AHRC Project

Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012

UK Report

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INTRODUCTION

In the UK, competition law enforcement has traditionally been the virtually exclusive dominion of administrative authorities, the European Commission ('DG Competition' - applying EU competition law only) and the Office of Fair Trading, respectively. In addition to ongoing developments under EU law, the dramatic change in UK competition law heralded by the Competition Act 1998 with the introduction of a modern EU-modelled prohibition system was underpinned by the intention that the Chapter 1 and Chapter II prohibitions (equivalent to Article 101 and 102) would be enforced by private party litigants before the courts. Moreover, it is clear that during the last twenty years the European Commission has sought to encourage and facilitate private enforcement of EU competition law, and a similar process has taken place in the UK since 1998, including the introduction of the Enterprise Act 2002 which made provision inter alia for follow-on actions before a specialist Competition Appeal Tribunal ('CAT').

Accordingly, there have been a number of important developments over the last twenty years to encourage private enforcement of competition law in the EU and more specifically in the UK, and we are in the midst of a raft of initiatives at EU and UK level in this area. In June 2013, following a consultation on Collective Redress, the Commission published a Communication and Recommendation on Collective Redress. At the same time the Commission also proposed a Draft Directive to harmonise aspects of private litigation across the EU, which will inter alia: provide easier access to evidence through minimum disclosure rules (DD Ch II Art 5); effectively limit access to leniency documentation (DD Ch II Arts 6-7) provide for

* Many thanks to Liam MacLean for his research assistance which was invaluable in allowing me to complete this report and related Table of Cases.
1 Note that this is a relatively simplistic outline, and in fact the Office of Fair Trading in its current statutory corporate guise was created under s 2 of the Enterprise Act 2002. Note that under the Enterprise and Regulatory Reform Bill, the functions of the OFT and the Competition Commission will be brought together in a combined Competition and Markets Authority ('CMA').
decisions of all NCA’s to constitute proof of infringement before all Member State civil courts (DD Ch III Art 9); establish clear limitation periods (DD Ch III Art 10); give protection to successful leniency immunity applicants who will only be liable to compensate their own purchasers as opposed to other participants in an infringement who will be liable for the full harm caused by the infringement (DD Ch III Art 10); establish rules on the passing-on of overcharges (DD Ch IV Arts 12-15); and introduce a rule on presumption of harm (DD CH V Art 16). Furthermore, in the UK, the Department for Business Innovation and Skills (‘BIS’) issued a consultation document in 2012 which led subsequently to the publication in January 2013 of proposals to facilitate private-sector led challenges to anti-competitive behaviour. The key proposals by BIS recommended the introduction of provision to allow cases to be transferred from the civil courts to the CAT, the extension of the competence of the CAT to standalone actions and beyond only damages actions to allow it to grant injunctions, and the adoption of an opt-out representative action for consumers and businesses (in follow-on and stand-alone claims). These proposed changes to the role of the CAT will be introduced should the provisions in clause 82 and Schedule 7 to the Consumer Rights Bill be enacted.

This report builds on earlier work which sought to provide a comprehensive analysis of all competition law litigation in the UK courts, involving the application of both EU and UK competition law, to the end of 2009, which identified very limited evidence of an increase in competition law litigation in the UK in recent years. Nonetheless, it should be stressed that the report, in line with the scope of the project, only considers cases where there has been a court judgment, and accordingly all competition litigation settlement practice is excluded formally from the report. Accordingly, although seeking to be comprehensive in case-law coverage, the account can only be partial, and there is anecdotal evidence that there has been a considerable increase in litigation practice in recent years, particularly before the High Court.

The report will first outline the background legal infrastructure to competition law litigation and collective redress in particular, and will thereafter discuss the case-law.

BACKGROUND TO PRIVATE ENFORCEMENT IN THE UK: LEGAL AND INSTITUTIONAL INFRASTRUCTURE

The Enterprise Act, the CAT and follow-on actions in the UK

The Competition Act 1998 (‘1998 Act’) introduced dramatic changes to UK domestic competition law in relation to both substantive law and its enforcement. The 1998 Act introduced a system based on the rules set out in Articles 81 and 82 EC Treaty (now Arts 101 and 102 TFEU), known as the Chapter I and Chapter II
prohibitions.\textsuperscript{11} The Act placed the Office of Fair Trading (‘OFT’) at the apex of the enforcement system with similar powers and sanctions as provided to the Commission by Regulation 17 (now Regulation 1/2003).\textsuperscript{12} This was the first time that any real, effective direct sanction could be imposed under UK competition law.\textsuperscript{13} Moreover, it was clearly intended that the prohibitions introduced by the Competition Act 1998 should be enforceable by means of private law actions through normal court processes.\textsuperscript{14} The Enterprise Act 2002 (‘2002 Act’) made further provision for encouraging private actions in relation to breaches of the 1998 Act prohibitions. Under s 47A of the 1998 Act,\textsuperscript{15} the Competition Appeal Tribunal (‘CAT’),\textsuperscript{16} could award damages and other monetary awards where there has already been a finding by the relevant authorities of an infringement of the Chapters I and II prohibitions, or Arts 101 or 102.\textsuperscript{17} Nonetheless, as made clear by s47(10), this provision does not affect the right to commence ordinary civil proceedings in respect of any of the infringements. Accordingly, follow-on actions may, but are not required to, be brought before the CAT, as subsequently demonstrated for example in Devenish.\textsuperscript{18} Furthermore, stand-alone actions cannot be raised before the CAT, as yet,\textsuperscript{19} and given that claims against multiple parties often combine stand-alone and follow-on elements, such claims lie outside the scope of the follow-on provisions and would require to be raised before the High Court.\textsuperscript{20}

Section 19 of the 2002 Act added section 47B to the 1998 Act, allowing damages claims to be brought before the CAT by a specified body on behalf of two or more consumers who have claims in respect of the same infringement,\textsuperscript{21} – a form of ‘consumer representative action’.\textsuperscript{22} The representative body requires the consent of the individuals to pursue their claims, ie it is an opt-in representative action.\textsuperscript{23}

\textsuperscript{11} Sections 2 and 18 of the Act respectively.
\textsuperscript{14} See \textit{A Prohibition Approach to Anti-Competitive Agreements and Abuse of a Dominant Position: Draft Bill}, DTI, August 1997. Previously, the only provision which could have been directly enforced by individuals was s 35(2) of the Restrictive Trade Practices Act 1976, although no damages were awarded under this provision. There were a number of non-publicised settled claims arising out of hard-core cartels.
\textsuperscript{15} As introduced by s 18 of the Enterprise Act.
\textsuperscript{16} For a fuller discussion of the CAT, its role, functions and case-load, see D. Bailey ‘The early case law of the Competition Appeal Tribunal’ Chap. 2 in Rodger (ed) 2010 supra.
\textsuperscript{17} See for instance \textit{HealthCare at Home Ltd v Genzyme Ltd}[2006] CAT 29, a judgment for interim relief by the CAT, discussed further below.
\textsuperscript{18} \textit{Devenish Nutrition Ltd v Sanofi-Aventis SA (France)}, [2007] EWHC 2394, (Ch) and [2008] EWCA Civ 1086 (CA), discussed further infra
\textsuperscript{19} See further infra re the BIS consultation on private actions in competition law, 2012.
\textsuperscript{20} See for instance \textit{Cooper Tire & Rubber Co v Shell Chemicals UK Ltd}[2010] EWCA Civ 864, CA. See also more recently, \textit{Nokia Corporation v AU Optonics Corporation and others}[2012] EWHC 732 (Ch) and \textit{Toshiba Carrier UK Ltd and others v KME Yorkshire Ltd and others}[2011] EWHC 2665 (Ch).
\textsuperscript{21} Subsections 9-10 make provision regarding the specification of a body by the Secretary of State.
\textsuperscript{22} See for instance, \textit{The Consumers’ Association v JJB Sports plc} (CAT Case 1078/7/9/07), a follow-on consumer representative action under these provisions before the CAT in relation to Replica Kits, discussed further below.
\textsuperscript{23} Section 47B(3).
47B was inserted to support an underlying aim of the Enterprise Act to reinforce the links between competition law and consumers. The only specified body to date is Which? (the Consumers’ Association), and there has only been one, albeit high-profile, section 47B claim: Consumers’ Association v JJB Sports plc.

A particular advantage of claims raised before the CAT is that they leave a ‘footprint’ even where the case settles before any judicial determination of the issues arising in the claim. On the other hand, with actions before the normal civil courts, one must always be aware of the ‘hidden story’ of competition litigation settlements which means that the visible litigation practice is effectively the ‘tip of the iceberg’. Anecdotal evidence from practitioners indicates that there has been a considerable increase in competition claims raised at the High Court in recent years, with a number of disputes related to prior infringement decisions, particularly by the European Commission. In that sense, although we can only effectively consider litigation practice through analysis of case-law judgments, we clearly can not present the fuller picture in which there is an increasing level of ‘follow-on’ litigation before the High Court.

Over 4 years after OFT recommendations which sought to enhance the scope for private enforcement in the UK, the Department for Business Innovation and Skills (‘BIS’) issued a consultation document which led subsequently to the publication in January 2013 of proposals to facilitate private-sector led challenges to anti-competitive behaviour. The key proposals by BIS, at least in the context of the role of the CAT as a specialist competition tribunal, recommended the possibility of cases being transferred from the civil courts to the CAT, the extension of the competence of the CAT to standalone actions and extending the scope of the CAT’s remit beyond only damages actions to allow it to grant injunctions, and there are provisions in the Draft Consumer Rights Bill Schedule 7 to implement these proposals.

Key Themes

Binding Effect of NCA decisions.

In order for the follow-on provision to have greatest success in facilitating litigation, it was considered necessary to include provision regarding the binding nature of prior enforcement authority decisions. The 1998 Act facilitated claims by providing, in s 58, that those findings of fact by the OFT, which are relevant to an issue arising in a court action, are binding on the parties, if that decision in which the
findings of fact were made is no longer subject to appeal. 31 Section 20 added section 58A to the 1998 Act which provides that in any action for damages for an infringement of the 1998 Act prohibitions or Articles 101(1) or 102, a court will be bound by a decision of the OFT or CAT that any of the prohibitions have been infringed, 32 if the requisite appeal process has taken place or the period for appeal lapsed. 33 Nonetheless, despite this supporting provision, there have been difficulties, outlined below, in determining the scope of the effect of a prior binding infringement decision. 34

**Funding/Costs**

The available funding mechanisms and costs rules can clearly act as a major incentive or disincentive to claimants and/or lawyers in relation to competition law claims. 35 The English rule of cost-shifting, the likelihood of paying up-front costs and other side’s costs if unsuccessful are major disincentives, compounded by the complexity and heavy costs involved in competition cases due to the economic and considerable documentary evidence required to advance a claim. 36 Although conditional fee agreements involving a reward (success fee) to the winning layer recoverable from the loser, are available in England and Wales, 37 and the potential costs of the other party can be insured against using ATE insurance, 38 Peysner has suggested that ‘there is no sign that they are being routinely offered by lawyers or litigation insurers in competition cases.’ 39 Nonetheless, the *Arkin* case on third party funding was welcomed as likely to enhance ‘the prospect for this type of funding because it allowed business plans to be laid on a more secure basis: the risk was more predictable and the reward could be calculated.’ 40 Riley and Peysner have advocated the introduction of a Contingency Legal Aid Fund, 41 and Peysner has also recognised that contingency fees would create greater incentives for lawyers than CFA’s. 42 Contingency fees were also advocated by a research paper for the Civil Justice

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31 See the discussion in *Enron Coal Services Ltd (in Liquidation) v English, Welsh and Scottish Railway Ltd* [2011] EWCA Civ 2.
32 Section 58A(2).
33 Section 58A(3). See also Art 16 of Regulation 1/2003 re decisions of the Commission. See the discussion in *Enron Coal Services Ltd (in Liquidation) v English, Welsh and Scottish Railway Ltd* [2011] EWCA Civ 2.
37 Similar arrangements, known as speculative fees, are available in Scotland.
38 Claimant lawyers are usually paid nothing if they lose but if they win they get a base fee, (number of hours times a reasonable rate), plus a success fee, which is a percentage of that, underpinned by ATE which covers the risk of paying opponents’ costs should they lose.
41 See A Riley and J Peysner (2006) E.L. Rev. 748 supra at 757 et seq. See also the OFT Recommendations, November 2007.
Council, which recognised the close relationship between funding and cost recovery rules and it proceeded to recommend the introduction of a mixed system, whereby there would be no cost-shifting unless there was unreasonable/vexatious behaviour or a formal offer to settle. Presently, CPR Rule 44.3 provides the basic rule in the High Court that the loser pays, although there are limited exceptions and cost control mechanisms:- estimates of costs and cost-capping. In comparison, the CAT has a discretionary cost power and the CAT’s flexibility in this context has been demonstrated in BCL Old Co v Aventis I and Emerson IV, which suggests that cost pressures may be reduced for claimants before the CAT. The OFT 2007 Recommendations included the introduction of CFAs in representative actions to allow for increases of greater than 100% on lawyer’s fees, codifying courts’ discretion to cap cost liabilities, the provision for cost protection where appropriate in addition to establishing a merits-based litigation fund. A full account of the funding issues is set out and discussed in ‘Litigation Funding: Status and Issues’, a Report by Hodges, Peysner and Nurse, in January 2012. The position has been overtaken by the passing of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 45 of which generally allows damages-based agreements in all civil cases. Nonetheless, the BIS 2013 proposals recommended the prohibition of such agreements for collective opt-out cases before the CAT, and indeed there is provision in the Consumer Rights Bill, currently proceeding through parliamentary legislative processes, which makes such fee arrangements in opt-out collective proceedings unenforceable.

In Scots law the award of costs generally flows from success. However, the successful party’s award costs may be reduced, potentially to nil, if their conduct in pursuing the case has been improper or if the case was unnecessary in the first place. Costs in Scotland are awarded by reference to a standard scale, which arguably fetters the courts general discretion to award appropriate costs and leads to less generous level of recovery. Most litigation in Scotland is funded by the parties themselves. However, there are various alternate methods of funding litigation. Solicitors may enter into speculative fee agreements with their clients whereby the client is only liable to pay the solicitor’s fees if the litigation is successful. Scots law also allows third party funding of litigation. It should be noted that Taylor Review into the Expenses and Funding of Civil Litigation in

43 Civil Justice Council ‘Improving Access to Justice’ ‘Contingency Fees, A Study of their operation in the United States of America: A research paper informing the Review of Costs, November 2008, R Moorhead, P Hurst. Inter alia, it was found that contingency fees could operate effectively and would broaden access to justice for multiparty and higher value cases, contingency fees in the US were generally not extravagant, there was no strong evidence that they provide improper disincentives to settle and they do not appear to promote high rates of litigation, frivolous claims or a litigation culture. 44 J Peysner [2006] Comp L Rev 97 supra. See also EU White paper at para. 2.9, indicating that it would be useful for Member States to reflect on their cost rules and to examine the practices existing across the EU.


46 Available at http://www.csls.ox.ac.uk/documents/ReportonLitigationFunding.pdf.

47 Supra fn 7 at paras 5.62- 5.63.

48 Section 47(C)(7) to be inserted into the Competition Act 1998.


50 Shepherd v Elliot (1896) 23 R 695 at 696, 33 SLR 495 at 496 per Lord President Robertson.

51 Crombie v British Transport Commission 1961 SLT 115.

52 ibid.

53 Allowed for by 61A of the Solicitors (Scotland) Act 1980

54 Quantum Claims Compensation Specialists Ltd v Powell 1998 SC 316.
Scotland published its Report in September 2013 and proposed various reforms, including the introduction of damages based agreements in relation to monetary claims.55

‘Discovery’
In England and Wales the Civil Procedure Rules mandate that a party must disclose all documents which are relevant to the litigation, including those that harm its own case or support the opposing party’s case.56 Standard disclosure in the High Court, takes place when pleadings are well-advanced.57 Although it is clear that disclosure is considerably broader than across most legal systems in continental Europe,58 there are clear limits on pre-trial disclosure as evidenced in Hutchison 3G UK Ltd v O2 (UK) Ltd. The limitations on access to leniency documentation has been examined by the European Court in Pfleiderer59 and that ruling has been subsequently considered and applied in the English courts in 2012 in National Grid Electricity Transmission plc v ABB Ltd and others.60 Contrastingly, there is no obligation of disclosure in Scots law. Rather, a party seeking documents from the other side in an action must apply to the court for specific documents it wishes to be disclosed. Normally when the court approves the specification of documents (as the list is called) the other party will disclose the requested documents without further procedure. However, if the documents are not forthcoming the court can allow for a commission to be held, which has all the powers of the court to compel a party to disclose documents which they are withholding.

Limitation Periods for Tortious and Delictual Actions

English law allows for, bar for personal injury cases, a 6 year limitation period.61 There is, however, a special limitation regime when the claimant is not in full cognisance of the facts regarding the tort that has been committed against them. In such cases, a limitation period of 3 years runs from the date when the claimant acquired the appropriate level of knowledge to make a claim.62 However, there is a longest of 15 years from the actual date of the tort, regardless of the claimant’s knowledge of the tort, which applies in such cases.63 This exception to the general limitation rule would be particularly significant in competition actions relating to collusive practices.

In Scotland, non-personal injury delictual claims have a prescriptive period of 5 years.64 Generally the prescriptive period runs from the point when the loss, harm or

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56 Civil Procedure Rules Part 31; in particular Part 31.6(b)
57 There is also the possibility of specific disclosure where appropriate. The process is known as ‘recovery’ in Scots law.
60 [2012] EWHC 869 (Ch).
61 Limitation Act 1980 s2
62 ibid. s11(4)(b); s11(7) defines the material facts the claimant should be aware of to trigger the start of limitation period as “facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.”
63 ibid. s14B
64 Prescription and Limitation (Scotland) Act 1973 s6.
damage occurred. When the pursuer is unaware of the loss, harm or damage they have suffered, the prescriptive period runs from the point they did, or reasonably should have, become so aware. This exception to the general rule would obviously be particularly important in claims against long standing secretive cartels.

The limitation rules for actions to be raised before the CAT have been the subject of extensive litigation and consideration, as outlined below, and this issue has been particularly problematic for potential claimants at the CAT and been the subject of reform proposals by BIS, and these have been included in Para 8 of schedule 7 to the draft Consumer Right Bill.

**Damages**

There was considerable debate about the possible introduction of rules providing for multiple damages following the Commission’s Green paper, but the Commission opted for a light-touch approach in the White Paper, with the subsequent publication of guidelines on quantification of damages. Although the Court of Justice considered in Manfredi that national systems could provide for exemplary damages, the Devenish rulings have emphasised that the UK courts will adopt a strictly compensatory approach and that there will be little scope for restitutionary, exemplary or other forms of multiple damages awards. Nonetheless, in a recent case, outside the temporal scope of the project, the CAT has awarded, in addition to an award of over £33k (plus interest) in lost profit, £60k for exemplary damages in *Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd.* Until that recent ruling, here has been an interim damages award by the CAT in *Healthcare at Home*, and different approaches adopted at first instance and the Court of Appeal in *Crehan* to quantification of damages. However *Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd* is the first successful, final award of damages as quantified by the CAT (including an exemplary damages award) although it has now been followed in 2013 by *Albion Water v Dwr Cymru Cyfyngedig*.

**Collective Redress**

There is currently limited scope for collective redress in the UK courts. In England and Wales, there is the possibility of bringing a test case, consolidation and single trial

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65 *ibid.* s11
66 *Ibid.* s11 (3)
of multiple actions, a GLO (Group Litigation order) and a representative action, although the Civil Justice Council issued a Report outlining the limitations of each of these options and recommending the introduction of a new collective procedure, allowing particular cases to proceed on an opt-in or opt-out basis. In particular, as noted later, the difficulties in bringing collective actions under existing mechanisms before the courts was demonstrated by *Emerald Supplies Ltd v British Airways Plc.*

In terms of Scottish court procedure for multi-party actions, there has been a serious debate regarding the introduction of a collective litigation mechanism for around thirty years. However, to date, no concrete reforms have been enacted. Indeed, in 2000, the Court of Session Rules Council chose not to follow the Scottish Law Commission’s recommendation to introduce a form of opt-out multi party action. More recently, the Gill Review again recommended the introduction of a multi-party procedure. Gill endorsed a flexible form of action where the court will decide on a case-by-case basis whether a class action should be opt-in or opt-out. However, Gill explicitly referred to the facts of the JJB case as the appropriate kind of situation for a court to allow an opt-out action to proceed. Much of the Gill Review agenda is expected to be realised following the establishment of the Scottish Civil Justice Council. It therefore appears that in the near future, especially given Lord Gill’s elevation to the role of Lord President, Scotland’s civil court procedures may be reformed in a way that allows for mass consumer competition law actions.

The OFT 2007 Recommendations suggested the introduction of a similar procedure specifically for competition law, acknowledging the clear limitations of the current specialist representative action under section 47B of the 1998 Act, notably the low participation rates in opt-in schemes, under which there has only been one claim to date by the *Consumers’ Association v JJB*, which settled. The OFT also recommended modification of the current procedures in relation to representative actions to allow them to also bring stand-alone actions, on behalf of consumers and businesses. The key proposal by BIS, at least in the context of collective redress, was to recommend the adoption of an opt-out representative action for consumers and businesses.

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72 [2009] EWHC 741 (Ch).

73 *Class Actions and the Scottish Case: A new way forward for consumers to obtain redress?* (Scottish Consumer Council; 1982: Edinburgh); *Multi-Party Actions: Report on a reference under s3(1)(e) of the Law Commissions Act 1965* (Scottish Law Commission; 1996: Edinburgh); C Ervine *A Class of their Own: Why Scotland needs a class action procedure* (Scottish Consumer Council; 2003: Edinburgh); a petition demanding the introduction of a class action procedure was also presented to the Scottish Parliament’s Public Petitions Committee in March 2009


75 *ibid.* 60.

76 *ibid.* 64

77 *ibid.*

78 The Scottish Civil Justice Council was established on May 28 2013 under the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013.

79 Cf the more limited recommendations in the Commission White Paper.

80 Note the subsequent judgment by the CAT in January 2009 re interim payment and costs, [2009] CAT 3.
businesses (in follow-on and stand-alone claims), and this has been included in reforms which will be made to the current Competition Act provisions by Schedule 7 of the Consumer Rights Bill, which is currently passing through Parliamentary processes.

CASE-LAW

The aim of the research undertaken in this project was to seek to comprehensively identify all competition law cases before the domestic courts of the UK where parties were seeking to exercise rights conferred on them either by EU law or domestic UK competition law, under Articles 101 and 102 TFEU and the Chapter 1 and 2 prohibitions of the Competition Act 1998.

The project originally covered all case-law from 1 May 1999 to 30 April 2009- ie a five year period either side of the entry into force of Regulation 1/2003, but the end period was subsequently extended to up to 1 May 2012.

Based on earlier research undertaken by the UK rapporteur, this section will seek to present a global overview of the case-law, and also break the information down where appropriate into the periods 1999-2004, 2005-2008 and 2009-2012 (May 1). This report will provide a breakdown of the figures of cases in the relevant periods according to the different ways the case-law has been categorised. A fully comprehensive review of all case-law is not feasible, but key case-law highlights will be outlined and discussed.

It is necessary at the outset to outline the process by which the list of relevant cases was identified and delimited. Thereafter, in the following sections, various aspects of the relevant competition case-law will be considered:- the number of competition law cases over the period; degree of success generally in relation to competition law issues raised in litigation; the court where the competition law issue was determined, i.e. at first instance, on appeal or at the CAT; success at different stages of the litigation process; the extent to which competition law issues have been raised as claims or defences and their relative success; the competition law provisions which were relied on and their relative success, and success according to the variety of


82 It should also be noted that in addition to private enforcement before the courts, under section 47A and 47B, claims may be brought before the Competition Appeal Tribunal where an infringement of any of the UK or Community prohibitions has already been established. See further infra and for a fuller discussion of these provisions, see Rodger, ‘Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages?’ [2003] ECLR 103. See also Riley, A ‘The Consequences of the European cartel-Busting Revolution’ (2005) Irish Journal of European law, 3.

It should be emphasised that together with out-of-court settlements, this research does not take into account competition-related disputes which are settled through arbitration. See for instance E. Stylopooulos ‘Powers and Duties of Arbitrators in the application of competition law: an EC approach in the light of recent developments’ [2009] ECLR 118.

83 See n 7 supra. But note that slightly different methodologies for case-counting have been adopted in the various research projects.
remedies sought by claimants. It is hoped that by looking at these various facets of the recent competition law case-law we will have a clearer representation of the developing nature of private litigation in the UK courts during this period.

Methodology and limitation of cases covered

In order to identify all competition law cases between private parties in UK courts since 1 May 1999 (and up to 1 July 2012), the Westlaw search engine was used. Searches were undertaken using the terms “Article 101”, “Article 102”, “Chapter 1 Competition Act 1998”, “Chapter 2 Competition Act 1998”, together with “s.47A Competition Act 1998”. Cases appearing in the UK courts between private parties were identified and the individual “case analysis” summary consulted in order to confirm relevance. This was repeated using the LexisNexis database to ensure the results were comprehensive. Finally, the website of the Competition Appeal Tribunal was consulted and the “cases” feature used to identify additional actions which may have settled or are yet to be decided. Some competition law cases fail on a procedural issue or because of some other technical or legal hurdle and not simply because they have failed to establish the substantive competition law claim or defence to the requisite standard, but we considered it crucial to consider the purported application of competition law rights in a comprehensive manner. Much of the recent focus at European and UK level has simply been on private damages actions. Whilst these are very important, and attract the highest public profile, it is important to recognise that competition law may also be used as a shield and that damages are not always an appropriate remedy for a competition law claimant. Moreover, it would provide merely a partial insight into competition litigation practice if one were only to consider and assess competition law rulings on the substance or merits after a trial (proof). This would ignore the wider legal framework in which competition law claims and defences may be successfully made and the context in which they are facilitated or obstructed. Accordingly, the research extends to all cases where competition law has been pled and relied on by either party, even where the ruling or judgment has not focused on the merits of the competition law issue itself, but may have determined a procedural aspect of the case. It is hoped that the research has been as comprehensive as possible.

Number of Competition Law Cases

There have been 106 judgments overall in the relevant period, in 80 separate disputes, as there have been judgments on relation to different aspects of the same dispute in some cases. Some cases, particularly through the CAT avenue, have been sagas with multiple judgments on various issues, eg ENRON v EWS.

In terms of background, earlier research demonstrated a slow but significant increase in the rate of cases through the 1970s, 1980s and 1990s. Nonetheless, the relatively

84 Note that Scottish case-law will refer to the pursuer.
85 A number of judgments found initially via this search process were automatically excluded, notably rulings by the European Court of Justice, and judgments delivered in other jurisdictions. The research focuses on private enforcement and it was important to remove cases which essentially concerned aspects of the process of public enforcement of UK competition law.
86 Although this figure has clearly been affected by the rationale for exclusion of a number of cases which initially appeared following the searches. It should also be noted that where a case has been appealed, it is only referred to once and in some instances in a subsequent year.
frequent airing of competition law issues during the 1980s, and the 1970s in particular, may come as a surprise. Litigants started to use the competition law provisions fairly early following the UK’s accession to the European Union, and there are a number of interesting cases in these early periods, although the resort to the competition law provisions as a Euro-defence, particularly by defendants in IP infringement cases, is fairly notable.

Overall, we can observe a steady level of cases between the years 1999-2009, with a peak in 2008 (4,3,4,6,4,7,9,7,11,7) and a noticeable increase in the years 2010 and 2011 (14 and 16 respectively). There has been an increase in case-law judgments, and anecdotal evidence is that there had been a considerable increase in private litigation over the past ten years, with the majority of cases settling, and considerable ongoing litigation in the High Court in relation to a number of major international cartels.

One can note over the full period that an increasing number of case-law judgments relate to follow-on cases, although it should be stressed at this stage that the term ‘follow-on’ for these purposes covers both cases raised through the special mechanism before the Competition Appeal Tribunal (‘CAT’) and before the High Court.

**Success of Competition Law issues**

The degree of success is difficult to measure when we are dealing with judgments at different stages of the litigation process and in relation to different aspects of the dispute, not necessarily in relation to the substantive competition law issue between the parties. Accordingly, success does not necessarily entail final success on the substantive merits of the action, but may for instance be at an interim stage of the litigation. It should also be stressed here that success does not relate to the claim but the success of the competition law issue, raised either by the claimant or the defendant, in whatever context. Accordingly, it should be recognised that there are degrees of success in terms of their overall significance to developing competition law jurisprudence, dependent for instance on the stage of the litigation process and the

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87 With 7 to 1 May 2012 continuing this trend.
88 Of course, one must always be aware of the ‘hidden story’ of competition litigation settlements which ensures that the visible litigation practice is effectively the ‘tip of the iceberg’.-See Rodger, B ‘Private Enforcement of Competition Law, The Hidden Story: Competition Litigation Settlements in the UK 2000-2005’ [2008] ECLR 96.
90 Furthermore, it should be noted that the term ‘follow-on’ is used primarily in the narrow sense to refer to actions raised against parties named in infringement decisions by the relevant authorities. Sometimes the defendants are members of the same undertaking as an addressee of a decision. In the wider sense, that is a follow-on claim, but because the defendants are not the specific addressees of the decision, in the narrower sense those are stand alone claims. Therefore, if the narrow sense is used, a claim can be follow-on in so far as the defendants are addressees, but standalone for other members of the same undertakings which are not addressees of the relevant decision. See for instance Cooper Tire & Rubber Co v Shell Chemicals UK Ltd [2010] EWCA Civ 864, CA. See also more recently, Nokia Corporation v AU Optronics Corporation and others [2012] EWHC 732 (Ch) and Toshiba Carrier UK Ltd and others v KME Yorkshire Ltd and others [2011] EWHC 2665 (Ch).
91 Note the delimitation in the research project parameters.
92 See further infra at ‘Success at Different stages of the litigation process’.
relationship between substantive and procedural rules, which it is difficult to reflect accurately by stark figures on success.

However, the litigant relying on competition law in the dispute has been successful in a number of cases over the full period, 29 successful and 12 partially successful judgments, although the success rate is accordingly less than 40%.

Over the period, there have been only 17 judgments which have been classified as substantive final judgments on the merits, and of these only 3 have been successful, 93 and one partially successful. 94 Ironically, given the intention behind the CAT follow-on mechanism being to facilitate private enforcement, only EWS was a follow-on action, and that was before the High Court, whilst more recently, although it is formally outside the temporal scope of the project, the award of over £33k (plus interest) in lost profit, and perhaps more significantly, an additional award of £60k for exemplary damages in 2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd is the first successful, final award of damages by the CAT. This has been followed by a second award of damages by the CAT in 2013 in a follow-on action in Albion Water v Dwr Cymru Cyfyngedig.

1999-2004
There were 6 successful and three partially successful in 28 cases.

There was one partially successful case in 1999 and none in 2000. In Glaxo Group Limited and others v Dowelhurst Limited and another, 95 applications by various defendants to amend pleadings to allege concerted practices and price-fixing was partially successful, being allowed in relation to the claims raised by certain but not all of the claimants.

There was a limited degree of success between the years 2001-2003 with one successful competition law issue raised each year, and two partially successful cases. Network Multimedia Television Ltd and another v Jobserve Ltd, 96 concerned an appeal as to whether the judge at first instance was wrong to hold that there was a “serious issue” to be tried in an action for injunction for alleged breaches of section 18 of the Competition Act 1998. The appeal was rejected, damages were not an adequate remedy for the claimant, and the balance of convenience favoured the grant of interim relief. 97 In Intel Corp v Via Technologies Inc, 98 an appeal against summary judgment in favour of the plaintiff was successful in respect of defences based on articles 81 and 82. On appeal it was stressed that for summary judgment to be granted, the defendant must have no real prospect of succeeding, and real prospect is to be contrasted with a fanciful one for this purpose. In Frazer (Willow Lane) Ltd v Nissan motors GB Ltd 99 an application for an injunction was rejected on the basis that the

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93 EWS Ltd v E.ON UK plc [2007] EWHC 599 (Comm); Calor Gas Ltd v Express Fuels (Scotland) Ltd 2008 SLT 123, and 2011 Purple Parking Ltd v Heathrow Airport Ltd [2011] EWHC 987 (Ch).
99 [2003] EWHC 3157 (Ch).
relevant terms of the agreement constituted a hard-core restriction under the applicable Commission Block Exemption Regulation.  

There were three successful cases in 2004 alone. Secretary of State for Health and others v Norton Healthcare ltd and others, and it showed a more flexible attitude to competition law claims at the stage of applications for summary judgment. In that case the Secretary of State and other health bodies were suing over alleged participation in a warfarin cartel involving elements of price-fixing, supply fixing and market sharing, and an application to strike out the claim was dismissed. In Fotheringham & son v The British Limousin Cattle Society Ltd, at first instance a plea as to the competency of an action in which the pursuer claimed that the defendant’s conduct, in discriminating against their black polled limousine cattle, breached the Chapter 2 prohibition was repelled and proof before answer allowed. In Blackburn Chemicals v Bim Kemi, the Court of Appeal dismissed an appeal in relation to a complicated dispute regarding a defence under Article 81 and the argument that this defence should be struck out on the basis that there was issue estoppel. At first instance, Cooke J had stressed the public importance of Article 81 in that ‘it is for the protection, not of the parties concerned, but of the public at large because of their interest in anti-competitive practices.’

There were two further partially successful cases in the period. In Provimi ltd v Aventis Animal Nutrition SA and others, an action was brought by buyers of vitamins who considered that they had been forced to pay excessive prices as a result of cartels that were operated by defendants contrary to Article 101 and the principal issue was whether the defendants were liable in damages. Applications to strike out or dismiss certain claims were unsuccessful, but the claimant had mixed success in relation to various jurisdictional issues. The claimant was also only partially successful in Hendry and others v The World Professional Billiards and Snooker Association limited (WPBSA), in relation to claims based on articles 81 and 82, the chapter 1 and chapter 2 prohibitions and the restraint of trade doctrine. It was held that the rule that snooker players may not enter tournaments organised elsewhere without prior written consent was in breach of all of these competition rules and was accordingly void and prohibited although in all other respects the claim was

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100 Council Regulation No. 1400/2002 Art.4(1)(h).
101 February 25 2004 [2004] EWHC 609 (Ch) [Secretary of State for Health and others v Norton healthcare ltd and others, July 24 2003 [2003] EWHC 1905 (Ch)].
104 The case is complicated as the defence was by the original claimant and defendant to a counterclaim and concerned an application by the original counterclaiming defendant to strike out parts of the defence by the original claimant and defendant to the counterclaim, who was seeking to rely on art 81 in defence to a damages claim.
105 As he stressed at para. 61:- ‘Moreover the very nature of the plea in itself appears to me to be one which a party should be allowed to raise even if an estoppel would otherwise operate since it raises an issue of which the Court should take cognisance. Where there is a strong prima facie case under art 81, the Court cannot simply ignore the matter once it has been brought to its attention and there remains the possibility of dealing with it on the basis of full argument and evidence.’
107 Although permission to appeal was given as the competition law point was novel and had wide-ranging implications, June 5 2003 [2003] EWHC 1211.
dismissed. To some extent, exposing the limitations of the classification, the partially successful case of Hendry is probably more significant as a final determination on the substantive application of particular competition rules.

2005-2008
The ‘success’ rates increased in this period, with 12 successful and 2 partially successful outcomes in the 34 judgments concerned. The number of successful rulings in favour of litigants relying on competition law, particularly claimants, predominantly before the CAT in procedural issues, helped to further clarify the legal position and make the legal framework for private enforcement more transparent.109

2009-2012
Of the 44 judgments, there have been eleven successful and 7 partially successful cases, with 7 successful and 4 partially successful rulings in 2011 and 2012 alone.


The partially successful cases were Consumers' Association v JJB Sports Plc (2008), Self-Imperial Ltd v British Standards Institution (2010), Albion Water Ltd v Dwr Cymru Cyfyngedig (2010), Albion Water Ltd v Dwr Cymru Cyfyngedig (2011), Albion Water Ltd v Dwr Cymru Cyfyngedig (2011), Nokia Corp v AU Optronics Corp(2012), and National Grid Electricity Transmission Plc v ABB Ltd(2012)

The most significant of these was Purple Parking, a successful final substantive judgment awarding an injunction on the basis of the Chapter II prohibition, and involving discussion of the scope of the essential facilities doctrine.

It is important to also be aware of the range of unsuccessful cases and their implications, and the following cases are notable in that regard:- Bookmakers Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd;111 Intecare Direct Ltd


110 Fuller case details are available in the UK Table of Cases.

v Pfizer;\textsuperscript{112} Emerald Supplies Ltd v British Airways Plc\textsuperscript{113} and Arriva Scotland West Ltd v Glasgow Airport Ltd.\textsuperscript{114}

**Court where competition law issue determined**

There are four options here. The first is the specialist tribunal, the CAT, as discussed below; a first instance court; an appeal court, and the highest level court. The Court of Appeal can act as an appeal court in relation to actions raised before the normal civil courts, normally the Chancery Division of the High court, and the CAT. We will first outline those cases which were dealt with by the Court of Appeal.\textsuperscript{115}

**Appeal judgments 1999-2004**

In the period to 2004, there were 7 cases in this category, including *Gary Parks v Esso Petroleum*,\textsuperscript{116} where the Court of Appeal refused leave to amend to include claims based on article 81, as the pleading was seriously defective and the losses claimed were not due to the tie. *Whitbread v Falla*,\textsuperscript{117} was an unsuccessful appeal against a summary judgment for possession of tenanted premises in a beer tie case. In *Black v Sumitomo*,\textsuperscript{118} the claimant was unsuccessful in seeking pre-action disclosure under s33(2) of the Supreme Court Act 1981 in relation to proceedings for unlawful conspiracy to manipulate markets and/or competitive behaviour under articles 81 and 82.

*Network Multimedia Television ltd and another v Jobserve ltd*\textsuperscript{119} was an important case in the development a competition law litigation culture. It was held at first instance, and upheld on appeal, that the claimant was entitled to an interlocutory
injunction on the basis that damages would not provide an adequate remedy. Chronologically, the next case in which the Court of Appeal overturned an earlier ruling was also crucial. In *Intel Corp v Via Technologies Inc*, in a patent infringement action, the defendant raised various competition law defences under arts 81 and 82, and the Chapter I and II prohibitions. The claimant sought to strike out those defences as an abuse of the court process and summary judgment was granted in favour of the claimant. However, the appeal was allowed and the Court of Appeal stressed that for a summary judgment the party must have no real prospect of succeeding. Significantly, where EC jurisprudence was vital to determination of the case it would be dangerous to assume that existing case-law would not be extended or modified so as to encompass the defence being advanced. Accordingly this case demonstrated reluctance by the Court to simply dismiss competition law defences and that there existed the need for facts to be ascertained at trial, partly because a reference to the European court may subsequently be required. Accordingly, this litigation reflects the recognition of the courts of the developmental nature of competition law, and also the role of the European Court in that process.

In 2004, one case was successful at both stages, *Blackburn Chemicals ltd v Bim Kemi AB*, discussed above. The other appeal in 2004 was unsuccessful at both stages, *Unipart group ltd v 02(UK) ltd (formerly BT Cellnet ltd), Call Connections limited*, in which the defendant was successful in gaining summary judgment against a claim based on Article 81, and the Court of Appeal dismissed the appeal and confirmed the approach at first instance as correct in applying the Community authority set out in *Bayer*.

Finally, there was a Scottish appeal to the inner House of the Court of Session in *Fotheringham & son v The British Limousin Cattle Society Ltd*, where the competition law claimant was successful.

**Appeal judgments 2005-2008**

Of the 34 judgments, 18 were decided at first instance, 7 were delivered on appeal (including one before the highest court- at that stage the House of Lords- now the Supreme Court)), and 6 by the Competition Appeal Tribunal.

In *Arkin v Borchard Lines*, the claimant had been unsuccessful in an Article 81 action, for which a third party funder had underwritten the litigation in exchange for 25% of the first £5million and 23% of any excess should the claim be successful. At

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120 See MacCulloch, A D and Rodger, B J ‘Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts,’ [1996] 7 ECLR 393. See also Garden Cottage Foods below.


122 Sir Andrew Morritt VC at para. 35.


124 July 30 2004 [2003] E.C.C. 22 [*Unipart Group Ltd v 02 (UK) Ltd (Formerly BT Cellnet ltd) and Anor*, November 22, 2002].


127 Either the High Court in England and Wales, or the Court of Session (Outer House) in Scotland.

first instance, the defendants were unsuccessful in a costs application but this was partly overturned by the Court of Appeal, which limited the potential liability of a third party-funder on a ‘pound for pound’ basis.129

*Sportswear Co Spa v Stonestyle Ltd,*130 was a successful appeal against summary judgment by a claimant to a competition law defence based on Article 81 in a trade mark infringement case. In *Wootton Trucks Ltd v Man ERF Uk Ltd*131 in a dispute concerning an application for injunctive relief, appeal was allowed on the basis that the contractual agreement as held by the Court of Appeal not to be in conflict with the terms of Commission Regulation (EC) No 1475/1995 of 28 June 1995 (“the 1995 block exemption”), which disapplied Article 81(1) in relation to certain categories of motor vehicle distribution and servicing agreements.

In *AttheRaces Ltd v British Horseracing Board,*132 the claimant, which supplied websites, TV channels, and other media relating to British horse racing, alleged that the defendant, which had a central role in the organisation and promoting of British horse racing and which kept a computerised database of data including pre-race data including the date and place of the race meeting, name of the race, list of horses entered etc, had abused a dominant position and thereby infringed both Article 82 and the Chapter 2 prohibition. BHB effectively held a monopoly in the provision of the pre-race data and it was held in the High Court that it had abused its dominant position by excessive, unfair and discriminatory pricing,133 and that a constructive refusal to supply the pre-race date, which constituted an essential facility, was caught by the prohibitions. Referring to European Court case-law on excessive and discriminatory pricing, it was held that the price was excessive in comparison to the cost to BHB plus a reasonable return, and discriminatory in being markedly higher than the sum normally charged to other broadcasters. On appeal, this ruling was overturned by the Court of Appeal, which was sceptical about Article 82/Chapter II becoming a general provision for the regulation of prices.134 The court stated that exceeding cost was a necessary but not a sufficient test for abuse of dominance, there was little evidence that competition on the market was being distorted by BHB’s demands and that the value to ATR of the pre-race data was relevant in determining whether the price was excessive. Furthermore, differential pricing was not necessary abusive, and prices essentially were dependent on market forces. Accordingly BHB’s pricing strategy was not abusive and the Court of Appeal clearly advocated a restrained approach to court involvement in claims of excessive or discriminatory pricing.135

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130 [2006] EWCA Civ 380, CA.
131 [2006] EWCA Civ 1042
132 [2005] EWHC 3015 (Ch) and [2007] EWCA Civ 38.
133 The first case was a striking out application by the defendant, [2005] EWHC 3015 (Ch). This was unsuccessful and the claimant’s application for an interim injunction restraining BHB from causing the termination in the supply of pre-race date to ATR. This has been classified as the former rather than an interim process case.
134 [2007] EWCA Civ 38, CA.
135 See also, DWR Cymru Cyfyngedig v Albion Water, The Water Services Regulation Authority (Formerly the Director General of Water Services), The Office of Fair Trading, The Office of Communications [2008] EWCA Civ 97, a case concerning whether one of the appeal judges should recuse himself from hearing the appeal.
Devenish Nutrition Ltd v Sanofi Aventis SA (France)\textsuperscript{136} was a post-Vitamins follow-on action in the High Court and concerned the preliminary issue of whether the claimant would be entitled to restitution of unjust enrichment and exemplary damages, although only the former issue was considered on appeal, unsuccessfully.\textsuperscript{137}

\textit{Crehan v Inntrepreneur Pub Company CPC},\textsuperscript{138} is possibly the most significant competition litigation saga in the UK to date. The Court of Appeal overturned the first instance judgment on the applicability of the \textit{Delimitis} ruling under Article 81,\textsuperscript{139} as the Court relied directly on the earlier preliminary ruling by the ECJ,\textsuperscript{140} in finding that Crehan was entitled to a remedy in damages. It reviewed the method of quantification of damages and reduced the sum significantly from that which would have been awarded at first instance had Crehan succeeded on the merits.\textsuperscript{141} Nonetheless, in making a monetary award for the first time the Court of Appeal set a significant milestone in the development of competition litigation in the UK courts. The final instalment in the \textit{Crehan v Inntrepreneur}\textsuperscript{142} saga took place in 2006 before the House of Lords.\textsuperscript{143} Disappointingly, on appeal, the House of Lords did not rule on the key remedy issue or on the appropriate quantification of damages, but focused on the issue of the national court’s duty of sincere co-operation.\textsuperscript{144} In overruling the Court of Appeal on the issue, the judgment of Park J in the High Court was restored, on the basis that where there was no ‘real conflict’ between a Commission decision and a national court ruling, the national court was not required to follow the Commission decision but was only required to give such weight to the Commission’s assessment as the evidence merited.\textsuperscript{145} Accordingly, as determined earlier by Park J, Crehan was not entitled to damages.

\textbf{Appeal judgments 2009-2012}

Between 2009 and mid-2012, there have been 44 judgments, including 9 appeal court rulings in:-

\begin{itemize}
\item \textsuperscript{136} [2008] EWCA Civ 1086 (CA).
\item \textsuperscript{137} See J. Skilbeck ‘Cartel damages: the Court of Appeal rejects a gain-based remedy’ [2009] ECLR 105.
\item \textsuperscript{139} [2004] ECC 28 at paras 59-146.
\item \textsuperscript{140} See Court of Appeal [2004] ECC 28 at paras 59-146.
\item \textsuperscript{141} See Court of Appeal at para. 167.
\item \textsuperscript{142} Ibid at paras 172-183.
\item \textsuperscript{143} [2007] 1 AC 333
\item \textsuperscript{145} [2007] 1 A.C. 333, HL. See in particular the leading speech by Lord Hoffman.
\end{itemize}
Particularly notable in this period were *Emerald Supplies Ltd* and *Safeway Stores Ltd v Twigger*. In relation to the former, a follow-on action was raised in the High Court and BA were successful in an application to strike out the purported representative element of the claim on the basis that the other persons did not have ‘the same interest’ under the relevant court rules to bring such a representative action, partly as there would be an inevitable conflict between the claims of different members of the class. This was a narrow interpretation of the particular court rules, upheld subsequently by the Court of Appeal.

In the latter, the Court of Appeal, reversing the first instance ruling, held that where an undertaking had breached the Competition Act 1998 and had been fined by the OFT, that undertaking was not entitled to recover the amount of such penalties from its directors or employees who were themselves responsible for the infringement, as this would be contrary to the maxim *ex turpi causa* as the undertaking was personally liable to pay penalties under the Act did not impose liability of any kind on the directors or employees for which it could be vicariously responsible.

Again it should be noted that 4 appeal court judgments in this period were in fact appeals from the CAT. Between 2009-2012 there were 16 judgments by the CAT and 19 by courts of first instance. Clearly a key element of UK competition law litigation, concerns follow-on actions, whether raised under the specialist procedure or generally before the normal civil courts, as detailed in the following section.

**UK Follow-on Actions- the Claims and Case-Law**

**Introduction**

Since the introduction of the Enterprise Act provisions, various ‘follow-on’ actions have been dealt with at the High Court (and Court of Appeal) including *English, Welsh and Scottish Railway Ltd v E.ON UK plc* (‘EWS’), *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)*, and *National Grid Electricity Submission plc v ABB Ltd and others* (‘National Grid’). There have

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146 Fuller case details are available in the UK Table of Cases.  
147 CPR Rule 19.6.  
149 In the narrow and wide senses discussed above at ???.  
150 See also *Cooper Tire & Rubber Co v Shell Chemicals UK Ltd*[2010] EWCA Civ 864, CA; *Nokia Corporation v AU Optronics Corporation and others* [2012] EWHC 732 (Ch) and *Toshiba Carrier UK Ltd and others v KME Yorkshire Ltd and others* [2011] EWHC 2665 (Ch).  
152 [2007] EWHC 2394, (Ch) and [2008] EWCA Civ 1086 (CA).  
been numerous rulings/judgments by the CAT, multiple judgments in some cases where the CAT, and the Court of Appeal in certain cases, have determined a number of interim process issues, notably in relation to time-bar, although there have only been two cases to date where there has been a final judgment on the merits. The first delivered an unsuccessful outcome in Enron Coal Services, whilst more recently (and outwith the formal temporal scope of the project), the award of over £33k (plus interest) in lost profit, and perhaps more significantly, an additional award of £60k for exemplary damages in 2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd is the first successful, final award of damages by the CAT and may act as a catalyst for future claims before the specialist tribunal.

Given that follow-on actions may be raised at the CAT in relation to OFT (and sectoral regulators) and Commission infringement decisions, the figures are more limited than may have been anticipated when the provision was introduced. In fact, one of the actions before the High Court, Devenish, was raised following the Commission’s Vitamins decision. At the CAT, the two BCL Old Co cases also followed the Vitamins Decision, while the protracted Emerson litigation and later, and ongoing, Deutsche Bahn AG and others v Morgan Crucible plc and others case both followed the Electrical and Mechanical Carbon and Graphite Products Commission decision. The National Grid case, raised at the High Court, was a follow-on action to the Commission decision in Gas Insulated Switchgear. Follow-on actions to UK authority infringement decisions have produced very few rulings or judgments:- in the High Court in EWS (an infringement finding by the ORR), and by the CAT in the following cases:- Healthcare at Home Ltd v Genzyme Ltd, the

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155 See for instance Emerson I, II, III and IV and both cases involving BCL Old Co Ltd (BCL Old Ltd v Aventis SA; BCL Old Co Ltd v BASF SE).
156 Enron Coal Services Ltd (in Liquidation) v English, Welsh and Scottish Railway Ltd [2009] CAT 36 and subsequent ruling by the Court of Appeal [2011] EWCA Civ 2, 2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd [2012] CAT 19. Cf the discussion on the potential award of exemplary damages in Devenish above n 55. It is anticipated that there will be considerable academic literature on the CAT ruling in 2 Travel Group plc, but at this stage, see for instance Veljanovski, C ‘CAT awards Triple damages, well not really: Cardiff Bus and the dislocation between liability and damages for exclusionary abuse in follow-on damages actions’ [2013] ECLR 47-49; http://competitionpolicy.wordpress.com/2012/07/23/cardiff-bus-exemplary-damages-in-follow-on-cases/.
157 See supra and see also G Monti ‘Utilities Regulators and the Competition Act 1998’ Chap. 6 in Rodger (ed) (2010) supra and also indeed following infringement decisions by the CAT itself, as in Burgess v W Austin & Sons (Stevenage) Ltd and Harwood Park Crematorium Ltd, following Burgess v OFT, [2005] CAT 25.
159 BCL Old Ltd v Aventis SA; BCL Old Co Ltd v BASF SE. See F. Randolph and A. Robertson ‘The First claims for Damages in the Competition Appeal Tribunal’ [2005] 26 ECLR 365-368.
160 Case 1077/5/7/07 Emerson Electric Co and others v Morgan Crucible Company plc.
161 Case 1173/5/7/10.
163 Case COMP/F/38/899.
Enron Coal Services Ltd case (involving the same ORR infringement finding),\textsuperscript{166} and more recently in relation to security for costs in 2 Travel group plc (in liquidation) v Cardiff City Transport Services Ltd (an OFT infringement finding) and then more significantly, a final award of damages (including exemplary damages).\textsuperscript{167}

Between 2009 and mid-2012, of the 44 judgments, 15 were involved in stand-alone proceedings, and perhaps unsurprisingly, with the outstanding exceptions of Purple Parking and Murphy, and the partially successful Self-Imperial Ltd v British Standards Institution (2010), all standalone judgments in that period have been unsuccessful. There has been a noticeable increase in judgments in follow-on cases to 29 judgments in the period 2009-2012, and in particular by the CAT, although this was probably inevitable given the time for cases to develop and increase in awareness of the CAT and its role.\textsuperscript{168} There has also been a significant increase in non-CAT follow on judgments, as explained below. There were 29 follow-on judgments in total in this period, with 16 by the CAT and 13 (9 effectively) in the normal civil courts.\textsuperscript{169} This compares with 1 follow-on judgment in 1999-2004 and 9 for 2005-2008.\textsuperscript{170} These figures demonstrate the increasing workload of the CAT, and also paradoxically the greater resort to the normal civil courts for follow-on actions.\textsuperscript{171} The decision by the CAT, in 2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd, albeit outwith the formal scope of the research project is also noteworthy, as is the 2013 follow-on damages award by the CAT in Albion Water v Dwr Cyfrifi Caifyngedig. Furthermore, there have also been three subsequent decisions by appeal courts (including the highest level civil court in the UK, the Supreme Court) in relation to the existing follow-on mechanism, which have in different ways addressed important issues relating to the scope of the mechanism, \textsuperscript{\textendash}by the Court of Appeal in Deutsche Bahn AG v Morgan Crucible Co Plc\textsuperscript{172} and Emerson Electric Co

\footnotesize{\textsuperscript{166} Enron Coal Services Ltd (in Liquidation) v English, Welsh and Scottish Railways Ltd, Case 1106/5/7/08, see http://www.catribunal.org.uk/237-3346/1106-5-7-08-Enron-Coal-Services-Limited-in-liquidation.html.}

\footnotesize{\textsuperscript{167} [2011] CAT 30. And [2012] CAT 19}

\footnotesize{\textsuperscript{168} See B Rodger 'Why not court? A study of follow-on actions in the UK’ (2012) Journal of Antitrust Enforcement 1-28.}

\footnotesize{\textsuperscript{169} Note that 4 of these were Appeal Court rulings following decisions by the CAT.}

\footnotesize{\textsuperscript{170} Although note that the CAT mechanism was in place from 2003, and there was only one follow-on judgment in the pre-2004 period in Provimi [2003] EWHC 1211 (Comm).}

\footnotesize{\textsuperscript{171} See See B Rodger 'Why not court? A study of follow-on actions in the UK’ (2012) Journal of Antitrust Enforcement 1-28 and see also the BIS reform proposals discussed further infra.}

\footnotesize{\textsuperscript{172} [2012] EWCA Civ 1055. The tribunal had erred in finding that "decision" in s.47A(8) referred to a decision against a particular party. The term "decision", read with s.47A(6)(d), was a decision of the Commission that an infringement situation existed. The appeal which had the effect of deferring the trigger date for limitation purposes was the appeal to the General Court against the decision that there had been an infringement, not against the addressing of that decision to the particular undertakings. Accordingly, D's claim against M had not been brought out of time and could proceed. See P Akman ‘Period of Limitations in follow-on competition cases: the elephant in the room?’ (2013) CCP Working paper 13-8.}
Consumer Redress

There have been no judgments in any section 47B representative action proceedings by the CAT. However, there has been one high-profile section 47B claim, in the Consumers' Association v JJB Sports plc. Ultimately, this action, with only 144 consumers party to the action, was settled on the basis of compensation up to a maximum of £20 per individual consumer. The paucity of section 47B claims is noteworthy but the difficulties in bringing collective actions under existing mechanisms before the courts was demonstrated by Emerald Supplies Ltd v British Airways Plc. That case related to alleged overcharges in relation to transatlantic air freight brought by the claimants, who import cut flowers from Columbia and Kenya, against BA, on their own behalf and on behalf of all other direct and indirect purchasers of air freight services. The action was raised in the High Court and BA were successful in an application to strike out the purported representative element of the claim on the basis that the other persons did not have 'the same interest' under the relevant court rules to bring such a representative action, partly as there would be an inevitable conflict between the claims of different members of the class. This was a narrow interpretation of the particular court rules, upheld subsequently by the Court of Appeal. As discussed above, following the 2013 BIS proposals, Schedule 7 to the Consumer Rights Bill include provisions to introduce a collective regime, on an opt-in and opt-out basis (subject to certification) for consumers or businesses or a combination of the two.

Follow-on at the High Court?

Of course, as emphasised earlier, claimants are not required to bring claims before the CAT, and non-monetary claims are specifically excluded from the ambit of the CAT’s jurisdiction. This explains why the action in EWS, involving an application for a declaration, was raised before the High Court. Another rationale for a claim being raised before the High Court relates to the suspensive requirements contained in section 47A for an action to be raised before the

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173 [2012] EWCA Civ 1559. The Competition Appeal Tribunal had been right to strike out a follow-on claim under the Competition Act which had been brought against the United Kingdom subsidiary of a company that the European Commission had found to have infringed competition law. The subsidiary had not been addressed by the Commission's decision, meaning that the tribunal had lacked jurisdiction.

174 [2012] 1 W.L.R. 2922. The SC held that the statutory limitation period for a claim for damages under the Competition Act s47A and the Competition Appeal Tribunal Rules 2003 r.31 was sufficiently clear, precise and foreseeable and did not breach European principles of effectiveness and legal certainty.

175 Case no 1078/7/9/07.

176 If receipts had been retained, see http://www.which.co.uk/news/2008/01/jjb-to-pay-fans-over-football-shirt-rip-off-128985.jsp.

177 [2009] EWHC 741 (Ch).

178 CPR Rule 19.6.


180 Supra n5 Part 5.

181 [2007] EWHC 599 (Comm). This case was raised in the Commercial Court rather than the Chancery Division as it was a matter of contract law rather than competition law.
CAT, as demonstrated by Emerson III involving claims against parties who had appealed to the General Court. The restrictions on the jurisdiction of the CAT, and the concomitant advantage of being able to proceed immediately with a follow-on action before the High Court were exemplified by National Grid, a follow-on claim seeking damages in the sum of £249m. It was clear that proceedings were raised in the High Court because a number of parties to the Commission Switchgear decision had appealed to the Court of First Instance, and the claimants ran the risk of an ‘Italian torpedo’ involving a negative declaratory action being raised in an alternative jurisdiction should they be required to wait until appeal proceedings had been completed and an action could be raised before the CAT. Furthermore, by kick-starting the action with immediate effect, National Grid also demonstrated that claimants could seek to benefit from immediate disclosure of documents by the defendants, without having to wait for the public appeal process to be completed. Accordingly, there are important litigation strategy reasons why follow-on claims are not (and increasingly unlikely to be) raised before the CAT, thereby creating a footprint that can be tracked. Again in this context the draft Consumer Rights Bill, implementing the 2013 BIS reform proposals, may be significant in extending the scope of the CAT’s jurisdiction to hear stand-alone actions (and to enable the CAT to grant injunctions) and to harmonise its limitation periods with those of the High Court.

Limitation Rules

In particular, the CAT has been required to consider two key aspects related to the scope of its follow-on jurisdiction. The first relates to the limitation rules before the CAT, distinctive from the 6 year limitation period for High Court claims, and dependent on the post-infringement appeal process, as discussed below. There have been various judgments focused directly on time-bar issues by the CAT. In Emerson I the Emerson claimants were seeking damages following the Commission decision in Electrical and Mechanical carbon and Graphite Products. In addition, Rule 31 of the Tribunal Rules provides that a claim must be made within 2 years of the relevant date, which is the later of the following –(a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made; (b) the date on which the cause of action accrued. The claimants were direct purchasers of mechanical carbon and graphite products and sought exemplary damages. Morgan Crucible was a successful leniency applicant and did not bring an action for annulment of the relevant Commission decision, although other parties to the decision brought annulment applications before the General Court. The CAT emphasised that section 47A refers to any such appellate proceedings and therefore, although Morgan Crucible did not appeal, the time limit for raising an action would not start to run until the appeal process had been completed, and accordingly the action against Morgan Crucible was not time-barred. A similar issue arose in BCL Old Co Limited v BASF and others I, a post-Vitamins indirect

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184 See [2012] EWHC 869 (Ch) in relation to disclosure of leniency documentation.
185 Supra n7 Part 4 particularly at paras. 4.5-4.8.
purchasers’ claim. BASF appealed against the Commission decision to the General Court but did not appeal against the infringement, and thereby claimed that the possibility of appeal against infringement ended in January 2002. The General Court determined the appeal on 15 March 2006 and the CAT claim was commenced on 13 March 2008. The CAT considered in detail the earlier Emerson I and III rulings and held that the claim was not time-barred. The Court of Appeal overturned the CAT’s decision, emphasising the distinction between a decision that a relevant prohibition has been infringed and a decision imposing a penalty, which was made clear in section 47A. Accordingly, the application for annulment of the fine did not extend the period within which a claim could be made, and the claim was accordingly time-barred. The CAT subsequently refused to extend the time to lodge claims in that case and Grampian Country Food Group Ltd v Sanofi-Aventis. Nonetheless the outcome of the Supreme Court ruling in BCL Old Co Ltd v BASF SE (formerly BASF AG), confirms why in practice claims like Devenish a post-Vitamins follow-on action, concerning the preliminary issue of whether the claimant would be entitled to restitution of unjust enrichment and exemplary damages, may be raised in the High Court either to avoid the suspensive requirements inherent in the CAT jurisdiction or to take advantage of the longer 6 year limitation period as opposed to the more restrictive 2 year period at the CAT. However, in Deutsche Bahn AG v Morgan crucible Company Plc and others, the Appeal Court overruled the CAT ruling that the limitation period was not suspended vis-a-vis a non-appealing addressee of a Commission decision. As noted earlier BIS have proposed the harmonisation of the CAT’s limitation periods with those of the High Court and the extension of the scope of its jurisdiction to hear stand-alone actions, and there are provisions to this effect in Schedule 7 to the draft Consumer Rights Bill.

### Binding Nature of Infringement Findings and Decisions

The second issue concerns the precise nature of the competition authority’s findings and the consequences of those findings, and this may involve factually complicated determinations by the CAT, as evidenced by Enron Coal Services ltd (in Liquidation) v EWS Ltd. This was a follow-on claim to an ORR decision that EWS had infringed the Chapter II prohibition and Article 102. The claimant sought various remedies including damages and lost profit. The claimants also made a ‘lost opportunity’ claim for £77 million, but the disputed issue here concerned whether they could claim an overcharge before the CAT. It was stressed throughout the proceedings that establishing liability is not an issue for the CAT under s 47A. In

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189 See in particular at para. 34.
190 [2009] EWCA Civ. 434, CA.
192 Supra n174.
193 [2008] EWCA Civ 1086 (CA).
194 Although only the former issue was considered on appeal, unsuccessfully. See J. Skilbeck, ‘Cartel damages: the Court of Appeal rejects a gain-based remedy’ [2009] ECLR 105.
196 Supra n5 Part 4 particularly at paras. 4.5-4.8. See P Akman ‘Period of Limitations in follow-on competition cases: the elephant in the room?’ (2013) CCP Working paper 13-8.
197 Case No. 1106/5/7/08. See also the earlier case of Deans Foods Ltd v Roche Products Ltd, Case No. 1029/5/7/04, where one issue was whether the prior decision allowed claims in relation to yellow carophyll in addition to red carophyll.
198 It is concerned with causation and quantum only.
relation to the particular overcharge claim which went to trial,\textsuperscript{199} on appeal, the Court of Appeal overturned the CAT, illustrating ‘the dangers of not taking a sufficiently strict approach as to what finding of infringement the regulator has in fact made.’\textsuperscript{200} This case and particular dispute, involving a regulator’s Decision of over 400 pages long which was described by the CAT as an ‘extraordinarily long and complex’ document,\textsuperscript{201} demonstrates the difficulties in ascertaining exactly what support the enforcement authority decision provides for subsequent claims.\textsuperscript{202} Furthermore in \textit{Emerson Electric Co v Morgan Crucible Co plc}, an application to dismiss damages claims was successful where the specific defendant was neither identified in the operative part of the Commission Decision nor an addressee.\textsuperscript{203} The CAT stressed that ‘the Tribunal’s jurisdiction in proceedings under section 47A is limited to resolving issues of causation and quantum of loss resulting from an already established infringement…. [and] it is not possible for a party claiming damages in a follow-on claim under the Act to root around in the decision of a competition authority to find stray phrases or sentences and claim that this amounts to an infringement decision.’\textsuperscript{204} This ruling has subsequently been upheld by the Court of Appeal.\textsuperscript{205}

\textbf{Follow-on and Damages Awards?}

Finally, \textit{Healthcare at Home ltd v Genzyme Ltd}\textsuperscript{206} comes as close to a final ruling awarding damages as there has been in the UK. This was an action under s47A of the 1998 Act following an earlier OFT decision\textsuperscript{207} that the defendant had a dominant position in the upstream market for the supply of drugs for the treatment of Gaucher disease and had abused it by a margin squeeze abuse. The Tribunal stressed that it ‘may make an interim payment order if it is satisfied that if the claim were to be heard the Claimant would obtain judgment for a substantial amount of money’.\textsuperscript{208} The Tribunal awarded £2 million as an interim payment, on the basis of the lowest figures to calculate a loss of revenue at £2,866,490, and the action was subsequently settled. The CAT rulings (although beyond the formal temporal scope of the project) awarding damages in \textit{2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd}, and also \textit{Albion Water v Dwr Cymru Cfyngedig}, may be viewed as a fillip for the follow-on mechanism, and may encourage a greater number of claimants to raise actions before the CAT, although the award of exemplary damages in particular in the former may be considered as controversial and potentially conflicting with a compensation-based damages system as stressed earlier in \textit{Devenish}. Furthermore, it remains the case that despite the welcome contribution by the CAT in that case, important questions regarding the nature and extent of the passing-on

\textsuperscript{199} The so-called ‘EME’ overcharge in relation to coal hauled to two power stations owned by Edison Mission Energy.
\textsuperscript{200} \textit{EWS Ltd v Enron Coal Services Ltd (in Liquidation)} [2009] EWCA Civ 647, per Patten LJ at para. 59. He also stressed at para. 60 that the CAT ‘should have decided whether it was clear from the Decision that a finding of infringement had been made which covered the pleaded claims.’
\textsuperscript{201} At para. 14.
\textsuperscript{202} This was reinforced by the subsequent CA decision in the case in relation to the issue of binding questions of fact. See the discussion in \textit{Enron Coal Services Ltd (in Liquidation) v English, Welsh and Scottish Railway ltd} [2011] EWCA Civ 2 and T Woodgate and I Filippi ‘The Decision That Binds: follow-on Actions for Competition damages After Enron’ [2012] ECLR 175-178.
\textsuperscript{203} [2011] CAT 4.
\textsuperscript{204} Ibid at para. 59.
\textsuperscript{205} [2012] EWCA Civ 1559.
\textsuperscript{206} [2006] CAT 29.
\textsuperscript{207} Decision no CA 98/3/03.
\textsuperscript{208} At para. 66.
defence, the scope for indirect purchasers to sue, and the quantification of damages in varying contexts, have yet to be tackled in any detail by the courts and/or CAT.

**Follow-on case-law: A summary**

There are dedicated provisions introduced by the Enterprise Act 2002 designed to facilitate follow-on actions before the CAT, and the CAT, and Court of Appeal, have delivered some interesting and important judgments, clarifying various aspects of the litigative process under the follow-on mechanism. However, given the number of infringement decisions by the relevant competition authorities, notably the OFT and European Commission, over the last ten years, the follow-on procedure has not been utilised as widely as expected. Nonetheless, the High Court has an increasingly significant role to play, particularly where it may be advantageous to rely on the six year limitation period before the High Court or as a litigation tactic to raise follow-on proceedings in the High Court prior to the completion of the appeal process following an infringement finding. There has only been one representative action raised to date although the opt-in requirement has clearly limited the impact of section 47B of the 1998 Act. There is considerable and increasing private enforcement practice in the UK, but much of it may be obscured as a result of the prevalence of out-of-court settlements which are not made public. It may be that the profile associated with the recent, successful damages awards in *2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd, and also Albion Water v Dwr Cymru Cyfyngedig*, may increase awareness of the possibility to seek redress for aggrieved parties, and thereby encourage follow-on claims, particularly before the CAT. However, the provisions to extend the scope and nature of the CAT’s jurisdiction included in schedule 7 to the draft Consumer Rights Bill, may have a more dramatic impact.

**Success at different stages of the litigation process**

We considered the success of competition law issues in four categories according to different stages of the litigation process.

**Substantive final judgments**

The most straightforward involves a substantive final judgment on the competition law issue, normally following trial. Inevitably these cases have generally attracted greatest public profile and interest, and perhaps not surprisingly they are relatively rare, reflecting partly the low success rate generally, the prevalence of settlements and the limited development of mechanisms to enhance the attraction of private competition law enforcement.

**1998-2004**

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209 As has the Court of Session in Scotland.

Note that section 16 of the Enterprise Act allows for transfer of proceedings in relation to the determination of an infringement issue from the High Court to the CAT but the provision has not, as yet, been activated. See C. Brown, ‘Section 16 Enterprise Act 2002- time for activation?’ [2007] ECLR 488-493. Note the BIS 2013 proposals on this issue, supra n 7 part 4.

210 See fn 7 supra re the 2013 BIS proposals at Part 5 to introduce an opt-out collective regime for claims by businesses and consumers.


212 Or proof as it is known in Scots law.
There were only 4 substantive final judgments in this period, including the partially successful case, **Hendry and others v The World Professional Billiards and Snooker Association limited (WPBSA)**,\(^{213}\) is a potentially very significant case regarding rules of organisations generally, and the interplay of competition law and sports organisations in particular.\(^{214}\) In that case it was held that the rule that players could not enter tournaments organised elsewhere without prior written consent was held to breach s 2 and 18 of 1998 Act, articles 81 and 82 and also constituted an unreasonable restraint of trade, but otherwise the claim was dismissed.

The competition law issue failed in the other three cases after trial,\(^{215}\) including the following:- in **Arkin v Borchard Lines ltd and others**, following a 49 day trial, the claimant was unsuccessful in claims of alleged infringements under articles 81 and 82 regarding the market for liner services to and from Israel. It was held that as prices never fell below average variable costs and the failure to pursue a policy of undercutting competitors was strong evidence against eliminatory intent and therefore there was no breach of either articles 81 or 82; **Leeds City Council v Watkins & Whiteley** concerned alleged breaches of Chapters 1 and 2 Competition Act 1998 and Arts 81 and 82 EC Treaty which were dismissed due to insufficient and unconvincing evidence regarding the relevant market and dominance; in **Days Medical Aids Limited v Pihisiang Machinery Manufacturing Co. limited and others**, the claimant sued for damages for repudiation of an exclusive distributorship agreement, and a defence based on article 81 was unsuccessful as the agreement was held to fall outside its scope.

**2005-2008**

There were 7 substantive final judgments in this period, two of which are deemed as successful.

In **English, Welsh and Scottish Railway Ltd v E.ON UK plc**\(^{216}\) the claimant was an operator of bulk freight services and the defendant was in the business of electricity generation. In 1997 they entered a Coal Carriage agreement. In 2006 the ORR found that EWS had foreclosed the Great Britain coal haulage by rail market by abusing its dominant position by **inter alia** the exclusionary terms of the CCA. They were fined £4.1m, and EWS and E.ON then disputed the CCA. EWS applied for a declaration to the effect that the ORR Directions rendered the CCA void. It was held that the exclusionary terms were illegal and void **ab initio** in terms of Art. 82, and also subsequently in relation to Chap 2,\(^{217}\) that that there could be no severance of the exclusionary term and the whole contract was void and unenforceable.

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\(^{216}\) [2007] EWHC 599 (Comm).

\(^{217}\) The courts are required to apply the doctrine of severance and the same approach is held to apply where a contract is void by reason of Article 82 and the Chapter II prohibition.
In *Calor Gas Ltd v Express Fuels (Scotland) Ltd*\(^{218}\) Calor, the market leaders in the distribution and supply of bulk and cylinder LPG in Great Britain, with circa 50% share of the cylinder LPG market, distributed its products through a network of independent dealers and retailers. The dealers’ contract with Calor had 2 key features: for the duration of the agreement dealers could purchase and sell only Calor cylinder LPG; and they undertook not to handle Calor cylinders after termination of the contract. The defender terminated the agreement and entered a dealership with Flogas, but continued to handle Calor cylinders. Calor sought damages and interdict, but the action was defended on basis that the single branding obligation for 5 years and the post-termination restriction in the agreements were null and void in accordance with Article 81. It was held that the twin factors of market power and duration ensured that ‘if a nationwide network of principal dealers is tied to the brand leader for at least five years, this will restrict competition, especially in a mature market.’\(^{219}\)

The various unsuccessful cases included the rulings by the House of Lords in *Crehan* and the Court of Appeal in *AttheRaces Ltd v British Horseracing Board*\(^{220}\).

In *Chester City Council v Arriva Plc*,\(^{221}\) Chester sought declarations, injunctions and damages based on the claim that Arriva had breached section 18 of the Competition Act 1998 by abusing its dominant position in the relevant bus market by threatening predatory behaviour to drive Chester City Transport out of business. This was a complicated saga arising out of the decision to sell CCT by tender, at which stage Arriva registered and duplicated CCT services; Arriva was thereafter accused of ‘cherry-picking’ the three most profitable CCT routes and targeting those, the allegation being that they were flooding the bus routes and selling below cost. It was held that the claimant had failed to prove that the market was comprised exclusively of bus services, and the court was not prepared to conclude that Arriva was dominant even if they had a market share of 53%.

*Bookmakers’ Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* involved two judgments on the merits.\(^{222}\) BAGS, a not for profit organisation, promoted the interests of bookmakers in licensed betting offices- ‘LBOs’. The other claimants were 3 large bookmakers. The defendants included AMRAC, which provided, to subscribing LBOs, live images and sound in respect of horseraces at various courses in Great Britain. The other defendants were operators of 30 racecourses in this dispute which alleged a breach of Article 81 and the Chapter 1 prohibition. In its first judgment, which dealt with the claimants relief, the issue was appealed and dealt with by the Court of Appeal in 2009, as discussed below.. Subsequently, the court dismissed counterclaims relating to collusive behaviour by certain bookmakers who

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\(^{219}\) At para. 35. In relation to severability, it was noted that: ‘the proper approach is to view [the clause] as an integral and non-severable part of the overall anti-competitive aspects of the agreement, and thus it, along with other relevant clauses, is void in terms of Article 81(1).’

\(^{220}\) [2005] EWHC 3015 (Ch) and [2007] EWCA Civ 38; Similarly, the first judgment in the *AttheRaces Ltd v British Horseracing Board* [2005] EWHC 1333 (Ch). dispute was an unsuccessful striking-out application by the defendant. This was unsuccessful and the claimant’s application for an interim injunction restraining BHB from causing the termination in the supply of pre-race date to ATR was granted. This has been classified as the former rather than an interim process case. See also *Ineos Vinyls Ltd v Huntsman Petrochemicals (UK Ltd)* [2006] EWHC 1241 (Ch).

\(^{221}\) [2007] EWHC 1373 (Ch).

\(^{222}\) [2008] EWHC 1978 (Ch) and [2008] EWHC 2688 (Ch).
had allegedly formed an unlawful concerted practice to boycott Turf TV, and to withdraw sponsorship from certain racecourses which had licensed their LBO rights to AMRAC. Although there was parallel behaviour, the evidence from all parties which ‘consistently explained their involvement in terms not involving any collusion of any relevant kind’ 223

In Ineos Vinlys Ltd v Huntsman Petrochemicals (UK) Ltd224 the claimant manufacturers had failed to establish that the defendant supplier of ethylene had a dominant position and abused it by charging prices and delivery charges that were unfair within the meaning of the EC Treaty Art.82 and the Competition Act 1998 s.18, as they had failed to analyse the costs incurred in producing the product, compare those costs with the price charged or evaluate the resulting profit.

**2009-2012**

There have only been six substantive final judgments during the more recent period. Five cases were unsuccessful. These included Raleigh Uk Ltd v Mail Order Cycles Ltd (2010),225 Global Knafaim Leasing Ltd v Civil Aviation Authority (2010),226 Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd (2011),227 and Nelson & Co Ltd v Guna Spa (2011).228

In BAGS, at first instance, the claimants had sought a declaration that collective exclusive licensing on a closed basis of the rights necessary for the supply to LBOs in UK and Ireland of images sound and data in respect of horseraces was prohibited, an injunction to prevent the defendants from giving effect to or providing for collective exclusive licensing of the rights on a closed basis, and also for damages. Since 1987 LBOs had paid a distributor, SIS, for the right to show live pictures of horseracing and in turn payments have been made to the racecourses for those LBO media rights. Over the years, racecourses became dissatisfied with the size of the payments and eventually 31 of the 60 decided to participate in a new joint venture to create a new distributor. The bookmaking industry considered that its emergence was anti-competitive and infringed the Art.81 and Chap. I prohibitions, and initially the challenge seemed to concern the way the racecourses went about granting exclusive rights to the venture. Following trial, in a 77 page judgment of 523 paras, it was held that the relevant concerted practice between racecourses did not have the object of fixing prices, and that foreclosure was ‘hypothetical’. In relation to collective selling, the claimants had not shown that the collective negotiation was likely to result in a higher price being paid, and accordingly, the claim fell and was dismissed. This was confirmed on appeal.

The only successful case was Purple Parking, a very important first instance ruling on the scope of the Chapter II prohibition, and a consideration of the essential facilities

223 [2008] EWHC 2688 (Ch). At para. 139.
224 [2006] EWHC 1241 (Ch).
225 [2010] EWHC 1664 (Ch).
227 [2011] EWCA Civ 2, affirmed [2009] CAT 36. In fact, although denoted as a substantive final judgment this was an appeal against a specific legal issue following the earlier negative outcome of the substantive process. The Court of Appeal held that the Competition Act 1998 s.58 applied to proceedings in the Competition Appeal Tribunal as well as in court, with the result that the tribunal was bound by findings of fact made by the Office of Rail Regulation in the course of an investigation, unless it directed otherwise.
228 [2011] EWHC 1202 (Comm).
doctrines, where it was held that an airport operator had abused its dominant position by excluding all off-site "meet and greet" car park operators from terminal forecourts whilst maintaining its own meet and greet operations on the forecourts.

Summary Judgment
This category involves cases where the defendant or the claimant has sought a summary judgment in order to dismiss the action or to strike out the defence. In this context, success does not denote whether or not the application to dismiss or strike out is successful, but whether the competition law plea is successful in that process.

1999-2004
There were 10 summary judgments in this period, 4 of which were deemed to be successful.

In Intel Corp v Via Technologies Inc, an appeal against summary judgment in favour of the plaintiff was successful in respect of defences based on articles 81 and 82. On appeal it was stressed that for summary judgment to be granted, the defendant must have no real prospect of succeeding, and real prospect is to be contrasted with a fanciful one for this purpose. Furthermore, where European Court jurisprudence was being developed, it would be dangerous to assume existing case-law would not be extended or modified so as to encompass the defence being advanced, and cases involving arts 81 and 82 often raised questions of mixed law and fact which were not suitable for summary determination.

In Secretary of State for Health and others v Norton Healthcare ltd and others, where the Secretary of State for Health and other health bodies were suing over alleged participation in a Warfarin cartel involving elements of price fixing, supply fixing and market sharing an application to strike out by the defendant was dismissed. In Blackburn Chemicals v Bim Kemi, the Court of Appeal dismissed an appeal in relation to a complicated dispute regarding a defence under Article 81 and the argument that this defence should be struck out on the basis that there was issue estoppel. See also the Scottish case of Fotheringham & son v The British Limousin Cattle Society Ltd, where a plea as to the competency of an action in which the pursuer claimed that the defendant’s conduct breached the Chapter 2 prohibition was repelled and proof before answer allowed, a decision confirmed on appeal to the Inner House.

229 Note there are some potential overlaps here with the interim process cases, discussed further infra.
231 For instance, it was possible that the exceptional circumstances test per Magill (Cases 241-242/91P RTE and ITP Ltd v Commission [1995] 4 CMLR 718) and IMS (Case C-418/01 IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG [2004] 4 CMLR 28) may apply to other circumstances. It was held to be arguable with a more than fanciful prospect of success that the range of exceptional circumstances could extend to the facts pleaded.
232 There was also the important requirement for the material facts to be ascertained at trial because a reference to the European Court may subsequently be necessary.
233 February 25 2004 [2004] EWHC 609 (Ch) [Secretary of State for Health and others v Norton healthcare ltd and others, July 24 2003 [2003] EWHC 1905 (Ch)].
There were a number of unsuccessful cases in this sub-category, including *Wireless group plc v Radio Joint Audience Research Ltd*, which involved a claim for compensation under Chapter 2 of the 1998 Act, but the defendant’s application for summary judgment was successful and it was noted that ‘the expense may be enormous. The pre-trial and trial costs of competition cases, with the need for expert evidence from economists, are notoriously high.’

The classification of cases as seeking summary judgment or as interim process is problematic, as exemplified by *Arsenal Football Club PLC v elite Sports Distribution Limited*, where the defendants pled that certain licences constituted an unreasonable restraint of trade and breached the Chapter I prohibition. There were two applications, an unsuccessful application by the defendant for the action to be struck out, and an application by the claimant for an affidavit.

**2005-2008**

There were relatively few judgments in this category in that period- at 9 in total 4 of which were successful:- including *Attheraces Ltd v British Horseracing Board Ltd (Preliminary Issues)* (2005). For instance, in *Emerson II*, Morgan Crucible made an unsuccessful application under the Tribunal Rules Rule 40 which provides the CAT with power to reject a claim- akin to summary judgment. There were two successful cases involving the claimant seeking summary judgment to strike out a competition law defence, success denoting that the defence is successful, albeit in allowing the defendant to proceed with their defence to the action to later stages in the litigation process.

The 5 unsuccessful cases included:- *PIK Facilities Ltd v Watson’s Ayr Park Ltd*, where the defender’s pleadings were inadequate in a Chapter 2 defence based on the essential facilities doctrine, when the pursuers, proprietors of Glasgow Prestwick International Airport, sought interdict against the defenders from trespassing on airport roads, by buses and taxis, to collect and drop off passengers being conveyed by them from their off-airport car parking facilities; and *P&S Amusements Ltd v*...

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236 *Wireless group plc v Radio Joint Audience Research Ltd*, December 16 2004 [2004] EWHC 2925 (Ch D; Unipart group ltd v 02(UK) ltd (formerly BT Cellnet ltd), Call Connections limited, July 30 2004 [2003] E.C.C. 22 [Unipart Group Ltd v 02 (UK) Ltd (Formerly BT Cellnet ltd) and Anor, November 22, 2002].


239 To explain how the defendant obtained the images used in its calendars, under the principle in *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133, [1973] 2 AllER 943.


241 *Sportswear Co SpA v Stonestyle Ltd* [2005] EWHC 2097 (Ch) and *Football Association Premier League Ltd v QC Leisure* [2008] EWHC 44 (Ch).


243 At para. 43 :- ‘The defendants’ averments in answer 5 touching upon the issue of the relevant market display, in my opinion, vagueness, ambiguity and confusion. I conclude that the defendants have not relevantly averred what is the relevant market in this case.’
Valley House Leisure Ltd, a beer tie case,\(^{244}\) where the tenant was restrained from buying requirements for designated beer from any person other than the nominated supplier. The tenant’s amended defences contended that the beer tie was prohibited and invalidated by sections 2 and 18 of the 1998 Act and an application to strike out or summarily dismiss the defences was successful, where the defences were misconceived and no appreciable effect on the bar trade in Blackpool was demonstrated. There were two traditional defences to IPR actions, which were unsuccessful and summary judgment awarded to the claimant.\(^{245}\) Finally, Devenish Nutrition Ltd v Sanofi Aventis SA (France)\(^{246}\) concerned the preliminary issue of whether the claimant would be entitled to restitution of unjust enrichment and exemplary damages, although only the former issue was considered on appeal, unsuccessfully.\(^{247}\)

2009-2012
10 judgments in this period have been summary judgments, in Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd (2009); Self-Imperial Ltd v British Standards Institution (2010); Jones v Ricoh UK Ltd (2010) Safeway Stores Ltd v Twigger (2010); Albion Water Ltd v Dwr Cymru Cyfyngedig (1-2011); Emerson Electric Co v Morgan Crucible Co Plc (1-2011); Toshiba Carrier UK Ltd v KME Yorkshire Ltd (2011); Humber Oil Terminals Trustee Ltd v Associated British Ports (2012); Murphy v Media Protection Services Ltd (2012) and Nokia Corp v AU Optronics Corp (2012).\(^{248}\) Of those cases, Albion Water I and Nokia were denoted as partially successful.\(^{249}\) The cases deemed successful were Toshiba\(^{250}\):- where it was held not to be appropriate to strike out a claim for damages against defendants, who were alleged to have participated in an unlawful cartel, as the particulars of claim sufficiently set out the allegations and the defendants were aware that the claimant was alleging knowledge of the making, or implementation, of agreements or concerted practices; and Murphy\(^{251}\) a preliminary ruling in relation to the use of a satellite decoding card to allow live Premier league matches to be screened In a pub without payment of the full Sky subscription.

Interim Process

\(^{244}\) [2006] EWHC 1510 (Ch).
\(^{246}\) [2008] EWCA Civ 1086 (CA).
\(^{248}\) Fuller case details are available in the UK Table of Cases.
\(^{249}\) In Albion Water, in a claim for damages brought by a water company against a water utility company for infringement of the prohibition against abuse of dominant position, the court struck out certain sections of the particulars of claim.
\(^{250}\) In Nokia, the causes of action in a claim alleging the defendants’ involvement in a cartel involving unlawful practices contravening the TFEU art.101 had been pleaded with proper particularity, and proposed amendments to the claim were allowed since they did not introduce new causes of action but provided further particularisation of the claims already made. The claims demonstrated a reasonably arguable case and there was no reason to strike them out or grant summary judgment.
The final category is denoted by the broad banner of ‘interim process’ which covers a range of situations in which judgments are given in a competition law dispute during the procedural phases of the litigation, and some judgments in this category are closely related to the summary judgment category, for instance where a party seeks to amend to include a competition law defense or claim.

1999-2004
There were 14 judgments in this category in that period, including two successful cases:—

*Network Multimedia Television ltd and another v Jobserve ltd,*[^252] concerned an appeal in an action for injunction for alleged breaches of section 18 of the Competition Act 1998, where the appeal was rejected as the judge was right to hold that there was a seriously arguable case.[^253] In *Frazer (Willow Lane) Ltd v Nissan Motors GB Ltd,*[^254] an application for an injunction was rejected on the basis that the relevant terms of the agreement constituted a hard-core restriction under the applicable Commission Block Exemption Regulation.[^255]

There were two partially successful cases in this category, discussed above, in England and Wales in *Glaxo Group Limited and others v Dowelhurst Limited and another,*[^256] In *Provimi Ltd v Aventis Animal Nutrition SA and others,*[^257] an action was brought by buyers of vitamins who considered that they had been forced to pay excessive prices as a result of cartels that were operated by defendants contrary to Article 101 and the principal issue was whether the defendants were liable in damages. Applications to strike out or dismiss certain claims were unsuccessful, but the claimant had mixed success in relation to various jurisdictional issues.[^258]

There are a considerable number of unsuccessful interim process actions, the vast majority involving applications for interlocutory injunctions, There are also a number of cases within this sub-category involving unsuccessful attempts to use competition law to obtain an interim order,[^259] including the following:— *Land Rover Group Ltd v UPF (UK) Ltd (in Administrative receivership) and others,* where the claimant unsuccessfully sought an interlocutory order for specific performance, the court doubting the existence of dominance in relation to the arguments based on section 18 of the 1998 Act and article 82; *Getmapping PLC v Ordnance Survey* where in addition to the lack of a credible case on the potential existence of abusive conduct, in

[^254]: [2003] EWHC 3157 (Ch).
[^258]: Although permission to appeal was given as the competition law point was novel and had wide-ranging implications, June 5 2003 [2003] EWHC 1211.
rejecting the application for an interlocutory injunction it was noted that although the claimant’s purported financial damage would be significant, it would not be irreparably harmed.

There are also a number of miscellaneous interim process cases. In *Black and others v Sumitomo Corporation and others*, a claim based on dishonest market manipulation and/or breach of articles 81 and 82 in relation to a market loss of $126 million, the claimant unsuccessfully sought pre-action disclosure under s 33(2) of the Supreme Court Act 1981.

Moreover, some cases in this category are in effect little different to the summary judgment cases, where the effect of the application is to strike out the particular competition law claim or defences. In *Her Majesty's Stationary Office and another v The Automobile Association limited and another*, where the defendant applied for permission to put in an amended rejoinder based on an alleged abuse by the claimant of article 82, the court held that the defendant’s claim would not give rise to a viable plea of abuse of a dominant position, noting that: ‘because the adverse consequences of allowing a plea under Article 82 into a case are so severe and may involve enormous cost, not just to the parties but to court time, it is incumbent upon the court to look carefully at what is and what is not pleaded.’

**2005-2008**

Interim process judgments, 18 in total, constitute the majority of judgments in competition litigation during this period, 53% of the total in 2005-2008.

There were a number of successful cases in this category, 6 in total- both *BCL Old Co Ltd v Aventis SA* rulings (2005); *Adidas-Salomon AG v Draper* (2006); *Healthcare at Home Ltd v Genzyme Ltd* (2006); *Software Cellular Network Ltd v T-Mobile (UK) Ltd* (2007); and *Leaflet Co Ltd v Royal Mail Group Ltd* (2008). There were also 2 partially successful cases: *Arkin v Borchard Lines Ltd* (2005) and *Emerson Electric Co v Morgan Crucible Co Plc* (2008).

A very limited number of cases involved applications for interlocutory injunctions, including two unsuccessful defences based on Article 81 to a claimant’s application for interlocutory relief. However, more significantly, two of the three cases involving claims for interlocutory relief on the basis of reliance on competition law

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260 See also two other rather complicated beer tie related cases, *Gary Parks v Esso Petroleum Company Limited*, July 23 199 [2000] E.C.C. 45; and *Whitbread PLC v Fal'a*, November 16 2000 Ch D.


262 Ibid. at para 92:- ‘unless there is some real evidence of dishonesty or abuse which only early disclosure can properly reveal and which may, in the absence of such disclosure, escape the probing eye of the litigation process and thus possibly all detection, I think that the court should be slow to allow a merely prospective litigant to conduct a review of the documents of another party, replacing focused allegation by a roving inquisition.’

263 See, for example, *Chiron Corporation v Murex Diagnostics Limited* (No 2), CA 7 April 1993 [1994] 1 CMLR 410. In *The British Horseracing Board Ltd v William Hill Organisation Ltd*, Ch D, July 19, 2000, certain parts of the defence were struck out.

264 At para. 21.

265 Fuller case details are available in the UK Table of Cases.

266 *Punch Taverns (PTL) Limited v Moses* [2006] EWHC 599 (Ch), and *Wooton Trucks Ltd v MAN ERF Uk Ltd* [2006] EWCH 943 (Ch). Note that on appeal, [2006] EWCA Civ 1042, the defendants abandoned any argument based on an alleged breach of European competition law.
provisions were successful. The claimant in *Adidas- Solomon AG v Draper*,\(^{267}\) was a leading sportswear company and the defendants were the owners, organisers and promoters of the tennis Grand Slam tournaments and the ITF umbrella organisation for all national governing bodies- all of which comprise the Grand Slam Committee. They had promulgated a Code of Conduct including dress rules, and had proposed a new rule to clarify that the limits on manufacturers’ logos on clothing had been exceeded by the Adidas trade-mark three stripes. The claimant relied on Article 81 and 82 and sought interlocutory injunctions. Reference was made\(^{268}\) to earlier dicta in *Intel Corporation v Via Technologies*\(^{269}\): ‘(a) claims and defences under Articles 81 and 82 require careful scrutiny so as to prevent cases lacking in merit going to long and expensive trials but (b) often raise questions of mixed law and fact which are not suitable for summary determination.’ The court noted that a cautionary approach was also appropriate in the context of the developing shape of European jurisprudence and was satisfied that there was a real prospect of success under Articles 81 and 82. *Software Cellular Network v T-Mobile (UK) Ltd*\(^{270}\) concerned the provision of mobile telephony services and the launch of a new service- Voice over Internet Protocol (‘VoIP’) technology. T-Mobile refused to activate numbers associated with Truphone, the trading name of the claimant, who contended that this amounted to an unlawful abuse of a dominant position. It was considered to be seriously arguable that between 22-30% market share may be sufficient to create dominance. Crucially, in relation to the adequacy of damages as a remedy, the claimant argued that its commercial survival would be in doubt if it would be required to await trial, even speedy trial, before launching a full service. On the balance of convenience, and taking into account the cross-undertaking in damages, the potential impact on Truphone favoured the grant of interim remedies. The court relied on the dicta in *Sea Containers Ltd v Stena Sealink Ports and Stena Sealink Line*\(^{271}\) to the effect that if an opportunity is denied to provide a new service ‘there is sufficient urgency to justify interim measures.’ Otherwise, a final decision may be ‘rendered “ineffectual or even illusory”.’\(^{272}\) However, in *AAH Pharmaceuticals Ltd v Pfizer ltd*\(^{273}\) an application for interim injunctions to restrain Pfizer from terminating supply agreements and refusing to supply the claimants with prescription drugs, in infringement of Arts 81 and 81 and sections 2 and 18 of the 1998 Act was unsuccessful. The delay in bringing the application and the fact the complainants had unsuccessfully requested the OFT to take interim measures added to the ‘disruption and reputational damage likely to occur from an injunction at this stage.’

Three of the cases involved attempts to amend the pleadings,\(^{274}\) and one was an appeal against a no-costs order by defendants who had succeeded at trial in an action

\(^{267}\) [2006] EWHC 1318 (Ch).
\(^{268}\) At para. 24.
\(^{269}\) [2002] AER (D) 346 at para. 32.
\(^{270}\) [2007] EWHC 1790 (Ch).
\(^{272}\) At paras. 58-59.
\(^{273}\) [2007] EWHC 565 (Ch).
\(^{274}\) A successful application to re-amend the particulars of claim in *Adidas* supra [2006] EWHC 2262 (Ch) and unsuccessful applications to amend the claim in *Bookmakers’ Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2008] EWHC 2503 (Ch) to allege a series of horizontal agreements and for leave to amend a defence to plead abuse of dominance in *BHB Enterprises Ltd v Victor Chandler (International) Ltd* [2005] EWHC 1074 (Ch).
based on Articles 81 and 82.\textsuperscript{275} One of the cases was an unsuccessful application for pre-trial disclosure in \textit{Hutchinson 3G UK ltd v O2 (UK) Ltd}.\textsuperscript{276}

**2009-2012**

The majority of the 44 rulings in this period have been interim process judgments, with 28 of those in total. Of these, \textit{National Grid Electricity Transmission Plc v ABB Ltd} (2009 and 2011); \textit{Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd} (1-2009); \textit{Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd} (2009 and 2010); \textit{Deutsche Bahn AG v Morgan Crucible Co Plc} (2011); 2 \textit{Travel Group Plc (In Liquidation) v Cardiff City Transport Services Ltd} (1-2011) and \textit{Albion Water Ltd v Dwr Cymru Cyfyngedig} (3-2011) were successful and \textit{Consumers' Association v JJB Sports Plc} (2009); \textit{Albion Water Ltd v Dwr Cymru Cyfyngedig} (2010 and 2-2011); and \textit{National Grid Electricity Transmission Plc v ABB Ltd} (2012) were denoted as partially successful.

**Competition Law Claims and defences each year and their success**

The preponderance of competition law defences, in the 1970s, 1980s and early to mid 1990s is notable, and there is a considerable overlap with the statistics for IP rights cases, as defendants during this early period sought to use the new Euro-defences. Only since 1999 have the competition law claims, outnumbered the cases involving competition law defences as it is being increasingly recognised that competition law may be used by claimants as a sword to protect their interests.

**1999-2004**

**SUCCESSFUL CLAIMS**

There have been 3 cases where have been successful competition law claims, including \textit{Network Multimedia Television ltd and another v Jobserve ltd},\textsuperscript{277} \textit{Secretary of State for Health and others v Norton Healthcare ltd and others},\textsuperscript{278} and the Scottish case of \textit{Fotheringham & son v The British Limousin Cattle Society Ltd}.\textsuperscript{279} and was also granted an interim injunction. There were also 2 partially successful claims, in \textit{Provimi ltd v Aventis Animal Nutrition SA and others},\textsuperscript{280} and \textit{Hendry and others v The World Professional Billiards and Snooker Association limited (WPBSA)},\textsuperscript{281} all discussed at length above. Although designated as partially successful, this does not detract from the significance of the outcome in Hendry, where an association rule was held to be void,

**SUCCESSFUL DEFENCES**

There have been 3 cases in which there have been successful competition law defences, although they have tended to be limited to a defendant overcoming a

\textsuperscript{275} Arkin v Borchard Lines Ltd (Nos 2 and 3) CA) [2005] 1 WLR 3055 considered supra.

\textsuperscript{276} [2008] EWHC 55 (Comm).

\textsuperscript{277} December 21 2001 [2001] EWCA Civ 2021 [\textit{Network Multimedia Television ltd (T/A Silicon.com) v Jobserve Ltd}, April 5 2001 Chancery Division (Transcript) 5 April 2001].

\textsuperscript{278} February 25 2004 [2004] EWHC 609 (Ch) [\textit{Secretary of State for Health and others v Norton healthcare ltd and others}, July 24 2003 [2003] EWHC 1905 (Ch)].

\textsuperscript{279} 8 April 2004, 2004 SLT 485, Ex Div.


potential procedural hurdle to defending an action on the basis of the application of competition law rules. For instance, success in certain cases has involved defences not being struck out, as in *Intel Corp v Via Technologies Inc*;282 and *Blackburn Chemicals Ltd v Bim Kemi AB*.283 In *Frazer (Willow Lane) Ltd v Nissan motors GB Ltd*284 an application for an injunction was rejected on the basis that the relevant terms of the agreement constituted a hard-core restriction under the applicable Commission Block Exemption Regulation.285

There was 1 partially successful defence, where certain defences were struck out and others allowed to proceed to trial, in each of the cases concerned *Glaxo Group Limited and others v Dowellhurst Limited and another*.286

**2005-2008**

**SUCCESSFUL CLAIMS**

The 9 successful claims in this period were *BCL v Aventis* (I and II, 2005); *Attheraces Ltd v BHB Ltd* (2005); *Adidas-Solomon AG v Draper* (2006); *Healthcare at Home Ltd v Genzyme* (2006); *EWS v EON* (2007); *Chester City Council v Arriva* (2007); *Software Cellular Network Ltd v T-Mobile (UK) Ltd* (2007); *Emerson Electric Co v Morgan Crucible Co* (2007) and *Leaflet Co Ltd v Royal Mail Group Ltd* (2008). *Arkin v Borchard Lines (Ltd)* (2005) and *Emerson Electric Co v Morgan Crucible Co* (2008) were both partially successful claims.287

**SUCCESSFUL DEFENCES**

The successful defences were *Sportswear Co Spa v Stonestyle Ltd* (2006); *Calor Gas Ltd v Express Fuels (Scotland) Ltd* (2008) and *Football Association Premier League Ltd v QC Leisure* (2008).288

**2009-2012**

**SUCCESSFUL CLAIMS**

The 10 successful claims in this period were *National Grid Electricity Transmission Plc v ABB Ltd* (2009); *Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd* (1-2009); *Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd* (2009 and 2010); *Purple Parking Ltd v Heathrow Airport Ltd* (2011); *National Grid Electricity Transmission Plc v ABB Ltd* (2011); *Deutsche Bahn AG v Morgan Crucible Co Plc* (2011); 2 *Travel Group Plc (In Liquidation) v Cardiff City Transport Services Ltd* (1-2011) and *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* (2011) and *Albion Water Ltd v Dwr Cymru Cyfyngedig* (3-2011).289

The partially successful cases were *Consumers' Association v JJB Sports Plc* (2009); *Self-Imperial Ltd v British Standards Institution* (2010); *Albion Water Ltd v Dwr Cymru Cyfyngedig* (2010); *Albion Water Ltd v Dwr Cymru Cyfyngedig* (1 and 2-...
SUCCESSFUL DEFENCES
The only successful defence was in Murphy v Media Protection Services Ltd (2012).

Competition Law Provisions Relied Upon and their relative success

This section will consider which competition law provisions parties have relied on and the degree of success achieved.

1999-2004
In the early period there were considerably more cases involving Art 101, with 11 Art 101 cases, only 1 domestic Article 101 case, and 1 Article 101 and domestic prohibition case combined.
There were three Article 102 cases, 6 domestic Article 102 cases and 1 case combining the two, with 5 cases involving a combination of provisions.

2005-2008
This trend continued during 2005-2008, with 13 Article 101 cases alone, no domestic Art 101 cases and 3 art 101 and domestic Art 101 combined cases. This trend is particularly highlighted during 2008 with 5 Article 101 judgments. In the same period there were only 2 Article 102 cases, and 5 judgments each involving either the Chapter 2 prohibition or the Chapter 2 prohibition combined with Article 102. This latter group included the unsuccessful defence in Hewlett-Packard Development and BHB Enterprises Ltd.

The case-law in this period generally reflects the difficulties in succeeding in establishing an abuse. In PIK Facilities Ltd v Watson’s Ayr Park Ltd the pursuers were proprietors of Glasgow Prestwick International Airport and sought interdict against the defenders from trespassing on airport roads, by buses and taxis, to collect and drop off passengers being conveyed by them from their off-airport car parking facilities. A defence was raised based on infringement of Chapter 2 of the Competition Act 1998, relying on the ‘essential facilities’ doctrine as developed to a limited extent under Community jurisprudence. However, this defence failed at the first hurdle of establishing the relevant market. Similarly, in Chester City Council v Arriva Plc it was stressed that each element of an abuse case needed to be established and the case fell at both the relevant market and dominance stages. The difficulties in this area were highlighted in BHB Enterprises Ltd v Victor Chandler (International) Ltd: ‘it seems to me that particular care is to be expected of a party

290 Fuller case details are available in the UK Table of Cases.
292 At para. 43: ‘The defenders’ averments in answer 5 touching upon the issue of the relevant market display, in my opinion, vagueness, ambiguity and confusion. I conclude that the defendants have not relevantly averred what is the relevant market in this case.’ Furthermore, it was held that the requirement of indispensability was not satisfied.
293 [2007] EWHC 1373 (Ch).
294 [2005] EWHC 1074 (Ch).
who pleads breach of s18 of the Act or an Article 82 offence. These are notoriously burdensome allegations. The recent history of cases in which such allegations have been raised illustrate that they can lead to lengthy and expensive trials. Mere assertion in a pleading will not do. Before a party has to respond to an allegation like that, it is incumbent on the party making the allegation to set out clearly and succinctly the major facts upon which it will rely.295 The difficulties in this area have been reduced by the greater readiness of courts in recent years to grant interlocutory remedies, but until very recently there has been a dearth of OFT activity in relation to the Chapter 2 prohibition (or Art 82) which could form the basis of follow-on actions at the CAT or High Court.296

2009-2012
The majority of judgments involved Article 101 and/or its domestic equivalent, with 26 judgments in this category. 18 of those related to Article 101 alone, with 5 judgments involving a combination of the 2 provisions and 3 judgments based on the UK chapter 1 prohibition alone. Unsurprisingly, of these 26 judgments, a minority, 8 were standalone, although this is perhaps a higher number than would have been anticipated.

In abuse cases, unlike the agreements case-law, the preponderance of cases involve the domestic prohibition alone, the Chapter 2 prohibition, with 10 cases in this category, with only 3 Article 102 cases and 4 combined provision abuse cases. Unsurprisingly, of all the abuse cases, 11 were standalone cases, and only 6 were follow-on cases. Of the latter only Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd was in the normal civil courts. One of the follow-on abuse cases was 2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Ltd, with 2 judgments, and there has, as noted earlier, been a subsequent final award of damages in that Chapter 2 prohibition case. Of the 17 abuse cases, only 4 were successful, Enron (2009), Purple Parking, 2 Travel (1-2011) and Albion Water (3-2011). Despite the special, subsequent follow-on successful judgment in 2 Travel, the difficulties of pleading abuse cases continues, although the Purple Parking case was a notably successful injunction case. Only 1 case had a wider combination of provisions- Electrical Waste Recycling Group v Philips Electronics UK Ltd (2012).297

Success according to remedies sought

1999-2004
Damages actions alone appeared to have the highest success rate, particularly compared to the low success rate in applications for an injunction, although in three of the claims denoted as successful, for example Secretary of State for Health and others v Norton Healthcare Ltd and others,298 and Fotheringham & son v The British

295 Ibid. At para. 43.
296 See the OFT infringement decision in relation to Cardiff Bus in November 2008 at http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/cardiffbus, its first infringement finding in relation to the Chap. 2 prohibition for circa 5 years.
297 [2012] EWHC 38 (Ch).
298 February 25 2004 [2004] EWHC 609 (Ch) [Secretary of State for Health and others v Norton healthcare ltd and others, July 24 2003 [2003] EWHC 1905 (Ch)].
Limousin Cattle Society Ltd\textsuperscript{299} the judgment always came at an interim stage in the litigation far removed from any final award of damages.

There were a number of cases in which claimants sought injunction, primarily interlocutory injunction, and the difficulties in this context, as evidenced most notably by Garden Cottage Foods have been noted and criticised.\textsuperscript{300} In Network Multimedia Television ltd and another v Jobserve ltd,\textsuperscript{301} the court rejected damages as an adequate remedy as the claimant could be forced out of the market and this would damage its reputation and its European expansions. In addition, the balance of convenience was in favour of maintaining the status quo for similar reasons. This suggested that the courts were more willing to grant interim remedies under the 1998 Act than had previously been thought to be the case in relation to the Community competition rules.

\textbf{2005-2008}

Success again predominated in the damages category but despite Healthcare at home interim damages award, there were no final damages awards in the courts in the UK in this period.

There are very few cases in which an injunction alone was sought, and the earlier difficulties in this context, as evidenced most notably by Garden Cottage Foods have been noted and criticised.\textsuperscript{302} However, following earlier rulings such as Network Multimedia Television ltd and another v Jobserve ltd,\textsuperscript{303} an injunction was successfully sought in Adidas- Solomon AG v Draper.\textsuperscript{304} The successful case involving a declaration was follow-on substantive ruling on the merits in English Welsh and Scottish railway Ltd v E.ON UK plc.\textsuperscript{305} There was one unsuccessful action for pre-action disclosure:- Hutchinson 3G UK ltd v O2 (UK) Ltd.\textsuperscript{306} The applicant sought an order for pre-trial disclosure against 4 principal competitors as Mobile Network Operators (NMOs) under s33 of Supreme Court Act 1981 and CPR Rule 31.16 on the basis that the MNP (Mobile Number portability) system restricted competition and prevented the development of an effective alternative MNP system. The limits of pre-trial disclosure were emphasised as follows:- 'it is inappropriate for any application to obtain pre-action disclosure of documents which would not in due course be subject to standard disclosure by simply calling for classes or categories of documents in which some documents would be disclosable.....the need for a highly focussed application.'\textsuperscript{307} Accordingly the application must be focused and specific.\textsuperscript{308}

\begin{footnotesize}
\textsuperscript{299} 8 April 2004, 2004 SLT 485, Ex Div.
\textsuperscript{300} See MacCulloch, A D and Rodger, B J ‘Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts,’ [1996] 7 ECLR 393.
\textsuperscript{301} December 21 2001 [2001] EWCA Civ 2021 [Network Multimedia Television ltd (T/A Silicon.com) v Jobserve Ltd, April 5 2001 Ch D].
\textsuperscript{302} See MacCulloch, A D and Rodger, B J ‘Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts,’ [1996] 7 ECLR 393.
\textsuperscript{303} [2001] EWCA Civ 2021 [Network Multimedia Television ltd (T/A Silicon.com) v Jobserve Ltd, April 5 2001 Ch D].
\textsuperscript{304} [2006] EWHC 1318 (Ch). Note that the subsequent ruling in the same case [2006] EWHC 2262 (Ch) concerned an application to amend the claim, which was successful, and as the claimant was seeking an injunction, this case is also necessarily categorised as a successful injunction case.
\textsuperscript{305} [2007] EWHC 599 (Comm).
\textsuperscript{306} [2008] EWHC 55 (Comm).
\textsuperscript{307} At paras. 38-40.
\textsuperscript{308} The court added, at para. 51:-“The reality is that much of the material may be relevant, if at all, only in the sense of being part of the “story” but that is insufficient. In fact much of it would appear to fall
\end{footnotesize}
2009-2012

In this period there were 6 defence cases, 3 injunction cases, 1 declaration case, with the remainder being damages actions (32), or actions seeking damages and other remedy (2- BAGS and Global Knaifam Leasing).

The change is dramatic from earlier periods and reflective of the increase in damages actions, and CAT follow-on actions.

Aside from all the ‘successful’ damages actions, the only other successful remedy was the injunction granted in Purple Parking. Furthermore, it should be stressed that the damages action ‘success’ did not entail any final award of damages- at least until the judgment in 2 Travel which falls outside the temporal scope of the project.

Conclusions

This research has provided a database for studying the extent to which private litigation in the UK courts has played a role in competition law enforcement, although the study of the individual cases is limited in depth. There is support for the hypothesis that there has been more frequent resort to the courts more recently. Nonetheless, it should be noted that out-of court settlements are not considered in this research and accordingly the limited number of competition law judgments gives an understated impression of the frequency with which such competition law claims and defences are made in practice. Although the classification as successful or partially successful imparts only limited information about the outcome of the case, it is important to recognise the significance, in advancing a particular competition law claim (or defence), and to the wider competition law legal culture, of success at different stages of litigation. Between 2009 and 2012 there have been considerably more competition law claims than defences, and we can witness the slowly increasing significance of the CAT in this context. Nonetheless, in comparison with the number of infringement findings by the OFT and Commission during the preceding period, there have been relatively few follow-on cases raised under the section 47A procedure, despite being described as an ‘attractive alternative’ to High Court proceedings, on the basis of its speed, relative inexpensiveness and flexible cost rules which may reduce the risk for claimants.

There have been very few final substantive judgments, which are more significant in developing a competition law culture, although the Calor Gas, English, Welsh and Scottish Railway Ltd and Purple Parking are notable success cases, and equally noteworthy are the unsuccessful claims in AttheRaces (Appeal Court) and Crehan (HL). Decisions taken at an interim stage are also important indicators of the potential obstacles facing parties raising competition law issues during litigation and may be crucial in terms of litigative strategy and bargaining power, the most significant case in this context arguably being the interim damages award in Healthcare at Home Ltd, although there is also evidence of a more relaxed approach to the grant of

more naturally into “line of inquiry” documentation. It is certainly not focused on supporting or undermining any specific issue which would be likely to be pleaded.’

309 Although the limited number of Chapter 2 infringement decisions has been noted.

310 Follow-on actions can also be raised in the normal civil courts- see for instance Devenish and English Scottish and Welsh Railway Ltd.

311 F Randolph, and A Robertson ‘The first claim for damages in the Competition Appeal tribunal’ [2005] ECLR 365 at 368.
interlocutory injunctions. In relation to the range of competition law provisions available, Article 101 has dominated, clearly constituting the most significant provision in relation to the interlinked categories of claims (for damages), follow-on actions, and claims raised before the CAT. Inevitably, greatest success has also been achieved where Article 101 has been relied upon. The case-law has generally demonstrated the difficulties in overcoming the various hurdles in a stand-alone case necessary to satisfy the abuse of dominance requirements. Finally, we analysed the types of remedies sought by claimants utilising competition law as a litigative sword and their relative success, and noted that damages actions had the highest success rate, although this must be qualified by the recognition that the judgments related to issues raised in the interim process, albeit including Healthcare at Home Ltd.

Overall, the research has identified a number of interesting themes emerging from the development of competition law litigation in the UK courts between 2009-2012 and provides further support for modification of the existing legal framework to further facilitate private enforcement. It is evident that competition litigation culture in the UK, particularly in comparison with the US, is in a state of infancy. Although the research seeks to be ‘comprehensive’ it is clear that due to the prevalence of settlement activity, the published judgments represent only a partial view of competition litigation strategy in the UK. There is some evidence, as noted, of a recent increase in the number of claims being raised before the CAT, and it has delivered some important judgments to date, although to date these have tended to be procedural skirmishes related to time-bar, costs and jurisdiction, but the consumer representative claim provision is clearly not an appropriate mechanism to incentivise ‘class actions’. It may be that the profile associated with the very recent, successful damages awards in 2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd, and also Albion Water v Dwr Cymru Cyfyngedig, may increase awareness of the possibility to seek redress for aggrieved parties, and thereby encourage follow-on claims, particularly before the CAT. Collective redress in particular may also be facilitated by the recent proposals to enhance private actions in the UK.312 The key proposal by BIS, at least in the context of collective redress, was to recommend the adoption of an opt-out representative action for consumers and businesses (in follow-on and stand-alone claims).313 Another key strand of the BIS proposals, which reflects increasing competition litigation practice, is the attempt to encourage ADR.314 More specifically, and innovative in this context, are the proposed introduction, first of a collective mass settlement regime (akin to the Dutch Mass Settlement Act 2005) and provision to enable the competition authorities to certify a voluntary redress scheme.315 Each of these BIS recommendations has been included in reforms which will be made to the current Competition Act provisions by Schedule

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314 Ibid, see part 6.
315 Ibid at paras. 6.20-6.26.
7 of the Consumer Rights Bill, which is currently passing through Parliamentary processes.316