

Can I claim compensation?

Competition Litigation

March 2022

This client guide addresses ten key questions on making a claim for compensation for loss or damage due to an infringement by a business of competition law.

1. Must there be a decision by an authority that the business had infringed competition law?

No. If there is a decision by the Competition & Markets Authority (CMA) or other relevant authority that a business has infringed competition law, this can make any action for damages easier and quicker. However, if there is no decision by the CMA this does not prevent an action for damages commencing.

2. Who can bring a claim for damages?

Any individual or business who claims to have suffered loss or damage can bring a claim for compensation. Examples include:

- A business customer – e.g., X who is a customer of business Y
- An end customer – e.g., W who is a customer of X
- A supplier – e.g., Z who supplies inputs to business Y
- A competitor – e.g., C who is a competitor of Y
- A shareholder or director of any of the above – e.g., a shareholder of competitor C

3. What types of loss or damage can you claim?

A claimant can claim compensation for monetary loss where this has been caused by the infringement of competition law. Some or all of the costs incurred in bringing the claim, such as lawyers' fees, can also be claimed. The claim can be for only a few pounds to millions of pounds. Claims for only a small amount of money are commonly progressed through a collective claim (see below).

4. What is a collective claim for damages?

Many individuals and/or businesses might have suffered loss or damage due to the infringement of competition law. To make the process easier, two or more claimants can bring a single claim using a representative. This so-called collective action will either be an:

- opt-in collective action - meaning every claimant that wants to have its claim run by the representative must notify the representative, or
- opt-out collective action – meaning a claimant's case is automatically run by the representative unless the claimant notifies the representative.

5. What are the benefits of a collective action?

Litigation always takes time and costs money in terms of fees for lawyers and other professional advisors.

An opt-in collective action has the benefits that:

- The costs of litigation are usually shared between the members of the class, meaning each claimant's costs are much lower than would otherwise be the case (indeed, those upfront costs may be zero if the claim is funded by a third party that specialises in funding this type of litigation), and
- The practical running of the claim will be managed by the representative, meaning only a small amount of effort is required from each claimant.

An opt-out collective action has the benefits that:

- The costs of litigation are usually paid for by a third-party funder, meaning no up-front costs are required from a claimant, and
- The practical running of the claim will be managed by the representative, meaning that if the claim is successful, the claimant may only need to identify that it belongs to the group or class of persons bringing the claim (e.g., you bought product X during a specified period of time from one of a specified list of suppliers).

6. What are the downsides of a collective action?

The time, expense and uncertainty of litigation means that many cases are settled by the parties prior to the court ruling on the matter. A claimant might believe it is able to reach a settlement sooner and on better terms than might be obtained by the representative of the collective action. In this case, a claimant may decide not to opt-in to a collective action or opt-out of a collective action.

7. How are damages calculated?

The court will award compensation equal to the amount of loss. For example, a business X purchases 100 products each year for three years from supplier Z at £10 per product and then continues to make the same purchases for the next three years but at £12 per product. A CMA decision identifies that for those last three years there was a cartel between Z and others with the object or effect of raising the price of the products. In the first instance X's claim for damages will be £600 (i.e., 3 years x 100 products per year x the price uplift of £2 per product). This will be the main claim, but other claims may also be made based on other losses or damages that the higher price caused.

The defendant, Z, may claim that X did not suffer loss because although it paid more for the products, it was able to resell those products to end customers at a higher price. Z may raise other arguments as to why X's claim is wholly or partially invalid, and X may have counterarguments.

8. What if I cannot afford the costs of litigation?

Even claimants, such as very large corporations, that could afford to pay for the costs of lawyers and other advisors, are likely to seek to have their litigation funded in some manner. This is the case whether a claimant is making a stand-alone claim or seeking to be a representative of a collective action. There are specialist funders that are willing to pay for the fees associated with bringing a claim. In return, the funder will make an agreement with the claimant or representative that will result in the funder obtaining a material part of the damages in the event of a successful case.

There are other alternatives, namely, conditional fee agreements (CFAs), damages-based agreements (DBAs), and after the event (ATE) insurance. Indeed, a combination of some or all of these may be appropriate. There is

no one size fits all formula, but a rule of thumb that some commentators adopt is that funding (under any of the above forms) will result in the funder receiving between two and three times the amount spent by the funder, or between a 30% and 40% share of the award. Much depends on the actual amount claimed.

9. When should I bring my claim?

If there is no CMA investigation, you can bring your claim at any time, noting that there are time limits within which a claim must be brought. Additionally, or alternatively, you could make a complaint to the CMA with the goal that an investigation is initiated. If there is an ongoing CMA investigation, you do not have to wait for the conclusion of that investigation to commence a claim, although there may be benefit in waiting.

10. Will I win the claim?

If there is a decision of the CMA or other relevant authority of an infringement of competition law, this is a significant positive aspect. Indeed, where the infringement is a cartel, it is assumed that the cartel has caused loss or damage unless the contrary is proved.

Most claims end by the parties settling the case. If you are a member of a collective action, the terms of the settlement will be agreed between the infringers and the representative.

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- 213 partners and 1600+ lawyers and business support employees
- Turnover of £154.2 million as at end of April 2020
- National Firm of the Year in The Lawyer Awards 2019
- Ranked in The Lawyer's Real Estate Global 50 2019
- Shortlisted in Legal Week's Innovation Awards 2020
- Winner of corporate/commercial specialism in the Legal 500 Awards 2019
- Featured in The Lawyer's UK Litigation 50 and UK Corporate 50
- A signatory to the Social Mobility Pledge and 38th in the Social Mobility Foundation's Employability Index
- Gold standard status in Investors in People
- Signatory to the United Nations Global Compact

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