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## **Erin Brockovich turns European: is there an interest for class actions?**

### **Litigation/Antitrust/Distribution law Commissions**

National Report of *England and Wales*

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### **INTRODUCTION**

Class actions are often related and associated to the American legal culture, as it is illustrated by several movies including the famous “Erin Brockovich” picture.

However, the class actions or collective redress actions exist also in other jurisdictions, notably in Europe.

Precisely, the European Commission has recently given an accurate definition of collective redress and of its aim in its communication named “Towards a European Horizontal Framework for Collective Redress”<sup>1</sup>, accompanying its “Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”<sup>2</sup>:

*“Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.”*

Although collective redress and class actions exist in several jurisdictions in the world, there are some differences arising from different legal and procedural cultures, notably between the Common Law and the Civil Law legal systems.

Thus, the purpose of this questionnaire is to identify such differences as well as the common points between the collective redress and class actions in various jurisdictions.

There is also a particular focus on class actions in the anti-trust field, which is one of the main areas for such actions, as shown by the recent proposal for an EU “Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”<sup>3</sup>.

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<sup>1</sup> COM(2013) 401/2

<sup>2</sup> C(2013) 3539/3

<sup>3</sup> COM(2013) 404 final

## 1. Existence and scope of class actions/collective redress actions

### 1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

For the purposes of this review and in the following sections, we will focus on the situation in the UK at the time of writing (March 2014). Where relevant, we also refer to proposed reforms.

In the UK, there are three key mechanisms for collective action. Two of these mechanisms are provided for in the Civil Procedure Rules (CPR). These include representative actions and Group Litigation Orders (GLOs). A third mechanism for collective action is made possible by the Competition Act 1998. This mechanism is referred to as a “Competition Action”. These are explained in greater detail below.

1. *Representative Actions* (CPR Part 19II). Representative actions can be brought “by or against one or more persons that have the same interest”. This mechanism is rarely used, as the courts have interpreted the term “same interest” very strictly (see *Emerald Supplies Limited v British Airways plc* [2009] EWHC 741 (Ch.)). The action cannot be used, for example, where the claimants have different personal rights or defendants have different defences. Representative actions are brought in the High Court.
2. *GLOs* (CPR Part 19III). Group Litigation Orders allow for common management of similar claims. A case register is maintained (including all claims in the group) and any judgments entered against a claim in this register are binding on all other claims registered. In order to join the GLO, claimants must apply to be entered on the register by a date specified by the court (i.e. they must opt in). Parties to GLOs must have similar claims that give rise to “common or related” issues of fact or law and these causes of action have to be pre-existing and identified. In competition cases, an application for a GLO can only be brought before the High Court.
3. *Competition Action* (s.47 B Competition Act 1998): this is a follow-on procedure; i.e., it enables an entity to seek compensation for damage incurred as a result of anticompetitive behaviour. Under the Competition Act 98, a *specified body* can bring a damages action for breach of competition law (both EU and UK) on behalf of a group of named consumers who suffered loss as a result of the anticompetitive behaviour. Competition Actions are brought before the Competition Appeal Tribunal (CAT).

The procedure has so far had only limited success. Currently *Which?* is the only specified body designated to bring competition claims. The Consumers’ Association (*Which?*) brought a claim in 2007 on behalf of approx. 130 individual consumers against JJB Sports (*Consumers’ Association v JJB Sports plc*, registered on 5 March 2007) following on from the Office of Fair Trading’s (OFT) decision that JJB Sports had infringed the Chapter I prohibition (s2(1) Competition Act 1998) by fixing the prices of certain football shirts. Only about

0.1% of the consumers that were affected by the illegal price fixing signed up to the action and the case settled. There have been no other cases to date.

For the balance of this questionnaire response, we refer to rules applicable to Representative Actions and GLOs “Mechanisms Governed by the CPR.” As for Competition Actions, we refer to these as “Matters Governed by the Competition Act 98”.

*Reforms:*

The Consumer Rights Bill is currently being scrutinised before Parliament. If this Bill passes, it will introduce significant changes in the context of competition actions. Collective actions for damages will be able to be brought on a stand-alone basis and not just as a follow-on from an established competition law infringement by a public enforcement authority. In addition, the Bill sets out a number of changes, including, amongst others:

1. The inclusion of an opt-out procedure in addition to the current opt-in mechanism. Collective proceedings will be brought by a representative body authorised by the CAT (but only when the CAT makes a collective proceedings order).
2. New rules for damages and costs (including a prohibition on exemplary damages and contingency fees).
3. A power of the CAT to grant injunctions in collective proceedings.
4. Rules on limitation periods, collective settlements and voluntary redress schemes.

**1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law...)?**

*For Matters Governed by the CPR:*

The two mechanisms governed by the CPR rules, namely representative actions and GLOs, are applicable to all types of civil proceedings. This is evidently dependent upon the relevant criteria being met, namely that the parties have the *same interest* if a representative action is brought or that the claims raise *common or related issues* in the context of a GLO as set out above at 1.1.

*For Matters Governed by the Competition Rules:*

If a Competition Action is brought before the CAT, it can only be brought as a follow-on action. This means that there has to be a previous decision establishing an infringement of competition law and the Competition Action must be based on this decision. A claimant cannot rely on a finding of fact made by a regulator that could amount to an infringement as a basis for a claim. Competition Actions are therefore limited to claims for damages based on previous competition infringement decisions (note however, that claims in competition law can be brought before the High Court as well. In that case, there is no need for a previous infringement decision of a UK or EU competition authority; cases in the High Court can be brought both on a stand-alone basis and as follow-on actions).

**1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?**

As mentioned above, representative actions and GLOs, are applicable to all types of civil proceedings. A claimant would therefore choose through which of these mechanisms a claim is to be brought. In relation to Competition Actions a claimant (currently only *Which?*) would bring an action on the basis of s.47 B Competition Act 98.

**1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?**

*For Matters Governed by the CPR:*

Part 24 of the CPR allows the court to give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that:

1. The claimant has no real prospect of succeeding on the claim or issue; or
2. The defendant has no real prospect of successfully defending the claim or issue.

In both cases, the court must be certain that there are no other compelling reasons why the case or issue should be disposed of at a trial.

Summary judgment may be given against a claimant in any type of proceedings. With regards to defendants, summary judgment may be given in all cases, except in proceedings for possession of residential premises against a mortgagor or a tenant and in proceedings for an admiralty claim in rem.

The court also has the power to strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim (CPR r. 3.4).

*For Matters Governed by the Competition Rules:*

Rule 41 of the CAT Rules allows the CAT to give summary judgment on its own initiative or on the application of a party. Summary judgment can be given on a particular issue or in the whole case if the CAT considers that:

1. The claimant has no real prospect of success; or
2. The defendant has no reasonable grounds for defending the claim.

The CAT must ensure that there are no other compelling reasons why the case or issue should be disposed of at a substantive hearing (CPR r. 41(1)(b)).

**1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors (“injunctive relief actions”) and/or to claim compensation for damage suffered (“compensatory relief actions”)?**

Injunctive Relief

*For Matters Governed by the CPR:*

The Court has discretion to grant interim remedies (Part 25 CPR). These remedies include interim injunctions (both prohibitory injunctions where the defendant must refrain from certain conduct and mandatory injunctions where the defendant must actively take certain actions. *Quia timet* injunctions where the defendant is restrained from engaging in future conduct are also available).

Interim remedies can be granted by the court at any time, both before proceedings are started (as long as the matter is urgent or it is otherwise necessary in the interests of justice) and after judgment has been given.

In terms of interim injunctions, the applicant must prove that damages would be an inadequate remedy and that it has a good and arguable case (*American Cyanamid v Ethicon Ltd* [1975] AC 396). In addition, given the serious damage that can be done to a respondent's business and reputation by an interim injunction, a cross-undertaking in damages must normally be offered by the applicant. Timing also plays an important role in the application for injunctive relief as can be seen from *AAH Pharmaceuticals v Pfizer Limited & Unichem Limited* [2007] EWHC 565. In this case, the High Court refused an application for an interim injunction on the basis that the application was brought “last-minute” and that the analysis required to establish whether Pfizer’s actions were anticompetitive was complex.

In a claim in which a party acts as a representative party in a representative action (Rule 19.6), an interim injunction granted against that representative is binding on all persons represented in the claim, but may only be enforced against a person who is not a party to the claim with the permission of the court (19.6(4)). Such an injunction may not include a term enabling the applicant to enforce the injunction against unidentified persons represented by the representative without first obtaining such permission (*Smithkline Beecham Plc v Avery* [2007] EWHC 948 (QB), April 27, 2007, unrep. (Teare J.)); *Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty* [2011] EWCA Civ 752, June 29, 2011, CA, unrep.).

*For Matters Governed by the Competition Rules:*

The CAT currently does not have the power to grant interim injunctions in cases of collective redress.

Interim relief in the form of interim payments may be awarded by the CAT (Rule 46 CAT Rules). This measure requires the defendant to make a payment on account of any damages for which he may be held liable. The CAT must be satisfied that the defendant has admitted his liability to pay and that the claimant would obtain judgment for a substantial amount of money in damages, were the claim to be heard. Any interim payment must be limited to a reasonable amount of the likely final damages award (Rule 46(4) CAT Rules). In *Healthcare At Home v Genzyme Ltd* [2006] CAT 29, the CAT ordered an interim payment of £2 million

in the context of a claim for damages based on an OFT decision that the defendant engaged in an illegal margin squeeze.

The CAT can also order security of costs (Rule 45, CAT Rules). It would appear that when deciding whether to grant such an order, the CAT will consider the likelihood of a cost order ultimately being made (*BCL Old Co v Aventis* [2005] CAT 2).

*Reforms:*

The Consumer Rights Bill will, if adopted, give the CAT the power to grant injunctions in the context of collective actions. Thus, whilst at present a party wishing to obtain an injunction would have to apply to the High Court, in future such measures might also be granted by the CAT.

### Compensatory Relief

It is possible to recover monetary compensation for damage suffered, i.e. damages, in both the civil courts and the CAT. This is discussed further below.

#### **1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?**

In contract claims, damages are awarded to put the injured party back in the position it would have been had the contract been performed. Damages can be awarded for monetary loss (such as damage incurred to personal property), but can also be awarded for non-pecuniary losses (such as damages for death or personal injury) if it was within the parties' contemplation as not unlikely to arise from the breach of contract. Economic loss (such as loss of profit) can be recovered if it was a foreseeable consequence of the breach.

In negligence claims, damages aim to put the injured party back into the position it would have been in had the negligent act not occurred. Damages are recoverable for death or personal injury (including mental injury) and damage to property. Pure economic loss is not normally recoverable.

Additional caveats apply to recovery of damages for psychological injury. Damages are not available for mere anxiety or distress. In order to recover damages, it must be shown that the psychological injury is a recognised psychiatric injury (*AB v Tameside & Glossop Health Authority* [1997] 8 Med LR91).

Compensation claims can also be made under specific statutes which may impose additional restrictions on the types of damages available (e.g. employment legislation).

Actions brought in the High Court as a consequence of an infringement of competition law and follow-on actions brought in the CAT, are based on the tort of breach of statutory duty (i.e. of s.2(1) European Communities Act 1972 or of Chapters I or II of the Competition Act 1998) (*Crehan v Inntrepreneur Pub Company* [2004] EWCA Civ 637). Damages are therefore awarded on a tortious basis, namely the amount of loss plus interest.

#### **1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual**

**actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?**

In England and Wales, the general rule is that damages should be compensatory in nature. Exemplary damages are only available in exceptional and limited circumstances such as where the defendant is guilty of oppressive or unconstitutional action or has calculated that the money to be made from his wrongdoing will probably exceed the damages payable (see *Rookes v Barnard* [1964] AC 1129). While they may be awarded in cases involving deliberate torts, such as deceit and defamation, it is not clear whether they may be available in cases involving negligence and other inadvertent torts. Following *Addis v Gramophone Co. Ltd* [1909] AC 488, it is clear that they are not available for breach of contract.

In the context of follow-on competition damages claims, the High Court in *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394 refused to award punitive or exemplary damages where the defendant had already been fined (or granted immunity from, or a reduction in, fines) by a regulatory authority in respect of the same behaviour. Note, however, the CAT's award of exemplary damages in *2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19 where the defendant had been granted immunity by the OFT on the basis of conduct of minor significance, rather than pursuant to a leniency regime. In contrast, in *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013] CAT 6, the CAT stated that for it to award exemplary damages, evidence was required that the common carriage service knew that the way the price was calculated was unlawfully excessive or that it did not care whether that was the case.

**1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?**

It is generally understood that the passing-on defence can be relied upon, provided that it has been sufficiently proven in fact. No definitive judgment has yet been made on this issue, but the ECJ judgment in *Manfredi v Lloyd Adriatico* (Case C-295/04 [2006] ECR I-6619), leads to the conclusion that the passing-on defence should be permitted in the UK.

The CAT considered the passing-on defence in *BCL Old Co Ltd v Aventis SA* [2005] CAT 2. Although the standing of the indirect purchaser claimants was not disputed, the case reached settlement before the substantive hearing.

It is arguable that the passing-on defence does exist in English law, as damages have a compensatory function and the quantification thereof therefore takes passing-on into account (*Devenish Nutrition v Sanofi-Aventis SA* [2007] EWHC 2394).

## **2. Standing and admissibility to bring class actions/collective redress actions**

**2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on**

**behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice (“representative actions”)?**

Generally, collective actions may be brought by any legal or natural person who has a claim.

*For Matters Governed by the CPR:*

As explained in more detail in response to question 1.1 above, representative actions can be brought “*by or against one or more persons that have the same interest*” – i.e. the claimant represents himself and other claimants, thus avoiding multiple claims being brought on the same issue. This mechanism is rarely used, however, as the courts have interpreted the term “same interest” very strictly (*Emerald Supplies Limited v British Airways plc* [2009] EWHC 741 (Ch.)).

GLOs (CPR Part 19III) are also available in the High Court. They are made where parties have similar claims giving rise to “*common or related issues*” of fact or law, and have been ordered by the court to consolidate proceedings.

*For Matters Governed by the Competition Rules:*

The Competition Act also provides a mechanism for collective redress (s47B). This is a follow-on, opt-in procedure whereby a *specified* (state-approved) body brings a damages action for breach of competition law (both EU and UK) on behalf of a group of named consumers who suffered loss as a result of the anticompetitive behaviour. At present, only the consumer organisation *Which?* has been authorised to bring such actions.

**2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?**

As specified above, when bringing a representative action before the High Court, the claimants must have the same interest. As regards GLOs, the requirement is that of establishing common or related issues.

When bringing a claim before the CAT, consumers which are being represented must have consented to the claim. The individual claims must also, of course, relate to the same infringement.

**2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements...), and can the representative entities be sanctioned if they do not comply with such requirements?**

Pursuant to s47B of CA98, Competition Actions can be brought before the CAT by a specified body on behalf of consumers in follow-on claims stemming from breaches of competition law (UK and EU). The organisation must be approved by the Secretary of State, and meet certain conditions, which include being independent and impartial, and acting in the best interest of consumers (for more, see <http://dti.gov.uk/files/file11957.pdf>).

To date, only the consumer organisation Which? has been designated for the purposes of s. 47B.

**2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?**

*For Matters Governed by the CPR:*

The court has the authority to strike out claims if it concludes that the normal requirements are not fulfilled by a particular case. The reasons could include, for example, that the case is not likely to succeed, that it is vexatious/opportunistic, oppressive or unfair vis-à-vis the defendants. In group actions, there is another element which requires that the claim be viable. This is a cost and benefit criterion which is linked to CPR r.1.4(2)(h) which stipulates that active case management includes “*considering whether the likely benefits of taking a particular step justify the costs of taking it*”.

*For Matters Governed by the Competition Rules:*

Once an appeal/application has been filed with the CAT, it will be checked in the Registry to ensure that the various formal requirements have been complied with. Documents that do not constitute appeals or applications, or which are out of time, will not be registered. Where a notice of appeal or application does not comply with one of the formal requirements, or is incomplete, the CAT may give directions for putting the document in order. Failure to comply with such a direction may lead to the appeal or application being rejected.

Furthermore, under r. 10(1) of the CAT Rules, the Tribunal has the power, after hearing the parties, to reject an appeal, or any part of one, if it discloses no valid ground of appeal, if the appellant is a vexatious litigant, or if the appellant fails to comply with a direction of the Tribunal. As regards claims for damages, the CAT has the power to reject a claim for damages in whole or in part at any stage of the proceedings on a number of grounds, i.e. where it considers that:

1. there are no reasonable grounds for making the claim;
2. in a claim under section 47B of CA98 the body bringing the proceedings is not entitled to do so or that an individual on whose behalf the proceedings are brought is not a consumer;
3. the claimant is a vexatious litigant; or
4. the claimant fails to comply with any rule, direction, practice direction or order of the CAT.

**2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?**

The ECJ’s judgment in the *Manfredi* case (Case C-295/04) provides that indirect claims should be permitted. As such, pursuant to s60 of CA98 which requires that the provisions of the Act must be consistent with EU law, it is generally understood that it is possible (i) to rely on the passing on defence and (ii) for indirect purchasers to bring actions.

**2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?**

There is no minimum threshold for the aggregation of claims. However, it is commonly accepted that, in the context of a GLO, there must be at least 5 claims (purely by reason of the resources required to conduct group litigation).

Actions that constitute the group litigation remain *individual* claims which are managed *collectively*.

**2.7 More generally, what procedural defences are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?**

A wide range of defences are available to the defendant prior to the examination of the merits. These include, but are not limited to:

- Lack of standing;
- Lack of jurisdiction;
- Expiry of limitation period (see the answer to question 4.4);
- In the case of collective actions, a failure to meet the requirements set out in the answer to question 1.1, above.

The defendant may also apply to strike out the statement of case, pursuant to CPR r. 3.4, provided that one of the following grounds are met:

- It discloses no reasonable grounds for bringing or defending the claim (CPR r. 3.4(2)(a)).
- It is an abuse of the court's process (CPR r. 3.4(2)(b)).
- It is otherwise likely to obstruct the just disposal of the proceedings (CPR r. 3.4(2)(b)).
- There has been a failure to comply with a rule, practice direction or court order (CPR r. 3.4(2)(c)).

**3. “Opt-in” vs “Opt-out” systems and information on the class action/collective redress action**

**3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed (“opt-in” principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group (“opt-out” principle)?**

Representative actions, GLOs and Competition Actions are based on the opt-in principle, requiring claimants to actively opt into the action to benefit from it.

The current situation in the UK might change with the adoption of the Consumer Rights Bill. If this Bill comes into force, it will introduce a limited opt-out collective actions regime. The CAT will be the forum for such claims enabling businesses and consumers to seek collective redress for competition law infringements in both follow-on and stand-alone cases.

### **3.2 What are the effects of the judgment on the victims in the “opt-in” or “opt-out” system chosen in your jurisdiction?**

*For Matters Governed by the CPR:*

1. *Representative Actions:* The normal Civil Procedure Rules apply. Usually representative actions bind all those represented in the claim, but such orders can only be enforced by or against a person who is not a party with the permission of the court (CPR r. 19.6 (4)).
2. *GLOs:* unless the court orders otherwise, a judgment (or order) given in a claim that is on the group register in relation to one or more GLO issues is binding on the parties to all other claims that are on the group register at the time the judgment is given. The court may give directions as to the extent to which that judgment is binding on the parties to any claim which is subsequently entered on the group register. A party to a claim which was entered on the group register after a judgment was given may not apply for the judgment to be set aside, varied or stayed or appeal that judgment. This party may, however, apply to the court for an order that the judgment or order is not binding on him (CPR r. 19.12).

*For Matters Governed by the Competition Rules:*

The CAT’s decision will be binding on all the parties to the proceedings. Damages must be awarded to the individuals, but the CAT can order that the sum be paid to the representative body.

### **3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?**

*For Matters Governed by the CPR:*

1. *Representative Actions:* in *Emerald Supplies Ltd v British Airways plc* ([2010] EWCA Civ 1284 the Court of Appeal held that (1) at all stages of the proceedings and not just at the date of judgment at the end, it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having “the same interest” as each other, (2) the authorities show that the claimant and the class must all have “a common interest and a common grievance” and “the relief sought must in its nature be beneficial to all” of them, (3) if those conditions are satisfied, it matters not that the class of person represented may fluctuate.
2. *GLOs:* A party to a claim entered on the group register may apply to the management court for the claim to be removed from the register. If the management court orders

the claim to be removed from the register it may give directions about the future management of the claim (CPR r. 19.14).

*For Matters Governed by the Competition Rules:*

A claimant may withdraw his claim only with the consent of the defendant or with the permission of the CAT. Where a claim is withdrawn, the CAT may make any consequential order it thinks fit and no further claim may be brought by the claimant in respect of the same subject matter (CAT Rules 42).

**3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?**

*For Matters Governed by the CPR:*

1. *Representative Actions:* see above at 3.3.
2. *GLOs:* other cases commenced after the establishment of the GLO and raising the same issues may be added to the register and become subject to the GLO. An order for a case to be entered on the register may be made when the case raises at least one of the GLO issues. The fact that a case raises a GLO issue does not mean that the case will automatically be entered on the register, however. The court has discretion to refuse a registration if it thinks that it cannot be managed conveniently with the other cases on the register or that its inclusion would adversely affect the other cases on the register. The management court may give directions that specify a date after which no more claims can be added to the GLO (unless the court gives special permission) (CPR r. 19.13 and PD19B13).

*For Matters Governed by the Competition Rules:*

The CAT may, after hearing the parties, grant permission for one or more parties to be joined in the proceedings in addition or in substitution to the existing parties (CAT Rules 35).

**3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?**

*For Matters Governed by the CPR:*

Once a GLO has been made, a copy of the order must be supplied to the Law Society and the Senior Master of the Queen's Bench Division (CPR PD 19B11). As mentioned above, all claims in a GLO are entered on a case register and a GLO will normally be publicised through the Law Society.

*For Matters Governed by the Competition Rules:*

On receiving a claim the CAT Registrar will send an acknowledgment of receipt to the claimant and send a copy of the claim form to the defendant. Within 7 days of receipt of the copy of the claim form, the defendant must then send an acknowledgment of service to the Registrar (CAT Rules 36).

**3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?**

CPR Rule 19.11(3)(c) and paragraph 11 of Practice Direction 13B covers the publication of a GLO. The intention is to enable the court to order the solicitors for the group to “advertise” the making of the order and any cut-off dates for joining the register to minimize the risk of individuals trying to start their own separate proceedings at a later date. Neither the rule nor the practice direction provide guidance on the form of any publicity, nor on who might be ordered to pay the costs of placing adequate advertisements.

**3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?**

*For Matters Governed by the CPR:*

As mentioned above, all claims in a GLO are entered on a case register. A list of GLOs is available on HM Court Services archived page at <http://webarchive.nationalarchives.gov.uk/20110110161730/http://www.hmcourts-service.gov.uk/cms/150.htm>

A link can be found on the Justice website at <http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders>).

*For Matters Governed by the Competition Rules:*

There has been only one case brought under s.47B at present so there is no register setting out the collective actions brought under this section. The case can be found on the CAT’s website (<http://www.catribunal.org.uk/237-640/1078-7-9-07-The-Consumers-Association.html>)

**4. Interplay of class actions / collective redress actions and public enforcement**

**4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law (“follow-on actions”) or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?**

Competition claims can be brought before the High Court on a stand-alone basis. This means that the alleged breach of competition has not already been established by a decision of an EU or UK competition authority and that the claimant will have to prove that there was an infringement of competition law and that he suffered a loss as a result.

Stand-alone claims cannot be brought before the CAT in the context of collective redress actions. All such claims must therefore be brought before the High Court.

Follow-on actions can be heard in both the CAT and the ordinary courts - see above in response to Question 1.

**4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?**

Collective actions (whether stand-alone or follow-on) can be brought in relation to all infringements of UK or EU competition law. This includes bilateral antitrust infringements such as cartels (Chapter I prohibition (s.2 Competition Act 1998) or Article 101 TFEU) and unilateral antitrust infringements such as abuse of dominance (Chapter II prohibition (s.18 Competition Act 1998) or Article 102 TFEU).

**4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?**

The Office of Fair Trading and the Competition Commission do not often disclose the documents obtained during their investigations to private claimants.<sup>4</sup>

Disclosure in the UK is governed by CPR Part 31. In larger cases, parties are required to submit a Disclosure Questionnaire before the disclosure procedure is commenced which enables all parties and the court to have an overview of the documents of the case. Three types of disclosure are available:

1. standard disclosure (where the parties have to disclose all documents in their control on which they rely, which adversely affects their case or another party's case and documents that support another party's case);
2. specific disclosure (where a party is required to disclose specific documents or specific categories of documents (CPR r. 31.12) or non-parties are required to disclose certain documents (CPR r. 31.17)); and
3. pre-action disclosure (where a someone that is likely to become a party to a claim is asked to disclose certain documents (CPR r. 31.16).

The status of leniency documents has been the subject of much debate following the ECJ's judgment in *Pfleiderer v Bundeskartellamt* (Case C-360/09). In the UK, the High Court performed a "balancing exercise" in line with *Pfleiderer* in the case of *National Grid Electricity Transmission plc v ABB Ltd* [2012] EWHC 869. This case involved an application by National Grid for disclosure of certain documents which might have contained information supplied during leniency applications (the confidential version of the Commission's decision, the leniency applicant's reply to the Commission's Statement of Objections and replies to requests for information made by the Commission). Initially, the claimant had requested that the High Court order the Commission to produce these documents itself, but in light of the ECJ's ruling in *Pfleiderer*, the claimant changed its request in favour of an order against the defendants.

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<sup>4</sup> Note that as of 1 April 2014, the OFT and Competition Commission will cease to exist, and will be replaced by single agency – the Competition and Markets Authority.

The Court held that *Pfleiderer* applied to the Commission's leniency programme and was therefore applicable in the present case. The fact and circumstances of the case meant that there were no other means available for National Grid to derive the requested information and the court held that the relevance of the materials being sought had to be determined on a document by document basis. In this case, only very limited disclosure of the documents requested was ordered by the court.

#### **4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?**

*For Matters Governed by the CPR:*

For cases brought in the High Court the limitation period is six years from the date on which the infringement of competition law ceased. An important caveat is that in claims involving deliberate concealment (such as cartel cases), the limitation period will only start to run from the time the claimant discovered or ought reasonably to have discovered the concealment (s.32 Limitation Act 1980). This means that in practice, limitation periods in cartel cases may only start to run when the cartel activity was announced publicly.

If an action for collective redress is brought as a follow-on claim in the High Court and it is based on an infringement decision relating to conduct more than six years old, it will therefore be time-barred.

*For Matters Governed by the Competition Rules:*

Follow-on damages actions in the Competition Appeal Tribunal must be brought within two years from the latest of:

1. the date on which the period for appealing against the infringement decision relied upon expires and the decision therefore becomes final;
2. the date on which any appeal has been determined; or
3. if the claimant does not suffer loss until after this date, two years from when the loss is sustained.

(s.47A(7),(8) Competition Act 1998).

Although the limitation period will not start to run if there is an appeal on substance, the same is not the case if the appeal is merely one relating to the fine (here the limitation period will start to run when the decision becomes final regardless of the ongoing appeal – *BCL Old Co v BASF* [2009] EWCA Civ 434).

*Reform:*

The Consumer Rights Bill will, if adopted, bring the time limits for claims brought before the CAT into line with the time limits in the High Court (as well as the Court of Session in Scotland (five years) and the High Court in Northern Ireland (six years)).

**4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?**

In the UK, damages actions following on from a public infringement decision, where only causation and quantum fall to be determined, can be brought in the CAT on the basis of an infringement decision by the OFT or the Commission. All other damages actions are to be brought in the ordinary courts. The provision for the bringing of an action in the CAT is without prejudice to the right to bring any action before the ordinary courts.

In damages proceedings before the ordinary courts in the UK, a decision of the OFT that either national competition law or EU competition law has been violated, or a decision of the CAT on appeal from a decision of the OFT to either of these two effects, binds the court (s. 58 of the Competition Act 1998). Similarly, in damages actions for breach of competition law brought before it, the CAT is bound by a decision of the OFT that either national competition law or EU competition law has been violated, a decision of the CAT on appeal from a decision of the OFT to either of these two effects, or an infringement decision by the Commission (s. 47A of the Competition Act 1998).

**5. Funding of the class actions / collective redress actions, attorney's fees**

On 1 April 2013, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) took effect, implementing Jackson LJ's recommendations. This has introduced substantive changes to procedure in England and Wales, perhaps most notably in relation to costs. Therefore, where relevant, both the costs regime which applies to agreements entered into prior to April 1, 2013, and the regime as it applies post-April 1, 2013 will be discussed.

**5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?**

English law traditionally refused to recognize arrangements whereby litigation was funded by third parties, under the doctrines of maintenance and champerty. However, since the abolition of the crimes and torts of maintenance and champerty under sections 13 and 14 of the Criminal Law Act 1967, third party funding has become increasingly prevalent in England and Wales.

Leading cases on third party funding include:

- *Giles v Thompson* [1993] UKHL 2, in which the House of Lords upheld the validity of funding arrangements provided by car hire companies.
- *R (Factortame and others) v Secretary of State for Transport* [2002] EWCA Civ 932, in which the Court of Appeal upheld an agreement by a firm of accounts to support the Claimants in return for 8% of the damages.
- *Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655, in which the Court of Appeal held the losing party's funders should be liable to pay the costs of the opposing party to the extent of funding provided. However, the court noted that other third party funding arrangements could amount to champerty.

**5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?**

There is generally no obligation to disclose to an opponent the existence or detail of any third party funding arrangement.

Under CPR r.44.15 as it applied prior to agreements entered into prior to April 1, 2013, a party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to other parties as required by a rule, practice direction or court order. The rule does not apply to agreements entered into since that date.

**5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?**

Under CPR r.3.1(2)(f) the court has an inherent jurisdiction, under its general powers of management, to stay the whole or any part of the proceedings. Therefore, the court may opt to stay the proceedings in any of the aforementioned circumstances.

**5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?**

Yes, under the Legal Aid scheme, eligible group actions may be supported by public funds.

**5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?**

With effect from 1 April 2013, contingency fee agreements, referred to as damages-based agreements (DBAs), became legal in all contentious business, other than criminal and family proceedings. Section 45 of LASPO 2012, with effect from 1 April 2013, amended section 58AA of the CLSA 1990 to allow DBAs in all civil litigation and not just in employment matters.

Section 58AA of the Courts and Legal Services Act 1990 (CLSA 1990) explains that a DBA is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services. “Advocacy services” are defined in section 119(1) of the CLSA 1990 as “[a]ny services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide”. “Litigation services” are defined in section 119(1) of the CLSA 1990 as “[a]ny services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide”. “Claims management services” is defined in section 58AA(7) of the CLSA 1990 and section 4(2) of the Compensation Act 2006 as “advice or other services in relation to the making of the claim”.

**5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party (“loser pays principle”), and in which proportion?**

*For Matters Governed by the CPR:*

The rules on costs are set out in CPR Parts 43 to 48 and the accompanying practice directions (which contain versions that apply both prior to and post-April 1, 2013). The general rule, as formulated in CPR r.44.2 of the post-April 1, 2013 rules (although the same rule applied prior to April 1, 2013), is that the unsuccessful party pays the costs of the successful party. However, courts retain a general discretion in awarding costs and will have regard to all the circumstances of the case.

It bears note that in certain situations, the winning party may recover costs against the third-party funder (*see Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655, above).

CPR r.46.6 (formerly CPR r. 48.6A) provides that where the court has made aGLO, unless the court orders otherwise, any order for common costs against group litigants imposes on each group litigant several liability for an equal proportion of those common costs. The general rule is that a group litigant who is the paying party will, in addition to any liability to pay the receiving party, be liable for the individual costs of that group litigant’s claim; and an equal proportion, together with all the other group litigants, of the common costs.

*For Matters Governed by the Competition rules:*

Rule 55 of the CAT Rules and paragraph 17 of the CAT Guide provide that the Tribunal has a discretion to make any order it thinks fit in relation to the payment of the costs.

**5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?**

Under CPR r. 3.1, the court has various general powers of management in conducting a case. R. 3.1(2) provides that: “Except where these Rules provide otherwise, the court may:

- (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);
- (b) adjourn or bring forward a hearing;
- (c) require a party or a party's legal representative to attend the court;
- (d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;
- (e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;
- (f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;

- (g) consolidate proceedings;
- (h) try two or more claims on the same occasion;
- (i) direct a separate trial of any issue;
- (j) decide the order in which issues are to be tried;
- (k) exclude an issue from consideration;
- (l) dismiss or give judgment on a claim after a decision on a preliminary issue;
- (ll) order any party to file and exchange a costs budget;
- (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.”

The court also has a wide discretion in relation to costs under CPR r. 44.3, which it may use as a disincentive to abuse of the collective redress system.

In relation to GLOs, under Practice Direction 19A, the court may, of its own initiative or on application of either an existing party or a party who wishes to become a party, remove, add or substitute an existing party.

#### 5.8 **Are the parties to an action able to insure against the cost risks?**

Yes. Both before-the-event (BTE) insurance and after-the-event (ATE) insurance are available in England and Wales.

#### 5.9 **Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?**

Yes. CPR r. 25.12(1) provides that “[a] defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings”. CPR r. 25.13 states that:

- (1) The court may make an order for security for costs under CPR r. 25.12 if-
  - (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
  - (b) [omitted]
    - (i) one or more of the conditions in paragraph (2) applies, or
    - (ii) an enactment permits the court to require security for costs.
- (2) The conditions are-
  - (a) the claimant is-
    - (i) resident out of the jurisdiction; but

(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982 ;

(b) [omitted]

(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

(e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;

(f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

**5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?**

Chapter 3 of the Solicitor's Regulation Authority's Code of Conduct contains safeguards against conflicts of interest (<http://www.sra.org.uk/solicitors/handbook/code/content.page>). Similarly, Part C of the Bar Standards Board Code of Conduct contains safeguards against conflicts of interest (see <http://handbook.barstandardsboard.org.uk/handbook/part-2/>).

**6. Cross-border cases**

**6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?**

There are no specific international private law rules that apply to collective redress actions in England and Wales. Therefore the general international private law rules apply to such actions. Following the decision of the House of the Lords in *Connelly v RTZ Corp Plc (No.2)* [1998] A.C. 584, it is now clear that proceedings, including group actions, can be brought in England and Wales against UK-based parent companies of multinational corporations, arising from the actions of their subsidiaries in other jurisdictions, on *forum conveniens* grounds. In *Lubbe v Cape plc* [2000 1 W.L.R. 1545, the House of Lords similarly applied ordinary principles of conflict of laws to decide an argument of *forum non conveniens*. The House of Lords has appeared to limit this to situations when the claimants could be denied justice in their own jurisdiction because of the non-availability of funding, legal representation and expert advice and established court procedures for group litigation.

The ordinary rules may be divided into two categories:

### (a) International agreements

Questions of jurisdiction and the recognition and enforcement of judgments rendered by the courts of Member States of the European are governed by Council Regulation 44/2001, 2001 O.J. (L 12), 1 (EC) (the “Brussels Regulation”).

Questions of jurisdiction and the recognition and enforcement of judgments rendered from the courts of Iceland, Norway and Switzerland are subject to the provisions of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Sept. 16, 1988, 20 I.L.M. 620 (the “Lugano Convention”), with applications being made under section 4 of the Civil Jurisdiction and Judgments Act, 1982.

(The Administration of Justice Act 1920 governs the recognition and enforcement of judgments from various Commonwealth countries, including Malaysia, Singapore, Nigeria and New Zealand. Judgments from Australia, Canada, Guernsey, Jersey, India, the Isle of Man, Israel, Pakistan, Surinam and Tonga are governed by the Foreign Judgments (Reciprocal Enforcement) Act 1933).

### (b) Common law rules

The ordinary common law rules apply to all jurisdictional issues and judgments not governed by one of the statutory rules. These are discussed in answer to question 6.4.

#### **6.2 Are there rules prohibiting a single collective action to take place in a single forum?**

There are no special rules prohibiting a single collective action from taking place in a single forum. It follows that the ordinary conflict of laws principles will apply.

#### **6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?**

There are no special rules governing whether a representative designated by a foreign country may have legal standing to bring representative actions in England and Wales. It follows that the ordinary rules governing representative actions apply. Note: currently *Which?* (a UK organisation) is the only specified body designated to bring follow-on competition claims before the CAT.

#### **6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?**

#### *Under the Regulation/Convention*

Articles 27 to 29 of the Brussels Regulation and of the Lugano Convention deal, respectively, with the relationship between actions pending in different Member and Convention States, both where the proceedings involve “the same cause of action” and where the actions are related (*lis pendens*). In the former case any court other than the court first seised shall not exercise jurisdiction. In the latter scenario, any court, other than the court first seised, may,

while the actions are pending in both courts, stay its proceedings or may dismiss them for consolidation with the proceedings which are pending at first instance in the court first seised, or may choose to do neither.

In relation to bringing a claim against a parent company domiciled outside of the jurisdiction in which the claim is brought, the High Court in *Provimi Ltd v Aventis Animal Nutrition SA* [2003] EWHC 961 found that it had jurisdiction to hear damages claims following on from the Commission's findings, despite the fact that some of the defendants were domiciled outside the UK (one claimant was also a German company). The Court considered that it had jurisdiction as the claims against the various defendants were so closely connected to those of the English defendant that it was more expedient to hear them together. Similarly, in *Cooper Tire & Rubber Company Europe Ltd and others v. Dow Deutschland Inc and others* [2010] EWCA Civ 864, the Court of Appeal held that the English courts had jurisdiction to hear EU-wide cartel damages claims where the pleadings allege that an English-domiciled subsidiary of a cartel implementer implemented the cartel and was either aware or a party to the anti-competitive practice.

#### *At Common law*

At common law, the leading case of *Spiliada Maritime Corp v Cansulex Ltd* [1987] A.C. 460, made it clear that the test was one of *forum non conveniens*: “[t]he basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice” (at p.476).

It is possible to bring an action against a company and/or individual outside of the jurisdiction which has a subsidiary within the jurisdiction. In such circumstances, the ordinary principles of *forum non conveniens* would apply if the matter were to be decided by a court in England and Wales, while the foreign jurisdiction's rules of conflict of laws would apply if the matter were to be decided by a foreign court. In England and Wales, the court in *Berkeley Administration Inc v McClelland* [1995] I.L.Pr. 201 (CA) held that a wholly-owned subsidiary may be regarded as the same party as its parent. In such circumstances, the aforementioned rules would apply in relation to *lis pendens*.

## **7. Alternative dispute resolution**

### **7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trial and are the implications for refusing?**

#### *In the High Court*

There is no specific mechanism of collective alternative dispute resolution (ADR) allowing the settlement of class actions / collective redress actions. The usual provisions for ADR therefore apply.

Competition law cases may thus be resolved by arbitration providing the claim falls within the ambit of the ADR clause. In *ET Plus SA v Welter* [2005] EWHC 2115, Gross J held, at

paragraph 50, that “[t]here is no realistic doubt that such “competition” or “anti-trust” claims are arbitrable; the issue is whether they come within the scope of the arbitration clause, as a matter of its true construction”. In the Court of Appeal case of Atheraces Limited v British Horseracing Board [2007] EWCA Civ 38 Mummery LJ considered, at paragraph 7, whether “[t]he nature of these difficult questions suggests that the problems of gaining access to essential facilities and of legal curbs on excessive and discriminatory pricing might, when negotiations between the parties fail, be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers. The adversarial procedures of an ordinary private law action, the limited scope of expertise in the ordinary courts and the restricted scope of legal remedies available are not best suited to helping the parties out of a deadlocked negotiating position or to achieving a business-like result reflecting both their respective interests and the public interest. These are not, however, matters for decision by the court, which must do the best that it can with a complex piece of private law litigation”.

Courts cannot compel the parties to use ADR procedures, as was made clear in Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576. However, failure to follow the pre-action protocols, which often provide for making efforts to resolve the dispute through ADR, may result in a cost sanction. In Dunnett v Railtrack plc [2002] EWCA Civ 303, the court refused to award costs to a successful party as it considered that the winning party had unreasonably refused to mediate.

#### *In the CAT*

Similarly there is no specific mechanism for collective ADR in the CAT. However, in contrast to the courts, the CAT appears more cautious with regard to the arbitrability of certain competition law issues. In Claymore Dairies v OFT (200 CAT 3), the tribunal emphasised the public interest importance of competition cases, and the importance of preserving the OFT and the Tribunal’s position to safeguard such public interest (at paragraph 88). Parties in the CAT who wish to withdraw their dispute and transfer it to private arbitration must generally obtain the Tribunal’s consent to a stay of the proceedings. Proceedings may only be withdrawn without the Tribunal’s permission where the defendant gives consent (according to paragraph 14.5 of the CAT Guide to Proceedings).

#### *Reform*

Consistent with the European Commission’s Proposal for a Directive on anti-trust damages, the UK Government has manifested strong support for the use of ADR in competition cases. In its “Private Actions in Competition Law: A consultation on options for reform – government response” (January 2013), it has manifested an intention to align the CAT Rules governing formal settlement offers with those of the High Court.

### **7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?**

#### *Court proceedings*

In terms of case management, CPR r.1.4(2)(e) specifically refers to ADR, and requires the court to further the overriding objective by encouraging the parties to use ADR procedures “if the court considers that appropriate”.

Further manifestation may be gleaned from the mechanisms of Part 36 of the CPR Rules. Part 36 contains provisions for adverse cost consequences to follow where an offer to settle is rejected and then not beaten by the rejector at trial. As recently as last year, Lewison L.J. in *Jopling v Leavesley & Another* [2013] EWCA Civ 1605 explained that “*the whole point of Part 36 is to encourage settlement and to minimise costs*”.

### *CAT proceedings*

Rule 20 of the CAT Rules 2003 (Statutory Instrument 2003 No. 1372) governs the case management conference. One of the stated purposes of a case management conference or pre-hearing review shall be, according to rule 20(4)(e), “*to facilitate the settlement of the proceedings*”.

### *Reform*

On 10 March 2014, the Competition Appeal Tribunal published draft procedural rules for collective proceedings and collective settlements in the CAT, to cater for Schedule 8 of the Consumer Rights Bill 2013-14, if adopted. An entire section is devoted to collective settlement and sets out the two procedures by which the CAT may approve the terms of a collective settlement: where a collective proceedings order has been made, and where a collective proceedings order has not been made. It provides that where a collective proceedings order has already been made; the parties would have to apply to the Tribunal for a collective settlement approval order, which the Tribunal would approve provided certain conditions are met (notably that the Tribunal is satisfied that the terms are just and reasonable). Where a collective proceedings order has not been made, then the parties would have to apply for a collective settlement order *and* a collective settlement approval order.

### **7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?**

A claim must be issued within the applicable time limit. Negotiations will not have the effect of suspending the limitation period unless there is a clear agreement to suspend the limitation period and such an agreement does not conflict with a relevant rule or practice direction which prohibits any variation of time limits.

Rule 2.11 of the CPR provides that “[*u*]nless these Rules or a practice direction provides otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by the written agreement of the parties. (Rules 3.8 (sanctions have effect unless defaulting party obtains relief), 28.4 (variation of case management timetable-fast track) and 29.5 (variation of case management timetable-multi-track), provide for time limits that cannot be varied by agreement between the parties)”.

In *Gold Shipping Navigation Co SA v Lulu Maritime Ltd* [2009] EWHC 1365 (Admlty), the court emphasised the need for clarity, finding that the standstill agreement, which had been drafted by one of the parties, was not effective to stop time running. It follows that negotiations between the parties both before and after a limitation period has expired will not constitute a waiver or estoppel unless the defendant has made his intention unequivocally clear.

Once a claim is issued, CPR r.26.4 provides for stays to allow for settlement of the case. A party may, when filing the completed directions questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by ADR or other means. If the court considers that a stay would be appropriate, the court will direct that the proceedings, either in whole or in part, be stayed for one month or such other period as it considers appropriate. A stay at the request of all the parties will be granted for one month.

It bears note that section 33 of the Limitation Act 1980 provides a discretionary exclusion of time limit for actions in respect of personal injury or death.

**7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?**

Regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations 1999/2083, which apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer, provides that a “*contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer*”. Schedule 2 of the Regulations provides an indicative and non-exhaustive list of terms which may be regarded as unfair. Section 1(q) of Schedule 2 includes terms “*excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract*”.

In *Zealander & Zealander v Laing Homes* [2000] TCLR, the phrase “*not covered by legal provisions*” was held not to mean that arbitrations under the Act could be excluded from the ambit of paragraph 1(q), but rather to mean those covered by a special statutory scheme. Applying this section, in *Mylcris Builders Limited v Mrs G Buck* [2008] EWHC 2172 (TCC), Ramsey J found that an arbitration clause in a party’s standard terms was not binding on his customer because it was unfair as it caused a significant imbalance in the parties’ rights and obligations, to the detriment of the customer, by preventing the customer from taking legal action other than arbitration.

**8. Enforcement of the court decision**

**8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?**

*In the High Court*

Rule 19.12 of the CPR provides that where a judgment or order is given or made in a claim on the group register in relation to one or more group litigation order issues, that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise; and the court may

give directions to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register.

Rule 19.11(3)(c) and paragraph 11 of Practice Direction 13B cover the publication of a GLO. The intention is to enable the court to order the solicitors for the group to “advertise” the making of the order and any cut-off dates for joining the register to minimize the risk of individuals trying to start their own separate proceedings at a later date. Neither the rule nor the practice direction give guidance on the form of any publicity, nor on who might be ordered to pay the costs of placing adequate advertisements.

#### *In the CAT*

Rule 54 of the CAT rules provides that the decision of the Tribunal shall be delivered in public on the date fixed for that purpose. The registrar shall send a copy of the document recording the decision to each party and shall enter it on the register. The decision of the Tribunal shall be treated as having been notified on the date on which a copy of the document recording it is sent to the parties. The president shall arrange for the decision of the Tribunal to be published in such manner as he considers appropriate.

**8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?**

#### *In the High Court*

General rules about the enforcement of decisions are to be found in CPR Part 70 and Practice Direction 70.

CPR r.70.2(2) provides that “[a] judgment creditor may, except where an enactment, rule or practice direction provides otherwise (a) use any method of enforcement which is available; and (b) use more than one method of enforcement, either at the same time or one after another”. The judgment creditor is therefore effectively “in charge” of the enforcement.

CPR r.70.4 provides that “[i]f a judgment or order is given or made in favour of or against a person who is not a party to proceedings, it may be enforced by or against that person by the same methods as if he were a party”.

#### *In the CAT*

Paragraph 2 of schedule 4 of the Enterprise Act 2002 provides that if a decision of the Tribunal is registered in England and Wales in accordance with rules of court or any practice direction, the following may be enforced by the High Court as if the damages, costs or expenses were an amount due in pursuance of a judgment or order of the High Court, or as if the direction were an order of the High Court: (a) payment of damages which are awarded by the decision, (b) costs or expenses awarded by the decision and (c) any direction given as a result of the decision.

**8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?**

If an injunctive order is disobeyed, then the party against whom it is made would be in contempt of court, which is punishable by imprisonment, a fine or sequestration of assets (CPR r.81.4). The penal notice accompanying the order puts the party against whom an order is made on notice of the consequences of failing to abide by it (CPR r.81.9(1)). This is generally enforced by committal proceedings.