

Competition Litigation  
in the UK

**SLAUGHTER AND MAY**

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## 1. BACKGROUND

- 1.1 This publication provides a general overview of competition litigation in the UK, together with details of Slaughter and May's experience and capability in this growing area.
- 1.2 Whilst the principle that breaches of competition law give rise to claims for damages and other relief in the English courts has been clear at least since the decision of the House of Lords in *Garden Cottage Foods v Milk Marketing Board* in 1983<sup>1</sup>, it is only with more recent policy and legislative changes that private enforcement of competition law in the UK has come to be widely perceived as a credible alternative to public enforcement by the competition regulators.
- 1.3 In particular, the enhancements to third party rights to enforce competition law, introduced by the Enterprise Act 2002 ("the Enterprise Act"), are viewed as having facilitated a much greater level of private enforcement of competition rules, relative both to the position at common law and to the position in other EU Member States. The Enterprise Act introduced a specialist tribunal (the Competition Appeal Tribunal ("the CAT")) to hear claims for damages on a "follow-on" basis from a prior finding of infringement by the competition authorities in the UK or Brussels, and allowed for representative actions to be brought by consumer organisations claiming damages on behalf of groups of consumers.
- 1.4 Other factors have been at work to increase the attractiveness of private enforcement in the English courts as a means of recourse for those who consider themselves to be victims of a breach of the competition rules. The English courts have interpreted their jurisdiction to award damages expansively so as in certain circumstances to allow claimants to recover damages for loss suffered outside England and Wales. At the same time, the primary competition authority in the UK (the Office of Fair Trading ("the OFT")) has developed a set of priority principles for assessing which cases warrant expenditure of scarce public resources. These principles take into account the ability of the complainant to seek redress through private enforcement of the competition rules. As a result, absent wider public policy considerations, victims of competition law breaches increasingly find that private enforcement is the only means of redress available to them.
- 1.5 Recent developments suggest that the momentum developing behind private enforcement can only gather pace. Both the OFT and the European Commission (the "Commission") have been very active in reviewing policy in this area of law and have both put forward a number of recommendations and proposals to enhance the effectiveness of private enforcement for breaches of competition law.<sup>2</sup>

<sup>1</sup> *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130.

<sup>2</sup> The Commission's publications on this area of law include its Green Paper on "Damages actions for breach of EC antitrust rules" in December 2005 ("Green Paper") (com (2005) 672 Final) and its White Paper on the same topic ("White Paper") (com 2008 165 Final). The OFT has also produced a number of publications on this area, including a discussion paper "Private Actions in Competition Law: Effective Redress for Consumers and Business", in April 2007 ("Discussion Paper") followed by a number of recommendations in November 2007 ("Recommendations") on how best to facilitate the case of private actions. More recently, the OFT has also published its response to the Commission's White Paper on this topic ("Response").

- 1.6 Where relevant, this publication makes reference to the Commission's and the OFT's publications in this area.
- 1.7 This publication deals with litigation before the CAT, whose jurisdiction extends to the United Kingdom as a whole, and in the court system of England and Wales. It should be noted that separate court systems exist in Scotland and Northern Ireland.

## 2. ACTIONABLE COMPETITION LAW BREACHES

2.1 Private legal actions brought before the UK courts claiming damages and/or other relief (e.g. injunctions) for breaches of competition law are generally brought in tort for breach of one of the following statutory duties<sup>3</sup>:

- > the prohibition on anti-competitive agreements (including cartels) contained in Article 81 of the EC Treaty and the domestic equivalent in Section 2 of the Competition Act 1998 ("the Competition Act") (commonly referred to as the "Chapter I prohibition"); and/or
- > the prohibition on the abuse of a dominant position contained in Article 82 of the EC Treaty and the domestic equivalent in Section 18 of the Competition Act (commonly referred to as the "Chapter II prohibition").

2.2 The relevant provisions of the EC Treaty have direct effect and are directly applicable, meaning that claims based on these provisions can be brought in a UK court. In practice, claims relating to anti-competitive agreements or the abuse of a dominant position are often based on both the relevant EC and UK provisions. Under Section 60 of the Competition Act, the English courts are obliged to act with a view to ensuring consistency in the application of the relevant EC and UK provisions and are also obliged in certain circumstances to respect precedent at European level under the provisions of Council Regulation (EC) 1/2003<sup>4</sup> (see further section 3 below).

2.3 In a reference to the European Court of Justice for a preliminary ruling in *Courage v. Crehan*<sup>5</sup>, the European Court confirmed that it is for domestic law to designate the courts and tribunals having jurisdiction to hear claims for damages arising from a breach of European competition law, and to make the detailed procedural rules, provided that the following two principles are adhered to:

- (i) *Principle of equivalence*: the rules must not be less favourable than those governing similar domestic actions (namely, actions in tort for breach of statutory duty in the context of English law); and
- (ii) *Principle of effectiveness*: the rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law.

2.4 In *Devenish*<sup>6</sup>, the High Court noted that, as found by the Court in *Crehan*, the principle of equivalence may require that the claimant is entitled to be compensated for a broader spectrum of loss than would be awarded under the equivalent domestic statute. This was then subsequently confirmed by the Court of Appeal.<sup>7</sup>

<sup>3</sup> It has also been suggested that such claims may be more correctly framed as being 'unjust enrichment' claims. However, at present, the prevailing view would characterise such claims as a breach of statutory duty.

<sup>4</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L1/1).

<sup>5</sup> Case no. C-453/99 *Courage v. Crehan* [2002] QB 507.

<sup>6</sup> *Devenish Nutrition Limited and others v. Sanofi-Aventis SA and others* [2007] EWHC 2394 (Ch).

<sup>7</sup> *Devenish Nutrition Limited v. Sanofi-Aventis SA (France) & others* [2008] EWCA Civ 1086.

### **The prohibition on anti-competitive agreements**

2.5 Article 81(1) of the EC Treaty prohibits any agreement or concerted practice between two or more undertakings that:

- (i) has the object or effect of preventing, restricting or distorting competition; and
- (ii) may affect trade between EU Member States.

2.6 The Chapter I prohibition of the Competition Act is based on Article 81 and contains an equivalent prohibition for agreements that may affect trade within the United Kingdom.

2.7 Some examples of the type of restrictions that may be caught by the prohibitions in Article 81 and/or Chapter I are:

- > price-fixing or market-sharing cartel agreements;
- > agreements to limit production or sales;
- > bid-rigging activities;
- > resale price maintenance;
- > exclusivity agreements;
- > intra-EU export bans;
- > territorial restrictions (e.g. restrictions on the places/customers in which/to whom a wholesaler may sell); and
- > agreements to exchange commercially sensitive information.

### **The prohibition on the abuse of a dominant position**

2.8 Article 82 of the EC Treaty prohibits the abuse, by one or more undertakings, of a dominant position within the common market or a substantial part of it, in so far as it may affect trade between Member States.

2.9 The Chapter II prohibition of the Competition Act is based on Article 82 and contains an equivalent prohibition for the abuse of a dominant position that may affect trade within the United Kingdom.

2.10 In order to decide whether a company has a dominant position, it is first necessary to define the relevant market by reference to both its product and geographic scope. A company will be found to have a dominant position within a market if it has the power to behave

to an appreciable extent independently of its competitors, its customers and ultimately of consumers. This analysis of the existence of dominance takes into account factors such as the market share of the company and its competitors, the presence of barriers to entry and expansion in the market and the market position of customers (e.g. buyer power).

2.11 There are two broad categories of abuse:

- (i) exclusionary abuses (designed to exclude a dominant company's competitors); and
- (ii) exploitative abuses (designed to exploit a dominant company's customers).

2.12 Some examples of the type of conduct that may be regarded as abusive are:

- > directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions (e.g. excessive pricing);
- > discriminatory treatment (i.e. offering differential terms without objective justification to equivalent customers or offering the same terms without objective justification to different customers);
- > predatory pricing (e.g. offering prices below cost with a view to eliminating a competitor from the market);
- > exclusivity provisions;
- > loyalty rebates;
- > tying or bundling; and
- > refusals to supply (e.g. refusing to supply an existing customer, refusing to grant access to an essential facility or refusing to supply information needed for interoperability).

2.13 The EC and UK rules are considered in greater detail in the Slaughter and May publications: *An Overview of the EU Competition Rules* and *An Overview of the UK Competition Rules* respectively.

### 3. CLAIMS IN THE HIGH COURT AND CAT

3.1 In terms of standing to bring competition law claims, to the extent that the English courts have jurisdiction to hear a claim (as to which, see below), any person or undertaking that has suffered loss or damage as a result of an infringement of UK and/or EC competition law may bring a claim for damages or other relief (e.g. injunctive relief) before the Chancery Division of the High Court<sup>8</sup> (on a “standalone” basis where there is no prior infringement decision by the Commission, or on a “follow-on” basis where there is such a decision). Alternatively, where a prior finding by the Commission or by a UK competition authority of an infringement exists and where the redress sought is limited to a claim for damages (or other claim for a sum of money), any such person may bring the claim before the CAT (on a “follow-on” basis). A prior finding of infringement also gives rise to the possibility of claims for damages being brought before the CAT by the Consumers’ Association – which now trades as “Which?” – or other bodies that may be specified in the future on behalf of individually named consumers (so-called “representative” actions). This section considers each of these different types of claim in turn.

#### High Court claims

- 3.2 An action before the High Court will often be the only avenue available to a litigant. This is the case, in particular, if there is no prior infringement decision of a competition authority and/or if the relief sought goes wider than a pure claim for damages (or other claim for a sum of money), for example if urgent injunctive relief is required.
- 3.3 “Follow-on” actions may also be brought in the High Court, based on a pre-existing decision of the Commission, since Article 16 of Regulation 1/2003 provides that an English court cannot take a position that runs contrary to a decision already taken by the Commission. Hence, in a “follow-on” action, the claimant does not need to establish that the defendant has infringed the relevant competition law rule. The claimant can rely on the decision of the Commission to that effect.
- 3.4 Article 16 has been given a relatively restrictive interpretation by the House of Lords in a recent case (*Crehan v. Inntrepreneur Pub Company*<sup>9</sup>) where it was held that a Commission decision is only binding on an English court when the court case before the English court involves the very same “agreements, decisions or practices” as were the subject of the Commission’s decision. If the English court is considering a dispute involving separate parties, the Commission’s decision will not be binding on the court even if the conduct at issue relates to the same product and geographic market and is in broadly similar form. However, the related decision will be admissible as evidence and may well be regarded by the court as highly persuasive, as indeed the House of Lords recognised in *Crehan*.

<sup>8</sup> The Judges in the Chancery Division have undertaken specialist training in examining claims involving competition law issues and the thinking behind allocating competition law cases to this Division is that the Chancery Division will develop a specialist understanding of competition law cases.

<sup>9</sup> [2006] UKHL 38.

- 3.5 Where a decision has yet to be taken by the Commission in proceedings it has initiated regarding an agreement or practice that is subject to challenge before the English courts, Article 16 further provides that the English courts must avoid giving a potentially conflicting decision. This may require the court to stay its own proceedings until such time as the Commission has reached a decision.
- 3.6 There is no equivalent to Article 16 for decisions taken by the OFT or other national competition authorities. The English courts are, therefore, comparatively less constrained by decisions of domestic competition authorities when faced with subsequent private actions. However, both the OFT's Discussion Paper and its Recommendations<sup>10</sup> suggest the introduction into UK law of a provision equivalent to Article 16, requiring that English courts and tribunals "have regard" to UK national competition authorities' decisions and guidance when determining competition issues. This is to ensure the continued consistent development of competition policy in the UK. In the meantime, a prior finding of infringement by any of the UK competition authorities can be expected to be of significant persuasive value in any subsequent standalone claim before the English courts. The Commission's White Paper has also proposed that decisions of the national competition authorities of *any* Member State regarding the application of EC competition rules should be binding on the national courts of *all* Member States in "follow-on" damages actions brought in relation to the same practices and the same parties. This proposal has been largely welcomed by the OFT in its Response to the White Paper<sup>11</sup>.
- 3.7 In addition, there are other avenues by which the views of the OFT and/or the Commission may be made known to a court considering a standalone competition claim. Any party whose statement of case raises or deals with an issue relating to the application of Article 81 or 82, or the Chapter I or II prohibitions, must serve a copy of the statement of case on the OFT at the same time that it is served on other parties to the claim. Under Regulation 1/2003, both the OFT and the Commission may decide to submit written observations on the case to the court, and with the court's permission they can also make oral representations. To date, the OFT's policy has been to intervene only in appeal cases and where there is a risk that the Court may not be aware of broader policy issues (as proved to be the case in relation to the appeal of the *Crehan* decision to the House of Lords). The Commission's policy is also to intervene only in appeal proceedings; it is not, however, known to have intervened in any proceedings before the courts in England and Wales to date.
- 3.8 The Court may decide to seek advice from the European Court of Justice where the case involves the interpretation of the EC Treaty or an act of the Commission, by requesting a preliminary ruling under Article 234 of the EC Treaty.

<sup>10</sup> Private actions in competition law: effective redress for consumers and business – Recommendations from the Office of Fair Trading, November 2007 (OFT916resp).

<sup>11</sup> Response to the European Commission's White Paper, Damages Actions for breach of the EC antitrust rules, July 2008 (OFT1006).

3.9 Where there are multiple claimants to the same cause of action, the UK court procedure rules allow for the use of Group Litigation Orders. This procedure has not yet been used in a competition law case, but it has been used in other types of cases giving rise to multiple consumer claims (e.g. product liability cases). To date, collective actions related to competition law breaches have taken the form of representative actions (see further below). The OFT's Discussion Paper and Recommendations raised the possibility of extending the use of representative actions to stand-alone actions and to actions brought on behalf of businesses (see further below).

### CAT actions

3.10 Section 47A of the Competition Act allows for follow-on actions to be brought before the CAT to recover damages (or to bring any other claim for a sum of money) suffered as a result of an infringement of the EC or UK prohibitions, provided that there is a prior decision of the OFT, Commission or CAT finding that an infringement has taken place. The right to bring such a "follow-on" action in respect of previous decisions of the Commission is not limited to decisions that relate to the UK or to parties resident in the UK. The first actions under Section 47A were brought in 2004<sup>12</sup> following the Commission's vitamins cartel decision<sup>13</sup>. These have been followed by a number of subsequent actions brought following both OFT and Commission infringement decisions<sup>14</sup>.

### Representative actions

3.11 One widely acknowledged deterrent to private litigation is that it may not be cost-effective for an individual consumer to bring an action for damages, especially if the loss suffered by the consumer is very small. With this in mind, UK law specifically allows a "specified body" to bring a damages action on behalf of named consumers in front of the CAT under Section 47B of the Competition Act. A specified body must meet certain criteria designed to ensure its independence, impartiality, integrity and ability to represent the interests of consumers. To date, Which? is the only body specified for the purposes of Section 47B. In March 2007, the first such representative action under section 47B was brought by Which?<sup>15</sup>

<sup>12</sup> Case no. 1029/5/7/04 Deans Foods Limited v. (1) Roche Products Limited (2) F Hoffman-La Roche AG (3) Aventis SA, registered on 26/02/2004; and Case no. 1028/5/7/04 (1) BCL Old Co Limited (2) DFL Old Co Limited (3) PFF Old Co Limited v. (1) Aventis SA (2) Rhodia Limited (3) F Hoffman-La Roche AG (4) Roche Products Limited, registered on 26/02/2004.

<sup>13</sup> Case COMP/37.512 Vitamins, Commission decision of 21/11/2001 (OJ 2003 L6/1).

<sup>14</sup> Subsequent actions include: Case no. 1060/5/7/06 Healthcare at Home v. Genzyme Limited, registered on 05/04/2006, following the OFT's abuse of dominance decision in relation to Genzyme; Case no. 1077/5/7/07 Emerson Electric Co and others v. Morgan Crucible Company plc and others, registered on 09/02/2007, following the Commission's cartel decision relating to carbon and graphite products; Case 1078/7/9/07, The Consumers Association v. JJB Sports plc, registered on 05/03/2007, following the OFT's cartel decision relating to replica football shirts; Case 1088/5/7/07, JJ Burgess and Sons v. W. Austin and Sons (Stevenage) Limited and Harwood Park Crematorium Limited, registered on 03/08/2007, following the OFT's abuse of dominance decision in relation to Austin/Harwood Park; and Cases 1098/5/7/08, BCL Old Co Limited, DFL Oldco Limited, PFF Old Co Limited and Deans Foods Limited v. BASF SE, BASF plc and Frank Wright Limited, registered on 13/03/2008, and 1101/5/7/08, Grampian Country Food Group Ltd, Grampian County Feed Limited, Marshall Food Group Limited, Cymru Country Chickens Limited and Favour Parker Limited v. Sanofi-Aventis SA, Rhodia Limited, F. Hoffman-LA Roche AG, Roche Products Limited, BASF plc and Frank Wright, registered on 14/05/2008, following the Commission's vitamins cartel decision.

<sup>15</sup> Case no. 1078/7/9/07 *The Consumers Association v. JJB Sports Plc*, registered on 05/03/2007.

on behalf of some 130 individual consumers against JJB Sports plc. The claim related to losses suffered by consumers as a result of JJB's involvement in a cartel to fix the prices of replica football kits in 2000 and 2001, following the OFT's infringement decision of August 2003.<sup>16</sup> However, no judgment was ultimately delivered in this case: on 9 January 2008, JJB announced that it had agreed to settle the case. The CAT subsequently issued an order on 14 January 2008 that the claim be withdrawn. JJB was also ordered to pay Which?'s costs.

- 3.12 There is currently no provision allowing representative actions to be brought on behalf of businesses, or as standalone actions on behalf of businesses or "consumers at large". However, in its Discussion Paper and Recommendations, the OFT has raised the possibility of encouraging the use of representative actions in competition law cases in several ways, including allowing representative actions to be brought on behalf of "consumers at large" (rather than the current requirement to bring an action on behalf of named consumers), allowing standalone actions and allowing representative actions to be brought by specified bodies on behalf of businesses, especially small and medium-sized enterprises. In its White Paper, the Commission also considered the issue of collective redress; however in contrast to the OFT, the Commission has been more modest in its approach on the issue of collective redress, stopping short of recommending that representative actions be generally allowed on behalf of "consumers at large" and instead suggesting a combination of two alternative complementary mechanisms of collective redress: (i) representative actions which are brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified (and, only in very restricted cases, identifiable) victims<sup>17</sup>; and (ii) opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into a single action.

### Jurisdiction and applicable law

- 3.13 The issue of whether a UK court has jurisdiction to hear a claim is determined by reference to the general rules contained in the Jurisdiction Regulation<sup>18</sup>, Lugano Convention<sup>19</sup> or common law conflict of laws rules, as appropriate.<sup>20</sup> Under the Jurisdiction Regulation, the default position is that the case should be brought in the jurisdiction in which the defendant is domiciled. Thus an English company can always be sued here. However, actions may also be brought in a jurisdiction where the harmful event (tort) occurred or, if the action is being brought by a consumer, in the jurisdiction where the consumer is domiciled. Where there

<sup>16</sup> Case no. CA98/06/2003 *Price-fixing of Replica Football Kit*, decision of the OFT of 01/08/2003.

<sup>17</sup> These entities are either (i) officially designated in advance; or (ii) certified on an ad hoc basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members.

<sup>18</sup> Council Regulation (EC) No.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L12/1).

<sup>19</sup> Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Lugano (16 September 1988).

<sup>20</sup> A UK Court will apply the Jurisdiction Regulation to determine whether it has jurisdiction over persons (including legal entities) domiciled in a Member State; the Lugano Convention will apply to determine jurisdiction over persons domiciled in EFTA states (Iceland, Liechtenstein, Norway and Switzerland); and English common law conflict of laws rules will be applied by the English courts to determine jurisdiction over persons domiciled in any other countries. This publication is focussed on the Jurisdiction Regulation as that is likely to be most relevant to damages actions for breaches of EU competition law, but the Lugano and common law regimes have broad similarities and will often lead to the same result.

are multiple defendants domiciled in different jurisdictions, it is possible to bring all actions in the same jurisdiction where the claims are “so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments”.

- 3.14 The rules on jurisdiction are somewhat complex to apply but can provide considerable flexibility for the English court to take jurisdiction, especially in cases involving multiple defendants based in different EU Member States. For example, in the *Provimi*<sup>21</sup> case, the High Court found that it had jurisdiction to hear damages claims following on from the Commission’s vitamins cartel case,<sup>22</sup> even though some of the defendants were domiciled outside the UK and one of the claimants was a German company which purchased vitamins in Germany. The Court concluded in *Provimi* that it has jurisdiction to hear claims against foreign elements of a cartel where the claims against them are so closely connected to those against an English element that it is expedient to hear them together to avoid the risk of separate hearings producing conflicting judgments. However, there are limitations on the ability of English courts to take jurisdiction over claims involving non-English companies. In *SanDisk Corporation v. Koninklijke Philips Electronics NV*<sup>23</sup>, for example, the Court decided that it did not have jurisdiction to hear the claim since no immediate damage had been caused to SanDisk in England and none of the abuses of a dominant position complained of had originated in England. Accordingly there needs to be some form of connection to England and Wales before the English court will take jurisdiction.
- 3.15 If the English court takes jurisdiction, it must then decide the applicable law to be applied in multi-jurisdictional cases. Different rules will apply depending on whether the events that give rise to the damage occurred prior to or from 11 January 2009.
- 3.16 Where the events that give rise to the damage occur prior to 11 January 2009, under English law conflict of laws rules, the applicable law will be that of the country in which the events constituting the tort (i.e., the infringement of competition law) occur. Where events have taken place in more than one country, the court will apply the law of the country in which the most significant elements of the events occurred.
- 3.17 Where the events that give rise to the damage occur on or after 11 January 2009, the English courts will apply Rome II<sup>24</sup> to determine the law applicable to most non-contractual obligations. Article 6 of Rome II sets out particular rules for determining the governing law with respect to obligations arising out of breaches of competition law, as follows:
- (i) Where the market of only one country is, or is likely to be, affected by the “restriction of competition” then the law applicable to any non-contractual obligations arising out of that restriction will be the law of that country.<sup>25</sup>

<sup>21</sup> *Provimi Ltd v. Aventis Animal Nutrition SA* [2003] EWHC 961.

<sup>22</sup> See footnote 14 above.

<sup>23</sup> [2007] EWHC 332 (Ch).

<sup>24</sup> Regulation (EC) No 864/2007 of 11 July 2007 (“Rome II”). Rome II will be applied in all Member States (except Denmark) to determine the governing law applicable to most non contractual obligations.

<sup>25</sup> Rome II, Article 6(3)(a).

- (ii) Where the markets of more than one country are affected, the position is considerably more complex and less certain. In those circumstances, Rome II<sup>26</sup> provides that the claimant who sues in the court of the defendant's country of domicile may choose to base his or her claim on the law of that country if the market in that country is "amongst those directly and substantially affected by the restriction on competition".<sup>27</sup> Beyond this (i.e. where more than one market is affected and the claimant does not sue in the court of the country in which the defendant is domiciled), Rome II provides no assistance as to which law should govern the claim. These uncertainties will need to be addressed by the courts of Member States and the European Court as the issues arise in future cases. However, it is notable that Rome II has taken a step towards claimants having the right, in claims for damages caused by anti-competitive practices, to elect the governing law on which to base their claim (at least provided that there is an impact on the market of the chosen governing law's country) and the case law might well develop further in that direction.<sup>28</sup>

### Standard of proof

- 3.18 The relevant standard under English law is the civil standard of the "*balance of probabilities*" which is lower than the test applied under criminal law.<sup>29</sup>

### Limitation periods

- 3.19 The standard limitation period for bringing a High Court action based on tort is six years from the date on which the cause of action accrued.<sup>30</sup>
- 3.20 Damages actions before the CAT must generally be brought within two years of the "relevant date". The relevant date is the date on which the period for appealing the competition authority's infringement decision expires with no appeal having been lodged, or the date on which any appeal arising from the infringement decision has been determined or, if later, the date on which the cause of action accrued. In *Emerson Electric Co and others v. Morgan Crucible Company plc and others*<sup>31</sup>, the CAT concluded that where an infringement decision is addressed to a number of parties (as is the case with a cartel) and one or more of the parties appeal the competition authority's decision, a damages action may not be brought against any of the infringing parties before the determination of all appeals against the infringement decision, unless the permission of the CAT is obtained. In *Emerson*, the

<sup>26</sup> Article 6(3)(b).

<sup>27</sup> It is not clear from a literal interpretation of Article 6(3)(b) if the claimant who sued in the defendant's country of domicile could alternately elect to base his or her claim on the court of another country (i.e. other than that of the defendant's domicile) in whose market is affected by the restriction to competition.

<sup>28</sup> From 11 January 2009, the Rome II Regulation (EC) No. 864/2007 (OJ 2007 L299/40) will come into force which will introduce EU wide rules on determining the applicable law.

<sup>29</sup> In criminal trials the jury will be directed that in order to reach a guilty verdict the prosecution must make them "*sure of guilt, which is the same as proving the case beyond reasonable doubt*".

<sup>30</sup> Section 2 of the Limitation Act 1980.

<sup>31</sup> See footnote 17 above.

CAT did grant permission for a claim to be brought against a party that had not appealed the decision, but denied permission for similar actions to be brought against certain parties that had appealed; however, the granting of permission in this case was based on very specific concerns over the defendant's attitude towards document preservation and pre-action disclosure and, as such, suggests that the CAT would not necessarily grant permission as a matter of course.

- 3.21 The CAT has the discretion to extend time limits, subject to a bar on actions being admitted after the date on which an action would be time-barred in the UK courts. The standard limitation period of six years therefore provides an absolute limit on the date by which an action must be brought.

## 4. PROCEDURE BEFORE UK COURTS

- 4.1 A flowchart illustrating the key stages that apply to actions before the English courts is attached as Annex 1. The length of any litigation in England will depend on a combination of factors such as the volume of evidence, the number of parties, the complexity of the issues, the likely length of trial and whether or not the Court decides to order that certain points be dealt with as preliminary issues. Few large commercial cases are dealt with in less than 18 months from when the claim form is issued (absent an order for expedition) and many take two to three years before judgment is issued.
- 4.2 The procedure adopted by both the High Court and the CAT in competition cases largely reflects that applied in all litigation. This part of the publication focuses upon the key issues of evidence likely to arise in competition cases, including the rules on disclosure that differentiate the English courts from their civil law counterparts elsewhere in the European Union. It also discusses issues related to rights of appeal from either tribunal.

### Disclosure

- 4.3 The High Court has long-established disclosure procedures, requiring parties to a claim to disclose to each other at any stage of the proceedings all documents which are or have been in their control and which are material to the issues in the proceedings. "Documents" for this purpose is broadly defined and includes: letters, memoranda, drafts, diaries, manuscript notes, tapes, video cassettes, computer disks, emails, microfilm documents that are stored on servers and back-up systems, electronic documents that have been deleted and "metadata".
- 4.4 The CAT may at any time, on the request of a party or upon its own initiative, give directions for the disclosure between or by the parties of documents or classes of documents. In contrast to the position before the High Court, disclosure is not an automatic part of proceedings before the CAT. Before ordering disclosure, the CAT must be satisfied that the disclosure sought is necessary, relevant and proportionate to determine the issues before it (*Claymore v. OFT*<sup>32</sup>).
- 4.5 Privileged documents have to be disclosed by way of general description, but they do not have to be made available for inspection. In contrast to the position at EU level, correspondence with an in-house lawyer is capable of attracting legal professional privilege for these purposes.
- 4.6 In England there is no oral discovery, and therefore no depositions, as exist in US procedure.
- 4.7 In its White Paper, the Commission has proposed that there be a minimum level of disclosure across the EU between parties to competition law private damages actions. However, it may be noted that these proposals are more modest than the current disclosure rules applied by the courts of England and Wales.

<sup>32</sup> Case no. 1008/2/1/02 *Claymore Dairies and Arla Foods UK PLC v. OFT*, registered on 06/11/2002.

## Disclosure by third parties, including competition authorities

- 4.8 The High Court's procedural rules provide for third party disclosure once proceedings have commenced. The court may make such an order only where the documents of which disclosure is 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 where disclosure is necessary in order to dispose fairly of the claim or to save costs. The CAT's procedural rules give the CAT considerable flexibility to ask third parties to produce documents or papers relating to the case.
- 4.9 Issues related to third party disclosure orders in competition litigation cases have arisen most frequently in relation to leniency statements made by a company to the Commission or the OFT in return for full immunity from civil fines or a reduction in the fines that might otherwise have been imposed upon them for infringement of the competition rules. In order to avoid the undermining of its leniency policy, the OFT has made clear that it will resist applications for disclosure of documents relating to a leniency application, but is nonetheless bound to disclose information where ordered to do so by a court or the CAT.<sup>33</sup> The OFT's concern over the impact of disclosure on the leniency regime is also shared by the Commission. Indeed, in its Response to the Commission's White Paper, the OFT confirmed its support for the Commission's proposal that protection from disclosure should apply to all corporate statements submitted by all applicants for leniency in relation to a breach of Article 81 of the EC Treaty (also where national competition law is applied in parallel). The OFT has also recommended that, in the UK, leniency documents should be excluded from use in civil litigation cases in which national competition law alone is applied.
- 4.10 The CAT has, in previous proceedings, considered whether to order the OFT to disclose documents on its internal files that may be relevant to the proceedings before the CAT. It has made clear that in considering such applications, it will examine whether the disclosure sought is necessary, relevant and proportionate and whether ordering disclosure will adversely affect the OFT's leniency programme. Nevertheless *Umbro* was ordered to disclose certain documents relating to its leniency application to the other parties in the *Replica Football Shirts*<sup>34</sup> case.
- 4.11 A competition authority's decision itself, once published, will expressly rely on certain pieces of evidence (including those put forward by leniency applicants) and so bring this information into the public domain. Damages claims may therefore be brought against leniency applicants based on the competition authority's infringement decision. It follows that to the extent that the competition authorities and the defendant can resist production of a leniency statement this is likely merely to postpone the date upon which the evidence becomes available to potential claimants.

<sup>33</sup> Paragraph 8.49, *Leniency and no-action: OFT's guidance note on the handling of applications*, December 2008 (OFT803).

<sup>34</sup> Case no. 1019/1/1/03 *Umbro Holdings Ltd v. OFT*, registered on 01/10/2003.

### Admission of expert evidence

4.12 Expert evidence, in particular the economic evidence necessary to prove or disprove an infringement, and the evidence of forensic accountants on the appropriate quantum of damages, is key to competition law cases. Such evidence is admissible if it is provided by a suitably qualified expert on a matter which lies within the scope of his expertise. The permission of the CAT or High Court is required to call an expert or put in evidence an expert's report and both tribunals will restrict expert evidence to that which is reasonably required to resolve the proceedings. Where both parties appoint experts, the court may require the experts to meet and establish the areas of agreement and disagreement between them. Experts have an overriding duty, above any obligation to the person instructing or paying them, to assist the court on matters within their expertise.

### Rights of audience

4.13 In the High Court, barristers have full rights of audience. Some solicitors have "higher rights of audience", that is, they have rights of audience in the higher courts, including the High Court.

4.14 In proceedings before the CAT, a party may be represented by a qualified lawyer having a right of audience before a court in the United Kingdom, or by any other person allowed by the CAT to appear on his behalf. Solicitors as well as barristers have full rights of audience in front of the CAT. Non-UK lawyers may be granted permission to appear, although in the *Emerson* case<sup>35</sup> the CAT required the US lawyer to appear with an English barrister to avoid difficulties arising from the US lawyer's inability to give undertakings to the tribunal, for instance in relation to disclosure obligations.

### Rights of appeal

4.15 Appeals may be made by a party from High Court decisions on points of law or against findings of fact, but permission to lodge an appeal must first be obtained from either the High Court or the Court of Appeal. A further appeal lies to the House of Lords, but permission is required from the House of Lords itself.

4.16 A party to proceedings before the CAT can appeal decisions of the CAT to the Court of Appeal. Before bringing an appeal, permission must be obtained from either the CAT or the Court of Appeal. A further appeal may lie to the House of Lords.

<sup>35</sup> See footnote 17 above.

## 5. AVAILABLE RELIEF AND COSTS

- 5.1 This part of the publication considers the various forms of relief that may be available to victims of competition law infringements, together with certain issues relating to costs. However, it ought to be noted as a preliminary point that many cases settle before reaching trial.
- 5.2 The following forms of relief are in theory available to victims of competition law infringements:
- (i) declaratory relief, for example a declaration that exclusivity provisions in an agreement (or, to the extent that the restrictions cannot be severed from the remainder, the entire agreement) are void and unenforceable;
  - (ii) damages for any loss suffered as a result of infringement, for example, to compensate a customer for the higher prices that it has paid as a result of cartel activity; and/or
  - (iii) injunctive relief, for example to compel access to a piece of infrastructure that can be regarded as an essential facility.
- 5.3 To the extent that a claimant is seeking declaratory or injunctive relief, the action must be brought before the High Court. The CAT has jurisdiction to hear claims only for damages or other sums of money.

### Damages

- 5.4 The measure of damages available under English law to the victim of an infringement of competition law has been the subject of considerable debate. Should damages beyond mere compensatory damages, such as exemplary damages designed to punish a wrongdoer, be available to a claimant? Should a defendant be able to assert that the claimant has passed-on the loss suffered to its customers and to that extent mitigated its loss? The law on this subject has been clarified to some extent by the recent judgments of both the High Court and the Court of Appeal in *Devenish*.<sup>36</sup>
- 5.5 There is broad agreement that compensatory damages are available for breaches of EU or UK competition law and that those damages ought to be calculated by reference to what is necessary to restore the victim to the position in which he would have been had the infringement not occurred. This principle is perhaps easier to express than to apply in practice (for example in unfair or excessive pricing cases, where in order to secure a remedy, the court is, in effect required to set a particular “fair” reference price), but the judgments of both of the High Court and the Court of Appeal in *Devenish* appear to confirm that the English courts will approach the exercise with a large degree of pragmatism and without insisting upon an exact account of the claimant’s loss of profits.

<sup>36</sup> *Devenish Nutrition Limited and others v. Sanofi-Aventis SA and others* [2007] EWHC 2394 (Ch); *Devenish Nutrition Limited v. Sanofi-Aventis SA (France) & others* [2008] EWCA Civ 1086.

- 5.6 It would seem to follow from the nature of compensatory damages that, where the defendant can show that the claimant has avoided or mitigated its loss by ‘passing-on’ the loss (for example, in a chain of purchasers in which prices have been increased down the chain), the defendant may be able to claim a complete defence or a reduction in the damages otherwise payable. Whilst not directly addressed in *Devenish*, both the High Court and the Court of Appeal proceeded on the basis that the passing-on defence is available as a matter of English law.
- 5.7 The availability of the passing-on defence has received support from the Commission in the White Paper. However, as a corollary of the passing-on defence being available, the Commission proposed that there should be a rebuttable presumption in favour of indirect purchasers that any overcharge has been passed on, which would make it easier for indirect purchasers to establish claims. The OFT also supports the concept of the passing-on defence in principle; however, it has expressed concern, in its Discussion Paper and Recommendations, that it might allow defendants to escape liability and accordingly proposed that the burden of proof should be on the defendant to show that any overcharge had been passed on. The OFT also proposed in its response to the White Paper that a European-wide consolidation mechanism (consolidating cases so that a defendant would be faced with only one action on behalf of both direct and indirect purchasers, rather than multiple actions), if it could be delivered, would be the best solution.
- 5.8 Whilst the position regarding compensatory damages appears relatively clear-cut, the availability of exemplary damages in competition claims has been the subject of some debate. Following the High Court decision in *Devenish* (the availability of exemplary damages was not appealed to the Court of Appeal), the position would appear to be as follows:
- (i) exemplary damages are in theory available for infringements of the competition rules where it is necessary to punish and deter the defendant;
  - (ii) but the award of exemplary damages is discretionary and the courts will exercise their discretion with caution;
  - (iii) in cases where there are multiple claimants, especially if there are victims of the infringement that are not within the class of claimants, the difficulty of apportioning any exemplary damages between the claimants means that the courts are less likely to exercise their discretion in favour of an award of exemplary damages; and
  - (iv) where fines have already been imposed upon a defendant (or would have been imposed were it not for a successful leniency application) by an EU or UK competition authority, exemplary damages will not be awarded because to do otherwise would breach the principle that a wrongdoer ought not to be punished twice for the same wrong and, in the case of decisions of the Commission, would run contrary to the obligation on national courts not to take decisions that conflict with Commission decisions under Article 16 of Regulation 1/2003.

- 5.9 *Devenish* also considered the availability of restitutionary damages, namely damages assessed by reference to the infringing party's gain rather than the victim's loss, to a party claiming damages for a competition law infringement. The conclusion reached was that as a matter of law such damages are not available in competition law cases. The same conclusion was reached in relation to a claim for an account of profits, that is, a requirement by the infringer to surrender the profits made. Whilst it may be possible to argue that the CAT is not bound by the principles in the *Devenish* case since its powers to award damages or any other sum of money arise from statute, the clear intention of the drafting in section 47A of the Competition Act was to ensure that the CAT would have equivalent powers to the general courts to award damages or other sums of money. The better view may therefore be that the CAT would be unlikely to deviate from the case law of the general courts.
- 5.10 The Commission's position as set out in the White Paper essentially conforms with the status quo under English Law, which is that damages in private anti-trust actions should be compensatory in nature, with exemplary or punitive damages available only to the extent they are available under national laws. However, the OFT has gone further than this, and proposes that, contrary to the law following *Devenish*, the Courts should have discretion to award damages on a restitutionary basis. The OFT views this as a key factor in securing the viability of representative actions, especially where the size of the damages suffered by individual claimants is small and so may not be an adequate incentive for them to participate in the action.

#### **Interim awards**

- 5.11 Both the High Court and the CAT can make interim awards of damages; that is, payments on account of damages which a defendant may be held liable to pay. The interim payment must not be more than a reasonable proportion of the likely amount of the final judgment.
- 5.12 The CAT may only do so once the defendant has filed its defence and in circumstances where, if the claim were heard, the claimant would obtain judgment for "substantial" damages. The CAT has already made one interim award of £2 million.<sup>37</sup>
- 5.13 The High Court's procedural rules contain detailed provisions on when an interim payment of damages may be made, for example where the defendant has admitted liability or where the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money.

#### **Declaratory relief (in the High Court only)**

- 5.14 The court is able to make binding declarations whether or not any other remedy is sought. In many cases, the claimant will request a declaration that, for example, the

<sup>37</sup> *Healthcare at Home Limited v. Genzyme* [2006] CAT 29. £2 million represented 70% of Healthcare's implied loss of revenue due to the actions of Genzyme.

anti-competitive provisions of an agreement (or the whole agreement if it is not possible to sever the anti-competitive provisions) are void and unenforceable.

### **Injunctive relief (in the High Court only)**

- 5.15 The High Court may grant injunctions either as a final remedy or as an interim measure. In previous competition law cases, applicants have requested a wide variety of injunctions, such as an injunction to require a mobile telephone operator to activate connections with an internet protocol-based voice network<sup>38</sup> and an injunction to prevent a pharmaceutical company from ceasing to supply certain wholesalers.<sup>39</sup>
- 5.16 Where an interim injunction has been requested, the court will consider whether there is a serious question to be tried; whether the balance of convenience is in favour of granting the order; the relative strengths of the case; and whether the defendant would be adequately compensated by a later award of damages if the injunction is wrongly granted.

### **Interest**

- 5.17 Interest in the High Court is awarded from the date the infringement occurred up to the date of judgment, and at the judgement rate if applicable after the judgment. The level and amount of interest are in the court's discretion. In practice, interest is generally awarded at base rate plus 1%.
- 5.18 The CAT has the power to award interest on awards of damages for any part of the period between the date on which the cause of action arose and either the date of any sum paid before the date of the award or the date of the award itself. However, the CAT has yet to make a final damages award and so its practice on the award of interest is not yet known. In considering interim awards, to date it has declined to award interest.<sup>40</sup>

### **Settlement**

- 5.19 The OFT and some other competition authorities in the EU have recently closed some cases by way of settlement, with the undertakings under investigation admitting that they have taken part in an infringement and agreeing not to appeal the competition authority's decision in return for a swift closure of the investigation and, in some cases, a reduction in fines. In addition, on 30 June 2008 the Commission adopted a new settlement procedure for cartel cases allowing the Commission to also settle cases through a simplified procedure, providing for the possibility of a reduction in fines where the cartellists acknowledge their involvement in the cartel and their liability for it.

<sup>38</sup> *Software Cellular Network Limited v. T-Mobile (UK) Limited* (Chancery Division, 17 July 2007).

<sup>39</sup> *AAH Pharmaceuticals Limited v. Pfizer Limited* [2007] EWHC 565.

<sup>40</sup> No interest was awarded as part of the £2 million interim award in *Healthcare v Genzyme* (see footnote 44).

- 5.20 Recent examples of the use of settlement by the OFT in the UK include a settlement with British Airways<sup>41</sup>, announced in August 2007, in relation to the long-haul passenger fuel surcharge investigation, a settlement with Asda, Sainsbury's, Safeway, Dairy Crest, The Cheese Company and Wiseman<sup>42</sup>, announced in December 2007, in relation to allegations of price collusion for dairy products and a settlement with Asda, First Quench, Gallaher, One Stop Stores, Somerfield and TM Retail<sup>43</sup>, announced in July 2008, in relation to the OFT's investigation into unlawful practices involving retail prices for tobacco products in the UK. Settlement agreements do not, however, protect the parties from claims for damages or other relief. Damages actions may therefore be brought against parties to a settlement agreement, based on the competition authority's infringement decision.
- 5.21 Over and above settlement with competition authorities of any civil investigations, there is a clear tendency for claims for damages based on competition breaches to settle. In those circumstances, it is clearly in the interests of the defendant to ensure that any agreement reached with the claimants precludes any further claims in respect of the same subject matter. As a matter of English law, it is possible to draft such agreements so as to prevent a party to the agreement from bringing future claims arising out of the same matter before an English court.
- 5.22 Should the claimant who settled decide to initiate proceedings in a foreign jurisdiction, the extent to which the agreement could be relied upon would depend upon the approach of that foreign jurisdiction. Generally, however, having the settlement agreement governed by an English jurisdiction clause would enhance the prospects of defeating such claims.

### Costs

- 5.23 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 costs (or the majority of the costs) it has incurred. Whilst there exists some discretion to adjust the balance of payment of costs (for instance, where the successful party can be shown unreasonably to have refused to engage in mediation), this is exceptional.
- 5.24 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 in respect of the whole or part of the proceedings. There is no specific rule that costs are awarded on a "loser pays" principle and the CAT may take into account the conduct of all the parties in relation to the proceedings in determining costs. In its Discussion Paper and Recommendations, the OFT proposes the enhanced use of cost-capping orders to cap the parties' base costs for the purpose of liability for costs as between the parties.

<sup>41</sup> Press Release 113/07 dated 1 August 2007.

<sup>42</sup> Press Release 170/07 dated 7 December 2007.

<sup>43</sup> Press release 82/08 dated 11 July 2008.

## Conditional fee arrangements

- 5.25 In the UK, contingent fee arrangements providing for the lawyers representing a claimant to receive a proportion of the damages awarded are not permitted. It is possible, however, to have conditional fee arrangements whereby the lawyers agree to receive no fees or reduced fees if the case is lost but normal fees or higher than normal fees (up to a 100% uplift) if the case is won. Conditional fee arrangements are available to fund High Court actions and may be used by both claimants and defendants. The use of conditional fee arrangements is also expressly permitted in proceedings before the CAT.<sup>44</sup>
- 5.26 The OFT's Discussion Paper highlighted the issue of funding as a major obstacle to bringing private actions. It makes a number of suggestions including an increased use of "enhanced" conditional fee arrangements (whereby the 100% cap is lifted), a more "structured" use of cost-capping orders made at an early stage of proceedings, and a more flexible operation of the "costs follow the event" rule.
- 5.27 In the private sector, interest in third party funding (where businesses offer litigation funding in return for a percentage of the damages) has been fuelled by a predicted surge in private actions before the English courts based on competition law. The Financial Services Authority has recently given its approval to certain brokers to offer third party funding in support of private litigation.

<sup>44</sup> Rule 65 of the CAT Procedure Rules 2003.

## **6. OUR CAPABILITY AND EXPERIENCE**

### **An integrated approach**

- 6.1 Slaughter and May has for many years provided a nationally and internationally recognised service across the range of contentious competition law work. Our team of specialist competition lawyers based in London and Brussels has extensive experience in appeals against decisions of competition authorities. This has encompassed the full range of inquiries by the Office of Fair Trading, the Competition Commission and the European Commission under the cartel, abuse of dominance, state aid and merger control laws.
- 6.2 However, private actions and judicial review, or analogous proceedings with a competition or EU dimension, call for a special approach. Complex litigation of this kind requires first class litigation and dispute resolution skills as well as cutting edge competition law and economics expertise.
- 6.3 Our Dispute Resolution Practice has an enviable track record in handling the whole range of statutory, regulatory and ad-hoc investigations carried out by regulators and the civil proceedings, including class actions, to which such investigations give rise.
- 6.4 The increasing focus on litigation in competition law, and in particular on private actions, is giving rise to additional and novel demands. In response, our Competition and Dispute Resolution practices have forged a new team of cross-disciplinary specialists to spearhead this work.
- 6.5 This builds upon our existing experience in competition proceedings before the EU and UK competition and regulatory authorities; in private actions and proceedings for judicial review in the High Court; and in defending clients against penalties imposed by the regulatory authorities.

### **An international resource**

- 6.6 It is clear that there will also be an increasing need for the highest quality expertise in jurisdictions outside the UK. We can provide this through our close relationships with the specialist competition and litigation practices of other leading firms in European and other jurisdictions, including the US.
- 6.7 Our objective is to ensure that we are able to provide our clients with first class legal advice and seamless case management worldwide. We place quality of advice and in-depth knowledge of the relevant jurisdiction at the heart of our international strategy. We believe these are best provided by lawyers at the top of their profession in their respective countries and that such lawyers are found in the independent law firms which comprise our "Best Friends" network.
- 6.8 We draw on these longstanding relationships to gather the individuals who can provide the optimum legal expertise required, working together as an integrated team. Our relationships are not, however, exclusive and allow us to work with the client's existing legal advisers if preferred.

## A leading role, working with other advisers

6.9 We are used to presenting complex legal and economic arguments, taking advantage of solicitors' rights of audience in many judicial fora, where early involvement in and familiarity with the case makes for the most compelling presentation of the arguments as well as cost-effectiveness. However, we are equally happy to work with Counsel where the client wishes or it is otherwise felt appropriate, as will often be the case in High Court litigation. The team enjoys good relations with all the leading members of the competition bar. Where the case demands, we also work closely with the leading economists who may be required to act as advisers or expert witnesses. Our understanding of the role and disciplines of such specialists mean that we naturally tend to play a key role in the directional management of the case.

## Making a difference

6.10 We believe that clients acknowledge the added value they can get from a service which brings together a top competition practice and a heavyweight litigation team. In summary, we believe our strength lies in our offering:

- > experience in litigious competition law matters;
- > ability to handle large-scale litigation, including cross-border cases; and
- > access to the most knowledgeable firms in each jurisdiction.

## Some recent relevant experience

6.11 Many of our cases remain confidential. The following are therefore some examples only of our extensive recent experience in the handling of:

### *High profile Article 81/Chapter I cartel cases*

- > Advising **British Airways** in relation to the Commission investigation of alleged cartel activity involving airlines and cargo operators providing air freight services, and the OFT's civil and criminal investigation of alleged cartel activity in passenger fuel surcharges.
- > Advising **Coats** in relation to the Commission's investigation of the thread market where Coats was fined €18 million after receiving a 50% reduction for leniency. Advising Coats in relation to the Commission's investigation of fasteners where Coats has been fined €120 million and is appealing most of the decision. Acting for Coats in their appeals before both the CFI and ECJ on the Commission's decision to fine Coats €30 million. The CFI reduced the fine to €20 million.

- > Advising **Fuji Electric** in relation to the Commission's investigation into an alleged cartel in the Gas Insulated Switchgear (GIS) sector, a case involving one of the largest sets of fines (approximately €750 million) imposed on a single cartel. We are currently advising Fuji Electric in its appeal to the CFI on the Commission's decision.
- > Advising **JCB** on appeals lodged by it before the CFI and ECJ against a Commission decision imposing on it a fine of €39.6 million in respect of its distribution arrangements for construction and earth moving equipment. The CFI annulled three of the Commission's five elements of the infringement, reduced the amount of the fine imposed to €30 million and ordered the Commission to pay 25% of JCB's costs. The ECJ largely upheld the CFI decision, increasing the fine only marginally back up to €30.84 million.

*Article 82 / Chapter II cases*

- > Acting for **Ericsson** in its Article 82 complaint to the Commission requesting that it investigate and stop alleged anti-competitive conduct by Qualcomm in relation to the licensing, including on fair, reasonable and non-discriminatory terms of Qualcomm's essential patents for 3G mobile technology.
  - > Acting for **Unilever** in proceedings before the European courts and advising on proceedings before national courts in relation to claims arising from distribution practices in the markets for impulse ice cream.
  - > Acting for **Ordnance Survey** in the successful defence of the interim stage of proceedings under the Chapter II prohibition.
  - > Acting for **Yale** in its defence of a claim for damages based on alleged Article 82/ Chapter II infringements, which settled on terms favourable to Yale.
  - > Acting for **United Utilities** in relation to a Chapter II investigation by Ofgem, resulting in a no infringement finding.
- 6.12 Our experience also finds expression in our ground-breaking approach to public law issues in the field of mergers, judicial review and analogous proceedings, for example:
- > Advising **MyTravel Group plc** on its claim to the CFI for an award of damages against the Commission for the unlawful prohibition of its 1999 bid to acquire First Choice Holidays PLC. We represented the company in the original merger case and the appeal against the prohibition decision, which was annulled by the CFI in June 2002.
  - > Representing **Bertelsmann** on its successful joint appeal with Sony Corporation of America to the ECJ following the CFI's annulment of the European Commission's unconditional clearance of the Sony BMG recorded music joint venture.

- > Advising **Royal Mail** in relation to a judicial review by the Consumer Council for Postal Services ("Postwatch") of the Postal Services Commission ("Postcomm") in relation to its licence requirements, and in the quashing in the High Court of a Postcomm fine for breach of a licence condition in connection with the offering of zonal access.
  - > Advising **Capital Meters Limited** in its role as intervener in support of the Gas and Electricity Markets Authority (Ofgem) in National Grid's appeal to the CAT against Ofgem's decision that National Grid had abused its dominant position in the market for the provision of domestic-sized gas meters in Great Britain in breach of Chapter II of the Competition Act 1998 and its imposition of a record £42 million fine.
- 6.13 We are accustomed to handling cases involving a multiplicity of claims and a multiplicity of claimants, which will often be relevant in claims based on competition law. We also have considerable experience of advising clients who are part of, or are considering joining, group litigation orders ("GLOs"). Our experience includes:
- > Acting for **RAC** and its directors in defending various class actions brought by classes of members of the RAC before the English and US Courts arising from a corporate reconstruction which effected the disposal of RAC Motoring Services Limited. All actions were dismissed or withdrawn and our clients received a contribution to their legal costs.
  - > We were heavily involved in the drafting of the first GLO to be made by the Chancery Division (the Advance Corporation Tax GLO), and represented two of the lead claimants in that GLO in obtaining successful judgments from the House of Lords (**Deutsche Morgan Grenfell Group plc** and **Sempra Metals Limited**).
  - > Acting for **British Airways** in class actions stemming from their alleged cartel activity in relation to both the cargo and the passenger fuel surcharges.
  - > Advising **Coats** in relation to class actions arising out of the fasteners cartel case.

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**ANNEX 1  
KEY STAGES IN ENGLISH LITIGATION**

*Pre-action*

Pre-action communications (Claimant sends letter of claim and Defendant responds; parties exchange information; settlement options explored)

Claimant issues Claim Form

*Statements of Case*

Defendant acknowledges service and files Defence (and any Counterclaim)

Claimant serves Reply (and Defence to any Counterclaim)

*Pre-Trial*

Case Management Conference – directions hearing before a Judge. Directions will be set through to trial.

Disclosure of Documents – both parties disclose material documents

Exchange of Witness Statements

Exchange of Expert Reports

Trial (Parties present their case orally at Court; witnesses and experts will be cross-examined)

*Post-Trial*

Judgment and Order for Costs

Appeal (it may be possible to appeal on points of law to the Court of Appeal and thereafter to the House of Lords – but no automatic right to appeal)

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