

COMPETITION LITIGATION



INTRODUCTION

The competition litigation environment is changing rapidly as a result of recent legislation which makes it easier for private parties to claim compensation resulting from competition law infringements.

- ▶ In the UK, the Consumer Rights Act 2015 has introduced a new regime for "opt-out" collective actions and broadened the jurisdiction of the CAT, making it the preferred forum for all competition law claims. The Act also introduces a new fast-track procedure for less complex cases, as well as measures to facilitate collective settlements.
- ▶ At an EU level, the UK (and other Member States) are implementing the Damages Directive, which introduces minimum standards for competition damages actions across the Union and introduces a rebuttable presumption that cartels cause harm in the form of an "overcharge".

These changes present new tactical opportunities for claimants and are already leading to a significant increase in damages actions, with high profile claims in a range of markets including air cargo, gas insulated switchgear and credit cards (interchange fees). Although the CAT's award of £68.5 million in damages together with compound interest to Sainsbury's in respect of its claim against MasterCard was the first cartel damages award in the UK, other retailers are bringing parallel claims against MasterCard and a £19 billion "opt-out" collective claim against MasterCard has also been launched on behalf of consumers. Further high profile damages claims are expected in the UK courts relating to the European Commission's FOREX and trucks cartel investigations.

Our competition litigation team represents corporate clients bringing and defending competition damages actions and has an established track record before the High Court and the CAT in these cases. A key part of our role is to help clients develop a clear strategy from the outset for the conduct of the litigation and ensure that they achieve a successful outcome.

- ▶ For claimants, this means using forensic and accounting expertise to scope the likely claim for damages (which involves assessing the value of commerce affected, the potential level of overcharge, arguments relating to "passing on" and interest), advising on whether to pursue an individual or collective claim and helping the client to determine the appropriate funding model (which may involve the use of conditional fee arrangements and adverse costs insurance or the involvement of a third party funder).
- ▶ For defendants, this may include coordinating the strategy for defending the UK claim with advisers in other jurisdictions (including Germany and the Netherlands which have also emerged as important venues for competition claims), managing the defence of the claim (both before and after the case management conference), and advising on the strategy for settlement (including costs protection). Defendants will also require advice on coordinating the defence of claims by "direct" purchasers and claims by indirect purchasers (including the defence of any "opt-out" collective action).

This is a fast-evolving area and we are up to speed on the key battle grounds, including approaches to disclosure, limitation and quantification of damages, having advised clients in numerous competition disputes, including foam, copper fittings, high voltage cables and numerous other confidential claims. We also work closely with expert forensic and economic advisers and Counsel in order to ensure that clients receive integrated and cost-efficient advice.

KEY ISSUES FOR CLAIMANTS

It is now easier for businesses which have suffered loss as a result of a competition law infringement to seek redress before the UK courts, with the CAT firmly established as the "go to" venue. In particular, the CAT now has the power to:

- ▶ hear so-called "stand-alone" claims (where there is no prior infringement decision establishing liability), as well as "follow-on" claims (where there is a prior decision) and "hybrid" claims (combining "follow-on" and "stand-alone" elements);
- ▶ grant injunctions (with the new "fast-track" procedure being ideally suited for this purpose);
- ▶ hear claims initiated within six years (previously two years) of the date the damage arose (subject to concealment);
- ▶ hear "opt-out" as well as "opt in" collective actions on behalf of a class (either consumers or businesses), subject to certification by the CAT through a collective proceedings order (CPO); and
- ▶ authorise a collective settlement (agreed by the defendant and the certified class representative).

Step 1: scoping the claim

During the early stages of the case, our competition litigation team (with support from forensic accountants) will work with you to scope the potential "high level" value of the claim, taking into account:

- ▶ the scope and duration of the underlying decision (which establishes the addressees' liability for infringing competition law on a "joint and several" basis) and the availability of records/documents within the client organisation;
- ▶ the "value of commerce" affected by the infringement (i.e. purchases of the cartelised products or services over the relevant period), taking into account the identity of the suppliers involved in the cartel, purchases from suppliers which were not part of the cartel but which may have inflated their prices (i.e. "umbrella" damages) and any "run-off" period;
- ▶ the potential "overcharge" resulting from the cartel (i.e. the difference between the price that was actually paid and the price that would have prevailed had the cartel not taken place);
- ▶ the extent to which the overcharge may have been "passed on" by the claimant to subsequent purchasers (which will depend on the nature of the market and the goods/services in question as well as the relevant contractual provisions); and
- ▶ whether there may be scope to claim compound (rather than simple) interest on any damages award.

Step 2: determining the right strategy for the claim (including the funding model)

Once the claim has been scoped, our team will work with you to agree the optimal strategy regarding:

- ▶ whether to bring an individual claim or explore the possibility of a collective claim (with a small number of similar claimants). There may be some cost advantages in pursuing a collective claim (particularly as regards the costs of managing the case and instructing experts), although this will depend on how similar the claims are and whether tensions may arise in practice between the claimants as regards the strategy for managing and/or settling the claim;
- ▶ the appropriate model for funding the claim (see below);
- ▶ whether you have a choice of jurisdiction (for example, if your organisation has European subsidiaries which purchased the goods from a subsidiary of one of the cartellists, you may be able to bring a claim in the Netherlands or Germany); and
- ▶ whether there is scope to achieve a rapid settlement (bearing in mind the value and merits of the underlying claim, the client's risk appetite and the ongoing relationship with the suppliers in question).

Step 3: managing the claim efficiently and advising on settlement strategy

Once the strategy for the claim has been determined, we focus on managing the case in the most cost effective manner both during the pre-action stage and after the claim has been issued (including advising on the interaction with any appeals, related proceedings in other jurisdictions and parallel claims before the UK courts). Particular issues can arise in cartel damages claims regarding the disclosure of documents on the European Commission's accessible file as well as the strategy for settling with co-defendants, both of which require specialist advice and familiarity with the conduct of previous cartel damages claims before the UK courts.

KEY ISSUES FOR DEFENDANTS

We often represent European companies and their legal advisers in disputes before the English courts in respect of cartel damages claims. Those companies may be sued directly by one or more claimants (typically direct purchasers but increasingly defendants face the prospect of "opt-out" collective actions) or they may be joined in at a later date via Part 20 contribution proceedings before the CAT or High Court.

In many ways, the key issues for defendants mirror those for claimants (as set out above). However, the changes to EU and UK legislation have contributed to a significant increase in the volume and value of claims, particularly in the UK, Germany and the Netherlands. That can create significant complexity in practice in defending parallel claims, particularly where there are numerous co-defendants whose interests may not be aligned (and therefore there may be no strong incentive on the part of the co-defendants as a group to settle the claims on a common basis).

Our experience of advising both corporate claimants and defendants means that we are well placed to advise on the parameters for any settlement strategy (and the timing and manner of any offer), in light of the defendant's own economic evidence on the extent of any overcharge and its assessment of the strengths and weaknesses of the cases brought by the claimants. We also provide advice on how defendants can shift costs risk within a litigation context, which can incentivise claimants to "come to the table".

FUNDING YOUR CLAIM

There are many ways to fund competition damages actions which can significantly reduce claimants' exposure to costs. Since launching CONTROL, an innovative suite of litigation funding solutions, in 2008, we have been a pioneer of litigation funding and at the forefront of sharing risk with clients on large and complex commercial cases. Over the years, we have formed strong relationships with the leading brokers, insurers and funders, gaining a wealth of experience of how different options work in practice. We provide an integrated solution to provide clients with greater certainty over the potential financial outcomes.

There are a number of ways in which clients may be able to lay off some of the risk of funding litigation, or postpone paying for it. In the UK, options range from a traditional retainer model (coupled with adverse costs insurance) to third party funding as well as getting a group of potential claimants together in a joint or parallel action or an action via a trade body. Competition law damages actions are cost-intensive and the incidence of costs can be a key issue in practice in deciding whether a claim should be pursued (on the basis that, if the case is unsuccessful, the loser pays the winner's reasonable costs).

The following table summarises the main funding models which are available.

CONDITIONAL FEE AGREEMENT (CFA)	THIRD PARTY FUNDING ("TPF")
<ul style="list-style-type: none"> ▶ An agreement between you and us under which you agree to pay our fees at less than standard rates throughout the life of the claim. ▶ If you are not successful you will pay us only those discounted rates. ▶ If you are successful, you will pay fees at standard rates plus a "success fee" (expressed as a percentage of the difference between the discounted rates and the standard rates). <p>Advantages of a CFA include:</p> <ul style="list-style-type: none"> ▶ improved cash flow, improved certainty on costs (by allowing you to make provision for legal costs); and ▶ a sharing of the risk with us. <p>The downside is that the 'success fee' is no longer recoverable from the other side, and so would be payable from damages.</p>	<ul style="list-style-type: none"> ▶ TPF is the provision of funds by those who have no connection with the litigation in return for a share of the proceeds. The funder agrees to pay some or all of a claimant's legal fees (and disbursements) in return for a fee. This fee is usually a proportion of the proceeds recovered as part of the litigation process whether by judgment or settlement. ▶ Funders tend to be institutional investors, private equity funds, hedge funds and private investors and will fund all or part of the legal costs and expenses (including experts' fees and Counsel's fees) of taking the matter to trial. <p>Advantages of TPF include:</p> <ul style="list-style-type: none"> ▶ more certainty of financial exposure depending on the outcome and more liquidity (by not having to pay the day to day costs of the litigation); ▶ you can also choose to put the other side on notice that your case is being funded, which sends a powerful message that, following independent assessments of your legal position, unconnected parties are willing to 'buy into' the prospects of your success; and ▶ if the claim is unsuccessful then the funder loses its investment and is not entitled to receive any payment from the claimant. <p>The downside is that funders demand a return based on their investment in addition to repayment of the costs actually incurred. Historically, this was up to 3 times the investment but based on recent discussions with funders we believe that funding could be available for around 1.5 times the investment. Funder's fees are not a recoverable cost of litigation, and would therefore be payable out of the damages.</p>
AFTER THE EVENT INSURANCE ("ATE")	DAMAGES BASED AGREEMENT ("DBA")
<ul style="list-style-type: none"> ▶ An insurance policy taken out to protect against the risk of having to pay the other side's legal costs if you are not successful. 	<ul style="list-style-type: none"> ▶ An agreement between you and us under which you agree to pay us a percentage of sums recovered in a claim.

AFTER THE EVENT INSURANCE ("ATE")	DAMAGES BASED AGREEMENT ("DBA")
<ul style="list-style-type: none"> ▶ The policy can be extended to cover some or all of your disbursements, such as counsel's fees and expert's fees. ▶ Premiums can be in the region of 25-60% depending on whether the premium is contingent or up front and on the amount of cover sought, but will only be payable if you are successful. <p>Advantages of ATE insurance are:</p> <ul style="list-style-type: none"> ▶ comfort that adverse costs will be covered if you unsuccessful; and ▶ again if you inform the other side that you have ATE insurance (with the insurer's permission) then it sends a strong message that the merits have been reviewed and backed through the provision of insurance. <p>The downside is that the premium is not recoverable and would therefore be payable out of damages.</p>	<ul style="list-style-type: none"> ▶ We would pay disbursements (Counsel and expert fees) and VAT out of the sum you pay to us. ▶ We would not be paid our fees during the lifetime of the dispute, and we would not receive any fees if you were not successful (or if you were successful but were unable to recover the damages awarded or settlement sum). ▶ You can recover costs from a losing opponent on a normal hourly rate basis but your opponent will not have to pay more than the percentage payable by you under the DBA. <p>Advantages of a DBA are:</p> <ul style="list-style-type: none"> ▶ improved cash flow; and ▶ improved certainty on costs. <p>The downside is that the damages you are awarded or any settlement sum you receive will be reduced by the percentage we take following success (which will reflect not only costs incurred but an uplift to cover the risk we have taken in acting for you under a DBA).</p>

Some of the options above can be combined, for example, ATE insurance is common where parties self-fund litigation and/or in conjunction with a CFA. It is also worth considering whether to self-fund any claim up to a certain stage (for example up to the letter before claim) and then to consider funding options to take the claim forward. Our approach would be to work with you to find the right funding fit for the claim.

OUR CREDENTIALS

Our competition litigation team integrates specialist competition lawyers with specialists in High Court and Competition Appeal Tribunal (CAT) litigation and alternative dispute resolution (ADR). We have acted on a number of leading cases in the competition arena, including the claimant in the first ever award of damages before the CAT and for defendants in "follow-on" damages actions in the High Court relating to European Commission cartel cases and in defending injunctions in the High Court in claims relating to alleged abuse of dominance.

Our team comprises expert lawyers from both our competition team and our litigation team, which means that competition advice is embedded as part of our overall litigation strategy. We can also draw on the wider resources for the firm, including a litigation department with over 25 partners and 80 associates, as well as an experienced competition law team. With bulk work, such as requirements for disclosure, we can deploy a team of over 100 paralegals in our Manchester office who work with the careful supervision of our associates.

Our practice is consistently ranked highly in the Chambers & Partners and Legal 500 Directories, both for competition law advice and for commercial litigation. Examples of recent matters include:

- ▶ We are currently advising a number of significant UK-based purchasers of the cartelised product in a private follow-on damages claim arising from a cartel investigated around 5 years ago. The matter is at the pre-action stage. A formal letter before claim was sent in December 2014 and the parties are currently in without prejudice discussions.
- ▶ We are currently advising a co-defendant on its defence of private follow-on damages claims brought by National Grid and Scottish Power arising out of the high voltage cables cartel decision issued by the European Commission.
- ▶ We are currently advising Delta plc on its defence of a Part 20 claim brought against it by the first and second Defendants in a private follow-on damages claim arising out of a copper fittings cartel. The 23 claimants sought damages in excess of £400m from three Defendants; the three Defendants issued a Part 20 claim against 24 Part 20 Defendants. The main claim has now settled, and the Part 20 claim is proceeding solely against Delta.
- ▶ We advised 2Travel Group Plc in its successful follow-on damages action against Cardiff Bus following a Chapter II infringement decision by the OFT which found that Cardiff Bus had abused its dominant position. This was the first ever award of damages by the CAT in a follow-on damages case.
- ▶ We act for a major UK airport in defence of a stand-alone abuse of dominance claim by a parking company. We are providing competition, litigation advice and strategic advice on the claim.
- ▶ We are advising a client on a major threatened competition law claim, which includes a threatened injunction, arising out of alleged abuse of a dominant position. The allegations of abuse extend to conduct of our client said to restrict competition in the market, as well as alleged failures in relation to a tender process for multi-million pound contracts for services provided to our client. We are providing litigation, competition and strategic advice on both the competition and contractual aspects of the dispute.
- ▶ We are currently advising a major UK FTSE100 on a high value competition law damages claim, which is currently at the pre-action stage and is being brought by liquidators of a company.
- ▶ We advised a major UK FTSE100 on a complex and strategically significant series of arbitrations, which included complex issues of competition law.
- ▶ We advised a major UK airport on the defence of a competition law based claim brought by a major low cost airline. The claim was of strategic significance to our client and if it had been successful would have threatened the future of the airport.

THE AG TEAM



Mark Molyneux

Partner

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Mark is a Partner specialising in commercial litigation. Mark has significant experience of leading large and complex investigations and litigation both in International Arbitration and the English High Court, including claims supported by urgent injunctive relief and worldwide freezing injunctions. Mark is currently representing a group of corporate claimants in "follow-on" proceedings and defending international clients in other cases before the English courts.



Bruce Kilpatrick

Partner

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Bruce is a Partner based in London and leads our Competition practice. He advises a range of clients on competition law, utility regulation, merger control and EU state aid matters. He has particular expertise in the energy, transport, retail and financial services sectors. He has represented defendants in both "stand-alone" and "follow-on" damages actions before the English courts.



Rona Bar-Isaac

Partner

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Rona specialises in UK and EC competition and merger control law. She advises UK and international clients on a wide range of competition law matters in both Brussels and London, including securing of merger clearances, investigations of anti-competitive agreements, abuses of market power and in the context of anti-trust litigation. Rona has substantial experience of advising clients before the CAT and the English Courts on competition law matters.



Simon Kamstra

Partner

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Simon is an extremely experienced commercial litigator and also heads Addleshaw Goddard's International Arbitration practice. A former head of the firm's wider dispute practice, he specialises in arbitration, judicial review and public law, and leads on major national court commercial litigation, including competition law disputes.



Clare Dwyer
Legal Director
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Clare is a litigator, and for over 20 years has dealt with a wide range of contractual and commercial disputes, from contract to multi-million pound warranty claims, and complex tax claims. Clare is currently defending a client in "follow-on" proceedings in the High Court.



Helen Stokes
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Helen is an associate in the competition team and has experience working on a wide range of UK and EU competition matters, including transactional, regulatory and disputes matters. She is a core member of our competition litigation team.



Samantha Haigh
Associate
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Sam joined the commercial disputes team as an Associate in September 2011 after training with the firm. Alongside her commercial litigation practice Sam has acted on a number of competition law disputes for both claimants and defendants, including both "stand-alone" and "follow-on" damages claims.



Fiona Walker
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Fiona has extensive experience of acting in commercial disputes and has acted on a broad spectrum of high value and complex matters including, commercial contract disputes; defamation claims; harassment claims; breach of warranty claims and judicial review claims. Fiona also regularly advises clients on media and reputation issues.

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