

# Competition Law Private Enforcement in the UK Courts:- Case-Law Developments 2013-2016<sup>1</sup>

## Introduction

### BACKGROUND

This article will outline and review competition law case-law developments in the UK courts between 2013 and 2016. The author has conducted previous comprehensive studies of competition rulings by the courts in the UK, involving the application of both EU and UK competition law.<sup>2</sup> This article updates the position to the end of 2016 and allows for a greater understanding of both competition case-law trends and the approach of the judiciary to a number of key procedural and substantive issues. It is clear that during the last twenty years the European Commission has sought to encourage and facilitate private enforcement of EU competition law, and a similar process has taken place in the UK since 1998, notably the introduction of the Enterprise Act 2002 which made provision *inter alia* for follow-on actions before a specialist Competition Appeal Tribunal ('CAT'). There has been a further tranche of initiatives to facilitate private enforcement at both the EU and UK levels within the 2013-2016 period. In June 2013, following a consultation on Collective Redress, the Commission published a Communication<sup>3</sup> and Recommendation on Collective Redress.<sup>4</sup> More significantly, the Consumer Rights Act 2015, in addition to significantly enhancing the role of the Competition Appeal Tribunal in competition law litigation,<sup>5</sup> introduced a revised collective redress mechanism in the UK with the possibility of opt-out collective competition litigation.<sup>6</sup>

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<sup>1</sup> **Professor Barry J Rodger, The Law School, University of Strathclyde, Glasgow**; Many thanks for the helpful comments and suggestions on an earlier draft by Jon Lawrence and Alex Malina, Freshfields. All errors and omissions remain my responsibility alone.

<sup>2</sup> See B. Rodger 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part I' [2006] ECLR 241; 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part II' [2006] ECLR 279; 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part III' [2006] ECLR 341; '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.

<sup>3</sup> Communication, Strasbourg, 11.6.2013 COM(2013) 401 final.

<sup>4</sup> 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.

<sup>5</sup> See 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; and further *infra*

<sup>6</sup> See B Rodger, 'The Consumer Rights Act 2015 and collective redress for competition law infringements in the UK: a class Act?' (2015) 3(2) JAE 258-286. See for instance Case1257/7/7/16, *Gibson v Pride Mobility Products Ltd* at <http://www.catribunal.org.uk/237-9255/1257-7-7-16-Dorothy-Gibson.html>.

Furthermore, the adoption of the Antitrust Damages Directive in 2014 after more than a decade of policy discussion at the EU level has been the most recent significant legislative development. The Directive seeks generally to introduce a set of provisions to establish a minimum level playing field of procedural and substantive laws to facilitate the recovery of compensation in relation to EU competition law infringements across the EU Member States courts. The Damages Directive Statutory Instrument- Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and other Enactments (Amendment) Regulations 2017 ‘the Regulations’), the measure implementing the Directive in the UK, entered into force on 9 March 2017.<sup>7</sup>

The aim of the research undertaken here was to seek to comprehensively identify all competition law judgments by the domestic courts of the UK<sup>8</sup> between 2013 and 2016 where parties were seeking to exercise rights conferred on them either by EU law or domestic UK competition law, under Articles 101 and 102 TFEU and the Chapter 1 and 2 prohibitions of the Competition Act 1998. A fully comprehensive review of all case-law is not feasible, but key case-law highlights will be outlined and discussed, and by looking at these various facets of the recent competition case-law we will have a clearer representation of the developing nature of private litigation in the UK courts during this period.<sup>9</sup> Nonetheless, it should be stressed that this research only considers cases where there has been a court judgment, and accordingly all competition litigation settlement practice is excluded formally from the report, although the author has in recent years sought to identify trends in competition litigation settlement practice also in the UK.<sup>10</sup>

## METHODOLOGY

In order to identify all competition law cases between private parties in UK courts since 1 Jan 2013 to end 2016, the Westlaw search engine was used. Searches were undertaken using the terms “Article 101”, “Article 102”, “Chapter 1 Competition Act 1998”, “Chapter 2 Competition

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<sup>7</sup> SI 2017/385. It introduces section 47F and Schedule 8A (Further Provision about claims in respect of Loss or Damage before a court or the Tribunal) to the Competition Act 1998. Other provisions will be implemented through rules made by Civil procedure Rules Committee, the Scottish Civil Council Justice Secretariat, and the NI Court of Judicature Rules Committee, respectively in addition to specific rules for the Competition Appeal Tribunal.

<sup>8</sup> It should be emphasised that together with out-of-court settlements, this research does not take into account competition-related disputes which are settled through arbitration. See for instance E. Stylopoulos ‘Powers and Duties of Arbitrators in the application of competition law: an EC approach in the light of recent developments’ [2009] ECLR 118.

<sup>9</sup> Note that in studies of competition law private enforcement case-law, the author does not include case-law which relates to the public enforcement process, and in this period for instance there were some interesting related judgments in that category, for instance in *Lindum Construction Co v OFT* [2014] EWHC 1613 (Ch) where the High Court dismissed a restitution claim brought by construction companies to recoup some of the penalties imposed on them by the OFT in its 2009 Construction decision.

<sup>10</sup> See B Rodger ‘Private Enforcement of Competition Law, the Hidden Story Part II: Competition litigation Settlements in the UK 2008-2012’ [2015] GCLR 89- 108.

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Act 1998”, together with “s.47A Competition Act 1998. The website of the Competition Appeal Tribunal was also consulted. Some competition law cases fail on a procedural issue or because of some other technical or legal hurdle and not simply because they have failed to establish the substantive competition law claim or defence to the requisite standard, but we considered it crucial to consider the purported application of competition law rights in a comprehensive manner. Much of the recent focus at European and UK level has simply been on private damages actions.<sup>11</sup> Whilst these are very important, and attract the highest public profile, it is important to recognise that competition law may also be used as a shield and that damages are not always an appropriate remedy for a competition law claimant. Moreover, it would provide merely a partial insight into competition litigation practice if one were only to consider and assess competition law rulings on the substance or merits after a trial (proof). This would ignore the wider legal framework in which competition law claims and defences may be successfully made and the context in which they are facilitated or obstructed. Accordingly, the research extends to all cases where competition law has been pled and relied on by either party, even where the ruling or judgment has not focused on the merits of the competition law issue itself, but may have determined a procedural aspect of the case.

#### **NUMBER OF COMPETITION LAW CASES**

There have been 58 judgments overall in the relevant period, in 30 separate disputes, as there have been judgments on relation to different aspects of the same dispute in some cases. Some cases, particularly through the CAT avenue, have been sagas with multiple judgments on various issues.

Earlier studies observed a steady level of cases between the years 1999-2009, with a peak in 2008 and a noticeable increase in the years 2010 and 2011 (14 and 16 respectively).<sup>12</sup> Although there is no clear pattern in the years 2013 -2015 (with 19, 7 and 8 judgments respectively) 2016 has witnessed a considerable increase in case-law activity with 24 judgments in total. Over the 4 year period there have been 26 CAT judgments (and of course appeals from CAT rulings to the Court of Appeal and Supreme Court) but in 2016 15 of the 24 judgments were by the CAT. The increase, and the increasing role of the CAT is likely to reflect the changes introduced by the Consumer Rights Act 2015, extending the scope of the CAT’s jurisdiction and limiting the significance of the distinction between stand-alone and follow-on actions in that context at least.

#### **CASE-LAW DISCUSSION**

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

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<sup>11</sup> See for instance J-F Laborde ‘Cartel Damages Claims in Europe: How Courts have assessed overcharges’ *Concurrences* No 1-2017, 36-42.

<sup>12</sup> With 7 to 1 May 2012 continuing this trend.

during the procedural phases of the litigation, and can be very significant, for instance in relation to disclosure or limitation.<sup>13</sup> The second category involves cases where the defendant or the claimant has sought a summary judgment in order to dismiss the action or to strike out the defence.<sup>14</sup> The third set of case-law involves a substantive final judgment on the competition law issue, normally following trial.<sup>15</sup> Inevitably these cases have generally attracted greatest public profile and interest, and perhaps not surprisingly they are relatively rare, reflecting partly the low success rate generally, the prevalence of settlements and the limited development of mechanisms to enhance the attraction of private competition law enforcement. There have only been 4 such rulings in this period. The final category are judgments in relation to follow-on damages actions awards, of which there has only been one by the CAT during the period 2013-2016 in *Albion water Limited v Dwr Cymru Cyfngedig*.<sup>16</sup>

### **Interim Process- Procedural issues**

#### **CAT OR HIGH COURT?**

The first set of procedural issues tackled in this period concerns the respective roles of the courts (the High Court) and CAT, raising questions about specialism, the application of s 16 of the Enterprise Act, allowing for transfer of cases, and the scope of the special provision in s47A of the Competition Act 1998.

The Consumer Rights Act 2015 has made various amendments to the Competition Act regime, as of 1<sup>st</sup> October 2015, to enhance the role of the CAT as the specialist forum for competition law disputes in the UK.<sup>17</sup> As noted above, it introduced a new model for collective redress, and in 2016 two collective actions were raised under these new provisions, in relation to mobility scooters and Mastercard respectively.<sup>18</sup> A central aspect of the reform was the extension of the competence of the CAT under section 47A of the Competition to standalone

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<sup>13</sup> 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.

<sup>14</sup> Note there are some potential overlaps here with the interim process cases.

<sup>15</sup> Or proof as it is known in Scots law.

<sup>16</sup> 8 March 2013 Case 1166/5/7/10 *Albion water Limited v Dwr Cymru Cyfngedig*, [2013] CAT 6

<sup>17</sup> See 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; A Robertson 'UK Competition Litigation: From Cinderella to Goldilocks?' (2010) Competition Law Journal 275. A number of claims have already been raised before the CAT under these new provisions, see <http://www.catribunal.org.uk/237/all/2/Cases.html>. See for instance the fast-track claim raised at the CAT for damages in relation to Polyurethane foam, instituted on 7/4/2016 in *Breasley Pillows Limited and others v Vita Cellular Foams (UK) Limited and another*, Case 1250/5/7/16.

<sup>18</sup> See Case 1257/7/16, *Dorothy Gibson v Pride Mobility Products Ltd*, and the CAT's ruling in this case on 31 March 2017, CAT [2017] 9 and the subsequent withdrawal of the claim ordered by the CAT on 25 May 2017, <http://www.catribunal.org.uk/237-9255/1257-7-7-16-Dorothy-Gibson.html>; and *Walter Hugh Merricks v Mastercard Inc* at <http://www.catribunal.org.uk/237-9391/1266-7-7-16--Walter-Hugh-Merricks-CBE-.html>.

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actions in addition to ‘follow-on’ actions where there is a prior infringement decision.<sup>19</sup> This will mean that claimants will not have to wait until an infringement decision by the CMA or Commission becomes final before raising an action before the CAT, or alternatively raise an action at the High Court.<sup>20</sup> Furthermore, the CAT now has power (at least in proceedings in England and Wales and Northern Ireland) to grant injunctions.<sup>21</sup> A fast-track procedure has also been introduced before the CAT, although in *Breasley Pillows Limited and others v Vita Cellular Foams (UK) Ltd and others* the CAT dismissed an application for fast-track proceedings under Rule 58 on a number of grounds, notably the complexity of the case, length of the final hearing and the lack of urgency.<sup>22</sup>

The existence, composition and functions allocated to a specialist competition court or tribunal are clearly major factors in the institutional design of a legal system to deal with competition litigation, and there has been a proliferation of specialist competition tribunals across jurisdictions worldwide over the last twenty years.<sup>23</sup> Nonetheless as Roth has stressed, the degree of specialism required is partly dependent on the role and functions to be performed by the particular court or tribunal. Roth notes that a key disadvantage in the competition law context concerns potential ‘jurisdictional disputes regarding the boundary’<sup>24</sup> which largely depends on how the specialist court’s jurisdiction is set out,<sup>25</sup> a recurrent theme in much of the early litigation following the Enterprise Act 2002.

One of the many rulings in this 2013-2016 period involving claims against Mastercard in relation to its MIF arrangements, involved this issue of the appropriate forum for trial:- in *Sainsbury's Supermarkets Limited v Mastercard Incorporated, Mastercard International*

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<sup>19</sup> Section 47A (2) extends the competence of the CAT to deal with claims involving ‘alleged infringements’.

<sup>20</sup> See P Akman ‘Period of Limitations in follow-on competition cases: when does a ‘decision become final?’ (2014) 2(2) JAE 389-421, although note the Consumer Act 2015 revisions do not make any provision as to when an infringement decision becomes final for the purposes of the running of the limitation periods, as revised. Moreover, it should be noted that as a result of Rule 119 of the revised CAT rules (The Competition Appeal Tribunal Rules 2015, SI 2015/1648), the old Competition Act provisions and Tribunal rules on limitation of actions (and the suspensive effect of appeal proceedings) will continue to apply to all claims (including in collective proceedings) to which section 47A applies where the claim arises before 1 October 2015. See <http://competitionbulletin.com/2015/10/01/private-actions-the-cra-2015-giveth-and-the-2015-cat-rules-taketh-away/>. See *Gibson v Pride Mobility Products Ltd* [2017] CAT 9.

<sup>21</sup> Section 47A(3). There is also provision for a fast-track procedure in para 31 of Schedule 8 to the 2015 Act.

<sup>22</sup> 7 June 2016 Case 1250/5/7/16 [2016] CAT 8.

<sup>23</sup> See B Rodger ‘Introduction’, p 17 in B Rodger (ed.) *Landmark Cases in Competition Law: around the World in Fourteen Stories*, Kluwer Law International, 2011. In the UK context see D Bailey, ‘Early Case-Law of the Competition Appeal tribunal, Ch 2 in B Rodger (ed) *Ten years of UK Competition Law Reform*, DUP, 2010. See D.S Savrin ‘Specialized Antitrust Courts: A Practitioner’s Observations’ Chapter 8, at pp116-117 and P. Roth ‘Specialized Antitrust Courts’ Chapter 7, p105, both in B Hawk (ed) *Annual Proceedings of the Fordham Competition Law Institute*, (2013: Fordham Competition Law Institute).

<sup>24</sup> Roth supra at 108.

<sup>25</sup> This problem has been clearly evidenced by practice before the CAT and the reforms introduced by the Consumer Rights Act 2015. Note also the related problem concerning claims also involving other non-competition issues (see Roth supra at 109).

*Incorporated, Mastercard Europe S.P.R.L.*,<sup>26</sup> whereby the High Court transferred the damages action to the CAT under s 16 of the Enterprise Act and the s 16 Enterprise Act Regulations 2015.<sup>27</sup> Prior to the Enterprise Act 2015 the Cat did not have jurisdiction to hear a standalone claim for damages. The 2015 Regulations allowed the High Court to transfer cases to the CAT for its determination ‘so much of any proceedings as relates to an infringement issue’.<sup>28</sup> The Act defined infringement issue as ‘any question relating to whether or not an infringement of (a) the Chapter I prohibition... Or (b) Article 101... of the Treaty has been or is being committed’ It was agreed that given the level of expert evidence it was suitable for transfer to the CAT despite the advanced stage of proceedings, partly given that Barling J would also be the trial judge at the CAT. It was held, taking into account the parties wishes, that such a transfer was appropriate, noting for instance the specialist nature of the CAT and in particular the ‘outstanding logistical and legal support provided by the CAT staff and legal assistants (referendaires)’. This is of particular value in lengthy and complex actions.<sup>29</sup>

There was also a ruling in relation to security for costs where the competition law issues had been transferred to the CAT under s16 in *Agents' Mutual Limited v Gascoigne Halman Limited (T/A Gascoigne Halman)*.<sup>30</sup> The question of the scope of s47A of the 1998 Act<sup>31</sup> was considered by the Court of Appeal in 2013 in *WH Newson Holding Ltd v IMI Plc*,<sup>32</sup> Under s 47A of the 1998 Act,<sup>33</sup> damages and other monetary awards could be awarded by the CAT or ordinary civil courts where there was already been a finding by the relevant authorities of an infringement of the Chapters I and II prohibitions, or Arts 101 or 102 TFEU.<sup>34</sup> Nonetheless, in this case the Court of Appeal accepted that claims may be based under section 47A on the tort of conspiracy to use unlawful means.<sup>35</sup> However, the Appeal Court stressed that given intent to injure was an essential component of the tort of conspiracy to injure, that element would require to be clearly established in the findings of the infringement decision. Accordingly the trial judge had erred in holding that one of the conspiracy claims could

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<sup>26</sup> 30 November 2015, [2015] EWHC 3472 (Ch).

<sup>27</sup> 2015/1643.

<sup>28</sup> s 16(6) of the Enterprise Act 2002. See also *Unwired Planet International Ltd v Huawei Technologies Co Ltd*, also known as: *Unwired Planet Inc v Samsung Electronics Co Ltd*, 27 May 2016, CA, [2016] EWCA Civ 489; [2016] 5 C.M.L.R. 11, where Mr Justice Birss rejected an application by Samsung to transfer the competition law aspects of the Unwired Planet case to the CAT. This was on the basis that contractual FRAND issues in the case were not “infringement issues” and thus incapable of being transferred – therefore, a transfer of the competition law aspects of the claim would render the case split in a way that would create an impractical and confusing division in the handling and decision making process.

<sup>29</sup> At para 16.

<sup>30</sup> 14 September 2016, [2016] EWHC 2315 (Ch).

<sup>31</sup> Prior to its revision by the Consumer Rights Act 2015 Act as outlined supra.

<sup>32</sup> Court of Appeal (Civil Division) 12 November 2013, [2013] EWCA Civ 1377; [2014] 1 All E.R. 1132.

<sup>33</sup> As introduced by s 18 of the Enterprise Act.

<sup>34</sup> See M Furse ‘Follow-On actions in the UK; Litigating Section 47A of the Competition Act 1998’ (2013) European Competition Journal 9(1) 79-103.

<sup>35</sup> See *WH Newson Holding Ltd v IMI Plc* [2013] EWCA Civ 1377; and L Dingsdale ‘Broadening the Scope for follow-on damages under the Competition Act- WH Newson Ltd v IMI plc (2014) Comp. L. J. 103-106. This may be more significant following the changes to the competence of the Competition Appeal Tribunal, following the introduction of the Consumer Rights Act, discussed supra. See also C A Banfi ‘Defining the Competition Torts as Unlawful Wrongs’ (2011) 70 Cambridge Law Journal 83-112

continue when this element was lacking in the Commission's decision in the cartel concerning the supply of copper plumbing pipes.<sup>36</sup>

Historically, a key dilemma for national courts has been the interplay between private litigation with EU proceedings and how to deal with ongoing cases by the EU authorities in order to avoid potentially conflicting decisions being taken by the national courts. There have been various cases on this issue in the period, including, *Infederation Ltd v Google Inc*<sup>37</sup> and *National Grid Electricity Transmission plc v ABB Ltd*.<sup>38</sup> Article 16 of Regulation 1/2003, in relation to the effect of Commission decisions on all EU national courts, provides as follows:- '1. When national courts rule on agreements, decisions or practices under Article [101] or Article [102] of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission...' This is a 'legislative recognition'<sup>39</sup> of the ECJ's decision in *Masterfoods*.<sup>40</sup> There are limits to the scope of the *Masterfoods*/Article 16 consistency requirement, as demonstrated by the House of Lords in its 2007 ruling in *Crehan v Inntrepreneur Pub co*,<sup>41</sup> where the court is not necessarily dealing with the same parties or markets as the earlier Commission decision. Moreover, as Justice Roth made clear in *National Grid Electricity transmission plc v ABB Ltd*,<sup>42</sup> there is a 'fundamental distinction' between inconsistency with a prior Commission decision, and claims which seek to elaborate on the findings of the Decision as to how the cartel worked in practice.<sup>43</sup> As he stressed, outside the limited confines of the old s47A mechanism, the term 'follow-on action' is not a 'term of art' and Commission decisions rarely provide a detailed 'elaboration of the consequences' of a cartel.<sup>44</sup> Article 16 of Regulation 1 also applies to standalone actions where there is as yet no Commission decision, but the possibility of such an infringement decision being issued in future.<sup>45</sup> *Infederation Ltd v Google Inc* confirmed that in such cases, the proceedings may continue to a point before actual decision or judgment,<sup>46</sup> and it is in the court's discretion what steps may be taken in the proceedings,<sup>47</sup> such discretion to be exercised having regard to the requirement to avoid a decision that is counter to the

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<sup>36</sup> *OJ L 192, 13.7.2006, p. 21–29*. See also *Iiyama Benelux Bv v Schott AG*, 23 May 2016, [2016 5 CMLR 15, (Ch)], discussed further infra in relation to the territorial scope of the EU competition law rules.

<sup>37</sup> Also known as: *Infederation Ltd v Google Ireland Ltd* 26 July 2013, [2013] EWHC 2295 (Ch); [2014] 1 All E.R. 325; [2014] 1 C.M.L.R. 13.

<sup>38</sup> [2014] EWHC 1055 (Ch).

<sup>39</sup> Per Floyd J at par 24 of *Conex Banninger Ltd v the European Commission* [2010] EWHC 1978 (Ch).

<sup>40</sup> Case C-344/98 *Masterfoods v HB* [2000] ECR I-11369. See also the earlier judgment by Laddie J at para 69 in *Iberian UK Limited v BPB Industries* [1996] 2 CMLR 601.

<sup>41</sup> [2007] 1 A.C. 333, HL.

<sup>42</sup> 6 May 2014, [2014] EWHC 1055 (Ch).

<sup>43</sup> At para 27.

<sup>44</sup> *Ibid* at para 26 and 27. 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); [2012] EWCA Civ 1190. See also the discussion in *Bord Na Mona Horticulture Ltd v British polythene Industries plc* [2012] EWHC 3346 (Comm) paras 38-42.

<sup>45</sup> See for instance *Infederation Ltd v Google Inc* [2013] EWHC 2295 (Ch), particularly at para. 25.

<sup>46</sup> *MTV Europe v BMG records (Uk) Ltd* [1997] 1 CMLR 867 per Bingham MR at para 29.

<sup>47</sup> *Morgan Stanley Dean Witter Bank Ltd v Visa International Services Association* [2001] All ER (D).

Commission or the EU courts.<sup>48</sup> The same principles were considered and applied in *Wm Morrison Supermarkets Plc v MasterCard Inc*,<sup>49</sup> where the court declined to stay proceedings pending the outcome of an appeal to the ECJ.

## DISCLOSURE

There have been a tranche of cases during the period concerning disclosure, a key factor in competition litigation. Of course, the EU Antitrust Damages Directive was at least partly introduced with the purpose of facilitating the task of potential claimants in proving their competition law claims. Accordingly, Article 5(1) provides that where a claimant provides a 'reasoned justification',<sup>50</sup> national courts shall order disclosure of relevant evidence within their control by the defendant or a third party.<sup>51</sup> Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.<sup>52</sup> Nonetheless, this provision in the Directive was aimed primarily at those Member States with limited provision for pre-trial disclosure and is unlikely to have any impact on the existing provision in the legal systems within the UK.<sup>53</sup>

In England and Wales the *Civil Procedure Rules* mandate that a party must disclose all documents which are relevant to the litigation, including those that harm its own case or support the opposing party's case.<sup>54</sup> Standard disclosure in the High Court takes place when pleadings are well-advanced.<sup>55</sup> Although it is clear that disclosure is considerably broader than across most legal systems in continental Europe,<sup>56</sup> there are limits on pre-trial disclosure.<sup>57</sup> In *WH Newson Holding Ltd v IMI plc*,<sup>58</sup> it was held that the claimants in complex litigation arising out of the copper plumbing tubes cartel under s47A of the 1998 Act which had been transferred to the High Court were entitled, when bringing a contribution claim against a third party, to disclosure by the addressees of a Commission infringement decision to ascertain if

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<sup>48</sup> See *National Grid Electricity Transmission plc v ABB Ltd* [2009] EWHC 1326 (Ch) and *Wm Morrison Supermarkets plc v Mastercard Inc* [2013] EWHC 1071 (Comm).

<sup>49</sup> 11 October 2013 (2013) EWHC 3082 (Comm). See also earlier ruling in the same case on 3<sup>rd</sup> May 2013, [2013] EWHC 1071 (Comm).

<sup>50</sup> ...'containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages' per Article 5(1) of the Directive.

<sup>51</sup> Article 5(1) also makes provision for a defendant or third party to seek disclosure from the claimant in a damages action.

<sup>52</sup> Article 5(2) ensures that courts can order disclosure of items or categories of evidence where 'circumscribed as precisely and as narrowly as possible', subject to a proportionality test as set out in Article 5(3) and the rules on professional legal privilege (article 5(6)). Note that subject to certain prescribed limitations, Article 6 ensures that disclosure also applies to evidence included in the file of a competition authority.

<sup>53</sup> B Rodger (ed) *Competition Law Comparative Private Enforcement and Collective Redress Across the EU* (2014 Kluwer Law International) chapter 2.

<sup>54</sup> *Civil Procedure Rules* Part 31; in particular Part 31.6(b). See Rules 60-65 of the Competition Appeal Tribunal Rules 2015.

<sup>55</sup> There is also the possibility of specific disclosure where appropriate. The process is known as 'recovery' in Scots law.

<sup>56</sup> See for instance P Guidici, 'Private Antitrust law Enforcement in Italy' [2004] 1 Comp. L. Rev 61.

<sup>57</sup> See *Hutchison 3G UK Ltd v O2 (UK) Ltd* [2008] EWHC 50 (Comm). See also Rule 18 of the Civil Procedure rules.

<sup>58</sup> 4 December 2013, [2013] EWHC 3788 (Ch).

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there was evidence of the third party involvement in the cartel.<sup>59</sup> There was a ruling on disclosure in 2014, as one of various rulings in the *National Grid Electricity Transmission Plc v ABB Ltd*<sup>60</sup> case following the supply of gas insulated switchgear cartel. The applicant, the owner of the UK electricity system, sought further information under CPR Pt 18 from various companies about how the cartel had operated in the UK market. It was argued that this information went beyond the infringement and ran contrary to the adversarial system at the heart of the English legal system. The application was granted in part where the requests were reasonable and proportionate and were necessary to understand how the infringement found by the Commission had actually operated in the UK and where the potentially relevant information was in the knowledge of only one side in the litigation, emphasising the importance of disclosure to equality of arms in the competition litigation context.

The 2015 Court of Appeal ruling in *Emerald Supplies Ltd v British Airways Plc*,<sup>61</sup> concerned two important legal points, including a disclosure related issue, in a claim by air cargo shippers that BA had operated an illegal world-wide cartel to fix prices for freight services, following an infringement decision by the European Commission.<sup>62</sup> The Commission decision had mentioned other parties without identifying them as infringers. The claimants unsuccessfully sought access to the unredacted version of the decision including the ‘Pergan material’, which described conduct by other parties which may be characterised as infringing art 101 but which could not be challenged before the European courts. The court followed the established principles set out by the European court in *Pergan*, in stressing the importance of the presumption of innocence.<sup>63</sup>

A second ruling in the *Infederation Ltd v Google Inc*<sup>64</sup> dispute also concerned disclosure. This was a case relating to the ongoing European investigation into the alleged abusive activities by Google, stemming from a complaint by Foundem. In the English court proceedings, the claimant sought permission to disclose in European proceedings a document analysing the defendant’s disclosed documents which had been produced in the English proceedings. Given there was no evidence to suggest the claimant had instituted the English court proceedings for an improper purpose or to gain an advantage in relation to the Commission’s proceedings, it was appropriate to grant permission under CPR r31.22(1)(b) and this would also further the important public policy that the domestic proceedings should be consistent with the European proceedings.<sup>65</sup>

## LIMITATION

As discussed elsewhere, probably the most significant procedural issue in practice, as evidenced by the considerable litigation, concerns the application of the limitation rules in

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<sup>59</sup> The High Court was not limited by s47A to claims only against the companies that were addresses of the infringement relied upon.

<sup>60</sup> 6 May 2014, [2014] EWHC 1055 (Ch).

<sup>61</sup> 14 October 2015, [2015] EWCA Civ 1024.

<sup>62</sup> See 2017 re-adopted decision, [http://europa.eu/rapid/press-release\\_IP-17-661\\_en.htm](http://europa.eu/rapid/press-release_IP-17-661_en.htm).

<sup>63</sup> Case T-474/04 *Pergan Hilfstoffe für Industrielle Prozesse v Commission*, [2007] E.C.R. II-4225.

<sup>64</sup> 17 December 2015, [2015] EWHC 3705 (Ch).

<sup>65</sup> Note also two other subsequent 2017 rulings on disclosure issues in 26 January 2017 Case 1248/5/7/16 *Peugeot SA and others v NSK Ltd and others* [2017] CAT 2; and 27 January 2017 Case 1262/5/7/16 (T) *Agents’ Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman)* [2017] CAT 3.

the competition law context.<sup>66</sup> Until the Consumer Rights Act 2015 reforms, the limitation rules before the CAT were distinctive from the 6 year limitation period for High Court claims, and dependent on the post-infringement appeal process. There have been various judgments focused directly on time-bar issues by the CAT. In *Deutsche Bahn AG v Morgan Crucible Company Plc and others*,<sup>67</sup> the Appeal Court, overruling the CAT, held that the limitation period was suspended vis-a-vis a non-appealing addressee of a Commission decision. However, in 2014 the Supreme Court<sup>68</sup> ruled that a Commission Decision establishing infringement of article 81 (now article 101) constituted in law a series of individual decisions addressed to its individual addressees. Accordingly, the only relevant decision establishing infringement in relation to an addressee who does not appeal is the original Commission Decision, and therefore any appeal against the finding of infringement by any other party is irrelevant to a non-appealing defendant. Under section 47A(5), the date of the relevant infringement decision was the date of the Commission decision and therefore the follow-on claim for civil damages was out of time. The appeal was allowed, the Court of Appeal's judgment set aside, and the CAT's judgment striking out the respondents' claim restored. The Supreme Court ruling is consistent with EU law but may encourage follow-on actions (before the CAT or High Court) while the underlying infringement issues are being appealed, although one would anticipate such proceedings to be stayed or a reference to be made to the European Court under Article 267 (in line with Article 16 of Regulation 1/2003) pending European Court appeal processes being finalised. As Akman has indicated, although this problem is relevant for all cartel proceedings involving multiple infringers, it may have particularly deleterious consequences for leniency recipients and for the overall balance between public and private enforcement.<sup>69</sup>

With the exception of personal injury cases, English law generally allows for a 6 year limitation period.<sup>70</sup> In 2013, in one of many rulings involving Mastercard, *Wm Morrison Supermarkets Plc v MasterCard Inc*,<sup>71</sup> an amendment was allowed to plead a new claim on the basis that the claim could only be made for the 6 year limitation period prior to the judgment. This was allowed to avoid the unnecessary costs in requiring the claimant to bring a separate claim and then seek to consolidate it with the existing action.

There is special provision for postponement of the limitation period in case of fraud, concealment or mistake under 32 of the Limitation Act 1980. In relation to secretive cartels in particular, s32(1)(b) has potential relevance where 'any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant'. In such cases, the time

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<sup>66</sup> See B Rodger, 'Implementation of the Antitrust Damages Directive in the UK: limited reform of the limitation rules?' [2017] 5 ECLR 219-227.

<sup>67</sup> [2012] EWCA Civ 1055. See the earlier CAT ruling at [2011] CAT 16 .

<sup>68</sup> 9 April 2014, *Deutsche Bahn AG and others v Morgan Advanced Materials Plc (formerly Morgan Crucible Co Plc)* [2014] UKSC 24 On appeal from: [2012] EWCA Civ 1055.

<sup>69</sup> P Akman 'Period of Limitations in follow-on competition cases: when does a 'decision become final?' (2014) 2(2) JAE 389-421.

<sup>70</sup> *Limitation Act 1980* s2.

<sup>71</sup> 08 October 2013, [2013] EWHC 3271 (Comm).

limit will not run until the claimant has discovered the concealment or could have done so with reasonable diligence.<sup>72</sup>

Of course, for claims arising since 1 October 2015, the Consumer Rights Act revised the limitation regime, and section 47E of the Competition Act effectively applies the same rules in the CAT as before the High Court. However, for claims arising before 1 October 2015, there are transitional provisions in the much-maligned 2015 Tribunal Rules 119(2)-(4).<sup>73</sup> Yet another of the rulings in this period involved Mastercard and consideration of the transitional limitation regime, in *Deutsche Bahn AG and others v Mastercard Inc and others*<sup>74</sup> where the claim arose before but was raised after 1 October 2015. Ultimately the CAT dismissed the defence claim under Art 34 that it had no jurisdiction, and more significantly the CAT rejected the defence that it was an abuse of process to raise proceedings in the CAT where High Court proceedings were pending. The multiple claimants in this action raised proceedings seeking damages in the High Court, where MasterCard raised limitation defences to the claims under the various foreign laws which it contended govern the different claims in those High Court proceedings. In light of those limitation defences, and given the overlapping jurisdiction of the CAT and High Court, the claimants raised actions in the CAT as a protective measure, although the High Court claims were more extensive in scope. Following the CRA, the CAT had full jurisdiction for competition law damages claims which is not restricted to follow-on damages actions. Here, since the CAT claim was commenced after 1 October 2015 but arose well before that date, it was governed by this transitional regime. The CAT concluded as follows:- ‘The commencement of a claim under sect 47A CA in the Tribunal as a protective measure, with the expressed intention to have that claim heard together with a pending claim in the High Court, in the circumstances here, does not even come within striking distance of an abuse. Indeed, until the question of whether the FLPA and foreign rules of limitation apply to a claim under sect 47A had been determined, I consider that it is the course which many prudent legal advisers, faced with a limitation defence in the High Court, would have followed.’<sup>75</sup>

The Limitation Act provisions were finally considered by the English courts in a competition law context in *Arcadia v Visa*.<sup>76</sup> This involved claims brought by retailers against Visa Europe and Visa Inc for breach of EU, UK and Irish competition law in relation to the inflated price for accepting credit and debit cards as a result of the multilateral interchange fee (‘MIF’) set by Visa. It was held by the High Court that the level of information published by the Commission in 2001 and 2002 in two separate parts of the public enforcement process were sufficient for the claimants to establish the key ingredients of the claim. The Court of Appeal affirmed that

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<sup>72</sup> See for example *Arcadia Group Brands and others v Visa Inc and others*[2015] EWCA Civ 883 discussed further infra. In Scotland, non-personal injury delictual claims have a prescriptive period of 5 years Prescription and Limitation (Scotland) Act 1973 s6. See D Johnson, *Prescription and Limitation*. 2nd edn, W. Green/SULI, 2012), When the pursuer is unaware of the loss, harm or damage they have suffered, the prescriptive period runs from the point they did, or reasonably should have, become so aware., s 11(3).

<sup>73</sup> See <http://competitionbulletin.com/2015/10/01/private-actions-the-cra-2015-giveth-and-the-2015-cat-rules-taketh-away/>.

<sup>74</sup> 27 July 2016 Case 1240/5/7/15, [2016] CAT 13.

<sup>75</sup> Ibid. at Para 45.

<sup>76</sup> 5 August 2015, [2015] EWCA Civ 883.

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none of the concealment issues raised by the appellant were sufficient to postpone the limitation period as they had sufficient facts to satisfy the statement of claim test at that stage. The Court of Appeal stressed that the Directive did not apply and that the application of the limitation rules in this way was not incompatible with the EU effectiveness principle. The court of Appeal noted (and affirmed the outcome):-

‘29 The Judge accepted (at [101]) that the full picture was not available to the appellants. He concluded (at [108]), however, that the facts which were known, or discoverable by the exercise of reasonable diligence, by the appellants before 2007 were sufficient to enable them to plead a statement of claim which established a *prima facie* case and that the issue under [section 32\(1\)\(b\)](#) of the 1980 Act is not concerned with other facts which the appellants say they did not, or still do not, know.’

There were 2 subsequent rulings on the same issue in the same dispute by the High Court and the Court of Appeal in *WH Newson Holding Ltd v IMI plc* involving the complicated relationship between s32(1)(b) of the Limitation Act and s1(4) of the Civil Liability (Contribution) Act 1978, in contribution proceedings after the main action had settled.<sup>77</sup> The Court of Appeal confirmed that the defendant in the contribution proceedings could not use the limitation defence as s.1(4) required the defendant in the main proceedings only to demonstrate that the factual basis of the claim would have disclosed a reasonable cause of action against him such as to make him liable in law to the claimant in respect of any damage. If he could do that then he would succeed against the defendant in the contribution proceedings.

The Antitrust Damages Directive sets out to facilitate competition law damages actions across the EU by providing a minimum level of harmonisation of aspects of the procedural and substantive laws of the Member States in relation to such litigation. Although the focus in much of the academic commentary has been on the relationship between discovery and leniency documentation, and the passing-on defence and standing for indirect purchasers, in practice the formulation, interpretation and application of the limitation periods are of fundamental significance to competition litigation practice. Article 10 of the Directive provides for a specialised set of limitation (and prescription) rules. Although *prima facie* the establishment of a minimum 5 year limitation period is one of *plus ça change* (with the 6 and 5 year periods in England and Wales and Scotland respectively being retained), it must be stressed that implementation of Article 10 introduces significant change to the determination of the limitation and prescription periods for competition damages actions in relation to infringements of both EU and UK competition law. The most significant reform relates to when the limitation period begins to run- the trigger point. First, the Directive ensures that this will not take place until after the illegal activity has ceased. The second and potentially significant deviation from existing practice concerns the claimant knowledge requirements to trigger the limitation period.<sup>78</sup> These would appear to potentially shift the litigation balance in favour of competition law claimants vis-à-vis businesses which (allegedly) infringe competition law. It remains to be seen whether the new constructive knowledge

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<sup>77</sup> High Court, 17 June 2015, [2015] EWHC 1676 (Ch) and Court of Appeal, 27 July 2016, [2016] EWCA Civ 773.

<sup>78</sup> See Rodger 2017 ECLR supra. Of course Art 10 only sets minimum requirements and there is scope for potentially divergent approaches to time-limits and the trigger point across the Member States.

requirements will be retained as part of the competition limitation rules in the legal systems of the UK post-Brexit when the UK is no longer an EU Member State.<sup>79</sup>

### INTERIM PROCESS and SUBSTANTIVE ISSUES

It should be noted that in addition to numerous minor less significant procedural orders and judgments by the CAT in the relevant period,<sup>80</sup> there were various non-final interim process rulings involving consideration of substantive issues.

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<sup>79</sup> See Andreangeli supra.

<sup>80</sup> See also one of the multiple rulings involving Mastercard, in *Sainsbury's Supermarkets Ltd v Mastercard Inc*, on 19 December 2013, [2013] EWHC 4554 (Ch), concerning whether there should be a trial of a preliminary issue on whether the supermarket's claim against the owners of a credit scheme would be barred by the doctrine of *ex turpi*. This was rejected on the basis that it would not dispose of the entire claim; *Illumina Inc v Premaitha Health Plc*, 1 July 2016, [2016] EWHC 1726 (Pat), involved competition law only in outline at the procedural stage of the case where the defendant to patent infringement claims was allowed to serve revised non-technical defences raising various competition issues.

31 July 2013 Case 1166/5/7/10 *Albion water Limitred v Dwr Cymru Cyfngedig*, [2013] CAT 16, costs, order to recover 85% of ATE premium as with other costs;

30 May 2013 Case 2298/5/7/12 *Siemens plc v National Grid*; Case 1199/5/7/12, *Capital Meters Ltd v National Grid plc* [2013] CAT 11, order to vacate case management conference and stay proceedings;

27 August 2013 Case 1173/5/7/10 *Deutsche Bahn AG & others v Morgan Crucible co plc and others* [2013] CAT 19 order in relation to time for seeking permission to appeal;

29 August 2013 Case 1173/5/7/10 *Deutsche Bahn AG & others v Morgan Crucible co plc and others* [2013] CAT 20 order with case management directions v various defenders;

24 September 2013 Case 1173/5/7/10 *Deutsche Bahn AG & others v Morgan Crucible co plc and others* [2013] CAT 22 order on permission to appeal;

25 November 2013 Case 1173/5/7/10 *Deutsche Bahn AG & others v Morgan Crucible co plc and others* [2013] CAT 28 order on directions in relation to certain claimants;

4 December 2013 Case 1173/5/7/10 *Deutsche Bahn AG & others v Morgan Crucible co plc and others* [2013] CAT 31 order listing a case management conference;

9 Sep 2014 Case 1173/5/7/10 *Deutsche Bahn AG & others v Morgan Crucible co plc and others* [2014] CAT 15 order with case management directions v various defenders;

9 February 2016 Case 1241/5/7/15 (T) *Sainsbury's Supermarkets Ltd v Mastercard Inc and others* [2016] CAT 2, ruling on application for specific disclosure and admission of supplemental witness;

26 April 2016 Case 1249/5/7/16 *Socrates Training Ltd v The Law Society of England and wales* [2016] CAT 5 order to extend time for filing of defence;

9 February 2016 Case 1241/5/7/15 (T) *Sainsbury's Supermarkets Ltd v Mastercard Inc and others* [2016] CAT 6 application by non-parties for access to non-confidential versions of certain categories of documents;

16 May 2016 Case 1249/5/7/16 *Socrates Training Ltd v The Law Society of England and wales* [2016] CAT 7 successful application for fast track proceedings;

15 June 2016 Case 1250/5/7/16 *Breasley Pillows Limited and others v Vita Cellular Foams (UK) Ltd and others* [2016] CAT 9 judgment on defendants' costs application for fast-track proceedings under Rule 58;

26 April 2016 Case 1249/5/7/16 *Socrates Training Ltd v The Law Society of England and wales* [2016] CAT 10 judgment capping cost recovery;

14 September 2016 Case 1262/5/7/16 (T) CAT 15 *Agents' Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman)*; *Agents' Mutual Ltd v Moginie James Ltd* judgment explaining reasons for costs managements;

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In *Chemistree Homecare Ltd v Abbvie Ltd*,<sup>81</sup> the Court of Appeal upheld the refusal of an application for an interim injunction to require a UK drug distributor to meet an order by a particular pharmacy and homecare services provider on the basis that the judge was entitled to hold that there could not be an abuse of a dominant position as there was no prospect of demonstrating that the distributor held a dominant position.

The first ruling in *Packet Media Ltd v Telefonica UK Ltd*,<sup>82</sup> demonstrated that the courts are willing, where appropriate, to provide interlocutory injunctions to maintain the status quo in the context of a claim of abuse of dominance where damages would not ultimately be a suitable remedy.<sup>83</sup> In this case there was an arguable case of abuse in the market for call and text origination services and an interim injunction was granted to prevent disconnection pending trial, given that the damage potentially suffered by refusal of an injunction was quantifiable and if disconnected there would be an immediate effect on its business and employees.

In *Deutsche Bank AG v Unitech Global Ltd*<sup>84</sup> the defendants were being sued under a bank loan in one action for a sum of over \$150 m and in relation to an interest swap agreement for a sum in excess of \$11 m. They contended that there had been a breach of Article 101 and the UK Chapter I prohibition, though it was accepted that the implications of an agreement being illegal and void under art 101 were for national law to determine. The Court of Appeal upheld the ruling refusing permission to amend the defence and counterclaim as there was no real prospect that the credit and swap agreements could be void as a result of the Libor arrangements being in breach of Article 101 and the Chapter 1 prohibition and there was no authority to the effect that vertical agreements being void as a result of a horizontal agreement infringing either prohibition.<sup>85</sup>

### Summary judgments

This set of cases basically involve judgments where the defendant or the claimant has sought a summary judgment in order to dismiss the action or to strike out the defence.<sup>86</sup>

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22 September 2016 1244/5/7/15 *Peugeot Citroen Automobiles UK Ltd and others v Pilkington Group Limited and others* [2016] CAT 16, refusal of permission to appeal to Appeal court on preliminary issue;  
5 October 2016 Case 1249/5/7/16 *Socrates Training Ltd v The Law Society of England and Wales* [2016] CAT 19 partially refusing defendant's application to adduce expert evidence;

7 October 2016 Case 1262/5/7/16 (T) *Agents' Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman)* [2016] CAT 20 judgment on costs management;

22 November 2016 Case 1241/5/7/15 (T) *Sainsbury's Supermarkets Ltd v Mastercard Inc and others* [2016] CAT 23, permission to appeal refused;

<sup>81</sup> 7 November 2013, [2013] EWCA Civ 1338.

<sup>82</sup> 20 July 2015, [2015] EWHC 2235 (Ch).

<sup>83</sup> Cf for instance ; A.D. MacCulloch and Barry J. Rodger, "Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts" [1996] E.C.L.R. 393.

<sup>84</sup> *Deutsche Bank AG v Unitech Global Ltd (Deutsche Bank AG v Unitech Ltd)*, 20 September 2013, [2013] EWHC 2793 (Comm) and 3 March 2016 (CA), [2016] EWCA Civ 119; [2016] 1 W.L.R. 3598.

<sup>85</sup> See *Courage v Crehan* [1999] ECC 455, CA.

<sup>86</sup> Note there are some potential overlaps here with the interim process cases, discussed further supra.

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This set of cases included two judgments by the Scottish courts in the same dispute, *Scottish Premier League Ltd v Lisini Pub Management Co Ltd*,<sup>87</sup> by the Outer and Inner House of the Court of Session. The Scottish Premier League ('SPL') raised an action against the owners of public houses seeking a permanent interdict based on an undertaking not to broadcast any live matches from premises using a broadcast from Poland and a decoder device. The ECJ had previously ruled in *Football Association Premier League Ltd v QC Leisure*<sup>88</sup> that clauses prohibiting the use of foreign decoders and smart cards were void as a restriction of competition. Lisini counter-claimed that the SPL had acted in breach of arts 101 and 102 and sought damages. It was held, and upheld by the Inner House that there was a prima facie art 101 case and the counterclaim could not be dismissed at that stage.

The judgment in *Martin Retail Group Ltd v Crawley BC*,<sup>89</sup> concerned the potential application of competition law to leases, which was interesting given the historical context whereby leases were originally excluded from the scope of the Competition Act 1998, and subsequently made subject to normal competition law principles,<sup>90</sup> as demonstrated here. In relation to a business tenancy in Crawley, East Sussex, the landlord proposed a user clause which would exclude the sale of alcohol, grocery, convenience goods, effectively prohibiting a newsagent from selling convenience goods. The tenant successfully claimed that the proposed restriction infringed the Competition Act 1998 subsequent to the Competition Act 1998 (Land Agreement Exclusion Revocation) Order 2010.<sup>91</sup> It was accepted that the clause may be contrary to s2 of the Act as an anti-competitive restriction and the landlord was unsuccessful with his argument that the restrictions were exemptable under s 9 of the Act—the domestic equivalent to Article 101(3) TFEU. In particular, the landlord failed to establish the criterion of efficiency as the court was not satisfied that the proposed restriction would improve the distribution of goods or economic progress and there was unlikely to be a price benefit for the community from the existence of the restrictions.

There has been increasing consideration of the application of the EU competition rules to sporting context in recent years,<sup>92</sup> and one of the early significant competition law cases before the English courts was indeed the high-profile litigation involving Stephen Hendry and the world snooker organisation.<sup>93</sup> The *Baker v British Boxing Board of Control*<sup>94</sup> judgment in 2014 involved a boxing promoter seeking interim remedies in relation to the withdrawal of his boxing licence pending his appeal. He claimed that certain of the Board's Regulations breached Art 101 and the Competition Act Chapter 1 and that the withdrawal of his licence was an abuse of dominance under Art 102 and the Chapter 2 prohibition. These were rejected summarily and an interim injunction application was unsuccessful. In particular, in line with

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<sup>87</sup> 25 March 2013, OH [2013] CSOH 48; 2013 SLT 629; Upheld by the Inner House 15 November 2013, [2013] CSIH 97; 2014 SC 300.

<sup>88</sup> [2011] E.C.R. I-9083.

<sup>89</sup> 24 December 2013, [2014] L. & T.R. 17.

<sup>90</sup> The Competition Act 1998 (Land Agreement Exclusion Revocation) Order 2010SI 2010/1709.

<sup>91</sup> *Ibid.*

<sup>92</sup> See notably Case C-519/04 P *Meca-medina v Commission*, CJEU, [2006] E.C.R. I-6991.

<sup>93</sup> See *Hendry v World Professional Billiards & Snooker Association Ltd*, [2002] U.K.C.L.R. 5; [2002] E.C.C. 8.

<sup>94</sup> 25 June 2014, [2014] EWHC 2074 (QB).

*Meca –Medina v European commission*,<sup>95</sup> the rules alleged to be in breach of the competition rules were inherent in the organisation of the sport - as being to 'ensure that the sport is conducted fairly, including the need to safeguard equal chances for the boxers, boxers' health, the integrity and objectivity of the sport and the ethical values in the sport.'

In a subsequent ruling in *Packet Media Ltd v Telefonica UK Ltd* by the High Court,<sup>96</sup> it was held that the claimant had failed to (come close to) establishing that the defendant mobile network operator had a dominant position- a failing in many cases brought under the abuse prohibition in the English courts.<sup>97</sup> Accordingly its claim for abuse of dominant position would be struck out (and the interim injunction discharged though stayed for 14 days to allow customers to make alternative arrangements).

In one of the cases against Mastercard,<sup>98</sup> involving Tesco (*Tesco Stores Ltd v Mastercard inc*), the court considered the potential application of the economic entity doctrine and the *ex turpi* defence.<sup>99</sup> In relation to the claim that Mastercard's fees were excessive, in relying on the Commission's findings that they had breached art 101, Mastercard argued that Tesco and Tesco Bank were part of the single economic entity, such that where the latter was participating in the alleged illegal cartel arrangement upon which the former's claims were based, those claims were accordingly barred under the *ex turpi causa* doctrine. It was held that it was not appropriate to dismiss the case summarily, that identifying a single economic entity,<sup>100</sup> and, the application of the *ex turpi causa* defence, in particular ascertaining whether the claimant bore a significant responsibility, were both fact specific and required to be determined after trial.

There was a second aspect to the Appeal Court ruling of 14 October in the *Emerald Supplies Ltd v British Airways plc* litigation.<sup>101</sup> The Court of Appeal allowed an appeal against the earlier refusal to strike out parts of the claim.<sup>102</sup> In this dispute, the claimants pursued their claims under the economic torts because they would not have been able to seek a remedy for the full range of the damage caused by the alleged cartel, partly in relation to claims that fell outside the scope of EU/EEA law for some flights, and partly as EU/EEA law didn't regulate airline routes between EU/EEA and third countries till May 2004.<sup>103</sup> Nonetheless in relation to both torts relied upon: interference with business by unlawful means and conspiracy to use unlawful means, the claimant required to demonstrate an intent to injure by the

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<sup>95</sup> [2006] ECR I-6991.

<sup>96</sup> December 14, 2015, [2015] EWHC 3873 (Ch).

<sup>97</sup> See B Rodger '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.

<sup>98</sup> *Tesco Stores Ltd v Mastercard inc*, 24 April 2015, [2015] EWHC 1145 (Ch).

<sup>99</sup> See the *Courage v Crehan* litigation saga.

<sup>100</sup> See Case C-97/08 P, *Akzo Nobel Nv v Commission* [2009] E.C.R. I-8237 and *Durkan Holdings Ltd v OFT* (2011) CAT 6.

<sup>101</sup> 14 October 2015, [2015] EWCA Civ 1024.

<sup>102</sup> [2014] EWHC 3514 (Ch).

<sup>103</sup> See *Ministere Public v Asjes* Cases C-209/84 to C-213-84 [1986] ECR 1457 and *Ahmed Saeed Flugreise v Centrale zur Bekämpfung Ulauterer Wettbewerb eV* [1989] ECR 803.



defendant.<sup>104</sup> Moreover, as earlier established by *WH Newson Holding Ltd*,<sup>105</sup> intent was not a necessary inference from the facts or the findings by the Commission. In this case it was not inherent in the nature of the pricing arrangements that the shipper claimants would suffer loss where they might pass that loss down the chain' Intent to injure a particular claimant had to be the cause of a defendant's conduct to succeed and this would not be the case if the defendant was not sure the claimant would certainly suffer the loss. This ruling certainly makes it very difficult for economic tort claims to succeed in any price-fixing chain context, where cartel claims most commonly arise, whether by direct or indirect purchasers. In that context the Court of Appeal noted that extension of the economic tort claims to this context would have the 'undesirable effect of extending the effect of competition law' by circumventing the scope of EU/EEA law, and it would dilute the concept of intention and bring it to close to the concept of foreseeability.<sup>106</sup>

*Unwired Planet International Ltd v Huawei Technologies Co Ltd*<sup>107</sup> was a complicated case relating to a patent infringement suit brought by Unwired Planet (UP) against Samsung and others in relation to a patent portfolio which included standard essential patents (SEPs). UP had acquired several of its patents from Ericsson by way of an agreement which Samsung and the other defendants argued was void for breach of EU and UK competition law on a number of different grounds. One of Samsung's defence arguments was that the UP/Ericsson agreement did not fully transfer Ericsson's FRAND undertaking – *inter alia* because (i) UP's FRAND undertaking was not enforceable by third parties, and (ii) the agreement did not prevent UP from obtaining licence terms that were more favourable to those that Ericsson itself could secure. This argument was struck out in its entirety by Mr Justice Birss in the first instance. On appeal, the strike out in relation to point (i) above was upheld, but set aside in relation to point (ii). The Court of Appeal agreed with Samsung that it is arguable that Article 101 requires the effective transfer of Ericsson's FRAND obligation to UP, including the non-discrimination obligation, such that UP could not obtain more favourable terms than Ericsson could have obtained. Whilst the Court acknowledged that the questions on practical workability of transferring Ericsson's FRAND obligation raised by Mr Justice Birss provided "powerful support" for Ericsson's position, these questions were not "necessarily unanswerable" and did not, therefore, justify a summary dismissal – particularly in a developing area of law.

*Apollo Window Blinds Limited v McNeil*,<sup>108</sup> concerned a franchise agreement, and an attempt by the franchisor to enforce post-termination provisions in the agreement. The franchisor claimed that the restrictive covenants were necessary to protect its good will and know-how for a 12 month period, in line with the *Pronuptia* criteria,<sup>109</sup> but the franchisee claimed not to have received any know how by training. It was accepted that the franchisee's competition law point was not unarguable, but an interim injunction was not granted on the basis that

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<sup>104</sup> See *Douglas v Hello (No3)*, CA [2006] QB 125.

<sup>105</sup> [2013] EWCA Civ 1377.

<sup>106</sup> *Ibid* at para 174.

<sup>107</sup> Also known as: *Unwired Planet Inc v Samsung Electronics Co Ltd*, 27 May 2016, CA, [2016] EWCA Civ 489; [2016] 5 C.M.L.R. 11.

<sup>108</sup> 14 July 2016, [2016] EWHC 2307 (QB).

<sup>109</sup> Case C-161/84, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis*, CJEU, [1986] E.C.R. 353; [1986] 1 C.M.L.R. 414.

damages would be an adequate remedy.

The combination of various factors: the increasing significance of (EU) competition law; the international cross-border impact of anti-competitive activity; awareness of the private law rights created by competition law infringements; and the increasing resort to litigation particularly in relation to wide-scale international cartels, means that private international law rules within the EU have a considerable role to play in determining the rights and obligations arising out of anti-competitive activity.<sup>110</sup> The rules determining the civil jurisdiction of the courts in the EU, and consequently where in the EU an action based on a competition law infringement may be raised, are now provided in the recast Brussels Ia Regulation.<sup>111</sup> One of the early significant cases before the CAT, which ultimately led to an appeal to the Supreme Court, *Deutsche Bahn AG v Morgan Crucible co plc and others*,<sup>112</sup> involved a judgment on jurisdiction issues in 2013, in relation to the application of Arts 5(3) and 24 of the Brussels I Regulation. The European Commission's Decision of 3 December 2003 in relation to "Electrical and mechanical carbon and graphite products"<sup>113</sup> found that the seven addressees of the Decision had participated in a single and continuous infringement of Art 101. There was an anchor defender under art 6(1) (now Art 8(1) Brussels Ia) but argument proceeded on the basis that the anchor defender may be lost to the proceedings and whether they could pursue under art 5(3). The central question was whether the claimants had a good arguable case that damage was suffered in the UK. There was considerable discussion of the indirect damage case law in *Dumez France* and *Marinari* by the CAT.<sup>114</sup> The CAT ultimately found that there was jurisdiction under art 5(3) as there was direct damage when purchases were made from subsidiaries – this did not constitute indirect damage,<sup>115</sup> otherwise a carteliser could avoid damages liability by implementing through a subsidiary. Accordingly purchases can be direct where through a subsidiary just as a parent company is liable under EU law for

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<sup>110</sup> See also Sasse, D.A. 'Private Damages Actions and the Limitations of US Class Actions for a Global Solution', (2008) *Global Competition Litigation Review*, 1 (2), 106–113; and also Adolphsen, J., 'The Conflict of Laws in Cartel Matters in a Globalised World: Alternatives to the Effects Doctrine', *Journal of Private International Law*, (2005) 1 (1), 151–83 on the limits of the extraterritorial application of the US antitrust rules in the context of international cartels, particularly following the Vitamins cartel. There are, of course, considerable difficulties involved in accessing information necessary to pursue an international competition law claim. For further discussion, see Idot, L. 'Access to Evidence and Files of Competition Authorities' Ch 12 and Stucke, M.E. 'Discovery in Global Economy', Ch 14 in Basedow, J, Francq, S, and Idot, L, (eds) *International Antitrust litigation, Conflict of Laws and Coordination*, Hart Publishing, 2011, where different aspects of this problem are considered in detail.

<sup>111</sup> Regulation 44/2001, [2001] OJ L 12/1, replaced by Regulation 1215/2012, [2012] OJ L 351/1. The Regulation replaced the Brussels Convention. For discussion, see Rodger, B., 'The Communitarisation of International Private Law: Reform of the Brussels Convention by Regulation', (2001) *Juridical Review*, 59–67 and 69–80.

<sup>112</sup> 15 August 2013, Case 1173/5/7/10 [2013] CAT 18.

<sup>113</sup> In Case No C.38.359, OJ L 125, 28.4.2004, p. 45–49.

<sup>114</sup> [2013] CAT 18, at paras 22–45.

<sup>115</sup> See in particular para 44, check, where the CAT stressed that both the direct and indirect purchasers were within the UK, and that this was not an "indirect" loss claim in line with *Dumez France*, although it noted that 'difficult questions' might arise where the direct and indirect purchasers were based in different jurisdictions.

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the actions of a subsidiary which implements a cartel.<sup>116</sup> The CAT also rejected the Defendants' contention that ordering them to defend the UK Claimants' claims would amount to a submission by the Defendants to the Tribunal's jurisdiction over the entire proceedings, and not just the those claims, under Article 24 of the Brussels I Regulation.<sup>117</sup> Provided any challenge to jurisdiction is made either before<sup>118</sup> or at the same time as the arguments on the merits, a defendant can enter an appearance to contest the merits without submitting to the jurisdiction it challenges. The Article 5(3),<sup>119</sup> issue was appealed to the Court of Appeal,<sup>120</sup> which confirmed the CAT's ruling that an indirect purchaser who claimed to have suffered financial damage in the UK qualified as immediate victims and could rely on Article 5(3).<sup>121</sup>

There was yet another Mastercard-related IPL ruling this time by the CAT, in 2015 in *DSG Retail limited and another v Mastercard Inc and others*,<sup>122</sup> in relation to English rules on service out of the jurisdiction, in the context of a s47A claim before the CAT. Jurisdiction was established against one defendant, domiciled in Belgium, under Article 7(2) of the Brussels Ia Regulation.<sup>123</sup> However in relation to other non-EU based defendants, the CAT applied the threefold test set out in *VTB Capital plc v Nutritek International Corp*,<sup>124</sup> to determine if it would exercise jurisdiction, where there were no specific rules in the Competition Act 1998 or CAT Rules:- 1) Whether there was serious issue to be tried on the merits; 2) that there was a good arguable case that the claim fell within one of the classes of case for service out under CPR PD 6B and 3) whether England was the appropriate forum for trial of the dispute. The court was satisfied on each of these points for claims up to the date of the Commission decision which established the particular infringement being relied upon in the proceedings. The other IPL related ruling was also by the CAT, in 2016, in *Deutsche Bahn AG and others v Mastercard Inc and others*,<sup>125</sup> in relation to limitation periods under the Foreign Limitation Periods Act 1984. The CAT confirmed in accordance with existing statutory provision and CAT

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<sup>116</sup> See *Roche Products Limited v Provimi Limited* [2003] EWHC 961 (Comm) at [31]-[32]; *Emerson Electric Co v Mersen UK Portslade Limited* [2012] EWCA Civ 1557 at [73], [76] and [82]. See also B Wardhaugh, 'Punishing parents for the sins of their child: extending EU Competition liability in groups and to subcontractors' [2017] *Journal of Antitrust Enforcement* 22-48.

<sup>117</sup> Case 150/80, *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671 and *Harada Limited v Turner* [2003] EWCA Civ 1695.

<sup>118</sup> As was the case here.

<sup>119</sup> Now Article 7(2) Brussels Ia, Regulation 1215/2012.

<sup>120</sup> 20 November 2013, [2013] EWCA Civ 1484.

<sup>121</sup> See B Rodger, 'EU Competition Law and private International Law: a developing relationship' Ch 8 in I Lianos and D Geradin (eds), *Handbook on European Competition Law: Enforcement and Procedure*, Edward Elgar:2013.

<sup>122</sup> 22 April 2015 Case 1236/7/15 *DSG Retail limited and another v Mastercard Inc and others* [2015] CAT 7.

<sup>123</sup> Ex Art 5(3).

<sup>124</sup> [2012] EWCA Civ 808 paras 18-19.

<sup>125</sup> 27 July 2016 Case 1240/5/7/15 *Deutsche Bahn AG and others v Mastercard Inc and others*; Case 1244/5/7/15 *Peugeot Citroen Automobiles UK Ltd and others v Pilkington Group Limited and others* [2016] CAT 14.

case-law, that limitation periods are substantive legal provisions by nature,<sup>126</sup> and accordingly where foreign law was applicable to determine particular claims, that foreign law's limitation rules would also be applicable.<sup>127</sup>

In this period there were also two judgments in the international context focusing on the territorial scope of the application of the EU rules in relation to private damages claims. In *Iiyama Benelux Bv v Schott AG*<sup>128</sup> in relation to a damages claim following the Cathode ray tube cartel, where it was held that the damages claims lacked a sufficient territorial connection with the EEA for Art 101 to apply. There was no arguable case that the cartel had been implemented there.<sup>129</sup> The immediate consequences of the pricing were in non-EU markets, and a mere 'end of road effect' on pricing of purchases in Europe did not satisfy the requirements of the implementation test.<sup>130</sup> On the other hand, in *Iiyama (Uk) Ltd v Samsung Electronics Co Ltd*,<sup>131</sup> a dispute following the world-wide price-fixing cartel by certain manufacturers in the liquid crystal displays sector (LCD). It was held that the infringement was potentially within the territorial scope of Article 101 where the claimant suffered loss and damage where buying products outside the EU at a price higher than would otherwise have been available in the EU if the cartel had not been implemented in the EU.<sup>132</sup> The final issue concerned jurisdiction and whether the court should exercise it in relation to defenders based in South Korea. The courts of England and Wales were considered to be clearly and distinctly the more appropriate forum in relation to one of the defendants where it was in control of the pricing policies of the various defenders based in England and Wales. As regards another Korean defendant it was held that service out would also be appropriate to avoid the potential for duplicating litigation and the risk of inconsistent findings.

### **Substantive Judgments**

#### **Anti-competitive agreements**

The 2014 ruling in *Carewatch Care Services Ltd v Focus Caring Services Ltd*,<sup>133</sup> concerned the application of the classic *Pronuptia* criteria<sup>134</sup> in the context of a franchising arrangement. The franchisor was a provider of home care services and the dispute concerned restrictive covenants which operated for 12 months from the termination of the franchise agreement.

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<sup>126</sup> In England and Wales, see FLPA s 1; and in Scotland see s23A of the P and L (Sc) Act 1984; see also 1240/5/7/15 *Deutsche Bahn AG and Others v MasterCard Incorporated and Others*; 1244/5/7/15 *Peugeot Citroën Automobiles UK LTD and Others v Pilkington Group Limited and Others*; [2016] CAT 14.

<sup>127</sup> This may lead to limitation issues being raised more frequently in cases with a foreign element and potentially lead to more generous foreign limitation periods where the CAT limitation period has expired under Rule 119.

<sup>128</sup> 23 May 2016, [2016] 5 CMLR 15, (Ch). It was also held that these were pure follow-on claims but that they did not in fact reflect the Commission's infringement decision.

<sup>129</sup> *Case C-89/85 A Ahlstrom Osakeyhtio v Commission of the European Communities*, [1993] E.C.R. I-1307.

<sup>130</sup> *Ibid*, see also *Case T-286/09 Intel Corp v European Commission*, [2014] 5 C.M.L.R. 9.

<sup>131</sup> 29 July 2016, [2016] EWHC 1980 (Ch); [2016] 5 C.M.L.R. 16.

<sup>132</sup> See *Case C-89/85 A Ahlstrom Osakeyhtio v Commission of the European Communities*, [1993] E.C.R. I-1307, and *Case T-102/96, Gencor Ltd v Commission*, [1999] E.C.R. II-753.

<sup>133</sup> 11 July 2014, [2014] EWHC 2313 (Ch).

<sup>134</sup> *Pronuptia*, *supra*.

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The franchisee argued that the restrictive covenants- containing non-competition and non-solicitation clauses, were caught by s 2(1) of the Competition Act 1998. Nonetheless, it was held in accordance with *Pronuptia*, that the restrictions were necessary in order to protect the know-how of the franchisor and to maintain the identity and reputation of the franchisor's network, and were accordingly enforceable.<sup>135</sup>

The most significant substantive ruling in the period was the recent CAT ruling in one of the disputes involving Mastercard in *Sainsbury's Supermarkets Ltd v Mastercard Inc and others*.<sup>136</sup> This claim had been transferred from the High court,<sup>137</sup> involving a damages claim in respect of Mastercard's Multilateral interchange fee ('MIF'). The Tribunal held that there was an infringement of Article 101 and that Sainsbury's were entitled to recover nearly £70 million in damages. The CAT basically held that there was an agreement which was a restriction of competition by effect not object, that, but for the UK MIF, bilateral interchange fees at a lower level would have been agreed in place of the UK MIF.<sup>138</sup> Moreover the arrangements were not exemptable and the illegality (*ex turpi causa* principle) defence failed. In this context there was considerable discussion of the *ex turpi* defence,<sup>139</sup> and the CAT also considered in detail

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<sup>135</sup> The franchisor was entitled to both injunctive relief and damages in enforcing the covenants.

<sup>136</sup> 14 July 2016 Case 1241/5/7/15 (T) *Sainsbury's Supermarkets Ltd v Mastercard Inc and others* [2016] CAT 11.

<sup>137</sup> 30 November 2015, [2015] EWHC 3472 (Ch), discussed supra.

<sup>138</sup> Para 267:- 'For these reasons, we conclude that in the counterfactual world that would be likely to exist in the absence of a UK MIF set by MasterCard, there would be very significant and better competition in the acquiring market than existed in the real world over the claim period. We consider that neither the issuing market nor competition between payment schemes would be adversely affected. In these circumstances, we are of the view that the UK MIF was a restriction on competition by effect within the meaning of Article 101(1) TFEU.'

See also para 548:- 'But for the UK MIF, bilaterally agreed Interchange Fees would have been agreed in place of the UK MIF (paragraph 266 above). These bilaterally agreed Interchange Fees would have been: (i) In the case of MasterCard credit card transactions, the equivalent of 0.50% (rather than 0.9%) (paragraph 226 above). (ii) In the case of MasterCard debit card transactions, the equivalent of 0.27% (rather than 0.36%) (paragraph 233(3) above).'

<sup>139</sup> See paras 290-419. See in particular at para 307:- 'We conclude that: (1) Since the *ex turpi causa* principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest, infringements of competition law can be, but are not necessarily, sufficiently turpitudinous so as to trigger the principle. (2) Whether an infringement of competition law can trigger an illegality defence depends upon whether that infringement is an "innocent" one (in which case, we consider it cannot) or a "negligent" or "deliberate" one (in which case it may do). (3) We consider that the drawing of such a distinction is one that is compelled by Lord Sumption's analysis of "strict liability" infringements 203 and by the fact that (for penalty purposes) this is precisely the distinction drawn in section 36(3) of the Competition Act 1998. 204 If Parliament and EU law have determined that the regulatory authorities should have no jurisdiction to punish innocent, as opposed to negligent or intentional, breaches of competition law, then we consider this to be clear guidance as to what would and would not engage the public interest for the purposes of the illegality defence.

See also para 419:- '(6) Conclusion on *Ex Turpi Causa* 419. In the light of the above, MasterCard's *ex turpi causa* argument fails for the following reasons: (1) There is no, or insufficient, turpitude on the part of Sainsbury's Bank. (2) Sainsbury's Bank and Sainsbury's are not members of a relevant "single economic unit" or "undertaking" within the meaning of Article 101(1) TFEU. (3) Even if these companies are each members of the same relevant "undertaking", any infringing conduct on the part of Sainsbury's Bank is not to be attributed to Sainsbury's so as to render the latter liable along with

the related question of the attribution of liability and the concept of the undertaking or 'single economic unit' for the purposes of EU competition law generally and for this defence specifically.<sup>140</sup> The CAT also considered in detail the issue of quantification of damages, in only the third, and most complicated case, in which it has awarded and assessed damages.<sup>141</sup> The general principles informing the calculation of the overcharge damages award<sup>142</sup> are compensation/reparation, the balance of probabilities and 'when carrying out such an assessment, where there is an element of estimation and assumption – as frequently there will be – restoration by way of compensation is often accomplished by "sound imagination" and a "broad axe".'<sup>143</sup> There was also considerable reflection by the CAT on the pass-on defence and underlying principle and focus on compensation and avoiding over-compensation,<sup>144</sup> particularly where indirect purchasers are involved. The CAT discussed the Antitrust Damages Directive<sup>145</sup> noting in passing that 2 provisions of the Directive<sup>146</sup> dealt with 'the burden of proof and the need to avoid over- or under-compensation between rival claimant levels or groups and potential defendants is a clear demonstration of the difficulties inherent in the pass-on defence.'<sup>147</sup> The CAT proceeded at para 484 to both confirm for the first time the recognition of overcharge claims by indirect purchasers and the existence of a passing-on defence for defendants.<sup>148</sup> Mastercard's passing on defence failed as the CAT stressed 'that the pass-on "defence" ought only to succeed where, on the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimant(s) in the action, to whom the overcharge has been passed on. Unless the defendant (and we stress that the burden is on the defendant) demonstrates the existence of such a class, we consider that a claimant's recovery of the overcharge incurred by it should not be reduced or defeated on this ground.'<sup>149</sup> There was also a detailed discussion and calculation of the appropriate levels of interest to be added to the damages awards,<sup>150</sup> and a subsequent ruling on the effect of taxation on the damages award and interest to be paid on the damages.<sup>151</sup> For the purposes of comprehensiveness, it should be

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Sainsbury's Bank for any such infringement. 234 (4) In any event, Sainsbury's Bank (and Sainsbury's) does not bear "significant responsibility" for an infringement of Article 101 TFEU by MasterCard in relation to the setting of the UK MIF.'

<sup>140</sup> See paras 344 et seq, and see also Wardhaugh supra.

<sup>141</sup> See further infra re follow-on damages awards by the CAT.

<sup>142</sup> See para 423.

<sup>143</sup> Ibid.

<sup>144</sup> At paras 479 et seq. see in particular para 480.

<sup>145</sup> Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("the Damages Directive").

<sup>146</sup> Ibid, Articles 13 and 14.

<sup>147</sup> Para 481.

<sup>148</sup> Para 484:- 'We agree with the submissions of MasterCard, that the pass-on "defence" is no more than an aspect of the process of the assessment of damage. The pass-on "defence" is in reality not a defence at all: it simply reflects the need to ensure that a claimant is sufficiently compensated, and not over-compensated, by a defendant. The corollary is that the defendant is not forced to pay more than compensatory damages, when considering all of the potential claimants.'

<sup>149</sup> Ibid at para. 484.

<sup>150</sup> At paras 527-547 and note the conclusions in particular at para 546.

<sup>151</sup> 21 December 2016 Case 1241/5/7/15 (T) *Sainsbury's Supermarkets Ltd v Mastercard Inc and others* [2016] CAT 11, [2016] CAT 26.

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noted that albeit outwith the period for this case-law review, there has been a ruling in the High Court in a related dispute by a retailer against Mastercard which is at odds with the CAT ruling, in *Asda Stores Ltd v Mastercard Inc.*<sup>152</sup> Popplewell J held that the multilateral interchange fees charged by Mastercard to card issuers and acquirers fell outside the scope of Art 101(1) on the basis of the ancillary restraints doctrine as they were objectively necessary to the main operation of the scheme as a whole, which in itself was either neutral or pro-competitive. In the hypothetical counterfactual, if the card operator set its fee at zero, the scheme would collapse and issuers would switch to a rival card operator. It is likely that both the CAT and High Court ruling will be appealed, and the Court of Appeal will require to resolve the inconsistent approaches in the two first instance cases. This will be significant both in terms of the damages awards and their assessment (given there are a number of similar/related actions against Mastercard) and the consideration of the substantive principles in relation to Mastercard's arrangements.

### **Abuse of Dominance**

In *Arriva The Shires Ltd v London Luton Airport Operations Ltd*,<sup>153</sup> ATS had a concession agreement with the operator of Luton Airport ('Luton Operations') to carry passengers (over 1 million a year) on the 757 bus service from the airport direct to London Victoria. Following a tender process, the concession was awarded to a rival bus operator. ATS claimed that Luton Operations was dominant in the market for granting rights to operate bus services and that they had abused it in two ways: 1) the tender procedure in awarding the new concession was unfair, and 2) through the abusive terms contained in the award of the new concession to the rival bus operator. The first part of the claim was unsuccessful as the tender process was fair, but the seven year exclusive period awarded to the successful tender bid operator was deemed to be abusive. The analysis and application of the abuse and objective justification in this judgment merits further analysis. It was noted that exclusionary abuses fall into two categories, where the dominant undertaking: a) competes on the downstream market and is acting to foreclose that market to its own advantage,<sup>154</sup> or b) distorts competition on the upstream market between itself and its competitors by entering contracts with customers to buy exclusively from the dominant undertaking.<sup>155</sup> This case clearly did not fall within the second category but Rose J rejected the defendant's assertion that to fall within the first category the dominant undertaking had to derive a competitive advantage or commercial benefit through the exclusionary conduct; for instance, by using its dominance in one market to improve its own position in a downstream market.<sup>156</sup> Clearly, Luton Operations were not active on the downstream bus services market, but in any event they gained important commercial and financial advantages from the concession which gave them a percentage of revenue earned by the bus operator. Rose J also held that the grant of an exclusive right to the bus route for a lengthy period of seven years affected competition on that downstream market and was anti-competitive. This reasoning is analogous with European Commission decisions in relation to the grant of media rights to broadcast football matches over an

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<sup>152</sup> 30 January 2017, [2017] EWHC 93 (Comm).

<sup>153</sup> [2014] EWHC 64 (Ch).

<sup>154</sup> See *Commercial Solvents v Commission* [1974] ECR 223. This is also the type of abuse involved in *Purple Parking*.

<sup>155</sup> See for instance Case C-549/10 P *Tomra Systems ASA v Commission* [2012] 4 CMLR 27.

<sup>156</sup> See for example Case T-128/98 *Aeroports de Paris v Commission* [2000] ECR II-3939, and *SEL-Imperial Ltd v The British Standards Institution* [2010] EWHC 854 (Ch).

extended period.<sup>157</sup> As in *Purple Parking*, it was stressed that the objective justification defence was not available simply where a business decision was commercially rational; prohibited abusive conduct normally invariably furthers the business interests of the dominant undertaking. Both these cases demonstrate a robust approach to abusive conduct and a restrictive approach to defences based on the objective justification for dominant undertakings' business decisions.

*Streetmap.EU Ltd v Google Inc*,<sup>158</sup> involved another alleged abuse of a dominant position involving the 'interaction of competition between online search engines and competition between suppliers of online maps.'<sup>159</sup> Basically the claimant contended that the preferential and prominent display of their own online map product restricted competition from competing suppliers of online maps. It was accepted for these purposes that Google held a dominant position in online search engines. The discussion on the case focused on the actual or potential anti-competitive effect of the alleged distortion of competition in online maps. Evidence of actual effect was required and it was not abusive where the effect was on a separate market from the market where the undertaking was dominant and the effect was not appreciable. There was considerable evidence to the effect that the Google Maps Onebox innovation had not had an appreciable effect in taking custom away from the claimant and was not reasonably likely to give effect to anti-competitive foreclosure. Roth J proceeded to make obiter observations in relation to the defendant's alternative argument based on objective justification,. Roth J considered their commercial strategy to be objectively justified in order to secure efficiency gains and there were other effective, proportionate or viable alternatives that they could use to achieve the same legitimate aim.<sup>160</sup> There were specific technical arguments to support Google's revised commercial strategy and there was considerable evidential support, but the validity of a commercial strategy is clearly justiciable and courts will not simply accept a plain argument that there was a commercial decision to objectively justify a strategy.

### Follow-on Damages Actions

Given the relative dearth of final damages awards in the UK,<sup>161</sup> the CAT's ruling in 2013 in *Albion water Limited v Dwr Cymru Cyfngedig*,<sup>162</sup> takes on added significance as only the 2<sup>nd</sup> award of damages by the CAT under s 47A, following the *2Travel* award in 2012.<sup>163</sup> This was an incredibly lengthy legal saga with a decision by the water regulator followed by numerous rulings by the CAT, an appeal to the Court of Appeal, and subsequently various stages of a successful follow-on damages action, again before the CAT.<sup>164</sup> The dispute arose out of a

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<sup>157</sup> See Commission Decision, Case COMP/38173, *Joint Selling of the Media Rights to the FA Premier League*, 22 March 2006.

<sup>158</sup> 12 February 2016, [2016] EWHC 253 (Ch).

<sup>159</sup> Per J Roth at para. 4.

<sup>160</sup> See generally paras 142-177.

<sup>161</sup> See Laborde *supra*, although that has been superceded by *Sainsbury's Supermarkets Ltd v Mastercard Inc and others*, and there have been two final damages awards by the CAT.

<sup>162</sup> 8 March 2013 Case 1166/5/7/10 *Albion water Limited v Dwr Cymru Cyfngedig*, [2013] CAT 6.

<sup>163</sup> *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 9.

<sup>164</sup> See *inter alia*, [2006] CAT 23, [2006] CAT 36, [2008] EWCA Civ 536, [2008] CAT 31, and [2013] CAT 6.



complaint by Albion Water Limited ('Albion') against Dwr Cymru Cyfyngedig ('Dwr Cymru') under the 1998 Act Chapter II prohibition in relation to the price quoted by Dwr Cymru for the common carriage of water across the relevant part of its network, claiming the price constituted a margin squeeze and was discriminatory. Albion complained to the Authority, which, under the Water Act 2003, was the specialist regulator for the water industry and given powers to apply the 1998 Act. The Authority, in 2004, rejected the complaint, but on appeal, the CAT found that Dwr Cymru was dominant<sup>165</sup> and that it had abused that position by imposing a margin squeeze.<sup>166</sup> An appeal to the Court of Appeal by Dwr Cymru was rejected<sup>167</sup> and subsequently the CAT also held that the access price Dwr Cymru proposed to charge Albion for common carriage through its water pipe network was an excessive and unfair price which was abusive.<sup>168</sup> Following this outcome in the lengthy public enforcement process, Albion raised a claim for damages against Dwr Cymru in reliance on the CAT's Chapter II infringement findings. In 2013, it was awarded over £1.8m (plus interest) in damages as a result of the high and abusive price it paid to Dwr Cymru meaning it lost profits under one contract and lost the chance to win another potentially lucrative contract.<sup>169</sup> This was a relatively straightforward application of the causation test, and an assessment of quantifiable damages to ensure that Dwr Cymru (a) was liable to pay Albion £1,694,343.50 in respect of Albion's claim for loss arising in relation to the supply of water to Shotton Paper; and (b) was liable to pay Albion £160,149.66 in respect of Albion's claim for loss arising from the lost opportunity to supply water to Corus Shotton.<sup>170</sup> It should be stressed that exemplary damages were not awarded as in 2Travel, although following the implementation of the Antitrust Damages Directive in the UK,<sup>171</sup> exemplary damages will no longer be available in any event in relation to infringements of either EU or UK competition law.

### Conclusions

Overall, the research has identified some interesting themes emerging from the development of competition law litigation in the UK courts between 2013 and 2016. Although the research seeks to be "comprehensive" it is clear that due to the prevalence of settlement activity, the published judgments represent only a partial view of competition litigation strategy in the United Kingdom. Nonetheless, 2016 in particular has witnessed a dramatic rise in competition law judgments and it will be interesting to see if this is a trend that continues in future years. The nature of the litigation process in the UK courts means that there are considerably more judgments than disputes given the multiple judgments in various cases at different stages of the litigation. There are case clusters dealing with a number of significant procedural issues

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<sup>165</sup> [2006] CAT 36.

<sup>166</sup> Ibid.

<sup>167</sup> [2008] EWCA Civ. 536.

<sup>168</sup> [2008] CAT 31. See also the CAT's final ruling on remedies in [2009] CAT 12.

<sup>169</sup> [2013] CAT 6.

<sup>170</sup> Note that the CAT ordered interest to be payable by Dwr Cymru on those sums at an annual rate of 2 per cent above the base rate from the date of infringement until payment. An additional claim for exemplary damages, as discussed below, was rejected by the Tribunal.

<sup>171</sup> The Damages Directive Statutory Instrument- Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and other Enactments (Amendment) Regulations 2017 'the Regulations'), SI 2017/385, as of 9 March 2017.

such as limitation, disclosure and the interplay with EU proceedings, together with interesting judgments on substantive law, particularly in relation to abuse of dominance. The increasing consideration and application of competition law principles to disputes in technological markets is also evidenced by the case-law in this period. The conflicting analysis of the anti-competitive effects of the Mastercard MIF scheme by the CAT in 2016 and the High Court early in 2016 will certainly require to be resolved by the Court of Appeal and perhaps the Supreme Court. Despite the continued limited number of final substantive judgments in the period, at least that CAT ruling and its earlier judgment in Welsh Water are examples of the courts' treatment of the assessment and quantification of damages, in only the 2<sup>nd</sup> and 3<sup>rd</sup> cases involving the final award of damages in the UK. Despite the specialist nature of the CAT as a competition tribunal, the case-law in the period reflects a significant continued role for the High Court, and certainly not simply in stand-alone abuse cases. Nonetheless, following the Consumer Rights Act 2015 reforms and the extension of the scope of the CAT's jurisdiction, the 2016 case-law demonstrates a recent increase in the number of claims being raised before the CAT, including resort to the CAT for consumer claims under the new collective redress regime which allows for opt-out proceedings. In the following years we will look to consider to what extent the CAT becomes the central forum for all competition law claims, whether the collective redress scheme is 'successful', and what if any, are the implications for competition law private enforcement practice in the UK of the implementation of the Antitrust Damages Directive and the (related) impending exit of the UK from the European Union.