no appeal has been lodged against the decision, and the time limit for appealing has expired; or all avenues of appeal have been exhausted). It, therefore, falls to the claimant to prove causation and loss in a follow-on damages claim and to prove the entire infringement as well as causation and loss in the case of a stand-alone claim.

The standard of proof in competition litigation cases, as for all civil claims, is the ‘balance of probabilities’ (ie, more likely than not).

In Royal Mail and others v DAF Trucks and others [2020] CAT 7, the CAT considered as a preliminary issue the extent to which the European Commission decision in Trucks was binding for the purpose of domestic damages claims. All the parties agreed that the finding of infringement in the operative part of a decision is binding on a national court. The dispute related to the recitals in parts of the decision. The Tribunal set out the following principles in its judgment:

- the recitals can be relied on as an aid to interpretation of the operative part insofar as the operative part is unclear or ambiguous;
- the legal effect of the recitals is not limited to cases where the operative part is ambiguous or unclear; and
- the relevant determinations in the operative part comprise not only the finding of infringement but also the imposition of the fines.

The Tribunal concluded that if a judgment were to be inconsistent with recitals in the decision that were the essential basis or necessary support for the operative part, that would be inconsistent with the decision and in breach of the obligation in article 16 of Council Regulation (EC) No 1/2003 that a national court must not make a decision inconsistent with a decision of the Commission. The claimants also argued that it was an abuse of process for the defendants – who had settled the European Commission investigation – to challenge the findings in the recitals of the decision. The Tribunal accepted that there are circumstances in which it will be an abuse of process to challenge recitals that form the essential basis of the decision.

The truck manufacturers appealed against the CAT's judgment that it would be an abuse of process for them to seek to contest facts set out in the European Commission decision. The Court of Appeal upheld the CAT's decision and held that the doctrine of abuse of process was properly engaged; the CAT is entitled to find that admissions recorded in the European Commission settlement may stand in the national court proceedings, even where the admissions related to ‘non-essential’ facts. In SOSH and others v Servier [2020] UKSC 44, the Supreme Court considered whether findings of fact made by the General Court of the EU are binding in subsequent domestic proceedings under the EU principle of absolute res judicata. There was significant overlap between the allegations of infringement in claims brought in the High Court and those investigated by the EC (in a decision that was subject to an appeal to the CJEU). Servier argued that certain findings made by the General Court annulling aspects of the decision were binding on the domestic courts in a preliminary issues trial. The Supreme Court unanimously dismissed the appeal on the basis that the findings of the General Court were not definitive and they may never become definitive because they may be overturned by the CJEU on appeal. Nonetheless, the Supreme Court went on to consider the principle of absolute res judicata. The principle gives dispositive effect to the judgment itself. It is essential to look beyond the operative part of the judgment to identify the reason for the decision and will extend to findings that are necessary to support the operative part. In particular, only those aspects of the judgment that explain the meaning of the annulment decision form part of the ratio, because those are the aspects that must be respected to fulfil the purpose of preventing the annulment judgment from being called into question in subsequent proceedings.

Law stated - 09 May 2023

Time frame

What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

High Court

The timetable in the context of a private antitrust action in the High Court will depend on the nature of the proceedings and the complexity of the case. In relation to a follow-on damages case, much will depend on whether proceedings are stayed (eg, in a follow-on claim pending appeals against an infringement decision); how extensive disclosure is; the number of witnesses and experts; and other such issues. In relation to a stand-alone claim, again the complexity of the issues will largely determine the typical timetable. The practice in high-value claims assigned to the 'multi-track' procedure under the CPR is to have a case management conference after close of pleadings (CPR 29.3) in which a timetable to trial is agreed or ordered that sets deadlines for the various stages in the proceedings (eg, disclosure, exchange of witness statements and expert reports). Cases may be expedited where circumstances warrant it, but this will be rare for a damages claim.

Cases in the High Court can be subject to strikeout or summary judgment applications where the statements of case disclose no cause of action or the claimant or defendant has no real prospect of success (CPR r.3 and r.24). In Nokia Corp v AU Optronics [2012] EWHC 731 (Ch), Sales J held that a measure of generosity concerning pleadings should be given to claimants in competition cases where some covert or secret behaviour is alleged. However, he also stated that this generosity depends upon certain procedural protections being available to defendants, such as the requirement that defendants should not be subjected to allegations of fraud or dishonest conduct without sufficient material being available to those who plead statements of case.

Issues may also be tried as 'preliminary issues' where to do so could allow the court to dispose of proceedings expeditiously (see, for example, the Chancery Guide , paragraph 3.15 and CPR 3.1(2)(l)) by hiving off a specific issue that can be dealt with discretely and that would allow the action to be determined without recourse to a full trial on all the issues.

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

In Emerald Supplies v British Airways plc [2014] EWHC 3514 (Ch), the court considered two applications for summary judgment and strikeout (one by the defendant and one by the claimant). The defendant's application was for strikeout and summary dismissal of the claimant's claims in the torts of unlawful means conspiracy and unlawful interference. At first instance, the High Court found that it was not appropriate to determine this important point of principle at a summary judgment stage. On appeal (Emerald Supplies Limited v British Airways plc [2015] EWCA Civ 1024), the Court of Appeal accepted that where the issue of law depends upon facts that have yet to be determined, it cannot be right for a court to strike out the case, or any part of it, before disclosure. That was not, however, the position in this case, as there was sufficient material before the judge to determine the issue.

In Streetmap.EU Limited v Google Inc and Others [2016] EWHC 253 (Ch), the claimant brought a stand-alone claim in the High Court, alleging that Google had abused its dominant position in the market for online search and search advertising. In this case, it was directed that the allegations of abuse raised by Streetmap should be tried as a preliminary issue, on the assumption that Google held a dominant position as alleged. Roth J noted that this appeared to be a sensible course, since if the abuse allegations failed, that would be an end for the matter, whereas if they succeeded, the question of dominance could be determined at a subsequent trial.

In Daimler AG v Walleniusrederierna Aktiebolag [2020] EWHC 525 (Comm), the claimant pursued a follow-on claim (based on the time period and geographical scope identified by the European Commission decision in relation to the supply of international shipping services for roll-on, roll-off cargo) and a stand-alone claim relating to time periods and geographical areas not covered by the European Commission decision. The defendant admitted liability in relation to the follow-on claim, disputed liability in relation to the stand-alone claim and applied for a split trial, with liability being determined first and then a subsequent trial on quantum. The court found that a liability trial would not produce significant savings in respect of the amount of disclosure required, the number of permutations that the experts must consider for determining quantum or in the total amount of court time used. In addition, the court found that with a split trial, it would be many years before the quantum would be known, and it would, therefore, provide no incentive to the defendants to settle the overall proceedings.

CAT

The timetable of a claim in the CAT will depend on similar factors to those set out above in relation to the High Court. The CAT also has the power to hear issues as preliminary issues (CAT Rule 53(2)(o)); the power to strike out claims in whole (or in part) (CAT Rule 41) and the power to give summary judgment (eg, if the claimant or defendant has no real prospect of success and there is no other compelling reason why the issue should be disposed of at a hearing (CAT Rule 41)).

In Allianz Global Investors GmbH & Others v Deutsche Bank AG London & Others [2022] CAT 44, the CAT considered the Defendants' application to have its limitation defence determined as a preliminary issue. The Defendants argued that there was a real prospect that its limitation defences would succeed on the merits such that there would be no need for any trial. The Claimants argued that, even if the Defendants were successful, it would not be determinative of the case and would not cut down the scope of the eventual trial. The CAT found that the limitation issues in this case were weighty, with a substantial number of potentially important legal issues that would be likely to arise. This created a considerable prospect that a losing party would be able to identify at least some issues that could be subject to appeal which would lead to further delay. In light of the complexity of the issues and risk of delay the CAT rejected the application.

In Dr Rachael Kent v Apple Inc. and Apple Distribution International Ltd [2022] CAT 45, the CAT set out its reasons for refusing Apple's application for the hearing of a preliminary issue on the issues of market definition and dominance. Apple argued that a decision in its favour on market definition would effectively dispose of the proceedings, leading to cost and time savings. However, the CAT agreed with the proposed class representative that there was a clear overlap between factual matters relating to market definition and dominance/ abuse issues, so it would be difficult to hear market definition as a separate preliminary issue. The CAT also identified a significant risk of appeal if the trial was split and of duplication as matters may need to be addressed more than once.

In David Courtney Boyle v Govia Thameslink Railway Limited & Others [2022] CAT 46, the CAT was asked to determine whether a two or three stage trial would be appropriate to hear the issues in this case. The CAT held that a two stage trial would be appropriate, with issues of quantum to be heard at stage two and all other issues heard at stage one, on the basis that the CAT could not be extremely confident that questions of dominance could be hermetically sealed from questions such as abuse and regulatory compliance. The CAT found that, if it was eventually the case that these issues could not be hermetically sealed, it would cause serious delay if these were artificially separated as adjournments would need to be made subsequently to the trial schedule.

In PSA Automobiles SA & Others v Autoliv AB & Others [2023] CAT 27 the CAT refused to exercise its power under CAT rule 41 to strike out a claim. The CAT found that the claimant did have a realistic chance of showing that the entity concerned was engaged in cartel activity and that there were reasonable grounds that a fuller investigation of the facts would put more material before the CAT at trial to determine the matter. The CAT noted that, in cases where there are allegations of concealment and destruction, it is expected that the evidence the claimants can show would be fragmentary which should be considered when determining whether the claim has a realistic chance of success.

The CRA 2015 introduced a fast-track procedure for simpler competition claims in the CAT (CAT Rule 85). The fast-track procedure means that the main substantive hearing will be fixed to commence as soon as practicable and in any event within six months of the CAT's order to fast-track the proceedings, and the amount of recoverable costs will be capped at a level to be determined by the CAT (CAT Rule 58(2)). In deciding whether to make proceedings subject to the fast-track procedure, the CAT takes into account all matters it thinks fit, including:

- whether one or more of the parties is an individual or a microenterprise or a small or medium-sized enterprise (SME);
- whether the time estimate for the main substantive hearing is three days or less;
- the complexity and novelty of the issues involved;
- whether any additional claims have been or will be made;
- the number of witnesses involved (including experts);
- the scale and nature of the documentary evidence;
- the likely extent of (if any) disclosure; and
- the nature of the remedy sought and (if relevant) the amount of damages claimed.

Since their introduction on 1 October 2015, a number of fast-track claims have been made in the CAT. In April 2016, purchasers of flexible polyurethane foam brought a follow-on damages claim pursuant to a decision of the European Commission and applied to be designated as a fast-track claim because they were SMEs (Breasley Pillows Limited and Others v Vita Cellular Foams (UK) Limited and Others [2016] CAT 8). Roth J refused the application. He found that the claimants' status as SMEs was only one factor, and it did not follow that because the case was brought by one or more SMEs it would fall within the fast-track procedure. He also considered that disclosure was of a scale and scope well beyond the procedure and that there was no particular urgency in this case. He further commented that when a case concerned damages for a cartel, particularly one of several years' duration, it was unlikely to come within the criteria of the fast-track procedure.

In contrast, a claim issued by Socrates Trading Limited (a provider of online training) against the Law Society of England and Wales (the professional body for solicitors in England and Wales) alleging an abuse of a dominant position was considered suitable for the fast-track procedure. The CAT also exercised its discretion to cap the level of recoverable costs in the case (Rule 58(2)). In his judgment, Roth J stated that there was no magic formula that produces an objectively correct figure for the level of recoverable costs. However, where parties are of very disparate means, it is important that those costs strike a fair balance between enabling access to justice for the claimant and providing a measure of protection to the defendant not only from unmeritorious claims but also from the burden of having to defend a claim that it is assumed for this purpose proves to be unfounded. The case was the first to proceed to trial under the fast-track procedure (Socrates Trading Limited v The Law Society of England and Wales [2017] CAT 10) and resulted in a finding that the Law Society had abused a dominant position. The trial in respect of the existence of an infringement was completed in four days. Each side adduced two factual witnesses and called one economist, whose expert evidence was confined to questions of market definition and dominance. The evidence of the experts was heard concurrently in a 'hot tub'.

In Instaplanta (Yorkshire) Limited v Leeds City Council [2023] CAT 11, the CAT refused an application to apply the fast track procedure given that the nature of the factual evidence in the case meant a three-day trial would not have been feasible and the range of issues and degree of complexity of some of those issues created a material risk that the parties might not properly be prepared for a hearing in six months' time, leading to further delay and inefficiency.

In Rest & Play Footwear Ltd v George Rye & Sons Ltd [2021] CAT 18, the CAT refused an application to apply the fast-track procedure, as the parties had agreed a trial estimate of longer than three days, the claim was likely to involve complex legal and economic issues regarding causation and quantification of loss and it was common ground between the parties that there was no particular urgency, given that the case concerned damages alleged to have been suffered between 2015 and 2019.

Law stated - 09 May 2023

Limitation periods

What are the relevant limitation periods?

The rules on limitation for competition damages claims are complex, vary depending on when the loss or damage suffered from an infringement took place and differ in certain respects from the rules relating to other civil claims.

Where the loss or damage suffered took place wholly on or after 9 March 2017

Where the loss or damage suffered from an infringement took place wholly on or after 9 March 2017, proceedings in respect of a competition law claim may not be brought after the end of the limitation period (six years) (see paragraphs 17 to 25, Schedule 8A, CA 1998). This applies regardless of whether the claim is brought in the High Court or the CAT.

- The limitation period begins with the later of the day on which the infringement ceases or the claimant's day of knowledge. The 'claimant's day of knowledge' is the day on which the claimant first knows or could reasonably be expected to know:
  - of the infringer's behaviour;
  - that the behaviour constitutes an infringement of competition law;
  - that the claimant has suffered loss or damage arising from part infringement; and
  - the identity of the infringer.
- The beginning of the limitation period may be deferred in certain circumstances, including where a claimant is 'under a disability', during the investigation by a competition authority, during a consensual dispute resolution process, or during collective proceedings.
- Where a competition authority investigates an infringement of competition law, the period of the investigation is not to be counted when calculating whether the limitation period has expired. The period of an investigation begins when the authority takes the first formal step in the investigation. It ends either one year after the day on which the authority closes the investigation or one year after the infringement decision becomes final (eg, when all appeals have been exhausted).

Where at least some of the loss or damage suffered took place before 9 March 2017

The limitation rules are different depending on whether the claims are brought in the High Court or the CAT. Claims brought in the High Court and transferred to the CAT are subject to the High Court limitation rules rather than those of the CAT (Sainsbury's Supermarkets Ltd v Mastercard Incorporated [2015] EWHC 3472 (Ch)).

High Court

For claims where the loss or damage began wholly before 9 March 2017, in civil claims brought in the High Court (which includes private antitrust litigation), the limitation period is six years from the date on which the cause of action accrued (section 2 of the Limitation Act 1980). The cause of action continues to accrue until the date the infringement of competition law ceases, so the limitation period will expire six years from the date on which the infringing conduct ends. Follow-on claims based on European Commission or CMA decisions relating to infringing conduct more than six years old would, therefore, be time-barred.

However, where there is deliberate concealment, the six-year period will not begin to run until such time as the claimant either discovered the concealment or ought reasonably to have discovered it (section 32 of the Limitation Act 1980). In relation to claims pertaining to cartel activity (that is likely to have been secret or concealed, or both), this may, depending on the facts of each case, extend the limitation period until, for example, the date on which the cartel activity was made public, such as an announcement by the competition regulator that it was investigating the infringement.

The High Court considered limitation in Arcadia Group Brands Limited and others v Visa Inc [2014] EWHC 3561. The defendants applied for summary judgment to strike out those aspects of the claims that alleged infringement of competition law six years prior to the issue of proceedings. The High Court found that there were facts that were known, or discoverable by the exercise of reasonable due diligence, by the claimants before the limitation period that were sufficient to establish a prima facie case. Simon J considered that this was not a 'secret cartel'; rather the existence and operation of the Visa payment system and interchange fees were matters of public knowledge that had been notified to the competition authorities.

In addition, the High Court found that competition cases (for all their potential complexity) do not fall within an exceptional category calling for a different approach to the application of section 32 of the Limitation Act 1980. The Court of Appeal upheld the decision and concluded that the statement of claim test (as set out in Johnson v Chief Constable of Surrey [1992] 10 WLUK 225) applied in the present case. This was on the basis that all the necessary ingredients for the causes of action were included in the particulars of claim, and the appellants accepted that no new material facts came to light in the six-year period prior to the commencement of proceedings. The Court of Appeal also found that the judge's decision did not infringe EU principles of effectiveness and full compensation.

In May 2016, three claimants commenced proceedings just under six years from the date of the European Commission's press release announcing its decision finding that the defendants had participated in a cartel coordinating price levels and quotations of dynamic random-access memory chips from 1998 to 2002. The court considered, as a preliminary issue, whether the claimants' claims were time-barred (Granville & Ors v Infineon & Ors [2020] EWHC 415). It was common ground that the burden of establishing that the claim is not time-barred lies on the claimant. They must establish that they could not have discovered the fraud without exceptional measures that they could not reasonably have expected to take.

The High Court found that two claimants' claims were time-barred on the basis that, with the exercise of reasonable diligence, they could have discovered not only the US developments (eg, various press reports about the progress of a US Department of Justice (DOJ) investigation starting in 2002) but also the fact and progress of a European Commission investigation (eg, as reported from June 2007), and the significant provisions that Infineon had made for a fine resulting from that investigation (eg, reported in the press in July 2004). However, the third claimant's claim was not time-barred because it ceased trading before any reports of the US DOJ investigation.

In DSG Retail Ltd & Ors v Mastercard [2020] EWCA Civ 671, the Court of Appeal confirmed the approach taken in Arcadia to section 32 of the Limitation Act and held that whether a claimant could with reasonable diligence have discovered the relevant concealment was fact dependent. At first instance, the CAT decided that the claimants' claims were not time-barred. The Court of Appeal acknowledged that the CAT had considered some of the things the respondents might have known about the alleged infringement, but had not asked what precisely had put them on notice of the need to investigate a potential claim. The Tribunal had wrongly assumed that the claimants were aware of important press articles. The court noted that in an internet age, huge numbers of documents are in the public domain; it does not follow that, even objectively judged, a potential claimant was aware of a particular claim or that it could with reasonable diligence have seen particular documents. In relation to the test in section 32(1)(b) of the Limitation Act, the Court of Appeal reiterated that proof of additional loss by another causative route flowing from the original breach of duty is not sufficient to show that there is a new or different cause of action, and that a ‘fact relevant to the plaintiff’s right of action’ in accordance with section 32(1)(b) is a fact without which the cause of action is incomplete.

In The Federal Deposit Insurance Corporation v Barclays Bank and others [2020] EWHC 2001 (Ch), Snowden J refused UBS’s application for summary judgment on limitation grounds on the basis that – prior to the regulatory findings by the FCA and the CFTC – there was nothing in the publicly available materials at the time that would have justified the inference that there was dishonest collusion between the banks.

In OT Computers Ltd (In Liquidation) v Infineon Technologies AG [2021] EWCA Civ 501, the Court of Appeal considered whether the judge at first instance was wrong to take account of OTC's insolvency in considering whether it could have with reasonable diligence discovered enough about the existence of the cartel to enable it to plead a viable claim. The Court of Appeal acknowledged that interpreting section 32 requires an objective standard because it is not the purpose of the law to put a claimant which does not exercise reasonable diligence in a more favourable position than other claimants in a similar position. However, in dismissing the appeal, the Court of Appeal found that a claimant in administration or liquidation which is no longer carrying on business is not in a similar position to claimants that do continue actively in business. In Mastercard v Deutsche Bahn [2015] EWHC 3749 (Ch), the High Court gave permission for the claimant to amend their claim to introduce a new claim and held that this new claim had commenced earlier for the purposes of limitation (applying the doctrine of ‘relation back’). Barling J found that, as the new claim arose out of the same facts or substantially the same facts as claims already made by the claimants in the proceedings, it justified an amendment with the benefit of the doctrine of ‘relation back’. The Court of Appeal in Mastercard v Deutsche Bahn [2017] EWCA Civ 272 overturned the judgment of the High Court. Sales LJ held that there was an important difference between the claimants’ existing claim and their proposed new claim and that the factual enquiries that would be required if the new claim was added would be very different from those required if it was not. This clearly indicated that the new claim does not arise out of the same or substantially the same facts. The Court of Appeal also held that a claimant had to sue within the relevant time, and if it failed to do so, it could not retrieve the position by the simple expedient of introducing new matters in its reply and then making an application to amend.

Applying these cases, the High Court in Gemalto Holding and Thales DIS France v Infineon Technologies and ors [2022] EWHC 156 stated that time will start to run when the claimant’s state of knowledge is such that it and its professional advisers can properly plead a claim that would not be liable to be struck out as unarguable or lacking sufficient evidential basis. The limitation period is not postponed until the claimant has completed its investigations or is certain that the claim will succeed. Mere suspicion will not, however, be enough, particularly if it is vague and unsupported. Rather, the standard is one of ‘reasonable belief’ of the facts giving rise to the relevant cause of action. In this case, Bacon J held that by the time the European Commission had announced the statement of objections, taking account also of the other information available to it, Gemalto had sufficient material before it to be able to form a reasonable belief as to the essential elements of a claim for damages arising from the cartel, sufficient to plead a claim at that stage without waiting for the decision which followed. As such, the limitation period started to run, for the purposes of section 32(1)(b) CAT Rules 2003, from the earlier date and not from the date of the EC decision.

On appeal, the Court of Appeal found that limitation begins to run in a deliberate concealment case when the claimant recognises that it has a worthwhile claim, and that a worthwhile claim arises when a reasonable person could have a reasonable belief that there had been a cartel. A claimant is not entitled to delay the start of the limitation period until it has any certainty about its claim succeeding. Once the claimant knows objectively that a cartel has been concealed, it does not need to have certainty about its existence or about the details of that cartel. The claimant needs only sufficient confidence to justify embarking on the preliminaries; a claim in respect of a concealed event would not be a worthwhile one if it were pure speculation, but it would be if an authoritative regulator had thought it sufficiently serious, having investigated all the evidence available, to lay charges or issue a statement of objections. The court held that it makes no sense to say that the test for whether the limitation period has begun to run is when the claimant recognises that it has a worthwhile claim, and then to say that it does not have a worthwhile claim when it knows there may have been a cartel but did not know, for example, the period during which the cartel operated. The formulation for necessary knowledge is 'knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ'. One can embark on the preliminaries to the issue of a writ once one knows that there may have been a cartel without knowing chapter and verse about the details.

The situation is more complicated in relation to claims that commenced before 1 October 2015, but where the claim arose before 20 June 1997 (see DSG Retail Ltd & Ors v Mastercard [2020] EWCA Civ 671).

CAT

Claims brought in the CAT are subject to additional rules depending on precisely when the claim was brought and when the alleged loss and damage was sustained:

- Where the loss or damage is suffered before 9 March 2017 but on or after 1 October 2015, a six-year limitation period applies (section 47E of the CA 1998).
- Where the loss or damage is suffered before 1 October 2015, transitional limitation rules apply, which means that claimants have two years from the date the infringement decision became final or the date on which the cause of action accrued (CAT Rules 119 and CAT Rules 2003, Rule 31). This two-year rule also applies to stand-alone proceedings and collective proceedings (Dorothy Gibson v Pride Mobility [2017] CAT 9), even though stand-alone or collective action claims were not envisaged under the CAT Rule 2003.
- For proceedings that commenced before 1 October 2015, the CAT Rules 2003 apply. This means that the limitation period remains two years from the later of the date on which the substantive infringement decision becomes final and can no longer be appealed or the date on which the action accrued (CAT Rules 2003, Rules 31(1) to 31(3)).

In Walter Hugh Merricks CBE v Mastercard Incorporated and Others [2023] CAT 15, the CAT ruled that Mastercard could rely on limitation rules to exclude claims arising before June 1997. The claimant had argued that the 2015 CAT Rules meant that limitation rules did not apply to this case but the CAT concluded the lawmakers could not have intended the 'illogical conclusion' that proceedings commenced before October 2015 might be subject to a time bar for claims arising prior to June 1997, whereas proceedings commenced after that date would not be time-barred. As a result, the CAT held that the general legislation on limitation does apply to claims arising before 1 October 2015.

The effect of appeals against infringement decisions

In Deutsche Bahn AG v Morgan Crucible Company plc [2011] CAT 16, the CAT held that the limitation period must be determined in relation to each defendant individually. Accordingly, the CAT held that an action brought against Morgan Crucible in December 2010 on the basis of the Commission's Electrical and Mechanical Carbon and Graphite Products decision of December 2003 was brought out of time: in circumstances where Morgan Crucible had not appealed the decision, the limitation period in respect of damages claims brought against it began to run from the deadline for filing an appeal to the European courts (in February 2004) and expired two years later (in February 2006). The CAT's judgment was reversed on appeal by the Court of Appeal ([2012] EWCA Civ 1055). However, in a unanimous judgment, and following an intervention by the European Commission, the Supreme Court set aside the Court of Appeal's judgment, restoring the CAT's judgment and striking out the claims against Morgan Crucible (Deutsche Bahn AG v Morgan Advanced Materials plc [2014] UKSC 24).

The Court of Appeal in BCL Old Co v BASF [2009] EWCA Civ 434 held that there is a distinction between an appeal of an infringement decision that concerns only the imposition of a fine and appeals relating to the substance of the infringement finding. In relation to the former, section 47A does not extend the limitation period (which will, therefore, start to run from the date on which the deadline to lodge an appeal expired), but if an appeal relates to the substance, then the limitation period may be extended (until the appeal has been determined and no further appeal is possible). In a separate judgment in BCL Old Co v BASF [2010] EWCA Civ 1258, the Court of Appeal held that the CAT does not have the power to extend the limitation period for follow-on claims brought under section 47A of CA 1998. In BCL Old Co Limited v BASF plc [2012] UKSC 45, the Supreme Court dismissed an appeal by BCL that the consequences of these findings breached the principles of effectiveness and legal certainty.

Prior to its departure from the EU, the United Kingdom issued a series of statutory instruments that amended the domestic statute book, bringing an end to the direct jurisdiction of the EU institutions in the United Kingdom on 31 December 2020. These regulations (the Competition SI), remedy deficiencies in UK competition law arising from the United Kingdom's withdrawal from the European Union, and provide for a transitional provision for the purposes of calculating the limitation period to bring stand-alone claims. For cases that the European Commission had not concluded before 31 December 2020, the Competition SI provides that the time before 31 December 2020 during which the European Commission was investigating will not be counted when calculating whether the time period to bring a stand-alone claim has expired.

Law stated - 09 May 2023

Appeals

What appeals are available? Is appeal available on the facts or on the law?

Judgments of the CAT (section 49 of CA 1998) and the High Court may be appealed to the Court of Appeal, provided the permission of the lower court or the Court of Appeal has been obtained. CPR 52.11(3) provides that appeals can be made on the basis that the lower court was either wrong, or unjust because of a serious procedural or other irregularity.

In Merchant Interchange Fee Umbrella Proceedings [2022] CAT 50, the CAT explored the limits that section 49 of CA 1998 imposes on the right to appeal. It noted that Parliament intended to circumscribe the appeals that could be made from the CAT to the 'appropriate court'. This means that, in addition to obtaining permission to appeal, there are restrictions in place on the questions that can be appealed. The CAT clarified in this ruling that the 'ousters of the courts' review jurisdiction… by way of controlling the rights of appeal are to be narrowly… construed'. It noted that, while there is a safeguard of judicial review for issues that are ousted from the courts' jurisdiction, it cannot be presumed that a right of judicial review automatically arises in these circumstances. Ultimately, the CAT refused Mastercard permission to appeal on the grounds that it did not consider any of the grounds raised by Mastercard to have a real prospect of success, nor did it consider that any arguable point of law had arisen justifying permission to appeal.

Appeals can be made either by a party to the proceedings or by someone who has a sufficient interest in the matter. This was widely interpreted by the CAT in English Welsh and Scottish Railways v Enron Coal Services [2009] EWCA Civ 647, where the Court of Appeal held that it had jurisdiction to hear an appeal against the CAT's refusal to strike out part of the claim for damages. A request to the CAT for permission to appeal must be made in writing and sent to the Registrar within three weeks (reduced from one month under the old rules) of the notification of that decision (CAT Rule 107(1)).

A further appeal from the Court of Appeal to the Supreme Court is possible on a point of law, again provided permission is granted either by the Court of Appeal or the Supreme Court.

Law stated - 09 May 2023

COLLECTIVE ACTIONS

Availability

Are collective proceedings available in respect of antitrust claims?

The Consumer Rights Act 2015 (CRA 2015) introduced collective actions in the Competition Appeal Tribunal (CAT) for both follow-on and stand-alone claims on an opt-in or an opt-out basis.

While it is possible to bring representative actions in the High Court, this is difficult to do in the context of private antitrust litigation.

CAT

Under section 47B of the Competition Act 1998 (CA 1998), claims may be brought before the CAT combining two or more claims and may be on an opt-in or an opt-out basis (ie, brought on behalf of each class member except those who opt out (by notifying the representative) or who are not domiciled in the United Kingdom, unless they opt in).

Section 47C of the CA 1998 provides further safeguards in relation to collective proceedings. First, the CAT may not award exemplary damages in collective proceedings (section 47C(1)). Second, damages-based agreements, under which lawyers' remuneration is based on the amount they recover, will not be enforceable if they relate to opt-out collective proceedings (section 47C(8)). However, conditional fee arrangements (sometimes called 'no win, no fee') will still be permitted. In opt-out collective proceedings, where the CAT makes an order, it must make an order that the damages be paid to the representative on behalf of the represented persons or such other person as the CAT thinks fit (section 47C(3)).

In 2022, the CAT issued the Umbrella Proceedings Practice Direction 2/2022. This gives the CAT the power9 to order that issues in one set of proceedings may be determined together with the same or similar issues featuring in other, unrelated proceedings. Rather than hearing the cases together or consolidating them, as the CAT has done when the claims themselves overlap, where 'Ubiquitous Matters' arise across different cases, these matters may be dealt with together. An Umbrella Proceedings Order was made under this practice direction in Merchant Interchange Fee Umbrella Proceedings [2022] CAT 50, on the basis that certain common issues could be agreed between the parties and determined by 'host cases' in the first instance. In those proceedings, this includes the issue of pass-on.

High Court

In the High Court, CPR 19.6(1) allows a representative action to be brought by a claimant representing him or herself and other claimants, thereby avoiding the need for those persons to issue their own claim form. Representative proceedings can be brought where more than one person has the 'same interest' in a claim and the interested persons must opt into the action to participate.

It is difficult to bring a representative action in the context of private antitrust litigation, as is shown in Emerald Supplies Limited v British Airways plc [2009] EWHC 741 (Ch). The claimants in that case were cut flower importers who were direct and indirect customers of British Airway's airfreight services. They alleged that they had paid inflated air freight prices as a result of a price-fixing cartel to which British Airways and other airlines were party and claimed damages for themselves and other importers of cut flowers who they purported to represent. The High Court struck out the action on the basis that the class of direct and indirect purchasers was too ill-defined for the purposes of CPR 19.6, as the criteria for inclusion in the class depended on the outcome of the claim itself (ie, whether they were indeed purchasers of services at inflated prices), and the direct and indirect purchasers would not all benefit from the relief sought by the claimant because of the need for direct purchasers to pass on the overcharge to indirect purchasers for the latter to benefit from damages awarded.

The Court of Appeal in Emerald Supplies Ltd v British Airways plc [2010] EWCA Civ 1284 confirmed the High Court's decision. The court held that the appellant and those it purported to represent did not all have 'the same interest' required by CPR 19.6: they were not defined in the pleadings with a sufficient degree of certainty to constitute a class of persons with 'the same interest' capable of being represented by the appellant. The potential conflicts arising from the defences that could be raised by British Airways to different claimants reinforced the fact that they did not have 'the same interest' and that the proceedings were not equally beneficial to all those to be represented.

Group litigation orders (GLOs) are also available in the High Court (CPR 19.11). GLOs are made where one or more claims raise 'common or related issues' and are ordered by the court to consolidate proceedings commenced by two or more claimants bringing separate actions. In practice, GLOs are rarely used, and have not been used in the context of competition litigation to date.

Law stated - 09 May 2023

Applicable legislation

Are collective proceedings mandated by legislation?

Yes.

Law stated - 09 May 2023

Certification process

If collective proceedings are allowed, is there a certification process? What is the test?

High Court

In the High Court, there is no equivalent in England and Wales of the US-style (opt-out) class-action procedure, nor is there a similar certification process. In relation to representative proceedings, it is necessary for the claimant representing others who have the same interest in the claim to show that the 'same interest' test is satisfied. The Court of Appeal's judgment in Emerald Supplies Ltd v British Airways plc [2010] EWCA Civ 1284 has shown that this will be difficult in the context of follow-on damages claims.

In relation to GLOs, an order can be made either of the court's own motion or following a request from a claimant or defendant. GLOs are made where one or more claims raise 'common or related issues', a concept that is wider than the requirement that the persons have the 'same interest' for representative proceedings.

CAT

There is a certification process in the CAT. Under section 47B of the CA 1998 (as amended by the CRA 2015), any collective proceedings will only be continued if the CAT makes a collective proceedings order. The CAT will make such an order if the person bringing the proceedings is someone it could authorise to act as the representative and it must also be satisfied that the claims are eligible for inclusion in collective proceedings. To be eligible, claims must raise the same, similar or related issues of fact or law and be suitable to be brought in collective proceedings. The collective proceedings must authorise the person who brought the proceedings to act as the representative; describe the class of persons whose claims are eligible for inclusion; and specify whether the proceedings are on an opt-in or an opt-out basis.

Class representatives

The collective proceedings must be commenced by a person who proposes to be the representative in the proceedings. The CAT may authorise a representative, regardless of whether that person is a class member, but only if the CAT considers that it is just and reasonable for them to act (CAT Rule 78(1)). CAT Rule 78(2) outlines that in determining whether it is just and reasonable for a person to act as the class representative, the CAT will consider a range of factors, including, for example, whether they would fairly and adequately act in the interests of class members and would be able to pay the defendants recoverable costs if ordered to do so. A class representative must establish a register on which it will record the names of those class members who opt in or opt out (CAT Rule 83) and may only withdraw from acting if the CAT gives permission (CAT Rule 87(1)).

The first case to be brought under the new collective proceedings regime was Dorothy Gibson v Pride Mobility Products Ltd [2017] CAT 9. Although ultimately the CAT did not issue a collective proceedings order (CPO) in this case, Roth J found that it was just and reasonable for the applicant to act as a class representative.

In Walter Merricks CBE v Mastercard [2017] CAT 16, the CAT considered objections raised by Mastercard that Mr Merricks should not be authorised as a class representative on the basis of an agreement he had entered into with a third-party funder. The CAT rejected the concerns raised by the respondent, subject to proposing certain amendments to the funding agreement. The CAT found that if a third party agrees to provide substantial monies to fund litigation, the payment that has to be made to that party in consideration of this commitment, whether out of the damages recovered or otherwise, is a cost or expense incurred in connection with the proceedings. The government clearly envisaged that many collective actions would be dependent on third-party funding and that this could not be achieved unless the class representative incurred a conditional liability for the funder's costs, which could be discharged through recovery out of the unclaimed damages.

Before the Supreme Court judgment in Merricks , the CAT did not consider whether the claims fulfilled the eligibility condition in section 47(B) of the CA 1998. However, it concluded that the question of which representative should be authorised to act (the authorisation condition) should not be considered separately in circumstances where there could be interplay between the eligibility and authorisation conditions and that both should be considered at the certification hearing. It rejected arguments of material savings of time and cost if the carriage dispute were heard in advance of certification (other than for the losing applicant) on the basis that a single hearing would be cheaper than two separate hearings. In the absence of a Merricks -induced delay, it was even less clear what time and cost savings would result from a preliminary issue hearing. However, the CAT said that this did not condemn all future carriage disputes to be heard alongside the question of certification.

O'Higgins v Barclays Bank and others [2020] CAT 9 was the first carriage dispute in which not one but two different proposed class representatives (PCRs), Michael O'Higgins and Phillip Evans each sought an opt-out CPO to bring follow-on claims for damages against the foreign exchange cartels. The European Commission's findings are set out in two separate decisions adopted pursuant to its settlement procedure. The CAT considered whether it could direct a preliminary issue as to which applicant would be the most suitable to act as class representative.

In its subsequent judgment in the same case, Mr Phillip Evans v Barclays Bank PLC and Others and Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others [2022] CAT 16, the CAT resolved the carriage dispute, and also addressed the issue of whether the claim should proceed on an opt-in or opt-out basis. The applications for collective proceedings orders were heard together. While the CAT found that the PCRs met the authorisation and eligibility conditions, it considered that the factors pointing towards certifying on an opt-out basis were substantially outweighed by the strength and practicability factors. The claims, as presently framed, were so weak that they were deserving of a strikeout and there was no practical reason why members of the class had not opted in (indeed access to justice should not be forced upon an unwilling class). The CAT gave permission for both PCRs to submit revised applications for certification on an opt-in basis. While it did not have to decide which PCR would have had carriage of the claims if they proceeded on an opt-out basis, the CAT found marginally in favour of the Evans PCR. The applications were very similar and the question of carriage was a very marginal decision. Being the first to file its application was not a point in favour of the O'Higgins PCR. While O'Higgins had an advantage in terms of the extent of after-the-event (ATE) insurance, which was a material point, it was given limited weight given the costs the respondents were likely to incur. The Evans PCR was 'better thought through', but the CAT emphasised that it was drawing a distinction between two cases that only just survived strikeout. It had very serious concerns about the manner in which the claims had been articulated. After the close of proceedings, the Evans PCR provided improved ATE insurance cover. Ultimately, the CAT concluded that even without the improved offering, that carriage should be given to the Evans PCR.

In UK Trucks Claim Limited v Stellantis NV and Others and Road Haulage Association Limited v Man SE and Others [2022] CAT 25, the CAT considered another carriage dispute in competing CPO applications for a follow-on claim to the EC Trucks decision, refusing certification in the UK Trucks Claim Limited application in favour of the Road Haulage Association application due to the differences in methodology proposed and preferring the opt-in nature of the successful Road Haulage Association application.

Most recently, the CAT considered a carriage dispute between two class representatives in Pollack and Arthur v Google [2023] CAT 34. The CAT considered whether it should determine the carriage dispute between the PCRs in an earlier, separate hearing, or in a combined hearing dealing with certification (which was the approach adopted in the above Evans/O'Higgins and Trucks claims). The Tribunal decided that an earlier hearing should determine the carriage dispute. The CAT noted that determining carriage as a preliminary issue can produce significant costs savings, and that approach is likely to be appropriate for most carriage disputes, and that defendants should not be entitled to have much of a say - save to assist the Tribunal – in picking the party that will be seeking to carry on collective proceedings against them. Consistent with Evans/O'Higgins , the CAT noted that the question of which PCR was 'first to file' is not determinative, though credit can be given to a PCR who filed first where they have spent time and money framing a carefully considered standalone claim. The longer the delay before the second claim is filed, the harder it will be to displace the first PCR.

CPOs

Collective proceedings only continue if the CAT makes a collective proceedings order. The CAT will make such an order only if the person bringing the proceedings is someone it could authorise to act as the representative, and it must also be satisfied that the claims are eligible for inclusion in collective proceedings (CAT Rule 77(1)). To be eligible, the claims must raise the same, similar or related issues of fact or law and be suitable to be brought in collective proceedings. CAT Rule 79 states that when deciding whether claims are suitable to be brought in collective proceedings, the CAT will take a range of matters into account. These include, for example, the size and nature of the class and whether claims are suitable for an aggregate damages award. When deciding on whether the proceedings should be opt-in or opt-out, the CAT will take into account all matters it thinks fit, including the strength of the claims, whether it is practicable for the proceedings to be brought on an opt-in basis, including the estimated damages that class members may recover along with those set out at CAT Rule 79(2).

If the CAT issues a collective proceedings order, the order must fulfil various formalities that are set out at Rule 80. Where the CAT gives a judgment or makes an order, the judgment or order will be binding on all represented persons, unless the CAT specifies a subclass of represented persons or individual represented persons to whom it will not apply (CAT Rule 91(1)). A collective settlement approval order is binding on all represented persons (CAT Rule 94(11)).

In Dorothy Gibson , the CAT considered whether the conditions for the grant of a CPO had been met (whether the claims raised common issues and whether they were suitable to be brought in collective proceedings). Roth J said that the approach to the certification of claims should be rigorous and not simply take at face value whatever may be said on behalf of the applicant. The CAT considered that the US approach to certification of common issues was of limited assistance (involving extensive discovery, deposition and cross-examination of witnesses and long hearings). The approach under the UK regime was intended to be very different, with either no or only very limited disclosure and shorter hearings. The CAT followed the approach in Canada, holding that the expert methodology must be sufficiently credible or plausible to establish some basis for loss on a class-wide basis.

A second case, Walter Merricks CBE v Mastercard [2017] CAT 16, was brought in September 2016 and proposed to combine follow-on actions for damages arising from a decision of the Commission. The decision found that Mastercard had infringed competition law by in effect setting a minimum price that merchants had to pay to their acquiring bank for accepting payment cards in the European Economic Area. The proposed claim included individuals who between May 1992 and June 2008 purchased goods or services from businesses selling in the United Kingdom that accepted Mastercard for those who were, at the time, both resident in the United Kingdom and aged over 16 (estimated to be approximately 47 million people). The CAT refused to issue a CPO for a number of reasons, including that the level of pass-on and individual spend were not common issues; that it was impossible to see how the payments to individuals could be determined; and 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.

The Court of Appeal overturned the CAT’s decision (Merricks v Mastercard [2019] EWCA Civ 674). and that judgment was upheld on appeal to the Supreme Court (Mastercard and others v Merricks [2020] UKSC 51). The Supreme Court found that the CAT made five errors of law. First, the CAT failed to recognise that the merchant pass-on issue was a common issue. Had it done so, this would, or should, have been a powerful factor in favour of certification under rule 79(2). Second, the CAT treated the suitability of the claims for aggregate damages as if it were a hurdle, rather than just one of many factors relevant to suitability of the claims for collective proceedings. Third, the CAT should have applied a test of relative suitability. If the forensic difficulties would have been insufficient to deny a trial to an individual claimant who could show an arguable case to have suffered some loss, they should not, in principle, have been sufficient to lead to a denial of certification for collective proceedings. Fourth, the CAT did not take into account the general principle that the court must do what it can with the evidence available when quantifying damages. The incompleteness of data and the difficulties of interpreting what survives are frequent problems with which the civil courts wrestle on a daily basis. This was not a good reason for a court refusing a trial to an individual or to a large class who have a reasonable prospect of showing they have suffered some loss from an already established breach of statutory duty. Fifth, the CAT was wrong to require Mr Merricks's proposed method of distributing aggregate damages to take account of the loss suffered by each class member. A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss.

Following the outcome of Mastercard’s appeal in the UK Supreme Court, the CAT has proceeded to certify 10 CPO claims, with 14 awaiting certification and five that are either discontinued or on appeal.

Amongst the 10 claims thus far certified by the CAT is Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others, concerning follow-on proceedings from a European Commission decision regarding a cartel in the deep-sea carriage of new motor vehicles. The CAT certified the claim to proceed with a CPO on 18 February 2022 ([2022] CAT 10). An appeal to the Court of Appeal ([2022] EWCA Civ 1701) was partially successful on the grounds that the CAT had failed to take into account the differences in the parties’ competing pricing theories and should have gone on to address the ramifications of the challenges to the PCR's proposed representative’s methodology, as at the CPO stage it was clear that this was the pivotal dispute in the case. The Court of Appeal remitted the case to CAT and emphasised that the duty on the CAT as gatekeeper in collective proceedings is proactive as well as reactive; once the CAT has decided to make a CPO, that is not the end of the gatekeeper role. The court emphasised that a CPO is neither the beginning nor the end of measures whereby the CAT may case manage collective proceedings; a PCR might not have to overcome a very high hurdle to obtain a CPO, but the CAT should nonetheless ensure that from the certification stage the case proceeds efficiently to trial. The CAT's role might well entail imposing substantial case management burdens on the parties at an early stage as a result.

While the UK Supreme Court judgment in Merricks effectively lowered the bar to certification for many claims, the CAT has so far refused certification in four claims, which are described further below.

In O'Higgins/Evans v Barclays Bank and Others [2022] CAT 16, the CAT refused to certify pending re-pleadings on an opt-out basis and stayed proceedings pending re-application for a CPO on an opt-in basis.

In UK Trucks Claim Limited v Stellantis NV and Others and Road Haulage Association Limited v Man SE and Others [2022] CAT 25 the CAT refused certification in the UK Trucks Claim Limited application in favour of the competing Road Haulage Association application.

In Gormsen v Meta Platforms, Inc and Others [2023] CAT 10 the CAT refused to certify a stand-alone CPO application alleging abuse of a dominant position by Meta in breach of the Chapter II prohibition of the CA 1998. The CAT found significant problems with the pleaded claims in the CPO application and with the methodology proposed by the PCR. Specifically, the CAT found that the proposed legal basis for assessing compensation owing to the class varied materially between the three alleged abuses, whereas the proposed economic analysis sought to provide a singular response to the respondents' alleged wrongs. Furthermore, the PCR's economic analysis failed to consider the two-sided nature of the relevant market and risked incorrectly matching alleged 'excess profits' earned by Meta with alleged losses suffered by the class. The CAT considered that there were two key points to address in order to determine the CPO application: (1) whether the CPO application met the test in Pro-Sys Consultants v Microsoft (the Pro-Sys test); and (2) whether, under rule 79(2)(b) of the CAT Rules, the continuation of the proceedings could be justified in terms of cost/benefit. In relation to (i), the CAT found that the PCR had failed to meet the Pro-Sys test because of inadequacies identified in the pleading of the abuses alleged in the CPO application, and the methodology proposed by the PCR for the quantification of loss. The CAT considered that there is no effective blueprint for the efficient and effective trial of the issues raised by the PCR. In respect of (2), the CAT considered that the problems identified in respect of the application of the Pro-Sys test to the CPO application meant that no cost/benefit analysis could be properly carried out at this stage. The CAT therefore stayed the CPO application for a period of six months to enable the PCR to file additional evidence setting out a new and better blueprint for the effective trial of the proceedings. Absent a new and better blueprint, the CAT will then lift the stay and reject the CPO application.

Following Gormsen, the CAT refused to certify four applications for CPOs by Commercial and Interregional Card Claims I Limited and Commercial and Interregional Card Claims II Limited against Visa and Mastercard (CICC v Visa and Mastercard [2023] CAT 38). The PCRs sought CPOs:

- on an opt in basis on behalf of a class of merchants with average annual turnover of £100 million or more per annum in the period 2016–2019 who have paid a merchant service charge in respect of interregional and or commercial card transactions that took place:
  - in the EU (including the UK) after 1 June 2016 and prior to 1 January 2021; or
  - in the UK on or after 1 January 2021; and
- on an opt out basis on behalf of a class of merchants with average annual turnover of less than £100 million per annum in the period 2016–2019 who have paid a merchant service charge in respect of interregional and or commercial card transactions that took place in the UK after 1 June 2016.

The CAT unanimously concluded that all four proposed collective proceedings do not meet the requirements set out in the CA 1998, and applying the Pro Sys test, it was unable to grant any of the applications for CPOs. In particular, the CAT noted that it was unable to grant the CPO applications for the proposed opt out proceedings in their current forms due to a defect in relation to the identification of the class; the absence of methodology for infringement and its counterfactual; and concerns about the practicality and proportionality of the methodology advanced for resolving acquirer and merchant pass on issues. The CAT was unable to grant the CPO applications for the proposed opt in proceedings in their current forms due to issues that flowed from the class definition and there being no adequate methodology for infringement and its counterfactual. The CAT stayed all four CPO applications and granted the PCRs a period of eight weeks from the date of the CAT's judgment to notify the CAT and the defendants of any intention to present revised proposals for any of the proposed collective proceedings.

Law stated - 09 May 2023

Have courts certified collective proceedings in antitrust matters?

Following the UK Supreme Court's judgment in Merricks , the CAT has certified 10 collective proceedings orders. These include David Courtney Boyle & Edward John Vermeer v Govia Thameslink Railway Limited & Others ; Road Haulage Association Limited v Man SE and Others; Justin Gutmann v Govia Thameslink Railway Limited & Others; Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd; Consumers' Association v Qualcomm Incorporated ; Justin Le Patourel v BT Group PLC ; Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others ; Justin Gutmann v London & South Eastern Railway Limited, and v First MTR South Western Trains Limited and Another ; and Walter Hugh Merricks CBE v Mastercard Incorporated and Others .

In the High Court, Emerald Supplies Limited's attempt to bring a quasi-class action was rejected at first instance, a decision that was upheld by the Court of Appeal.

Law stated - 09 May 2023

Opting in or out

Can plaintiffs opt out or opt in?

Under section 47B of the CA 1998, it is possible to bring either opt-in or opt-out collective proceedings. Opt-in collective proceedings are those brought on behalf of each class member who opts in by notifying the representative. Opt-out collective proceedings are brought on behalf of each class member except those who opt out by notifying the representative or who are not domiciled in the United Kingdom (unless they opt in). Where the CAT gives a judgment or makes an order in collective proceedings, the judgment or order will be binding on all represented persons unless the CAT specifies a subclass of represented persons or individual represented persons to whom it will not apply (CAT Rule 91(1)).

In Justin Le Patourel v BT [2021] CAT 30, the PCR Le Patourel sought a CPO for consumers of BT residential landline services, claiming that BT charged excessive prices to these customers on the basis of a review conducted by Ofcom in 2017 of the market for stand-alone landline telephone services. The application was brought on an opt-out basis, which was challenged by BT on grounds that: (1) because all the potential claimants are, or have been in the recent past, customers of BT, they are easily identifiable; (2) the Tribunal may not have jurisdiction to enable damages to be paid out to each customer via a credit to their account or something similar, if customers could be identified; (3) that the class representative's own proposed plan for distribution of damages, if the claim succeeded, would involve filling out a claim form by each customer who may be contacted (with BT's assistance) online, by post or by telephone; and (4) that, for the proportion of customers who used their residential landlines for business purposes, BT may have a pass-on defence, which could not properly be run on an opt-out basis as BT would not know at the outset which customers were in the potential pass-on group.

The CAT concluded that the opt-out basis was clearly more appropriate and suitable than an opt-in basis. The CAT agreed with the PCR that there is a real difference between the option to join a legal action at the outset and claiming a damages entitlement later on once the case has been won, that it did have the power, under rule 93(1), to order a claims administrator or BT to effect an account credit to the relevant customer, and that it would be for BT to try and work out which customers are using the landlines for business purposes for the identification of a pass-on group. BT appealed the CAT's judgment to the Court of Appeal ([2022] EWCA Civ 593), which upheld the CAT's decision to certify the CPO on an opt-out basis. Green LJ held that: (1) the balancing exercise of opt-in versus opt-out was well within the CAT's margin of discretion, and there was no error of law; (2) the CAT was correct to conclude that it had the power to order an account credit, and it was open to the Tribunal, following an award, to seek proposals as to how best to achieve an informal, mediated method of distributing the award, which could include any creative solution; and (3) if the CAT had sought to create a new test based on the merits of the claim, for certification on an opt-out basis, this would have been an error of law, but it did not do so. Finally the Court of Appeal suggested that there were a number of points made in the CAT Guide to Proceedings about collective proceedings that might, when the Tribunal considers that it has sufficient experience, warrant reconsideration.

In Evans/O'Higgins v Barclays and Ors [2022] CAT 16, the CAT also addressed the question of whether the collective proceedings subject to the carriage dispute between the parties should proceed on an opt-in or opt-out basis. The CAT found it had a discretion in determining the outcome of the opt-in versus opt-out issue, and could not simply 'rubber stamp' the applicants' choice in framing their applications. In assessing this question, the CAT was not concerned with whether the conditions for eligibility for certification as collective proceedings were met, but whether there were elements of those conditions that indicate the proper outcome of the opt-in versus opt-out issue. The CAT found that the fact that neither the O'Higgins representative nor the Evans representative was a 'pre-existing' body was a factor pointing away from certifying on an opt-out basis. If the CAT had before it a trade association, whose established purpose was to represent a specific class that had suffered alleged harm, but found it difficult to corral members of the class into opting-in, that would be a factor in favour of certifying on an opt-out basis. However, the CAT found that the fact that both representatives in this case had come forward, not at the behest of the class, but at the behest of the lawyers they instructed (who had themselves failed to 'build a book') was an indicator against certifying on an opt-out basis. The Tribunal was also concerned that there was a risk that the PCRs would effectively be forced into an early settlement because of a lack of a sufficiently large fighting fund. Although one of little weight, this factor inclined the Tribunal against opt-out collective proceedings.

The Tribunal considered that the extent to which the representative was able to pay the respondents' costs was irrelevant to whether the claim should proceed on an opt-in or an opt-out basis. The CAT found that the benefit it had to look for was access to justice. The fact that the claim was brought on an opt-out basis was a factor that, in this case, weighed strongly in favour of certification on as an opt out claim. The fact that the opt-out class action would be able to recover irrecoverable costs from the undistributed damages of those who were nominally in the class but who did not claim damages, was a factor in favour of opt-out certification. In considering whether there were any separate proceedings, the existence of a separate but related non-collective High Court claim by Allianz indicated that there was an appetite to bring this sort of claim and supported the sense that the putative class members were choosing not to involve themselves in the proceedings the applicants wished to bring on their behalf.

When considering the nature and the size of the class in terms of identifiability, commercial sophistication and ability to look after themselves, the CAT suggested that, in light of the efforts of the claimant firms involved, there was simply no enthusiasm or desire to take this matter forward, even if it costs a class member nothing. The CAT also considered that the strength of the claims, and whether it was practicable for the proceedings to be brought as opt-in proceedings, were additional factors that apply specifically in relation to the opt-in versus opt-out issue. Consideration of strength should not involve a mini trial and should be gauged principally by reference to the plausibility of the case made in the pleadings. The Tribunal should approach this issue with a degree of trepidation and caution, particularly where the determination of this issue may cause collective proceedings not to be brought at all. As a general rule, the weaker a case, the less justification there is for certifying on an opt-out basis.

In Evans/O'Higgins , the CAT found that the claims pleaded were so weak that they were liable to be struck out, although it did not do so. Their lack of particularity made it effectively impossible to gauge the strength of any case that might be made by the applicants if they were to plead matters more fully. This was a powerful reason against certification. In terms of practicability, this needed to be considered from the standpoint of the members of the class concerned; it was a legal standard assessed by the reasonable class member. It required consideration of why the more obvious route of opt-in proceedings was not being taken. The CAT noted that considerable efforts had been made by one of the claimant firms having contacted some 321 firms and invested more than 6,000 hours over four years in trying to build a book of claimants, resulting in only 14 advisory retainers. Although some of these institutions had theoretical claims exceeding £1 million, it was not possible to assemble a large enough group to make a group action economically feasible on an opt-in basis. When assessing the composition of the class, it was clear that these were not Merricks -type claims, where the individual claims of the whole class, or substantially the whole class, are so small that one can see why members of the class would simply not be interested to sign up a claim that ought to be brought to rectify a market-wide wrong. The putative class members will, on the whole, be sophisticated potential litigants capable of looking after themselves. Nor could it be said that the putative class members will be ignorant of these potential claims. To the contrary, the efforts of the claimant law firms evidence that there appeared to be a deliberate decision not to participate. The CAT could see no reason why it was not practicable for the putative class to join on an opt-in basis, given the sophistication, the class knowledge and the potential size of claim. The inference (and the CAT considered it a strong one) was that the potential class members were not opting in because they did not want to, and not because opt-in proceedings were not practicable. These weighed strongly against opt-out certification. Overall, the CAT considered that the factors pointing towards certifying on an opt-out basis were substantially outweighed by the strength and practicability factors. The CAT has given permission for both claims to appeal to the Court of Appeal, stating that the exercise of CAT's discretion involved traversing the whole of a relatively new area of law in circumstances where one member of the Tribunal dissented. The CAT concluded that there was a real prospect of the O'Higgins and Evans PCRs persuading the Court of Appeal that the discretion exercised by the majority of the Tribunal was sufficiently flawed as to be erroneous in law.

In UK Trucks Claim Limited v Stellantis NV and Others and Road Haulage Association Limited v Man SE and Others [2022] CAT 25, the CAT considered two competing CPO applications made by UK Trucks Claim Ltd (UKTC), a special purpose vehicle, and the Road Haulage Association Limited (RHA), a trade association. There were a number of key differences between the applications, including that UK Trucks Claim Limited (UKTC) sought to bring collective proceedings on an opt-out basis, whereas the RHA sought to bring collective proceedings on an opt-in basis. UKTC sought an award of aggregate damages, whereas the RHA did not. UKTC sought damages in respect of only new trucks, and the RHA claim covered both new and used trucks. The UKTC claim covered trucks acquired in the UK, whereas the RHA claimed extended to certain trucks acquired in the European Economic Area. The claims also differed in the length of the claimed 'run-off period' before prices are assumed to have returned to competitive levels; the proposed class definition in the RHA claim assumed a longer run-off period such that the class covered those who acquired trucks up to 17 May 2019, rather than December 2011 as in the UKTC claim. Both proceedings comprised claims by those who acquired trucks for use in providing carriage either as a haulier for third parties or in their own business and both proceedings exclude truck dealers, however defined the proposed class differently in terms of exclusions. The claims also approached the estimation of loss by very different methodologies. The CAT held that the claims were in principle eligible for collective proceedings, and that the CAT had to determine which of the two applications was preferable. However, the CAT concluded that the RHA opt-in proceedings were preferable to the UKTC opt-out proceedings, or even to the UKTC proceedings on an opt-in basis. The CAT felt more confidence in the robustness of the method proposed by RHA's expert economist, in part because the use of regression analysis that is well tested and widely acknowledged. Addressing whether proceedings should be brought as opt in or opt out, the Tribunal noted that RHA is proposing opt-in proceedings, which would give the RHA access to a significant volume of data from the class members to be deployed for the purpose of sophisticated analysis that takes more account of the heterogeneity of the trucks market. The CAT also found that it was practicable for the proceedings to be brought as opt-in proceedings, given the RHA established a website dedicated to the proceedings, which provided information for class members to register their interest. The Tribunal dismissed the proposed defendants' argument that the RHA application was unsustainable because the inclusion of claimants for both new and used trucks in the class would give rise to an irreconcilable conflict of interest on the part of the RHA and its legal advisors.

The CAT considered that there were two important and related distinguishing features of the RHA action: (1) the RHA sought certification of opt-in proceedings and this distinction was fundamental because in opt-out proceedings the class representative had no direct engagement with the class members it was representing and they would nonetheless be bound; and (2) it was very relevant that there was a substantial overlap between class members who acquired new trucks and class members who acquired used trucks - these are not two discrete categories. On this basis, the CAT dismissed the UKTC application in favour of the opt-in RHA application, subject to an amendment to the proposed run-off period described above.

Law stated - 09 May 2023

Judicial authorisation

Do collective settlements require judicial authorisation?

In general terms, settlement agreements entered into between parties to litigation do not require the consent of the court or the CAT. In normal circumstances, the claimant can then withdraw (discontinue) the claim unilaterally. However, in proceedings brought by more than one claimant, if a settlement is entered into with one of the claimants, the consent of either the other claimants or the court is required to discontinue the claim (CPR 38.2(2)(c)). Settlements should include a provision for payment of costs or state that each party is to bear its own costs. In the High Court, where a claimant discontinues the claim, it is required to pay the defendant's costs (CPR 38.6). In the CAT, a claimant may only withdraw the claim prior to the hearing with the consent of the defendant or with the permission of the CAT (or if no tribunal has been constituted, with the permission of the president (CAT Rule 44(1)). Where a claim is withdrawn, the CAT may make any consequential order it thinks fit (CAT Rule 44(2)).

The CRA 2015 introduced a new opt-out collective settlement regime for competition law in the CAT. Any opt-out settlement must be judicially approved. Section 49A of the CA 1998 applies to cases where a collective proceedings order has been made and where the CAT has specified that the proceedings are on an opt-out basis. An application for approval of a proposed collective settlement must be made to the CAT by the representative and the defendant (or where there is more than one, those defendants who wish to be bound by the proposed settlement) in the collective proceedings (CAT Rule 94(1)).

The CAT may approve the settlement only if it is satisfied that its terms are just and reasonable. In determining whether the terms are just and reasonable, under CAT Rule 94(9), the CAT will take into account all relevant circumstances, including:

- the amount and terms of the settlement, including the payment of costs, fees and disbursements;
- the number or estimated number of persons likely to be entitled to a share of the settlement;
- the likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of the settlement;
- the likely duration and cost of the collective proceedings if they proceeded to trial;
- any opinion by an independent expert and any legal representative for the applicants and, in certain circumstances, the views of any represented person or any class member; and
- the provisions regarding the disposition of any unclaimed balance of the settlement.

The settlement will bind all persons falling within the class of persons described in the collective proceedings order who were domiciled in the United Kingdom and did not opt out or who opted into the collective proceedings. The CAT may also make an order in relation to cases where a collective proceedings order has now been made (section 49B of the CA 1998). Any CAT-approved collective settlement order will be binding on all persons falling within the class except those who opt out or are not domiciled in the United Kingdom (and do not opt in) (CAT Rule 94(9)).

Law stated - 09 May 2023

National collective proceedings

If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

The United Kingdom is divided into three jurisdictions: England and Wales, Scotland and Northern Ireland. Claims can be brought separately, and simultaneously, in more than one jurisdiction, but the courts of one jurisdiction cannot order the claims brought in one or both of the other jurisdictions to be consolidated.

However, if simultaneous proceedings are commenced across the different jurisdictions, it is open to the defendants to challenge the jurisdiction of one of the courts on the basis that the other one is the more appropriate forum for resolution of the dispute. It is also likely to be in the claimant's interests (in terms of both costs and expediency) to bring their claims in one jurisdiction.

Under the Competition Appeal Tribunal Rules (SI 2015 No. 1648), the CAT may, at any stage of the proceedings, on the request of a party or of its own initiative, and after the observations of the parties, direct that all or part of a claim brought under section 47A of the CA 1998 be transferred to the High Court or a county court in England and Wales or Northern Ireland, or the Court of Session or a sheriff court in Scotland (CAT Rule 71).

Law stated - 09 May 2023

Collective-proceeding bar

Has a plaintiffs' collective-proceeding bar developed?

There are an increasing number of claimant firms in England and Wales. Such is the strength of the claimant bar, we have also now seen two cases in which different claimant firms sought to bring claims on behalf of competing PCRs for the same or similar classes of potential class members in *UKTC/RHA* (Trucks) and *O'Higgins/Evans* (Forex).

Law stated - 09 May 2023

REMEDIES

Compensation

What forms of compensation are available and on what basis are they allowed?

Follow-on actions are based on the tort of breach of statutory duty, and damages are awarded on the tortious basis (ie, the amount of the loss, plus interest). This is in line with European Court of Justice (ECJ) case law (*Manfredi v Lloyd Adriatico* , Case C-295/04, [2006] ECR I-6619), which requires injured persons to be able to seek compensation not only for actual loss but also lost profit and interest. How damages might be calculated in a competition law claim will depend on the facts of the case and the nature of the infringement. In relation to a cartel, the damages should be the cartel overcharge, adjusted as necessary for passing on. In relation to exclusionary abuses, the damages should be the profit that the claimant would have made had it not been excluded from the market or marginalised by the infringing conduct. The Damages Directive outlined that it was presumed that cartel infringements cause harm, although the infringer will have the right to rebut that presumption.

Establishing the counterfactual and quantifying loss

In Arkin v Borchard Lines Limited (No. 4) [2003] EWHC 687 (Comm), the judge considered that an assessment of damages would involve considering what loss, if any, the infringement had as a matter of 'common sense' directly caused to the claimant (although he held that, on the facts, there had been no breach of the competition rules). For this purpose, it would be necessary to consider the 'counterfactual' (ie, what the market conditions would have been like without the infringement), and the likely difference between the price actually paid and the price that would have been paid in such a competitive market. In Enron Coal Services v English Welsh and Scottish Railways [2009] CAT 36, the CAT concluded that there was no loss at all because on the counterfactual the claimant would have been no better off.

BritNed Development ltd v ABB and Others [2018] EWHC 2616 (Ch) was a claim for damages arising out of a restriction of article 101 of the Treaty on the Functioning of the European Union (TFEU). The claim was a follow-on damages claim relating to the European Commission's decision in high-voltage submarine and underground cable projects. In assessing damages, Marcus Smith J said that at the quantification exercise, English law moved away from the balance of probabilities and involved the taking into account of all manner of risks and possibilities. Quantification of loss was not a question of mathematical calculation, but turned on developing a robust understanding of what would have happened in the counterfactual case. The court preferred an approach that focused on the specific project in relation to which compensation was sought rather than alternative projects that were not subject to the infringement. In considering the overcharge, the court found that it was necessary to have regard to the object and scope of the statutory duty imposed.

To require a claimant to show monetary harm to found a cause of action was to ignore the purpose of article 101 TFEU and to impose too great a burden on the claimant. Rather, what the claimant must show, as the 'gist' of the damage, was that the unlawful conduct of the defendant had, on the balance of probabilities, in some way restricted or reduced the level of the claimant's consumer benefit. Consumer benefit was a broad concept, but it might take the form of an increased price payable or a reduction in the number of suppliers properly participating in a tender process. Marcus Smith J concluded that the common costs for the project did not contain an overcharge owing to the direct influence of persons aware of the cartel. However, the effect of the cartel was to insulate the defendants from inefficiencies in their own product, and this was an overcharge arising out of this 'baked-in' inefficiency. In addition, there was a 'cartel saving' in the defendants' common costs owing to the saving attributable to the cartelists not having to compete. In a later unreported judgment, Marcus Smith J also ordered that the defendants and the claimant must each pay their own costs.

Both BritNed and ABB appealed the High Court judgment. The Court of Appeal dismissed BritNed's appeal, and held that the High Court was correct that there was no direct overcharge in relation to the project, and was correct to dismiss BritNed's claim for lost profits, and in reducing the damages to reflect the existence of a regulatory cap. However, the Court of Appeal allowed ABB's appeal, overturning the High Court's finding on cartel savings (that there was a cartel saving in the defendants' common costs for not having to compete). The court concluded that the award of damages on the basis of savings made by the cartelist, rather than loss to the victim of the cartel, constituted an error of law as it did not comply with the principle that cartel damages should be compensatory in nature. In any event, the court held it had not been established that cartel savings had affected the price of the BritNed project.

In the CAT, an order for interim relief was made in Healthcare at Home v Genzyme [2006] CAT 29. The case involved a margin squeeze by the supplier of a particular drug; the CAT's judgment specified the percentage discount that should have been applied to the supplier's pricing to ensure a reasonable profit margin. A purchaser claimed the value of the percentage discount against the amount purchased, plus exemplary damages. The CAT considered that, if the claimant could demonstrate that the effects of the infringement had continued past the period of infringement found, damages could extend for that longer period. The CAT accepted that the lost profit margin was an appropriate measure of damages, and made an interim award based on the likely percentage discount that it would find should have been charged. The case settled before final judgment.

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

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

Exemplary damages, restitutionary damages and an account of profits

For claims where the loss or damage suffered was wholly on or after 9 March 2017, under paragraph 36 of the Regulations, a court or tribunal may not award exemplary damages in competition proceedings. However, for claims where loss or damage was suffered before, there are circumstances in which exemplary damages may be awarded.

In Devenish Nutrition v Sanofi-Aventis [2007] EWHC 2394 (Ch), the High Court held on a preliminary issue that the claimants were not entitled to exemplary or restitutionary damages, or to an account of profits, in circumstances where fines had been imposed by the regulator for competition law infringements (or reduced or waived in the case of leniency and immunity applicants). On appeal, the Court of Appeal confirmed that the claimants were not entitled to restitutionary damages or to an account of profits ([2008] EWCA Civ 1086). However, in 2 Travel Group plc (In Liquidation) v Cardiff City Transport Services Limited [2012] CAT 19, the CAT held that 2 Travel was entitled to both compensatory and exemplary damages.

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

Law stated - 09 May 2023

Other remedies

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

High Court

Aside from damages, claimants can seek injunctions in the High Court in respect of either an ongoing or anticipated breach of competition law (Civil Procedural Rules (CPR) 25) . Prohibitory injunctions (requiring the defendant to refrain from conduct), mandatory injunctions (requiring a defendant actively to do something) and quia timet injunctions (restraining the defendant from engaging in future actions) are all available. To succeed in being awarded an interim injunction, the applicant must show it has a good arguable case, that damages would be inadequate to remedy its losses and that the balance of convenience favours an injunction being granted (American Cyanamid v Ethicon Ltd [1975] AC 396). Where an interim injunction is sought, it is necessary for the applicant to give a cross-undertaking in damages to cover any loss suffered by the defendant as a result of the injunction in the event of the applicant losing the case.

Timing is a critical issue. In AAH Pharmaceuticals v Pfizer Limited & Unichem Limited [2007] EWHC 565 (Ch), the High Court refused to award an interim injunction in circumstances where eight wholesalers sought to prevent Pfizer terminating supply agreements with them but brought their injunction application a month before implementation of Pfizer's proposals, even though they knew of Pfizer's proposal six months in advance. The last-minute nature of the application and the complexity of the analysis required to establish whether Pfizer's actions were anticompetitive caused the court to refuse the wholesalers' application.

An example of a prohibitory injunction is Adidas v ITF [2006] EWHC 1318 (Ch), in which Adidas successfully argued that the International Tennis Federation's restriction on the size of logos applied to tennis players' uniforms was an abuse of its dominant position and obtained interim relief against the application of the restriction at that year's tournaments. From Adidas's point of view, this allowed it to pursue its objective (ie, changing the rules rather than receiving damages).

An example of a mandatory injunction is Software Cellular Network Ltd v T-Mobile Limited [2007] EWHC 1790 (Ch), in which Truphone obtained an injunction obliging T-Mobile to purchase services on the basis that T-Mobile's refusal to activate relevant numbers amounted to an abuse of a dominant position (even though T-Mobile had only a 20 to 30 per cent market share and there was no precedent for such a refusal to purchase a service being characterised as an abusive refusal to supply).

The High Court can also award security for costs (CPR 25).

CAT

Following the introduction of the Consumer Rights Act 2015, the CAT has the power to grant injunctions. An injunction granted by the CAT has the same effect as an injunction granted by the High Court and will be enforceable as if it were an injunction granted by the High Court (section 47D(1) of the Competition Act 1998 (CA 1998)). In deciding whether to grant an injunction, the CAT must apply the principles that the High Court would apply. The CAT can also make interim injunctions at any time (CAT Rule 68(1)). An application for an interim injunction must be supported by evidence unless the CAT directs otherwise (CAT Rule 69(2)). An application for an interim injunction can be made without notice if it appears to the CAT that there are good reasons for not giving notice that must be stated as part of the evidence in support of the application (CAT Rule 69).

Interim relief in the form of interim payments may be sought from the CAT (CAT Rule 66). Such an order would require the defendant to make a payment on account of any damages (excluding costs) for which the CAT may hold the defendant liable (CAT Rule 66(1)). The conditions for such an award to be made are: the defendant against whom the order is sought has admitted liability to pay damages to the claimant or the claimant has obtained judgment against the defendant for damages to be assessed or for a sum of money (other than costs) to be assessed; and the CAT is satisfied that, if the claim were to be heard, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant. In Healthcare at Home v Genzyme Ltd [2006] CAT 29, the CAT ordered an interim payment of £2 million to be made to the claimant in the context of proceedings brought following on from an Office of Fair Trading (OFT) (as it then was) finding that Genzyme had operated an unlawful margin squeeze in breach of Chapter II of CA 1998.

The CAT can also order security for costs (CAT Rule 59), in circumstances similar to those set out in CPR 25 for claims in the High Court. Indications to date suggest the CAT will consider in particular whether a costs order is ultimately likely to be made, whether a costs order would stifle the case, and the reason for the request for a costs order. In BCL Old Co v Aventis [2005] CAT 2, the CAT declined to award security for costs primarily because it was not satisfied there was a substantial likelihood that the defendants would in due course benefit from a costs order. In Commercial Buyers Group Limited v Associated Lead Mills Limited and Others [2023] CAT 17, the CAT declined to award security for costs against the claimant on the basis that the claimant did not have the funds to provide security for costs and so an order would stifle a genuine claim.

CAT Rule 59 prescribes a procedure for a defendant to obtain an order for security for costs from the CAT. The CAT may make an order for security for costs if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order and one or more of the conditions set out in the Competition Appeal Tribunal Rules (SI 2015 No. 1648) (the CAT Rules) or another enactment apply (CAT Rule 59(4)).

Law stated - 09 May 2023

Punitive damages

Are punitive or exemplary damages available?

For claims where the loss or damage suffered was wholly on or after 9 March 2017, under paragraph 36, Schedule 8A of the CA 1998 (as amended), a court or tribunal may not award exemplary damages in competition proceedings. However, for claims where loss or damage was before 9 March 2017, punitive and exemplary damages are available in certain limited circumstances in England and Wales.

Section 47C of the CA 1998 provides that the CAT may not award exemplary damages in collective proceedings.

Law stated - 09 May 2023

Interest

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

The ECJ in Manfredi v Lloyd Adriatico (Case C-295/04 [2006] ECR I-6619) held that interest should be available in respect of claims for damages based on infringements of competition law (the principle of equivalence). The English courts have discretion to order simple interest on damages awarded. The applicable rate is normally the claimant's borrowing rate, as assessed by the court. In the absence of such evidence, a fair commercial rate would be applied. In addition, the claimant can obtain compound interest if it can prove actual losses (eg, if it can show that it has in fact had to borrow money and pay interest on it).

Sainsbury's v Mastercard [2016] CAT 11 was the first time that compound interest has been awarded in a judgment regarding competition law. Following Sempra Metals , it found that interest losses are in principle recoverable, but subject to proof of loss and any other relevant rules relating to the recovery of damages. A claim for interest is a loss like any other, recoverable according to the usual rules. Precisely what must be pleaded and proved for a claim for interest to succeed depends on the facts of the individual case.

The CAT noted that Sainsbury's factual witnesses provided evidence in respect of what would have happened if the interchange fees applied by Mastercard had been lower as well as a detailed description of Sainsbury's budget process and the way in which it monitored costs and adjusted prices. It found that had the overcharge not been made, Sainsbury's cash balances would have been higher, and Sainsbury's would have received interest on these sums. In addition, had the overcharge not been made, Sainsbury's borrowing needs would have been less, and it would not have incurred the costs of borrowing.

Applying a 'broad axe', the CAT found that had there been no overcharge, 50 per cent of an amount equivalent to the overcharge would have been passed on to Sainsbury's customers (albeit not in a manner sufficient to reduce the damages due to it) and 50 per cent would have been retained by Sainsbury's. Sainsbury's would have received interest on this second 50 per cent.

In Royal Mail Group Limited v DAF Trucks Limited and others, BT Group PLC and Others v DAF Trucks Limited and Others [2023] CAT 6, the CAT followed the approach in Sainsbury's v Mastercard [2016] CAT 11 and awarded compound interest. The CAT noted that a claim for compound interest can better reflect a claimant's actual interest losses and that it is perhaps surprising that compound interest is not ordered more often.

The CAT may also order that interest is payable on damages awarded by it for all or any part of the period between the date when the action arose and the date of decision of the award for damages, or, if the sum has been paid before the decision making the award, the date of payment (CAT Rule 105(3)). Unless the CAT directs otherwise, the rate of interest must not exceed the rate specified by any order made under section 44 of the Administration of Justice Act 1970.

Law stated - 09 May 2023

Consideration of fines

Are the fines imposed by competition authorities taken into account when setting damages?

The High Court's judgment in Devenish Nutrition Limited v Sanofi-Aventis and Others [2007] EWHC 2394 (Ch) shows that where fines have been imposed by competition authorities (or not imposed because the defendant was a leniency applicant), neither punitive or exemplary damages, nor restitution or account of profits, will be available in follow-on damages claims. The Court of Appeal upheld the judgment in respect of restitution or account of profits ([2008] EWCA Civ 10). However, the CAT awarded exemplary damages in 2 Travel ([2012] CAT 19) where the defendant had been granted immunity by the OFT (as it then was) on the basis of conduct of minor significance. Section 47C of CA 1998 provides that the CAT may not award exemplary damages in collective proceedings.

For claims where the loss or damage suffered from an infringement takes place before 9 March 2017, there are no provisions protecting leniency or immunity applicants from follow-on damages claims brought in England and Wales. However, for claims where the loss or damage suffered from an infringement takes place on or after 9 March 2017, paragraphs 15 and 16 of Schedule 8A (CA 1998) apply to undertakings that have been granted immunity from financial penalties under a cartel leniency programme. Paragraph 15 states that an immunity recipient is not 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 liability) except in certain circumstances.

Where loss or damage arising from competition law is the subject of a consensual settlement between an infringer and a complainant, the complainant has no cause of action against the infringer in respect of the loss or damage. However, this does not apply where another infringer is liable to the settling complainant but is unable to pay, and the settling infringer's liability is not expressly excluded by the terms of the consensual settlement (paragraph 40, Schedule 8A of the CA 1998).

As the normal measure of damages in the English court is compensatory, the fact that fines have been imposed by the competition regulator would not normally lead to a reduction in the damages awarded.

Law stated - 09 May 2023

Legal costs

Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

High Court

The rules on costs in the High Court are set out in CPR 44 to 48 and the accompanying Practice Directions. The general rule is that costs follow the event, namely that the unsuccessful party pays the costs of the successful party (CPR 44.2). However, the courts have a general discretion in awarding costs and will have regard to all the circumstances of the case, including the conduct of the parties, whether a party was partially successful, and any payment into a court or settlement offer that is drawn to the court's attention. Even where a costs order is made, the successful party is generally only likely to recover around two-thirds of its costs.

In exceptional cases, a successful party may seek a costs order against a third party, for example, if a third party has helped to fund litigation on behalf of the losing party. However, following Arkin v Borchard Lines Limited [2005] EWCA Civ 655, it is necessary in this regard to distinguish between 'pure funders' (who have no interest personally in the litigation and do not stand to benefit from it) and professional funders. The court in Arkin held that costs orders would not be made against pure funders; against professional funders, costs orders may be made to the extent of the funding provided.

In rare cases, a 'wasted costs' order may be made to hold legal representatives personally liable for costs. Wasted costs orders are imposed to punish lawyers for wasting the court's time; for example, in cases of serious improper, unreasonable or negligent acts or omissions in the course of the litigation.

CAT

CAT Rule 104 addresses the issue of costs. It provides that the CAT may, at its discretion, make any order it thinks fit in relation to the payment of costs. In contrast to the provisions in relation to the High Court, in the CAT, there is no general rule that costs follow the event. However, the CAT Rules provide a number of factors that the CAT may take account of when determining the amount of costs. These factors are set out in CAT Rule 104(4) and include, for example, whether a party has succeeded on part of its case and any admissible offer to settle that has been made. While CAT case law sets out that the starting point is that the successful party is entitled to recover its reasonable costs (The Racecourse Association v OFT [2006] CAT 1), the CAT acknowledges that a balance must be struck between ensuring that costs awards do not undermine the effectiveness of the competition regime whilst ensuring a just result for both parties (CMA v Flynn Pharma [2020] UKSC 12).

The CAT Rules also include specific cost consequences relating to the acceptance or rejection of a settlement offer that are similar to those applicable in the High Court under the rules on offers to settle in CPR Part 36 . Under the CAT Rules, an offer to settle is labelled a 'Rule 45 Offer'. In addition, CAT Rule 57(1)(d) states that if any party fails to comply with any direction, the CAT may order that the party (or his or her representative) be subject to an order for costs as the CAT sees fit.

The CAT also has the power to impose a cost-capping order on the parties (Rule 19(2)(r) and 53(2)(m)). This power is only used in exceptional circumstances, with costs budgeting usually preferred (Durham Company Limited v Durham County Council [2023] CAT 14).

In Merricks v Mastercard [2017] CAT 27, the respondent sought an order for costs in their favour, following an earlier judgment by the CAT that dismissed an application for a collective proceedings order (CPO). The applicant contended that the CAT had no jurisdiction to make an order for costs concerning an application for a CPO that was unsuccessful. They argued that CAT Rule 98 provides that costs may be awarded to or against the class representative but may not be awarded to or against a represented person who is not the class representative. The CAT rejected that submission as fundamentally misconceived. If a CPO application is unsuccessful, then Rule 98 is not engaged, but the general power concerning costs (CAT Rule 104) continues to apply.

In deciding its approach to awarding costs, the CAT said that, in private litigation, its practice is that the appropriate starting point is that the successful party should be awarded its costs (following Albion Water v Dwr Cymru Cyfngedig [2013] CAT 16). The CAT was not persuaded that, in relation to a contested CPO application, there were good grounds why the CAT should not adopt as a starting point that the loser is, in principle, liable for the relevant costs of the successful party. When considering the conduct of the parties under CAT Rule 104(4) the CAT said that where neither party has behaved unreasonably, the net effect of their conduct is neutral. Adopting a broad-brush approach, after deducting the fees of specialist costs counsel, the CAT considered that the respondent should be awarded 80 per cent of their costs. However, in relation to interest on those costs, the CAT considered that the applicant was correct that the CAT Rules in their current form did not enable the CAT to award interest on costs. The CAT recognised that this was a lacuna in the rules that required urgent attention.

Law stated - 09 May 2023

Joint and several liability

Is liability imposed on a joint and several basis?

Although the point has not been decided, it is generally understood that in cases before both the CAT and the High Court, liability is likely to be joint and several in respect of defendants in a cartel action.

Under paragraph 12 of Schedule 8A (CA 1998), small or medium-sized enterprises (SMEs) are liable only to their direct or indirect purchasers if their share in the relevant market was below 5 per cent at any time throughout the infringement, 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. This exception does not apply if the SME led the infringement, coerced others to participate or has been found to have previously infringed competition law.

Law stated - 09 May 2023

Contribution and indemnity

Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

For claims where the loss or damage suffered from an infringement took place wholly on or after 9 March 2017, paragraphs 16 and 38 to 41 (Schedule 8A of CA 1998) apply in relation to contribution. The amount of contribution that one person may recover from another must be determined in light of their relative responsibility for the whole of the loss or damage caused by the infringement. That amount must take into account any damages paid by the other person in respect of the loss or damage in accordance with a consensual settlement between an infringer and a claimant. Where loss or damage arising from an infringement is the subject of a settlement between the infringer and a claimant, it is also the subject of a damages claim by the settling complainant, and an undertaking other than the settling infringer is liable to pay damages to the settling complainants, that undertaking may not recover contribution from the settling infringer. This applies regardless of the terms of the settlement.

In England and Wales, there is provision for contribution proceedings to be brought under the Civil Liability (Contribution) Act 1978 , which allows any person liable for damage suffered by another to recover a contribution from a third party who is also liable in respect of the same damage. Contribution proceedings may be brought by a defendant joining another party or parties to the action, or by bringing contribution proceedings against them after judgment has been made. In Emerald Supplies Ltd v British Airways plc [2009] EWHC 741 (Ch), British Airways was sued in the High Court for damages allegedly sustained by the claimants in relation to a cartel in which British Airways and a number of other airlines were alleged to have infringed competition law. British Airways sought to join 32 other airlines to this action, not all of which were ultimately addressees of the Commission decision (British Airways later discontinued its attempts to join the airlines that were not addressees of the Commission decision).

How liability is apportioned between defendants is a matter for the court, which will make such award as it considers just and equitable in light of each person's actual responsibility. It remains to be seen whether the court will consider parties to a cartel to be liable in equal proportions, or whether damages will be apportioned, for example, according to 'culpability' in relation to the operation of the cartel (eg, if one party was the ringleader) or according to the amount of sales each party made to the claimant.

If a claim is settled, the defendant can still seek to bring a claim for contribution against another party. Section 1(4) of the Civil Liability (Contribution) Act 1978, states that a person who has agreed to make any payment in bona fide settlement of any claim made against him or her shall be entitled to recover contribution without regard to whether he or she is or ever was liable in respect of the damage, provided that he or she would have been liable, assuming that the factual basis of the claim against him or her could be established.

This was considered in WH Newson v IMI plc [2015] EWHC 1676 (Ch), where Delta sought to challenge the Part 20 claim made against it by IMI on the basis that the claimants' claims were time-barred. In dismissing Delta's appeal, the Court of Appeal considered the application of section 1(4) of the Civil Liability (Contribution) Act 1978 (WH Newson v IMI [2016] EWCA Civ 773). The court found that section 1(4) must also be read as a whole, and its major part makes clear that a contribution claim by IMI against Delta made in the wake of IMI's bona fide settlement of WH Newson's claim does not require any investigation into whether IMI was actually liable. The court noted that it was open to Delta to argue that the settlement was not a bona fide one, for example that it was collusive, corrupt or dishonest, and if such a case was made good, then section 1(4) would not apply. However, there was no suggestion of that in this case. IMI had to prove that it would have been liable to WH Newson assuming that the factual basis of the claim could be established. Therefore, all IMI needed to prove was that such factual basis would have disclosed a reasonable cause of action against IMI such as would make IMI liable in law to WH Newson in respect of the damage.

Law stated - 09 May 2023

Passing on

Is the 'passing-on' defence allowed?

It is generally understood that the passing-on defence, if it can be proved in fact (and perhaps with the assistance of expert evidence), is available to defendants. In broad terms, the damages suffered by the purchaser of a cartelised product may be reduced if the defendant can prove that the purchaser passed on the overcharge to his or her own customers. For claims where the loss or damage suffered from an infringement took place wholly on or after 9 March 2017, paragraphs 8 to 11 of Schedule 8A (CA 1998), which deal with passing on, apply. The burden of proving the passing-on defence lies with the defendant.

Prior to Sainsbury's v Mastercard [2016] CAT 11, there was no case under English law substantively dealing with the passing-on defence, although the existence of the defence had been previously recognised. The CAT considered whether Mastercard could benefit from the defence of passing on. The CAT found that the passing-on defence was in reality not a defence at all; instead, its thrust was to prevent the over-compensation of a claimant and to ensure that the defendant does not pay damages for the same wrong twice. The CAT considered that, whereas an economist might define passing on more widely (ie, to include cost savings and expenditure), the passing-on defence was only concerned with identifiable increases in prices by a firm to its customers. The increase in price must be causally connected with the overcharge and demonstrably so. The CAT considered that the passing-on defence ought only to succeed where, on the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimants in the action, to whom the overcharge has been passed on. In its judgment, the CAT found that Mastercard's defence failed because no identifiable increase in retail price had been established, still less one that was causally connected with the infringement. The Court of Appeal upheld the CAT's decision (Sainsbury's v Mastercard and ors [2018] EWCA Civ 1536).

Mastercard (and Visa) appealed the judgment on a number of grounds, including whether the Court of Appeal found and, if so, did it err in law in finding, that a defendant has to prove the exact amount of loss mitigated to reduce damages? The Supreme Court upheld that aspect of the appeal (Sainsbury's v Visa and Mastercard and ors [2020] UKSC 24). It found that Visa and Mastercard had the legal burden of establishing that the merchants have recovered the costs incurred, but once defendants had raised the issue of mitigation, in the form of pass-on, there was a heavy evidential burden on the merchants to provide evidence of how they have dealt with the recovery of their costs in their business. In applying the compensatory principle, the court was charged with avoiding under-compensation and over-compensation but the court must also have regard to the principle that legal disputes should be dealt with at proportionate cost. The law does not require unreasonable precision in the proof of the amount of the prima facie loss that the merchants have passed on. The Supreme Court did not interpret the Court of Appeal's judgment as having held that the defendants had to prove the exact amount of the loss mitigated. Insofar as the Court of Appeal required a greater degree of precision in the quantification of pass-on from the defendant than from the claimant, the court erred. However, applying the Supreme Court's judgment, the CAT in Royal Mail Group Limited v DAF Trucks Limited and Others [2021] CAT 10 stated that there must be some plausible basis in fact for alleging that the claimant would have acted in a manner that amounts to legal mitigation for the application of the broad economic theory of pass-on. In that case, the CAT held that it is necessary to prove a proximate causative link between the overcharge and a reduction in other input costs, so as to constitute mitigation in accordance with the principles set out by the Supreme Court.

In Stellantis NV and Others v NTN Corporation and Others [2021] CAT 14, the CAT applied the test as set out in Royal Mail to an application by the defendants to plead an additional defence of mitigation. The CAT held that a defendant must establish a sufficient causal connection between the overcharge and the steps that are relied upon as amounting to the relevant mitigation. If a defendant can only point to what might be regarded as ordinary financial operations and budgetary control processes, this will generally be insufficient to establish the necessary connection between the overcharge and the relevant steps. There are some cases where a combination of factors may nevertheless permit a defendant to establish a plausible case of causation, notwithstanding the ordinariness of the financial operations and budgetary processes relied upon. However, in the absence of such factors, a defendant who only points to ordinary operations and processes for controlling costs is unlikely to demonstrate a realistic prospect of succeeding at trial in showing proximate causation.

The CAT also held that that there must be some basis other than pure theory for believing that a defence of mitigation has some factual basis for it, and the relevant facts relied upon must give rise to a plausible case of causation that carries a degree of conviction. It is possible for facts to exist from which a reasonable inference of proximate causation can be inferred. In Stellantis , the CAT found that the facts did not give rise to a plausible case of causation that carries any degree of conviction. There was no suggestion in NTN's submissions that the setting of targets could be regarded as being in any way an unusual business approach, but was an ordinary and run-of-the-mill budgetary control process. It was not introduced in consequence of the (alleged) overcharge, and operated independently and in ignorance of an overcharge. The necessary linkage between that process and the overcharge was absent and certainly implausible, at least unless there are some particular facts that plausibly give rise to the inference that the necessary causal connection existed. On appeal, the Court of Appeal upheld the CAT's judgment; the court found that the CAT applied the correct test to the pleadings. It did not misconstrue the judgment in Sainsbury's , nor did it misapply the relevant policy considerations. The CAT made no errors of law in its analysis of the pleadings and in its conclusion that they failed to meet the appropriate test. The pleaded off-setting defence lacked particularisation or evidential underpinning, was hypothetical and theoretical and, in some respects, counterintuitive, and there were no policy considerations that justified permitting this defence to continue to trial.

This was built upon by the CAT in Royal Mail Group Limited v DAF Trucks Limited and others, BT Group PLC and Others v DAF Trucks Limited and Others [2023] CAT 6. This case consisted of the trial of follow-on claims brought by the claimants following the European Commission's decision in Case AT.39824 that five truck manufacturers had carried out a single and continuous infringement of Article 101 of the TFEU and Article 53 of the Agreement on the European Economic Area between 1997 and 2011. The CAT found that, in order to establish causation following this decision, the claimants needed to show on the balance of probabilities that they suffered some monetary harm as a result of the infringement. The CAT found that, on the balance of probabilities, the evidence pointed to the existence of a cartel overcharge. It noted that there are a priori reasons for expecting that a concerted attempt by all the major European truck suppliers to restrict price competition over a 14-year period would to some extent succeed in materially affecting transaction prices. The CAT therefore found that the claimants had established the necessary causation to complete their cause of action.

The defendants had argued that any damages should be mitigated using a pass-on form mitigation defence. The CAT clarified that the legal test for causation in relation to a pass-on form mitigation defence required the defendant to prove a direct and proximate causative link between the overcharge and any increase in prices by the claimants. It was not sufficient for the defendant to say that all costs, including increases in costs are fed into the claimants' business. In order to demonstrate this link, the CAT suggested four relevant factors that the defendant could rely on. These were:

- knowledge of the overcharge or the specific cost increase in question;
- the relative size of the overcharge against the claimants' overall costs and revenue;
- the relationship or association between what the overcharge is incurred on and the product whose prices have been increased; and
- whether there are identifiable claims by identifiable purchasers from the claimants in respect of losses caused by the overcharge.

The CAT found that the defendant was not able to satisfy the legal test for causation here; as none of these four factors were present, the evidence of factual causation would need to be even stronger and the defendant was not able to establish this. The defendant also sought to rely on supply pass on and complements defences, each of which failed.

Law stated - 09 May 2023

Other defences

Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

In English law, the ex turpi causa doctrine means that a person may not benefit from relief (eg, damages) where to do so would enable him or her to benefit from his or her own illegality. This would prevent a claimant from recovering damages in respect of his or her own illegal activity. In Gibbs Mew v Gemmell [1999] ECC 97, the court held that a party to an anticompetitive agreement under what is now article 101(1) of the TFEU is prevented from recovering damages in respect of loss suffered as a result of that agreement. That judgment predates the ECJ's judgment in Courage v Crehan (Case C-453/99, [2001] ECR I-6297), which held that a party to a contract that infringes article 101(1) of the TFEU can rely on a breach of that provision to obtain relief before a national court, despite the existence of a national rule denying a person the right to rely on his or her own 'illegality' to obtain damages in circumstances where the parties are not in positions of equivalent bargaining power.

Law stated - 09 May 2023

Alternative dispute resolution

Is alternative dispute resolution available?

Alternative dispute resolution (ADR) is available in England and Wales. CPR 1.4(2)(e) specifically refers to ADR and requires the court to further the overriding objective by actively managing cases, with active case management including 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'.

Competition law issues are arbitrable if the claim alleging an antitrust infringement falls within the ambit of a contractual arbitration clause. In ET plus SA v Welter [2005] EWHC 2115 (Comm), the High Court considered that there was no realistic doubt that antitrust claims were arbitrable, and the Court of Appeal in Attheraces Limited v British Horseracing Board [2007] EWCA Civ 38 has also emphasised the positive benefits of arbitrating competition disputes. In Microsoft Mobile v Sony [2017] EWHC 374 (Ch), the High Court considered the application of an arbitration clause in a tortious claim arising from allegations of anticompetitive conduct and determined that the claim should be stayed under section 9 of the Arbitration Act 1996 .

The CAT appears to be less willing to embrace arbitration. In Claymore Dairies v OFT [2006] CAT 3, the CAT emphasised the public law nature of the CA 1998 (ie, that proceedings before the CAT are there also to protect the public interest). Where parties in the CAT wish to withdraw their dispute and transfer to private arbitration, it is necessary to obtain the Tribunal's consent to a stay of the proceedings, although proceedings can be withdrawn without the Tribunal's permission, provided the defendant gives consent (CAT Rule 44(1)(a)).

Law stated - 09 May 2023

UPDATE AND TRENDS

Recent developments

Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

A number of collective proceedings brought in the Competition Appeal Tribunal (CAT) had been stayed pending judgment of the Supreme Court in Merricks v Mastercard . The CAT is now proceeding to certify these stayed claims, whose progression continues to give greater clarity to what is required of claimants when bringing collective proceedings before the CAT. In O'Higgins/Evans and UKTC/RHA, the CAT has dealt with the first two carriage disputes in which competing proposed class representatives (PCRs) seek to manage the same or similar claims on behalf of the same or similar classes. In addition, the CAT has begun to refuse to certify claims on the basis of the strength of their pleading, economic expert evidence and methodologies for determining liability and quantum at trial. In the coming year, we will continue to see the CAT clarify its approach to determining the extent to which PCRs bear a substantial evidential burden at certification stage, rather than at trial, and whether this could develop into a meaningful barrier to new and more innovative claims (in particular stand-alone claims) coming forward.

On 22 April 2022, the UK government announced a consultation to reform the CAT rules governing procedure of cases in the Tribunal. This included a technical review of the CAT rules, working with the Tribunal and other interested parties, to encompass updating and improvement of case management procedures including in the context of private actions and with a view to enhancing the Tribunal's ability to conduct proceedings by electronic means. Following this, the UK government intends to expand the CAT's jurisdiction to include the ability to grant declaratory relief, and give it and other courts discretion to award exemplary damages for breaches of competition law.

Law stated - 09 May 2023

Jurisdictions

Brazil	Araújo e Policastro Advogados
European Union	Hogan Lovells
France	Fréget Glaser & Associés
Germany	Milbank LLP
Italy	Gianni & Origoni
Japan	Anderson Mōri & Tomotsune
Netherlands	Pels Rijcken
Portugal	Gomez-Acebo & Pombo Abogados
South Korea	Ejelaw
Spain	Ramón y Cajal Abogados
Turkey	ACTECON
United Kingdom - England & Wales	Clifford Chance