The Legal 500 Country Comparative Guides

United Kingdom: Competition Litigation

This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in United Kingdom.

For a full list of jurisdictional Q&As visit here
1. **What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?**

   Claims are usually framed as actions for breach of statutory duty in respect of (i) Articles 101 or 102 of the Treaty on the Functioning of the European Union ("TFEU"), and/or (ii) the equivalent UK domestic provisions, sections 2 and 18 of the Competition Act 1998 ("CA98") (known as the “Chapter I” and “Chapter II” prohibitions).

   Article 101 TFEU prohibits agreements or decisions by associations of undertakings and concerted practices which may affect trade between EU member states and which have as their object or effect the prevention, restriction or distortion of competition. The Chapter I provisions prohibit similar agreements affecting trade within the UK. Article 102 TFEU prohibits the abuse of a dominant position within the EU which may affect trade between EU member states. The Chapter II provisions prohibit similar conduct affecting trade within the UK.

   Claims can be brought on either a follow-on or stand-alone basis. Follow-on claims rely on a prior infringement finding (e.g. a decision by the European Commission (the “Commission”) or the UK Competition and Markets Authority ("CMA")) to establish liability, whereas in a stand-alone claim, liability must be proved by the claimant. In practice, claims may be a hybrid of the two.

   In *Air Canada & Ors v Emerald Supplies Limited & Ors* [2015] EWCA Civ 1024, the Court of Appeal struck out an attempt to base claims on the economic tort of unlawful means conspiracy on the basis that the requisite intention to injure the claimants (who were indirect purchasers of the allegedly cartelised services) could not be established.

2. **What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?**

   Claims can either be brought before the High Court or the Competition Appeal Tribunal (the “CAT”) (see question 6), and are subject to the procedural requirements of the Civil Procedure Rules and the CAT Rules, respectively. Proceedings are commenced by the claimant filing a claim form.

   Once the claim form is filed, it must be served on the defendant. In some circumstances, permission is required to effect service on a defendant outside of the jurisdiction.

   In the CAT, full details of the claim, including a statement of the relevant facts and any contentious points of law relied upon, must be included on the claim form. In the High Court, the claim form is more general, but full details are then provided in the claimant’s “particulars of claim” (which are usually served on the defendant either with, or shortly after, the claim form). A claimant’s pleadings must set out reasonable grounds for a claim that has
a realistic prospect of success; otherwise the claim may be vulnerable to strike-out or summary judgment.

3. **What remedies are available to claimants in competition damages claims?**

Claimants generally seek an award of damages. In addition, they can also seek an injunction (i.e. an order from the court mandating or prohibiting certain action by the defendant) and/or a declaration from the court as to the legal position.

4. **What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?**

The general rule is that damages are compensatory and should put the claimant in the position it would have been in had the breach of competition law not occurred. In order to assess damages, the courts consider the position of the claimant absent the infringement by constructing a hypothetical reference scenario, or “counterfactual” against which the actual situation can be compared. This is a complex exercise and the courts will typically rely on expert evidence to assist with quantification (see question 13 below).

Before implementation of Directive 2014/104/EU (the “**Damages Directive**”) on 9 March 2017 (the “**Implementation Date**”) the courts could award punitive or exemplary damages in limited circumstances where the defendant had not been fined by a competition authority. Such damages are no longer available in claims where the relevant infringement started on or after the Implementation Date.

The principle of joint and several liability is recognised in English law: a claimant who has suffered loss as a result of a cartel can claim its entire loss from any one of the cartelists. However, the implementation of the Damages Directive has introduced limitations on the principle (see, for example, question 16 below).

5. **What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?**

The default limitation period is six years from the date on which the cause of action accrued (which will usually be the date on which the relevant loss was suffered). However, this can be extended if a claimant can show that a defendant has deliberately concealed essential facts relevant to the claimant’s cause of action (e.g. in the case of a secret cartel). In that case, limitation will begin to run from the date on which the claimant discovered or could, with reasonable diligence, have discovered, the concealment.

Following the implementation of the Damages Directive, specific limitation provisions apply in claims relating to an infringement that took place on or after the Implementation Date. In these cases, limitation will not start to run until (i) the infringement has ceased and (ii) the
claimant knows (or could reasonably be expected to know) of the infringement, the identity of the infringer, and that it has suffered loss. The limitation period is suspended during competition authority investigations (including while any appeals are ongoing) and for a period of one year thereafter.

Special limitation rules apply to follow-on claims before the CAT where the cause of action arose before 1 October 2015. Such claims must be brought within two years from the date on which the infringement decision became final (i.e. once the time for appealing the decision expired or the appeals process concluded). On 1 October 2015, new rules were introduced which extended the CAT’s jurisdiction to include stand-alone claims and aligned the limitation period in the CAT with the general rule described above for claims arising on or after 1 October 2015.

Special limitation rules also apply to claims made in collective proceedings before the CAT (see question 20 below). In particular, the limitation period is suspended from the date on which the collective action is commenced, and will only continue running on the occurrence of certain events (e.g. withdrawal or settlement of the claim).

6. Which local courts and/or tribunals deal with competition damages claims?

Competition damages claims can be commenced in the High Court (which has jurisdiction over England and Wales) or the CAT (a specialist competition claims tribunal with jurisdiction over the United Kingdom). Claims in the High Court are typically commenced in the Chancery Division (which has judges with competition law expertise) or the Commercial Court.

(See question 15 below for details of the appeal process.)

7. How does the court determine whether it has jurisdiction over a competition damages claim?

(a) The European regime

Currently, the question of jurisdiction as between EU member states of the EU (“EU Member States”) is governed by Regulation (EU) No 1215/2012 (the “Brussels Recast Regulation”) for claims arising on or after 10 January 2015, and by Council Regulation (EC) 44/2001 (“the Brussels I Regulation”) for claims arising before 10 January 2015 (together, the “Brussels Regulations”). Equivalent rules apply to jurisdiction as between the EU Member States and Switzerland, Iceland and Norway (the “Lugano States”, and together with the EU Member States, the “Member States”) via the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (the “2007 Lugano Convention”).

These rules provide that a defendant ought to be sued in the courts of the Member State in
which it is domiciled (Article 2(1) of the Brussels I Regulation; Article 4 of the Brussels Recast Regulation; and Article 2 of the 2007 Lugano Convention). The question of where a defendant “is domiciled” is to be determined by the national law of the court which is being asked to accept jurisdiction. However, a corporate defendant is domiciled at the place where it has its (i) statutory seat (which, in the UK, means the place where it has its registered office), (ii) central administration, or (iii) principal place of business. It is sufficient if any one of these three limbs is satisfied.

However, there are exceptions, including that:

- For matters relating to tort (including breach of statutory duty), a person domiciled in a Member State may be sued in the courts of the place where the “harmful event” occurred or may occur, i.e. (i) the place where the wrongful act or omission took place, or (ii) where the damage occurred. The claimant has the option to sue in either jurisdiction.
- A person domiciled in one Member State, “where he is one of a number of defendants” domiciled in other Member States, may be sued in another place where any of the other defendants are domiciled “provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”. The effect of this exception is that claimants can use claims against defendants domiciled in one Member State as a way of “anchoring” their claims against defendants which are domiciled in a different Member State.

The Commercial Court has recently found that the English courts should conduct a “merits test” to evaluate a claim against an anchor defendant before exercising jurisdiction over defendants domiciled in other Member States (Senior Taxi Aereo & Others v Agusta Westland S.p.A & Others [2020] EWHC 1348 (Comm)). However, that is unlikely to have much practical impact for competition damages actions, in relation to which the English courts have taken an expansive approach to their jurisdiction, showing themselves particularly willing to claim jurisdiction over defendants using this anchoring mechanism, even, for example, where the anchor defendant was not an addressee of an infringement decision by the Commission but was alleged to have implemented the arrangement (see Toshiba Carrier UK Ltd & Ors v KME Yorkshire Ltd & Ors [2011] EWCH 2665 (Ch) and [2012] EWCA Civ 1190; Vattenfall AB v Prysmian SpA [2018] EWCH 1694 (Ch)).

See question 24 below as to the impact of Brexit.

(b) Jurisdiction over non-Member State defendants

Where a defendant is not domiciled in a Member State, the jurisdiction of the English Courts must be determined in accordance with the common law of England and Wales (Article 4(1) of the Brussels I Regulation; Article 6(1) of the Brussels Recast Regulation; and Article 4(1) of the 2007 Lugano Convention).
Under English law, the primary question is whether the defendant can properly be served with proceedings. Where a defendant is considered to be within the jurisdiction, proceedings can be served on that defendant in England and Wales irrespective of whether the claim has any other connection with the jurisdiction. A corporate defendant is considered to be in the jurisdiction for example, if (a) it has a place (e.g. a registered office) in England and Wales where it carries on its activities, (b) it has appointed English solicitors to accept service on its behalf, or (c) it has appointed an agent under contract to accept service.

Where the defendant cannot be served in England and Wales, claimants are required to obtain the permission of the English courts to serve proceedings out of the jurisdiction. To do so, claimants will be required to demonstrate the following:

- that they have a good arguable case that each claim falls within one of the permitted “jurisdictional gateways”. These include (i) where “damage was sustained...within the jurisdiction” or where “a claim is made against a person (the “defendant”) on whom the claim form has been or will be served...and (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim”;
- that the claim has a reasonable prospect of success; and
- that England is the proper forum for the resolution of the dispute.

Even if the English courts have jurisdiction, it is open to the defendant to seek a stay of proceedings on the basis of *forum non conveniens*, i.e. that there is another jurisdiction more appropriate to accept proceedings. This is fact-dependent and must be assessed on a case by case basis. However, even if the defendant can prove *forum non conveniens*, the English courts may refuse a stay if the claimant can show that it would be unjust to stay proceedings in England (for example, because the claimant would not receive a fair trial in the other state).

Where there is a jurisdiction clause in favour of England, the English Courts will only stay proceedings if there are strong reasons not to hold the parties to that agreement.

8. **How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?**

The law to be applied to a dispute in the High Court or the CAT depends on the time period relevant to the claim:

(i) Article 6(3) of the EC Regulation 864/2007/EC (*Rome II*) applies when determining the applicable law for the period after 11 January 2009. It states that the relevant test is “where the market is, or is likely to be, affected”. Rome II also states that, when the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant may instead choose to base his
or her claim on the law of the court seised, provided that the market in that EU Member State is amongst those “directly and substantially affected by the restriction of competition”. Further, if the claimant sues more than one defendant in that court, the claimant can elect to apply the law of the court against all of the defendants provided that the claim against each defendant “directly and substantially affects the market in the Member State of that court”. (See question 24 below as to the impact of Brexit.)

(ii) The Private International Law (Miscellaneous Provisions) Act 1995 (the “1995 Act”) applies when determining the applicable law for the period 1 May 1996 to 10 January 2009. The 1995 Act involves a complicated process of weighing up different aspects of the tort (typically in damages actions under competition law, breach of statutory duty). The English Courts will identify: (i) the elements constituting the tort; (ii) the countries in which the events comprising those elements took place; and (iii) the country in which the most significant events comprising those elements occurred. In Deutsche Bahn AG & Ors v MasterCard Inc. & Ors [2018] EWHC 412 (Ch) (“Deutsche Bahn/MasterCard”), the High Court distinguished competition damages actions from other tort cases and held that the most important element of the tort is the restriction of competition in the market.

(iii) The test for applicable law prior to 1 May 1996 is the “double actionability” rule which provides that a tort must be actionable under both English law and the law of the place where harm was done (i.e. the *lex loci delicti*) to give rise to a cause of action. In Deutsche Bahn/MasterCard, the High Court held that the *lex loci delicti* would be the country in which competition was restricted in competition cases.

The applicable standard of proof for a competition damages action under English law is the civil standard, i.e. “the balance of probabilities”.

It is worth noting that the UK Supreme Court has found that Article 101(3) TFEU imposes requirements as to the nature of the evidence which is capable of satisfying that standard in order to obtain an exemption under the provision (imported into UK domestic competition law by section 60 of CA98). In particular, the Supreme Court has indicated that undertakings seeking an exemption under Article 101(3) before the English courts will need to produce “*robust analysis and cogent empirical evidence*” in support of their claim (*Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC & Ors* [2020] UKSC 24).

9. **To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?**

Decisions of the Commission and the CMA are binding on both the High Court and the CAT. This means that if a claimant brings a follow-on action in reliance on a decision taken by the Commission or the CMA, it does not need to establish that the defendant(s) has/have infringed competition law; it merely has to show that it has suffered loss as a result of the infringement.
Decisions of national competition authorities other than the CMA are not binding on the High Court or the CAT. However, they are treated as evidence that an infringement of competition law has occurred.

10. **To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?**

The High Court and the CAT must not deliver judgments which might conflict with decisions contemplated by the Commission or the CMA. Proceedings which relate to conduct subject to a regulatory investigation will therefore typically be stayed until the investigation has been completed and the regulator has given its decision. However, the High Court and the CAT have recently been inclined to progress private proceedings as far as possible while awaiting the regulator’s decision. Accordingly, parties are likely to be required to file all of their pleadings before a stay is granted, and may also need to undertake disclosure and/or exchange of evidence.

11. **What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?**

A new collective action procedure for private actions for breaches of competition law came into force on 1 October 2015. The regime enables claims to be brought on behalf of a class of claimants by a class representative. However, a proposed collective action may only proceed to trial if the CAT makes a “collective proceedings order” (“CPO”) authorising the proposed class representative and certifying that the claims are eligible for inclusion on the basis that they are brought on behalf of an identifiable class, raise common issues and are suitable to be brought in collective proceedings. The CPO will also determine whether the collective proceedings will continue on an opt-in or opt-out basis. The CAT rejected the first two CPO applications. However, in April 2019, the Court of Appeal overturned the CAT’s refusal to grant a CPO to Walter Merricks in respect of a proposed action on behalf of 46 million consumers concerning MasterCard interchange fees (Walter Merricks CBE v Mastercard Incorporated & Ors [2019] EWCA Civ 674). That decision was appealed to the Supreme Court, which heard the case in May 2020. If the Court of Appeal’s judgment is upheld, it would make the CPO criteria easier to satisfy. Other pending CPO applications have largely been put on hold until the the Supreme Court hands down its judgment in the Merricks case.

Under the general procedural rules, the court can also make a “group litigation order” (GLO) which provides for individual claims that give rise to common or related issues of fact or law to be managed together. Claims managed under the GLO will be entered on a group register. Unless the court orders otherwise, a judgment or order made in one claim on the group register in respect of a GLO issue is binding on all other claims entered on the register at the time of judgment. The individual GLO claimants may choose to appoint a common legal representative, but this is not obligatory.
Under the general “representative action” procedure, the court can also direct that a claim may be begun or continued by one or more persons as representatives of any other person who has the same interest in that claim. Unless the court orders otherwise, any judgment or order given in such a claim is binding on all persons represented in the claim, although it may only be enforced by or against non-represented persons with the court’s permission. This procedure is rarely used. An attempt by two flower importers to deploy it on behalf of all direct or indirect purchasers of air freight services affected by the air cargo cartel was struck out in 2009 on the basis that (i) the represented class did not have the same interest in the claim at the time the claim was begun and (ii) there was inevitable conflict between the claims of the different class members (Emerald Supplies Ltd v British Airways PLC [2009] EWHC 741 (Ch).

There are also general procedural rules by which parties may consolidate individual proceedings or add third parties to existing proceedings.

12. **Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?**

The pass-on defence is often raised by defendants in competition damages cases and is a key feature of such actions. The defence was recently considered by the Supreme Court in Sainsbury’s Supermarkets Limited and Ors v Mastercard Inc. and Ors [2020] UKSC 24, which held that the burden of proof is on the defendant to establish that the claimant has passed on any unlawful overcharge. However, once the defence has been raised by the defendant(s), the Supreme Court found that “there is a heavy evidential burden on the [claimant(s)] to provide evidence as to how they have dealt with the recovery of their costs in their business” and that, if the claimant does not adduce such evidence, “adverse inferences” can be taken against it (§216). The Supreme Court also found that “the law does not require unreasonable precision” in the proof of the amount of the prima facie loss which claimants have passed on (§225) meaning that a “broad axe” can be wielded to determine quantification of pass on in the same way that it can be wielded to determine quantification of damages.

The implementation of the Damages Directive has also clarified that (for claims where the infringement started on or after the Implementation Date) a defendant seeking to rely on the defence has the burden of proving the existence and extent of the pass-on. Where the existence of the claim depends on the overcharge having been passed-on, the burden lies with the claimant (but there is a rebuttable presumption that the overcharge has been passed-on to indirect purchasers).

13. **Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?**

Expert evidence is permitted with the court’s permission. Experts are appointed by the parties and owe duties to them to e.g. exercise due care and skill, comply with any relevant code of ethics, act independently, and inform the parties of relevant conflicts of interest.
However, the experts’ primary duty is to help the court by providing objective, unbiased opinions on matters within their expertise, and the duty to the court overrides any duties to the parties.

Each party will usually appoint its own expert, although it is possible (albeit rare in competition cases) for the court to order a single expert to be jointly instructed. Where the parties have their own experts, they typically exchange expert reports and then meet with the aim of producing a joint statement for the court, detailing the points on which they agree or disagree. Experts are then cross-examined at trial. This can be done separately, or the court may order the parties’ experts to give evidence concurrently in a process known as “hot-tubbing”, whereby the experts are cross-examined by the parties and the judge (or tribunal) simultaneously.

Expert evidence is a feature in virtually all competition litigation cases given the complexity of issues, particularly around the identification of the appropriate counterfactual and issues relating to quantification of damages (including pass-on). Experts from a variety of fields may be engaged, but typically include economists, industry experts and forensic accountants.

14. **Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?**

High Court cases are usually heard by a single judge. Claims in the CAT are generally heard by a three-member panel: a chairman and two ‘ordinary members’. The chairman is usually a judge of the High Court. The ordinary members may be drawn from a wider pool of lawyers, accountants, economists and other experts. Neither forum uses juries in competition cases.

Rules of evidence are found in the Civil Procedure Rules (for High Court claims), the CAT Rules 2015 (for matters in the CAT) and in the common law. Parties typically exchange written statements from factual and expert witnesses in advance of trial, as well as any other documentary evidence (please refer to question 21 for details of the disclosure process). Those witnesses confirm the accuracy of their written statement at the trial and are usually then cross-examined by the opposing party’s counsel. The approaches in the High Court and CAT are similar, although the CAT has specific powers to limit cross-examination as it sees fit (CAT Rules 2015, Rules 21(7) and 55(6)).

15. **How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?**

Timing will vary depending on status of regulatory appeal proceedings, volume of evidence, complexity of the issues and the number of parties. Competition cases can take longer than large commercial cases. A ‘typical’ case tends to take around 18 months to two years to reach the trial stage. More complicated cases or those in which related regulatory appeal proceedings are pending can take several years to reach trial, and fast-track procedures are available for smaller matters.
Appeals against a High Court judgment or CAT decision can be made to the Court of Appeal (or, for CAT decisions in Scotland, the Court of Sessions). Permission to appeal must be obtained from the High Court or CAT at first instance, or, if this is refused, from the Court of Appeal itself. Appeals may only be made in respect of: (i) points of law; (ii) a finding of breach of competition law (in standalone claims); (iii) the award of amount of damages; or (iv) the issuing of an injunction. Appeals against High Court judgments may only be made by parties; appeals from the CAT may be made by anyone with sufficient standing.

Subsequently, a further appeal can be made to the Supreme Court, but only on a point of law of general public importance. This requires permission from the Supreme Court itself.

16. **Do leniency recipients receive any benefit in the damages litigation context?**

Historically, a successful leniency application provided no protection from civil claims for damages brought by victims of the infringement.

However, following the implementation of the Damages Directive, some limitations on the liability of immunity recipients have been imposed. Immunity recipients will generally only be liable for the harm caused to their direct and indirect purchasers, but will not be jointly and severally liable for the entire harm caused by the infringement (except where the remaining ‘co-infringers’ are unable to fully compensate the other victims of the infringement). As such, they will also generally be protected from contribution claims from co-infringers. However, this protection only extends to immunity recipients and they are likely to have to wait several years to determine the full extent of their liability. This protection only applies in the context of proceedings commenced on or after 9 March 2017, where the relevant infringement and harm also occurred on or after that date.

17. **How does the court approach the assessment of loss in competition damages cases? Are “umbrella effects” recognised? Is any particular economic methodology favoured by the court? How is interest calculated?**

Damages are compensatory, aiming to put the claimant in the position it would have been in had the breach of competition law not occurred. This may include the claimant’s lost profits.

Under EU law, claimants may seek ‘umbrella’ damages i.e. they can claim for purchases made from firms that did not participate in the cartel, on the basis that the cartel inflated the market price, enabling non-cartelist firms to charge higher prices to their customers as a result (see Case C-557/12 Kone AG & Others v OBB-Infrastruktur AG (2014)).

No clear evidential preference has emerged in relation to quantifying damages. Assessment of damages can range from consideration of complex econometric evidence adduced by expert economists to narrative evidence put forward by factual witnesses. The CAT in particular has previously reserved its position to interpret expert economic evidence in light
of its own assessment of the case.

The High Court and CAT have broad discretion as to the rate of interest awarded, and this is often disputed between the parties. Interest may be awarded on a compound or simple basis but, again, this depends on the facts of each case.

18. **Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?**

   English civil law grants defendants a general right to seek contribution from any other defendant (or third party) which is liable for the same damage. The contribution of any one party may be up to 100% of the damages awarded; the proportion is based on a flexible test of what is ‘just and equitable’ based on the evidence.

   The implementation of the Damages Directive amends this general position for competition claims on or after 9 March 2017 in three principal ways: (i) if one defendant settles, the other defendants cannot seek a contribution from the settling defendant; (ii) defendants which have received immunity have a partial exemption (see question 16 above); and (iii) the “just and equitable” test is replaced with an assessment of the “relative responsibility for the whole of the loss or damage caused by the infringement”.

19. **In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?**

   The most common way for a competition damages claim to be resolved without a trial is by means of a settlement between the parties.

   In the High Court, there are two kinds of application which defendants can use to dispose of claims (wholly or in part) without a full trial: summary judgment and strike-out.

   Summary judgment may be given where the claim has no real prospect of success and where there is no other reason to go to trial. “Real” prospect of success does not mean that the claim will probably succeed at trial; rather, it needs to be a “real” prospect of success as opposed to “fanciful”.

   A claim may be struck out in four principal circumstances: (i) where the statement of case discloses no reasonable grounds for bringing or defending the claim; (ii) where it amounts to an abuse of process (e.g. if judgment has already been handed down on the same dispute); (iii) where it is vexatious, scurrilous or obviously ill-founded; or (iv) where the claimant has failed to comply with a rule, practice direction or court order.

   The CAT has broadly similar powers of strike-out and summary judgment under the CAT Rules, as the CAT itself has noted (see *Wolesley UK Ltd & Ors v Fiat Chrysler & Ors* [2019])
20. **What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?**

Collective settlement is possible under the CAT’s collective actions regime (see question 11). A collective settlement must be approved by the CAT in order to be binding, which it will do if it is satisfied that the settlement terms are ‘just and reasonable’, having regard to the size of the class covered by the settlement, the amount and terms of settlement, the likelihood of a higher amount being awarded at trial and the likely cost and duration of trial. In assessing this, it may have regard to submissions by the parties’ experts, legal counsel and any individual class member.

The settlement can include parties outside of the UK, provided that they have opted in to the proceedings.

21. **What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?**

The parties to English proceedings must generally disclose the existence of all documents which are or have been in their control, and which harm or support their own or another party’s case.

Following the implementation of the Damages Directive, a party cannot be required to disclose either a settlement submission made to a competition authority which has not been withdrawn or a cartel leniency statement. A prohibition on disclosure also applies to a competition authority’s investigation materials until after the investigation is closed.

A party is entitled to withhold privileged documents from inspection by the other side. The most important category of privilege is “legal professional privilege”. This includes “legal advice privilege”, which protects confidential communications between a lawyer (whether in-house or external) and his client which come into existence for the purpose of giving or receiving legal advice, and “litigation privilege”, which protects confidential communications between a client and its lawyer, or between a client (or its lawyer) and a third party which come into existence for the dominant purpose of obtaining information or advice in connection with the conduct of the litigation.

Documents cannot be withheld from inspection on grounds of confidentiality. In practice, the confidentiality of commercially-sensitive documents is commonly safeguarded by disclosing them into a “confidentiality ring”, which restricts access to a limited number of persons who...
are typically required to sign confidentiality undertakings. Additional protective measures may be taken in respect of hearings, such as asking the court to go into private session while a confidential document is referred to.

Disclosure can also be sought against third parties, but the applicant must satisfy the court or CAT that the documents sought are likely to support its case or harm another party’s case and that disclosure is necessary to dispose fairly of the claim or to save costs. Following implementation of the Damages Directive, the English courts/CAT cannot make a disclosure order addressed to a competition authority in respect of documents included in the authority’s file unless satisfied that no-one else is reasonably able to provide them.

In proceedings before the High Court, the parties must file disclosure reports and seek to agree a proposal for disclosure before the first case management conference (“CMC”). The court will then choose from a “menu” of disclosure options to determine the appropriate disclosure order. Since 1 January 2019, a new disclosure pilot scheme has applied to cases before the Business and Property Courts. This is intended to be an entirely new scheme of disclosure under which the parties (and their representatives) cooperate in order to assist the court in determining the scope of disclosure that is required in the most efficient way possible. However, the new scheme does not currently apply to competition damages actions unless the court makes a specific order to that effect.

In proceedings before the CAT, the procedure is less prescriptive. The CAT will determine whether or not a disclosure report is appropriate at the first CMC, and then decide what orders to make in relation to disclosure at a subsequent CMC.

22. **Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?**

The losing party is usually ordered to pay the costs of the winning party, although, in practice, the winner is unlikely to recover the full amount. The court or CAT generally takes into account a range of factors in determining the level of a cost award, including the conduct of the parties before and during the proceedings.

Costs which have been unreasonably incurred or which are unreasonable in amount cannot be recovered.

23. **Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party’s costs? Are lawyers permitted to act on a contingency or conditional fee basis?**
Litigation funding is now a common feature of competition damages actions in the UK. Although not formally regulated, litigation funders generally subscribe to the “Code of Conduct for Litigation Funders”, a voluntary code of conduct launched in November 2011.

Lawyers are permitted to act on the basis of conditional fee arrangements (“CFAs”) under which the client pays different amounts for the legal services provided depending on the outcome of the case. Success fees payable under CFAs are not recoverable from the other side.

Contingency fee agreements known as “damages-based agreements” (“DBAs”) under which the amount paid to the lawyer is calculated by reference to the compensation recovered by the client are also permitted, except in respect of collective actions. A successful claimant which has entered into a DBA may not recover more by way of costs than is payable under the DBA.

Claimants may also take out “after-the-event” or “ATE” insurance which will typically cover the client’s liability for the disbursements and expenses of its own lawyers, and the other side’s legal costs. The insurance premia are not recoverable from the other side.

24. What, in your opinion, are the main obstacles to litigating competition damages claims?

There is some speculation that the uncertainty surrounding the EU-UK relationship following the Brexit transition period (that ends on 31 December 2020) may make the UK a less attractive regime for claimants. However, most of the changes that are currently anticipated post-the transition period should not affect the effectiveness and practical advantages of the UK as a forum for resolution of competition damages claims.

After the transition period (and assuming no other arrangements are concluded as part of the EU-UK future relationship), the UK will be outside of the EU framework that currently governs jurisdiction, enforcement and choice of law in international disputes (see questions 7 and 8 above). As things stand, at the end of the transition period, jurisdiction will be governed by the English common law rules (save for cases commenced before the end of the transition period), which are in some respects more generous to claimants than the current rules. EU judgments should still be enforceable in the UK and vice versa, although this will be less straightforward than is currently the case. The current rules on choice of law will be domesticated and continue to apply post-transition.

In the short term, Brexit should have a limited impact on competition damages actions. Rights of action which have accrued on the basis of EU law before the end of the transition period will be domesticated into English law. Claimants will be able to bring follow-on damages claims in the UK after the end of the transition period on the basis of Commission decisions taken before the end of the transition period, and Commission decisions taken after
the transition period will remain persuasive authority for the UK courts. In addition, EU principles and case law applicable before the end of the transition period will continue to bind UK courts (with the exception of the Supreme Court) when considering damages claims brought after that date.

Claimants will also be able to bring claims in respect of post-Brexit breaches of EU law outside of the UK as breaches of foreign torts (which are a common feature of commercial litigation in the UK).

Aside from Brexit, the relatively high costs of lawyers and the litigation process in the UK can be a deterrent to claimants. However, this has been mitigated by the ready availability of litigation funding.

25. **What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?**

The collective action regime, which was introduced to address a gap in the effectiveness of private enforcement for consumers and other smaller claimants, has the potential to transform the competition litigation landscape. Although the regime has had a slow start, it is now gaining momentum. The CPO application in the *Merricks* case (see question 11 above) is set to provide important guidance for future class representatives and their funders. If the Court of Appeal’s ruling in that case is upheld, it should encourage claimants and funders to use the regime.

The success of the new regime is not all bad news for potential defendants, as the new collective settlement regime introduced alongside it (see question 20 above) provides a potential route for achieving finality of settlement with the entire class of litigants far more efficiently and effectively than is possible if claims are pursued separately.