25th BURRELL LECTURE[1]

THE PRIVATE ENFORCEMENT OF COMPETITION LAW – REFLECTIONS UPON ITS DEVELOPMENT, PROGRESS AND CHALLENGES

For several years when I was in practice at the Bar, I was the chair of the Competition Law Association. In that capacity, I had to introduce a number of distinguished speakers for the annual Burrell lecture. The one thing I never imagined was that one day I would be the subject of such an introduction and be giving the lecture myself. So I cannot help feeling a slight imposter syndrome – and the sense that I should really have been making the introduction and now be sitting down with you to listen to a lecture from someone else.

Your chair suggested that rather than selecting a narrower, more focused topic, people might have some interest in hearing my reflections on the development of private enforcement of competition law over the many years that I spent first at the Bar and then on the Bench, and the challenges which it now presents.

When I started practice, and indeed for many years afterwards, private enforcement of competition law in this country was non-existent.

Competition law generally – or the law of Restrictive Trade Practices as it was more usually called at the time – was altogether seen as a very esoteric field. Although there was enforcement, it was entirely public rather than private. The Restrictive Trade Practices Act was very formalistic in its approach. An agreement which came within its scope (a "registrable agreement") was subject to registration in a register maintained by the Director General of Fair Trading. There *was* a specialist court, the Restrictive Practices Court, but only a very few such registrable agreements were challenged before the Court, where they could be justified under a number of possible public interest gateways.

And although a specialist Court, the Restrictive Practices Court was not well attuned to digesting economic evidence. In the 1999 Premier League case, about agreements governing the broadcasting of football matches, when hearing evidence from an economic expert on econometric analysis, the president of the Court, a judge of the Chancery Division now several years deceased and who I will not name, interrupted the witness to say:

> *"I have never listened to evidence in any court for an hour and understood so little of it as I have understood during the last hour.... I think that those who are asking the court to rely on this must be under no illusions that at the moment, so far as I am concerned, this is all washing over my head"*.

And a few moments later, he added:

> *"I am thinking of buying a little flag which I can raise when we get to a part of the case that I just do not understand,.... It is up at this part of the case."*

Well, full marks for judicial honesty. But we have come a long way since then.

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[1] Delivered to the Competition Law Association in Gray's Inn on 18 November 2025. An edited version of this lecture will be published in the *Journal of Antitrust Enforcement*.

There was of course the competition law of the then European Economic Community. However, in private actions, that featured largely when raised as a defence to some attempt to enforce or claim damages under an agreement. But such a "Euro-defence" – and the term had a pejorative ring – was regarded by many judges as the last refuge of a scoundrel seeking to evade their legal obligations.

There were I think four transformative events led to the modern era of private enforcement of competition law.

1. The case of *Garden Cottage Foods v Milk Marketing Board*, decided by House of Lords in 1983. Unusually for an appeal to the House of Lords, it concerned an interim injunction. But the case is notable for the definitive statement by House of Lords that a person claiming to be harmed by an abuse of dominance under European law – then Article 86 of the Treaty of Rome – can recover damages in an English court. That proposition is now so fundamental that it takes some imagination to appreciate that a full decade after UK membership of the Community, all three members of Court of Appeal, including Lord Denning MR, had considered that the contrary was well arguable.

2. The case of *Courage v Crehan*, decided by the European Court of Justice in 2001. That was a reference from the Court of Appeal. It was a case where EU competition law raised by way of defence to the enforcement by a brewer of a pub tie; but the defendant, Mr Crehan, also counterclaimed for damages. While the legal question concerned application of English *ex turpi causa* rule, the Court's ruling was a resounding endorsement of the importance of damages claims under competition law. The Court stated, at para 26:

   > *"The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."*

   However, there was still the problem that a grant of exemption under Article 85(3) could only be given by the Commission. And if parties notified an agreement to Commission with a request for exemption, that process would prevent a national court from finding that the agreement constituted a breach of competition law until the Commission took a decision. And an exemption decision had retroactive effect to the date of notification. Given the mounting pile of notifications at the Commission, most were never determined.

   In 1998, I represented Cardiff City Rugby Football Club in proceedings challenging a rule of the Welsh Rugby Union (WRU) concerning the grant of broadcasting rights as contrary to EU competition law. Because it refused to sign a long-term exclusive grant of its rights, the Cardiff club was denied its share of broadcasting revenue from WRU games, which put it under severe financial pressure. The Welsh rule corresponded to

the regulations of what was then the International Rugby Board (IRB). The case was due to come for trial in November 1998. But just a few months before, the IRB applied to intervene in the case and told the court that it had just notified its regulations to the Commission with an application for exemption. The WRU then said that they were also going to notify their rules to the Commission, although they had not yet done so. On that basis, the Court held that it should vacate the trial date and stay the proceedings. The claim was accordingly frustrated as Cardiff RFC could not wait for potentially years until the Commission took a decision. In fact, I need hardly add, the Commission never did take a decision on whether or not the rules should be exempted.

3. The Competition Act 1998, which came into force in March 2000. The new statute swept away the antiquated approach of the Restrictive Trade Practices Act and gave the UK a modern competition law, which mirrored the provisions of European competition law, with statutory invocation in section 60 of consistency in interpretation of domestic and European competition law.

4. The European Modernisation Regulation 1/2003, which abolished the rule that only the Commission could give exemptions under Art 101(3), and decentralised the application of European competition law to national courts. So the problems encountered in the Cardiff Rugby case were no more.

   And this was done with the express aim of facilitating private enforcement. Recital (7) to the Regulation states:

   > "*National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements*."

Over the same period, from about the late 1990s, the Commission in Brussels was adopting a more economic approach to the application of competition law. That process occurred partly in response to judgments of the European Courts in Luxembourg. The 1998 Decision of the Court of First Instance in *European Night Services* was a landmark in that process. And the rather formalistic and confined Block Exemption regulations of 1983 and 1985 were replaced with new Block Exemption regulations that took a more economically based approach, supported by the interpretation of the law articulated in a number of important Commission Guidelines. The process culminated with the creation of the post of Chief Economist at the Commission in 2003.

One aspect of the Competition Act 1998 was the creation of the Competition Appeal Tribunal (CAT) as a specialist UK competition court. Although of course very significant, that initially that did not impact on private enforcement. It was a Competition *Appeal* Tribunal: its jurisdiction was limited to hearing appeals against decisions of the Office of Fair Trading and then the specialist regulators.

Expansion of the jurisdiction of the CAT to encompass private actions came in stages. First, from June 2003, the CAT was given jurisdiction to hear and decide only follow-on claims. That

created the paradoxical situation that where the OFT or the Commission had found a violation of competition law, someone allegedly injured by the infringement could sue in the CAT where the issues would be causation and quantum; but someone with a stand-alone claim, where the issues were the substantive competition law questions of whether there was an anti-competitive arrangement or an abuse of a dominant position – their case could not be heard by the specialist tribunal but had to be brought in the regular court.

The somewhat absurd nature of this distinction was eventually removed, but only with the Consumer Rights Act 2015, when full jurisdiction over private claims was finally given to the CAT.

And so it was that it was in High Court that Rose J heard the abuse of dominance case of *Arriva the Shires v Luton Airport* in 2013. Her judgment includes important judicial pronouncements that it is not a condition that a dominant company is involved in the downstream market for its conduct to give rise to an abuse; and also regarding the proper approach to the assessment of objective justification for otherwise abusive conduct.

Similarly, it was in the High Court that I heard the case of *Streetmap v Google* in 2015. The judgment is perhaps notable for finding that Google's promotion on its general search engine of its own related product (Google Maps) in a manner which was denied to competing online map products could constitute the abuse of a dominant position in the form of self-preferencing – although I did not use that term. This was contrary to a widespread belief at the time that there could be no abuse in such circumstances if the essential facilities doctrine did not apply.

However, the claimant did not succeed, since I found on the evidence – and contrary to my initial expectations – that Google's conduct had no appreciable effect in the market for online maps, And although there was European jurisprudence to the effect that there was no *de minimis* exception under Article 102, I held that this did not apply where the competition at issue was not in the market where the defendant was dominant, but in a distinct market which was competitive.

A particular feature of that case is that, I believe, it was the first time that a hot-tub was used for the hearing of expert evidence in a competition case in this country. I think counsel from both sides are present and many have their own views, but from my perspective as a judge, I found that this greatly assisted the presentation of the economic evidence in a more collaborative and useful way. Moreover, the Court heard both points of view on each expert issue at same time, instead of hearing one expert one day and the other covering that issue perhaps a day later. And the process undoubtedly saved a great deal of Court time. However, I can tell you that I don't think I ever worked so hard as judge the night before the hearing as in preparing my questioning of the two experts.

Of course, the process is easier now in the CAT, with the assistance of an economist on the panel. I think that both *Luton Airport* and *Streetmap*, had they come some years later, would have been heard in the CAT. Indeed, for past few years, the CAT has been largely a first instance court for private actions and much less an appeal tribunal. And I consider that such private litigation has greatly benefited from the nature and operation of the CAT. I am thinking

not so much of its facilities, excellent though they are, but its character as a specialist and inter-disciplinary tribunal.

I just mentioned the obvious benefit of an economist on the panel when hearing economic evidence. But the structure of the CAT also enables non-specialist High Court and Court of Session judges to sit alongside retired specialist competition solicitors; and to have panels with members from the financial sector or industry, depending on nature of the case. And just a week ago, in a case alleging anti-competitive agreements and abuse by Microsoft over its software licensing arrangements for Windows and MS Office, the CAT's judgment on a preliminary issue concerning copyright infringement and exhaustion of rights was given by panel comprising two intellectual property silks and a solicitor with considerable IP experience.

I believe it is this combination of specialist expertise which contributes greatly to the efficiency of the proceedings and the quality of CAT judgments. And in my discussions over the years with foreign judges, and in speaking at various conferences abroad, it has been gratifying to see the high reputation which CAT enjoys, not only in Europe but far beyond.

The amendments to the Competition Act 1998 made by the Consumer Rights Act not only gave the CAT full jurisdiction in private enforcement, but also introduced the regime for collective proceedings. But while the CAT's jurisdictions for collective actions is exclusive, its jurisdiction for other private actions is not: it is a parallel jurisdiction with the High Court. However, in the final section of its judgment on three appeals in the credit card interchange fee litigation, delivered in July 2018, the Court of Appeal stated that cases claiming for infringement of UK or EU competition law should "in normal circumstances be transferred to the CAT" [357]. That has been the general position ever since.

However, the CAT's statutory jurisdiction is confined to a cause of action in competition law. There remain cases started in High Court which combine competition law claims with other claims which by definition cannot be transferred. And it may not be practicable or sensible to separate the competition issues (which could be transferred) from the other issues.

That was precisely the position in the *Phones 4U* litigation a few years ago, because the claimant was also alleging various economic torts against some of the defendants arising from the same facts. The result was a 10-week trial which I heard as a single judge, where it was alleged that there was a concerted practice - or rather a series of concerted practices - at the highest level between three of the four main mobile phone networks and their parent companies. I think it was the longest trial I heard in my time as a judge, and the extent of not only documentary but also oral evidence was vast. It was rather like a single-handed cartel investigation, conducted through the medium of adversarial court litigation.

Although I found that some rather odd and inappropriate things happened, I have absolutely no doubt regarding the outcome of the case on the facts, i.e. that there was no breach of competition law. But the experience did reinforce the view I formed 15 years earlier when at the Bar doing the *BAGS case* involving the bookmakers and racecourses. It is exceptionally difficult to prove a cartel by way of a private action; and any realistic prospect of doing so is likely to be phenomenally expensive.

However far a court can go in ordering disclosure – and we went very far in *Phones 4u*, requiring disclosure of personal mobile devices of some senior executives based overseas – a private claimant is at a significant disadvantage compared to a competition authority. Not only can the authority acquire documents by dawn raids, but it is able to compel relevant individuals to provide information and answer questions, it has the power in the course of an investigation to require production of documents from third parties, and at least in UK it has power under the Investigatory Powers Act (s. 12(2B)) to get communications data from mobile network operators.

The *Phones 4u* case mostly concerned disputes of fact. Legally, the only interesting part of the case concerns the question of the necessary factual foundation for a concerted practice; or put another way, what is required for an exchange between competitors to cross the boundary to a prohibited concerted practice. Perhaps unsurprisingly, I held that it requires an element of concertation. But that rather simplifies the answer in a field covered by a number of European cases that are each very sensitive to their particular facts, which make general statements difficult. As the penetrating and thorough analysis by Falk LJ in the Court of Appeal brings out, underlying the jurisprudence is the need for a degree of consensus, whether express or implied, and that is very context specific.

Leaving aside the difficulties of proving a cartel, what are the challenges now presented by private enforcement of competition law? I wish to focus on a few.

Expert evidence

Many competition cases of course involve expert economic evidence – and that does bring challenges. We have developed standard methods of handling such evidence, with the joint expert statement of issues agreed and disagreed – which was taken from construction cases; and as I mentioned a moment ago, use of a hot-tub when appropriate (and it is not always appropriate).

In the UK, we also benefit from having experts from well-established and responsible economic consultancies, who are generally very good at presenting their evidence to the tribunal. Part of problem in that 1999 *Premier League* case may have lain not with the judge but the expert failing to explain his method in accessible language for a non-economist.

But there are two aspects of this evidence which I think remain ongoing challenges:

1) The plethora of lengthy expert reports. Not only does that cause mounting costs, but it becomes simply unmanageable in forensic terms. I think the CAT may need to consider imposing page limits on expert reports – just as is commonly done for counsel's skeleton argument and, at least in my case, closing submissions. And when there have been a series of responsive and reply reports, perhaps each expert should be required to serve either an overall summary report, or a final consolidated report which will then serve as the basis of their evidence at trial.

2) The problem of the unduly partial expert who does not respect their overriding duty to the court or tribunal. Simply requiring experts to read the protocol and include a signed expert's statement in their report is not sufficient. I think the practical response is for judges to call out and identify an expert who fails to adhere to that duty, and to attach correspondingly little weight to their evidence. I think this needs to be done in forthright terms. That of course happened with the defendant's economic expert in the CAT judgment in the *Trucks* case brought by Royal Mail and BT. There has been another example recently in the *Kent v Apple* judgment, as regards an American professor who gave evidence for Apple.

   When I tell foreign Judges from civil law countries that we do this, they express astonishment and say they could never do that in their own judgments. But I feel this is the most effective form of discipline. And I have heard that responsible experts in fact welcome this. It enables them to say to their clients, who are of course paying them a lot of money, that they cannot say certain things which their client may wish them to say since that will devalue their entire evidence before the court. And I am sure they have an eye on their ongoing reputation for future cases as well.

Pass-through

I consider that the pass-through defence is now presenting a real challenge to effective conduct of many cases. Almost whenever the claimants are not the final consumer of the product or service, the defendants seek to argue that any higher prices they may have paid will have been passed through to their customers.

But suppose that Royal Mail purchased 300 custom-made and expensive machines for automatic sorting of mail in its various sorting offices around the UK. And after only a few months those machines started to break down. Until they could be replaced with newly manufactured machines from another supplier, Royal Mail reasonably had to revert to manual sorting of mail, using extra staff and paying them overtime. In their claim for damages against suppliers of the defective machines, Royal Mail included these additional s
staff costs which it incurred.

If the defendants sought to argue that Royal Mail did not really suffer this loss because these extra costs were passed on to its customers as a small element in the price rise for stamps and other services – I think that such an argument would get nowhere. And I don't think the court would allow an elaborate and intensive scrutiny of the way Royal Mail recovered its costs in the pricing of its various products, with all the burdensome and expensive disclosure this would require.

Yet when it comes to increased costs from a cartel, that argument can be run, as it was in the Royal Mail *Trucks* case to which I just referred. The point is important, since any economist will explain, as Derek Ridyard did in his concurring judgment in *Trucks*, that in the long run the great majority of cost increases – certainly if they are industry-wide – are passed on. As the CAT stated in the Royal Mail case, the notion that the loss suffered can be reduced or avoided completely as a result of pass-on of this kind is "curious from a legal perspective" [178]

As is well known, under US federal antitrust law, a passing on defence is not allowed. That was result of the *Hanover Shoe* decision of the US Supreme Court in 1968. The judgment fully recognised that pass-on may occur. So it is worth recalling the reasoning of the Supreme Court, expressed in the single judgment of White J:

> *"… it is not unlikely that, if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories. In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case, the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit, and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price-fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."*

I think our own experience with the pass-on defence bears out many of those observations.

In Canada also, it should be noted, the Supreme Court has held that a pass-on defence is not permitted under Canadian competition law.

I, of course, appreciate that under EU competition law, a pass-on defence is permitted: see Article 13 of the Damages Directive. But in that regard, it is instructive to note the way the German Federal Supreme Court has addressed this issue in several recent judgments.

The first is the *Rail Track Cartel* case, a judgment of September 2020. Following a finding of a cartel among suppliers of rail tracks, the German municipal transport companies that had purchased the track claimed damages. The defendants argued that the claimants had passed on any increased costs through higher fares to the public, set on the basis of increased depreciation of infrastructure costs.

The Federal Supreme Court held that although a pass-on defence was in principle available, in the circumstances of the case it was excluded. The Court gave two cumulative reasons for that conclusion:

a) Since the charges on the downstream market by way of fares to customers are determined by a highly complex price-formation mechanism, in which costs of track infrastructure was only one of numerous elements, the question whether and to what extent the cartel had any effect on fares "could be answered only with the aid of complex and costly econometric calculations".

b) Critically, the Court said that given the almost incalculable number of passengers who would have each a minimal claim, it was inherently unlikely that the defendants would face any claims for what the Court termed such "scattered losses". Nor was there any sign of such claims being raised.

In those circumstances, the likelihood was that allowing a pass-on defence would lead to unjustified relief for the cartel participants.

This approach was followed by Federal Supreme Court some months later In an appeal in a case concerning the *Trucks cartel* – the same cartel of course as gave rise to the Royal Mail claim and other cases here. In Germany too, defendant truck manufactures (in this case Daimler) raised a pass-on defence. Referring to its *Rail Track Cartel* judgment, the Court held that a careful consideration of the circumstances was required to determine whether the pass-on defence should be excluded on what the Court described as normative grounds (*normative Erwägungen*). And the Court stressed that compensation for cartel-related harm is "an integral part of the system for the effective enforcement of the prohibitions laid down in cartel law and complements the public enforcement of those provisions."

I stress that I am talking about pass-on as a defence, not the offensive reliance on pass-on, which I think is justifiable and necessary, otherwise all indirect purchaser claims would be precluded. In many consumer collective actions, causation is based on pass-on. And even the merchants claiming damages for excessive credit card MIFs are relying on pass-on: the pass-on to them by way of the merchant service charge levied by their acquiring banks that paid the MIF.

Since the approach of the German court takes account of the need to avoid double recovery, it might be suggested that this approach is difficult to apply in the UK where we now have vibrant regime for collective proceedings, whereas opt-out collective proceedings are not currently a feature of litigation in Germany.

However, in the first place, not all such "scattered losses" are subject to collective actions. And secondly, it is notable that a somewhat similar policy- based approach has been adopted in Canada, where of course opt-out class actions are well established.

I mentioned that the Supreme Court of Canada, like the Supreme Court of the US, has held that pass-on does not afford a defence in a competition claim. But when the question then arose whether offensive pass-on – i.e. pass-on as a sword rather than a shield – should therefore be excluded, the Court rejected that argument.

The case which decided that was *Pro-Sys v Microsoft* – known here as the case which articulated what we call the *Microsoft* test for assessment of the economic methodology relied on for certification of collective proceedings. But that was not the main issue in the case. The main issue was whether the preclusion of pass-on as a defence meant as a necessary corollary that indirect purchaser claims could not be allowed.

The Court noted that this was what the US Supreme Court had decided in *Illinois Brick*. But the Canadian Court found force in dissenting judgment of Brennan J in *Illinois Brick* and explained why it was not following that US precedent. In a single judgment in which all nine judges concurred, the Canadian Supreme Court noted that the real concern was to prevent double recovery from the defendants. The court held that when there was evidence that this was a real risk, then it should be taken into account but that a trial court had various practical ways of

trying to prevent that occurring; and if all else failed, the court could modify the award of damages on that ground. In other words, the governing approach was not driven by a concern to avoid over-compensation of the claimants, but to avoid defendants being exposed to double recovery. As the Court stated:

> "*the double recovery rule should not in the abstract bar a claim in real life cases where double recovery can be avoided*."

I of course recognise that in the *Sainsbury's* case, our Supreme Court in the final section of the judgment considered that a pass-on defence is available, referring to the compensatory principle, the need to avoid double recovery and to comply with EU law. But the issue on the appeal was only as to the standard of proof that should apply for pass-on. There was no sustained argument that pass-on should be restricted as a matter of law or policy. The Canadian jurisprudence was therefore not cited, and of course the German Supreme Court judgments were not yet available.

Given the plethora of private actions, and the substantial additional costs generated by the pass-on defence, I hope that this is something that may be revisited in the future.

European national judgments

This discussion of German judgments highlights the potential significance of cases from national courts in other European countries, since in effect, we are all applying the same substantive law, whether EU law or national law directly modelled on EU law. Brexit has not changed that.

Obviously, such judgments are not binding on our courts; but they can be relevant, helpful and persuasive. Indeed, they can arise, as in *Trucks*, from the very same competition law infringement, whether a cartel or abuse of dominance.

Here, the challenge is a practical one of accessibility. I have been proud over the past three years to have led the project of the Association of European Competition Law Judges to develop EUCOJUD, launched a few months ago. It is an open access database, like BAILII, where through keywords a user can search in their own language for potentially relevant judgments from across Europe.

As you can imagine, it was a challenge to create a database operating in 24 languages and three alphabets! But we have got there, and EUCOJUD is gradually being populated with national judgments from EU states and the UK. The judgments are in their original language: to provide approved translations would have been prohibitively expensive. But once a potentially relevant judgment is identified, there is increasingly sophisticated AI software available which can be used for translation.

I might add that EUCOJUD will have the collateral benefit that UK competition judgments will become more widely known across Europe, especially as for many foreigners English is their second language.

Collective proceedings

No discussion of the developments and challenges of private enforcement would be complete without mention of collective proceedings. They have become the dominating feature of the CAT's caseload. There have now been 65 such cases lodged at CAT since regime introduced – at least that was position when I checked at the end of last week.

Collective proceedings, which can be brought on an opt-out basis and claim aggregate damages, but are subject to prior certification process by the tribunal – all that was a dramatic innovation not just in private enforcement of competition law but in UK procedure generally. It is not surprising that it has brought many challenges.

The procedural rules governing these proceedings had to be developed on a blank page. Since our statutory regime is closest to that of the Canadian class action statutes, the Registrar of the CAT and I went over to Canada to speak to Canadian judges and class action lawyers to seek the benefit of their experience and advice. We also had help in drafting the rules of a dedicated sub-group of the CAT user group.

As you know, in applying the regime, the CAT has often looked to Canadian jurisprudence, as well as that from elsewhere, for guidance. Hence the *Microsoft* test, adopted here in the very 1st collective proceedings case, *Gibson v Pride Mobility Scooters*, and now an established part of the regime.

In August, the Government launched what is effectively a consultation on the working of opt-out collective actions and calling for responses. The paper from the Department of Business and Trade says that after 10 years of operation, it is timely to conduct a review of opt-out collective proceedings.

I think that misses the reality of the position. The second collective action, *Merricks*, was appealed all the way to the Supreme Court on the question of certification, and all other actions were then stayed pending the outcome. As the Supreme Court judgment came out in December 2020, that means that in effect we have less than five years' experience. And given the complexity of these cases – in terms of disclosure, expert evidence, etc – it is unsurprising that very few have yet come to trial or settlement. That will change over next few years and I imagine that many in this room are involved in ongoing cases. So in my view, the consultation is premature.

I also feel that we have not been entirely well served by the two Supreme Court judgments we've had concerning collective proceedings. In both *Merricks* and *PACCAR*, I think that the powerful dissenting judgments are very persuasive.

In *Merricks*, although the majority judgment emphasises the importance of the gatekeeper function of the CAT, that is then rather attenuated when the statutory requirement that the case should be "suitable" for collective proceedings is interpreted as not having a substantive meaning but only a relative meaning – i.e. more suitable than by way of individual proceedings.

Litigation funding is essential for these collective proceedings, and the result of *PACCAR* is that instead of the litigation funder's return being based on a percentage of any damages recovered, it is now being set at a multiple of funds expended or committed, often on a rather complicated basis. That is not only less transparent and may be less favourable to the class, but I think it is also more likely to generate conflicts of interest.

However, the potential for a conflict between the interests of a litigation funder and of the solicitor and representative of the class is not confined to competition law cases: look at public fall-out between the funder and solicitors in the Mariana dam litigation in the High Court. So some of the problems which can arise from litigation funding are more general - and no doubt could be the subject of another lecture.

What is unique about opt-out collective proceedings is the need for the CAT to approve either a settlement or the distribution of damages – and therefore the supervisory jurisdiction of the CAT over the own client costs incurred by the Class Representative and also the return of the funder. That is undoubtedly challenging, and the case-law on that is developing: see the *Merricks settlement* judgment and the judgment 11 days ago on the stakeholder entitlements to the settlement in the *Gutmann v Stagecoach* train tickets case.

Gutmann v Stagecoach also highlights the fact that even if the proceedings result in damages or settlement, in some cases take-up may be exceptionally low: there it was under 1%. I think in other kinds of case, take-up will be reassuringly higher. But I am speculating. As we start now to have damages awards and settlements, we will gain experience of distribution. And I think that may feed into the cost-benefit analysis which can be applied under rule 79(2)(b) at the time of certification, so that where expectation of take-up is particularly low, the CAT can consider whether the enormous costs to be incurred justify certification of the proceedings. Indeed, there have been some indications of that in recent judgments.

Abuse of dominance

When the collective actions regime was introduced, I thought that these cases would be mostly follow-on claims. The very first were indeed such cases: *Gibson* v *Pride Mobility Scooters*, *Merricks* and then *Trucks*. But in fact, my expectation proved largely wrong.

A large number of the collective proceedings which have been brought are stand- alone claims for abuse of dominance. In particular, a significant number of such actions have been launched against the 'big tech' companies: Google, Apple, Amazon, Microsoft and Meta. In fact, I feel one can hardly claim to be a leading digital platform if one is not a defendant to a collective action before the CAT. That of course reflects the power of such platforms and the part they play in our lives.

These cases present their own challenges because of the nature of the product and the unusual features of many of these markets. That is particularly the situation when the alleged abuse is the exploitative abuse of unfair prices or unfair trading terms. But I think the concept of abuse in competition law is sufficiently flexible and can evolve to recognise, e.g., that the currency of transactions may be data rather than financial recompense, and that competition

can take various forms, such as for consumers' attention or clicks, not just for sales. These cases are still cases about the competitive dynamics in a market, or the use of market power in the exploitation of customers. And when such proceedings raise novel questions of law, I think it is generally helpful when CMA exercises its right under rule 50 of CAT Rules to intervene.

Keeping competition law within bounds

The UK is very unusual in having introduced an opt-out collective actions regime but restricting it only to competition law. Clearly, the logic for such actions can apply also in other fields of law, such as environmental law, or consumer law. As a result, I think there is a risk that people will try to squeeze claims which in essence are for violation of another field of law into competition law clothing - as that is the only basis on which opt-out proceedings can be brought. I believe there have already been some instances of that. I am not suggesting that those attempts should never succeed. But I think this can present another challenge, and in the current climate I don't see any prospect of opt-out collective actions being introduced more widely.

The attempts to extend competition law outside its proper sphere, and the danger that can result, are to my mind vividly illustrated by the antitrust case brought before the Federal District Court of DC against the BBC, Washington Post, Reuters and Associated Press. The claimants are Children's Health Defense, a policy group founded by the current US health secretary, Robert F Kennedy Jr, and various individuals that support it. The case is based on the defendants having set up what they called a "Trusted News Initiative" with some of the main internet platforms such as Facebook, Google and Twitter. This arrangement provided that the news organisations would alert the platforms about postings of what they considered were highly misleading and dangerous information about Covid-19 and Covid vaccines. But the decision whether or not to exclude or expunge that information was then up to the individual platform. The claimants allege that this violated section 1 of Sherman Act as a combination or conspiracy in restraint of trade.

The real concern is not that such an action would be brought: the defendants have applied to strike it out or for reverse summary judgment. I mention this case because last July, the US Government, by the Department of Justice, filed an amicus brief in the proceedings supporting the claimants' legal position and contending that "viewpoint competition in the marketplace of ideas" comes within the scope of antitrust law.

You may react by thinking that this is just one of many strange things that are now happening in America. But with the general growth of litigation in the UK brought by interest groups and campaigning organisations, I don't think this sort of tactic or strategy can be dismissed so lightly.

What I do think is that the CAT and our appellate courts can be relied on to keep private enforcement of competition law within proper bounds. It is a law to protect against impairment of commercial competition and to protect businesses and consumers against commercial exploitation by dominant companies which have substantial market power. Those objectives promote dynamic economic growth and consumer welfare. And I think it is

clear that in pursuing those objectives, private enforcement of competition law has come to play a vital role.
