


Competition Law Litigation in the UK Courts: A study of all cases 2005–2008—Part II

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 [Keywords to Follow]

Part II of this article continues the discussion of all competition law cases before the domestic courts of the United Kingdom, including the Competition Appeal Tribunal (CAT), where parties were seeking to exercise rights conferred on them by either Community or UK competition law in the period 2005–2008. Part I outlined the background developments in private enforcement generally, the methodology and identification of appropriate cases, the general success rates and also the role of different courts in competition litigation, in particular focusing on follow-on actions before the CAT. Part II assesses the success of competition law issues raised at different stages of the litigation process, the extent to which particular competition laws have been relied on in litigation and their relative success and the degree of success according to the remedies sought. The article proceeds to consider key themes which may act as incentives or disincentives to competition law litigation, focusing on the issues of funding and costs of litigation, discovery processes, the type of damages available and collective redress, before drawing conclusions about the state of development of competition litigation in the United Kingdom.

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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. The most straightforward involves a substantive final judgment on the competition law issue, normally following trial.¹ Inevitably, these cases have generally attracted greatest public profile and interest, and there have been nine in total in the four-year period. As detailed in Crosstabs 12, three cases in this first category of substantive final judgments have been successful, although, with the exception of *Healthcare at Home*, there have as yet been no awards of damages in a UK court. In *Calor Gas Ltd v Express Fuels (Scotland) Ltd*,² Calor, the market leaders in the distribution and supply of bulk and cylinder liquefied petroleum gas (LPG) in Great Britain, with circa a 50 per cent share of the cylinder LPG market, distributed its products through a network of independent dealers and retailers. The dealers' contract with Calor had two 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

1 Or proof, as it is known in Scots law.
2 *Calor Gas Ltd v Express Fuels (Scotland) Ltd* [2008] C.S.O.H. 13.

Table 6: Stage of litigation

Stage of litigation	Frequency	Per cent	Cumulative Per cent
Substantive final judgment	9	22.0	22.0
Summary judgment for defendant to competition claim	2	4.8	26.8
Summary judgment for claimant to competition defence	6	14.6	41.4
Interim process	24	58.5	100.0
Total	41	100.0	

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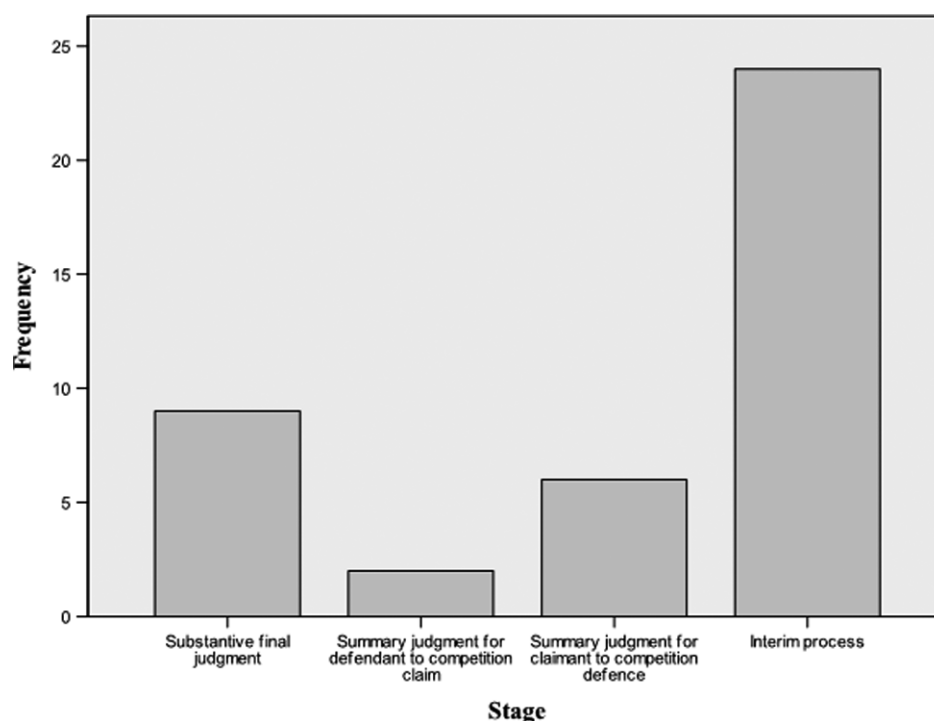


Chart 6: Stage of litigation

and entered a dealership with Flogas, but continued to handle Calor cylinders. Calor sought damages and interdict, but the action was defended on the basis that the single branding obligation for five years and the post-termination restriction in the agreements were null and void in accordance with art.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.”³

In *English, Welsh and Scottish Railway Ltd v E.ON UK Plc*,⁴ 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 (CCA). In 2006, the Office of Rail Regulation (ORR) found that EWS had foreclosed the British coal haulage by rail market by abusing its

dominant position by inter alia the exclusionary terms of the CCA. They were fined £4.1 million, 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 Ch.2⁵; that there could be no severance of the exclusionary term; and the whole contract was void and unenforceable.

The final “successful” case was *Atthe Races Ltd v British Horseracing Board Ltd*,⁶ although as noted above this was overturned on appeal. 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*.⁷ In *Chester CC v Arriva Plc*,⁸ Chester sought declarations, injunctions and damages based on the claim that Arriva had breached s.18 of the Competition Act 1998 by abusing its dominant position in the relevant bus market by

3 *Calor Gas Ltd* [2008] C.S.O.H. 13 at [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).”

4 *English, Welsh and Scottish Railway Ltd v E.ON UK Plc* [2007] EWHC 599 (Comm).

5 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 art.82 and the Ch.II prohibition.

6 *Atthe Races Ltd v British Horseracing Board Ltd* [2005] EWHC 3015 (Ch).

7 *AttheRaces Ltd v British Horseracing Board* [2005] EWHC 3015 (Ch) and [2007] EWCA Civ 38; see also *Ineos Vinyls Ltd v Huntsman Petrochemicals (UK Ltd)* [2006] EWHC 1241 (Ch).

8 *Chester CC v Arriva Plc* [2007] EWHC 1373 (Ch).

threatening predatory behaviour to drive Chester City Transport (CCT) 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 per cent.

Bookmakers’ Afternoon Greyhound Services Ltd (BAGS) v Amalgamated Racing Ltd involved two judgments on the merits.⁹ BAGS, a not-for-profit organisation, promoted the interests of bookmakers in licensed betting offices (LBOs). The other claimants were three large bookmakers. The defendants included AMRAC, which provided, to subscribing LBOs, live images and sound in respect of horse races at various courses in Great Britain. The other defendants were operators of 30 racecourses in this dispute which alleged a breach of art.81 and the Ch.1 prohibition. The claimants sought a declaration that collective exclusive licensing on a closed basis of the rights necessary for the supply to LBOs in the United Kingdom and Ireland of images, sound and data in respect of horse races 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 ch.1 prohibitions, and initially the challenge seemed to concern the way in which the racecourses went about granting exclusive rights to the venture. Following trial, in a 77-page judgment of 523 paragraphs, 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. Subsequently, the court also dismissed counterclaims relating to collusive behaviour by certain bookmakers who 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 “consistently explained their involvement in terms not involving any collusion of any relevant kind”.¹⁰

The next two categories basically involve cases where the defendant or claimant has sought a summary judgment in order to dismiss the action or strike out the defence.¹¹ In this context, success does not denote whether or not the application to dismiss or strike out is successful, but whether the party relying on competition law is successful in that process. There were relatively few judgments in these categories, at two and six respectively (there were 11 and 20 respectively in the period to 2004). In the former, a defendant seeking summary judgment to strike out a competition law claim, success denotes that the application fails, allowing the claimant to proceed with the action to later stages in the litigation process. Interestingly, both cases in this category have been categorised as successful, as indicated in Crosstabs 12. For instance, in *Emerson II*,¹² 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. Similarly, the first judgment in the *AttheRaces Ltd v British Horseracing Board*¹³ dispute was an unsuccessful striking-out application by the defendant.¹⁴

There have also been 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.¹⁵ The four unsuccessful

⁹ *Bookmakers’ Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch) and [2008] EWHC 2688 (Ch).

¹⁰ *Bookmakers’ Afternoon Greyhound Services Ltd* [2008] EWHC 1978 (Ch) and [2008] EWHC 2688 (Ch) at [139].

¹¹ Note that there are some potential overlaps here with the interim process cases, discussed further later in this article.

¹² *Emerson Electric Co v Morgan Crucible Co Plc (Emerson II)* [2008] C.A.T. 30.

¹³ *AttheRaces Ltd* [2005] EWHC 1533 (Ch).

¹⁴ This was unsuccessful and the claimant’s application for an interim injunction restraining BHB from causing the termination in the supply of pre-race data to ATR was granted. This has been classified as the former rather than an interim process case.

¹⁵ *Sportswear Co SpA v Stonestyle Ltd* [2005] EWHC 2097 (Ch); and *Football Association Premier League Ltd v QC Leisure* [2008] EWHC 44 (Ch).

cases included: *PIK Facilities Ltd v Watson's Ayr Park Ltd*,¹⁶ where the defender's pleadings were inadequate in a Ch.2 defence based on the essential facilities doctrine¹⁷; 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 Valley House Leisure Ltd*, a beer tie case,¹⁸ 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 ss.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. The final two cases are both traditional defences to intellectual property rights (IPR) actions,¹⁹ although it is notable that the Court of Appeal overturned the High Court in *Sportswear Co Spa v Stonestyle Ltd*.²⁰

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 defence or claim. Interim process judgments, 24 in total, constitute the majority of judgments in competition litigation during this period—58.6 per cent of the total. There have been a number of successful cases in this category, 11 in total, and three partially successful cases, and only 10 unsuccessful cases, as detailed in Crosstabs 12. This compares favourably with the pre-2005 case law, where 33 of 43 interim process cases were unsuccessful. A considerable proportion of the

successful interim process cases have involved the CAT, as discussed previously: *BCL Old Co Ltd v BASF I and II*, *BCL Old Co Ltd v Aventis I and II*, *Healthcare at Home Ltd v Genzyme* and *Emerson I and II*, in addition to the partially successful and unsuccessful rulings in *Emerson III* and *IV*. A very limited number of cases involved applications for interlocutory injunctions, including two unsuccessful defences based on art.81 to a claimant's application for interlocutory relief.²¹ However, more significantly, two of the three cases involving claims for interlocutory relief on the basis of reliance on competition law provisions were successful.

The claimant in *Adidas-Solomon AG v Draper*²² was a leading sportswear company and the defendants were the owners, organisers and promoters of the tennis Grand Slam tournaments and the International Tennis Federation 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 arts 81 and 82 and sought interlocutory injunctions. Reference was made²³ to earlier dicta in *Intel Corp v Via Technologies*²⁴:

"(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 arts 81 and 82.

*Software Cellular Network v T-Mobile (UK) Ltd*²⁵ 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

16 *PIK Facilities Ltd v Watson's Ayr Park Ltd* [2005] C.S.O.H. 32.

17 *PIK Facilities Ltd v Watson's Ayr Park Ltd* [2005] C.S.O.H. 32 at [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 defenders have not relevantly averred what is the relevant market in this case."

18 *P&S Amusements Ltd v Valley House Leisure Ltd* [2006] EWHC 1510 (Ch).

19 *Hewlett-Packard Development Co LP v Expansys UK Ltd* [2005] EWHC 1495; [2007] E.C.C. 9; and *Sportswear Co Spa v Stonestyle Ltd* [2005] EWHC 2097 (Ch).

20 *Sportswear Co Spa v Stonestyle Ltd* [2006] EWCA Civ 830.

21 *Punch Taverns (PTL) Ltd v Moses* [2006] EWHC 599 (Ch); and *Wooton Trucks Ltd v MAN ERF UK Ltd* [2006] EWHC 943 (Ch). Note that on appeal, [2006] EWCA Civ 1042, the defendants abandoned any argument based on an alleged breach of European competition law.

22 *Adidas-Solomon AG v Draper* [2006] EWHC 1318 (Ch).

23 *Adidas-Solomon AG* [2006] EWHC 1318 (Ch) at [24].

24 *Intel Corp v Via Technologies* [2002] A.E.R. (D) 346 at [32].

25 *Software Cellular Network v T-Mobile (UK) Ltd* [2007] EWHC 1790 (Ch).

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 a market share of between 22 and 30 per cent 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*²⁶ 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’”.²⁷ However, in *AAH Pharmaceuticals Ltd v Pfizer Ltd*,²⁸ 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 ss.2 and 18 of the 1998 Act, was unsuccessful. The delay in bringing the application, and the fact that the complainants had unsuccessfully requested the Office of Fair Trading (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,²⁹ and one was an appeal against a no-costs order by defendants who had succeeded at trial in an action based on arts 81 and 82.³⁰ Two of the cases related to disclosure, an unsuccessful application for pre-trial disclosure in *Hutchinson 3G UK Ltd v O2 (UK) Ltd*³¹ and an unsuccessful application to the High Court and subsequent appeal to the Court of Appeal in *British Sky Broadcasting Plc v Virgin Media Communications*

*Ltd*³² to limit disclosure of documents relating to a claim alleging that Sky was abusing a dominant position contrary to arts 82 and s.18, partly by the acquisition of a 17.99 per cent shareholding in ITV.

There were two cases related to the broadcasting of live Premier League matches. *Murphy v Media Protection Services Ltd*³³ involved an appeal against conviction for offences contrary to s.297(1) of the Copyright, Designs and Patents Act 1988 in relation to broadcasting live Premier League football matches, and *Football Association Premier League Ltd v QC Leisure*³⁴ involved a civil claim that the use of decoder cards in the United Kingdom to access foreign transmissions of live Premier League football matches infringed s.298 of the Copyright Designs and Patents Act 1988. Both cases were at the post-trial stage, but were classified as partially successful interim process judgments as the substance of the defence in both cases, based on art.81 and the prohibition on export bans, was referred to the European Court of Justice (ECJ) for a preliminary ruling. Finally, the judgments at first instance and Court of Appeal in *Devenish* fall into this category as the claims for restitutionary and exemplary damages were dealt with as preliminary issues.

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. In the earlier research, we noted a marked increase in the number of cases in recent years involving art.81, particularly in 2003 and 2004—and art.81 had also been utilised in competition law claims more frequently in recent years than as a defence. This trend continued during 2005–2008, with 19 art.81 cases alone, and nine cases involving art.81 in combination with other provisions (as demonstrated by Table 7 and Chart 7). This trend is particularly highlighted during 2008 with nine art.81 judgments and three of the remaining five judgments also involving art.81 (as highlighted in Crosstabs 2). Overall, eight of the art.81 cases have involved art.81 defences, as

26 *Sea Containers Ltd v Stena Sealink Ports and Stena Sealink Line* [1995] 4 C.M.L.R. 84 at [58]–[59].

27 *Sea Containers Ltd* [1995] 4 C.M.L.R. 84 at [58]–[59].

28 *AAH Pharmaceuticals Ltd v Pfizer Ltd* [2007] EWHC 565 (Ch).

29 A successful application to re-amend the particulars of claim in *Adidas* [2006] EWHC 2262 (Ch) and unsuccessful applications to amend the claim in *Bookmakers' Afternoon Greyhound Services 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).

30 *Arkin v Borchard Lines Ltd (Nos 2 and 3)* (CA) [2005] 1 W.L.R. 3055 considered in Part I of this article.

31 *Hutchinson 3G UK Ltd v O2 (UK) Ltd* [2008] EWHC 55 (Comm), considered further later in this article.

32 *British Sky Broadcasting Plc v Virgin Media Communications Ltd* [2008] 1 W.L.R. 2854 (CA); and [2008] EWHC 1283 (Ch).

33 *Murphy v Media Protection Services Ltd* [2008] EWHC 1666 (Admin).

34 *Football Association Premier League Ltd v QC Leisure* [2008] EWHC 1411 (Ch).

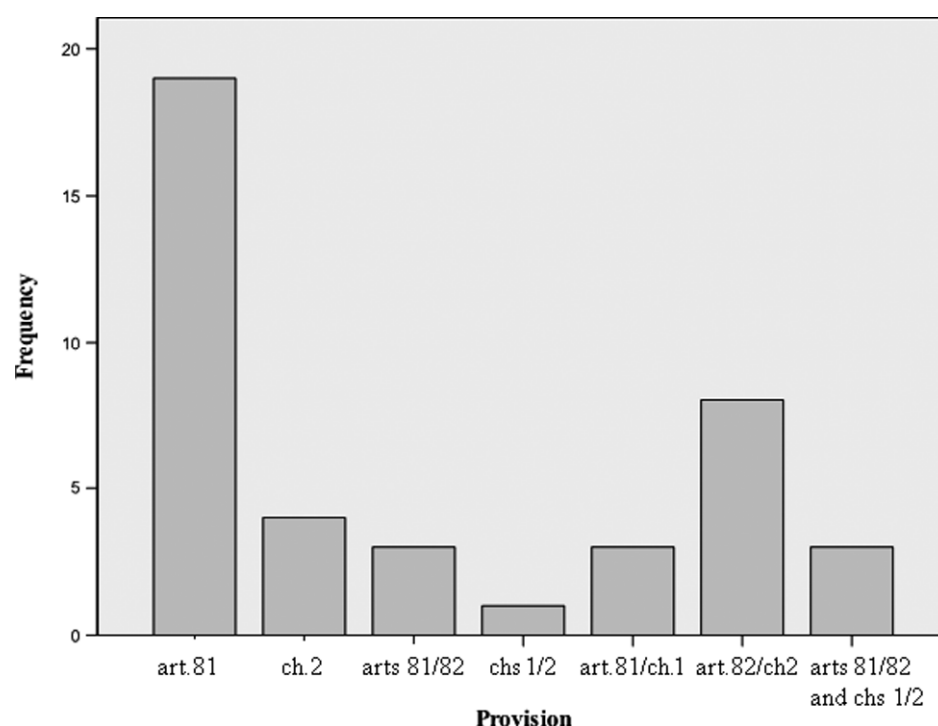


Chart 7: Competition law provision relied upon

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Table 7: Competition law provision(s) relied upon

Provision(s)	Frequency	Percent	Cumulative Percent
art.81	19	46.3	46.3
ch.2	4	9.8	56.1
arts 81/82	3	7.3	63.4
chs 1/2	1	2.4	65.9
art.81/ch.1	3	7.3	73.2
art.82/ch.2	8	19.5	92.7
arts 81/82 and chs 1/2	3	7.3	100.0
Total	41	100.0	

demonstrated by Crosstabs 4,³⁵ of which two have been successful—*Sportswear Co SpA v Stonestyle Ltd* (CA) and *Calor Gas Ltd v Express Fuels (Scotland)*

³⁵ Including five of the six IPR judgments: *Sportswear Co SpA v Stonestyle Ltd* [2005] EWHC 2097 (Ch) and [2005] EWHC Civ 830 (CA); *Murphy v Media Protection Services Ltd* [2008] EWHC 1666 (Admin); *Football Association Premier League Ltd v QC Leisure* [2008] EWHC 44 (Ch) and [2008] EWHC 1411 (Ch); and also *Calor Gas Ltd v Express Fuels (Scotland) Ltd* [2008] C.S.O.H. 13; *Punch taverns (PTL) Ltd v Moses* [2006] EWHC 599 (Ch); and *Wooton Trucks Ltd v MAN ERF UK Ltd* [2006] EWHC 599 (Ch).

Ltd, and two partially successful—*Murphy v Media Protection Services Ltd*³⁶ and *Football Association Premier League Ltd v QC Leisure*. Of the 11 art.81 claimant cases, Crosstabs 9 demonstrates that 10 were follow-on actions, with the remaining two follow-on actions being *Healthcare at Home v Genzyme Ltd*, involving a claim based on Ch.2 before the CAT, and the action raised in the High Court in *English, Welsh and Scottish Railway Ltd v E.ON UK Ltd* involving art.82/ch.2. It should also be noted that two of the art.81 follow-on cases were the *Devenish* judgments in the High Court and Court of Appeal respectively. Crosstabs 6 indicates that seven of the CAT cases were successful, one partially successful and one unsuccessful. One of the successful cases was *Healthcare at Home v Genzyme Ltd*, and of the remainder of the CAT cases, all based on art.81 (which were discussed earlier in this article), six were successful: *BCL Old Co Ltd v Aventis I and II*, *BCL Old Co Ltd v BASF I and II* and *Emerson I and II*. *Emerson IV* was a partially successful case; and only *Emerson II* was an unsuccessful case. The “three” unsuccessful judgments in relation to the art.81/Ch.1 prohibition combination were all

³⁶ *Murphy v Media Protection Services Ltd* [2008] EWHC 1666 (Admin).

in fact in the same dispute: *BAGS v Amalgamated Racing Ltd*.

In the earlier study, there had been no art.82 cases since 2000, and the clear preponderance of art.82 cases was in the 1980s and 1990s (11 and nine respectively). These were primarily in cases where art.82 was used as a euro-defence, for the most part unsuccessfully and primarily in intellectual property-related cases as a defence to some form of IPR infringement action. In the current study, although there were no art.82 cases alone, art.82 was combined with art.81 in three cases, two of which were successful,³⁷ and as part of a combination of all competition law cases in three unsuccessful cases. However, art.82 was combined with the Ch.2 prohibition in a total of eight cases during this period. This included the unsuccessful defence in *Hewlett-Packard Development* and *BHB Enterprises Ltd*. The combination was successful in the important final judgment case in *English Welsh and Scottish Railway Ltd v E.ON UK Plc*³⁸ and in the two rulings at first instance and on appeal in relation to disclosure in *BSKYB Plc v Virgin*, in addition to two High Court rulings in *Attheraces v British Horseracing Board Ltd*, although the latter judgment on the merits was overturned in the third unsuccessful case in this category by the Court of Appeal.

Between 2005 and 2008, there have been a total of 19 cases in which UK competition law has been pled by either party, alone or in combination with other provisions, mostly unsuccessfully, in 12 cases. The most significant category is in relation to Ch.2 with four cases—including the only CAT follow-on action involving an OFT infringement decision, in relation to the Ch.2 prohibition, in *Healthcare at Home v Genzyme*. The other successful case here was the successful interlocutory injunction case, *Software Cellular Network v T-Mobile (Uk) Ltd*. The two unsuccessful Ch.2 cases, and one of the unsuccessful art.82/Ch.2 combination cases, reflect the difficulties in succeeding in establishing an abuse.

In *PIK Facilities Ltd v Watson's Ayr Park Ltd*,³⁹ 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 Ch.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.⁴⁰ Similarly, in *Chester CC v Arriva Plc*,⁴¹ 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*⁴²:

“... it seems to me that particular care is to be expected of a party 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.”⁴³

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 Ch.2 prohibition (or art.82) which could form the basis of follow-on actions at the CAT or High Court.⁴⁴

Success according to remedies sought

The remedies sought by claimants were split into various categories, in conformity with the case law:

40 *PIK Facilities Ltd* [2005] C.S.O.H. 132 at [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 defenders have not relevantly averred what is the relevant market in this case.”

Furthermore, it was held that the requirement of indispensability was not satisfied.

41 *Chester CC v Arriva Plc* [2007] EWHC 1373 (Ch).

42 *BHB Enterprises Ltd v Victor Chandler (International) Ltd* [2005] EWHC 1074 (Ch).

43 *BHB Enterprises Ltd* [2005] EWHC 1074 (Ch) at [43].

44 See the OFT infringement decision in relation to Cardiff Bus in November 2008 at http://www.of.gov.uk/advice_and_resources/resource_base/ca98/decisions/cardiffbus [Accessed June 24, 2009], its first infringement finding in relation to the Ch.2 prohibition for circa five years.

37 Both in the same dispute, *Adidas-Solomon AG v Draper* [2006] EWHC 1318 (Ch), discussed earlier.

38 *English Welsh and Scottish Railway Ltd v E.ON UK Plc* [2007] EWHC 599 (Comm).

39 *PIK Facilities Ltd v Watson's Ayr Park Ltd* [2005] C.S.O.H. 132.

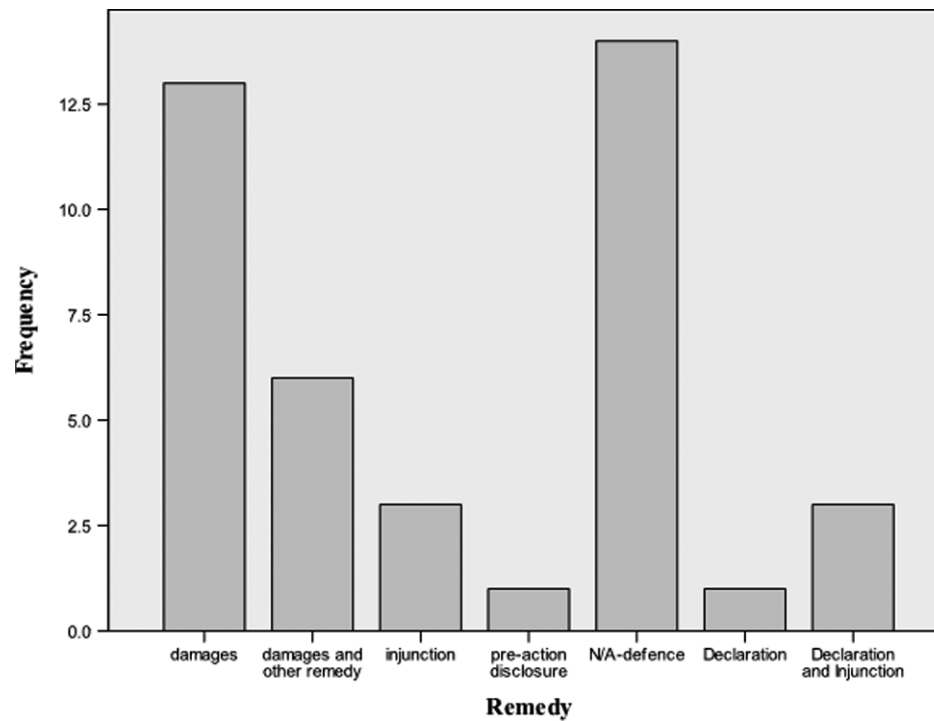


Chart 8: Remedy sought

Table 8: Remedy sought

Remedy sought	Frequency	Percent	Cumulative Percent
Damages	13	31.7	31.7
Damages and other remedy	6	14.6	46.3
Injunction	3	7.3	53.7
Pre-action disclosure	1	2.4	56.1
N/A—defence	14	34.1	90.2
Declaration	1	2.4	92.7
Declaration and injunction	3	7.3	100.0
Total	41	100.0	

Damages (and other remedy)

There were 13 damages cases alone and six cases seeking to combine damages with other remedies, comprising 31.7 and 14.6 per cent of the total number of judgments. Unsurprisingly, as Crosstabs 8 demonstrates, 11 of the 12 follow-on actions were damages actions. The non-damages follow-on case was *English, Welsh and*

Scottish Railway Ltd v E.ON UK Plc.⁴⁵ The two damages cases that were not follow-on were *Arkin v Borchard Lines* and *Crehan*. The *Devenish* rulings at first instance and Court of Appeal constitute the remaining two damages follow-on cases in addition to the nine CAT cases discussed above. Eleven of the 13 damages actions have been art.81 claims,⁴⁶ and seven of them have been successful, although as noted previously, there has only been one (unsuccessful) final judgment—in *Crehan*—and six of the seven successful damages cases have been interim process decisions by the CAT,⁴⁷ albeit including the important interim damages award in *Healthcare at Home Ltd*. The unsuccessful damages cases are constituted by the two *Devenish* rulings, *Crehan* (HL), *Emerson III* and *Arkin v Borchard Lines*. The only successful case where damages combined with other remedies were sought was *Software Cellular Network v T-Mobile (UK) Ltd*, a ruling at the interlocutory stage. Nonetheless, it remains the case that there have been no final damages awards in the courts in the United Kingdom, and the important questions of the nature and extent of the passing-on

⁴⁵ *English, Welsh and Scottish Railway Ltd v E.ON UK Plc* [2007] EWHC 599 (Comm).

⁴⁶ See Crosstabs 13 and 14.

⁴⁷ The exception is *Emerson II*.

defence, the scope for indirect purchasers to sue and the process of quantification of damages have yet to be tackled in any detail by the courts and/or CAT.

Declaration and injunction (interlocutory or otherwise)

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.⁴⁸ However, following earlier rulings such as *Network Multimedia Television Ltd v Jobserve Ltd*,⁴⁹ an injunction was successfully sought in *Adidas-Solomon AG v Draper*.⁵⁰ Although *Crosstabs 14* shows two successful declaration and injunction cases, in fact the unsuccessful case in this category is crucial, being the Court of Appeal ruling on the merits following two successful earlier rulings, at interim process and on the merits, in the High Court in the *Attheraces v British Horseracing Board* dispute. Nonetheless, the successful case involving a declaration was a follow-on substantive ruling on the merits in *English, Welsh and Scottish Railway Ltd v E.ON UK Plc*.⁵¹

Pre-action disclosure

There has been one unsuccessful action in this category: *Hutchinson 3G UK Ltd v O2 (UK) Ltd*.⁵² The applicant sought an order for pre-trial disclosure against four principal competitors as Mobile Network Operators (MNOs) under s.33 of Supreme Court Act 1981 and CPR r.31.16, on the basis that the Mobile Number Portability (MNP) system restricted competition and prevented the development of an effective alternative MNP system. The limits of pre-trial disclosure were emphasised as follows:

48 See A.D. MacCulloch and B.J. Rodger, “Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts” [1996] E.C.L.R. 393.

49 *Network Multimedia Television Ltd (T/A Silicon.com) v Jobserve Ltd* [2001] EWCA Civ 2021, April 5, 2001 (Ch D).

50 *Adidas-Solomon AG v Draper* [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.

51 *English, Welsh and Scottish Railway Ltd v E.ON UK Plc* [2007] EWHC 599 (Comm).

52 *Hutchinson 3G UK Ltd v O2 (UK) Ltd* [2008] EWHC 55 (Comm).

“... 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.”⁵³

Accordingly, the application must be focused and specific.⁵⁴

Key themes

It may be instructive to look at certain key areas where the litigative process in the United States appears to be conducive to antitrust claims, assess briefly the position in the United Kingdom and whether any lessons can be learned from the UK case law in relation to the availability and appropriateness of rules providing for funding/costs of a competition law claim, discovery, damages and collective redress.

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.⁵⁵

“Costs are the key to the castle in competition damage cases. So far costs and financing problems have limited the potential for bringing cases even when there is established cartel activity.”⁵⁶

The English rule of cost-shifting, the likelihood of paying up-front costs and the other side’s costs if unsuccessful

53 *Hutchinson 3G UK Ltd* [2008] EWHC 55 (Comm) at [38]–[40].

54 The court added, in *Hutchinson 3G UK Ltd* [2008] EWHC 55 (Comm) at [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 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.”

55 See A. Riley and J. Peysner, “Damages in EC Antitrust actions: Who pays the Piper?” [2006] E.L.Rev. 748; and J. Peysner, “Costs and Funding in private third party competition damages actions” [2006] Comp.L.Rev. 97. See fuller discussion on the incentives in “Making Antitrust damages more effective in the EU: welfare impact and potential scenarios”, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#link1> [Accessed June 24, 2009].

56 Peysner, “Costs and Funding in private third party competition damages actions” [2006] Comp.L.Rev. 97.

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.⁵⁷ Although conditional fee agreements involving a reward (success fee) to the winning layer recoverable from the loser are available in England and Wales,⁵⁸ and the potential costs of the other party can be insured against using after-the-event (ATE) insurance,⁵⁹ Peysner has suggested that “there is no sign that they are being routinely offered by lawyers or litigation insurers in competition cases”.⁶⁰ 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.”⁶¹

Riley and Peysner have advocated the introduction of a Contingency Legal Aid Fund (CFA),⁶² and Peysner has also recognised that contingency fees would create greater incentives for lawyers than CFAs.⁶³ Contingency fees have also recently been advocated by a research paper for the Civil Justice Council,⁶⁴ which also recognised the close relationship between funding and cost recovery rules. 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 r.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.⁶⁵ The OFT 2007 Recommendations include the introduction of CFAs in representative actions to allow for increases of greater than 100 per cent 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.

Discovery

Standard disclosure in the High Court, involving a duty on both parties to disclose documents which support or adversely affect the other party’s case, takes place when pleadings are well advanced.⁶⁶ Although it is clear that disclosure in a UK context is considerably broader than across most legal systems in continental Europe,⁶⁷ there are clear limits on pre-trial disclosure—as evidenced in *Hutchison 3G UK Ltd v O2 (UK) Ltd*.

Damages

There was considerable debate about the possible introduction of rules providing for multiple damages following the Commission’s Green Paper,⁶⁸ but the Commission opted for a light-touch approach in the White Paper, with the promised publication of guidelines on quantification of damages. Although the

57 See Riley and Peysner, “Damages in EC Antitrust actions” [2006] E.L.Rev. 748.

58 Similar arrangements, known as speculative fees, are available in Scotland.

59 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.

60 Peysner, “Costs and Funding in private third party competition damages actions” [2006] Comp.L.Rev. 97.

61 J. Peysner, “After Sub-Prime” [2008] *Civil Justice Quarterly* 407.

62 See Riley and Peysner, “Damages in EC Antitrust actions” [2006] E.L.Rev. 748, 757 *et seq.* See also the OFT Recommendations, November 2007.

63 Peysner, “Costs and Funding in private third party competition damages actions” [2006] Comp.L.Rev. 97, 100.

64 R. Moorhead and P. Hurst, report for the Civil Justice Council, “Improving Access to Justice: Contingency Fees, a study of their operation in the United States”, November 2008. 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 United States 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.

65 Peysner, “Costs and Funding in private third party competition damages actions” [2006] Comp.L.Rev. 97. See also EU White Paper, 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 European Union.

66 There is also the possibility of specific disclosure where appropriate. The process is known as “recovery” in Scots law.

67 See for instance P. Guidici, “Private antitrust law enforcement in Italy” [2004] Comp.L.Rev. 61.

68 See also the earlier Green Paper at COM(2005) 672, December 19, 2005, and associated staff working document, SEC(2005) 1732, both available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html#greenpaper> [Accessed June 24, 2009]. See also the detailed consideration in “Making Antitrust damages more effective in the EU: welfare impact and potential scenarios”, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#link1> [Accessed June 24, 2009].

ECJ 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. There has been an interim damages award by the CAT in *Healthcare at Home*, but different approaches adopted at first instance and the Court of Appeal in *Crehan* to quantification and the trickier issue of the passing-on defence raised in some of the post-*Vitamins* CAT litigation remains unresolved, where the cases have ultimately settled.

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 of multiple actions, a Group Litigation Order (GLO) and a representative action, although the Civil Justice Council has recently 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.⁶⁹ The OFT 2007 Recommendations suggest the introduction of a similar procedure specifically for competition law,⁷⁰ acknowledging the clear limitations of the current specialist representative action under s.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.⁷¹ 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.

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, although it should be stressed that the research considers the number of competition-law-related judgments (41) as opposed to the number of disputes (27) during the period. 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. Compared to the period up to 2004, there has been a clear increase in the success of competition law issues raised by parties before the courts.

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 2005 and 2008, 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, as highlighted earlier in this article, in comparison with the number of infringement findings by the OFT and Commission during the preceding period,⁷² there have been relatively few follow-on cases raised under the s.47A procedure⁷³—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.⁷⁴ There is some evidence, as noted in Table B (shown in Part I of this article),⁷⁵ of a recent increase in the number of claims being raised before the CAT, and it has delivered some important judgments to date, particularly in relation to time-bar and costs, but the consumer representative claim provision is clearly not an appropriate mechanism to incentivise “class actions”.

It was also important to assess success according to the various different stages of the litigation process.

69 “Improving Access to Justice Through Collective Actions”, Developing a More Efficient and Effective Procedure for Collective Actions, Final Report, November 2008, Civil Justice Council. The ongoing Civil Courts Review in Scotland is also considering ways of enhancing collective redress.

70 cf. the more limited recommendations in the Commission White Paper.

71 Note the subsequent judgment by the CAT in January 2009 re. interim payment and costs, [2009] C.A.T. 3.

72 Although the limited number of Ch.2 infringement decisions has been noted.

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

74 F. Randolph and A. Robertson, “The first claim for damages in the Competition Appeal tribunal” [2005] E.C.L.R. 365, 368.

75 B.J. Rodger, “Competition Law Litigation in the UK Courts: A study of all cases 20052008—Part I” [2009] G.C.L.R. 93, 114.

There have been very few final substantive judgments, which are more significant in developing a competition law culture, although the *Calor Gas* and *English, Welsh and Scottish Railway Ltd* are notable success cases, and equally noteworthy are the unsuccessful claims in *AttheRaces* (Appeal Court) and *Crehan* (House of Lords). 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 interlocutory injunctions. In relation to the range of competition law provisions available, art.81 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 art.81 has been relied upon. *Healthcare at Home Ltd* is a Ch.2 success case, but it is a follow-on case and there have been very few recent Ch.2 infringement findings—and 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 2005 and 2008 and provides further support for modification of the existing legal framework to facilitate private enforcement further. It is evident that competition litigation culture in the United Kingdom, particularly in comparison with the United States, 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 litigative strategy in the United Kingdom. However, as I have argued before, the absence of developed procedural and substantive rules appears to be both a cause and effect of settlement practice, and is arguably restricting, discouraging and disincentivising appropriate competition law claims. This may be slowly changing, and the recent evidence of successful interim process decisions by the CAT, and increasing number of claims raised before the CAT, may be signs of a more progressive litigation culture. The anticipated publication of OFT decisions in relation to a number of early resolution cases during the last 18 months, involving price fixing of transatlantic passenger surcharges, dairy products and tobacco, may also stimulate follow-on litigation, on an individual or collective basis.



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