What are the Problems with EC Antitrust Damage Actions in Europe? Does the Private Pillar Require Reinforcement?

Background Paper
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Introduction

My perspective is that of a national competition authority – or in my case a national consumer and competition authority: an NCA whose mission is to make markets work well for consumers. We do this through the use of a variety of tools and instruments that the legislator has given to us including, but not limited to, enforcement of competition rules under a prohibition regime.

Our mission is to drive productivity growth in the economy and to remove or minimise sources of consumer detriment. We are seeking to maximise the impact of our public enforcement work and, to that end, are increasingly focusing on outcomes. Evaluation of our work has become increasingly important in guiding what we do and is a significant factor in the performance framework agreed for our future funding arrangements with HM Treasury. We have already carried out or commissioned a number of evaluation studies for these purposes.[2]

At the centre of our mission lies the belief that properly functioning markets in which there is effective competition drive productivity and competitiveness and maximise consumer welfare. As regards productivity and competitiveness, effective competition promotes efficiency, flexibility and innovation in business. Competitive and open markets therefore increase the competitiveness of firms nationally, in the EU and globally, and thus raise economic growth and standards of living. Effective competition also forces firms to deliver benefits to consumers in terms of price, quality and variety of goods and services, which in turn also drive economic growth and living standards.

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[1] This paper was prepared as a background paper to the debate at *Cartel enforcement and Antitrust damage actions in Europe*, 8–9 March 2007, Brussels, Belgium. The conference was co–hosted by DG Competition and the International Bar Association. This paper reflects a personal view and should not necessarily be taken as reflecting an official OFT view or position.

[2] See, for example, *Positive impact — An initial evaluation of the effect of the competition enforcement work conducted by the OFT*, December 2005, OFT827; *Evaluating the impact of the car warranties market study*, June 2006, OFT852; and *Evaluation strategy for market studies*, September 2006, OFT862.

The interest of an NCA in private enforcement

Where does private enforcement, including damages actions, fit within the agenda of an NCA? Why does an NCA have an interest in promoting private enforcement?

Public and private enforcement are complementary

Promoting proper and effective private enforcement is part of our mission. Private enforcement helps to keep markets open and competitive.[3] Proper and effective public and private enforcement are therefore complementary, and both are essential to achieving the total welfare benefits described above.

Conversely, they are **not** alternatives – **more** private enforcement does **not** mean **less** public enforcement. Public enforcement is a fundamental pillar of the system, but public enforcement has to be focussed and make the optimum use of the resources that are made available from the public purse. That means, for instance:

- that we have to prioritize the work that we do and to concentrate on a portfolio of cases that are the most important, and
- that we cannot pursue every complaint or take on every case at the public expense.

In October 2006, the OFT published a case prioritisation framework.[4] The following examples illustrate some of the policy choices which the OFT has to make and which are, to an extent, reflected in that framework:

- we could devote our entire resources to investigating cartels – and probably just cartels in one or two sectors. Although cartels will always be a high priority, focusing exclusively on such cartels would leave

[3] Infringements of competition law give rise to individual rights of action under domestic law and/or EC law, as appropriate. See Case 127/73 *BRT v Sabam* [1974] ECR 51 on the direct effect of Articles 81(1) and 82. *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] 1 AC 130, [1983] 2 All ER 770, HL established that a claim for damages is available in English law for breach of EC competition law. Damages for breach of the Chapter I and II prohibitions of the Competition Act 1998 have been available since the entry into force of that Act. Follow–on claims for damages or other sums of money arising from an infringement of domestic or EC law may be brought in the ordinary courts or, by virtue of section 47A of the Competition Act 1998, in the Competition Appeal Tribunal.
If individual rights of action cannot be, or are not being, effectively pursued, that suggests either a regulatory failure (for example, in the legislative framework or the implementing rules or in the way they are applied by the courts) or a market failure (for example, in the market for legal services, or for funding legal services). If it is the former, there is an argument that, in so far as EC law is concerned, the Member State is in breach of its Treaty obligations.

[4] *Competition prioritisation framework*, October 2006, available at http://www.oft.gov.uk/NR/rdonlyres/26B0A415-843B-4B5E-8ACD-0D9125115366/0/compcriteria.pdf.

other types of anti–competitive behaviour and other sectors of the economy untouched by public enforcement,

- we should not generally use public resources, at least outside the field of cartels, to pursue a case where the legal issues are relatively clear and those that have been harmed are well able to fund private litigation, and
- we should not generally spend public resources on similar issues in multiple cases if we can use individual cases to illustrate and develop the application of the law and then, using those precedents, encourage compliance through other means. There are some exceptions, however, such as cartels.

In summary, private enforcement is a second, and equally important, fundamental pillar of the system. Given our mission and the benefits that flow from competition compliance, we have a strong interest in ensuring that our public cases are followed up, where appropriate, with damages actions. Although an administrative fine is intended to encourage compliance, the imposition of an administrative fine does not make good the harm suffered by individual businesses or consumers. Also, where we cannot pursue a well–founded complaint for reasons of administrative priority, we have a strong interest in ensuring that persons who have been harmed can seek a remedy on a 'stand–alone' basis.

Central to our work, therefore, is the belief that the **combination** of **public** and **private** enforcement will deliver the benefits to total welfare described above.

The effects of making private enforcement more effective

Making the private enforcement of competition law more effective will:

- increase businesses' (and consumers') **incentives** to monitor the behaviour of the businesses with whom they deal,
- increase businesses' (and consumers') **incentives** to complain to a competition authority or take the matter to a court if that monitoring uncovers an infringement, and
- increase the **financial and litigation risks** for businesses committing an infringement, in that the likelihood and magnitude of any financial liability to a competition authority and/or a claimant will increase. As the financial and litigation risks increase, so does (or should) the interest of those ultimately responsible for the governance of the business (especially supervisory boards and non–executive directors) or for supporting the business (including, for example, financiers and investor groups).

As a result of the above factors, businesses will be incentivised to comply with the law and greater compliance will maximise total welfare.

Private enforcement is also good for efficient businesses seeking to develop successfully because:

- those businesses that comply have nothing to fear,[5]
- businesses which have been harmed can recover for the loss or damage that they have suffered, and
- consumers who have been harmed can also obtain redress – and may also be encouraged to deal in future with businesses that comply with the law.

The UK framework for private enforcement

In the UK we already have in place all the main elements for proper and effective private enforcement. Such elements can be found in the Competition Act 1998 and the Enterprise Act 2002, in particular. In England and Wales, the Civil Procedure Rules are also of key importance,[6] as are the rules of the Competition Appeal Tribunal.[7]

[5] Appropriate powers must be available to courts to deal with unmeritorious or speculative claims. To a large extent, such powers are already available in the UK.

[6] In Scotland the Rules of the Court of Session or the relevant Act of Sederunt rules apply, depending on the court in which a claim is made.

[7] Competition Appeal Tribunal Rules, SI 2003/1372. Section 16(1) of the Enterprise Act 2002 allows the Lord Chancellor to make regulations enabling the ordinary courts to transfer to the Tribunal for its determination so much of any proceedings before the relevant court as relates

Although there are few reported cases where awards of damages have been made (and, where applicable, upheld on appeal), there have been a number of settlements. The details remain confidential, but it is generally understood that the sums involved in some of these cases are not insignificant. (Although consumers appear to have recovered virtually no compensation in cases to date, that may also be about to change, as discussed further below.)

Court rules allocate stand–alone and follow–on competition cases in England and Wales[8] principally to a division of the High Court[9] but follow–on actions can also be brought in the Competition Appeal Tribunal.[10]

Representative actions

Where a number of actions (in any sphere, including competition law) raise 'common or related issues', the court may make a 'group litigation order.'[11] Specifically in the competition sphere, follow–on consumer claims – a form of representative action in the strict sense – can be brought in the Competition Appeal Tribunal by 'specified bodies' on behalf of one or more consumers.[12] So far, Which? (formerly the Consumers' Association) is the only body to have been designated by the Secretary of State for these purposes and is preparing to bring its first action following on from a decision of the OFT concerning price fixing of replica football kits.[13]

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to any question relating to whether an infringement of the Chapter I prohibition, Chapter II prohibition or Article 81 or 82 of the EC Treaty has been or is being committed.

[8] In Scotland, both the Court of Session and the Sheriff Court have jurisdiction to hear competition law cases.

[9] See Rule 30.8 of the Civil Procedure Rules and *Practice Direction – Competition law – Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998*.

[10] See sections 58A and 47A of the Competition Act 1998. Currently, all claims pleading a breach of EC or UK competition law must be issued in or transferred to the High Court and, unless they come within the scope of Rule 58.1(2) of the Civil Procedure Rules (in which case they are assigned to the Commercial Court), they are assigned to the Chancery Division.

[11] See Rule 19.11 of the Civil Procedure Rules. There is no direct equivalent in Scotland, but it is possible to arrange administratively for cases to be dealt with together, if the parties agree.

Representative party actions (which are sometimes referred to as 'representative actions' or 'representative claims') can be brought by one or more persons who have the 'same interest' as the representative parties. However, the criterion of 'same interest' is difficult to satisfy – where the relief requested is an award of damages, quantum will vary from claimant to claimant. Furthermore, all members of the action will be affected by any issues of fact or limitation facing the representative party, and the representative claimant (or defendant) is solely liable for costs. In light of these features, representative party actions are relatively rare.

[12] See section 47B of the Competition Act 1998.

[13] Shortly after the House of Lords' refusal of permission to appeal against the judgment of the Court of Appeal, Which? warned JJB Sports that it intends to sue on behalf of consumers who have been unlawfully overcharged for football shirts. JJB Sports had two weeks to respond but this time has now expired, Which? is currently considering filing the action at the

Disclosure and evidence

The Civil Procedure Rules provide for disclosure of documentary evidence, the use of witness statements and the submission of expert evidence.[14] Each party has a duty to disclose documents on which it intends to rely, together with documents which either adversely affect its own case, adversely affect another party's case or support another party's case. This is referred to as 'standard disclosure.'[15] In certain circumstances, orders for pre–action disclosure can be obtained on application by a prospective party against another prospective party.[16]

Courts will normally order parties to put oral evidence that they intend to bring on issues of fact into a witness statement and serve it on the other side. The submission of expert evidence is also provided for.[17] Unless the court directs otherwise, expert evidence is to be given in a written report.

Courts have flexible powers to ensure the adequate protection of confidential information. The court will consider the interests of justice, the public interest, and the nature of any confidential information before agreeing to a request for confidentiality, however. Generally, a witness statement may only be used for the purpose of the proceedings in which it is served.

In a case before the Competition Appeal Tribunal, parties can apply to have confidential documents excluded from disclosure subject to certain conditions. The request has to be made in writing within 14 days of sending the document to the Registrar and the parties must specify what they are claiming confidentiality for and why. The Tribunal will decide what is to be regarded as confidential and will only disclose where the information is essential for a decision.

Service on, and intervention by, the OFT

Any party whose statement of case raises or deals with an issue relating to the application of Article 81 or 82, or Chapter I or II, must serve a copy of the statement of case on the OFT at the same time as it is served on the other parties to the claim.

Competition Appeal Tribunal. See *Argos Ltd & Anor v Office of Fair Trading* [2006] EWCA Civ 1318.

[14] In Scotland, disclosure is replaced by 'recovery'.

[15] Part 53 of the Civil Procedure Rules. In Scotland, a party must apply to the court for an 'order for commission and diligence'.

[16] Rule 32.4(2) of the Civil Procedure Rules.

[17] Rule 35 of the Civil Procedure Rules. In Scotland, expert evidence is given by oral testimony.

In common with other competition authorities, the OFT has the power under Regulation 1/2003 to intervene in individual cases where issues of Articles 81 and 82 are before the domestic courts. The OFT has already used this power when *Courage v Crehan* was before the House of Lords.[18] The OFT also has the power to intervene where issues of domestic competition law are at stake.[19]

Fault

Under English law, fault is not an element of an infringement of the competition rules – there is strict liability. I understand that a fault requirement may be an issue in other jurisdictions, but it is not – or should not — be a problem in the UK.

Limitation periods

Similarly limitation periods should not be a problem in UK proceedings. The European Court of Justice held in *Manfredi*[20] that limitation periods must not render it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered. In England and Wales, a significant limitation period – six years from the date on which the cause of action arose – applies to all cases, including competition cases.[21] If cases are to be brought by way of a follow–on action in the Competition Appeal Tribunal, rather than the ordinary courts, the applicable limitation period is two years.[22]

Injunctive relief

Injunctive relief (interim or final) is available in the English courts to complement damages actions.[23] So far, only one final injunction has been awarded in the English courts in *Attheraces*,[24] but this was overturned by the Court of Appeal.[25]

Damages

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[18] *Inntrepreneur Pub Company (CPC) & Ors v. Crehan* [2006] UKHL 38.
[19] See *Practice Direction – Competition law – Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998*, paragraph 4.1A.
[20] Joined Cases C–295/04 to C–298/04 *Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others*, [2006] 5 CMLR 17.
[21] See the Limitation Act 1980. In Scotland, the period is five years, under the Prescription and Limitation (Scotland) Act 1973.
[22] See Rule 31 of the Competition Appeal Tribunal Rules.
[23] In Scotland, the relevant form of relief is an 'order for interdict'.
[24] *Attheraces Ltd & Anor v British Horse Racing Board & Anor* [2005] EWHC 3015 (Ch).
[25] *Attheraces Ltd & Anor v The British Horseracing Board Ltd & Anor Rev 2* [2007] EWCA Civ 38.

Damages are based on the loss or damage suffered by the claimant. However, there is also the possibility of aggravated, restitutionary or exemplary damages in certain circumstances. Aggravated damages are intended to compensate the victim of a wrong for mental distress or injury to feelings,[26] whereas restitutionary damages aim to strip away some or all of the gains by a defendant arising from a civil wrong.[27] In England and Wales, exemplary damages (otherwise known as 'punitive damages') are available at common law in three situations, as outlined in *Rookes v Barnard*.[28] Exemplary damages are available where, for instance, 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the [claimant]'. Exemplary damages have not been awarded in a competition case in England and Wales to date but they have been sought on several occasions.

[26] *Rookes v Barnard* [1964] AC 1129, HL.
[27] See, for example, *Ministry of Defence v Ashman* (1993) 66 P.&C.R. 195; [1993] 40 E.G. 144; [1993] N.P.C. 70; [1993] 2 E.G.L.R. 102, CA (Civ Div).
[28] The courts in Scotland have not recognised exemplary damages to date.

Legal system

Finally, we have a developed and internationally respected legal system that is well used to hearing and determining complex, commercial disputes, including major international disputes, and to dealing with conflicts of expert evidence. It is, on the other hand, an adversarial system in which oral advocacy and examination of witnesses are important features. Litigation can therefore be both long and expensive.

What are the problems?

Within this framework, and noting that there have been relatively few cases that have been taken to final judgment (though a number have been settled), what are the problems?[29]

A central issue in considering the problems relates to incentives, or rather the insufficiency of incentives.

Incentives

Incentives for **claimants** to bring well–founded cases are low:

- they face large upfront costs to start and develop their case – both legal costs and experts' costs, and
- they face large exposure to the other side's costs under the 'loser pays' principle, albeit applied on a discretionary basis by the judge, if the claim is unsuccessful.

Thus incentives are low particularly in the light of the typical complexity of the facts and expert evidence, the absence of precedents and the consequent lack of clarity in certain areas of the law.

As regards consumers:

- consumers are often unaware that they are being, or have been, harmed by anti–competitive agreements or behaviour. Anti–competitive behaviour is often covert (cartels) or difficult for consumers to identify (other agreements and abuse),
- even if consumers become aware of anti–competitive behaviour, it may be that each individual consumer's loss is so small that it is not in their interest to pursue an individual claim,
- the exposure to the legal costs of the defendant due to uncertainty of outcome of the proceedings can be substantial and both difficult to quantify and provide for (for example, through after the event insurance),

[29] I have indicated above some issues that should not give rise to problems – for instance a requirement for fault or unduly short limitation periods.

- consumers typically do not have access to the evidence without commencing proceedings and seeking disclosure, and
- consumers are put off by the sometimes complex legal and economic issues that have to be considered in competition cases.

The same considerations would also apply in most cases to small and medium–sized businesses.

Incentives for **lawyers** to take cases on a 'no win, no fee' basis may currently be too low, except (possibly) where a follow–on action is concerned:

- Conditional Fee Agreements, available generally for litigation, may not be sufficiently flexible for competition cases as currently implemented. Under a Conditional Fee Agreement,[30] solicitors and counsel may agree to receive no payment or less than normal payment if the case is lost but normal or higher than normal payment if the case is won. Currently, the uplift on the normal fees if the case is won can be no more than 100 per cent, and
- insurance against paying the defendant's costs is not sufficiently developed, at least in competition cases – perhaps due to the lack of precedents.

It is worth noting, however, that the Court of Appeal recognised in *Arkin*[31] in May 2005 that commercial funders who finance part of a claimant's costs of litigation 'in a manner which facilitates access to justice and which is not otherwise objectionable' will only be liable for the costs of the opposing party to the extent of the funding provided, rather than without limit.

The main problems that I see from a UK perspective can be summarised under a number of headings: the form and nature of representative actions (which allow individual claims to be brought together), costs and funding issues, disclosure and evidential issues, bringing public and private enforcement closer together, and effective case management. I will also comment on damages and on standing and the so–called 'passing–on' defence.

Representative actions

I have referred above to the existence of follow–on representative actions in the UK system and the fact that the first such action is in preparation at the moment. I am keen to ensure that representative actions develop successfully in the UK.

[30] Conditional fees are known as 'speculative fees' in Scotland.
[31] *Arkin v Borchard Lines* [2005] EWCA Civ 655.

Looking at the problem on a more international level, it may be appropriate to introduce generally in Europe, and widen the scope of existing, representative actions. For example, the following possibilities could be considered:

- by means of a Community legislative instrument, requiring all Member States to ensure that there is an effective collective means for (especially) consumers to bring claims,
- empowering designated bodies or bodies granted permission by the courts (together, 'representative bodies') to bring stand–alone representative actions on behalf of consumers (and follow–on actions where the possibility does not already exist), and
- empowering representative bodies to bring follow–on and stand–alone representative actions on behalf of businesses.

The rationale for such possible action is as follows. Allowing stand–alone and follow–on representative actions on behalf of consumers and businesses would enable economies of scale to be realized. Consumers and small and medium–sized businesses, in particular, may find that bringing individual claims against other businesses is excessively costly and burdensome. In a representative action, a single judge (or panel of judges) could consider the issues and a single law firm could be instructed for the claimants.

Costs and funding

As regards costs and funding arrangements, these are probably the greatest impediments to more effective private enforcement in the UK at present.

There is a need to seek and find innovative ways to raise the incentives for both claimants and lawyers, but in a way that ensures that incentives are not raised to a level that encourages the bringing of unmeritorious or speculative claims.

Among the ideas that may be worth considering in the domestic context are the following:

- modifying the form of permissible Conditional Fee Agreements, thus incentivising lawyers to bring cases, and
- providing for cost–capping, whereby in an appropriate case the court could cap a party's liability (in both individual and representative actions) for the other side's costs.

With regard to Conditional Fee Agreements, currently a lawyer who wins his case is entitled to a 100 per cent uplift of his fees and, as such, will only take a case on if his chance of winning is, on average, greater than 50 per cent.

Although this may be sufficient for follow–on actions it may not sufficiently incentivise lawyers to take on well–founded stand–alone cases. A possible modification may be to allow an uplift of more than 100 per cent. The next question would, however, be whether the additional uplift should be payable by the losing party or out of any damages recovered.

Developments in the market for commercial funding should also be monitored following the Court of Appeal's important judgment in *Arkin*.

Disclosure and evidence

As regards disclosure and other evidential issues, there are a number of issues affecting first, the relationship between the competition authority and the private claimant and second, the court's handling of the evidential issues.

As to the first point, one could, for example:

- by means of a Community legislative instrument, provide for the binding effect of decisions by NCAs in private enforcement cases before the courts of the EU Member States, or
- take a softer mutual recognition approach (although this may give rise to greater technical difficulties than a Community instrument).

Where an NCA has found an infringement of competition law and any appeal procedures have been exhausted, a claimant should not have to relitigate that finding of infringement from scratch. If decisions of NCAs can be reopened before national courts, the consistent application of the competition rules throughout the Community is put at risk.

The English courts recognised as far back as 1996 the undesirability of reopening the findings of the European Commission[32] and it seems to me that similar considerations would apply in the case of decisions by other NCAs. The possibility that a national court could be faced with (binding) conflicting decisions of different competition authorities was anticipated and dealt with in Regulation 1/2003 and the Commission's notice on cooperation within the Network of Competition Authorities.

As to the second point, England and Wales already has detailed rules for disclosure and for preparation and presentation of evidence.[33] In this respect we do not have the problems of access to evidence that exist for claimants in some civil law systems.

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[32] *Iberian U.K. Limited v BPB Industries Plc and Another* [1996] 2 CMLR 601. See also Case C–344/98 *Masterfoods* [2000] ECR I – 11369 and Article 16 of Regulation 1/2003.

[33] As mentioned above, in Scotland the relevant procedure is recovery.

In addition, we also have provision for disclosure to be ordered against third parties in any kind of civil action.[34] Disclosure may be ordered when a person who is not a party to the proceedings (which includes the Crown) appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of a claim pending before the court.[35] The court may make an order only where the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties and disclosure is necessary in order to dispose fairly of the claim or to save costs.[36]

On disclosure and evidential issues generally, this really is a matter for the courts and the judges to develop procedures and practice that ensure, on the one hand, that the claimant has access to the evidence which is available and relevant to the issue in the case, and on the other hand that the evidence placed before the court, and especially any economic evidence, is comprehensible and capable of evaluation so that the case does not just become a trial between experts. This is an aspect of effective case management to which I will return below.

It is essential, though, from a public enforcement perspective, that the effectiveness of leniency regimes is not reduced as a result of disclosure of documents created **for the purpose of** leniency applications themselves. A distinction should be drawn between, on the one hand, leniency documents (defined to mean any documents created for inclusion in or to support an undertaking's leniency application) and, on the other hand, documents created for any other purpose (that is, pre–existing documents, broadly). There should be no blanket exclusion of access to pre–existing documents, as this would confer advantages in private litigation that would not have been obtained but for the leniency application. However, a request for access in the form of a request for all documents submitted to the competition authority – that is, a request for a fishing expedition – should be rejected.

Bringing public and private enforcement closer together

Another problem may be that public and private enforcement have perhaps been regarded as two separate systems, or at least two distinct parts of the same system. I have explained in the introduction that, in fact, the two are complementary. There may be a case for bringing public enforcement and private enforcement closer together so as to avoid or minimise some of the

[34] Section 34 of the Supreme Court Act 1981 and Rule 31.17 of the Civil Procedure Rules.
[35] Section 34 of the Supreme Court Act 1981.
[36] Rule 31.17 of the Civil Procedure Rules.

undoubted complexities and perils of private litigation in the courts. One could, for example:

- provide a framework for early resolution of competition disputes and, if litigation is unavoidable, ensure that the proceedings focus on the key contested issues, are well managed, and are less costly (by means of, for example, 'pre–action protocols'),
- prepare information leaflets to assist prospective claimants and their legal advisers – generally but not in individual cases – in planning and conducting competition law litigation,
- raise awareness of ways in which parties may privately resolve competition disputes other than through litigation, including various forms of alternative dispute resolution and mediation. In certain circumstances, it may be appropriate for an NCA to reduce the amount of an administrative fine on the basis, for example, that an infringing undertaking provides a mechanism for compensation of those who have been harmed, and
- in order to promote consistency of decision–making, enhance the status of NCAs' general policy statements before the courts, in recognition of the fact that NCAs are entrusted with the task of protecting competition in the public interest.

Effective case management

Cost and complexity are not peculiar to competition cases: they arise in various contexts ranging from consumer claims (for medical negligence or product liability, for example) to commercial cases (about the construction or operation of industrial plants and processes, for instance).

It is essential that case management by courts and judges is effective if private enforcement is to be effective.[37] Unmeritorious or speculative cases can be 'struck out' at an early stage so that neither claimant nor defendant is put to substantial costs. However, the approach taken by the courts will need to be monitored – in *Adidas v The Lawn Tennis Association and others*,[38] for example, the court suggested that striking out a claim or a defence might not be appropriate in competition cases, where the issues are complex. Similarly, the courts have power to enable a claimant or defendant to obtain judgment ('summary judgment') at an early stage without incurring the time and expense of proceeding to a full trial.[39]

[37] Rule 3.4(2) of the Civil Procedure Rules.
[38] *Adidas v The Lawn Tennis Association* [2006] EWHC 1318 (Ch).
[39] Part 24 of the Civil Procedure Rules.

Effective case management also means that the parties need to be forced to identify at an early stage the issues and evidence to be relied upon, so that the case can be managed on a staged basis, with (in some cases) the issues being tried sequentially and logically. I have already mentioned the importance of ensuring that courts deal with evidential issues in an appropriate manner.

Ensuring that cases progress involves setting realistic but challenging timescales and adopting a rigorous approach to tactics designed to delay or disrupt the course of the case.

Damages

It is well established that private actions involve claims for damages that are compensatory in nature. As Lord Blackburn said as far back as 1880 in *Livingstone v Rawyards Coal Co*,[40] the general principle is that the court should award 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'. In 2006, the European Court of Justice held in *Manfredi* that 'it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages …, provided that the principles of equivalence and effectiveness are observed'. However, it also held that 'injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest'.

It is difficult to see a justification for a departure from this principle at this stage of development of private enforcement, and certainly not without blurring the distinction between public and private enforcement. (However, as mentioned above, in certain circumstances exemplary damages may be available in England and Wales.) This is therefore an area where it is appropriate for the case law to be allowed to develop in competition cases as it has in other civil cases. Proving causation and quantum is essential for claimants in all tort cases.

A feature of the UK system that is often not taken into account in the debate about whether there should be some multiple of damages for competition cases is the availability of pre–judgment interest on damages awards.[41] Pre–judgment interest could be considered in certain European jurisdictions where it is not currently available.

Standing and the passing–on defence

Again it is not clear that standing and passing–on should be real barriers to the development of private actions and it may be best to allow the application of the principles to develop through individual cases.

There are already indications that, as a matter of EC law, indirect purchaser standing cannot be excluded. In any event, it is likely to be inappropriate in policy terms to deny consumers and other end–users the right to sue for

[40] *Livingstone v Rawyards Coal Co* (1879 – 80) L.R. 5 App. Cas.25; 28 W.R. 357; 42 L.T. 335, HL.

[41] This can potentially extend to interest from the date of the infringement. Interest may additionally be awarded on the judgment debt at the rate for the time being specified under section 17 of the Judgments Act 1838. The applicable rate is currently 8 per cent.

damages arising from breach of the competition rules. In *Manfredi*, the European Court of Justice confirmed its view in *Courage v Crehan* that 'any individual can rely on a breach of Article 81 EC before a national court', but only where 'there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC'.

In *Manfredi*, the European Court of Justice also held that 'Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.' It can be argued that, as the case law stands at the moment, it is open to the Member States to allow a defendant to raise a passing–on defence to a claim in appropriate cases, that is, that the claimant has not suffered the whole or part of the loss claimed – but to put the burden of proof on the defendant raising that defence.

Conclusion

In conclusion, therefore, I believe that the system in the UK has many features which are conducive to the proper and effective private enforcement of competition law. There have been few, successful reported actions for damages, but it is generally understood that there have been a number of significant settlements. The emphasis on settlement should, I believe, continue, but a credible threat of damages actions against infringers is a necessary and important condition to ensure effective compliance with the law.

Although I believe that there is more that can – and should – be done to encourage private enforcement, that does not mean that I want to import either a litigation or a compensation culture. I want to foster a compliance culture. I do not consider, for example, that it is appropriate to introduce US–style class actions or contingency fee systems or double or treble damages in what are typically complex cases from a factual and economic point of view.

The goal must be to ensure that private and public enforcement work alongside, and in harmony with, each other to deliver the total welfare benefits which competitive markets present for business and for consumers.