Executive summary and overview of the national report for the United Kingdom

Section I – Summary of findings

These findings relate exclusively to the recovery of damages against private parties for infringements of EC competition law in the UK. Until 21 May 2004, there have been no decided cases (reported) in the United Kingdom awarding damages for breach of Articles 81 and 82 EC. On that date, the Court of Appeal has awarded damages to the claimant of £131.336 (plus interest and subject to the incidence of taxation, to be assessed if not agreed) in the *Crehan* case.

The nature of the cause of action, in English law, for damages for infringement of EC competition law is characterised as the tort of breach of statutory duty (*Garden Cottage Foods Ltd v Milk Marketing Board*[1]). This stems from section 2(1) European Communities Act 1972 which provides a statutory basis for the recognition of directly effective EC law rights and duties in the English legal system. The principles of English law applicable to the tort of breach of statutory duty will, therefore, also apply to a claim for breaches of Article 81 and 82 provided that those rules do not conflict with the Community law principles that require national law not to discriminate between similar claims under national and EC law and not to prevent the availability of an effective remedy for breach of EC law. In particular, in the *Crehan* case, the Court of Appeal has found that the English law rule applicable to a damages claim for breach of statutory duty requiring the damage to fall within the scope of the type of damage covered by the statute was not satisfied by the claimant. However, the Court held that as a matter of EC law, as interpreted by the ECJ in its preliminary ruling in the *Crehan* case, the rule would have to be disapplied in favour of the principle of effectiveness of remedies.

To establish liability for breach of Articles 81 and 82 it may be necessary to prove:

(a) a breach of statutory duty owed to the relevant class of persons but subject to European Court case law on the interpretation of Articles 81 and 82 (for example, the *Crehan*[2] case establishes that Article 81 imposes duties not to breach its terms and suggests that those duties create directly effective rights which may be enforced by all individuals since the duty is owed to all individuals);

(b) the breach of duty must have caused the claimant loss and damage of the type covered by the statute, in order to satisfy the requirement that there must be an economic or personal interest before an individual claiming breach of a directly effective right can bring a claim for damages. It follows that the English law on causation should be applied. Evidence must be adduced to establish the causal link between the breach and the damage and normally the claimant need only show that the breach materially contributed to the harm. The claimant should not be denied relief simply because the breach is not the sole or even the main cause of the harm under English tort principles. Further, the usual tortious defences applicable to a breach of statutory duty (for example, limitation) will be available subject to the two overriding Community law principles that limit the procedural autonomy of member states (non-discrimination and effective protection). The *Crehan* case, for example, has established that the *in pari delicto* (no damages if you also are at fault i.e. may not rely on one's own illegality) defence is not available in all circumstances.

(c) the damage claimed satisfies the English law requirements on remoteness (foreseeability) of damage in the context of tortious claims. Actual loss caused by the infringement including loss of profits and reduction in value of a business may be claimed if supported by cogent expert evidence as to the assessment of the loss.

Policy considerations likely to arise may include avoidance of double-recovery (passing-on, unjust enrichment), right to claim of direct and indirect purchasers, multiplicity of actions and the foreseeability of damage, as English law does not impose indefinite liability.

1 [1984] 1 AC 130
2 Courage Ltd v Crehan C-453/99

In *X and Others (minors) v Bedfordshire County Council*[3] it was held that there are four categories of breach of statutory duty. These are (i) breach simpliciter irrespective of carelessness (strict liability); (ii) careless performance of statutory duty in the absence of any other common law right of action; (iii) common law duty of care arising from imposition of statutory duty; and (iv) misfeasance in public office. It was held that for breach simpliciter a private law cause of action only arises if the duty is imposed to protect that particular class of claimant and if the statute was intended to provide a private remedy. The weight of academic authority suggests that a breach of statutory duty arising from an infringement of Community competition law imposes this type of strict liability. The EC law concepts of direct effect and effectiveness of remedies (effet utile) whereby obligations having direct effect may confer enforceable rights on individuals harmed by breach of the obligations are recognised by the ECA 1972, Section 2(1) and the Garden Cottage case law as confirmed by the Court Appeal in its *Crehan* judgment of 21 May 2004. In the UK, private parties harmed by a breach of Articles 81 and 82 EC are entitled to the remedy of damages without any need to prove fault as the Treaty articles enforced through the ECA 1972 breach of statutory duty cause of action are intended to protect the rights of individuals arising from the imposition of the obligations in question; Following *Provimi Ltd v Aventis Animal Nutrition SA and others*[4], it has been accepted as arguable that any corporate entity within a group, in which any group member was engaged in anti-competitive behaviour may be subject to strict liability for the actions of that other member. The judge, in this interlocutory hearing, interpreted the Community principles of "undertaking" and "single economic entity" as a means of imposing joint and several liability on each member of a group for the infringing activity of any particular member within that group. A subsidiary with no knowledge of the cartel was held arguably liable for damage in tort arising from an infringing agreement to which it was not a party but was said to have implemented on the basis that the prices it charged were the cartel prices fixed by another member of the corporate group. This case settled before appeal, and therefore represents the current position in English law. In addition to breach of statutory duty, some academic authorities have argued that it is possible to bring a private action for breach of a directly effective Community law provision. This would be characterised as an economic tort or an innominate tort. This argument may now be somewhat academic following the Court of Appeal *Crehan* judgment of 21 May 2004 and the coming into force of section 47A Competition Act 1998 on 20 June 2003. This section now provides a statutory procedure (not a new cause of action) for bringing an action for damages for infringement of national or Community competition law provided an infringement has been found by either a decision of the Office of Fair Trading or the European Commission. However, the principles of evidence and procedure generally applicable to tort cases in English law will apply until further harmonisation takes place at the Community level. This Chapter describes the position in the Courts of England and Wales. As EC and UK competition law applies throughout the United Kingdom, the position will be the same in Scotland and Northern Ireland subject to the Constititutional and court structure differences outlined in Annex 1.	
Section II – status quo and forthcoming reforms – action for damages	
A. Legal Basis	
(i) Is there an explicit statutory basis?	(1) No, but s.2(1) European Communities Act 1972 (ECA) has been interpreted by UK courts to provide a cause of action enabling a claimant to recover damages for breach of statutory duty resulting from an infringement of Articles 81 and 82 (EC) This is a tort claim. (2) As far as English competition law is concerned, breach of the Competition Act 1998 (CA1998) Chapters I and II prohibitions will give rise to a cause of action for damages by way of breach of statutory duty contained in the prohibitions. s.47A CA1998 also provides a statutory procedure giving the Competition Appeal Tribunal ("CAT") jurisdiction in monetary claims in addition to the jurisdiction of the ordinary courts.
(ii) Is this statutory basis different from other actions for damages?	Breach of statutory duty is a specific cause of action in English law which differs from other actions for damages e.g. breach of contract.
(iii) Is there a distinction between EC and national law in this regard?	No and yes. No because the S47A CA1998 express statutory procedural right to bring monetary claims before CAT applies equally to OFT and EC Commission

[3] [1995] 2 AC 633
[4] [2003] EWHC 961 (Comm)

	decisions under CA1998 and/or Articles 81 and 82 and as such decisions are binding on the CAT. But, yes in that S58A CA1998 only renders OFT/CAT decisions binding on an ordinary court (as opposed to the CAT) dealing with a claim for damages and not EC Commission decisions. However, the *Masterfoods* case law would have a similar effect by virtue of S60 CA1998 which requires the relevant Community law principles to be applied by the English ordinary courts. This would include the doctrines of direct effect and supremacy of Community law. After 1 May 2004 Article 16(1) of Regulation 1/2003 will oblige national courts not to adopt a decision which conflicts with adopted or contemplated Commission decisions, unless and until the question of their validity is decided on a reference to the ECJ under Article 234 EC.
B. Competent court	
(i) Which courts are competent?	CAT (specialist tribunal); all civil courts in England and Wales (High Court, County Court), Scotland (Court of Session and Sheriffs Court) and Northern Ireland. This report refers to the law and practice in England and Wales. Unless expressly stated otherwise, the situation in Scotland and Northern Ireland will be similar, subject to differences in terminology, such as "interdict" instead of "injunction". A summary of the constitutional and court systems in Scotland and Northern Ireland is attached in an Annex to the UK Chapter. Until January 2004, there were no special rules for allocation of EC competition cases in the UK civil courts. (Both the county courts and High Courts in England and Wales had jurisdiction to hear competition law cases. The county court has jurisdiction in proceedings where the value of the claim is £50,000 or less. In view of the complexity of the legal issues, competition law proceedings normally were brought in the High Court.) However, in January 2004, the Civil Procedure Rules were amended to provide that all EC competition cases should be brought, or transferred to, the Chancery Division of the High Court (CPR, Part 30.8). At the same time a Practice Direction was published covering the question of allocation/ transfer to the Chancery Division and co-operation between the Commission/NCAs and national courts under Regulation 1/2003 from 1 May 2004: *Practice Direction – Competition Law – Claims Relating to the Application of Articles 81 and 82 of the EC Treaty* (Civil Procedure Rules, January 2004, PRACTICE DIRECTION, EU Competition Law; see, http://www.dca.gov.uk/civil/).
(ii) Are there specialised courts for private enforcement of competition rules?	Yes: CAT
C. Standing	
(i) Limitations on standing of natural or legal persons, including those from other jurisdictions?	The ordinary law of tort applicable to breaches of statutory duty will apply to standing i.e. the claimant must fall within the class of persons intended to be protected by the Act in question. It follows that any individual harmed by a breach of Articles 81 and 82 will be protected by ECA 1972 which applies to all directly effective provisions of EC law and not only competition law. However this has been tentatively extended by Aikens J. in the *Provimi case* in the context of defendants who are part of the same corporate group ruled it was arguable that a non-UK claimant who has never directly done business with a defendant within the English jurisdiction qualifies if that claimant has purchased products, or would have purchased products if they were not subject to cartel prices, from any member of that group. The judge then allowed the non-UK claimant to

	sue other non-English co-defendants under the rules of the Civil Jurisdiction Regulation 44/2001, Article 6(1) of which allows a claimant to bring an action against non-UK defendants when the claims are sufficiently closely connected to that against the defendant domiciled in England and Wales.
(ii) What are the connecting factor(s) required with the jurisdiction in order for an action to be admissible?	The ordinary rules on jurisdiction apply including the Brussels Civil Jurisdiction Regulation 44/2001 and the Lugano Convention. However, this has been interpreted as applying to all members of a corporate group where one member of that group qualifies as a defendant in English proceedings and the foreign affiliates are "closely connected" defendants in accordance with Article 6(1) of Regulation 44/2001 in the *Provimi case*.
(iii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?	Yes: (1) Under the ordinary procedural rules of court, Civil Procedure Rules (CPR) where it is possible to bring a representative action when more than one party has the "same interest" in a claim under CPR Part 19, (1) or more commonly a group action when there are multiple claimants and common issues of law or related fact under a Group Litigation Order (CPR Part 19, Rule 19.11); (2) Under Section 47B CA1998 representative bodies may bring actions on behalf of individual consumers if appointed by Order, e.g. Consumers' Association.
D. Procedural and substantive conditions	
(i) What forms of compensation are available?	Damages including interim awards; arguably restitution and account of profits, but neither tested, and either is likely to negate damages. Main remedies include damages, account of profits, specific performance, rectification of contract. Courts apply established common law rules/formulae in quantifying damages. Damages usually fairly predictable. In personal injury cases, guidelines exist for pain and suffering damages. Punitive damages not available in commercial cases.
(ii) What are the other forms of civil law liability (if any)?	Injunction (ordinary courts, not CAT); Declaratory Judgment; Disqualification of directors under S204 Enterprise Act ("EA") 2002 and S9A Company Directors Disqualification Act 1986 ("CDDA") where express or implied knowledge that undertaking infringed EC or UK competition law. Courts have wide powers to grant interim remedies, including interim injunctions, detention/preservation orders, freezing injunctions and search orders. Basic test for interim injunction: serious question to be tried or "real prospect of success" at trial and balance of convenience being in favour of injunctive relief, this balancing exercise entailing various considerations but principal among them the adequacy of damages as a remedy were an injunction not granted and were the applicant to succeed at trial. Court has considerable discretion. Non-compliance with interim injunction constitutes and is generally punishable as a contempt of court, the main penalties being fines and, in extreme cases, imprisonment.
(iii) Does the infringement have to imply fault?	There are no procedural or substantive conditions beyond those contained in Articles 81 and 82. The cause of action for breach of statutory duty is generally considered to impose strict liability, but the loss suffered may need to be demonstrated to fall within the scope of injury contemplated by the statute.

(iv) If so, is fault based on objective criteria?	N/A
(v) Is bad faith (intent) required?	No, same as (iii)
(vi) Can negligence be taken into account?	No but not judicially decided.
E. Rules of evidence	
a. General	
(i) Burden of proof and identity of the party on which it rests?	Burden of proof is on the claimant but Section 47A provides that OFT/EC Commission decision is binding on CAT (including decisions prior to 20 June 2003, the date when the EA 2002 entered into force); and OFT decisions are binding on ordinary courts under Section 58A CA1998.
(ii) Standard of proof	The civil standard of proof (balance of probabilities) applies (in the *Napp case*, CAT said burden of proof on OFT to establish breach of prohibition under CA1998 is civil standard of proof but in terms indicating that little different to criminal standard of "beyond reasonable doubt"; in *Arkin case* commercial court held civil burden of proof on claimant to establish breach of Article 82 but a "high" balance of probability test).
(iii) Limitations concerning form of evidence	None in ordinary civil courts; in CAT, oral evidence and cross-examination minimised to issues defined by CAT which operates in a similar way to CFI with English rules of procedure and evidence (adapted to swift procedure). Factual evidence normally given by written witness statements, appending documents, which are exchanged before trial and form the basis for oral examination (often limited to reference to the witness statements themselves as a party's evidence-in-chief) and oral cross-examination at trial.
(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis parties	Normal rules of discovery apply in civil courts (CPR, Part 31) and are applied by the CAT in practice. Normal threshold is "standard disclosure". But the CAT disclosure is not automatic and subject to directions under CAT Rule 19(2)(K). Normal disclosure requires each party to disclose documents on which it relies, which adversely affect or support either party's case, and as required by any practice direction. Pre-action disclosure and disclosure against third parties also possible provided certain prerequisites are satisfied. Disclosure processes can be time-consuming and costly. Legal advice privilege: Confidential party-solicitor communications for the dominant purpose of advice on legal rights and liabilities. Applies to in-house counsel but care needs to be taken as to what is and is not covered. Litigation privilege: solicitor-client/agent/third party communications coming into existence after litigation reasonably contemplated or commenced and in connection with the litigation. Without prejudice: Communications recording genuine attempts to settle disputes not to be produced in proceedings.
(v) Rules on (pre-trial or other) discovery within	Expert witnesses; non-involved parties and interveners

	and outside the jurisdiction of the court vis-à-vis third parties	all subject to ordinary rules (CPR) of ordinary courts; CAT similar on the principle that CAT applies the CPR by analogy in practice, but narrow approach to protecting confidentiality of third party documents e.g. disclosure of leniency application ordered in *Umbro case* when the whistle blower Hasbro was not a party.
(vi)	Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis competition authorities (national, foreign, Commission)	CPR applies but not judicially tested outside CAT. Public interest test for disclosure of confidential documents in the possession of the Competition authorities, and as against whistle blowers. However, disclosure ordered in Claymore Case against OFT and Argos/Littlewood case by CAT against Hasbro in respect of leniency application in public interest so that equality of arms for appellant against OFT.
b.	Proving the infringement	
(i)	Is expert evidence admissible?	Yes. Parties may usually each appoint expert(s) to report to court on technical issues provided court gives permission. Written questions may be put by parties on opponent's expert report for clarification purposes. Court may direct meeting between experts to narrow issues in proceedings. Single joint experts are rare. It follows that experts are party led not court appointed. UK civil court practice does not favour use of joint experts, despite preference expressed by CPR. Joint or Court appointed experts are not known before the CAT, although the CAT has the power to make such directions (see E(a)(iv) above).
(ii)	To what extent, if any, is cross examination permissible?	Yes (but limited by CAT). The court may (usually will) order the exchange of witness statements and experts reports (for example witnesses who may give opinions as to market dominance or restriction of competition) in advance of trial. In the civil courts, witness statements are exchanged and the witness tendered for cross-examination by the other parties at the trial. The Court does not cross examine. The Courts and CAT have the power at all times to ask questions of a witness or of the lawyers. In particular, the CAT has the specific case management power to give directions as to the examination or cross-examination of witnesses (Rule 19(2)(9)). The CAT also has the power to limit cross-examination of witnesses to any extent or in any manner it deems appropriate (Rule 51(4)), under its power regarding procedure at the hearing.
(iii)	Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?	For the binding status of OFT/Commission decisions on the CAT (under s47A CA 1998) and of OFT decisions under Chapter 1/Chapter 2 Prohibition and Articles 81/82 EC on the ordinary courts (under s58A CA 1998), see Section A(i) and B(ii) and (iii) above. Under the normal rules foreign decisions (which may questionably include foreign NCA decisions) are treated as a question of fact, like foreign law, if relevant at all. The value of decisions of other national courts, for example, is their persuasive jurisprudential value. There have been no examples in the context of competition damages cases to date. In order to admit the report of a non-English decision, or its summary, into evidence, it must be translated and certified.
c.	Proving damage	

(i) Are there any specific rules for evidence of damage?	In the case of Articles 81 and 82 anyone who suffers loss as a result of a breach of statutory duty may claim damages. Claims for breach of statutory duty are subject to the general rules applicable to tort. To prove a claim for damages, therefore, it has to be established that the loss suffered is directly attributable to the alleged breaches of Articles 81 and 82. The evidential test is a balance of probabilities. Normally, as in *Crehan*, the court will assess the reliability of the expert evidence relating to the assessment of the quantum of loss. In the Crehan case, the Court of Appeal and Park J assessed the damages by reference to the expert witnesses calculations and expert opinion on the nature of the loss (e.g. closure of a pub because of loss of profits on beer sales caused by the price of tied-house beer).
d. Proving causation	
(i) Which level of causation must be proven: direct or indirect?	Causation is a question of fact; only direct damage caused by the infringement may be claimed (but including loss of profits or out of pocket expenses where causation proven) (see *Crehan case*). The English tort rules distinguish direct loss from consequential damage but in the context of economic torts such as infringement of Articles 81 and 82 EC, the question of remoteness of damage overlaps with causation as interpreted by the ECJ i.e. there must be a causal link proved for damage to be recoverable (see also Section D(iii)(b) and (c) above).
F. Grounds of justification	
(i) Are there grounds of justification?	No; only in accordance with substantive EC competition law under Article 81(3) post 1 May 2004, and Article 82 (objective justification).
(ii) Is the 'passing on' defence taken into account?	Open question (no decided case yet).
(iii) Are 'indirect purchaser' issues taken into account?	Open question (no decided case yet).
(iv) Is it relevant that plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement?	Where claimant is co-contractor, the defence of *in pari delicto* (may not claim damages in reliance on own illegality) may apply if the claimant can be shown to be responsible on the *Crehan* tests (but no question of negligence) and principle of unjust enrichment still to be clarified. In English law there is a general duty to take reasonable steps to mitigate loss. Thus, assuming that the direct purchaser genuinely is unaware of a cartel between its suppliers the direct purchaser should charge a profit maximising price to the extent that the relevant market place will permit.
G. Damages	
a. Calculation of damages	

(i)	What economic or other models are used by courts to calculate damage?	English courts apply general principles of foreseeability and quantum applicable in tort claims where loss of profits claimed i.e restore claimant to position it would have been in but for unlawful conduct (see *Crehan* and *Arkin cases*).
(ii)	Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?	Damages are awarded for injuries suffered on the territory of England and Wales, Scotland and Northern Ireland i.e national territory and territory where claimant over which Court accepts jurisdiction has suffered damage (e.g. *Provimi* and *Trouw cases*).
(iii)	Are ex ante (time of injury) or ex post (time of trial) estimates used?	Ex ante (time of injury) plus interest normally (but see *Crehan case* where the general principle was recognised but exceptionally not applied by High Court but overturned by Court of Appeal which applied the orthodox ex ante approach).
(iv)	Are there maximum limits to damages?	There are no maximum limits to damages.
(v)	Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?	Damages assessed on the basis of injuries suffered by the claimant would be the normal English tort law approach (but no decided case rejecting the alternative basis i.e. claim for account of profits or restitution).
(vi)	Are punitive or exemplary damages available?	Exemplary damages are a punitive remedy available in English law in limited circumstances. No decided competition case where exemplary damages considered; in the *Factortame case,* the English courts rejected a claim for punitive or exemplary damages since the tests were not satisfied under English law although that law was held to be compatible with community law by the ECJ on the Article 234 reference concerned. Exemplary damages were claimed in the *Provimin* case.
(vii)	Are fines imposed by competition authorities taken into account when settling damages?	There is no case either way as to whether fines imposed by Competition Authorities are taken into account when settling damages – there is an implied recommendation to the national court to do so by the European Commission in its leniency notice.
b. Interest		
(i)	Is interest awarded from the date the infringement occurred the date of the judgment or the date of a decision by a competition authority?	Interest is awarded from the date the infringement occurred up to the date of judgment, and at the judgment rate if applicable after the judgment. However, in *Crehan* (para 267), Park J confirmed that "the normal rule is that damages are assessed at the date of loss, not at the date of judgment, and that it is assumed that interest will compensate the claimant for the passage of time between the time when he suffered his loss and the time when he gets judgment in respect of it. However, I believe the legal position to be that that is not an invariable rule of law, and that if the justice of the case requires damages to be measured at the date of the judgment the court may award damages on that basis instead. This can arise, for example, in times of high inflation when interest would not be any form of acceptable compensation." However, the Court of Appeal has overturned this approach in its judgment of 21 May 2004, returning to the normal assessment of damages at the date of loss, plus interest.
(ii)	What are the criteria to determine the levels	Statute provides the basis of recovery interest. Since

of interest?	the level and amount are in the Courts discretion, recovery depends on evidence and the Court's view of the events, as well as parties' conduct. The CAT adopts a similar approach (Rule 56(2).
(iii) Is compound interest included?	No, simple only on damages (but Law Commission recommendation favours compound interest).
H. Timing	
(i) What is the time limit in which to institute proceedings?	The time limit in which to institute proceedings is determined by the limitation period of six years for tort damages determined by S2 Limitation Act 1980 (LA 80). The time limit starts on the date the wrongful act caused the damage in issue, subject to fraudulent concealment (s.32LA 80). Damages claims to the CAT must be brought within two years of the expiry of the period for appealing the OFT/EC Commission decision relied upon under S47A (see CAT Rules of Procedure).
(ii) On average, how long do proceedings take?	On average first instance High Court proceedings take 2-3 years. Queen's Bench: in 2002 average waiting time from issue of claim to start of trial across all centres=149 weeks; average time between setting down and start of trial=47 weeks. But much depends on length of hearing, e.g., average waiting time for trials up to 5 days was 4-6 months, between 5-10 days 6-8 months and from 10 days+, 9-12 months. Average waiting times between setting down (as opposed to issue) and start of trial in other significant courts: Chancery - trials up to 3 days, 3 months; up to 5 days, 6 months; from 10 days +, 8 months; Technology and Construction Court - trials up to 4 days, 6 weeks; up to 8 days, 6 weeks; between 9 and 16 days, 9 weeks; over 17 days, 18.5 weeks; Admiralty and Commercial Court – applications up to half a day, 2 months; trials up to 4 weeks, 7 months.
(iii) It is possible to accelerate proceedings?	It is possible to accelerate proceedings by requesting the relevant court to order expedition. Summary judgment rules of court may apply in clear cases (strike out and summary judgments are covered by Parts 3 and 24 of the CPR, respectively; CAT has power to give summary judgment to claimant or defendant as appropriate); procedures exist to obtain orders for interim payments during lengthy trials in the ordinary courts and the CAT. It is sometimes possible to obtain an expedited hearing (e.g., commercial judicial review) and the Commercial Court, for example, "is able to provide an expedited trial in cases of sufficient urgency and importance." It is also generally possible to apply for a "speedy trial" order which can significantly reduce the lead-time to trial. No specific rules; at court's discretion. Three recent cases: trial within 9 to 11 weeks. Note also that Patents Court has a "streamlined procedure".
(iv) How many judges sit in actions for damages cases?	In the High Court, one Judge normally sits in actions for damages. A lay assessor who could be an economist or accountant may sit with the Judge in certain cases. Following the "Competition Regulation" Practice direction of January 2004, all competition cases must be begun or transferred to the Chancery Division of the High Court under CPR, Rule 30.8. In the CAT, the president or a lawyer tribunal chairman will sit with two other members of the tribunal who will not be lawyers normally.

(v) How transparent is the procedure?	Procedure is transparent to the extent that hearings take place in open court. However, written pleadings are not made public by the ordinary courts. On the other hand, the CAT publishes nearly every step in the procedure before it on its website including skeleton arguments of the parties and transcripts of oral hearings in selected cases.
I. Legal costs	
(i) Are Court fees paid up front?	Court fees are payable by the parties as they go, but are recovered like any other legal cost.
(ii) Who bears the legal costs?	Costs are in the Court's discretion and are increasingly decided on an issue by issue basis but the party that loses the case will normally be ordered to pay the costs of the party that wins on the basis that costs normally follow the event. However, a successful party is unlikely to recover more than 70% of the actual legal costs involved. Courts should generally make a summary assessment of costs at the conclusion of a hearing which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim. Otherwise assessment of costs usually dealt with separately by way of a detailed assessment.
(iii) Are contingency fees permissible?	Contingency fees are permissible subject to specific terms and conditions and the procedural rules.
(iv) Are contingency fees generally available for private enforcement of EC competition law?	There is no reason why contingency fees should not generally be available for private enforcement of EC Competition law to the same extent that they are generally available (e.g. *Arkin case*).
(v) Can the plaintiff/defendant recover costs?	The claimant or defendant will normally recover up to 70% of their costs if they win the case.
(vi) What are the different types of litigation costs?	The different types of litigation costs include the following orders for costs: costs in cause (i.e. costs will be awarded to the party which ultimately wins the case); costs in any event (i.e. whichever party wins, the party awarded costs for the specific proceeding will be paid those costs); wasted costs (ordered against the lawyers responsible for wasting unjustifiably the Court's and other parties time); and indemnity costs (a higher percentage of costs which should cover all the parties' costs not just the less than total cost that would normally be paid after taxation). There are no standard fees in the UK. The types of litigation costs will include fees payable to the Court, lawyers, experts, witnesses and for disbursements such as translation etc. The amount of fees will depend on the complexity of the case and volume of work. Most professionals charge hourly fee rates.
(vii) Are there any national rules for taxation of costs?	There are rules for taxation of costs i.e. scrutiny by a costs judge.
(viii) Is any form of legal aid insurance available?	Legal aid for civil claims is severely limited. Legal expenses insurance may be available to cover a claimant depending on the terms and conditions, but unlikely in

		the case of defendant since it is likely to be against public policy and would involve breaches of disclosure obligations applicable to a contract of uberimae fide (ultimate good faith).
(ix)	What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?	The likely average costs in an action brought by a third party in respect of a hard-core violation in competition law will vary enormously according to the nature of the party and the violation. Average costs are likely to range from approximately **£200,000 to 300,000**, including court fees, lawyers' fees and witness expenses.
J. General		
(i)	Are some of the answers to the previous questions specific to the private enforcement of competition rules?	Yes.
(ii)	If the answer to the previous question is yes, in what way do they differ from general private enforcement rules?	The main way that the private enforcement of competition rules differ from general private enforcement rules is where the CAT is involved. In particular, following S47A CA1998 added by S18EA 2002 as from 20 June 2003, decisions by the OFT and European Commission (even if adopted prior to that date but provided that the time for appealing has expired) are binding on the CAT in monetary claims; and under Section 58A CA1998 added by S20EA 2002, decisions of the OFT only are binding on ordinary civil courts. But this does not make bringing claims based on European Commission decisions more difficult because of the doctrine of supremacy of Community law and the *Masterfoods case* law which from 1 May 2004 will apply expressly by virtue of Article 16(1) of Regulation 1/2003 and Notice on Cooperation with national courts.
(iii)	EC competition rules are regarded as being of public policy. Does that influence any answers given?	The English courts have regarded EC competition rules as being part of public policy and that influenced the decision in the *Iberian case*, which held that the English court should not admit fresh evidence intended to contradict a European Commission competition decision by the addressee of that decision since it would be against the public policy of competition law enforcement generally. Refusal to disclose a complaint letter sent to EC Commission was upheld on the basis of public policy and the need for complaints to be unprejudiced if competition law is to be enforced in *Hasselblad v Orbinson* [1985] QB475.
(iv)	Are there any differences according to whether defendant is public authority or natural or legal person?	There are no differences according to whether a defendant is a public authority or a natural/legal person in general, provided that the public authority is an undertaking subject to Articles 81 and 82.
(v)	What are the key differences, if any, from region to region within the Member State as regards damages actions for breach of national or EC competition rules?	Scotland, and to a lesser extent Northern Ireland, have a different court structure, different substantive law (in Scotland) and different procedure and terminology (in Scotland). However, the CA1998 is applicable throughout the United Kingdom with necessary modifications for the different court structure and procedures.
(vi)	Is there any interaction between leniency programmes and actions for claims for damages under competition rules?	No decided case on such interaction but existence of exemplary damages may be relevant here.
(vii)	Please mention any other major issues	The following are some of the other major issues

	relevant to the private enforcement of EC competition law in your jurisdiction	relevant to the private enforcement of EC competition law in England and Wales (Scotland and Northern Ireland): - limitation issues - joint and several liability in tort - joint tort feasors and the joining of such as defendants - the knowledge of lawyers and the judiciary is improving but could be better - both competition law and judicial remedies in the field are novel and therefore have involved lengthy proceedings to date such as *Crehan* and *Arkin* - forum shopping - lack of clarity over standard of proof - uncertainty over availability of exemplary damages and pass-on defence
(viii)	Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon	The statistics show that there are a very small number of cases based on the violation of EC competition rules in which the issue of damages was decided upon, because there have been very few decided cases. The first case was *Arkin* where the English High Court decided that there was no violation of EC competition law although a claim for damages had been made and was considered. The second case was *Crehan* where similarly the English High Court decided there was no violation of EC competition law although it gave consideration to the quantum and calculation of damages claimed for that alleged breach. The *Provimi case* settled after strike out application so the question of damages was not determined. A new claim for damages against Aventis and Hoffman La Roche has been initiated in the CAT in February 2004,
Section III: Means to facilitate private enforcement of Articles 81 and 82 EC		
(i)	Which of the above elements of claims for damages as applied in each Member State and accession country provide scope for facilitating the private enforcement of Articles 81 and 82 EC?	- pre-trial disclosure - broad discovery rules - costs awarded to winner - pre-judgment interest - contingency fees - full jurisdiction for all EU claims by claimants against the same defendant corporate group under Aventis case - binding nature of prior OFT and European Commission decisions on the CAT; and of OFT decisions (and Commission decisions) in ordinary civil courts. <u>NB</u> S47A CA1998 obligation on the CAT to be bound by OFT in English and EC competition violation cases and by European Commission decisions in EC competition cases once the time for appealing has expired or any appeals made been dismissed.
(ii)	How could that be achieved?	The statutory provisions in the CA1998 could be introduced in other national laws. The most important development in the UK is the case management approach to procedure and the strict time limits followed by the CAT. The CAT is intended to blend the best of the CFI civil style process with the adversarial tools of discovery and cross examination under the common law system where the tribunal agrees.

(iii)	Are alternative means of dispute resolution available?	Alternative means of dispute resolution are available – the CPR applicable in the ordinary English courts (and by analogy applied in practice by the CAT to a large extent) specifically require conciliation to be considered where appropriate. Mediation is on the increase. Historically, practically every claim for damages brought by one party against another for breach of EC competition law in the United Kingdom has been settled. This explains why there are so few decided cases. It can be reliably predicted that those settlements have been the result of an alternative means of dispute resolution however informal those negotiations for settlement may have been. It will be misleading to suggest that they are based on formal conciliation or arbitration but the expense of litigation in the United Kingdom would normally drive the parties to settle disputes where their differences relate to the amount of compensation as the only issue.
(iv)	If so, to what extent are they successful?	Successful.