Private Enforcement of Competition Law, The Hidden Story Part II: Competition Litigation Settlements In The UK, 2008-2012*

Introduction

The author has undertaken research in recent years to attempt to provide a comprehensive account, over various periods, of all competition law litigation in the UK courts, involving the application of both EU and UK competition law,[1] and was also principal Investigator on a wider AHRC funded project on competition case-law in the courts of all EU Member States between 1999-2012.[2] The latter revealed interesting data and trends on competition litigation in the UK and across the EU. However, it has always been recognised that competition law disputes which are made visible by the existence of court judgments, and especially by final substantive judgments on the merits, are likely to be the 'tip of the iceberg'. This was the rationale which underlay an earlier project by the author to collect information on the number and types of competition law settlements which took place between 2000 and 2005 in the UK, and sought to identify and inform about the 'hidden story' of settlement practice in the UK.[3] The limited publicly available information in the UK can be contrasted with the USA,[4] where there is considerably more antitrust litigation, a number of aspects of the litigation process have been considered and resolved, and where there is also more evidence of antitrust litigation settlement practice and outcomes.[5] This article provides an account of a follow-up research project on competition litigation settlements in the UK, in relation to the period 2008-2012, comprising an extensive and focused analysis of the data accumulated in relation to the reported settlements during that period. Discussion of the project and outcomes will follow a broad introduction to the private enforcement background including recent developments and an outline of the wider

* Professor Barry J Rodger, The Law School, University of Strathclyde, Glasgow. All responsibility for the research project and for any errors or omissions remain mine alone, although I would like to thank all respondent practitioners for their time and patience in dealing with my requests and without whom this research could not have been undertaken. Moreover, I would like to express my gratitude to Jon Lawrence, Freshfields, for his incredibly helpful input, support and sage advice at various stages in the project.

[1] Rodger, B. 'Competition Law Litigation in the UK Courts: a study of all cases 2005-2008'- Parts I and II [2009] 2 Global Competition Litigation Review 93-114 and 136-147 and 'Competition Law litigation in the UK Courts: A study of all cases 2009-2012' [2013] 6(2) GCLR 55-67; see also M Furse, 'Follow-on Actions in the UK: Litigating Section 47A of the Competition Act 1998' (2013) 9(1) Euro C.J. 79-103.

[2] B Rodger (ed) *Competition Law Comparative Private Enforcement and Collective Redress Across the EU* (2014 Kluwer Law International).

[3] Rodger, B 'Private Enforcement of Competition Law, The Hidden Story: Competition Litigation Settlements in the UK 2000-2005' [2008] ECLR 96.

[4] See in particular, R H Lande and J P Davis, Interim Report, November 8 2006 'An Evaluation of Private Antitrust Enforcement: 29 Case Studies', available at http://www.antitrustinstitute.org/Archives/550.ashx**,** which analysed a group of 29 successful, large-scale private antitrust cases.

[5] Ibid.

context of competition litigation settlements context and the potential role for ADR, notably mediation, in that context.

Private Enforcement Background

The competition law enforcement landscape has been changing, albeit slowly, particularly since the Commission has sought to encourage private enforcement since the early 1990s, partly to enhance the deterrence and effectiveness of EU competition law and alleviate its own resource limitations. The Ashurst Report and subsequent Green and White Papers on 'Damages actions for breach of the EC Antitrust Rules',[6] demonstrated the Commission's intention to consider further ways to facilitate private competition law enforcement across the EU, to potentially allow for a new wave of litigation following the 2002 Leniency notice.[7] In relation to consumer redress, the 2013 Commission Communication[8] and Recommendation on Collective Redress,[9] recommended that Member States should have collective redress mechanisms in place to ensure effective access to justice. However, the Recommendation endorses harmonisation at the lowest common level as in general these collective redress mechanisms should be based on the opt-in model, with exceptional resort to an opt-out model justified on the basis of the sound administration of justice.[10] More recently, in June 2013, the Commission also proposed a Draft Directive to harmonise aspects of private litigation across the EU.[11] The Antitrust Damages Directive, adopted by the co-decision procedure in Spring of 2014,[12] contains provisions aimed at facilitating the task of potential claimants in proving their competition law claims, yet probably the most controversial provision in that Directive seeks to ensure the protection of leniency applicants' documentation from being accessed by damages claimants through court disclosure processes.[13]

In the UK context, in addition to ongoing developments under EU law,[14] the new system of 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. The Enterprise Act 2002 subsequently made provision *inter alia* for follow-on actions before a specialist Competition Appeal Tribunal

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[6] Ashurst 'Study on the conditions of claims for Damages in case of Infringement of EC Competition Rules,' 31st August 2004, available at http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.

[7] For a detailed discussion of this issue, see Riley, A 'Beyond Leniency: Enhancing Enforcement in EC Antitrust Law' 2005 World Competition 28(3) pp377-400.

[8] Communication, Strasbourg, 11.6.2013 COM(2013) 401 final.

[9] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law *OJ L 201, 26.7.2013, pp. 60–65.*

[10] Commission Recommendation supra n9 at para 21.

[11] R Gamble 'Whether neap or Spring, the tide turns for private enforcement: The EU proposal for a Directive on Damages examined' [2013] 34(12) ECLR 611-620.

[12] Directive 2014/104/EU (2014) OJ L349/1. See for example, C F Weidt 'The Directive on actions for antitrust damages after passing the European Parliament' [2014] 35(9) ECLR 438-444

[13] A Singh, 'Disclosure of Leniency evidence: examining the Directive on damages actions in the aftermath of recent ECJ rulings' [2014] 7(4) GCLR 200-213.

[14] See http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.

('CAT'). Moreover, empirical research by the author has demonstrated a slow but significant increase in the rate of cases over the last 40 years.[15] 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,[16] and considerable on-going litigation in the High Court in relation to a number of major international cartels.[17] More recently, 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*[18] was the first successful, final award of damages by the CAT. That was followed by a subsequent £1.6m damages award in March 2013 in *Albion Water v Dwr Cymru Cyfyngedig*.[19] There is some evidence, 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.[20] Furthermore, the consumer representative claim provision in s47B of the 1998 Act is clearly not an appropriate mechanism to incentivise 'class actions'. It may be that the profile associated with the successful damages awards in *2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd and 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.

Moreover, in 2012 the Department for Business, Innovation and Skills in the UK ('BIS') consulted on proposals to reinforce the system of private enforcement in the UK established by the Competition Act 1998 and Enterprise Act 2002, and this led to important provision in the Consumer Rights Bill to significantly change the landscape of private enforcement in the UK.[21] 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, and parties can always raise any competition law actions before the High Court.

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[15] Not just in the UK, but EU wide, see B Rodger (ed) *Competition Law Comparative Private Enforcement and Collective Redress Across the EU* (2014 Kluwer Law International).- The findings of the research reported in this book show that there is considerably more private enforcement of competition law than had previously been imagined, that enforcement is far wider than just actions for damages, and that the context in which competition law is most invoked is business to business (B2B) relations. See for instance S. Peyer, 'Myths and Untold Stories – Private Antitrust Enforcement in Germany' (2011) *Journal of Competition Law and Economics*. See also F Marcos 'Competition law private litigation in the Spanish courts (1999-2012)' G.C.L.R. 2013, 6(4), 167-208.

[16] See Rodger, B 'Private Enforcement of Competition Law, The Hidden Story: Competition Litigation Settlements in the UK 2000-2005' [2008] ECLR 96.

[17] B Rodger 'Why not court? A study of follow-on actions in the UK' (2013) 1(1) Journal of Antitrust Enforcement 104-131.

[18] *2 Travel Group PLC (in Liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19. See C Veljanovski 'CAT Awards Triple Damages, Well Not Really- Cardiff Bus, and the Dislocation between Liability and Damages for Exclusionary Abuse' [2012] ECLR 47-49.

[19] [2013] CAT 6.

[20] See P Akman, 'Period of limitations in follow-on competition cases: when does a "decision" become final?' (2014) 2 (2) Journal of Antitrust Enforcement 389-421

[21] See https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform and https://www.gov.uk/government/publications/consumer-rights-bill.

Accordingly, a central aim of the reforms was to enhance the role of the specialist court, the CAT by extending its competence to hear stand-alone actions as well as follow-on actions, and allow parties to seek injunctions as well as monetary awards.[22] The key proposal by BIS, at least in the context of collective redress, was to recommend the adoption of an opt-out representative collective action for consumers and businesses (in follow-on and stand-alone claims),[23] together with mechanisms for CAT approved collective settlements. Furthermore, there were proposals to introduce an innovative scheme to enable the competition authorities to certify a voluntary redress scheme.[24] Each of these BIS recommendations was included in reforms to be made to the existing Competition Act regime, originally by clause 82 and Schedule 7 of the Consumer Rights Bill, when the Bill was first introduced to Parliament on 23rd January 2014. The Act was given Royal Assent on 26 March 2015 and the changes to the Competition Act 1998 regime, introduced by section 81 and Schedule 8 to the 2015 Act, come into effect on a date appointed by statutory instrument. As indicated above, the Act contains provision to enable the CMA to certify a voluntary redress scheme, and one prominent academic commentator believes that this innovation may be more important in practice than reliance simply on a private enforcement model.[25]

Settlements and Mediation Context

The reality is that the overwhelming majority of private disputes, including competition/antitrust disputes,[26] settle out of court before a final judgment on the merits,[27]

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[22] These key changes to the role and competence of the CAT following the passing of the Consumer Rights Act 2015 have been addressed by A Andreangeli, 'The Changing structure of competition enforcement in the UK: The Competition Appeal Tribunal between present challenges and an uncertain future' (2015) 3(1) JAE 1-30. Note that the power to award injunctions only relates to proceedings before the Tribunal in England and Wales and Northern Ireland, and an interdict is not available in relation to Scottish proceedings.

[23] See 'Private Actions in Competition Law: A consultation on options for reform- government response' Jan 2013 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf at paras 5.11-5.23.

[24] Ibid at paras. 6.20-6.26.

[25] See C Hodges 'Fast, Effective and Low Cost Redress: How Do Public and Private Enforcement and ADR Compare? , Ch 8 in Rodger (ed) 2014 supra.

[26] See C. B. Renfrew, 'Negotiation and Judicial Scrutiny of Settlements in Civil and Criminal Antitrust Cases', (1976) 70 *F.R.D*. 495 at pp.495-496:- " …often overlooked and sometimes ignored facts of life in litigation is that the overwhelming number of cases are disposed of by various means prior to trial. For example, in …1975, 91 per cent of all federal civil cases were disposed of prior to trial. Antitrust cases are not significantly different in this respect: 90 per cent of all private treble-damage actions were disposed of prior to trial."

[27] See J.C Alexander, 'Do the Merits Matter? A Study of Settlements in Securities Class Actions' 1990-1991 43 Stan. L. Rev. 497 at p.498:- " …although trial is our paradigm of how civil litigation resolves disputes, in reality only a tiny fraction of litigation cases – perhaps five percent or less – are actually tried to judgment. Most cases are resolved through settlement."
For a consideration of some statistics in relation to England and Wales, see *Smith, Bailey and Gunn on Modern English Legal System*, 4th edn, S.H. Smith, J.P.L. Ching and M.J. Gunn (eds), (London:Sweet and Maxwell, 2004) at pp677-679. See also the Lord Woolf Report 'Access to Justice', 1996 and the earlier Pearson Committee Report (1978, Cmnd 7064, which noted that 86% of cases settled without proceedings).

although it is difficult to provide any accurate figures for this where we consider settlements at all phases after the dispute has arisen, irrespective of whether an action has been raised in the relevant courts.[28] The current research has not sought to develop a particular model of why cases settle,[29] which cases settle[30] and what factors help to determine settlement,[31] but on the basis of the limited sample of reported settlements it does allow us to identify trends and factors which may be relevant in those contexts, and it is generally accepted that settlements should be promoted.[32]

ADR, and notably mediation, involving independent expertise may facilitate in dealing with complexities associated with competition litigation, such as causation, quantum and

[28] J. M. Perloff, D. L. Rubinfeld, and P. Rudd, 'Antitrust Settlements and Trial Outcomes' (1996) The Review of Economics and Statistics 401, note in relation to their empirical study at p404:- " Because there are numerous paths that a case can follow, the characterization of a case as having "settled" rather than been "dropped" is difficult to make. We label as a "settlement" cases that closed due to a pretrial stipulation and order, pretrial withdrawal, settlement, or that were statistically closed…Finally, we dropped a case if, in the opinion of the paralegal who collected the data, antitrust was not a significant issue in the case".

[29] Cf J. M. Perloff, D. L. Rubinfeld, and P. Rudd supra, at p401:- " Whether parties to private antitrust lawsuits settle or go to trial depends on their beliefs about the likely trial outcome and on their attitudes toward risk…An important feature of the model is that the likelihood of settlement depends on the parties' beliefs about trial outcomes. Specifically, settlements are a function of the expected distribution of outcomes conditional on the case going to trial…"

[30] See for instance L. Lederman, 'Which Cases Go To Trial? An Empirical Study of Predictors of Failure To Settle' (1999) 49 Case W. Res. L. Rev. 315 at pp.317-318: "Many scholars have theorized that cases that go to trial are not representative of the larger pool of disputes. If tried cases are substantively different from the much larger set of cases that settle prior to trial, then published cases law provides only a distorted window into peoples' behavior in response to legal rules, unless we determine the mechanisms by which cases are "selected" for trial…. little empirical evidence exists about what factors impact on a case's likelihood of going to trial."

[31] L.J White (ed) *Private Antitrust Litigation* (MIT Press, 1988), at pp. 164-166:- "We hypothesize that the settlement gap is a function of the characteristics of the case and the litigants as well as difference in the courts…For example, one might expect that the size of the market (international, national, regional, or local) firm size, industry or other litigant characteristics, and the relationship between the parties (competitor, supplier, customer etc) would be important indicators of the propensity to settle." See also J. M. Perloff, D. L. Rubinfeld, and P. Rudd supra, at p408:- "if a class action is requested, the probability of settlement falls by nearly 44 percentage points. The reason is that the plaintiffs in a class action suit have a 15% lower probability of winning at trial.…changes in rules on discovery or other changes that affect the probability that a plaintiff will win at trial may substantially affect the share of cases that settle, and hence the burden on the court system. Moreover, because the size of the risk aversion effect increases with the size of damages awarded, trebling antitrust damages has a dramatic effect on the probability of a settlement. Were we to stop trebling antitrust damages, the fraction of cases litigated would increase substantially." See also G. M Fournier and T. W. Zuehlke 'Litigation and Settlement An Empirical Approach' [1989] The Review of Economics and Statistics Vol. LXXI Number 2 189 at p189:- "This literature finds the settlement choices of expected utility maximizing litigants to be dependent upon their risk preferences, their expectations regarding which party will prevail if a trial occurs, and their expectations about the amount of money to be awarded by the court in the event the plaintiff wins. Alternative rules for assignment of legal expenses are also shown to influence the relative frequency of settlements. While the importance of these variable in theoretical models of settlement choice is clear, their empirical significance has not yet been verified." See also J.C Alexander supra.

[32] See also Hodges n 25 supra.

distribution issues, in an attempt to reach a negotiated solution between parties.[33] As Hodges has noted: 'Systems are spreading quickly across European Member States for consumer ADR (CDR), based on an architecture of ombudsmen or other special bodies rather than courts, since it is a swift, cheap and effective means of resolving consumer-to-business (C2B) disputes''[34] and CDR must now be available for every type of C2B dispute.[35] In its BIS 2012 Consultation document, the Government noted that "cases being resolved through alternative means, avoiding court involvement, can be a more satisfactory outcome for all parties as well as reducing burdens on the state…. It therefore is minded to ensure that courts and the OFT can use ADR wherever suitable, and to encourage private and third sector bodies to provide further forms of ADR …".[36] Although there is no mention of ADR or settlements in either the Commission 2013 Recommendation on Collective Redress or the 2014 Antitrust Damages Directive the Consumer Rights Act 2015 contains provision for a collective redress settlement scheme,[37] and also for a certified voluntary redress scheme without adopting any specific measures in relation to ADR. Hodges considers that although ADR may assist settlement, the decision on whether to settle remains primarily an economic decision and the pressures and incentives to litigate early do not exist as clearly as they do in the USA. Ideally, Hodges considers that a combination of voluntary redress and ADR would comprise the best technique for enhancing the quality of private enforcement redress but that in essence this needs to be incentivized by other aspects of the way the enforcement system were designed.[38] Partly reflecting the academic debate on the role for ADR mechanisms in dispute resolution generally and anecdotal evidence about the increasing role for mediation in competition litigation settlements, the research undertaken here also sought to ascertain the extent to which mediation has been a factor in competition settlements in the relevant period.

Undertaking the research

It was necessary to define the research period which was confined to the period between 2008-2012 inclusive, as the research commenced during the late Summer of 2013. The earlier research on this topic had covered the period 2000-2005 and it would have been

[33] See K.J. Hopt and F. Steffek (eds.), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press, 2012).

[34] Hodges, Ch 8 in Rodger 2014 supra n25 at p263. See also C. Hodges, I. Benöhr and N. Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).

[35] Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); and Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR).

[36] Consultation, ch 6 Introductory summary.

[37] S 49A and s49B of the revised Competition Act 1998. The Netherlands invented a mechanism for making a settlement scheme binding on inactive class members, under the Class Action Settlement Law (WCAM) C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing, 2008), p 70ff. F. Weber and W.H. van Boom, 'Dutch Treat: The Dutch Collective Settlement of Mass Damage Act (WCAM 2005)' (2011) 1 *Contratto e Impresa/Europa, 69-79.*

[38] Comprising a public aspect- such as achieving the resolution of all public sanctions- and private compensation consequences at the same time, or the prospect of negotiating a sufficiently large reduction the fine or other penalty. This underlies the voluntary redress certification scheme being introduced by the Consumer Rights Act.

more problematic for the relevant respondents to trace accurate information for the period going back to 2006 and this also supported a more limited research timeframe. We sought to ensure that the research would target, in as comprehensive a manner as possible, all practitioners within the UK legal system who may have been involved in private enforcement of either/both EU and UK competition law. The Legal 500 was used to compile a database of practitioners most likely to be potentially involved in competition litigation. The Legal 500 search tool was used,[39] with the search focused on EU and Competition law within the broader corporate and commercial area. We formed a database of 83 practitioners to contact, using the leading individuals in London and a practitioner for all law firms identified across the other 'regions' of the UK including Scotland. Questionnaires were forwarded to the 83 lawyers on 23rd October 2013, although the actual sample of potential respondents will have been less than that because we contacted multiple individuals in some of the London firms as it was unclear from the Legal 500 database which of those practitioners in a firm were more likely to be involved directly in competition litigation as opposed to acting in a public enforcement context.[40] A subsequent reminder with duplicate questionnaires was sent to all potential respondents in February 2014. Unlike the earlier research none of the questionnaire recipients responded to the effect that they had no competition litigation experience or practice, and responses were only received by respondents who had actually completed questionnaires. Unfortunately, the initial response rate was very poor with a total number of only 12 responses,[41] with a range of 1 to 5 completed questionnaires for the relevant period, resulting in 29 completed questionnaires[42] as opposed to 43 for the earlier period 2005-2008 (from 18 respondents). A selection of law firms were contacted directly in December 2014 and this resulted in three further responses and 16 questionnaires and a total of 45 questionnaires for 2008-2012.[43] The number of responses overall was disappointing, and exacerbated by the absence of key details in many of the settlement questionnaires regarding levels of settlement awards, perhaps reflective of enhanced but misplaced caution by lawyers regarding confidentiality and anonymity of individual settlement agreements.[44] Accordingly, we will assess certain

[39] http://www.legal500.com.

[40] As noted earlier, the Legal 500 list only identifies lawyers within the broad specialism area of EU/competition law.

[41] Generally, response rates to surveys have declined considerably since the 1960s, as reported by J. Goyder and J. McK. Leiper 'The Decline in Survey Response: A Social Values Interpretation' in *Social Surveys*, edited by D. De Vaus (London:Sage Publications, 2002) at pp191-210. For a fuller discussion of the issue of response rates, see see V Lehmann Nielsen and C. Parker, Centre for Competition and Consumer Policy, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings* (2005) http://cccp.anu.edu.au/projects/CCCPReport%20Final.pdf at pp9-12.

[42] Recipients were requested to complete one questionnaire for each settlement within the sample period.

[43] There were various completed questionnaires for 2013, which unfortunately could not be considered as they fell outside the relevant period.

[44] As explained in my introductory letter, we did not ask for any details which could identify the parties involved and indeed the questionnaire information was input to SPSS which provides generalised data and allows us to identify trends rather than any concern with individual settlement outcomes. The reticence by some respondents continued despite assurances about University ethical requirements, the fact that no details of firms involved in settlements was requested which

trends we can observe in the reported settlements over the period 2008-2012 but one must bear in mind the limited response rate and accordingly it is difficult to demonstrate that this is an accurate and complete reflection of all the types of competition litigation and settlement activity during the period.

Questionnaire Results and Analysis

The data on the 45 returned questionnaires was input and analysed using the statistical programme, SPSS for windows.[45] Frequency analysis was carried out on the responses, in some cases represented graphically, and crosstabulations were made between certain responses.[46] This has allowed us to provide detailed information about the numbers of settlements, the competition law rules relied on in cases, the types of dispute and whether mediation was involved, together with a range of other issues identified in the questionnaire. The research outcomes provide invaluable insights into litigation and settlement practice, and in relation to the more limited sample of settlements (compared to the research for 2000-2005) allows us to look in more detail at the relationship between different aspects of the settlements, to allow us, where feasible, to build a better picture of the types of litigation settlements and the underlying rationale/motivations and outcomes in the different settlement contexts.[47]

Number and Period of Settlements

Q2 asked in which year the settlement took place. Table 1 provides the total number of settlements in competition law litigation for each year between 2008-2012. Like the earlier research, where there appeared to be a fairly dramatic increase in the number of settlements in latter years to 2005, in this period there is a significant increase in reported settlements in the final 3 years, particularly 2012. Nonetheless, even although there appears to be more settlements in the last 3 years this may simply reflect the fact that those were easier to record for the respondent practitioners as the files and individual and institutional memory of more recent cases is likely to be higher.

TABLE 1- Year of Settlement

	Frequency	Percent	Cumulative Percent
2008	4	8.9	8.9
2009	5	11.1	20.0
2010	9	20.0	40.0
2011	10	22.2	62.2
2012	17	37.8	100.0
Total	45	100.0	

would allow them to be identified, and the practical matter that all questionnaires were simply input into SPSS to provide aggregated responses for each question.

[45] SPSS 22.

[46] See Frances Clegg, *Simple Statistics, A course book for the social sciences*, (Cambridge: Cambridge University Press, 1990).

[47] But note the limitations in this data as discussed further infra.

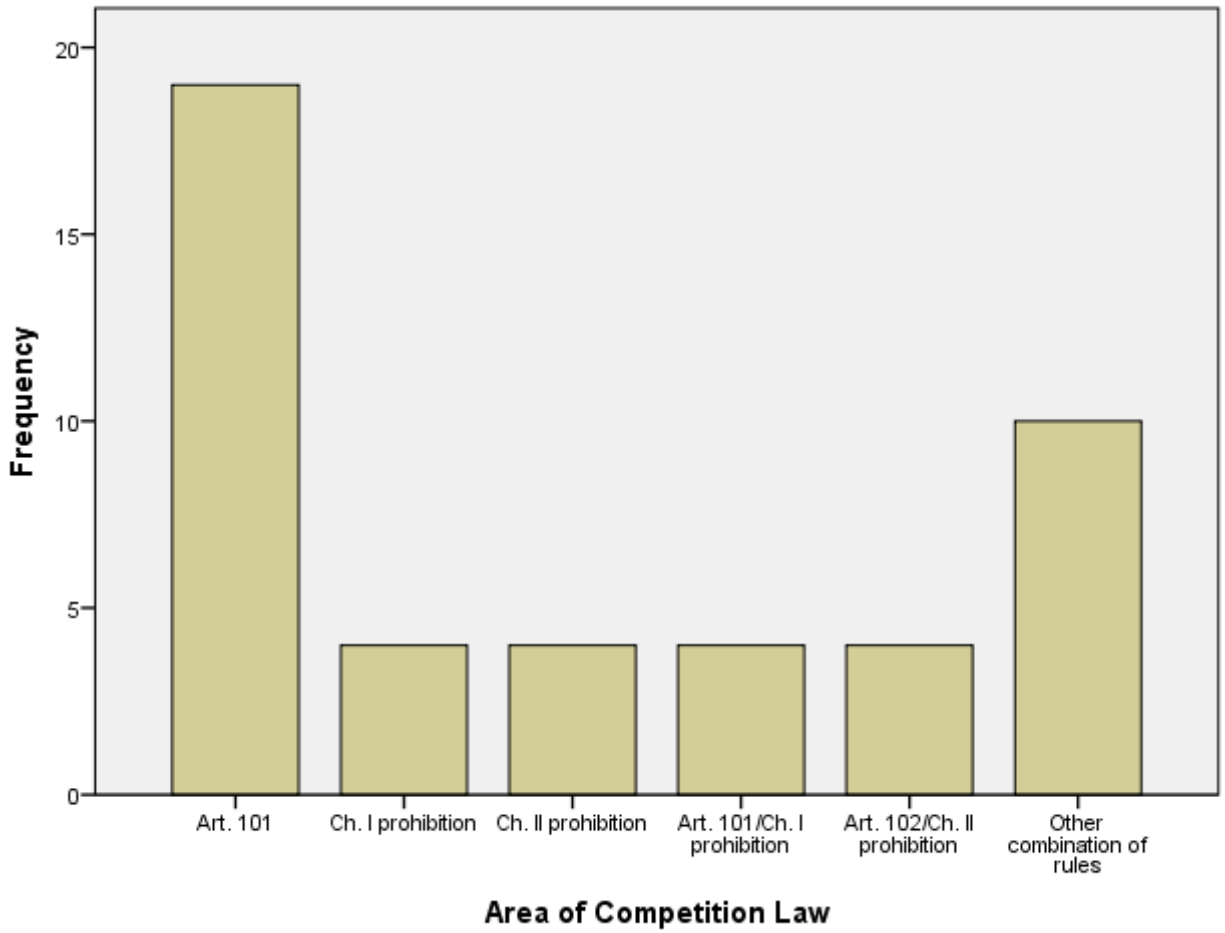
Competition Law Rules Concerned

Q3 asked which areas of competition law the settlement concerned and provided the following options:- a) Article 101; b) Article 102; c) Chapter I prohibition; d) Chapter II prohibition; e) Article 101/Chapter I prohibition; f) Article 102/Chapter 2 prohibition; and g) other combination of rules. Table 2 provides details of the competition law rules concerned in the 29 reported settlements and this is represented graphically in Chart 1.

Table 2 Competition Law Rules Concerned

	Frequency	Percent	Cumulative Percent
Art. 101	19	42.2	42.2
Ch. I prohibition	4	8.9	51.1
Ch. II prohibition	4	8.9	60.0
Art. 101/Ch. I prohibition	4	8.9	68.9
Art. 102/Ch. II prohibition	4	8.9	77.8
Other combination of rules	10	22.2	100.0
Total	45	100.0	

Chart 1 Competition Law Rules Concerned



Clearly Article 101 was most frequently resorted to in the settled disputes, and this continues a similar trend from 2005-2008. Similarly, the focus in abuse cases is on Chapter II although the absence of any Article 102 cases alone is noteworthy.[48] However, although the categories provided in the questionnaire sought to ascertain the reliance by parties on specific competition law rules, we can observe a broader picture. Aggregating the anti-competitive agreements case categories (and we will look in more detail at what types of cases these are) provides 27 cases- 60% as opposed to only 8 abuse cases (17.8%) and 10 combination of rules cases (22.3%).[49] In the earlier research[50]- Part I Hidden Story- there was parity between abuse and anti-competitive agreements cases. The broader picture of the types of cases settling should become clearer as we examine the other data and crosstabulate the results.

Competition Law Dispute

Q4 asked which type of competition law dispute the settlement involved and provided the following options:- a) Claim for abuse of a dominant position; b) Defence to the exercise of an IPR; c) Claim by a direct purchaser from a cartel; d) Claim by an indirect purchaser from a cartel; e) Dispute relating to a vertical agreement; f) Defence to enforcement of a contract; and g) Other, please specify. The outcomes are set out in Table 3 and Chart 2.

Table 3 Type of Dispute

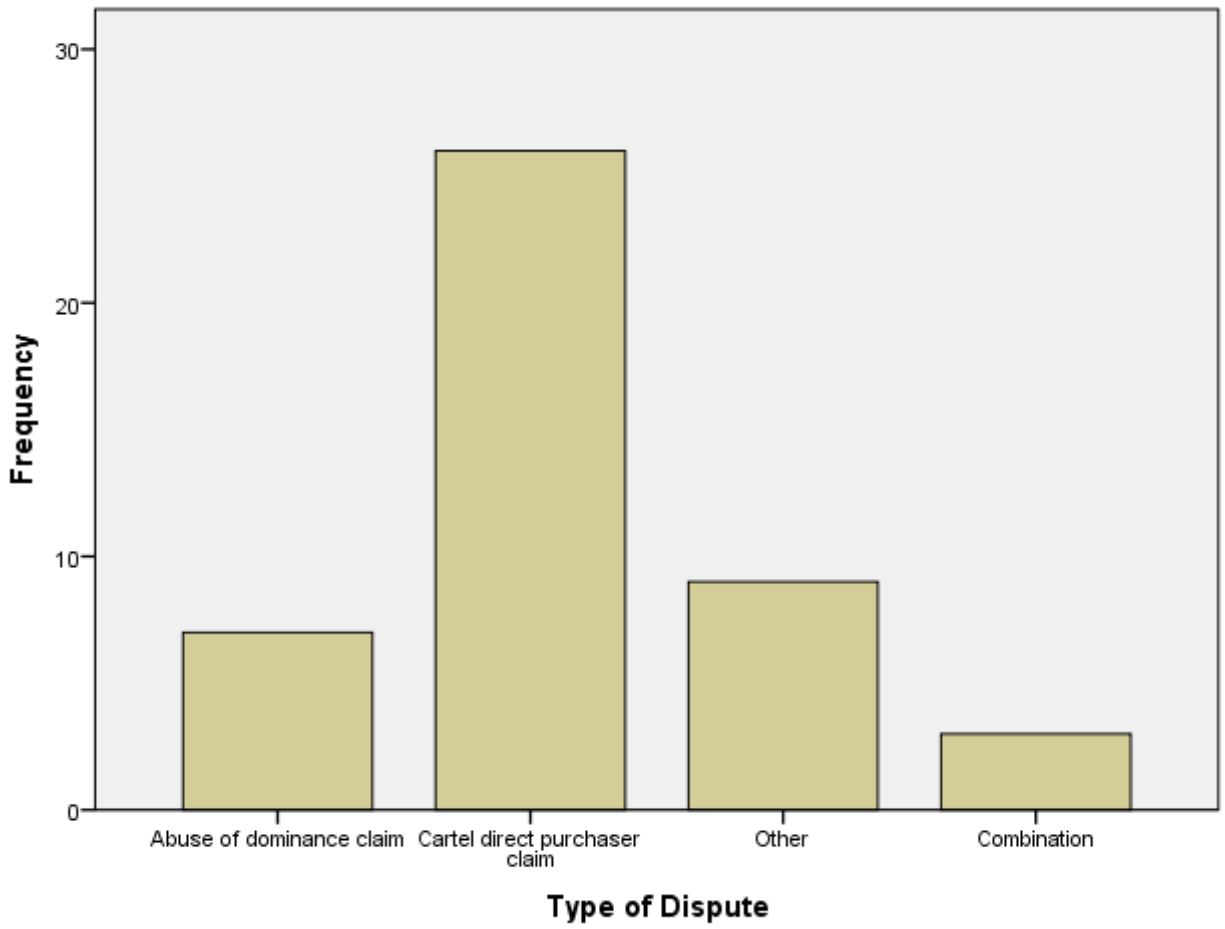
	Frequency	Percent	Cumulative Percent
Abuse of dominance claim	7	15.6	15.6
Cartel direct purchaser claim	26	57.8	73.3
Other	9	20.0	93.3
Combination	3	6.7	100.0
Total	45	100.0	

[48] There were 5 cases in total involving Article 102- 4 in combination with Chapter II, and one case involving all 4 sets of rules.

[49] 2 respondents provided details of these as: all 4 sets of rules (Articles 101 and 102 and Chapter I and II), and Article 101 Article 53 EEA.

[50] Supra n3.

Chart 2 Type of Dispute



Notably none of the settlements alone involved any of the following:- defence to the exercise of an IPR; claim by an indirect purchaser from a cartel or defence to enforcement of a contract. A significant majority of the reported settlements involved cartel direct purchaser claims (57.8%)[51] and 7 were abuse of dominance claims (24.1%).This is a significant shift from the earlier research where the most frequent response was in relation to a claim for abuse of a dominant position, with 21/43 (48.8 %). Of the 'Other' 9 settlement cases, the majority constituted claims by competitors, primarily in relation to cartel activities.

Parties Involved

Q5 asked about the parties involved in the settlement, and provided the following options:- a) Multiple claimants; b) Multiple defendants; c) Both; d) Neither. Table 4 provides details of the parties involved in the 45 reported settlements.

[51] Including all of the final batch of 10 reported settlements, in relation to which unfortunately no final settlement value details were provided, as discussed further infra.

Table 4 Parties Involved

	Frequency	Percent	Cumulative Percent
Multiple claimants	2	4.4	4.4
Multiple defendants	7	15.	20.0
Both	21	46.7	66.7
Neither	15	33.3	100.0
Total	45	100.0	

There were multiple parties in 66.7% of cases, with 21 or 46.7% of cases involving both multiple claimants and defendants. This is a notable development from the earlier research where the vast majority of settlements involved individual party litigants- 67.4%- and only 11.6% both multiple claimants and defendants. This is suggestive of a broader change in the type of competition litigation being undertaken and settled, but we should understand more when we crosstabulate the data on this issue with other variables.

Proceedings Raised Prior to Settlement

Q 8 asked whether proceedings had been raised prior to settlement?[52] Table 5 provides details of the answers for the 29 reported settlements.

Table 5 Prior Proceedings Raised

	Frequency	Cumulative Percent
Yes	30	66.7
No	15	100.0
Total	45	

This question sought to tease out the nature and context of the settlement process in competition law cases, and ascertain whether settlements routinely followed litigation. In the majority of reported cases settlement followed proceedings being raised- 66.7% (30 of the 45 settlements), although there are no further details regarding the stage of litigation at which settlement was reached. This is a slight increase from the earlier period, where 51.2% of reported settlements arose after commencement of court proceedings, and this may indicate a shift towards the more common settlement pattern in US antitrust cases where settlements are frequent, court approved and publicised, but often after a very lengthy litigation battle.[53]

Again more interesting insights may be gained when we crosstabulate the data from this question in relation to the data in relation to other variables. Unsurprisingly, the responses to question 9 demonstrated that the vast majority of prior litigation had been raised in the courts of England and

[52] The questionnaire sought information about settlements both after and prior to commencement of litigation, and this aspect required to be clarified for various potential respondents. The obvious difficulty with including settlements prior to commencement of litigation is where to draw the line.
[53] See Lande and Davis supra n4.

Wales (32/45, 71.1%) as set out in Table 6.[54] Nonetheless 4 settlements were reached in relation to litigation before the Scottish courts, demonstrating an increasing awareness and likelihood of competition law disputes and litigation in that context.[55]

Table 6 Jurisdiction Proceedings Raised

	Frequency	Percent	Cumulative Percent
England and Wales	32	71.1	71.1
Scotland	4	8.9	80.0
N/A	8	17.8	97.8
CAT	1	2.2	100.0
Total	29	100.0	

The Basis of Settlement

Q 10 asked respondents to denote the basis of settlement and provided the following options:- a) Payment in lieu of Damages; b) Agreement as to Future Conduct; c) A Combination of Both; d) Withdrawal of Claim without any of the above; and e) Other, Please specify. Table 7 provides details of the basis of settlement in the 45 reported settlements and this is represented graphically in Chart 3.

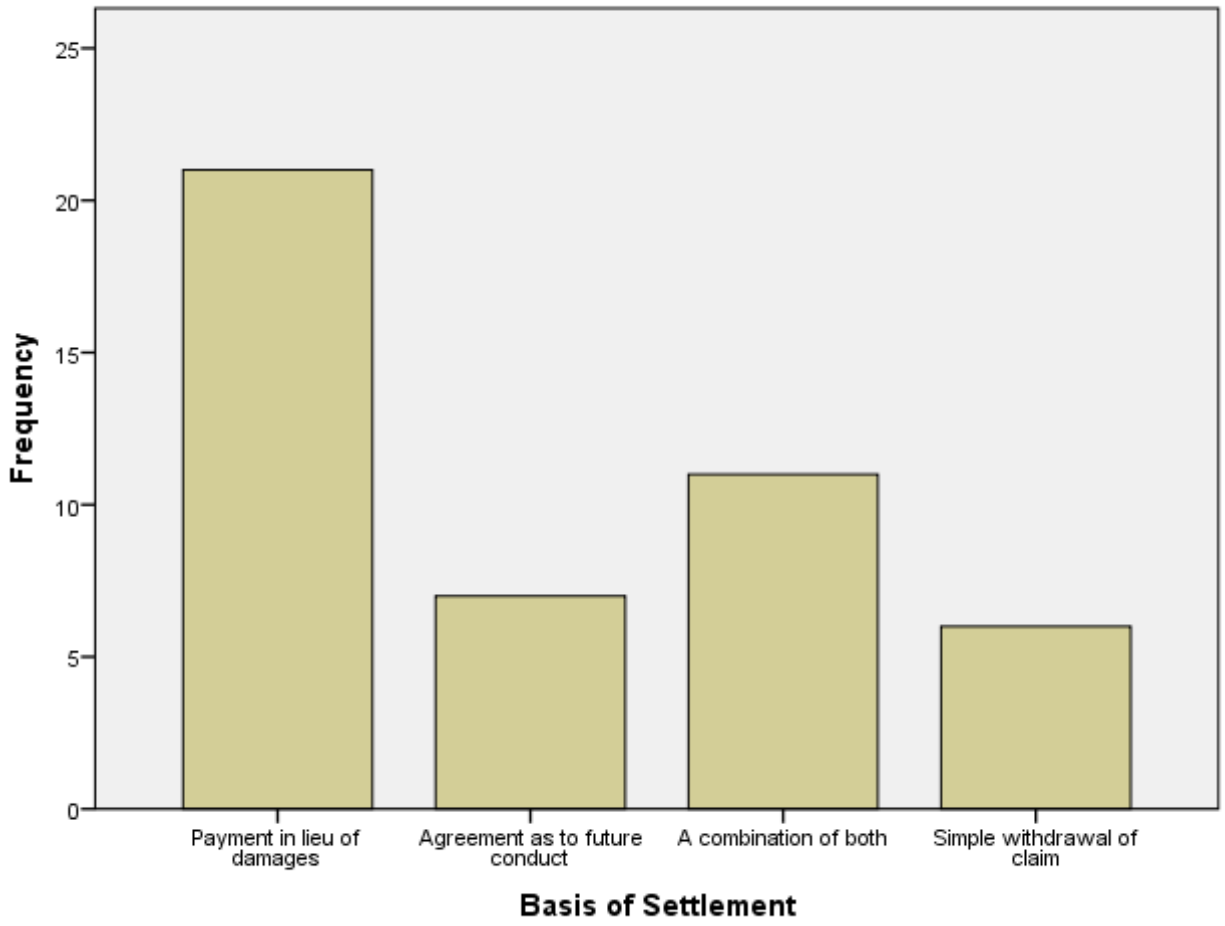
Table 7 Basis of Settlement

	Frequency	Percent	Cumulative Percent
Payment in lieu of damages	21	46.7	46.7
Agreement as to future conduct	7	15.6	62.2
A combination of both	11	24.4	86.7
Simple withdrawal of claim	6	13.3	100.0
Total	45	100.0	

[54] Although it does appear that this question was answered on the basis of where proceedings actually were or could have been raised, given that 24 responses related to proceedings in specific legal systems of the UK.

[55] See for instance B Rodger, 'Competition Law in a Scottish Forum' (2003) Juridical Review 247-275. It may be that, despite the separate category for CAT, a number of the 32 responses for England and Wales may have been in relation to actual or potential CAT proceedings.

Chart 3 Basis of Settlement



This aspect focuses even more specifically than the legal provisions relied upon, or the type of dispute on the context in which settlements take place in seeking to ascertain the remedy sought which drives the settlement process. Clearly the most common basis of settlement was a payment in lieu of damages, in 47.7% of cases (21 of 45). Agreement as to future conduct cases constituted 7 of the cases (15.6%) and 11 cases (24.4%) were a combination of those two modes of settlement. The remaining 6 cases settled on the basis of a simple withdrawal of the claim (13.3%). Compared to the earlier research, this indicates a significant increase in settled cases on the basis of a payment in lieu of damages alone, from 23.3% in the full period 2000-2005.[56]

Amount of damages sought and paid

Q11 asked respondents, where damages were sought, to specify the approximate amount sought in total by or from the client, and provided the following options:- a) Under £1m; b) Between £1m and

[56] Although note that in that period, 20.9% of cases comprised the combination of payment in lieu of damages with an agreement as to future conduct. Furthermore, as discussed below, there was clear evidence in that period that the incidence of payment in lieu of damages cases was increasing to 2005, a trend continued in the more recent period.

£5 m; c) Between £5m and £20m; d) Over £20m; e) N/A.[57] Table 8 provides details of the answers for the 8 reported settlements. **Q12** asked for the approximate amount paid in total by or to your client, where damages were paid and, although the response was open rather than a tick-box, the responses were classified using similar categories as for question 11:- a) Between £100k and £1m; b) Between £1m and £5 m; c) Over £5m d) N/A. Table 9 provides details of the answers for the reported settlements. Unlike the position in the USA,[58] the only visible information about settlement levels in the UK was provided in the earlier study in relation to the period 2000-2005. Disappointingly, the data here is limited because a number of respondents refused to provide data on amounts sought and paid in settlements due to confidentiality reasons.

Table 8 Amount Sought

	Frequency	Percent	Cumulative Percent
Under £1m	1	2.2	2.2
Between £1m and £5m	6	13.3	15.6
Between £5m and £20m	14	31.1	46.7
Over £20m	5	11.1	57.8
N/A	19	42.2	100.0
Total	45	100.0	

Table 9 Amount Paid

	Frequency	Percent	Cumulative Percent
Between £100k and £1m	6	13.3	13.3
Between £1m and £5m	7	15.6	28.9
Over £5m	5	11.1	40.0
N/A	27	60.0	100.0
Total	45	100.0	

Despite the existence of 32 settlements involving payment in lieu of damages, we have only been provided with details of damages actually paid in 18 cases,[59] notwithstanding assurances regarding anonymity and confidentiality. There has been a slight decline in the proportion of cases involving large damages claims of over £20m, with 5 of 29 (17.2%) compared to 10 of 43 (23.3**%**) in the earlier period. However, compared to the earlier research period, most notable is the increase in settlements generally involving sums of over £1million- 12 in total with 7 settlements between £1

[57] The N/A for sums sought obviously relate to claims which were not for damages, and similarly for damages paid, where there were no damages paid. However, it was also used predominantly by respondents who did not want to provide those settlement details on confidentiality grounds.

[58] See for instance Lande and Davis, supra n4.

[59] Although this is if anything a slight improvement compared to the earlier research period where we were provided with details of 9 settlements in 19 payment in lieu of damages cases.

and £5m[60] and 5 settlements of over £5m, compared to only 4 £1m plus settlements (out of a similar sample of 43) in the earlier period.[61] The highest reported settlement in the earlier period was stipulated as 'between £5-£6m' but the highest reported settlement between 2008 and 2012 was £16m.[62]

Settlement Motivations

Q14 asked what were perceived to be the motivations behind settlement in the particular dispute, and provided the following options, allowing more than one option to be selected for any dispute:- a) To avoid the uncertainty of litigation; b) To avoid creating damaging legal precedent; c) To reduce the likely damages; d) To reduce the likely costs inconvenience; e) To smooth ongoing business relationships; f) Other, please specify. The responses are set out in Table 10.

Table 10 Settlement Motivations

	Frequency	Percent	Cumulative Percent
Avoid Uncertainty of Litigation	3	6.7	6.7
Reduce Likely Damages	2	4.4	11.1
Reduce Likely costs/inconvenience	1	2.2	13.3
Smooth Ongoing Business Relationships	1	2.2	15.6
Other	5	11.1	26.7
A combination of Factors	33	73.3	100.0
Total	45	100.0	

Respondents could tick more than one box and unsurprisingly a considerable number of respondents ticked multiple boxes- 17 of the 29 (58.6%) fell within this combination of factors category. This limits the potential for crosstabulating the results with other data. Nonetheless it does indicate that there are normally multiple overlapping rationales for parties settling disputes in a competition law context.[63] Looking at the combination of factors responses reveals that a considerable majority of responses, 33 (73.3%)[64] considered avoiding the uncertainty of litigation as a motivation for settlement. A slightly lower figure of 55.8% cited this as a motivation behind settlement in the earlier period, and it is perhaps concerning that the legal landscape in the subsequent years has not provided any greater certainty as to litigation outcomes in this context. In declining order, the other factors were reduce likely costs/inconvenience (30, 66.7%); reduce likely damages (14, 31.1%); smooth ongoing business relationships (14, 31.1%).[65] Of the 5 respondents

[60] The highest of the reported settlements in this band was £3.5m.

[61] Only one reported settlement in the earlier period of over £5 m.

[62] Although note as stated above, a significant number of respondents did not provide details of the settlement figures where there had been a payment in lieu of damages.

[63] Unfortunately the number of responses in this 'combination of factors' makes any crosstabulation between the data here and data in relation to other issues of very limited significance and will not be undertaken for the purposes of this article.

[64] Including the 3 respondents who selected this motivating factor alone.

[65] This has clearly become a less significant factor compared to the earlier research period, perhaps reflecting the higher incidence of Article 101 payment in lieu of damages based settlements as evidenced above compared to the reported settlements between 2000-2005.

who ticked Other, two specified the following motivations for settlement:- 'presumed lack of prospects of success' and 'OFT investigation into cartel found there was no cartel'.

Type of Claim

Obviously one of the most significant issues in looking at the development of competition litigation is the dichotomy between follow-on and stand-alone actions, and Q 15 of the questionnaire asked whether the settlement related to a follow-on or stand-alone claim. Follow-on actions 'follow-on' from prior public authority enforcement decisions, for example, where a damages action is raised against a party or parties who against whom there has been a Commission cartel infringement decision based on Article 101 TFEU. Cartel-related damages actions are nearly always follow-on actions, facilitated by a provision in Regulation 1/2003 which makes prior Commission infringement decisions binding subsequently on national courts.[66] There are similar provisions in many Member States in relation to the evidential value or binding nature of prior infringement decisions by their NCAs,[67] and this has been supplemented by Article 9 of the 2014 Antitrust Damages Directive.[68]

Stand-alone actions are independent of, and, usually, in the absence of enforcement action by a competition authority. This would arise either because the competition authority will not deal with a complaint in accordance with its prioritisation principles, or because the victim needs to take immediate court action to bring a halt to the alleged anti-competitive behaviour. Stand-alone actions tend to be associated with allegations based on the abuse of a dominant position under Art 102 TFEU. The distinction between follow-on and stand-alone cases can become somewhat blurred. In the UK, litigation preceded by a CMA decision may be raised in the normal courts outside the designated follow-on mechanism. The term 'follow-on' can be used in a narrow sense to refer to actions raised against parties named in infringement decisions by the relevant authorities. But in other cases the defendants are not directly named in the infringement decision, but are related companies, perhaps the parent company in a corporate group. In a wider sense these could be seen as follow-on claims, but because the defendants are not the specific addressees of the decision they could also be seen as stand-alone claims.[69]

In recent work undertaken by Rodger,[70] albeit based on a completely different methodology for counting competition law private enforcement cases, it was observed that the frequency of stand-alone and follow-on actions varied considerably across the EU Member States in the study period of 1 May 1999 and 1 May 2012. In relation to the aggregate EU case-law (excluding Germany), stand-alone actions dominated, representing 85.3% of the total, with only 14.7% of judgments relating to follow-on actions.[71] In the UK, the figure for follow-on cases in that study was considerably higher than the EU average at 36.8% of the overall UK case-law, although not all of these judgments will have been delivered as part of the specific follow-on mechanism under s47 of the 1998 Act (by the CAT or subsequent appeal courts). This current research demonstrates an even more significant role for follow-on actions, at least in terms of the limited reported settlement activity on which the study is based, with 73.3% of settlements involved in follow-on cases and only 26.7% in stand-alone cases as set out in Table 11 and Chart 4.

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[66] Article 16 of Regulation 1/2003.

[67] See for example in the UK under its follow-on mechanism, but see above re the changes introduced by the Consumer Rights Act and see in particular Andreangeli supra n22.

[68] Directive 2014/104/EU (2014) OJ L349/1. See for example, C F Weidt 'The Directive on actions for antitrust damages after passing the European Parliament' [2014] 35(9) ECLR 438-444

[69] 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 Optonics Corporation and* others [2012] EWHC 732 (Ch) and *Toshiba Carrier UK Ltd and others v KME Yorkshire Ltd and others* [2011] EWHC 2665 (Ch).

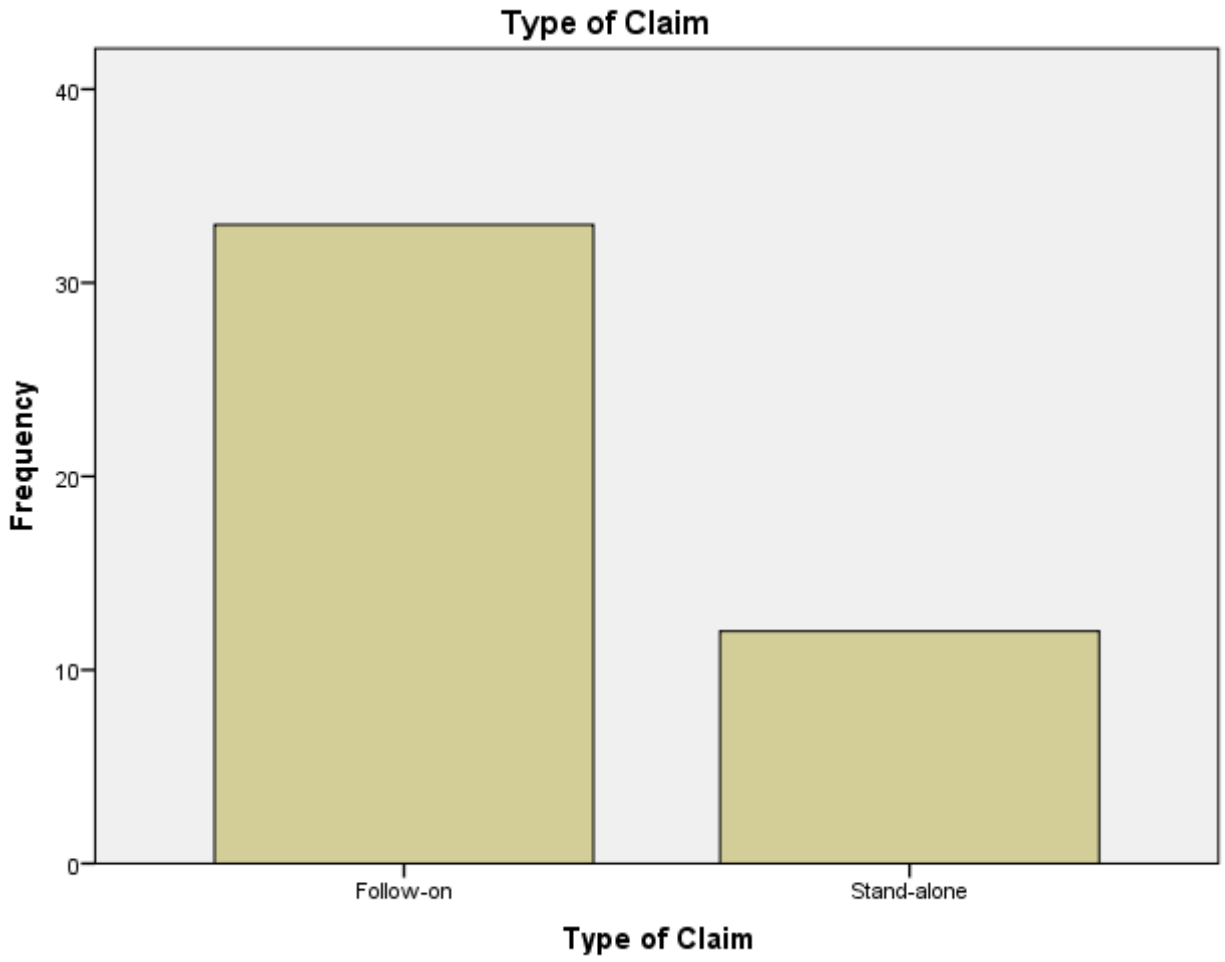
[70] B Rodger (ed) *Competition Law Comparative Private Enforcement and Collective Redress Across the EU* (2014 Kluwer Law International).

[71] See Rodger ibid, Chap. 2.

Table 11 Type of Claim

	Frequency	Percent	Cumulative Percent
Follow-on	33	73.3	73.3
Stand-alone	12	26.7	100.0
Total	45	100.0	

Chart 4 Type of Claim



Difficulties in Pursuing/Establishing a Case

Q16 asked what were the principal difficulties in pursuing or establishing the competition law issues, and provided the following options, allowing more than one option to be selected for any dispute:- a) Evidential; b) Economic; c) Legal Uncertainty; d) Availability of Expertise; e) Publicity; f) Other, please specify. The responses are set out in Table 12.

Table 12 Difficulties

	Frequency	Percent	Cumulative Percent
Evidential	10	22.2	22.2
Legal Uncertainty	1	2.2	24.4
Other	1	2.2	26.7
A combination of Factors	33	73.3	100.0
Total	45	100.0	

Respondents could tick more than one box and unsurprisingly again the vast majority of respondents ticked multiple boxes- 33 of the 45 (73.3%) fell within this combination of factors category- and accordingly the responses make it difficult to relate particular cases and types of disputes to specific difficulties. Nonetheless it does indicate that there are normally various difficulties faced by parties in a competition law dispute.[72] The most frequent response in the earlier period of 2000-2005 was Evidential, in 51.2% of all cases. It is clearly still the most common sole burden or difficulty facing competition litigants, with 10 respondents (22.2%) citing this factor alone, and a further 31 respondents (68.9%) cited this as one of combination of factors. Accordingly evidential difficulties were a major difficulty faced in 91.1% of the reported settlements, a significant increase on the previous period. This is somewhat difficult to equate with the data suggesting that the majority of actions are follow-on actions given the evidential and proof advantages associated with such actions. It is suggested that the evidential difficulties may lie primarily in relation to issues of causation and quantum although further work would be required to establish this. Legal uncertainty was cited as a difficulty in 15 cases overall (33.3%) although strangely not all of the cases match with those where the uncertainty of litigation was considered to be a factor motivating settlement (in 33 cases, 73.3%). Economic difficulties were considered to be the second most significant difficulty with 26 of 45 responses identifying with this issue (57.8%).[73] In declining order, the other difficulties faced by parties were:- publicity (2, 4.4%); smooth ongoing business relationships (8, 17.8%).

Mediation

Earlier work by the author[74] noted the anecdotal evidence of the increasing role of mediation in competition-law-related disputes, and suggested that resort to mediation maybe one of the reasons considerably fewer disputes are being litigated.[75] At that stage the UK BIS consultation had proposed the promotion of ADR, notably mediation, to resolve competition law disputes, and set out a range of consultation questions on how best to encourage the use of ADR in this context.[76] In this context

[72] Unfortunately the number of responses in this 'combination of factors' makes any crosstabulation between the data here and data in relation to other issues of very limited significance and will not be undertaken for the purposes of this article.

[73] One respondent specifically noted in the questionnaire that:- 'The cost of economic research is a major obstacle to proper analysis in a follow on action'.

[74] B Rodger, 'Why not Court? A Study of Follow-on Actions in the UK' (2013) 1(1) Journal of Antitrust Enforcement 104-131.

[75] This is based on anecdotal evidence and reference in the dismissal of certain cases by the CAT to the parties having resolved the matter via mediation. See also M Cover and E Lecchi, 'Mediating Competition Law Cases' (2008) 74(2) Arbitration 121–24.

[76] See BIS Consultation above n20 paras 6.1–6.25. Nonetheless, there are no specific provisions in the Consumer Rights Act 2015. See eg C Hodges, 'Fast, Effective and Low Cost Redress: How do

it is appropriate that there should be a better understanding of how the availability of and resort to mediation has impacted upon competition law litigation practice to allow a better understanding of how competition law rights may be effectively realized. Accordingly the questionnaire sought to elicit information on the role mediation may have played in competition litigation settlement practice in the period. As discussed above, there has been increasing resort to mediation generally in commercial litigation,[77] and there is anecdotal evidence that it is becoming more common in competition litigation disputes. Q 17 asked whether mediation was involved in the settlement and the results are set out in Table 13. Only 5 cases involved mediation[78] but this constituted 11.1% of the reported settlements in the period. Although there are few cases, it will be interesting to seek to ascertain the types of case that are more likely to lead to mediated settlements.

Table 13 Mediation Involved

	Frequency	Percent	Cumulative Percent
Yes	5	11.1	11.1
No	40	88.9	100.0
Total	45	100.0	

Q 18 asked whether in those cases where mediation had been resorted to whether it had been viewed as a positive process by you and your clients and why? The following positive anecdotal responses were received:- 'viewed as positive- good settlement figure for our client'; positive as a good outcome was achieved'; and 'mediation with a number of the largest claimants provided the basis to settle the remainder of the claims'.

Crosstabulated data

In this section we will seek to crosstabulate many of the variables to give us a fuller picture of the types of settlement involved in the 45 reported settlements. This has been explored in greater depth than in the earlier study, and accordingly only limited comparisons with the earlier period are feasible. Nonetheless, the analysis here is restricted by apparent confidentiality concerns in relation to the provision of settlement damages details and also limited by the information revealed by the multiple tick-box categories, notably in relation to settlement motivations and difficulties.

Competition Law Area

First we took the area of competition law data and crosstabulated it with the type of dispute data as set out in Table 14.

Public and Private Enforcement and ADR Compare?' Ch 8 in B Rodger (ed), *Competition Law: Comparative Private Enforcement and Collective Redress Across the EU* (Kluwer, 2014).

[77] See for example, D Spencer and M Brogan, *Mediation Law and Practice*, CUP, 2012; B Clark, *Lawyers and Mediation*, Springer, 2012.

[78] One response noted, in relation to Q18 below, that ADR was involved though not mediation.

Table 14 Competition Law Area/Type of Dispute

	Type of Dispute				
	Abuse of dominance claim	Cartel direct purchaser claim	Other	Combination	Total
Art. 101	0	15	2	2	19
Ch. I prohibition	0	2	2	0	4
Ch. II prohibition	4	0	0	0	4
Art. 101/Ch. I prohibition	0	2	2	0	4
Art. 102/Ch. II prohibition	3	0	0	1	4
Other combination of rules	0	7	3	0	10
Total	7	26	9	3	45

This provided the inevitable results that the cartel direct purchaser claims all involved Article 101/Chap 1 and that the abuse of dominance claims were all based on Article 102/Chapter 2.
In crosstabulating the area of competition law with the basis of settlement, as set out in Table 15, only 2[79] of the 21 settlements resolved by a payment in lieu of damages did not involve Art 101/chap 1 (ie 90.5% of payment cases were anti- competitive agreements cases) whereas inevitably only 1 of the cases resolved by an agreement as to future conduct[80] did not involve the rules on abuse of dominance.[81]

Table 15 Area of Competition Law/Basis of Settlement

		Basis of Settlement				
		Payment in lieu of damages	Agreement as to future conduct	A combination of both	Simple withdrawal of claim	Total
Area of Competition Law	Art. 101	11	0	6	2	19
	Ch. I prohibition	3	1	0	0	4
	Ch. II prohibition	2	1	0	1	4
	Art. 101/Ch. I prohibition	3	0	0	1	4
	Art. 102/Ch. II prohibition	0	3	1	0	4
	Other combination of rules	2	2	4	2	10
Total		21	7	11	6	45

[79] Both Competition Act 1998 Chapter 2 cases.
[80] A Competition Act 1998 Chapter 1 case.
[81] One involving Chapter 2 alone, 3 involving a combination of chapter 2 and Art 102 and the final case involving a wider combination of rules.

This reveals, as perhaps anticipated, that payment in lieu of damages settlements tend to occur in anti-competitive agreements cases and the future conduct agreement settlements tend to arise more frequently in dominance cases. This is perhaps inevitable, with claimants in abuse cases generally more concerned about their future viability and not being excluded from market opportunities. It also reinforces the data from the earlier study where 7 of the 11 Article 101 settlement cases, 63.6%, involved payment in lieu, either alone or in combination with an agreement as to future conduct, whereas only 22.2% of the Chapter 2 abuse cases led to some form of payment.

Table 16 Type of Dispute/Basis of Settlement

		Basis of Settlement				
		Payment in lieu of damages	Agreement as to future conduct	A combination of both	Simple withdrawal of claim	Total
Type of Dispute	Abuse of dominance claim	2	4	0	1	7
	Cartel direct purchaser claim	14	2	9	1	26
	Other	3	1	1	4	9
	Combination	2	0	1	0	3
Total		21	7	11	6	45

Indeed, in looking at the type of dispute and basis of settlement crosstabulation in Table 16, of the 6 abuse of dominance claims which did not lead to a withdrawal of the claim,[82] 4 were settled on the basis of an agreement as to future conduct, and 2 on the basis of a payment in lieu of damages, whereas of the 25 cartel direct purchaser claims which did not result in a withdrawal of the claim,[83] 23 were settled by a payment in lieu of damages, alone in 14 cases and combined with an agreement as to future conduct in 9 cases, and only 1 case was settled solely on the basis of an agreement as to future conduct. There were also 3 combination cases, 2 of which resulted in payment in lieu of damages and 1 in a combination of a payment and agreement as to future conduct.

The link between cartel claims under Art 101 and damages based settlements is further highlighted when crosstabulating the area of competition law with the amount of damages paid as set out in Table 17.

[82] Of which there was one.
[83] Of which there was one.

Table 17 Area of Competition Law/Amount of Damages Paid

		Damages Paid				
		Between £100k and £1m	Between £1m and £5m	Over £5m	N/A	Total
Area of Competition Law	Art. 101	2	2	2	13	19
	Ch. I prohibition	2	2	0	0	4
	Ch. II prohibition	0	1	0	3	4
	Art. 101/Ch. I prohibition	2	0	0	2	4
	Art. 102/Ch. II prohibition	0	0	0	4	4
	Other combination of rules	0	2	3	5	10
Total		6	7	5	27	45

In all the settlements where details were provided of the damages paid, only 1 of those (between £1m and £5m) involved the Chapter II prohibition.[84] 4 of the remaining 6 settlements with a payment of between £1m and £5m involved reliance on the Article 101 or Chapter I prohibition, with the other 2 involving a combination of rules. Moreover, there were two reported settlements involving payments of over £5m in disputes based on Article 101,[85] in addition to three further such large settlements involving a combination of rules.

In crosstabulating the type of dispute with the parties involved in the dispute as set out in Table 18, the most notable issue is that virtually all the cartel direct purchaser claims (24 out of 26, 92.3%) involved either or both multiple claimants and defendants, with 18 of those 26 having both multiple claimants and defendants (69.2%).

[84] None of these settlements involved Art 102 at all.

[85] Interestingly, the final batch of 10 submitted reported settlements all involved Article 101 and cartel direct purchaser claims but unfortunately no details of damages sought or paid were provided with the questionnaires. The link between Article 101/cartels and higher settlement damages payments is reinforced by the crosstabulated data in relation to the type of despite and the damages paid, which establishes that 8 of the 12 settlements of over £1m involved direct purchaser claims alone.

Table 18 Type of Dispute/Parties Involved

		Parties involved				
		Multiple claimants	Multiple defendants	Both	Neither	Total
Type of Dispute	Abuse of dominance claim	0	0	0	7	7
	Cartel direct purchaser claim	2	4	18	2	26
	Other	0	3	1	5	9
	Combination	0	0	2	1	3
Total		1	5	10	13	45

In undertaking the crosstabulations between the data, and bearing in mind the limited scope of the study, we can build up a picture of the most common types of competition law dispute, at least those which are settled. Cartel litigation tends to involve a multiplicity of litigants, claimants and defendants. It is also notable that all of the 7 abuse of dominance cases involved neither multiple claimants nor defendants, again reinforcing the impression that abuse cases are generally direct competitor disputes between a dominant undertaking and a single party which has allegedly suffered some form of direct abuse or exclusionary strategy.

In crosstabulating the type of dispute with the type of claim, as demonstrated in Table 19, 5 of the 7 abuse of dominance claims were stand-alone actions (71.4%) whereas 24 of the 26 cartel direct purchaser claims were follow-on actions (92.3%), confirming the perception that cartel claims tend to follow-on from prior infringement proceedings.

Table 19 Type of Dispute/Type of Claim

		Type of Claim		
		Follow-on	Stand-alone	Total
Type of Dispute	Abuse of dominance claim	2	5	7
	Cartel direct purchaser claim	24	2	26
	Other	5	4	9
	Combination	2	1	3
Total		33	12	45

Given the limited number of mediated outcomes, and the spread of the 5 mediated settlements between the different types of dispute, no clear pattern emerges from the data set out in Table 20 as to the type of dispute in which mediation is more likely.

Table 20 Type of Dispute/Mediation Involved

		Mediation Involved		
		Yes	No	Total
Type of Dispute	Abuse of dominance claim	0	7	7
	Cartel direct purchaser claim	3	23	26
	Other	1	8	9
	Combination	1	2	3
Total		3	26	45

Parties Involved

When we crosstabulate the parties involved with damages paid, the notable point is that multiple claimants were involved in all five of the £5m plus settlements, as demonstrated by Table 21.

Table 21 Parties Involved/Damages Paid

		Damages Paid				
		Between £100k and £1m	Between £1m and £5m	Over £5m	N/A	Total
Parties involved	Multiple claimants	0	0	2	0	2
	Multiple defendants	4	1	0	2	7
	Both	1	4	3	13	21
	Neither	1	2	0	11	15
Total		6	7	5	27	45

Multiple parties were involved generally in 30 of the 45 settlements (66.7%) but constituted 27 of the 33 follow-on cases (81.8%) as evidenced by Table 22, indicating that the follow-on procedure is more likely to involve multiple claimants and/or defendants, and this further develops our understanding of the types of follow-on and stand-alone claim settlements.

Table 22 Parties Involved/Type of Claim

		Type of Claim		
		Follow-on	Stand-alone	Total
Parties involved	Multiple claimants	2	0	2
	Multiple defendants	6	1	7
	Both	19	2	21
	Neither	6	9	15
Total		33	12	45

Prior Proceedings Raised

In crosstabulating the data on whether prior proceedings were raised and the damages paid, as set out in Table 23, although damages were paid in settlement in a number of cases where prior proceedings had not been raised,[86] four of the five settlements in excess of £5m involved cases where litigation had been raised (80%, where prior proceedings where raised in 66.7% of cases) .

Table 23 Proceedings Raised/Damages Paid

		Damages Paid				
		Between £100k and £1m	Between £1m and £5m	Over £5m	N/A	Total
Prior Proceedings Raised	Yes	2	5	4	19	30
	No	4	2	1	8	15
Total		6	7	5	27	45

Despite the limitations in the data, crosstabulating the data provides some fascinating insights and this is notable with the crosstabulation between prior proceedings raised and whether mediation was involved. Table 24 demonstrates that all 5 cases involving mediation followed the instigation of legal proceedings- ie mediation appears not to be a complete alternative to litigation but flowed from and took place within the overall mechanism of litigation between the parties.

Table 24 Proceedings Raised/Mediation Involved

		Mediation Involved		
		Yes	No	Total
Prior Proceedings Raised	Yes	5	25	30
	No	0	15	15
Total		5	40	45

Basis of Settlement

Furthermore, the crosstabulation between the basis of settlement and the type of claim (Table 25) shows that all 15 settlements involving payment in lieu of damages were follow-on cases.

Table 25 basis of Settlement/Type of Claim

		Type of Claim		
		Follow-on	Stand-alone	Total
Basis of Settlement	Payment in lieu of damages	21	0	21
	Agreement as to future conduct	3	4	7
	A combination of both	8	3	11
	Simple withdrawal of claim	1	5	6
Total		33	12	45

[86] 7, in fact 46.7% of cases where no proceedings had been raised.

Of course, follow-on cases, as discussed above, are not necessarily damages-only follow on mechanism cases before the CAT but this category also includes certain disputes before the High Court[87] as demonstrated by the three cases resolved by an agreement as to future conduct. However the data does clearly indicate that payment in lieu settlements arise in follow-on actions and that stand-alone cases tend to result in agreement as to future conduct.[88]

Table 26 Basis of Settlement/Mediation Involved

		Mediation Involved		
		Yes	No	Total
Basis of Settlement	Payment in lieu of damages	2	19	21
	Agreement as to future conduct	0	7	7
	A combination of both	3	8	11
	Simple withdrawal of claim	0	6	6
Total		5	40	45

Table 26 sets out the Basis of Settlement/Mediation involved crosstabulation. Interestingly mediation was always involved in the payment in lieu cases.[89] One may have envisaged that mediation would more likely involve disputes concerning parties negotiating in relation to future behaviour in a stand-alone claim. However, in the context of competition law disputes, at least in these five reported settlements, mediation appears to have arisen in cartel multi-party payment cases, following litigation being raised, and mediation has been utilised essentially as an alternative mechanism for agreeing on an appropriate quantum of damages for the settlement.

Damages Paid/Sought

As demonstrated by Table 27 the settlements in follow-on cases were spread among the different levels of amount sought in the settlements,[90] although the vast majority (14 of 21, 66.7%) sought sums of over £5m. Interestingly the stand-alone claims for damages, predominantly abuse claims, were all for bigger sums:-4 for between £5 and £20m and 1 for more than £20m.

[87] And potentially the Court of Session in Scotland.

[88] There were also 3 stand-alone cases involving a combination with payment in lieu of damages.

[89] Payment in lieu of damages only in 2 cases and combined with an agreement as to future conduct in 3 cases. and with an agreement as to future conduct

[90] Taking into account the limitations in the data here, as discussed above, as a result of a significant number of NA responses for damages sought and damages paid as a result of confidentiality concerns by respondents.

Table 27 Damages Sought/Type of Claim

		Type of Claim		
		Follow-on	Stand-alone	Total
Amount sought	Under £1m	1	0	1
	Between £1m and £5m	6	0	6
	Between £5m and £20m	10	4	14
	Over £20m	4	1	5
	N/A	12	7	19
Total		33	12	45

Nonetheless, as the crosstabulation between damages paid and type of claim reveals in Table 28,[91] only 1 reported stand-alone claim settled for a payment and it was for between £1m and £5m. The remainder of the damages paid settlements (17 in total) were in follow-on actions, including 5 settlements of over £5m.[92]

Table 28 Damages Paid/Type of Claim

		Type of Claim		
		Follow-on	Stand-alone	Total
Damages Paid	Between £100k and £1m	6	0	6
	Between £1m and £5m	6	1	7
	Over £5m	5	0	5
	N/A	16	11	27
Total		33	12	45

The picture of the mediation context is further illuminated by the evidence in Table 29 that 3 of the 5 settlements involving claims of more than £20m resulted from mediation- 60% when mediation was only involved in only 11.1% of cases overall. Ignoring the N/A response in 1 mediation case, the outcomes were damages of between £1m and £5m in 1 case and above £5m in the remaining 3 mediation settled cases as evidenced by Table 30.

[91] Ibid.

[92] And it is anticipated that among the many N/A responses to this question there would have been a number of cases involving significant damages payments.

Table 29 Damages Sought/Mediation involved

		Mediation Involved		
		Yes	No	Total
Amount sought	Under £1m	0	1	1
	Between £1m and £5m	0	6	6
	Between £5m and £20m	1	16	14
	Over £20m	3	2	5
	N/A	1	18	19
Total		5	40	45

Table 30 Damages Paid/Mediation involved

		Mediation Involved		
		Yes	No	Total
Damages Paid	Between £100k and £1m	0	6	6
	Between £1m and £5m	1	6	7
	Over £5m	3	2	5
	N/A	1	26	27
Total		5	40	45

Mediation

There have clearly been a limited number of mediated case settlement outcomes but it presents an interesting pattern- cases where considerable sums have been sought, and the settlement consists at least partly of payment in lieu following proceedings being raised in court- though it is of course uncertain, based on the limited sample, whether and to what extent this is fully reflective of practice. Table 31 also suggests that mediation is more likely to take place in the follow-on litigation environment with 4 of 5 mediated outcomes in that context.

Table 31 Type of Claim/Mediation involved

		Mediation Involved		
		Yes	No	Total
Type of Claim	Follow-on	4	29	33
	Stand-alone	1	11	12
Total		5	40	45

Conclusions

This research project has provided valuable additional empirical data and information about competition litigation and settlement outcomes in the UK. It is far from comprehensive both in terms of the response rate by practitioners and the nature of the data provided by some respondents, particularly in relation to the levels of damages sought and paid in a number of reported settlements. Nonetheless, in contrast with the United States where antitrust settlements tend to be court-approved and visible, when there is an ongoing policy debate at the UK and EU levels about further encouraging and facilitating competition litigation, it is important to seek to gain a better understanding of the 'hidden' story of competition litigation settlements in the UK, at least. There has been research to outline and review the competition litigation case-law and judgments in the UK, and there is increasing case-law in the High Court and CAT in recent years, but it is evident from anecdotal evidence that settled outcomes remain prevalent. This article has helped to provide at least a partial narrative of the types of competition litigation settlements in the UK between 2008-2012. A number of patterns have emerged from the research:- competition litigation settlements have predominately taken place in relation to Article 101 and written responses regarding the nature of the parties involved has inevitably demonstrated that all competition litigation settlements have taken place in a B2B context- the majority of which have been cartel direct purchaser claims. Follow-on anti-competitive agreements claims involving multiple parties have predominated, and these have tended to result in payments in lieu of damages. A small minority of primarily abuse-based claims led generally to settlements based on an agreement as to future conduct. The level of damages settlements in this period has generally increased since 2005-2008, although the data is patchy here. As with the earlier research the primary motivations for settlements were the uncertainty of litigation and to avoid costs and inconvenience and similarly the main hurdles in pursuing a competition case were perceived to be evidential and economic difficulties. It is unclear to what extent this picture of competition litigation and its settled outcomes will evolve in response to case-law developments, such as the CAT's consideration of causation in *2 Travel Group*, and the wider legislative and institutional developments, notably the Consumer Rights Act 2015 Schedule 8. In particular, it will be interesting to ascertain whether consumer claims will become more prevalent, although these may indeed lead to CAT-approved visible Collective Settlements under the revised s49A and s49B of the Competition Act 1998. Finally, the research sought to consider the extent to which we could observe a greater prominence for mediation leading to competition law settlements. The data evidences a small but significant role for mediation in this context, particularly in relation to large cartel-based claims involving multiple claimants (and defendants) in follow-on claims where proceedings have already been raised, seeking significant damages awards leading to payment in lieu of damages. In the light of academic and civil justice policy support for increased resort to mediation in commercial disputes, it will be interesting to follow the development of mediated competition litigation settlement outcomes in the next few years when it is anticipated that competition litigation is likely to increase in the UK as a result of greater awareness and the recent reform of legal and institutional mechanisms for competition law private enforcement.