ICC COMPENDIUM OF ANTITRUST DAMAGES ACTIONS

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This chapter is part of the *ICC Compendium of Antitrust Damages Actions* (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
Glossary

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between 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 within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** a statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
The contents of this note relate to the law of England and Wales, which is formally a separate jurisdiction within the United Kingdom. Where reference is made to law deriving from European law this is the same throughout the United Kingdom, and the principles set out will apply broadly in Scotland and Northern Ireland. However, this note does not specifically address the position in those jurisdictions.

In the United Kingdom there is a long-established regime for individual and corporate claimants to bring claims against others for losses caused by anti-competitive behaviour, that is breaches of Article 101 or Article 102 on the Treaty on the Functioning of the European Union ("TFEU") and/or Chapter 1 (anti-competitive agreements) and Chapter 2 (abuse of a dominant position) of the Competition Act 1998, as amended ("CA 1998"). The CA 1998 was expanded in 2015 by the Consumer Rights Act 2015 ("CRA 2015") and further updated from 9 March 2017 to implement the EU Damages Directive to the extent that the Directive's provisions were not already part of United Kingdom law.

As discussed in Section 10, Brexit is not expected to change the current regime in the short term, since it is based on United Kingdom statute (some of which implements EU Directives, and which is otherwise closely aligned with EU law) and common law.

1. Jurisdiction

The United Kingdom has a specialist competition claims court, the Competition Appeal Tribunal ("CAT"), but claims, other than collective actions, may also be brought in the High Court of England and Wales. The established regime in the United Kingdom makes it an attractive jurisdiction for such claims because of the experience of judges in such cases, and the availability of specialist economic experts in the CAT (who form part of the tribunal).

In addition, recent changes to the law have been introduced to allow collective actions to be brought efficiently on behalf of groups of claimants (both on an “opt-in” and an “opt-out” basis). These must be brought in the CAT. Other than the collective actions the CAT and the High Court have a broadly similar function in respective of competition claims. The CAT also offers a “fast track” procedure for less complex claims which it aims to decide quickly (as soon as practicable and in any event within six months) with limited risk as to costs.

2. Relevant legislation and legal grounds

A civil claim for damages arising from anti-competitive behaviour is generally brought as a claim in tort for breach of statutory duty, namely breach of CA 1998 and/or the TFEU. A claimant may bring a private action based on an infringement decision of the United
Kingdom or EU competition authorities (in the United Kingdom, the Competition and Markets Authority (“CMA”) (often know as a “follow-on” claim) or, in cases where no decision has been reached, a so-called “stand-alone claim”. These claims may now be brought in either the High Court or the CAT. Prior to the implementation of the CRA 2015 the CAT could not hear stand-alone claims.

If the English court has jurisdiction, claims can be brought under foreign laws as well as English law.

Where there has been such a decision, this is binding evidence of the defendant’s anti-competitive conduct under English common law and section 58A of the CA 1998. Claimants will still need to prove causation (that is, that the particular behaviour caused them loss) and the quantum of the loss. The defendant may seek to argue “pass-on” in the context of proof of loss, to reduce any liability.

Claimants may also bring claims based on the torts of “interference with business by unlawful means” and “conspiracy to injure by the use of unlawful means”. These are not specific competition-related claims, but may apply in situations where there has been a breach of competition law. In practice, these causes of action tend only to be relied on where it may be difficult to establish a breach of statutory duty because of the territorial scope of the infringement. One key challenge for claimants in bringing these actions is that they must demonstrate an intention to injure the claimant, which is often hard to establish.

Following the implementation of the Damages Directive1 and other changes to the relevant law, slightly different rules apply to certain aspects of claims depending on when the infringing behaviour occurred or was established. These variations affect limitation periods and the collective actions regime in particular, and are dealt with in the relevant sections below. The Damages Directive provisions relating to limitation only apply in the United Kingdom where claims relate to infringements occurring after 9 March 2017.

3. **What types of anti-competitive conduct are damages actions available for?**

Claims may be brought for any conduct which is a breach of competition law, *i.e.* Articles 101 or 102 of the TFEU or the relevant provisions of CA 1998. United Kingdom competition law expressly permits claims in the CAT for damages for breaches of Articles 101 and 102 as well as:

(a) agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition within the UK; and

(b) any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

As noted above, claims may also be brought in the High Court, and claims for “breach of statutory duty” may be based on other statutes regulating the behaviour of companies in

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certain sectors, such as the utilities. Such claims may therefore have the same objective as claims for breaches of the dedicated competition legislation, often fair access to networks.

4. **What forms of relief may a private claimant seek?**

The damages available in relation to competition claims are the same as those available for any tort under English law, and are subject to the same “tests” of liability, causation and proof of financial loss.

Claims are typically brought for financial loss arising from an overcharge in price, if the overcharge is not passed on by the claimant, loss of sales/profit arising from higher prices where the overcharge is passed on, and interest on the damages in either case. In cases of abuse of dominant position, the claimant typically seeks loss of profits and/or loss of opportunity.

In addition, where the claimant has a contract with the defendant that it believes is void for illegality because some or all of the provisions are contrary to competition law it may seek a declaration that the contract or certain clauses are unenforceable.

English courts, including the CAT, also have the power to grant injunctions based on a breach of competition law, requiring certain behaviour to cease, or compelling the defendant to take certain steps.

5. **Passing-on defence**

English law has recognised the principle of “pass-on” for some time, that is, that a defendant can defend the amount of a claim by demonstrating that all or part of the loss caused by the anti-competitive behaviour was passed on to a customer of the claimant. The courts have, however, only recently considered it in any detail because of the small number of competition litigation claims progressing all the way to trial. The recent *Sainsbury’s v MasterCard* decision by the CAT, which was confirmed by the Court of Appeal (and may now not be further appealed) represents the current position.

Following the *Sainsbury’s* judgment defendants wishing to plead pass-on must establish a clear causal link between the overcharge arising from the anti-competitive behaviour and an increase in prices charged by the claimant. In cases where the claimant’s prices are composed of a large number of different elements—which will often be the case for large companies, or manufacturers—a defendant is likely to find this difficult.

Aspects of the pass-on principle have now also been codified by the Damages Directive. There is now a rebuttable presumption that there is ‘upstream’ pass-on of an overcharge to an indirect purchaser claimant. Furthermore, it is confirmed that the burden of proof in proving “downstream” pass-on (reducing the value of a claimant’s claim) falls on the defendant. However, this rule applies to claims arising (and brought) after the implementation of the Damages Directive and it is likely therefore, given the typical delay

2 *Sainsbury’s v MasterCard* [2016] CAT II
3 *Sainsbury’s v MasterCard* [2018] EWCA 1536 (Civ)
before anti-competitive behaviour comes to light, that the Sainsbury’s principle will be the predominant approach for some time.

6. **Pre-trial discovery and disclosure, treatment of confidential information**

The English rules regarding the disclosure by all parties to litigation of documents both supporting and adverse to their case remains a very important factor in competition litigation. Disclosure is particularly important because it is often the case that the defendants will have control of many of the documents necessary to determine the overcharge and the precise nature of the infringing conduct. The disclosure regime in England is being overhauled to reduce, where appropriate, the burden and cost to the parties, but these changes do not yet apply to competition claims.

The English Civil Procedure Rules contain a specific Practice Direction relating to the disclosure of documents in competition claims (Practice Direction 31C). This relates, in particular, to applications seeking evidence in the file of the competition authority, and implements (together with amendments to CA 1998) the provisions of the Damages Directive.

Documents that may be considered as simply “commercially confidential” are not afforded any protection under the English rules. They should be disclosed as long as they are relevant to the case of either party.

In general, the court will not expect a claimant to be able to present its evidential case in detail prior to disclosure where the evidence required by the claimant will only become available during the disclosure process.

7. **Statute of Limitation**

For claims not falling under the Damages Directive regime, the general limitation period for an English law tortious claim under the Limitation Act 1980 is six years from the date “on which the cause of action accrued”. However, there is an important exception in section 32 of this act where there has been concealment of the facts giving rise to the action. In such a case the period of limitation does not begin to run until the claimant “has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it”.

The date on which this “discovery” occurs will depend on the facts of each individual case and there is limited case law on how the test applies in follow-on competition damages cases, where information may become available over a lengthy period in multiple jurisdictions but regulators may reveal few details. The test is now generally accepted to be the “statement of case” test laid down in the Arcadia case, that is, the date on which the claimant knew the concealed facts which were essential for him to prove in order to establish a prima facie case. In practice the date of publication of a decision is likely to be the latest such date, although in some cases the facts may be found to be known to the claimant at an earlier date, and detailed analysis is likely to be required in each case. Recent

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4 Arcadia Group Brands Limited & Ors v Visa [2014] EWHC 3561 (Comm)
case law⁵ suggests that possessing some actual knowledge that could enable the claimant to discover other facts may be sufficient to start time running.

Prior to CRA 2015, a claim in the CAT could only be brought within two years of a final decision (subject to no further appeals). However the CAT limitation period (other than for collective claims, discussed below) has now been brought in line with the non-specialist courts for causes of action accruing after 1 October 2015 (when the CRA 2015 came into force). However, given the period that may elapse before a cartel is uncovered, this provision will continue to have force for some time to come.

Since the implementation of the Damages Directive, the date on which the limitation period starts to run has been codified across the EU for causes of action accruing after that date (subject to one important point on suspension of the period). Limitation for such causes of action now runs from the later of the dates (i) when the infringing behaviour ceases or (ii) the “date of knowledge” of certain facts. Unless the question of when the latter date falls is the subject of references to the EU courts the similar “statement of case” test may well continue to prevail in the United Kingdom.

Where the Commission or CMA is still investigating, however, or a decision has been appealed, the limitation period will be suspended until the investigation concludes, and any appeals are then determined. This is likely to mean that the date of any decision becomes the de facto start of the limitation period, since it will generally be hard to argue that any knowledge of the behaviour existed before the announcement of an investigation. It must be remembered, however, that this applies only to claims relating to infringements occurring after 9 March 2017, in accordance with the United Kingdom legislation implementing the Damages Directive.

8. Appeal

Appeals against judgments of the Competition Appeal Tribunal (which, despite its name, is a first instance court for civil competition claims) or the High Court, must be made to the Court of Appeal. Permission is required for all appeals, which may be granted by the lower court or, if not, sought from the Court of Appeal. The same rules apply to competition damages claims as to other civil claims in relation to the grounds on which appeals are permitted.

9. Class actions and collective representation

The courts of England and Wales have long-established processes for coordinating and consolidating similar claims into group or multi-party claims of multiple (though not “mass”) claimants, including a facility for “representative” claims although this is not widely used. Since 1 October 2015, the United Kingdom CAT regime also offers “opt-in” and “opt-out” collective actions, in which a single representative may be certified by the CAT to lead a claim on behalf of a wider, defined, group of claimants facing “common issues”. The certified group may consist either of all claimants fulfilling defined criteria unless they actively choose not to participate (an “opt-out” action) or of all claimants fulfilling approved criteria who choose to participate (“opt-in”). The classes may encompass many thousands of

Granville Technology Group Limited and ors v Infineon Technologies AG and ors [2020] EWHC 415 (Comm)
claimants and the regime is at least partly aimed at litigating claims that may be too small to bring on an individual basis, such as those of consumers.

The process for bringing a collective action is as follows:

(a) A proposed “class representative” issues a claim form together with a detailed document setting out:
   
i. Whether the claim is to be certified as “opt-in” or “opt-out”;
   
ii. How the class is to be defined;
   
iii. What the “common issues” faced by the members of the class are;
   
iv. Why the class representative is suitable to be certified; and
   
v. How the claim will be managed (communications with the class members, funding, how defendants’ costs will be met in the event of an adverse costs order, distribution of any award, etc.).

(a) A hearing is held at which the CAT considers whether to certify (i) the class, and on what basis; and (ii) the class representative. (These decisions are taken independently.) The CAT may certify the class on a different basis to that in the representative’s application. The defendants may oppose the certifications if they have reasonable grounds to do so.

(b) If the claim is certified it then proceeds in the usual way, except that it must be “advertised” to potential class members (for opt-in) or to class members who may wish to pursue a separate claim (for opt-out).

(c) If there is an award in favour of an opt-out class, the representative must make efforts to distribute it to all qualifying members. If the award is not fully distributed the default position is that the balance is payable to a nominated statutory charity. However, the CAT has the power to allow the release of funds to others, including for payment of the expenses of the claim including amounts due to a third party funder, or even return of a portion to the defendants.

(d) If a full or partial settlement is reached, the CAT must approve the terms.

The regime is still in its infancy, with no class representative having yet been successfully certified, even after four years of the regime being in place, but important principles have been established by the CAT and the Court of Appeal in relation to what a suitable representative might look like, how the “common issues” might be determined, how a certifiable class should be defined and what economic evidence might be required at the certification stage. In an important judgment in 2017 the CAT confirmed that collective claims could benefit from third party litigation funding and that a portion of any damages awarded could be used to pay the funder’s return as a legitimate expense of the claim. This seems likely to increase take-up of the regime.

Under the transitional provisions of the CRA 2015, if the facts giving rise to the claim arose before 1 October 2015, the collective claims procedure is only available to claimants where
the claim is a follow-on claim and is based on a decision after that date (since the CAT did not have jurisdiction over stand-alone claims before 1 October 2015).

The two-year limitation period (from the date of the decision becoming final) for bringing a CAT claim still applies to the collective action regime where the facts giving rise to the claim arise before 1 October 2015. Where claims arise after 1 October 2015, the six-year limitation period set out in Section 7 above will apply.

10. Key issues

As noted above, the competition damages regime is well-established in the United Kingdom and many issues are settled law. Areas where the law continues to evolve are:

i. Limitation—which, as described above, will begin to be affected by the provisions implementing the Damages Directive, but where there is still a long “tail” of cases that fall within the pre-Directive regime; and

ii. Collective actions—where questions have yet to be finally answered on questions such as how detailed the methodology for calculating damages must be for very large classes, and how certification should proceed where there are multiple applications for certification as a representative; and

iii. Pass-on—where the courts are seeking to balance the burden of proof on a defendant to show that a claimant has passed on any overcharge (further strengthened by the implementation of the Damages Directive), with the principle that a claimant should be permitted to recover only the loss it has actually suffered. This can be a difficult area, and very fact-dependent, particularly where a claimant’s selling prices result from numerous input costs and are affected by strategic pricing policies. The position is further complicated by the possibility that the provisions introduced by the Damages Directive may now be amended following Brexit.

Brexit

The departure of the United Kingdom from the EU is unlikely to undermine the current regime to a significant extent, much of which exists independent of EU law. Under the current provisions of the European Union (Withdrawal) Act 2018, the United Kingdom will bring all EU law into force as United Kingdom law on the date of withdrawal, thus preserving the current body of law, with consequential amendments to reflect the United Kingdom’s new status as a non-EU-member. Although the UK parliament will have the right to amend the retained law over time, without reference to the EU, at time of writing there are no proposals for any material amendments to the detailed provisions that arose from the implementation of the Damages Directive, although EU infringement decisions made after the Brexit transition period (i.e. after 31 December 2020) will cease to be binding on the English courts as regards follow-on claims.

United Kingdom claimants will retain the right to bring follow-on claims in England and Wales for breaches of EU law arising from EU decisions pre-dating the date of the United Kingdom’s withdrawal. Standalone claims in such circumstances (where the claim does not directly arise out of a decision) have always been, and remain, possible. For breaches
relating to subsequent EU decisions, irrespective of any ongoing arrangements with the EU, it is likely that the English courts will continue to view such Decisions as *prima facie* evidence of anti-competitive behaviour, although defendants may be able to rebut this presumption. UK claimants will of course need to prove that such anti-competitive behaviour in the EU/EEA had an effect that extended to the UK market and/or that the infringement itself included the UK market, that is, went beyond the scope of any EU decision. This may require expert economic evidence on the market (which is also currently the case in most claims), or the establishment of a breach of UK competition law, in respect of which the English disclosure rules are likely to assist.

In either case, even if no framework is agreed with the EU, the English courts, including the CAT, will nevertheless have jurisdiction to hear competition claims where the claimants are able to meet the present “tests” for claims involving defendants outside the UK. These “common law” tests include instances where damage has arisen in the UK, or a liable party is a UK-registered company, for example.
ICC COMPRENDIUM OF
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