Private Antitrust Litigation in the UK and the US: Comparison and Strategic Considerations

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Practice notes | Law stated as at 01-Jan-2023 | United Kingdom, United States

A Practice Note comparing key elements of private competition and antitrust damages collective and class action litigation in the UK and US, and providing strategic considerations for managing parallel proceedings. The Note includes discussion of the procedures in the UK Competition Appeal Tribunal (CAT) and High Court, as well as US federal and state courts, and issues relating to class and collective actions, the use of experts, data transfers and confidentiality, limitation periods, litigation funding, damages (including pass-on defenses), and settlement.

The UK has been relatively slow to foster the development of private competition law damages litigation. Historically, UK damages actions have failed to prove attractive enough for claimants. This is despite the UK having several concurrent regulators with competition law enforcement powers, the introduction of the specialist *Competition Appeal Tribunal* (CAT), the 2014 overhaul of the UK competition law regime (including the UK implementation of the *EU Damages Directive (2014/104/EU)*, and the EU courts' efforts to galvanize a pan-EU private damages regime.

However, private damages actions have taken off in the UK over the past two years, following developments in collective actions. Most notably, the Supreme Court's judgment in *Merricks v Mastercard [2020] UKSC 51* (Merricks) lowered the bar for certification of opt-in collective proceedings in the UK.

In contrast, claims for antitrust (competition law) damages have been commonplace in the US for many years, due in part to the possibility of *class actions* and treble damages awards. Private actions based on developed US federal and state antitrust law (since the adoption of the Sherman Act in 1890) show no signs of abating.

This Practice Note provides practical guidance on a number of issues likely to arise in UK and US proceedings, such as the choice of forum, handling data, and managing settlements. It compares and contrasts the US and developing UK positions. Many of the considerations for collective action proceedings are similar and can inform strategy and decision-making in either jurisdiction, particularly when parallel claims are brought in both jurisdictions.

Forum

The choice of forum dictates not only the relevant procedural rules, but also the likely approach of the court to the substance of the claim.

High Court or CAT in the UK

The High Court and the CAT have broadly similar powers in relation to competition damages actions in the UK, and potential claimants may bring stand-alone and follow-on damages claims in either the High Court or the CAT. However, while the CAT can hear both opt-in and opt-out collective actions, collective antitrust claims in the High Court can only be brought on an

opt-in basis, in the form of group litigation orders (GLOs) (see *Practice Note, Group litigation and group litigation orders*) or representative actions, and have been relatively infrequent. (See *Collective Actions in the UK*.)

Claimants bringing follow-on claims need only prove that the infringement caused them to suffer loss (and the amount of that loss). However, claimants bringing stand-alone claims also need to prove that a breach of competition law has occurred.

Claims brought in the High Court are governed by the *Civil Procedure Rules 1998* (CPRs) whereas CAT claims are governed by the *Competition Appeal Tribunal Rules 2015* (CAT Rules). The CAT Rules broadly follow, and should generally be interpreted consistently with, the CPRs (although parties should not assume this for any particular issue).

The High Court also has the power to transfer whole or part of the proceedings that relate to the infringement of competition law to the CAT.

Some of the factors that influence the decision to transfer proceedings to the CAT include:

- Complexity of the issues involved.
- The extent to which economic evidence is an issue.
- Costs implications.

A key difference between the High Court and the CAT is their composition:

- The High Court has specialist competition judges (who also sit in the CAT).
- A CAT panel has, as its chair, a qualified lawyer (usually a High Court Judge), together with two further "ordinary" panel members with expertise relevant to competition issues such as economics, accounting, or business, who may be well placed to deal with complex non-legal submissions and expert evidence.

In addition, the rules on limitation periods for bringing a claim differ between the CAT and the High Court (see *Limitation*).

The typical timetable for completion of proceedings in the High Court is three to five years. As administration of CAT claims is relatively nascent, none have yet been completed and many collective proceedings claims are still ongoing after more than four years.

For further detail on the relative merits of bringing a claim in the High Court rather than the CAT, see *Legal Update, High Court or CAT: pros and cons of where to bring a competition claim*.

Brexit

Following the UK's decision to leave the EU, claimants before the UK courts may continue to bring follow-on actions based upon infringement decisions adopted by the European Commission (EC) before 31 December 2020, or where the relevant EC investigation was formally initiated before that date.

However, claimants seeking to rely on EC infringement decisions falling outside this period will need to plead the EU competition law elements as a breach of foreign tort law, which is likely to require further expert evidence on EU competition law. Further, as these EC decisions will no longer be binding on UK courts, it is not as yet clear to what extent a UK court will accept these decisions as prima facie evidence of an infringement, and parties should monitor the degree to which the UK departs from EU competition case law going forward.

Federal or State Court in the US

In the US, both federal and state laws exist which govern antitrust violations, sometimes offering the plaintiff the choice of whether to proceed in federal or state court.

Federal courts often handle private antitrust suits in the US, as antitrust actions often involve claims under the federal Sherman Act and parties from multiple states. US antitrust actions that involve both federal and state law claims also can be adjudicated together in federal court.

Private plaintiffs' right to bring federal lawsuits arises under:

- Section 4 of the Clayton Act, which allows any person (including legal persons such as corporations and associations) injured as a result of an antitrust violation to bring a lawsuit to recover triple the amount of damages (15 U.S.C. §15(a)).
- Section 16 of the Clayton Act, which allows a plaintiff to seek injunctive relief at the threat of loss or damage resulting from an antitrust violation (15 U.S.C. §26)).

Although federal judges largely are generalists, some federal districts see a higher proportion of antitrust litigation than others, such as the Northern District of California, Northern District of Illinois, and the Southern District of New York.

For damages claims in federal court, the parties are entitled to a jury trial under the US Constitution, though the right to a jury can be waived, including by contract. The alternative is a trial before a judge (known as a bench trial) (see *Practice Note, Bench Trials (Federal)*). However, US judges play a critical role in antitrust litigation in any matter, as they rule on pretrial motions and procedural issues that are often dispositive of a case.

A plaintiff certainly can pursue an antitrust complaint in state court, but it may not remain there (see *Practice Note, Initial Stages of Federal Litigation: Overview: Decide Between Federal and State Court*). The defendant can, and often will, remove the suit to federal court if there are any grounds to do so, including if:

- The complaint includes a claim under federal law, such as the Sherman Act.
- Any plaintiff is from a different state to any defendant, leading to federal *diversity jurisdiction*.

(See *Practice Note, Removal: Overview*.)

State judges also largely are generalists and may have been appointed or elected to office, depending on the state. State law determines the types of claims that are entitled to a jury trial in state court. In California, for example, jury trials are available for antitrust claims for damages.

Procedural and jurisdictional rules in the US also provide grounds in some cases for defendants to:

- Transfer federal complaints filed by multiple parties in different districts into a single multidistrict litigation (MDL) to coordinate pretrial proceedings (see *Class Action and Multidistrict Litigation Comparison Chart*). For a discussion of the UK approach to multi-party proceedings, see *Approaches to Multi-Party Claims in the CAT*.
- Move the claims into arbitration (see *Practice Note, Private Antitrust Actions: Arbitration of Private Antitrust Actions*).

Contractual forum selection clauses can be important in determining the forum in which US antitrust claims are resolved. For example, agreements can specify that claims will be litigated under federal law in federal court, including in specific federal districts, or that they must be arbitrated.

Class and Collective Actions

Collective Actions in the UK

Historically, the majority of collective competition damages proceedings in the UK have been on an opt-in basis, requiring the litigants to take an active step to join the claim. However, opt-out proceedings in the CAT, which allow a representative to bring a claim on behalf of an entire class, are growing in significance.

The CAT has discretion to authorize collective action proceedings on either an opt-in or an opt-out basis under the collective proceedings orders (CPO) regime, although the regime has only relatively recently taken off following the Supreme Court's decision in *Merricks*.

The class representative must seek approval to bring opt-out proceedings and must make submissions as to why they are more appropriate than opt-in proceedings, including on the strength of the claims and whether it is practical for them to be brought as opt-in proceedings. Rules 79(2) and 79(3) of the CAT Rules list factors for the CAT to consider when deciding whether proceedings should be opt-in or opt-out at the CPO certification stage. In *Merricks*, the Supreme Court significantly lowered the threshold for opt-out CPO certification from the threshold previously applied by the CAT (see *Article, Mastercard competition damages: Supreme Court boosts collective action regime*).

Merricks and subsequent CPO decisions in the CAT show that while the CAT may be flexible in considering opt-out claims, they must nevertheless as a minimum:

- Be brought on behalf of an identifiable class of claimants.
- Be brought against identifiable defendants.
- Allege some kind of actionable and identifiable common harm by the defendants to the claimants (*Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd [2022] CAT 38*) (see *CaseTracker, Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd*).
- Demonstrate the potential benefits of the claim outweigh the cost of proceedings (*Consumers' Association v Qualcomm Incorporated [2022] CAT 20*) (see *CaseTracker, Consumers' Association v Qualcomm Incorporated*).
- Be more suitable for opt-out proceedings than opt-in proceedings (*Gutmann v South Western Trains and another [2021] CAT 31*) (see *CaseTracker, Justin Gutmann v First MTR South Western Trains Limited and another*).

Both the CAT and the Court of Appeal have declared that there is no presumption under the legislative scheme in favor of opt-in over opt-out proceedings (applying the factors set out in Merricks):

- In *BT v Le Patourel [2022] EWCA Civ 593*, the Court of Appeal dismissed BT's appeal against the CPO by the CAT on an opt-in basis (see *Article, Green light for mass claim against BT: let's talk about collective actions*).
- In *UK Trucks Claim Limited v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others [2022] CAT 25* (*Trucks*), the CAT found that opt-in proceedings were more appropriate (see *Legal update: case report, Judgment granting one of two truck manufacturers collective damages CPO applications (CAT)*).

Approaches to Multi-Party Claims in the CAT

Although developments in the damages regime are relatively recent, the CAT has already demonstrated novel ways to deal with multi-party claims and those involving the same infringement cause of action:

- **Test claimants.** In the *Trucks* litigation, the CAT has approved a series of test claims from the various claimant groups to resolve numerous pending issues, while staying the remaining claims. This approach could result in defendants being locked into a particular route for resolution of common issues between all the claims, for example, in relation to the methodology used to calculate damages.
- **Data cooperation.** Also in the *Trucks* litigation, the CAT has required the claimants and the defendants to work together to prepare a synthesized dataset for the court by matching purchasers, products and prices to establish quantum more accurately.
- **Bundling and mini-trials.** By contrast, in *CaseTracker, Merchant Interchange Fee Umbrella Proceedings (Interchange Fee Proceedings),* which involves approximately 1000 damages claims following on from the same infringement decision, the CAT has preferred to bundle the claims (transferred from the High Court) and to run mini-trials on common issues between all claimants rather than run test cases.
- **Umbrella proceedings.** The CAT has issued a *Practice Direction* providing that the President of the CAT may group together relevant issues or features across individual claims under umbrella proceedings, to be dealt with collectively under that umbrella (for example, the pass-on issue in *Interchange Fee Proceedings*).

Class Actions in the US

In the US, antitrust class actions are common, particularly as follow-on litigation to government price-fixing cases. Class action proceedings are governed by Federal Rule of Civil Procedure (FRCP) 23, which allows private plaintiffs to litigate their claims on a class-wide basis (known as certifying a class) if the court finds:

- The class is so numerous that joinder of all members is impracticable.
- There are questions of law or fact common to the class.
- The claims or defenses of the representative parties are typical of the claims or defenses of the class.
- The representative parties will fairly and adequately protect the interests of the class.

(FRCP 23(a).)

Antitrust plaintiffs must also show class-wide antitrust damages (*Comcast v. Behrend*, 133 S.Ct. 1426, 1433, 1435 (2013)). US courts have imposed increasingly strict standards of evidence to certify a class, following the lead of recent Supreme Court cases such as *Wal-Mart Stores, Inc. v. Dukes* (564 U.S. 338 (2011) and *Comcast*. The availability of class actions may also be limited by contractual class arbitration waivers, which can require potential classes of claimants to arbitrate their claims.

(See *Practice Notes, Class Actions: Overview* and *Antitrust Class Certification*.)

In the US, plaintiffs can either opt-in or opt-out of a certified class. This decision is a strategic choice and opting out, or bringing a direct action, is most commonly done by plaintiffs with potentially large damages or that sit in a unique position with the defendants.

In practice, the class certification process in antitrust suits can operate like a mini-trial, with testimony of experts and fact witnesses presented to the judge. Prevailing at the class certification stage often can create outcome-determinative leverage for the parties.

Experts

Competition damages claims characteristically involve complex theories of harm, calculations of market shares over time and the quantification of damages. Consequently, robust economic evidence from economists, forensic accountants, industry experts and other experts is generally vital to supporting a case. In both the UK and the US, to be admissible, expert evidence presented before a court must meet high standards of reliability and credibility, given that such evidence is based to a large extent on opinion rather than fact.

For more detailed discussion of the use of expert evidence in the UK, see *Practice Note, Expert evidence: an overview*. For a collection of resources on expert evidence in the US, see *Expert Toolkit (Federal)*.

Expert Testimony and Privilege in the UK

In the UK, under CPR 35.4, the permission of the court is required for expert evidence to be admissible. (See *Practice Note, Experts: seeking permission to use expert evidence*).

It is highly likely that the work product of any expert instructed in the context of UK proceedings will be protected by litigation privilege. (See *Practice Note, Experts and privilege*). In contrast, the US distinguishes between testifying and non-testifying experts, and work product protections for testifying experts vary among federal and state courts.

Accordingly, in the context of joint instructions, work done in respect of the UK claim by an expert who is categorized as a testifying expert in the US may be discoverable. Although rules of federal civil procedure protect draft expert reports from disclosure, some US state courts take a narrower view of what material is privileged. Therefore, defendants facing litigation in US federal and state courts should conduct a thorough analysis of relevant privilege issues before sharing materials with an expert witness (for example, communications conveying facts or data for the expert to rely upon in forming an opinion).

"Hot-Tubbing" of Experts in the UK

Hot-tubbing is primarily a tool applied to assist the court or tribunal to understand the (usually economic) expert evidence before it, and is a distinct feature in UK competition claims before either the CAT or the High Court. During this process, the parties' experts are required to take to the witness box together and present their evidence concurrently. The experts are questioned by the CAT or High Court judge, following which counsel for each party in turn can ask brief, supplementary questions.

This is a separate process from cross-examination of expert evidence (which may occur later in the ordinary course of a claim). It may be specified for use at a pre-trial review.

Expert Evidence in the US

US courts evaluate expert testimony for:

- The expert's qualifications, based on their knowledge, skill, experience, training, or education.
- Reliability and relevance.
- The soundness of the expert's theory and methodology.

(Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm.*, Inc., 509 U.S. 579, 597 (1993).)

A party can seek to exclude all or part of an expert's testimony through a *Daubert motion*, named for the governing Supreme Court case, *Daubert v. Merrell Down Pharm., Inc.* (509 U.S. 579 (1993)).

Experts: Strategic Considerations for Both the UK and US

Counsel should consider the following strategic points for the use of expert evidence in either the UK or US:

- Experts have an overriding duty to assist the court and CAT with their independent opinion on matters within their expertise, rather than appear as advocates for those instructing them.
- Given limitation periods, it is paramount that credible market experts are identified and retained early. It is important to bear in mind when selecting an expert that conflicts may arise not only in respect of instructions from other private parties, but also from any prior work undertaken for a competition authority in respect of the substance of the claim.
- Where one of several defendants is in receipt of the claim, it may be prudent to explore whether it would be advantageous to defend the claim jointly, including with respect to claims in multiple jurisdictions.

Limitation

The limitation periods in the UK depend on whether the claim is brought in the High Court or CAT, whereas the limitation periods in the US follow the *statute of limitations*, with certain expansions available.

Limitation Periods in the UK

UK limitation periods are determined by applying a set of factual circumstances to the relevant statutory provisions or rules (depending on whether the claim is brought in the High Court or CAT).. For an overview of the limitation periods for competition claims in the UK, in both the High Court and the CAT, see *Practice Note, High Court or CAT: pros and cons of where to bring a competition claim: Limitation*.

Recent Developments

Gemalto Holding BV and another v Infineon Technologies AG and others [2022] EWCA Civ 782 (Gemalto) concerned a follow-on action resulting from the EC's 2014 infringement decision in the smart card chips cartel (*Case AT.39574 -Smart Card Chips*). (See *Legal update: case report, Judgment on section 32 limitation test confirms that competition damages action based on smart card chips cartel is time-barred (Court of Appeal)*.)

The Court of Appeal applied the "preliminaries test" set by the Supreme Court in *Test Claimants in the Franked Investment Group Litigation v. HMRC [2020] UKSC 47* (FII). In summary, the court held that test applies to instances of deliberate concealment as follows:

> "Time begins to run in a deliberate concealment case when the claimant recognises that it has a worthwhile claim. In a case of this kind, **a worthwhile claim arises when a reasonable person could have a reasonable belief that there had been a cartel**. The claimant can embark on the preliminaries to the issue of a writ (and therefore the limitation has begun) once it knows that there may have been a cartel and the identity of the participants, without knowing chapter and verse about the details..."(emphasis added) (*Gemalto* at paragraph 53)

The Court of Appeal further held that a potential claimant can reasonably rely on a statement of objections (where the competition authority informs the parties concerned of the allegations against them in writing) as a basis for a belief in the existence of a cartel. However, the Court of Appeal cautioned that there is "no universally applicable rule" and each case will turn on its own facts. In this case, the cumulation of the claimant's knowledge was important, including from the competition authority's press release about dawn raids, subsequent press reports about the dawn raids, internal claimant documents discussing and even identifying potential participants, and disclosure of requests for information from the competition authority.

There is a risk (following *Gemalto*) that more potentially speculative claims may be commenced on the basis of a statement of objections, or even earlier, particularly where the authority is slow to issue an infringement decision. These claims may be subsequently stayed, pending release of the infringement decision.

Limitation Periods in the US

In the US, federal antitrust law provides for a four-year statute of limitations. However, this period may be expanded (known as tolling) if certain exceptions apply, including:

- **The discovery rule.** Under the discovery rule, the four-year limitations period does not run until plaintiffs could have, through ordinary diligence, discovered the underlying conduct. Plaintiffs often allege a secret conspiracy which they are only able to discover years later.
- **Fraudulent concealment.** Similarly, the limitations period can be extended if plaintiffs are able to show that the defendants acted to conceal their illegal activity so that it was not reasonably possible to discover their conduct until a later date.
- **Continuing violations.** Anti-competitive conduct initiated outside the four-year limitations period but overtly continued within the period is also actionable, but damages may be limited to injury suffered within the past four years.

Each of these exceptions attempt to account for the fact that antitrust conspiracies are typically secretive by nature, and it may be difficult or impossible for plaintiffs to learn about any potentially illegal behavior before the statute of limitations period has passed.

Funding

Litigation funding is growing as a source of resources for litigation in both the UK and US.

Funding in the UK

Litigation funding for claimants by third parties is permitted in the UK, before both the High Court and the CAT.

Although the funding will probably have been secured by the time the claim form is received, parties should note:

- Particularly in CPO applications, collective actions involve some level of judicial scrutiny of the claimants' funding agreements and "after the event" insurance policies in order to demonstrate suitability. However, the CAT has ruled in support of keeping certain commercial terms of these agreements confidential.
- Litigation funding in the UK had grown slowly for many years but has now become an established and understood investment vehicle. Any decision to fund litigation is taken carefully and following in-depth research.
- Although recent cases have confirmed that typical third-party funding arrangements for competition claims do not constitute damages-based agreements (DBAs), which are prohibited in respect of opt-out claims (section 47C(8), Competition Act 1998 **(**CA 1998**)**), a significant barrier to raising funding remains the rule under sections 47C(5) to (6) of the CA 1998. This rule requires that any sums left over from the distribution should be paid to a prescribed charity, minus the expenses of the class representative, on which the CAT must sign-off. Litigation funders' fees may be considered to fall within these expenses.

The availability of third-party litigation funding for defendants has not yet developed significantly in the UK. However, DBAs could potentially be available to defendants (for example, if the defendants were to raise a counterclaim).

Funding in the US

Litigation funding, or litigation finance, is a growing sector in the US that provides third-party funding to plaintiffs in complex commercial litigation, including antitrust class actions. The rules and ethics standards addressing litigation funding are actively being developed and may be found within bar association guidance, court rules, and state law.

In most cases, the existence of litigation funding does not need to be disclosed to federal courts and litigation funding documents are usually not discoverable. However, some states, such as Wisconsin, and federal judicial districts, such as the Northern District of California, have enacted rules requiring disclosure (see, for example, Wis. Stat. § 804.01(2)(bg) and *Standing Order for all Judges of the Northern District of California, para. 18*).

Damages

In a UK competition law context, damages compensate claimants for the financial loss suffered due to overcharge resulting from the artificially inflated prices that are the subject of the competition law breach. Damages are defined broadly as including "any sum of money (other than costs or expenses) which may be awarded in respect of a competition claim" (Claims in respect of Loss or Damage arising from Competition Infringements (*Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017*, Schedule 8A, Part 1, 7(2)).

In the US, federal law provides that successful plaintiffs may recover treble damages (three times their actual damages) and reasonable attorney's fees. The policy rationale for automatic trebling is to deter violation of the antitrust laws, but it makes private antitrust litigation an even more costly and risky proceeding for companies facing antitrust claims.

Mitigation

The extent to which damages may be reduced if the defendant can prove that the overcharge was passed on to the claimant or plaintiff's own customers varies between the UK and the US.

Pass-On in the UK

Pass-on is a type of mitigation defense that has been applied specifically in competition damages claims by the Damages Directive and implemented in the UK through Schedule 8A, Part 2 of the CA 1998. It allows the defendant to argue that the claimant's losses have been mitigated, or even eliminated completely, because the claimant passed on the alleged overcharge caused by the competition law infringement to another party. In principle, damages awarded to a claimant as a purchaser of a product or service may be reduced if the defendant can prove that the anti-competitive overcharge was passed on to the claimant's own customers.

The Supreme Court has held that the defendant has the initial burden of establishing that the claimant has mitigated its loss by way of pass-on. There is then a heavy evidential burden on the claimant to establish how it has dealt with the recovery of costs. The quantification of pass-on does not need to be precise. All that is required is a "broad axe". (*Sainsbury's v Mastercard [2013] EWHC 4554*) (See *CaseTracker, Sainsbury's Supermarkets Ltd v Mastercard Inc and others: Supreme Court judgment*.)

The CAT has since held that there must be a plausible basis on the facts of the particular case for the pass-on. Broad economic theory alone is not sufficient (this is essentially a proportionality threshold, recognizing that the burden on the claimants to disprove pass-on is onerous). The CAT provided further examples of factual patterns that may give rise to a reasonable inference of mitigation by the claimants, in support of the pass-on defense:

- The claimant's knowledge of the nature and the amount of the overcharge.
- The gross amount of overcharge as a proportion of the claimant's relevant expenditure (the higher the proportion, the more likely the claimant would take some step to mitigate its impact).
- The relative ease by which the claimant could be expected to reduce their costs.
- Any renegotiation of supplies from the defendant (or connected parties or associates) to the claimant following the time in which the overcharge was allegedly imposed.

(*Royal Mail v DAF [2021] CAT 10.*)

The Court of Appeal has affirmed the CAT's approach in *Royal Mail v DAF*:

- Although there is a heavy burden on the claimant to produce evidence of how it dealt with the alleged overcharge, the defendant still needs to provide some evidence of causation and a connection with the mitigation action taken by the claimant in the initial stage.
- This connection must be realistic and carry some degree of conviction, with the evidence being more than merely arguable.

(*NTN v Stellantis [2022] EWCA Civ 16.*)

It has also been clarified that there must be a causal link between the inflated prices and the overcharge to consumers (*NTN v Stellantis [2022] EWCA Civ 16*).

Although the relevant standard continues to be refined by the UK courts, it is clear that it is not sufficient for defendants to raise pass-on without some particularized basis, and that the operation of the pass-on defense is a highly fact-specific exercise.

Pass-On in the US

The pass-on defense is an antitrust defense that seeks to reduce damages awards by claiming that the plaintiff passed on damages resulting from an antitrust violation to another party (for example, an alleged overcharge passed on to a customer, known as an indirect purchaser). Under US federal antitrust laws, pass-on generally may not be used to reduce damages claimed by direct sellers to, or purchasers from, a cartel. This is because only direct purchasers may bring claims for damages under federal antitrust law. As such, there is reduced risk that direct purchasers and indirect purchaser plaintiffs could obtain duplicative recovery for the same alleged overcharge.

But while federal antitrust laws largely do not allow damages claims by indirect purchasers, approximately half of the states allow indirect purchaser damages to be claimed under state antitrust laws. Where indirect purchaser damages are allowed, some states also recognize pass-on as a valid defense to damages. (For a list of states allowing indirect purchaser claims and pass-on defenses, see *State Illinois Brick Repealer Laws Chart*.)

Some courts presiding over consolidated antitrust litigation in the US involving both direct and indirect purchaser claims (under both federal and state law) have expressed the view that if both groups were able to succeed in proving their claims, damages between the direct and indirect purchasers would have to be allocated so that the defendant's total liability does not exceed 100% of the claimed overcharge after trebling of damages. (See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 763 n.19 (1977) and *In re Packaged Seafood Products Antitrust Litig.*, 332 F.R.D. 308, 338 (S.D. Cal. 2019)).

Other mitigation defenses may be available to defendants in the US, including that:

- Plaintiffs failed to mitigate their own damages (see *Steward Health Care Sys. v. Blue Cross & Blue Shield of Rhode Island*, 311 F. Supp. 3d 468, 511 (D.R.I. 2018)).
- Damages would be duplicative of other non-antitrust claims brought in the litigation (see *Masimo Corp. v. Tyco Health Care Grp., L.P.*, 2004 WL 7094931, at *4 (C.D. Cal. Dec. 15, 2004)).

Joint and Several Liability

Linked to funding are the issues of settlement and the potential liability of the defendants in multi-party proceedings.

Joint and Several Liability in the UK

In the UK, a common law presumption exists that defendants to a class action are jointly and severally liable for the damage suffered. For claims where the damage suffered from an infringement took place in its entirety from 9 March 2017, the contribution rules in Schedule 8A of the CA 1998 apply, which provide for *joint and several liability* and principles of contribution.

It is important to bear in mind, however, that under the Civil Liability (Contribution) Act 1978, damages may be apportioned differently by the High Court or the CAT, taking into account principles of justice and equity.

A defendant may bring a separate action against other defendants, even where a claim is settled. The time limit for this type of action is two years from the date on which the defendant initiating the claim settled, or was held liable for damages. The quantification of the claims is apportioned according to the defendants' relative responsibility for the entirety of the damages.

Exceptions are applicable for small or medium-sized enterprises, as well as immunity applicants, who are liable only to their direct and indirect purchasers.

Joint and Several Liability in the US

In the US, the risk of damages liability in antitrust lawsuits that allege a conspiracy among multiple sellers or producers is particularly significant, because co-conspirators may be held jointly and severally liable for damages caused by the conspiracy.

There is no right to contribution between co-conspirators recognized under federal antitrust law. Therefore, in a scenario where ten alleged co-conspirators are sued under the antitrust laws but nine of them settle, the last defendant can be found liable at trial for the entire amount of damages caused by the conspiracy (for example, sales from all co-conspirators) and may not seek contribution from any settling co-defendant. The non-settling defendant is only entitled to a setoff of the actual dollar value of the other defendants' settlements (including with classes or opt-out plaintiffs).

Data

Modern competition damages claims now turn on the analysis of huge volumes of data. Access to data – on which damages claims (and pass-on defenses) rest – in both the UK and the US is crucial.

Confidentiality Rings

Confidentiality rings are now commonplace in competition damages claims in both the UK and the US, in circumstances where disclosure of high volumes of confidential material between parties needs to be regulated. The defendant parties will likely be competitors, and it will be necessary for them to observe basic competition law principles as regards exchange of commercially sensitive information between competitors.

Confidentiality Rings in the UK

In the UK, courts may approve disclosure through the use of confidentiality rings, to strike a balance between the need for disclosure in the interests of fairness and openness in a public hearing, and the protection of genuinely confidential material.

In some cases, there may be inner- and outer-rings to designate who can receive certain types of information. For example, named individuals from the business may be included within the outer-ring but excluded from receipt of commercially sensitive information within the inner-ring (for example, pricing data or business strategies), whereas this material may still be shared between experts and advisors of the claimants and defendants.

The court commonly orders disclosure of the confidential version of the relevant infringement decision (where the claim involves a follow-on element). The CAT is even willing to order disclosure of materials from the authority's file that were removed with permission of the court or earlier redacted on confidentiality or relevance grounds, or from related proceedings involving the same parties, especially where such documents may assist with establishing a basis for the calculation of the overcharge. While the CAT may order restrictions on the use of information disclosed, defendants should be aware of the need to request that the information is designated as (inner) confidentiality ring material.

While the individuals from the relevant parties provide undertakings to the court to observe the obligations within the ring, it is the responsibility of the parties to agree upon the terms of the confidentiality ring agreement, which is approved by the court. Defendants should therefore be alert to attempts by the claimants to unnecessarily restrict access to information between the defendants or to de-designate certain information, which would allow its use outside of the proceedings, such as in a US claim.

Confidentiality Orders in the US

In the US, confidentiality orders are typically negotiated between the parties and approved by the court. They operate to protect highly confidential material from disclosure, while ensuring public access to court proceedings. Confidentiality agreements are often stipulated by the parties but the court may also order one at a party's request if an agreement cannot be reached.

For highly sensitive information, a confidentiality order may contain a higher level of protection, including limiting the disclosure to specific, identified individuals, such as outside counsel only. Two-tiered confidentiality agreements have been adopted by many courts. Some judges, however, may only permit two-tiered confidentiality agreements in limited circumstances. (See *Standard Document, Confidentiality Agreement (Order) (Federal)* and *Practice Note, Antitrust Litigation: Discovery Considerations: Protective Orders or Confidentiality Agreements*.)

Parties, including third parties, can also seek *protective orders* from the court to prevent specific information or documents from being produced in response to a discovery request. The *Department of Justice* (DOJ) often seeks and obtains a protective order to stay discovery in private litigation while criminal proceedings covering the same subject matter are underway (see, for example, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2010 WL 5027536 (E.D.N.Y. Dec. 3, 2010)).

Discovery from the government in private litigation may be allowed if the information is relevant and not privileged. Private litigants sometimes seek information from the government's case files by issuing *subpoenas* to the agencies or by submitting a *Freedom of Information Act* request. Generally, materials that the DOJ or *Federal Trade Commission* (FTC) obtains in its investigations are considered confidential by statute or by policy and cannot be disclosed by the agency. Internal agency documents (such as investigative notes or internal deliberations) are considered privileged and are not disclosed.

Criminal antitrust proceedings in the US typically involve the DOJ convening a grand jury to investigate a crime and issue an indictment. Under Rule 6(e) of the Federal Rules of Criminal Procedure, grand jury matters are confidential, including transcripts, the identities of witnesses, witness testimony, and subpoenaed documents (Fed. R. Crim. P. 6(e)). Rule 6(e)'s confidentiality is designed to protect the process and deliberation of the grand jury. However, parties may for certain purposes, such as impeachment, obtain discovery of limited grand jury materials if they can show a particularized need for the materials. The need for disclosure must be greater than the need for secrecy (*Douglas Oil v. Petrol Stops Nw.*, 441 U.S. 211, 222-23 (1979)).

Disclosure in Parallel Proceedings in the UK and the US

In the UK, a circumscribed disclosure process exists under CPR 31 and relevant practice directions including Practice Direction 31, as well as CAT Rules 60 to 65 and 89, which set out the parameters of the disclosure duty (see *Practice Note, Disclosure: an overview*). In the US, disclosure (called discovery) is governed by federal or state rules of procedure, formal rules developed by specific courts, court orders in specific litigations, and agreements between the parties (see *Practice Note, Antitrust Litigation: Discovery Considerations*).

None of the CPOs before the CAT have yet reached the procedural stage of disclosure, and the CAT does not encourage requests for disclosure as part of CPO applications (paragraph 6.28 of the *CAT Guide to Proceedings*). However, disclosure of a specific document from the proposed defendants has been ordered in one opt-out CPO (*Gutmann v Apple Inc and others [2022] CAT 55*) on the basis that it seemed likely that the document contained information on matters relating to the claim about which the class representative was not yet informed, picking up on previous indications from the CAT that it would take seriously any assertions from PCRs that disclosure was required to establish their claims (*Mr Phillip Evans and Michael O'Higgins FX Class Representative Limited v Barclays Bank Plc and Others [2022] CAT 16*).

It is important to contemplate the use of information disclosed in the UK proceedings in the US, and vice versa. It is highly likely that the claimants will seek to leverage off disclosures made in either jurisdiction to seek further disclosure of material in the other jurisdiction or seek permission to use the disclosure obtained in either jurisdiction in the other. The confidentiality ring may provide a useful mechanism to regulate the disclosure of such information and provide an opportunity for defendants to limit the information to which the claimants have access.

For a collection of resources addressing how to manage discovery across borders, including how to obtain discovery in the US for use in proceedings in other jurisdictions, see *International Litigation Toolkit*.

Data Transfers and Sharing

Defendants in multi-party proceedings should consider early whether pooling relevant disclosure material will be a useful and cost-effective exercise. For example, in claims involving large quantities of evidence, such as chatroom transcripts, production schedules, and pricing data, defendants should consider the extent to which:

- All defendants would benefit from having access to this material generally.
- Access should be regulated between the UK and US businesses in parallel proceedings. This will naturally be informed by the extent to which the defendants interests are (and will remain) aligned.

Data Protection

It is important to consider compliance with data protection obligations. The UK and EU data protection obligations are generally more stringent than those within US states, especially as regards transfers of data outside of the jurisdiction (which, under EU and UK rules, includes the ability to access data from outside of the jurisdiction).

Under strengthened EU and UK data access rules, it may be possible for claimants to achieve disclosure of relevant information through so-called data subject access requests. Once legal counsel are instructed (for privilege purposes), an important step is to analyze what exposure the defendant has to information located with the UK that may support the claimants and would be considered as personal data, and therefore disclosable outside the ordinary litigation process.

Settlement

A pressing issue for defendants will be how to achieve settlement of UK proceedings while the US proceedings are continuing, or vice versa, or settling both in a global settlement.

Settlement in the UK

As in ordinary litigation, settlement of competition damages proceedings is possible at any time in the CAT and the High Court. However, Schedule 8A of the CA 1998 sets out rules for settlement in multi-party litigation.

For opt-out proceedings in the CAT, the permission of the CAT is required (though this is not expected to be an obstacle to settlement). This is similar to FRCP 23 in the US (see *Settlement in the US*). The CAT Rules set out the cost consequences in the case of settlements.

Settlement in the US

Settlement is possible at any stage of US litigation, including before the court has certified a class. Before class certification, the litigation can be settled as an individual action, or with a class that is certified only for settlement purposes.

FRCP 23 in the US requires that courts approve settlements involving classes, whether the class has been formally certified or is only certified for the purposes of settlement (FRCP 23(e)). The court is tasked with ensuring that the proposed settlement is fair, reasonable, and adequate, to protect the interests of unnamed class members who are not present during settlement negotiations.

Final court approval follows a fairness hearing and a notice period for class members that provides them with an opportunity to object or opt-out.

(See *Practice Note, Settling Class Actions: Process and Procedure*.)

Settlement in Parallel Proceedings in the UK and the US

While it is possible to carve out the proceedings in a settlement agreement, the degree of finality that can be achieved through settlement is necessarily limited to the particular proceedings before the parties. Settlement against one claimant (or group of claimants) will not nullify claims by other potentially affected claimants. It is highly likely (especially in the context of follow-on proceedings) that other potential claimants may be incentivized to bring a claim in order to achieve further (quick) settlements. However, in collective proceedings, where an opt-out claim is defeated, this will preclude other class representatives from bringing further opt-out proceedings based on the same cause of action (section 49A, CA 1998).

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