Remedies in private enforcement: can they fill the gaps of public enforcement?

Dr Sebastian Peyer

UEA Law School & Centre for Competition Policy
Role of public and private remedies

❖ Public enforcement pursues deterrence

❖ Private enforcement goals include compensation and deterrence
  ❖ Damages Directive: compensation and restorative justice
  ❖ Full effectiveness of Arts 101 & 102 TFEU requires compensation claims
  ❖ *Courage v Crehan* (para 27): “[...] actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”
Enforcement priorities and gap(s)

- Detection rate and level of punishment
- Level of public enforcement activity
  - Depends on type and size of potential infringement
  - Priority to enforcement activities against cartels
  - Growing number of investigations into vertical agreements and abuse of dominance
  - Strategic choices regarding type of infringement and sector, e.g. Digital Single Market
- Public enforcement and follow-on damages actions are time-consuming
Private remedies complementing public enforcement

❖ Follow-on damages actions increase overall punishment
  ❖ Cartel enforcement

❖ Stand-alone damages actions increase detection
  ❖ Rare especially against horizontal agreements, e.g. *Sainsbury’s v MasterCard*

❖ Nullity as a ‘contract remedy’ (e.g. *Courage v Crehan*)

❖ Injunctions against vertical restraints and abuse of dominance
  ❖ Damages actions seem to ‘follow’ injunction claims
Injunctions in private enforcement

- Function: maintain *status quo* or restore competitive conditions in the market
- Interim injunctions to prevent irreversible change of market conditions (exit)
  - *Unlockd Ltd v Google Ltd* [2018]
- Involve abuse of dominance or non-cartel agreements
  - Access to facility
  - Favourable or fair trading conditions
  - Highly concentrated digital markets and disruptive innovations pose challenges, e.g. *Streetmap.EU Ltd v Google Inc* [2016]
Limits of private remedies

❖ Damages actions
  ❖ Compensate ultimate victims?
  ❖ Consumer claims are cumbersome, e.g. *Merrick v MasterCard*

❖ Sound theory of harm in abuse cases
  ❖ Problematic concepts, e.g. excessive pricing
  ❖ What is competition on the merits in quickly developing markets?

❖ Risk of diverging decisions – *Mastercard* and *Visa* litigation in the UK
Outlook

- Effective deterrence
- Digital markets with dominant platforms
- Speedy remedies
- Forward-looking approach