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The Relationship between Public and Private Enforcement

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1. INTRODUCTION

1.1 Does public and private enforcement in the UK enjoy a happy, symbiotic, relationship? Do the two spheres support and assist their corresponding objectives? Or has an unhappy and profound fault line developed, serving to confound enforcement outcomes that should otherwise be common and mutually supporting?

1.2 This short article provides observations from a private practitioner's perspective[2] regarding the relationship between public and private enforcement and the extent to which their respective objectives may be distinguished.

1.3 In particular, we consider:

- The respective roles of the *public* and *private* sphere in securing each stage of the *enforcement process* by which competition law policy objectives are achieved;
- Whether the threat of liability from *private* damages continues to mute the effectiveness of *leniency* in the *public* enforcement regime as would impact negatively upon cartel detection;
- The role played by the *public* investigation and infringement *decision* in the determination of causation and quantum in the context of follow-on actions for private damages;
- The growing interrelationship between *concurrent public* and *private* enforcement, particularly in the field of collective actions.

1.4 In doing so we focus upon the relationship between the principal UK competition authority, the CMA, and its relationship with the Competition Appeal Tribunal, whose anniversary we mark. We do not consider a number of important aspects of the Tribunal's work, such as appeals against public enforcement decisions (both Chapter I and II of the 1998 Act). Arguably these could have been included, but a line of demarcation has to be drawn somewhere.

2. THE OBJECTIVES OF THE PUBLIC AND PRIVATE COMPETITION LAW SPHERES

2.1 If commentary is to be offered as to the success or failure of the public and private routes in securing effective competition enforcement, some preliminary thought has to be given to

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[2] The observations are solely attributable to the author in a personal capacity.

what are the *objectives* of these two regimes. What is success or failure to be measured against? We turn to these policy questions first.

2.2 The European Commission defines the ultimate aim of EU competition law policy as:

> "*Competition policy is about applying rules to make sure businesses and companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality.*"[3]

2.3 Whilst the Department of Business, Innovation and Skills (as was) has defined the CMA's mission statement as:

> *"The CMA's mission is to make markets work well in the interests of consumers, businesses and the economy."*[4]

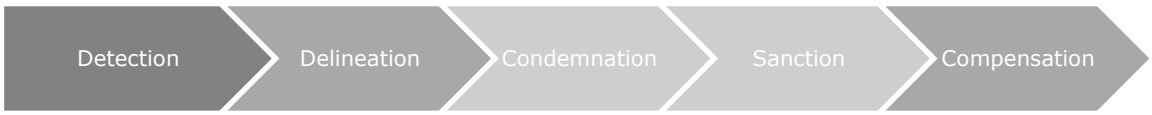
2.4 If the objectives of the public enforcement regimes are directed at producing *effective* (and possibly *fair*) market competition, for the benefit of consumers, the economy and (at least in the UK) businesses, it is tempting to consider that objectives of the *private* enforcement regime are somewhat narrower. Namely, is its role not to be primarily focused upon the issue of compensation? Such an assumption would be incorrect, at least if the original policy objectives identified by HM Government when the present regime was consulted upon are to be taken at face value:

> "*The Government is now consulting on how to complement the public enforcement regime by promoting more private sector challenges to anti-competitive behaviour. The ambition is to enable businesses, particularly SMEs, to be better able to take direct action against anticompetitive behaviour that is stopping them grow as well as allowing both consumers and businesses to recover money that they have lost because of infringements of competition law*."[5]

2.5 The UK Government, at least, has been clear that private enforcement is to play a role not just in delivering a right to compensation, but also permitting entities to take direct action to ensure competitive markets, which are essential for their growth.

2.6 So how are these objectives to be achieved in practice? Figure 1 below sets out the conventional steps comprising what might be called the *competition enforcement process*.

Figure 1: Competition enforcement process



2.7 There is obviously nothing particularly innovative in this concept, but it does give a sense as to how antitrust enforcement is an interconnected process, with the success of each subsequent step in some ways dependent upon the one that preceded it. Moreover, in the context of the title of this article, it prompts the question: what are the roles for private and public enforcement at each stage? Are outcomes best secured if the baton is passed from

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[3] https://competition-policy.ec.europa.eu/consumers/why-competition-policy-important-consumers_en

[4] CMA Performance Management Framework 2014.

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf

the public to the private at a given point? Is it important that each of the public and private regimes, respectively, are able to accommodate the entire lifecycle of an enforcement process for any given case? Can both public and private regimes engage with the same fact pattern at the same time, or does that way confusion lie?

2.8 Taking on this theme, Table 1 below seeks to explore the manner in which the public and private enforcement spheres, respectively, engage productively (or not) with these steps. Whilst the green, amber and red coding is somewhat superficial, it may at least promote a debate as to the relative success (or failure) of the public and private enforcement sphere to the achievement of the objectives in play at each step of the enforcement process.

Table 1: Public and private enforcement at each stage of the process

Enforcement process steps	Public enforcement	Private enforcement
1. Detection	Immunity programs Complaints Related investigations	Allegations
2. Delineation[6]	Wide investigative powers Self-reported evidence Admissions Witness evidence (compulsory or voluntary) Statement of Objections process	Pleaded allegations Disclosure processes Trial process
3. Condemnation	Infringement decision	Judgment
4. Sanction[7]	Administrative fine	Presently not applicable
5. Reparation	Voluntary redress	Damages & Interest

2.9 If the red colour code suggests ineffective or poor enforcement mechanics, it may be seen that the two regimes may, in most cases, attempt to address all stages of the enforcement process, albeit with arguably different degrees of success. Whilst somewhat simplistic, some observations concerning the above might include:

(a) *Detection*: The private trial process of course offers little to no assistance in detecting secret cartels. This, in turn, is what makes the role of public enforcement in effectively unearthing such conduct so sensitive and important to preserve. It also, to a degree, justifies the competition regulators' preoccupation with preserving the efficacy of leniency regimes, even where this generates tensions with encouraging private enforcement. We return to this issue below;

[6] Delineation, in the sense of identifying and establishing the scope and nature of the infringing conduct at hand. An investigation in the public sphere; or the various tools available to the parties and the court to get at the truth of the allegations in the private.

[7] There is scope for breaking "sanction" into two separate heads, namely "punishment" and "deterrence", but we have combined the two elements for the purposes of this article.

(b) *Delineation*: in the public enforcement sphere, the identification of the nature of a given cartel or other infringement, its scope and duration, together with the relevant evidential record to prove the same, is largely a matter of the investigative stage. This involves an increasingly powerful mix of statutory powers and policy tools to unearth unlawful activity, through compulsory and voluntary means. However, in the private sphere, and irrespective of the merits of the UK pleading and disclosure processes, it remains challenging and expensive for claimants to use the private court process to conduct a proxy cartel investigation. Indeed, there are grounds to argue that an "investigation by trial" is not an appropriate objective at all, given the constraints and design of the English court system, including the ever tightening restrictions upon the scope of disclosure.[8] This might prompt the question as to whether there should really be a role for the courts to hear and determine stand-alone actions where the operation, if not the mere existence, of the cartel concerned is yet to be explored?[9] If there is no such role, then what does this say about the obligation upon UK competition authorities to prioritise the investigation of all secret cartel allegations to avoid an enforcement gap arising, given the lack of other viable enforcement options?

(c) *Condemnation*: It is arguable that conduct is equally well condemned through a public infringement decision or a court judgment. However, even here, scope for debate exists. Is there not a basis to argue that a fully investigated regulatory decision provides a more robust basis to condemn the relevant conduct following the full investigative process described above? In contrast to a fast moving trial that, as a matter of necessity, will have lasted weeks rather than years and will usually have been forced to be highly selective in terms of the issues considered and litigated. Or is there a fundamental and objective integrity to findings produced as a consequence of a judicial process? Where such findings are untainted by the potential for distortion argued to exist, for example in regimes where: the regulator combines the role of investigator and decision maker; affords corporate leniency statements equivalent weight to contemporaneous evidence (even where explicitly produced with the subjective purpose of maintaining the conditional currency of protection under an immunity program); or the ever present potential for investigating officials, howsoever well meaning, to fall prey to confirmatory bias? Does it really matter, providing that addressees of UK competition authority infringement decisions continue to enjoy what we suggest is the essential right to a "full appeal" before the Tribunal, including the opportunity to test findings of fact as well as law? We return to this issue below, given the theme of what we suggest is the increasing importance of the liability "decision" for the purposes of the subsequent determination of issues of causation and quantum;

(d) *Sanction*: where this element serves the dual purpose of punishing and deterring corporate entities from engaging in competition law infringements (for this article we do not consider sanctions against individuals, albeit it is arguably the most powerful weapon in a competition authority's enforcement arsenal). Pursuant to the Damages Directive, the English courts, including the Tribunal, currently have no ability to "punish" anti-competitive conduct (for example through exemplary or punitive damages). Any "sanction" delivered by the private enforcement sphere is thus limited to the indirect financial and reputational impact consequent upon a significant award of compensatory damages. The original logic for this limitation, as determined by the English common law process and prior to the Directive, was the need to avoid

[8] This might, however, be a surprising and unambitious conclusion given, for example, the specific extension afforded by the Consumer Rights Act 2015 to the Tribunal's jurisdiction so as to permit it to hear stand-alone claims in the context of competition law infringement cases.

[9] In contrast, the procedures of the English court process are much better able to grapple with stand-alone cases involving allegations of abuse or restrictions enshrined in commercial dealings between the parties. In this context, the conduct and the scope of the evidential record needed to be sought and disclosed is more likely to be in the knowledge of both claimant and defendant alike.

the potential for double jeopardy, in circumstances where infringements have already been sanctioned (or granted leniency). In addition, restitutionary remedies were also confirmed to be unavailable in tortious claims based upon breach of statutory duty.[10] An interesting question arises as to whether, post-Brexit, this debate might be reopened, particularly in circumstances where the number of stand-alone actions continue to grow (i.e. no administrative fine has been imposed) and the process of estimating actual losses appears to become increasingly complex. One sign pointing that way came with the introduction of the UK Digital Markets, Competition and Consumers Bill to Parliament on 25 April 2023, which contains provisions to give the Tribunal and courts discretion to award exemplary damages in private actions brought in respect of digital harms under the proposed legislation (other than in relation to collective proceedings). Or does the "broad axe" of estimation now serve for all intents and purposes as a satisfactory tool in circumstances where the identification of the actual overcharge proves elusive? Or will the regime revisit the need for punitive or gains based damages in circumstances where private enforcement is taking the lead, no *a priori* administration sanction has been imposed and the attempt to produce a calculation of a loss based measure of damage would defeat a maul let alone an axe?;

(e) *Compensation*: Quite obviously, compensatory actions are the focus of the greater part of the private enforcement "volume" currently before the courts, including the Tribunal. Such private actions fulfil a wider enforcement role, even in this limited regard. This reflects the fact that effective redress not only serves to "do justice" to the victim, but also plays an important enforcement function in the area of deterrence where the award of compensation is both significant and well publicised. However, conversely, should there be a greater role for the public enforcement regime in securing compensation? A central theme of this article is the continuing relevance of the role of public regulators in conducting effective investigations and producing detailed infringement decisions if follow-on damages claims are to be fairly estimated and effectively facilitated. However, more direct attempts by the public enforcement sphere to deliver compensatory remedies have met with mixed, if any, success at all to date. Most notably, it probably is fair comment that the voluntary redress scheme mechanism introduced by the 2015 Act and found under section 49C of the Competition Act 1998 ("CA98") (as amended), has failed to take off.[11] In particular, where such schemes are highly complex, particularly in multiparty contexts, and fail to provide the proffering addressee/defendant security that they will not be sued for the same or more damages by a range of claimants in any event (all and any of whom need to opt into the settlement concerned for it to have any effect).[12] There have been some novel compensatory damages settlements effected by regulators. Most notably in 2019 when the pharmaceutical provider Aspen agreed to pay a maximum fine of £2.1 million for an infringement in respect of the supply to the NHS of the drug fludrocortisone and at the same time agreed to pay a sum of £8 million by way of compensation to the NHS.[13] The scope for more such "all in one" settlements – involving the effective resolution of both public and private enforcement liabilities and organised within a context of a CMA statement of objections – remains to be seen.

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[10] *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors* [2008] EWCA Civ 1086, noting that gains based awards may still be available in exceptional circumstances where for no fault of its own a claimant is unable to establish loss on a compensatory basis and an account for profits is necessary to do justice to the case.

[11] See also the Competition Act 1998 (Redress Scheme) Regulations 2015 and ancillary guidance.

[12] Reference is also made to schemes successfully implemented by sector regulators, such as energy companies investigated by Ofgem making voluntary payments to the Ofgem Energy Industry Voluntary Redress Scheme, which has been in place since 2018, and has awarded over £55 million in funding to develop energy projects and support vulnerable energy consumers.

[13] https://www.gov.uk/government/news/second-firm-admits-illegal-role-in-agreement-for-essential-drug; a smaller sum was also negotiated in respect of the *Nortriptyline* investigation in June 2019.

3. PRIVATE DAMAGES, LENIENCY APPLICATIONS AND CARTEL DETECTION

3.1 We turn first to possibly the longest running theme in connection with the relationship between private and public enforcement. Namely, has the rise of private follow-on damages litigation suppressed the propensity for leniency applications to be made and, in turn, weakened the ability of public enforcement regulators to detect and condemn secret cartels?

3.2 We start with the obvious but important notion that: "*Applications for leniency are a key tool in detecting and taking enforcement action against cartels*".[14] Against this background, it has been a constant theme for commentators to identify a decline in leniency applications and attribute this to the rise in private damages actions. As is well known, the logic being that, although leniency provides full or partial immunity from regulatory fines, it loads a countervailing likelihood that the beneficiary will be sued for any resulting overcharge.

3.3 However, the relationship between public and private enforcement in this regard bears further consideration. First, has there *been* a decline? If so, what is *causing* any decline; in other words, are private damages actions really to blame? Finally, are there any *further* measures that could be taken to ameliorate the tensions between the competing "public" and "private" enforcement objectives associated with, respectively, cartel detection and cartel redress?

3.4 In respect of the first issue, the statistics point both ways as to whether leniency applications are declining:

(a) On the one hand, the OECD has found that leniency applications in Europe were 70.5% lower in 2020 than 2015.[15] Most of the nine European jurisdictions included in the analysis that introduced private enforcement in the period 2005 to 2020 also showed a decline in leniency applications following the introduction of their private enforcement regimes. This decline in applications was often sharper following the introduction of the private enforcement regime, although there may also have been a more general decline also observed before its introduction.[16] However, jurisdictions that introduced private enforcement at a much earlier period, namely before 2005, have also shown a decline in the number of leniency applications after 2015, well after the immediate impacts of such a regime should have been felt. Does this suggest that "*there are likely other additional factors* (separate from that usual suspect, private enforcement) *causing the decline in leniency applications*". Or is it simply that follow-on litigation only operates as a practical deterrence to leniency applications when such actions become the norm in practice in such jurisdictions, even where they may in theory have been an option on the statute book for quite some time?[17]

(b) However, there is also evidence that the picture of a decline in the very recent past may be more mixed. In 2022, the Executive Director of Enforcement at the CMA confirmed that the average number of leniency applications in the UK had been "*stable*".[18] According to the *Global Competition Review's* Ratings Enforcement, the

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[14] Consultation outcome Reforming competition and consumer policy: government response, Updated 20 April 2022 accessed at https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response.

[15] OECD Competition Trends 2022, paragraph 5.2 accessed at https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf.

[16] OECD Competition Trends 2022, paragraph 5.2 accessed at https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf.

[17] OECD Competition Trends 2022, paragraph 5.3 accessed at https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf.

[18] Global Competition Review, *CMA official says application numbers not only way to measure success of leniency programme* (29 June 2022) accessed at https://globalcompetitionreview.com/article/cma-official-says-application-numbers-not-only-way-measure-success-of-leniency-programme.

CMA had a total of 11 leniency applications in 2020, 12 in 2021 and 23 in 2022.[19] Similarly, in the EU, the Head of the Commission's Cartel Directorate, Maria Jaspers, indicated that the Commission had received twice as many applications in 2022 as in 2021, and more than three times the number submitted in 2020. Whilst insufficient to confirm a clear pattern, these UK and EU statistics are suggestive that the wider decline in leniency applications in Europe may be beginning to slow or even reverse.

3.5 In terms of causal factors affecting trends for leniency applications, there are many other competing reasons to dissuade companies from applying from immunity above and beyond a perceived increased risk of damages. These include placing the entity at the centre of a long cartel investigation with the cost and disruption that involves, particularly when combined with the reputational damage of having admitted to the conduct concerned and where it would be necessary to apply for leniency in multiple jurisdictions/client markets. Where complete immunity from fine is unavailable, it is increasingly the case that serious consideration needs to be given to the net benefit of the application even if the damages risk is disregarded. In this regard, the low level of discounts offered to those further down the reporting line may throw into serious doubt the benefits of making an application in all but the very largest and obvious of infringements: in particular, where a concern exists that with the benefit of an admission a sanctioning authority may, even with the best will in the world, be emboldened to err on the side of a larger basic fine from which any partial leniency reduction is to be made (leading to no net benefit).

3.6 It may also not be coincidental that the apparent arrest in the decline of leniency applications appears to have followed the introduction of the Damages Directive (which was implemented in UK on 9 March 2017). Again, as is well known, aspects of this Directive are founded upon the premise that private enforcement may deter applicants from applying for leniency and as a consequence seeks to offer a range of limited protections to leniency applicants in an effort to mitigate this effect. In particular:

(a) Where the Competition Act 1998 (as amended) now relieves recipients of immunity of their joint and several liability to compensate all victims of the cartel, confining their obligations to pay compensation to their direct and indirect purchasers (save where the injured parties cannot obtain full compensation from the other undertakings that were involved in the same infringement).[20] Importantly, this relief is understood not to apply to beneficiaries of partial leniency;

(b) Leniency statements now benefit from absolute protection against disclosure,[21] including direct quotations from the leniency statement contained in other documents.[22] In addition, Article 6(5) of the Damages Directive provides that information that is specifically prepared for the purposes of a competition authority investigation, or sent to the parties in the course of those proceedings, may only be disclosed after the regulatory investigation has concluded. Given the typical length of regulatory investigations, such delays may be material and are particularly relevant in the context of hybrid settlement procedures. For example, in the *Euro Interest Rate Derivatives* cartel case, the General Court held that the Commission is entitled to refuse disclosure of documents from the Commission's file to third party

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[19] Global Competition Review, Ratings Enforcement 2022 for the CMA accessed here https://globalcompetitionreview.com/survey/rating-enforcement/2022/article/united-kingdoms-competition-and-markets-authority; 2021 accessed here https://globalcompetitionreview.com/survey/rating-enforcement/2021/article/united-kingdoms-competition-and-markets-authority; and 2020 accessed here https://globalcompetitionreview.com/survey/rating-enforcement/2020/article/united-kingdoms-competition-and-markets-authority.

[20] CA98, Schedule 8A, paragraph 15.

[21] CA98, Schedule 8A, paragraph 28.

[22] CA98, Schedule 8A, paragraph 4(6)(b).

damages claimants in hybrid cases, where some parties have settled but others continue to contest the administrative process. [23]

3.7 Whilst these protections are not absolute, there is no doubt that in practice they weigh in the balance when decisions are being made as to whether or not to apply for immunity. However, ultimately, a decision to apply for leniency is rarely straight forward and will turn upon: the nature and strength of the potential allegations; wider implications for the entity; its culture and executives; and the need to take account of the potential for the application to create exposure to additional liabilities (national and international), particularly where only partial leniency, rather than immunity, is likely to be available.

3.8 Against this background, it is worth considering whether the current framework goes far enough to secure the effectiveness of the public enforcement regime, notwithstanding the increasing liabilities perceived to flow from an ever more active private action regime. In this context, the current Director of Enforcement of the CMA, who has done so much to reinvigorate the CMA's antitrust enforcement programme, has noted that the CMA is working to increase incentives to apply for leniency notwithstanding these liabilities, through the application of both carrot and stick, so to speak. According to the Director, initiatives to encourage would-be applicants either could, or currently do, include: increasing the size of fines awaiting the addressees concerned if they choose not to apply; offering relief from exclusion from public contracts where relevant; removing the threat of director disqualification; and eliminating criminal prosecution for companies that come forward first.[24] Some parts of that menu may prove more inviting than others.

3.9 Some commentators have called for regulators to go further and grant leniency applicants complete protection from follow-on damages claims. Andreas Mundt, head of Germany's Federal Cartel Office, said the authority was "*looking at*" the possibility in 2021, whilst the EU Commission was reported to be "*throwing around*" the idea in 2022.[25][26] However, such proposals pose moral hazard and legal issues. Limiting the civil liability of immunity applicants would eliminate a defendant against whom a claimant could bring a claim and may result in victims being unable to obtain full compensation for the harm they suffered as a result of a cartel's anticompetitive behaviour. Wouter Wils has argued that if a potential immunity applicant could expect immunity, not only from fines but also from damages, it may be tempted to exaggerate the scope and extent of the cartel to harm its competitors.[27] Furthermore, Wils points out that regulators already have to give consideration to the impact that any fines they impose will have on the competitive structure of the market. He argues that the risk for competitive distortion would be further aggravated if immunity applicants alone were also not liable at all to compensate for private damages.[28]

3.10 The UK Government has also considered the notion of absolute protection from private damages liabilities for those granted immunity from public sanction. On April 2022, BEIS published the outcome of its consultation on "*Reforming competition and consumer policy*". The consultation outcome acknowledged that "*the ability for those harmed by cartels to obtain redress may act as a disincentive to apply for leniency*" but noted that there "*are*

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[23] *Case T- 611/15 Edeka-Handelsgesellschaft Hessenring v Commission*, recitals 89-90.

[24] Global Competition Review, *CMA official says application numbers not only way to measure success of leniency programme* (29 June 2022) accessed at https://globalcompetitionreview.com/article/cma-official-says-application-numbers-not-only-way-measure-success-of-leniency-programme.

[25] Global Competition Review, *Mundt touts immunity from damages for leniency applicants* (10 June 2021) accessed at https://globalcompetitionreview.com/article/mundt-touts-immunity-damages-leniency-applicants.

[26] Global Competition Review, *EU is reviewing leniency policy amidst drop in first-in applications, enforcer says* (5 April 2022) accessed at https://globalcompetitionreview.com/article/eu-reviewing-leniency-policy-amidst-drop-in-first-in-applications-enforcer-says.

[27] Wouter P.J. Wils, *Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future* (2017) World Competition, Volume 40, Issue 1.

[28] Wouter P.J. Wils, Priva*te Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future* (2017) World Competition, Volume 40, Issue 1.

already measures in the current legal framework to manage this tension."[29] The outcome stated:

> "*Government's view is that where there is a tension between public and private enforcement against cartels, there are strong reasons to prioritise public enforcement. Without effective public enforcement (which often relies on leniency to bring otherwise secret cartel behaviour to light), there is only a small prospect of businesses and consumers obtaining redress for the cartel's conduct. Rights to be compensated for cartel conduct risk becoming abstract if they frustrate the public enforcement process which identifies secret cartel conduct in the first place*."

3.11 However, the UK Government rejected the proposal to grant holders of full immunity complete immunity from liability to pay compensatory damages. The consultation outcome considered that there is "*mixed evidence*" on the extent to which leniency programmes are frustrated by the private damages regime and that "*more time may be needed to observe any effects of the changes introduced in 2017*".[30] The Government concluded that the proposal was "*premature*", but indicated it would keep the effect of the private damages regime on leniency programmes under review.

4. IMPORTANCE OF THE PUBLIC INVESTIGATION AND DECISION TO FOLLOW-ON ACTIONS

4.1 The second theme is the obvious but nonetheless important relationship between, on the one hand, the regulatory investigation together with its findings as embodied in the infringement *decision* and, on the other hand, the increasingly inevitable private action for compensatory damage that will follow.

4.2 This linkage is so well established that the predictable private follow-on damages risk needs to inform the strategy adopted at the outset of the public enforcement process. For example, an initially attractive application for complete "immunity" that (through delay or other circumstances) drifts to leave only the option of a partial "type C" leniency award, may risk leaving the entity in the very worst position possible: receiving a small and uncertain reduction from fine (possibly presenting no material net fining benefit), to be weighed against the very significant downside of having placed the entity in the cross-hairs for the purposes of damages actions as a result of admissions made, evidence provided and with no corresponding relief from the burden of joint and several liability as regards losses suffered by the cartel's wider purchasing class. All of these risks need to inform the initial approach taken by the advisor to the public enforcement investigation, lest liabilities faced subsequently are exacerbated.

4.3 However, recent developments also reward re-examination of the linkages between the public enforcement investigation/decision and the subsequent "follow-on" action. In particular, we discuss:

(a) The binding role of the infringement decision and the scope of the findings of facts/admissions contained in its recitals that defendants in a subsequent damages action will be precluded from contesting;

(b) The extent to which disclosure of the facts of the conduct which formed the subject of the investigation and infringement decision will be required for the purposes of the subsequent damages action. Or, whether the Tribunal may largely limit

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[29] Consultation outcome Reforming competition and consumer policy: government response, Updated 20 April 2022 accessed at https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response.

[30] Consultation outcome Reforming competition and consumer policy: government response, Updated 20 April 2022 accessed at https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response.

disclosure to data in circumstances where (i) it is not concerned with issues of liability (ii) the binding nature of factual findings contained in the decision prevent the defendants placing such facts in issue and as might necessitate disclosure and (iii) the relevant issues of causation and quantum will be largely fall to be determined as matters of expert evidence in any event;

(c) The difficulties that, in practice, the English courts/Tribunal appear to have had in resolving issues of causation and quantum purely "on the numbers". In contrast, the reliance that appears to have been placed upon findings of fact drawn from the infringement decision and available evidential record (including as gathered during the public enforcement investigation) when determining causation and quantum with recourse to the broad axe principle.

(a) The binding nature of the infringement decision

4.4 Turning to the infringement decision, the so-called binding recitals judgments arising from the recent Trucks Cartel litigation have confirmed the importance of factual findings made in the context of a settlement/leniency process. [31]

4.5 First, the Tribunal identified in its judgment of 4 March 2020 the principles regarding those parts of a settlement decision that would bind a settling defendant. [32] In response to arguments made by the defendants that, beyond the operative part of the settlement decision in question, very few of the recitals in the main body of the text were binding on them, the Tribunal re-stated the position as a matter of EU law. Namely, that for a recital to bind a defendant and the Tribunal, *"the criterion is that the finding in the recital is an essential basis or the necessary support for a determination in the operative part, or necessary to understand the scope of the operative part."*[33]

4.6 In practice, this led to the production of schedules to set out those recitals that were binding. The exercise was material, given the claimants alleged that the recitals concerned included issues of fact relevant to questions of causation and loss, such as findings relating to the sharing of gross price lists and other commercially sensitive information.

4.7 Secondly, the Tribunal went further. It held that it was an *"abuse of process"* of domestic law for the defendants to deny, for the purposes of a follow-on damages claim before the Tribunal, findings that they had previously admitted to in the context of the EU Commission settlement decision. The Tribunal considered "*it would bring the administration of justice into disrepute*" if the defendants could deny, or not admit to, facts recorded in the settlement decision, with the result that the claimants would have to (re) prove those facts.

4.8 The defendants appealed the Tribunal's decision, principally on the ground that the concept of abuse of process is a doctrine of English common law and could not override EU principles, which in this case should apply to determine which recitals of an EU decision could and could not be challenged in national courts. [34] The Court of Appeal upheld the Tribunal's decision. Lady Justice Rose (as she then was) commented at paragraphs 55 of the judgment (with Lord Justice Flaux and Sir Geoffrey Vos agreeing) that, whilst Article 16 prevented a national court from taking a decision contrary to a decision of the Commission, it did not govern the application of national rules whose effect upon application would *not* contradict a Commission decision.

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[31] *Royal Mail Group Ltd v DAF Trucks Ltd* [2020] CAT 7

[32] https://www.catribunal.org.uk/sites/cat/files/2020-03/1284-1295_Trucks_Judgment_%5b2020_CAT_7%5d_040320.pdf

[33] *Royal Mail Group Ltd v DAF Trucks Ltd* [2020] CAT 7, paragraph 68.

[34] *AB Volvo (publ) and others v Ryder Ltd and others* [2020] EWCA Civ 1475

4.9 The case has important implications for both the application of the pre-existing binding recitals doctrine and, perhaps more importantly in the post-Brexit world, the notion of an abuse of process in this context.

4.10 First, the Court of Appeal rejected the defendants' attempts to confine the scope of the binding recitals to a limited sub-set of "main facts" within the settlement decision. In doing so, the Court of Appeal confirmed the pre-existing doctrine of binding recitals as applied by the Tribunal with reference to Article 16 of Regulation 1/2003. Namely, the notion of binding recitals confirms the obligation of a national court under EU law not to take decisions running contrary to a decision taken by the Commission. As such, the national court is bound by the operative part of the decision, together with those recitals properly characterised as forming the *"essential basis"* for the operative part. In practice, this confirms the pre-existing position that the binding recitals doctrine will render a sub-set of recitals within the overall settlement decision as capable of having a binding effect upon the national court.

4.11 The Court of Appeal also found that the application of this EU binding recitals doctrine does not prevent the parallel application by the English courts of what, for the purposes of this article, we will refer to as a "*binding admissions*" doctrine. The latter is arguably of wider application and will, as a matter of abuse of process, prevent a defendant from subsequently denying any of the facts found in a regulatory settlement or leniency decision in respect of which the defendant, collectively or individually, has admitted its guilt through the regulatory process:

> "*Every fact set out in the Decision is equally admitted by every addressee unless the Decision itself draws a distinction between some addressees and others. The CAT ruled that some of the facts admitted are non-essential and therefore not binding for the purposes of Article 16. That does not make them any less admitted for the purposes of the application of the abuse of process doctrine*.[35]"

4.12 The defendants also sought to argue that, by giving binding effect to admissions made as part of a settlement procedure, the Tribunal's decision would deter addressees from entering the settlement procedure and thus breach the duty of sincere cooperation set out in Article 4(3) TFEU, which requires Member States to assist each other and to facilitate the achievement of the Union's objectives when fulfilling EU obligations.[36]

4.13 Rose LJ disagreed with this argument, stating that the Commission had made clear, both in previous cases and in the Damages Directive, that:

> *"For every statement by the EU institutions to the effect that the settlement procedure is an important weapon in the competition enforcement armoury, one can find a corresponding statement that the directly effective right of a cartel victim to claim damages in the national court strengthens the working of the competition rules and that actions for damages make a significant contribution to the maintenance of effective competition in the Community: see for example Courage v Crehan at [27]."*

4.14 This is a clear and helpful judicial confirmation as to the need to balance the rights of victims of cartels to claim damages in *private* follow-on actions, on the one hand, with the use of the settlement and leniency *public* regimes to encourage the discovery of the same secret cartels, on the other.

4.15 Finally, an interesting jurisdictional implication of the binding admissions regime is the part it will play in continuing to encourage the use of the UK as a private litigation regime post-Brexit. Providing the claimant can demonstrate that the admissions were given in a context whereby the rights of defence of the admitting defendant were respected, it may be

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[35] *AB Volvo (publ) and others v Ryder Ltd and others* [2020] EWCA Civ 1475, at paragraph 49.

[36] Ibid, at paragraph 80.

problematic for a defendant in a UK court to resile from admissions given to other public enforcement authorities within or without the EU without engaging the doctrine.[37]

4.16 In a recent judgment, the Tribunal applied the concept of binding admissions to non-settling defendants.[38] The hearing concerned related to the collective proceeding brought by Mr Merricks against Mastercard following the Commission's 2007 infringement decision concerning cross-border EEA multilateral interchange fees ("MIFs"). The *Merricks* judgment arguably extends the doctrine, albeit in a highly fact specific way, in that it finds that defendants in national proceedings may be bound by recitals in Commission decisions in circumstances where they had the *opportunity* to contest the facts concerned but declined to do so. In particular, where Mastercard was bound by recitals as to the level of MIF in circumstances where it was clear on the face of the infringement decision that Mastercard had had the opportunity to raise evidence in relation to alternative levels of MIFs before the Commission, but had not done so. [39]

4.17 In relation to abuse of process, the Tribunal considered that although the case did not relate to a settlement process (in contrast to the *Trucks* decision considered above), it was still necessary to consider the facts of the proceedings before the Commission for the purposes of the application of the abuse of process doctrine. The Tribunal took into account the repeated meetings that Mastercard had had with the Commission during the course of the proceedings and in which Mastercard had also had the opportunity to submit empirical evidence justifying the level of the MIF, but concluded that it was clear that Mastercard had disavowed any intention to justify the level of the MIF. The Tribunal further considered email evidence (cited in recital (378) of the infringement decision) that showed that consideration of follow-on damages had been central to Mastercard's strategy not to engage in consideration of an exemptible level of MIF. The Tribunal therefore concluded that to allow Mastercard to advance an alternative level of MIF as the counterfactual would, on the particular facts, amount to an abuse of process.

4.18 As discussed below, the scope of the findings of fact made during the public enforcement stage which are considered to be binding when applied to the private damages action becomes particularly important when those facts are considered relevant to the court's determination of the issues of causation and quantum. In this way, admissions made at the settlement stage may serve to bind the damages court, not in an abstract sense, but as regards the very real question of whether the conduct caused loss and the likely estimate of how much.

(b) Disclosure of evidence gathered during the public enforcement phase

4.19 In the context of a follow-on claim, there are many legitimate reasons why a court may question the extent to which it really needs to revisit (including through requiring extensive disclosure) the facts underpinning the infringement finding. Liability has been established. The court is only concerned with the issues of causation and quantum. These discrete questions are to largely be determined through the application of expert evidence. In particular, where this expert testimony will largely turn upon econometric analysis that, once the relevant data pertaining to the defendants' cost and price setting (within and without the cartel period) has been obtained, will produce a scientifically derived overcharge.

4.20 In an important ruling, the Tribunal set out the principles that it considered would apply generally to disclosure in follow-on damages cases. The Ruling acknowledged the need for flexibility as the case progressed, but proposed a starting point that would focus upon the

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[37] Although there remains scope for argument with regard, for example, to the justification for the application of the doctrine given by the Court of Appeal at paragraph 52, referring to the knowledge of any settling party as to the likelihood it would face follow-on damages actions on other member states and the express confirmation given by such a party that its rights of defence had been observed in the context of the Commission's settlement regime.

[38] *Walter Hugh Merricks CBE v Mastercard Incorporated,* [2023] CAT 15

[39] Ibid, paragraph 139

production of data for use by the experts accompanied by statements as to the relevant entities' pricing and negotiation policy and cost structures[40], rather than a "bottom up" analysis of the relevant factual context:

> *"We would wish to hear submissions on this at the next CMC but our present view is that we doubt that the issues can be approached from the 'bottom up' on the traditional evidential basis of witness statements from the various key employees regarding the numerous contemporary emails, notes of meetings and telephone conversations, and so forth, on which they would then be cross-examined: see in that regard the observations of Rose J (as she then was) in the air freight cartel litigation: Emerald Supplies Ltd v British Airways PLC [2015] EWHC 2904 (Ch). Instead, it seems to us that the issues will probably have to be approached by the analysis of large amounts of pricing and market data, using established economic techniques to determine what, if any, was the effect of the infringement on prices and any pass-on through the relevant period. That is not to say that evidence of witnesses of fact would be irrelevant but we anticipate it will be of a more general nature, for example explaining how the OEMs priced their trucks and the nature of the relationship between gross and net prices, the significance of configurators, and so forth. The same approach would apply to the prices charged by the claimants in the context of pass-on. This has significant implications for the nature of the disclosure to be ordered."* [41]

4.21 The Tribunal also set out some general principles that it considered would apply to most cases; broadly: orders for standard disclosure would not generally be made, with disclosure being confined to relevant documents (with relevance being derived by reference to the pleadings). [42] By exception, disclosure might be ordered in relation to matters not specifically pleaded, but a strong justification would be required to permit disclosure along the lines of the "train of enquiry" test.[43]

4.22 In setting out this approach, the Tribunal emphasised that the nature of its inquiry in a follow-on damages case was confined to the questions of causation and quantum, rather than liability. The Tribunal also noted that it was not required to follow the disclosure rules of the High Court set out in Rule 51 CPR, but referred instead to the Tribunal's own practice direction "*Disclosure and Inspection of Evidence in Claims Made Pursuant to Parts 4 and 5 of the Competition Appeal Tribunal Rules 2015*", introduced in 2017 to ensure that the practice and procedure of the Tribunal with regard to disclosure and inspection of evidence is aligned with the relevant requirements of the Damages Directive.

4.23 Indeed, the approach followed by the Tribunal in the Ruling above and consistent with the 2017 Practice Direction is faithful to the Damages Directive. As readers will be aware, the Damages Directive provides for a disclosure regime that seeks to bring EU member state disclosure regimes in competition law cases up to a *minimum* standard. This is in a context where a number of those member states had, and have, no tradition of disclosure as would be understood as fit for purpose by common law lawyers. In turn, that minimum standard described by the Directive was narrower (and certainly placed a greater emphasis upon the need to avoid cost and tie disclosure to identified issues) than the disclosure regime found in England & Wales at the time.[44]

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[40] For the claimants pertaining to cost and price setting as regards the allegedly overcharged product; for the defendants pertaining to downstream negotiations as might be relevant to matters of pass-on.

[41] *Ryder Limited & Another v Man SE & Others* [2020] CAT 3

[42] See also the Tribunal's relevant practice direction cited below.

[43] *Compagnie Financière du Pacifique v. Peruvian Guano Co*. (1882) 11 QBD 55 at paragraph 63

[44] Certainly with reference to traditional standard disclosure principles and also, arguably, by reference to the Initial Disclosure and Extended Disclosure models found in the PD51U "pilot regime" (now PD77AD).

4.24 Stepping back, this efficient approach to disclosure and its relationship with the prior public enforcement process proceeds on the basis that:

(a) the Tribunal may seek to limit its inquiry to the issues of causation and quantum, with the corollary being that it is unlikely to be concerned with issues of fact pertaining to liability as dealt with by the regulator and found in the infringement decision. In some senses, this constitutes a decoupling for disclosure purposes between issues of liability, as opposed to causation and quantum;

(b) the need to explore issues of fact considered at the investigative stage should be further reduced by the application of the binding recitals/binding admissions doctrine. If the defendants are precluded from contesting such matters, then there should be no need to contest them and they are not in issue for disclosure purposes;

(c) the determination of issues pertaining to causation and quantum (together with pass on) are, primarily, matters for a scientifically-based determination involving expert (econometric) evidence. Disclosure for these purposes may be most efficiently designed around the requirements of the experts concerned and, in the first instance, will most probably focus upon data and supporting material.

4.25 The approach is not absolute. For example, in various named claimant Trucks proceedings, [45] contemporaneous documents gathered during the public enforcement investigation and found on the Commission's file were disclosed into the proceedings, albeit the documents were themselves filtered. In particular, documents from the Commission file were not disclosed (at least until later in the trial preparation process[46]) where they related to conduct that fell outside of the timeframe of the cartel period as found by the Commission or where the conduct related to products that fell outside the ambit of the claims concerned.

4.26 This approach has a clear logic, seeks to achieve efficiency and is in line with the Damages Directive. The position of the Tribunal in seeking to steer a middle line is also evident when both the defendants and the Commission itself queried whether allowing disclosure from the case file at all would be consistent with the obligations found under the Damages Directive, which applied to the second and third wave Trucks claims.

4.27 However, in the event, the relevance of the fact pattern surrounding the original investigation regarding the way the cartel operated, together with the need for granular factual disclosure as to the way it may have been implemented, became increasingly apparent as the various Trucks cases progressed to trial.

4.28 For example, an issue arose on the pleadings as to whether it was "*plausible*" that the conduct that had taken place was capable of having *caused* changes to the actual (net as opposed to list) prices that the claimants as customers were actually charged. This line of argument required both the production of detailed witness evidence as to the price setting and negotiation processes conducted by the defendants during the cartel period, together with disclosure of large volumes of factual communications evidence (largely by agreement) pertaining to those negotiations. A factual inquiry and review of relevant documents was also required to ascertain the extent to which the cartel conduct impacted upon net prices themselves. The plausibility theories also contended that cartel meetings were too infrequent to have caused impacts upon the UK market in any sustainable fashion: again requiring evidence of and regard to the fact pattern of the cartel.

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[45] In this context we refer to the Trucks litigation in general terms as involving some or all of the various identified claimant groups in the seven actions contained, variously, in the first, second and third rounds of proceedings including Royal Mail, British Telecom, the Ryder Claimants, Dawson Group and the Veolia, Suez & Wolseley claims.

[46] *Ryder Limited & Another v Man SE & Others* [2022] CAT 41

4.29 Some of the defendants also ran "mitigation" arguments, to the effect that any inflation of cartelised products should be offset for the purposes of damages by reductions on non-cartelised products. These arguments, in turn, required disclosure of documents on the Commission file relating to the non-cartelised products. Similarly, arguments arose as to the extent to which conduct prior to or subsequent to the cartel period may have been affected by cartel conduct. This, again, required the eventual disclosure of a wider category of documents gathered by the Commission than originally envisaged as necessary, pertaining to both the before and after cartel periods.

(c) Relevance of the fact pattern to findings on causation and quantum

4.30 Every case will of course turn on its own facts. However, it became clear from Trucks that the broader factual matrix, including that unearthed by the initial public enforcement investigation in connection with liability and then supplemented by factual evidence held by the parties, was eventually required in a private damages action concerned with causation and liability.

4.31 In respect of causation, the Tribunal in its judgment in *Royal Mail* earlier this year appears to have relied heavily upon its understanding of the fact pattern around the cartel conduct as found in the Commission decision and explored with the witnesses during that trial to determine whether the issue of causation had been established by the claimants. In its conclusions on the issue, it relied upon the facts of the cartel as found to draw conclusions as to the likely existence of effects, namely that there were: "*…sound a priori reasons for expecting that a concerted attempt by all the major European truck suppliers to restrict price competition that persisted over a 14-year period would to some extent have succeeded in materially affecting transaction prices*." [47] The approach appears consistent with the notion of the importance of the findings made and evidence uncovered at the public enforcement stage and the role they may play in the determination of issues live in the private damages action.

4.32 The facts also appear to have played a role in the Tribunal's determination of *quantum* in the *Royal Mail* proceedings. It is clear from the judgment that difficulty was experienced in seeking to resolve these questions solely on the basis of a "data-driven" scientific determination relying upon expert econometric evidence. Instead, it is clear the Tribunal needed to rely upon its understanding of the factual operation of the cartel and its impacts in the market, including as derived from the Commission settlement decision, in order to make its determination as to quantum. In an important passage from the *Royal Mail* judgment, the Tribunal explains that when applying a "broad axe" to the issue of quantum it was necessary to place weight upon the factual context and witness evidence against the background of the difficulties it experienced with the irreconcilable conclusions drawn by the respective experts from the econometric evidence:

> "*Having reached that conclusion, we then have to place a value on the likely Overcharge. In doing so, we adopt the "broad axe" approach in reaching an overall answer rather than seeking to "score" the experts point by point across the various aspects of agreement and disagreement between them. To engage in a detailed mathematical exercise of this kind might appear to provide some credibility to the figure we end up with. However, we take the view that it would be an exercise in spurious accuracy to attempt to do so. Several of the imperfections in the experts' regression models do not yield a definitive solution and we believe that no regression model could. As we made clear in the sections above on exchange rates and the GFC, the true value of the Overcharge we believe lies somewhere between the two experts' diametrically opposed positions. In the circumstances, we have no choice but to make a judgment based both*

[47] *Royal Mail Trucks Limited v DAF Trucks Limited & Others* [2023] CAT 6 at paragraph 477.

on the evidence that was presented in the experts' models, and on a wider appreciation of the factual context and witness evidence." [emphasis added] [48]

4.33 It is important at this stage to step back and reflect on whether the laudable approach (consistent with the approach advocated by the European Commission and reflected in the Damages Directive)[49], namely to limit disclosure to the minimum necessary in such cases and trusting data and the econometric evidence to do the hard work on causation and quantum, is achievable in practice.

4.34 Alternatively, whether a "mixed approach" will always be required in practice and which emphasises the linkages between the public investigation/decision and the private action. Where a detailed understanding of the operation of the cartel, its implementation and its impacts upon price setting and negotiation may play at least an equal role alongside a "data-driven" econometric approach in unpicking the thorny questions of causation and likely overcharge. And, if the mixed approach is required, whether it would be more efficient in the medium term for that to be recognised at the outset of the trial process and used to the inform of the scope of disclosure ordered at an earlier stage?

4.35 In this regard, the need to have careful regard to the factual matrix (including as established in the original regulatory investigation) as well as an econometric/data driven approach is not unique to the *Royal Mail* case.

4.36 In *Britned*, the only other follow-on damages award made in the UK, it is striking the extent to which the court was required to carry out a careful assessment of both the factual and economic evidence.[50] This assessment required a thorough weighing up of both economic and factual evidence. In particular, the court found that weight could be placed upon one of the two econometric models submitted in evidence, but then proceeded to determine the key questions pertaining to overcharge (such as whether an overcharge arose as a function of the inflation of common costs to bids or technical inefficiencies), through a granular and mixed factual/economic assessment as to the nature of the cartel conduct, the price setting and negotiation processes it may have affected and, where relevant, econometric evidence as to the existence of margin inflation during the relevant period.[51]

4.37 Given the complexities the courts and the Tribunal have faced when seeking to rely upon econometric evidence to determine issues of causation and quantum, together with the important role that the factual matrix has played in resolving these difficulties including through the application of the "broad axe", it is suggested that a mixed approach is likely to continue to play a role in assessing damages in follow on actions.

4.38 In turn, this need to have regard to the facts will continue to see a close and continuing overlap between the findings and documentary record produced as a consequence of the public enforcement regime and the efforts of the courts/Tribunal to determine causation and quantum in the context of private damages actions. This nexus will emphasise the role not only of the infringement decision and admissions made in the course of any leniency or settlement process, but also of access by way of disclosure to the documentary record produced in the context of the investigation. But what happens when there is no prior investigation and the public and private enforcement processes proceed in parallel? These are the issues to which we now turn in the context of stand-alone private actions.

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[48] Ibid at paragraph 479.

[49] In July 2020, the Commission clarified, in a communication, that under the Damages Directive disclosure requests should identify specific items or categories of evidence "*as precisely and as narrowly*" as reasonably possible given available facts, and with regard to the proportionality of the cost of the disclosure exercise concerned. See also Article 5 Damages Directive.

[50] *BritNed Development Limited v ABB AB & Another* [2018] EWHC 2616 (Ch)

[51] *BritNed Development Limited v ABB AB & Another* [2018] EWHC 2616 (Ch) at 438 et seq.in an aspect of the approach to quantum determination in connection with that part upheld upon appeal (see [2019] EWCA (Civ) 1840).

5. CONCURRENT PUBLIC AND PRIVATE ENFORCEMENT: A COMING TOGETHER?

5.1 In September 2021, the CMA's Director of Litigation noted that: "*The CMA's work will be complemented by private enforcement and* […] *it will increasingly be intervening in private actions*".[52]

5.2 It is suggested that this comment was prescient and marks an increasing trend of concurrent private and public enforcement. We consider briefly below two aspects of that trend, namely:

(a) the growth of consumer focused collective actions; and

(b) CMA interventions in private actions.

(a) Consumer focused collective actions

5.1 The Supreme Court's relaxation of the certification thresholds in Walter Merricks' collective claim against Mastercard in December 2020, and the subsequent growth in the number of collective actions which have since been certified by the Tribunal, have promoted new overlaps between the public and private realms of competition law enforcement in the UK. Small- and medium-sized businesses and individuals were once reliant on the public enforcement regime to address alleged consumer harms arising as a result of a failure of competition (whether through the market investigation regime or individual Competition Act 98 antitrust investigations). However, a new enforcement route has gathered pace with remarkable speed, where class representatives seeking collective redress on behalf of a claimant group are now able to pursue many of the "public" consumer focused outcomes through private litigation that were previously reserved for regulatory action.

5.2 Many of these actions pre-empt any attempt to deal with the issue through public channels Of the 26 collective claims currently before the CAT, 16 of these have been brought on a standalone basis.[53]

5.3 It is also notable the extent to which many of these actions have at their heart alleged wrongs that might be said to fall more easily within the ambit of "consumer law", rather than conventional competition law infringements. This has required many of the claims to adopt somewhat novel approaches to categories of abuse of dominant positions or restrictions of competition to place the claim within the narrow UK class action regime, presently reserved as it is for breaches of competition law under the UK Consumer Rights Act 2015.

5.4 On one view, this is a clear example of the "private" regime fulfilling an important role in supplementing public enforcement. The CMA itself has noted that *"[t]he availability of private redress for consumers and businesses is an important complement to the CMA's public enforcement".*[54] It has also noted in other commentary that it is "*pleased*" to see an increase in collective proceedings before the CAT.[55]

5.5 However, it may also be argued that the dramatic rise in such claims simply reflects a gap in UK law in the field of consumer redress, which requires legislative attention. And whilst the resultant vacuum has been filled in the very recent past (following *Merricks*) by a

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[52] Global Competition Review, *CMA likely to intervene in private competition claims,* citing comments of Jessica Radke, CMA (30 September 2021) accessed at https://globalcompetitionreview.com/article/cma-likely-intervene-in-private-competition-claims-says-official

[53] Albeit that one of these claims was supported by a 2017 market review decision of Ofcom (Justin Le Patourel v BT Group Plc), and one has been refused certification (Dr Liza Lovdahl Gormsen v Meta Platforms, Inc.).

[54] Service of documents on the CMA in court proceedings relating to competition law - GOV.UK (www.gov.uk)

[55] Global Competition Review, *CMA likely to intervene in private competition claims, says official* (30 September 2021) accessed at https://globalcompetitionreview.com/article/cma-likely-intervene-in-private-competition-claims-says-official.

plethora of consumer rights motivated stand-alone opt-out class actions, we now have a situation where the "private" regime under the 2015 Act is performing, by default, a quasi-"public" enforcement role that it was never anticipated it would fulfil.

5.6 The consumer focus of these actions is rather clear. For example, it is notable that class representatives have tended to be individuals with a historic interest in public enforcement and consumer welfare: Justin Gutmann, who has spearheaded three boundary fares actions and one action against Apple, was previously a senior officer at Consumer Focus, a policy and campaigning body. Similarly, Justin Le Patourel, class representative for a mass claim against BT, is a former director at Ofcom. These private claims might be said, by some, to embody a genuine spirit of public enforcement, with a focus on consumer protection, accountability and deterrence, as well as compensation for a consumer class who would otherwise go unacknowledged.

5.7 The potential liability to which defendants are now exposed will also, should any of the claims succeed, operate as a form of deterrence as might previously have required public enforcement intervention. The scale of this deterrence role remains to be seen – by and large the actions concerned remain at a nascent stage and may ultimately fail - but has the potential to be significant.

5.8 An obvious sector of interest for such class representatives lies in the field of so-called digital harms, with the products concerned used by millions of consumers worldwide. Public antitrust enforcement has had an impact in this sector to date that might at best be described as partial. There remains a concern amongst regulators that when dealing with entities of such scale and deep pockets, administrative fines are essentially historic by the time the administrative and appeal process has concluded. Moreover, they are rarely of sufficient scale to amount to anything other than a "cost of doing business". These concerns provide some explanation for the recent steps taken to swap out the antitrust tools for the regulatory rule book when engaging with the digital sector. It remains to be seen whether the estimated liabilities arising from mass consumer claims in the digital sector actually manifest and serve a role in checking behaviour.

5.9 It will also be interesting to observe the extent to which the collective claims interact with the developing regulatory regime coming into force under the UK Digital Markets Unit and, probably more significantly, the EU Digital Markets Act. The Commission has stated that it expects the introduction of these regulatory controls to greatly reduce the extent to which "antitrust" is used as the enforcement tool in the digital sector. However, this may be a little simplistic in jurisdictions such as the UK, where there is great potential for consumer class actions to operate symbiotically with these regulatory codes. In particular, for a species of action seeking compensation in reliance upon findings produced by the regulatory regime (even if such actions are not strictly speaking "follow on" actions benefiting from the "binding recitals" doctrine discussed above).

5.10 In summary, there remain questions as to how effective or beneficial for the public interest the development of these consumer focused class actions will actually be. The fundamental question remains as to how many of these "consumer claims" will actually succeed when brought within the wrapper of a competition law class action. In addition, collective claims are, almost invariably and out of necessity, funded by litigation funders whose ultimate goal, quite legitimately, will always be to make a return on their investment. Their motives and appetite for such cases will be sporadic and opportunistic. As such, they will never serve as an adequate substitute for the policy-led and planned public interest interventions carried out by government regulators. Concerns are also raised from time to time concerning the fact that commercial claims vehicles and funders are lightly regulated in the UK, relying upon self-policed standards. There is, accordingly, a basis to argue that a tension exists between the public and private sphere in this area. Whether this tension will resolve may depend to a large extent upon the regulators themselves, and whether they are prepared to take proactive steps to ensure such actions coexist in an efficient and productive manner with the public enforcement regime. We turn to this topic next.

(b) The role of public enforcement intervention in private antitrust actions

5.11 A clear legal framework to govern regulatory intervention can be found, even if its application remains somewhat nascent. Under the relevant Practice Direction, any party whose statement of claim raises issues relating to Chapter I or II of the Competition Act 1998 or Article 101 or 102 TFEU must serve a copy of the statement of claim on the CMA at the same time as it is served on the other parties to the case.[56] Similar provisions apply on appeal to the Court of Appeal.[57]

5.12 The CMA may then elect to intervene in private actions relating to competition or consumer law before the Tribunal, High Court, Court of Appeal and Supreme Court. The CMA may also participate in private actions in the Tribunal. Alternatively, the CMA may elect to simply request that they are kept up to date with developments.[58] This process of keeping the CMA updated is assisted by that fact that under the CAT Rules 2015, not only is the CMA to be provided with a copy of the claim form (in both individual and collective opt-out damages proceedings), but should also be provided with a copy of the defence and the reply.[59] Pursuant to Rule 50, the CMA may submit written observations on the application of the Chapter I and II prohibitions to the Tribunal and, with the Tribunal's permission, may also submit oral observations.

5.13 The Tribunal's approach to regulatory interventions may depend upon the context. The Tribunal President has recently commented that in the context of a *follow-on claim*, "*the nexus between public enforcement and private claim is clear on its face*".[60] By contrast, the position may be more complex in respect of stand-alone claims. In generic comments made at a recent roundtable conference, the Tribunal President questioned whether the relationship between public and private enforcement may be less clear in the context of *stand-alone* actions:

> "*Less so in the case of stand-alone actions. Here, it seems to me, that the claim should come to trial, and be determined, as swiftly as possible. There is provision for regulator involvement, but it seems to me that that involvement ought generally to be less rather than more. That said, if the CMA wanted to intervene, the answer would be "yes", not "no": but I would want to understand the basis of that interest*."[61]

5.14 For its part, the CMA has itself indicated that it is most likely to intervene in cases which raise legal or policy issues. In 2021, Jessica Radke said that her agency's power to submit oral or written observations under the CAT Rules is especially important where claims raise policy or legal issues that could affect the CMA's own decisions.[62]

5.15 At a recent CPO hearing in respect of Dr Lovdahl Gormsen's collective claim against Meta, the Tribunal President requested submissions from the parties as to whether the CMA should be invited to make submissions on the proceedings given its ongoing parallel regulatory investigation into the company. Whilst his general view was that the courts would be interested in hearing what the CMA had to say, Mr Justice Smith indicated that the judiciary

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[56] Competition Law Practice Direction, paragraph 3.

[57] Practice Direction 52D, paragraph 7.1(3).

[58] As in *1433/7/7/22 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others.*

[59] The CAT Rules 2015, Rules 33(7), 35(6), 36(4), and 76(6).

[60] Page 2, Private Enforcement of Competition Law 2023, Judges' Roundtable, Remarks of Sir Marcus Smith (7 February 2023) accessed at https://www.catribunal.org.uk/sites/cat/files/2023-02/2023_PRIVATE%20ENFORCEMENT%20OF%20COMPETITION%20LAW%202023.pdf.

[61] Page 2, Private Enforcement of Competition Law 2023, Judges' Roundtable, Remarks of Sir Marcus Smith (7 February 2023) accessed at https://www.catribunal.org.uk/sites/cat/files/2023-02/2023_PRIVATE%20ENFORCEMENT%20OF%20COMPETITION%20LAW%202023.pdf.

[62] Global Competition Review, *CMA likely to intervene in private competition claims, says official* (30 September 2021) accessed at https://globalcompetitionreview.com/article/cma-likely-intervene-in-private-competition-claims-says-official.

itself still needs to grapple with questions of regulatory involvement in private proceedings and the extent to which the judicial and regulatory processes should remain separate, describing such circumstances as *"terrain that is largely uncharted "*.[63]

5.16 The interplay between "public" and "private" interests was discussed expressly at the hearing, in circumstances where Meta is facing concurrent private and public proceedings concerning related allegations. The Tribunal stayed Dr Gormsen's CPO application on the basis that "*[w]ithout significantly more articulation, there is no blueprint to trial*".[64] During the hearing, the Tribunal President questioned how far the public interest was relevant in assessing the benefit of a case to class members, noting that "*this is something which is significantly unexplored in the case law*".[65] Counsel for Meta acknowledged that "*private enforcement serves a useful public interest*" in cases where the regulator is not also investigating the defendant, but argued that it was not a factor to account for in this case as the public interest would be well served by the fact that the CMA is conducting its own concurrent investigation into Meta.[66] Having not intervened, the CMA was unable to express its view. The PCR now has six months to file additional evidence to improve the proposed methodology. It remains to be seen whether the CMA will be more involved (if the CPO application resumes) to assist the Tribunal with difficult questions such as how best to address the public interest involved in such claims in circumstances where a concurrent investigation is already on foot in the public enforcement sphere.

5.17 There is some scope for tension between the position of the CMA and the Tribunal, in circumstances where the CMA may consider itself under some pressure to have some involvement in actions that overlap and potentially lead to inconsistent outcomes with its own concurrent investigations and where liability in either forum remains unresolved.

5.18 Whether this engagement will be productive or lead to inconsistency will require careful case management. For reasons set out above, it may be that the CMA is better placed than the Tribunal will ever be to investigate and delineate the scope of infringing conduct. However, the need for effective and timely access to justice is also an important priority, recognised by the CMA and one that the Tribunal notes that it is under an obligation to deliver, particularly in a context where regulatory investigations, for no lack of effort, take a long time to conclude.

5.19 In practice, we understand that at the time of writing the CMA has currently intervened in five private actions to date.[67] Notably, the five cases are all stand-alone cases (although, it must be noted that Mr Le Patourel's collective claim against BT is heavily based on a regulatory report issued by Ofcom). In each instance, there was a related public investigation, indicative of a public interest in the private action. For example, a CMA spokesperson justified the watchdog's intervention in Epic Games' claim against Alphabet Inc. and Google LLC, stating that the CMA believed the proceedings overlapped in a "*number*

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[63] *1433/7/7/22 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*, Transcript of CPO Application Hearing (Day 3), pg. 28.

[64] *1433/7/7/22 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*, Judgment (CPO Application), 20 February 2023, para. 57.

[65] *1433/7/7/22 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*, Transcript of CPO Application Hearing (Day 3), pg. 25.

[66] *1433/7/7/22 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*, Transcript of CPO Application Hearing (Day 3), pg. 26.

[67] Service of documents on the CMA in court proceedings relating to competition law updated 30 January 2023, accessed on 25 March 2023 at https://www.gov.uk/government/publications/competition-law-court-proceedings-serving-documents-on-the-cma/service-of-documents-on-the-cma-in-court-proceedings-relating-to-competition-law These are: *1378/5/7/20 Epic Games, Inc. and Others v Alphabet Inc., Google LLC and Others*; *1381/7/7/21 Justin Le Patourel v BT Group PLC*; *1433/7/7/22 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*; *1408/7/7/21 Elizabeth Helen Coll v Alphabet Inc. and Others*; and *1403/7/7/21 Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd*.

of areas" with both the agency's investigation into Apple's App Store and its market study into Google and Apple's ecosystems, "*which is why it makes sense for us to be involved*".[68]

5.20 Such interventions may also limit themselves to discrete issues. For example, the CMA made a limited intervention in class representative Justin Le Patourel's opt-out collective proceedings against BT Group PLC, confining its intervention to the legal test for excessive pricing whilst reserving the right to intervene more fully at a later stage.

5.21 In terms of sector focus, it is notable that the CMA has made a number of interventions in private actions claiming abuse of dominance in the digital sector, such as Liz Coll's claim against Alphabet and Dr Rachel Kent's claim against Apple. As noted above, the digital revolution has led to increased regulatory scrutiny of digital markets by competition authorities, much of which is ongoing and actively being transferred to a regulatory rather than purely antitrust setting. The CMA's Annual Plan for 2023 to 2024 has also recognised the need to clamp down on cartel behaviour in light of the ongoing cost of living crisis by making it an area of focus in order that "*[p]eople can be confident they are getting great choices and fair deals*".[69]

5.22 Collective proceedings also raise particular questions for the regulator in deciding when to intervene. As noted above, the CMA chose not to intervene in Dr Lovdahl Gormsen's opt-out collective proceedings against Meta at the certification stage. Although the CMA indicated it was watching the case and would want to be present at trial, the watchdog told the Tribunal that it did not need to intervene in the CPO application.[70] Furthermore, the Tribunal opted not to invite the authority to intervene despite expressing its interest in hearing the CMA's views. Mr Justice Smith commented that "*in an ideal world*" any CMA submissions ought to have taken place before rather than after the hearing:

> "*inviting what is in effect further material after both sides have sat down is a course that is asking for trouble. Trouble may not result, but one should not ask for it* […]"[71]

5.23 Timing issues will inevitably arise and be difficult to manage when the public and private enforcement routes are running in parallel. In the case of Dr Rachel Kent's claim against Apple, the CMA began its investigation into abuse of dominance in the Apple App Store on 3 March 2021,[72] shortly before collective proceedings were commenced on 11 May 2021.[73] By contrast, collective proceedings concerning the Play Store were issued on 29 July 2021, before the launch of the regulator's investigation on 10 June 2022.[74][75]

5.24 In terms of the upside of intervention, the CMA benefits from being informed on the case's progress, having access to the case materials and being able to make submissions. In theory, such involvement should not prejudice any ongoing CMA investigation and both proceedings should be able to progress quickly and efficiently. However, the CMA has acknowledged the potential for complications to arise when private actions overlap with an

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[68] Global Competition Review, *UK tribunal allows CMA to intervene in private antitrust case for first time* (6 December 2021) accessed at https://globalcompetitionreview.com/article/uk-tribunal-allows-cma-intervene-in-private-antitrust-case-first-time.

[69] CMA Annual Plan 2023 to 2024 (23 March 2023) accessed at https://www.gov.uk/government/publications/cma-annual-plan-2023-to-2024/cma-annual-plan-2023-to-2024 .

[70] *1433/7/7/22 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*, Transcript of CPO Application Hearing (Day 3), pg. 25.

[71] *1433/7/7/22 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*, Transcript of CPO Application Hearing (Day 3), pg. 78.

[72] CMA case page, *Investigation into Apple AppStore*.

[73] *1403/7/7/21 Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd*, Summary of the collective proceedings claim form (4 June 2021).

[74] *1408/7/7/21 Elizabeth Helen Coll v Alphabet Inc. and Others*, Summary of collective proceedings claim form (13 September 2021).

[75] CMA case page, Investigation into suspected anti-competitive conduct by Google.

ongoing CMA investigation or market study and suggested that intervention in these circumstances should be minimised.[76]

5.25 Such complications may take many forms. For example, how much weight is to be given to a request from the CMA for a particular claim to be certified or not to be certified, citing the existence of an ongoing investigation and the risk of issue conflict? Following an intervention, is there a risk that the scope of the action is widened beyond the facts and issues pleaded and new avenues of investigation are opened up at trial (characterised by Justice Smith as a sort of *"cottage industry"*)? How is relevant evidence discovered in the context of the investigation to then be managed through the trial process, including respecting rights of defence at the investigative stage? It is also difficult to imagine that the outcome of a private action would not influence the outcome of a regulatory investigation into the same alleged harm. There are practical benefits to such parallel proceedings, not least in terms of efficiencies and costs, but there may also be a risk that proper regulatory process is disturbed or abused.

6. CONCLUSION

6.1 So where does this discussion leave us on the essential topics that we framed at the beginning of this article?

6.2 With regard to the ***competition enforcement process*** and its interconnected steps, it is suggested that there is and should be a role for public or private enforcement to engage with each stage.[77] It may be that the public enforcement regime is much better placed to engage with the early phases, given the tools at its disposal to unearth conduct and build out the evidential picture. However, an enforcement gap would arise were the private regime to fail to ensure that its own processes were able to grapple with such cases, in circumstances where the regulators, exercising broad discretions under carefully described prioritisation criteria, decide not to take the matter forward.

6.3 Turning to the ***impact upon the leniency regime*** of the ever growing threat of follow-on litigation: there is some early evidence that the protections under the Damages Directive are beginning to have some effect in encouraging a growth in immunity applications again, although the trends are nascent. However, there are real arguments that the incentives to admit or otherwise settle have reduced again following the enduring resonance of factual findings and admissions following the various binding recitals judgments. In particular, it is becoming increasingly difficult to find a scenario where a type C partial leniency application affording only an incremental reduction from fine makes sense, given the damages exposure that will arise on a joint and several basis and the restrictions on the ability to contest factual findings as a result of the admissions made. Perhaps the incentives available to this type of applicant require re-examination, even where partial type C leniency serves the less important function of assisting with the establishment of the infringement finding rather than its initial detection.

6.4 In the context of the follow-on case, what of the ***relationship between the initial enforcement process*** (including both the infringement decision and the evidence it unearths) ***and the subsequent private damages action seeking compensation****?* There are too few English judgments to draw definitive conclusions, but the early signs are that the determination of causation, and the application of the broad axe to questions of quantum, will lean as heavily upon the essential fact pattern of the cartel and its implementation as they will upon a scientific econometric determination. If so, it follows that the findings and evidence produced by the public enforcement regime will not so much as connect with, but rather intertwine with and continue to run through, the private litigation

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[76] Global Competition Review, *CMA likely to intervene in private competition claims, says official* (30 September 2021) accessed at https://globalcompetitionreview.com/article/cma-likely-intervene-in-private-competition-claims-says-official.

[77] With the possible exception of detection in the context of secret cartels, which would usually be best left to the reporting and investigative tools available to the public enforcement sphere.

process to determine compensation. Whether this continuing interrelationship was reflected in the model upon which the Damages Directive and its approach to disclosure was based, or the manner in which access to the infringement decision and evidential fruits of the investigation is interpreted by the Commission, is a more involved question for another day.

6.5 Finally, like it or not, the number of examples in which both public and private cases are climbing ***concurrently*** across the competition enforcement framework is increasing. This presents the opportunity for good outcomes. But, it is suggested, this will require proactive and sensitive management on the part of both the UK regulators and the Tribunal, which is difficult. Too much case management in this regard may produce delay or frustrate access to justice. Too little will result in the risk of inconsistent decisions, legal uncertainty and, ultimately, unfairness. Perhaps each such matter, particularly those ostensibly concerned with large scale consumer issues, requires assessment on a case by case basis as to which regime is in the lead at each stage of the enforcement process noted above. That will only be achieved through active and timely engagement and coordination from both private and public sides of the regime. Which, of course, is easier in the saying than the doing.