SLAUGHTER AND MAY/

PRIVATE ENFORCEMENT OF COMPETITION LAW IN THE UK

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1. Introduction

1.1 The UK has represented one of the world's leading fora for private actions based on competition law breaches for many years, offering a credible complement to the public enforcement efforts of competition authorities.

1.2 Recent developments have continued to reinforce the UK's attractiveness to potential claimants – for example, the widening of the UK Competition Appeal Tribunal's (CAT) remit to hear both "follow-on" and "standalone" (and "hybrid") claims for damages and other relief.

1.3 Perhaps most significantly though, the introduction of the CAT's collective proceedings regime in October 2015 has facilitated the pursuit of mass claims by a single representative on behalf of large numbers of claimants falling within the same class (or classes) - in effect, the UK's equivalent to US-style "opt-out" class actions.

1.4 None of the ten applications for a collective proceedings order (CPO) has, to date, progressed successfully through certification.[1] In December 2020, however, the Supreme Court handed down its much-anticipated judgment in *Mastercard Incorporated and others v Merricks*, largely upholding the Court of Appeal's decision which had significantly lowered the threshold that a proposed class representative needs to overcome when applying for a CPO.[2] This development is expected to have a material impact on the viability of CPOs and reinvigorate potential claimants' interest in the pursuit of such collective proceedings.

1.5 Another major recent development is, of course, Brexit. Following the end of the transition period, UK competition authorities only have the power to enforce domestic competition law. In addition, the UK courts and competition authorities are not bound by developments in EU law from 1 January 2021 onwards or decisions adopted by the European Commission in respect of EU competition law infringements after 31 December 2020, unless proceedings were instituted by that date. They are, however, obliged to avoid inconsistency between domestic competition law and the EU law position that existed as at the end of the transition period ("retained EU law") save in certain specified circumstances.

1.6 Against this background, this publication examines the key aspects of competition litigation before the CAT (whose jurisdiction extends to the UK as a whole) and the High Court of England and Wales. It also outlines our capability and experience in this field.

[1] Slaughter and May is acting on six applications for a CPO that are currently pending before the CAT (relating to FX, Trains and Trucks).

[2] [2020] UKSC 51.

2. Types of claims for competition law breaches

2.1 Private actions brought in the English courts or CAT for breaches of UK competition law can be framed as claims for breach of one of the following statutory prohibitions:

- the prohibition on anti-competitive conduct in Section 2 of the Competition Act 1998 (CA98), commonly referred to as the "Chapter I prohibition"; or
- the prohibition on the abuse of a dominant position in Section 18 of the CA98, commonly referred to as the "Chapter II prohibition".

2.2 In addition, following Brexit, claims for breach of the equivalent EU provisions (i.e. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)) can still be brought in England on the following bases:

- *Existing claims brought in the English courts or CAT before 1 January 2021*: these claims remain unaffected by the end of the transition period provided they (continue to) relate to infringements that occurred before 1 January 2021.
- *New claims commenced in respect of infringements that occurred before 1 January 2021:* these claims can be brought directly before the English courts or the CAT, provided the claimant would have had the right to bring the claim before this date. Claims arising before 1 January 2021 have in practice often been based on infringements of both domestic law and the equivalent EU provisions.
- *New claims brought in respect of infringements that occurred from 1 January 2021 onwards:* these claims can still be brought before the English courts (and the CAT if part of the claim arose before 1 January 2021). However, as explained in further detail at Section 4 below, such claims would need to be based on an infringement of foreign law.

The prohibition on anti-competitive conduct

2.3 The Chapter I prohibition applies to agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK and which have the object or effect of preventing, restricting or distorting competition within the UK. Article 101 TFEU prohibits similar practices that may affect trade between EU Member States.

2.4 The types of conduct that may be caught by the Chapter I prohibition (or Article 101 TFEU) include:

- price-fixing or market-sharing cartels;
- agreements to limit production or sales;
- bid-rigging;
- resale price maintenance;
- exclusivity agreements;
- territorial restrictions; and
- sharing commercially sensitive information.

The prohibition on the abuse of a dominant position

2.5 The Chapter II prohibition applies to abuses of a dominant position within the UK (or any part of it) which may affect trade within the UK. Article 102 TFEU prohibits similar abuses that may affect trade between EU Member States.

2.6 The Chapter II prohibition only applies to undertakings that hold a "dominant position". An undertaking will hold a dominant position in the relevant market if it has "the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers". Determining whether or not an undertaking has a dominant position is often a complex exercise, and may take into account a variety of factors such as market shares, barriers to entry, entry or expansion by competitors and countervailing buyer power.

2.7 Where an undertaking holds a dominant position, it only infringes UK (and, if applicable, EU) competition law if it abuses that position. Although there is no closed list of potential abuses under the Chapter II prohibition or Article 102 TFEU, abuses typically fall within two broad categories: (i) conduct that may exclude competitors; and (ii) conduct that may exploit customers.

2.8 The types of conduct that have previously been found to constitute an abuse under the Chapter II prohibition or Article 102 TFEU include:

- unfair purchase or selling prices;
- discriminatory treatment of certain customers without objective justification;
- predatory pricing;
- exclusivity provisions;
- exclusivity rebates;
- tying or bundling; and
- refusals to supply essential inputs or information.

3. Claims in the High Court and the CAT

3.1 A claimant may bring a competition claim either before the High Court (the court of first instance for high-value claims) or the CAT. The High Court has jurisdiction over England and Wales. The jurisdiction of the CAT extends to the whole of the UK.

Common features

3.2 A claimant can bring a competition claim before either the High Court or the CAT; however, the High Court can order a transfer to the CAT in certain circumstances, so claimants do not always have complete control over which route is taken.

3.3 There are many similarities between the High Court and the CAT:

- *Binding nature of decisions*: decisions of the CMA (and UK concurrent regulators) and decisions of the European Commission issued before 1 January 2021 (or, issued on or after 1 January 2021, where the European Commission initiated proceedings before 1 January 2021), are binding on both the High Court and the CAT. Therefore, where a claimant brings a "follow-on" action (relying on a decision already taken by the one of those authorities), it does not need to establish that the defendant has infringed competition law; it only needs to show that it has suffered loss as a result of the infringement. Although the UK courts are no longer required to treat decisions of EU Member States' national competition authorities as prima facie evidence of an infringement, the High Court and CAT may treat them as evidence that an infringement of competition law has occurred (and may also do so for European Commission decisions in circumstances where they are not otherwise binding on the UK courts).
- *Type of claim*: both "standalone" and follow-on claims can be brought in either the High Court or the CAT. Outside of collective proceedings, most significant competition cases today are hybrids of the two. Cases will often have a follow-on element that relies on a pre-existing decision, but will also have a standalone element that adduces other evidence to establish a broader infringement than that described in the decision.
- *Limitation periods*: in general, in England claims may be brought before the High Court or the CAT within six years of the date on which the cause of action accrued. Previously, the CAT's limitation period was shorter.
- *Right of appeal*: appeals can be made to the Court of Appeal on decisions of the High Court and the CAT. This not only applies to points of law and decisions as to the amount of a penalty, but also to decisions by the CAT as to whether to make a CPO.

High Court vs. CAT

3.4 Choosing between the High Court and the CAT will depend in part on the type of action and the type of relief sought. The main considerations include the following:

- *Procedure*: there are certain differences between High Court procedure and CAT procedure. Generally, the CAT's approach is considered to be more flexible and informal.
- *CAT fast track procedure*: claimants in the CAT can benefit from a "fast track" procedure that was introduced by the CAT Rules in October 2015, primarily for use where one or more of the parties involved is an individual or a small or medium enterprise, and where the case is relatively simple.
- *Judge*: claims in the High Court are generally heard by a single judge, who will be a lawyer (normally a barrister) by training. Claims in the CAT are generally heard by a panel made up of three members. One member (the chairman) will be a lawyer, but the other two will be drawn from the CAT's panel of ordinary members, which includes experts from other fields, such as economics, accountancy and business. Claimants may therefore regard the CAT as more commercial and less legalistic than the High Court.
- *Collective proceedings*: collective proceedings are only available before the CAT. Group litigation is possible in the High Court on the basis of the court's general case management powers or formal mechanisms known as representative proceedings (which are brought on an "opt out" basis) and group litigation orders (which are brought on an "opt in" basis). These mechanisms are generally considered to be less flexible than collective proceedings, although the Court of Appeal's decision in *Lloyd v Google*[3] has potentially lowered the bar for representative actions. The case is currently on appeal before the Supreme Court, which is expected to hear the case in April 2021.

Collective proceedings

3.5 One widely acknowledged deterrent to the private enforcement of competition law has historically been that it is not always cost-effective for a single claimant to bring an action if the loss that they have allegedly suffered is small. Collective proceedings were introduced to help overcome that problem by combining the claims of individual claimants into a single action.

3.6 In collective proceedings, the so-called "class representative" brings a claim on behalf of an entire class (or classes) of claimants. Any person may act as the class representative, whether or not they are a class member, as long as the CAT considers that it is "just and reasonable" to allow that person to do so. The class can be defined using one of two models:

- an opt-in model, where the representative claims on behalf of all those who have expressly chosen to participate; or
- an opt-out model, where the representative claims on behalf of all persons domiciled in the UK that match a particular description except for those who have expressly chosen not to participate.

3.7 In collective proceedings, the claimants' claims all have to raise the same, similar or related issues of fact or law, and the CAT has to make a CPO approving the

[3] [2019] EWCA Civ 1599.

proceedings. The CPO will specify whether the class is to be defined using an opt-in or opt-out model. The CAT can revoke its CPO at any time and its discretion is relatively broad.

3.8 To date, ten applications for a CPO have been filed with the CAT – further details of these applications are provided at Annex 2.

3.9 As noted earlier, the Supreme Court's recent judgment in *Mastercard Incorporated and others v Merricks* represents a significant development for the future of collective proceedings in the UK. The Supreme Court considered the CAT's determination on whether the collective action brought by Mr Walter Merricks CBE was "suitable to be brought in collective proceedings". The crux of the majority of the Supreme Court's ruling is that the CAT failed to take account of the general principle in civil procedure that realistically arguable claims should be allowed to go ahead to trial and the court has to do its best on the available evidence to quantify the claimants' loss, even if it is complex and difficult. The Supreme Court also found that it is not necessary for aggregated damages in collective proceedings to be compensatory. This point is considered in more detail in our separate client briefing on the Supreme Court's decision.[4]

3.10 With a number of other CPO applications currently pending in the CAT, the Supreme Court's judgment is expected to have a material impact on their viability and reinvigorate potential claimants' interest in the possible pursuit of collective proceedings. That said, the longer-term impact of the judgment is yet to be determined; a number of issues remain unresolved and we expect to see further developments in this evolving area of law as other CPO applications are determined by the CAT.

[4] See our client briefing: "Merricks v Mastercard: What does the Supreme Court's judgment mean for the future of collective proceedings in the UK?" (18 December 2020), available at: https://my.slaughterandmay.com/insights/briefings/merricks-v-mastercard-what-does-the-supreme-courts-judgment-mean-for-the-future-of-collective-proceedings-in-the-uk. Also, see our podcast: "Merricks v Mastercard and the Future of Collective Actions in the UK", available at: https://my.slaughterandmay.com/insights/briefings/podcast-merricks-v-mastercard-and-the-future-of-collective-actions-in-the-uk.

4. Jurisdiction and applicable law

4.1 The multi-national nature of modern business practices and supply chains means that litigation often concerns parties from, or events that took place in, a number of different countries. In such cases, it will not always be obvious which court has jurisdiction to hear the case and which law should be applied to determine it. It is important to regard these as two distinct issues: sometimes, the court of one country will have jurisdiction, but will apply the law of another country or countries.

Jurisdiction

4.2 For proceedings or related actions brought before 1 January 2021, the European rules on jurisdiction continue to apply in the UK. Under these rules, the default position is that a claim should be brought in the jurisdiction in which the defendant is domiciled. Therefore, the starting point is that an English company can always be sued before the English courts. However, there are situations where claims can be brought elsewhere:

- Competition actions that would be a matter relating to tort, delict or quasi-delict may also be brought in the jurisdiction where "the harmful event occurred". This means, for example, in the case of a cartel infringement the EU Member State where that cartel was definitively concluded, the place where a market was affected by a competition law infringement (such as the place where prices were distorted and in which the victim claims to have suffered damage), or the EU Member State where the claimant company has its registered office.
- Consumers can bring an action in the jurisdiction where the consumer is domiciled.
- Where there are multiple defendants domiciled in different jurisdictions, but the claims are closely connected, it is often possible to bring all actions in the EU Member State in which (at least) one of the defendants is domiciled.

4.3 These rules can provide considerable flexibility for claimants when deciding where to launch proceedings, especially in cases involving multiple defendants, which can be of significant strategic importance to the parties.

4.4 For proceedings or related actions brought on or after 1 January 2021, the rules governing jurisdiction are different. The UK has applied to accede the Lugano Convention; however, its accession must be consented to by all contracting parties for the Convention – as of the date of publication, this has not yet occurred. Unless and until the UK becomes a party to the Convention, English courts will apply common law rules to decide jurisdiction and the UK will be considered a third country vis-à-vis the EU regime on jurisdiction, which will continue to be applied by EU Member States. When UK-based defendants are sued in the courts of an EU Member State, that court will apply its national law to determine jurisdiction (subject to any applicable EU law).

Applicable law

4.5 Where an English court takes jurisdiction, it will not necessarily apply English law. In fact, claimants may attempt to broaden their claims by pleading breaches of relevant foreign competition law. Further, as applicable limitation periods are an issue of

substantive law, where all or part of a claim for damages is substantively governed by foreign law(s), those laws will apply to determine the limitation period of the claims. The court may in certain circumstances decide to apply foreign law (which, as discussed above at Section 2, may now also include EU competition law):

- Where the case arises from "unfair competition", the applicable law will, in general, be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.
- Where the case arises from a "restriction of competition", the applicable law will be the law of the country where the market is, or is likely to be, affected. Where the markets of more than one country are affected, the position is considerably more complex and less certain. If the claim is for the tort of breach of statutory duty, this may require identifying the geographic location of the events constituting the tort, which may well be the location of: any alleged anti-competitive agreements, the alleged restriction on competition, and the alleged damage sustained by the claimants.
- It is possible for a patchwork of applicable laws to be pleaded. Unless the foreign law is pleaded and proved on a particular issue, the English courts may assume that the foreign law is the same as English law.

4.6 For contracts concluded or events giving rise to damage occurring before 1 January 2021, the EU law rules (the Rome Regulations) continue to apply. Thereafter, the Rome Regulations no longer apply to the UK on a reciprocal basis. As the UK transposed the EU rules into domestic law (under The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019), broadly speaking the approach taken by UK and EU courts to applicable law will, at least for the moment, largely be unchanged (bar some possible divergences in interpretation between the UK and EU courts).

EU jurisprudence

4.7 Subject to the above-mentioned changes that Brexit has on follow-on damages claims, English courts remain bound by EU courts' judgments handed down before 1 January 2021 (subject to limited exceptions). However, there is no statutory duty for English courts or the CMA to maintain consistency with judgments of the EU courts that are handed down on or after 1 January 2021. Nevertheless, the UK courts may find EU courts' decisions persuasive. Similarly, European Commission decisions made on or after 1 January 2021 are not binding on the English courts.

Arbitration

4.8 Competition law issues can also be arbitrated. The English courts have taken the view that competition issues are arbitrable, although this will depend on the drafting of any arbitration agreement between parties.

5. Features of litigating in the UK

5.1 There are many reasons why parties to disputes often choose to come to the UK to resolve them, such as a level of trust in the UK's legal system, a connection to the UK (for example, a listing on the London Stock Exchange), or simply the fact that all the parties have English as a common language. There are also several features of the UK's legal system that make it a particularly attractive forum for competition litigation.

Joint and several liability

5.2 English law applies the principle of joint and several liability: generally, if there are multiple wrongdoers (such as in cartels) then one wrongdoer can be held liable for the whole loss caused to a claimant, even though that wrongdoer may only have played a limited part in events. Claimants often regard this feature of English law as being particularly attractive, since it allows them to bring a claim against just one of a number of possible defendants for the entirety of the loss they have sustained.

5.3 Defendants that have suffered the effects of joint and several liability have recourse through contribution proceedings, in which they can pursue fellow wrongdoers to recoup a "just and equitable" amount. Contribution proceedings can be brought in respect of sums paid under a judgment or a settlement agreement, but in practice a defendant will typically start contribution proceedings against co-infringers soon after the claimant initiates proceedings.

5.4 The Damages Directive, an EU directive implemented into English law on 9 March 2017 by The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, which will remain in force after Brexit, modifies this regime to make settlement a more attractive option in the following ways:

- *Immunity for whistle-blowers*: companies that have received immunity from fines in return for blowing the whistle on their fellow wrongdoers will receive a partial exemption from the principle of joint and several liability. Under this partial exemption, they will only be liable to their own direct or indirect purchasers (assuming the other injured parties can obtain full compensation from elsewhere).
- *Protection for defendants that settle*: non-settling co-cartelists will not be able to bring contribution proceedings against defendants that do settle.

International enforceability

5.5 The UK is party to a number of international regimes and treaties for the enforcement of judgments from other contracting states. The European regime for the enforcement of judgments in EU Member States and certain EFTA states still applies to UK judgments in proceedings instituted before 1 January 2021. From 1 January 2021, the European regime will no longer apply to the UK, and EU Member States' and those EFTA states' courts will enforce UK judgments in accordance with the national law of the country where the judgment is to be enforced.

5.6 Outside of Europe, the UK has a wide network of treaties that facilitate the enforcement of its judgments. UK judgments can generally be enforced through such treaties countries including Australia, Canada, India, Israel, Malaysia, New Zealand, Nigeria, Pakistan, and Singapore, as well as many other jurisdictions.

5.7 Enforcement of UK judgments in a country that is not subject to a treaty with the UK is a matter of local law in the country where the judgment is to be enforced. Many UK judgments are enforced this way, such as in the US.

5.8 The fact that a judgment in the UK can bring an end to disputes in so many places means that parties often choose the UK as their global litigation hub, or indeed as the sole forum in which to conduct worldwide litigation.

Limitation periods

5.9 Generally, competition claims in the High Court and the CAT can only be brought in respect of loss suffered up to six years from the date on which the cause of action accrued (which in competition claims is normally the point at which the loss was suffered). The start of this six-year period can, however, be delayed where the defendant has deliberately concealed essential facts about the infringement (with the result that time only starts to run from the point when the claimant discovers the relevant facts). This will often be relevant in cartel damages actions, since concealment is typically an inherent part of cartel conduct, although this test needs to be applied carefully.

5.10 Following the implementation of the Damages Directive, where both the infringement and the harm occur after 9 March 2017, time does not start to run until: (1) the infringement has ceased; or (2) the claimant knows, or can reasonably be expected to know, of the infringement, the identity of the infringer and that they have suffered a loss, whichever is the later. The limitation period is also suspended while a competition authority's investigation is ongoing and for at least one year after the investigation has concluded. The combined effect of these changes is that claimants are often able to bring claims at an even later stage.

5.11 Where the infringement and harm occurred before 9 March 2017, different rules apply and the limitation period may be shorter.

Procedure

5.12 A flowchart highlighting the main stages in civil actions proceedings before the English courts is set out at *Annex 1*. The procedure adopted by both the High Court and the CAT in competition cases largely reflects that used in all English litigation.

5.13 Timing will depend on a number of factors, including the volume of evidence, the number of parties, the complexity of the issues (including the possible hearing of preliminary issues) and the length of the trial. While large commercial cases can sometimes be dealt with in less than 18 months, competition cases can take much longer, particularly if the defendant appeals against the decision.

5.14 Litigation in the UK is generally perceived as being faster than in some continental European jurisdictions, but not as fast as in others. Nonetheless, many litigants value

what are generally considered to be tactical advantages that flow from certain of the UK's comparatively fulsome procedures, such as disclosure, and the robust case management powers afforded to the High Court and the CAT.

6. Available relief and costs

6.1 Various forms of relief are available to those affected by competition law breaches, including damages and injunctions (which are available in both the High Court and the CAT). In practice, however, most cases settle before reaching trial, with the result that the parties often have the flexibility to agree a compromise that differs significantly from any potential court-imposed remedy.

Damages

6.2 Generally, damages awarded by the English courts are compensatory in nature and thus limited to the amount necessary to place a person who has suffered harm in the position in which they would have been absent the infringement of competition law.

6.3 Damages may compensate a claimant for loss of profit. Damages may also compensate for loss due to inflated prices (an "overcharge"). "Exemplary" or punitive damages are not available in respect of infringements taking place on or after 9 March 2017 but may be available in limited circumstances in respect of infringements occurring prior to that date.

6.4 A claimant should also not be overcompensated. Damages can therefore be reduced to reflect any benefits the claimant enjoyed due to the competition law infringement or any losses they have "passed on" (for example, where the claimant mitigated its loss by passing price increases down the supply chain).

6.5 The Supreme Court has recently provided guidance on the issue of pass-on when assessing competition damages in *Sainsbury's v Mastercard Incorporated and others*[5], adopting a more liberal approach to the assessment of pass-on than had previously been taken. The Supreme Court's judgment confirmed that although the burden of establishing pass-on lies with the defendant, the onus lies with the claimant to provide evidence of how they dealt with the recovery of costs in their business. The judgment also confirmed that the courts will not require an unreasonable degree of precision to quantify the amount of the pass-on and recognises that there will often be a need for estimates. It also indicates that the scope of matters that the English courts may take into account when considering mitigation of loss in competition damages claims may be broader than previously thought to be the case, such as cost reductions by claimants in addition to pass-on.[6]

Interest

6.6 The High Court may award interest at whatever rate it thinks fit on damages it awards. Interest may accrue in respect of part or all of the period from the date of the

[5] [2020] UKSC 24.

[6] See our client briefing: "Sainsbury's v Mastercard – Supreme Court liberalises rules on pass-own when assessing competition damages" (24 June 2020), available at: https://my.slaughterandmay.com/insights/briefings/sainsburys-v-mastercard-supreme-court-liberalises-rules-on-pass-on-when-assessing-competition-damages.

infringement to the date of judgment. In practice, the High Court tends to award simple interest at the base rate plus 1%. Separately, simple interest will normally accrue at the "judgment rate" (currently 8% per annum) on damages and costs which remain unpaid after the date of judgment.

6.7 The CAT may award simple interest in respect of part or all of the period from the date the cause of action arose to the date of the award. The rate of interest cannot generally exceed the judgment rate. In previous cases, consistent with the High Court's approach, the CAT has typically awarded interest at the base rate plus 1%.

6.8 Both the High Court and the CAT may also award compound interest, but it must be pleaded as part of the loss actually suffered, not as interest on that loss.

Injunctions

6.9 An injunction is a judicial (and therefore binding) order. Breach of an injunction can constitute contempt of court, which can lead to fines or imprisonment. Both the High Court and the CAT may grant injunctions either as a final remedy or as an interim measure.

6.10 In previous competition cases, applicants have requested a wide variety of injunctions, including:

- an injunction requiring a mobile telephone operator to activate connections with an Internet-protocol-based voice network;
- an injunction preventing the respondents from withdrawing or suspending the supply of services for the applicants' software application;
- an injunction preventing a pharmaceutical company from ceasing to supply certain wholesalers;
- an injunction preventing a technology company from disabling or removing the applicant's software products from its software application platform; and
- an injunction forbidding an airport operator from excluding a parking service provider from the airport's forecourts.

Settlement

6.11 There are many options available for resolving disputes without going to court, including mediation, adjudication and arbitration. Even where court proceedings are initiated, there is a tendency for competition claims to settle. Courts in the UK encourage parties to engage actively in genuine attempts to settle cases before litigation and before trial. Once a claim has been commenced, a party may make an offer to settle the claim by serving a notice on the other party in accordance with the applicable rules. There can be cost consequences depending on whether the other party accepts. For example, if the defendant offers to settle and the claimant refuses but then wins a lower amount at trial, the claimant can be required to pay the defendant's costs from the date the offer closed until the end of the case.

6.12 Since October 2015, it has also been possible for parties to enter into a collective settlement before the CAT. This applies both where collective proceedings have

already been brought and in circumstances where such proceedings have not yet been started. A collective settlement using an opt-in model will only bind those claimants that expressly choose to participate. A collective settlement using an opt-out model will bind all UK-domiciled persons matching a particular description except those that expressly choose not to participate. The CAT has to approve a collective settlement in order for it to be binding, and will only do so if it regards the settlement as being "just and reasonable".

6.13 The Damages Directive seeks to ensure that defendants who settle are no worse off than co-infringers (such as fellow cartelists) who do not. Therefore, it provides that when a defendant settles, any claimant's claim must be reduced by the amount of the loss attributable to the actions of the settling defendant. The claimant will then only be allowed to exercise the remainder of its claim against the non-settling co-infringers (except in exceptional circumstances). The settling defendant will also be exempted from any liability to pay contributions to non-settling co-infringers. This represents a modification to the previous position at English law, where settling defendants could sometimes still be pursued under contribution proceedings.

Costs

6.14 In High Court proceedings, the general rule is that "costs follow the event". That is, the successful party can recover from the losing party the majority of the costs it has incurred. Costs include court fees, lawyers' and experts' fees, and certain other expenses incurred in connection with the litigation. Whilst the court has some discretion to depart from this general rule (for instance, where the successful party's conduct has been unreasonable), this is exceptional. Nonetheless, the High Court regularly varies the exact amount that the successful party can recover. It does so to discourage poor behaviour - most notably, failure to behave reasonably and comply with the procedural rules. Accordingly, the court takes account of the parties' conduct over the entire course of the proceedings when deciding the exact amount the successful party can recover.

6.15 The rules in the CAT are more flexible. The CAT has the discretion at any stage in proceedings to make such an order as it thinks fit in relation to the payment of costs. There is no specific "costs follow the event" rule, and the CAT may take into account all the conduct of the parties in relation to the proceedings when determining costs.

Contingency fees and funding

6.16 In the UK, parties to disputes may use certain alternative ways to fund litigation proceedings. It is possible to enter into "conditional fee agreements" (CFAs). A CFA is an agreement whereby a lawyer and a client agree to share the risk of the litigation whereby the lawyer will receive part of their fees (or sometimes no fees) if the case is lost but higher-than-normal fees, including up to a 100% "success fee" uplift, if the case is won. In general, however, the CFA success fee is not recoverable from the losing opponent.

6.17 It is also possible to enter into "damages-based agreements" (DBAs). Under DBAs, lawyers are not paid if the case is lost, but may take a percentage of the damages

awarded if the case is won. The maximum percentage that the lawyers may take under a DBA is 50%. DBAs are prohibited in collective proceedings using an opt-out model.

6.18 A party may also be able to cover some of the costs of litigation through insurance policy cover.

6.19 The UK has a well-established third-party funding market. Litigation funding involves a professional funder funding the costs of a litigation in exchange for a share of the proceeds.

6.20 Third-party funding can be attractive to claimants who would otherwise be reluctant to take on the risk of litigation. Lawyers can offer such claimants a DBA, meaning that there will be no legal costs unless the claimant wins. In return for a percentage of the amount recovered, a third-party funder can then cover all other costs, including experts' fees, administrative expenses, and any adverse costs orders made against the claimant. The funder can also agree to pay a proportion of the lawyer's fees even if the case does not succeed (which claimants cannot do under a DBA). The result is that the claimant can bring a claim at no risk and no up-front cost, and with the certainty that the fees it has to pay will be no more than a fixed percentage of any amount it recovers. This kind of arrangement may be particularly attractive to representative claimants in collective proceedings, who would, under traditional funding models, have to put themselves at risk of having to pay the other party's costs.

7. Our capability and experience

Our practice is preeminent

We are at the cutting edge of private enforcement actions, advising on some of the largest standalone and follow-on damages claims in the CAT and the High Court.

We also regularly act on appeals against decisions of competition and regulatory authorities, both in national courts and the Court of Justice of the European Union.

We provide cross-disciplinary expertise

Our team of cross-disciplinary specialists brings together lawyers from our market-leading Competition and Disputes practices in both London and Brussels, combining first-class litigation and dispute resolution skills with cutting-edge UK and EU competition law expertise.

We offer unparalleled strategic insight

We have significant experience of acting on both the defendant- and claimant-side of private enforcement actions. This enables us to bring unparalleled strategic insight to our clients. For example, we can anticipate the tactical manoeuvres they are likely to face during proceedings, such as pressure in relation to disclosure or strike-out applications, and advise on appropriate steps to help our clients gain an advantage.

Should a settlement be desirable, we have a track record of successfully negotiating settlements in complex, multi-party litigation, such as our work for British Airways in the air cargo cartel litigation.

Our work spans the globe

We regularly co-ordinate cross-border antitrust litigation strategies for our clients, leading handpicked international teams of lawyers and providing seamless case management around the world.

Our close working relationships with market-leading independent law firms in every major jurisdiction enable us to deliver truly integrated legal services of the highest quality. Our relationships are not, however, exclusive, and also allow us to work with our clients' existing legal advisers if preferred.

We understand funded claims

We have significant experience of acting in relation to mass claims funded by litigation funders, including many of the most prominent industry players, and can bring our collective strategic and tactical insights from those cases to bear.

We are ranked among the elite

We are ranked among the elite by the legal directories, with individual partners singled out as leaders in their field:

- **BAND 1** - Chambers and Partners (UK) 2021: Competition Law.
- **TIER 1** - Legal 500 (UK) 2021: Competition Litigation.
- **Litigation Team of the Year -** British Airways in the UK air cargo follow-on litigation Global Competition Review Awards 2018.

Three of our cases were also listed in **The Lawyer's Top 20 Cases of 2020** - including JPMorgan in FX proceedings in the High Court and the CAT and BHP Group in the £5bn 'biggest claim in English legal history'.

Key experience

Collective proceedings and group actions

- **MAN** in its defence of one of the largest ever competition law follow-on damages proceedings in the English courts and CAT which cover multiple individual claims, group actions and competing applications for CPOs. The total worldwide claims against the members of the trucks cartel amount to billions of euros.
- **JPMorgan** in relation to both High Court litigation and the competing applications for CPOs brought in the CAT arising out of the global FX investigations (which resulted in fines totalling over USD 8.5bn).
- **British Airways** in one of the largest and most complex series of group litigation claims (valued at their height at over £3.6 billion) before the English courts arising out of the European Commission, US Department of Justice and multiple other agencies' investigations into the air cargo cartel.
- **Philips** on three cartel damages claims, amounting to billions of euros, brought in the English High Court following on from the European Commission's CRT and CRT Glass cartel decisions. The case raises novel points of territorial limits of EU competition law in the context of private damages actions.
- **Deutsche Bank AG** in relation to a claim brought against it and several other financial institutions in the first general LIBOR claim against multiple banks.
- **First MTR South Western Trains Ltd** in defence of the first application for a CPO brought in the CAT on a standalone basis alleging that First MTR's abuse of dominance resulted in millions of customers being overcharged for their fares (with a claim value of £90m).
- **Louis Dreyfus Company BV** on a significant group claim brought by Brazilian orange growers in the English courts related to the orange juice market in Brazil.
- **Volkswagen AG (and other group entities)** as claimants in respect of a claim to recover damages suffered by members of its group arising from the roll-on/roll-off shipping cartel, which was issued before the Commercial Court in late November 2020.

Other private enforcement actions

- **Infineon** in relation to follow-on damages claims brought in a number of different jurisdictions, including England and Wales, arising out of the European Commission's cartel decision against ten manufacturers of DRAM computer chips (which imposed a total of €331 million in fines).

- **The Department for Transport** in respect of the procurement and state aid claims brought by Eurotunnel and, subsequently, P&O Ferries in relation to the Freight Capacity litigation.
- **Electrolux** in connection with its global litigation strategy for recovery of losses suffered as a result of cartels in the refrigerator compressor sector.
- **Unilever** in proceedings before the European and national courts in relation to claims arising from distribution practices in the markets for impulse ice cream.
- **Yale** in its defence of a claim for damages based on alleged Article 102/Chapter II infringements, which settled on terms favourable to Yale.

Other experience of litigation in a competition law context

- **Coats** in its appeals before both the Court of First Instance (now the General Court) and European Court of Justice against the European Commission's decision to fine Coats €30 million. The fine imposed on Coats was reduced to €20 million.
- **Fuji Electric** in its appeal before the General Court against the European Commission's gas insulated switchgear cartel decision. The fine imposed on Fuji was reduced by 8%.
- **Japan Tobacco (Gallaher)** on the judicial review of the UK Office of Fair Trading's decision on the retail pricing of tobacco products.
- **AkzoNobel** and **Global Radio** in respect of their appeals to the CAT against merger decisions by the UK Competition Commission.
- **Bertelsmann** on its successful joint appeal with Sony Corporation of America to the European Court of Justice following the Court of First Instance's annulment of the European Commission's unconditional clearance of the Sony BMG recorded music joint venture.
- **Google** on a standalone abuse of dominance claim brought by Unlockd seeking injunctive relief.
- **European stationary manufacturer** in respect of the follow-on litigation arising out of the envelopes cartel.
- **Booking.com** on its successful appeal to the Dusseldorf court against a BKA prohibition decision. This case involved working closely with a leading German firm to develop a robust case against the German competition authority's findings.

Annex 1: Key stages in English litigation

Pre-action	• Pre-action communications: the claimant sends a letter of claim, the defendant responds, and the parties exchange information and explore settlement options. • The claimant issues a claim form.
Statements of case	• The claimant serves and files its particulars of claim. • The defendant serves and files its defence (and any counterclaim). • The claimant serves and files its reply (and its defence to any counterclaim).
Pre-trial	• Case management conference(s): the court sets directions through to trial. Disclosure of documents: both parties disclose material documents. • Exchange of witness statements. • Exchange of expert reports.
Trial	• The parties present their cases orally at court.
Post-trial	• Judgment and order for costs. • Possible appeal. • Possible enforcement of judgment.

Annex 2: Current CPO applications

CPO	Status	Detail
Dorothy Gibson v Pride Mobility Products Limited (Case 1257/7/7/16)	Withdrawn	The CAT raised concerns regarding the proposed approach to class certification, which meant that the expected costs would potentially have outweighed the damages.
Walter Hugh Merricks CBE v Mastercard Incorporated and Others (Case 1266/7/7/16)	Open	The CAT refused to grant a CPO on the basis that the applicant had not established that the claims had sufficient commonality to be brought as collective proceedings. The Court of Appeal reversed this decision and applied a significantly lower threshold to class certification. The defendants appealed to the Supreme Court, but their appeal was dismissed and the case has been remitted to the CAT.
Road Haulage Association Limited v MAN SE and others (Case 1289/7/7/18)	Open	The CAT will hear these two applications for CPOs together in light of substantial overlap in the grounds concerning common issues and suitability.
UK Trucks Claim Limited v Fiat Chrysler Automobiles N.V. (Case 1282/7/7/18)		
Justin Gutmann v First MTR South Western Trains Limited and another (Case 1304/7/7/19)	Open	These two applications relating to the same fact pattern are standalone claims. This means that the applicants will need to not only meet the requirements under a CPO, but also demonstrate a breach of competition law. A CPO hearing has been listed for 9 March 2021.
Justin Gutmann v London & South Eastern Railway Limited (Case 1305/7/7/19)	Open	
Michael O'Higgins FX Class	Open	These applications mark the first time that competing opt-out CPOs

CPO	Status	Detail
Representative Ltd v Barclays Bank PLC & Others (Case 1329/7/7/19)		have been filed in the UK. The CAT has made clear that where two competing opt-out CPO applications relate to the same matter, only one (if any) can prevail in relation to the same claim. However, the CAT has decided that it will not determine as a preliminary issue which of the two applicants would be the most suitable to act as the class representative.
Phillip Evans v Barclays Bank Plc & Ors (Case 1336/7/7/19)	Open	
Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others (Case 1339/7/7/20)	Open	This case concerns an opt-out CPO application following the European Commission's decision relating to the provision of deep-sea car transportation.
Justin Le Patourel v BT Group PLC (Case 1381/7/7/21)	Open	This application was registered by the CAT on 15 January 2021.

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