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# CLOSING THE ENFORCEMENT GAP

## *Proposals for reform and increasing the speed of enforcement action in Big Tech competition cases*

*A Paper by ResPublica*

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# EXECUTIVE SUMMARY

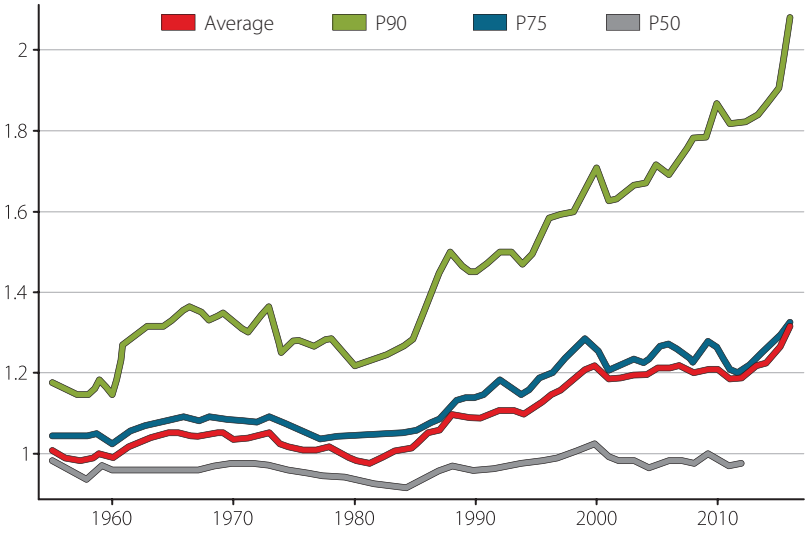
## *OUTLINE*

To state the obvious and the self-evident, big tech markets have become highly monopolised. This is a major growth inhibiting and innovation limiting issue for smaller tax paying tech firms in the UK. Unfortunately, UK Government recognition and awareness of this issue seems almost entirely absent, which perhaps is why UK enforcement and legislation is lagging other countries. In court in David vs Goliath situations there is very little help to equalise the imbalance. UK firms seeking to get the law enforced also face the difficulty of taking private court action where their identity must be disclosed, and risks of retaliation are high. They depend on the CMA acting well and using the full remit of its (already limited) powers which sadly it hardly ever does. For example, The CMA does not routinely use injunctions to protect the market and "freeze the scene of the crime" pending further investigation, as it could. Furthermore, in digital markets, where data is critical, investigations in cases may reveal breaches of other laws (data protection and other consumer protection laws). We therefore propose reforms that enable private whistle blower action, and a broader remit for a specialised Digital Markets Unit so multiple laws can be investigated by a single investigating team under the authority of the Attorney General's Office, to better protect the public interest and the rule of law.

## *THE "MONOPOLY PROBLEM"*

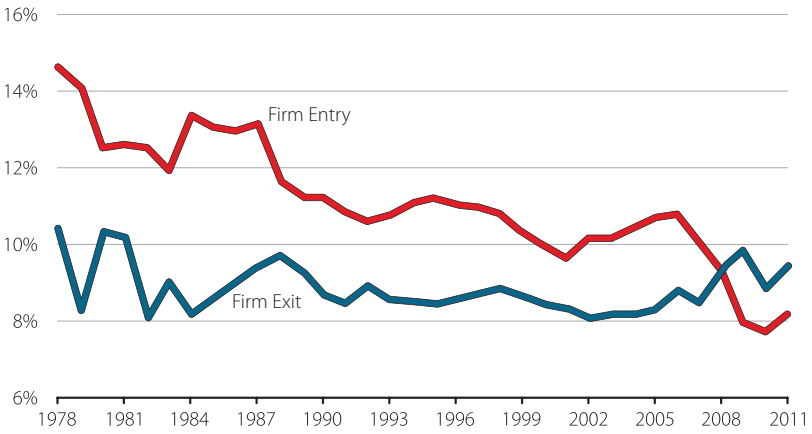
A core problem identified in many recent reports is that tech markets have become concentrated[1] – with a small number of big players dominating the sector[2]. This is known as the "monopoly problem" as consumers' choices are not driving suppliers to compete to meet their needs. Instead, big firms dictate what consumers

want, and impose one size fits all terms on a "take it or leave it" basis[3], relying on their sheer market power to get what they want, while squeezing out smaller rivals. The monopoly problem was initially called out by researchers and the Obama Council of Economic Advisors to the President which noted[4] high levels of mark ups[5] and rates of entry and exit falling in the US:




(B) Percentiles of the markup distribution (revenue weighted)

The U.S. economy has become less entrepreneurial over time
Firm Entry and Exit Rates in the United States, 1978-2011




*Source: U.S. Census Bureau, BDS; authors' calculations*

Initial work was based on US statistics.[6] More recent work for the EU[7] suggests the same pattern occurs in the EU and UK[8 9] and most recently, in late 2021, the former Chief Economist at the EU Commission published findings suggesting similar issues arise from the concentrated structure of markets for all states including the UK.[10] The most recent studies show marked differences in the share of industries where the increase in concentration was above 20%. France and the UK have a large proportion of industries with strong increases in concentration. The failure of market-oriented governments to take competition and monopoly power seriously defies rational comprehension.

## *"THE NEED FOR SPEED" IN LAW ENFORCEMENT*

Competition law enforcement is designed to protect the process of competition. Pro-competition responses would reassert consumer preferences. Remedies, such as break up, are designed to create a competitive industrial structure, for example moving from a small number of big players to a larger number of smaller players, allowing firm rivalry to operate and deliver a diversity (rather than a uniformity) of products meeting consumers' needs. Where certain assets are more efficiently provided by one player, access conditions can be imposed that require the use of those assets by all competitors. A well-known example being BT's Openreach entity being used as the main telecoms network operator by Sky, and other rivals, for the provision of broadband in the UK.

Swift enforcement is most critical in fast-moving digital markets. Without it, abuse of smaller players means they are pushed out quickly, and concentration rises, making innovation and entry more difficult. When it is realised that the major global platforms employ relatively few people and pay tax on an internationally optimised basis, squeezing out local tax paying competitors also means nation states' ability to fund social systems are impacted and the need for swift action increased.

Notoriously, at EU level, the flagship EU antitrust cases against Microsoft,[11] Intel[12] and Google[13] each took over 10 years to determine. No interim orders were issued during the investigation process. Cases drag on through multiple appeals and in the meantime, orders to prevent more harm were not issued [14]. One can only conclude that breaching the letter and the spirit of the law pays, as any subsequent fines will be dwarfed by the illegitimate profits made in the interregnum between complaint and final action. The EU Commission did take interim enforcement action against Broadcom in 2019 after decades of inaction and officials have suggested that they are keen to use their powers more often[15]. This is hardly bold thinking.

## *THE UK IS NOW FALLING BEHIND OTHER COUNTRIES*

Speed of enforcement is now a central policy concern in antitrust and competition law enforcement circles worldwide.[16] The CMA initially investigated Online markets and Google and Facebook's market power in 2019 and reported in 2020, calling for a new law and specialist enforcement agency. The UK has thus created a new Digital Markets Unit[17] which is set to police the major technology platforms. However, it has to be noted that:

- The UK now seriously lags behind other countries and the EU. The Penrose Report[18] noted in 2021 that the CMA's historic record of enforcement was lagging other countries (such as the EU, France and Germany). While the UK has done nothing in the interim, the German Federal Competition Office ("FCO")[19] German's antitrust authority, announced in January 2022 that it has concluded that Google's business meets the threshold for its new special abuse control which was established under an update to its competition legislation targeted at digital giants which was itself passed into law at the start of 2021. The finding that Google has "paramount significance across markets" is the first such decision taken by Germany's FCO — which has ongoing procedures assessing the same vis-a-vis the market power of Amazon, Apple and Meta/Facebook — and it stands for five years. This paves the way for antitrust interventions which could prefigure incoming pan-EU ex ante rules also targeting tech giants' overbearing market power (aka the Digital Markets Act). That EU law is also now being progressed –while the UK is falling further behind by not even publishing draft legislation that was called for by the CMA to tackle the problem in July 2020.
- Interim injunctions are little used. Interim injunctions – to preserve the status quo while investigation takes place – or legislation formulated – are hardly ever used by the authorities. For example, the latest action for enforcement to prevent Google's browser changes before the CMA has now dragged on since the changes were announced in August 2019. To be sure, many reports and consultations have been written but sadly and unsurprisingly no action has yet been taken. This inaction is in stark contrast to interim injunction applications available before the courts, which require only three days advance notice and typically take a matter of days to be resolved[20]. Those applying to the CMA in the UK can see from the table below its relative position:

| JURISDICTION | NUMBER OF INTERIM MEASURES IMPOSED |
|---|---|
| United Kingdom | 2[21] in the last 18 years |
| European Commission (EU) | 9[22] in the last 18 years |
| France | 169 cases since 1989 |
| Italy | 2 cases in 2020 alone[23] |

- Private Actions are unavailable for "whistle blowers". Unfortunately, applying to the CMA is the only real option facing many smaller businesses that risk retaliation when making their cases in the courts. This is because private action via the courts cannot easily be used by whistle blowers as they require the applicant to be known to the defendant. In David vs Goliath big tech markets, the risk of retaliation is just too great for private actions to be a meaningful option. In consequence, those harmed need enforcement actions and for that they depend on the CMA, if and when it chooses to take action. Which as the table above shows, hardly ever happens.
- Big Tech acts in ways that cause multiple harms. The latest DCMS/BEIS consultation[24] also raises the problem that abusive actions by tech platforms may also involve invasion of privacy and online harms and go beyond purely competition matters. Where Big Tech's actions cut across public policy issues a competition authority will always face a "defence" that its remit is restricted, and it is going beyond its competence if it takes cases that deal with privacy or security or plurality of the media as well one based on breach of as competition law. In effect the sheer size and scale of Big Tech means it can virtually always employ this strategy, tripping up its pursuers.
- International Coordination may be helpful. Digital markets are usually international, and multiple governmental agencies and enforcement systems may be coordinated to secure better global compliance. Also, the UK is seeking, via its position in the G7, to take a leadership position in global enforcement.[25] While international coordination may be helpful, it may also increase the risk of delay and should not get in the way of the enforcement of the law.
- Why have actions taken so long? Why do the competition authorities move so slowly against the big tech players? Competition authorities do vet mergers quickly. Key issues investigated in more detail in this paper that create delay include: (i) Information/evidence; (ii) Authority Knowledge of Technology Markets; (iii) Asymmetry and Quality of Evidence; (iv) Incentives in litigation; (v) Experience, capability and capacity in government to take enforcement actions; (vi) Inconsistency of law and policy toward public and private enforcement; (vii) Lack of use/usefulness of interim relief; (viii) Compliance incentives; and (ix) Lack of prenotification processes for the dominant players.

## *POTENTIAL SOLUTIONS: GREATER USE OF COMMON LAW INTERIM MEASURES AND PUBLIC INTEREST ENFORCEMENT*

We urgently need for reasons of justice, market plurality and productivity to change how Big Tech responds to legal action. Currently its strategy of "walking slowly backwards" bankrupts litigants, delays process and ultimately assures the defendant a victory such that damages fall far short of the level needed to change incentives and correct the behaviour. We need to invert this and restore the incentive to "discharge the injunction asap".

- Potential solutions would be the greater use of interim orders so the "scene of the crime" and "status quo" is preserved while the investigation, and necessary checking with witnesses, reviewing the defendant's case and the process of disclosure and analysis of evidence takes place.
- It should be recognised that interim relief changes the incentives on the defendant and a strategy of "walking slowly backwards" (disclosing evidence and moving slowly while making money as the case progresses) is less commercially attractive than the incentive to "discharge the injunction asap", with attendant incentives to resolve matters such as evidence and confidentiality issues more quickly.
- Since the Big Tech businesses are now Trillion-dollar market capitalization entities, collectively being the wealthiest companies known to history, their legal resources are similarly very significant. Enforcement action by a new UK government enforcement agency will need to be funded adequately and its public funds can be supplemented by public interest damages cases (such as are routinely taken in other common law jurisdictions such as the US).
- A new agency can be supplemented by the use of external help but it will be a battle in which there will be no "equality of arms" unless something more fundamental is done. One central issue is not about the ability to hire expensive help: it's about being open and willing to move at speed, any solution is then clearly about having people who have experience and knowledge of digital markets, and systems and processes to litigate at speed. The teams and capability need to be used to the rough and tumble of the marketplace. To break with the past the people who are to manage the system will need to have a litigation background, and a mindset informed by legal battles.
- The UK is currently primarily an EU-like jurisdiction, with no public authority organised on the same basis as the Federal DOJ or the Attorney Generals of the US States. There were no UK public enforcement actions against Google, Amazon, Apple, Facebook or Microsoft (the main digital platforms) over the past 20 years, until 2020. Consequently, no private follow-on cases have been taken by adversely affected UK businesses, except for those taken following EU Commission Decisions. This is a travesty.

## *A SPECIALIST ENFORCEMENT BODY UNDER THE ATTORNEY GENERAL'S ("AG") AUTHORITY OR LICENCED BY THE AG TO TAKE CASES IN THE NAME OF THE AG*

*This* could, by contrast, investigate once and take enforcement action for breach of multiple laws that are disclosed in a single investigation. Acting under the historic remit of the AG the DMU could be formed as a new Office in a way that would allow it to take public interest actions and secure the rule of law and see to it that *all laws* are properly enforced.

## *POTENTIAL SOLUTIONS: A NEW UK ENFORCEMENT AGENCY UNDER THE REMIT OF THE ATTORNEY GENERAL'S OFFICE?*

All mature systems (in the EU, UK and the USA) recognise that the public interest may better be served on behalf of many businesses and consumers if a public authority is provided with powers to investigate and take appropriate action. In the US specialist "Assistant Attorneys General for Antitrust" exist at Federal and

State levels. The UK's Digital Markets Unit will technically sit in the CMA – but as an enforcement agency it could be formed under the Attorney General's remit.

The common law recognition that certain public interest cases require public interest enforcement involves entrusting court action to a public (or in some cases licenced private) Attorney General to safeguard the public interest with the support of affected businesses. This could be considered further for the UK and staffed with specialist litigators that can take cases in digital markets as well as enforcing other laws where they find breach such as consumer protection, breach of privacy or security and plurality of the media laws.

This may help to address the issue of cases being brought to address multiple harms to business and consumers caused by Big Tech.

The UK competition authorities and an Attorney General's office charged with taking public interest cases could learn from the US Attorney General's Federal and State processes and take public interest cases, working more closely with claimants in accordance with US practice.

The need to close the enforcement gap is pressing and paramount. It is a feature of the accumulation of decisions by generations of previous governments that accepted too readily the idea that the market would self-correct and regulate itself in an open and fair manner. Only the most ideological of minds would now persist with this delusion. In a new era of monopoly and market dominance we need a bold new competition institution that can amass under its ambit all the multiple public interest concerns that accompany extreme market dominance; and to act with speed. Our current institutions have failed and are failing – the time for renewal is now. Our key aim is changing the incentives toward compliance and preventing harm rather than dealing with it once it has occurred. Our more detailed paper discussing the issues is attached.

# CLOSING THE ENFORCEMENT GAP - PROPOSALS FOR REFORM AND INCREASING THE SPEED OF ENFORCEMENT ACTION IN BIG TECH COMPETITION CASES

## *OUTLINE*

The following content is divided into:

1. International context and opportunity to benefit from disclosure of documents in US proceedings.
2. Recognition of the policy problem:
   - » Nature of the enforcement problem
   - » Information issues
   - » Knowledge issues
   - » Information asymmetry and quality of evidence issues
   - » Incentives in litigation
   - » Government organisation and enforcement experience
3. Inconsistency of law and policy toward public and private enforcement and incentives. The AG system and three basic issues Anonymity, Evidence and Money
4. Lack of use/usefulness of interim measures and interim injunctions
5. Importance of incentives on compliance: Damages/Exemplary damages
6. Proposals

Appendix I Summary of relevant law and practice

## 1. INTERNATIONAL CONTEXT AND OPPORTUNITY TO BENEFIT FROM US PROCEEDINGS

The UK is not alone in taking action against the tech platforms nor in seeking to legislate to address the issues. For example, the ACCC in Australia has conducted a series of studies and reports[26], and the Australian Government is proposing legislation. The EU Commission has taken cases against Google, Apple, Amazon, Intel and Microsoft and cases abound in France and Germany against Apple and Facebook.[27] The EU has also proposed legislation in the form of the Digital Markets Act and Digital Services Acts to provide greater control over digital gatekeepers,[28] and has also dedicated funding to "deploy technology to help boost the speed and effectiveness of its investigations and proceedings".[29] The US Federal government has commenced antitrust proceedings against Google, as have numerous US States Attorneys General, and the FTC has commenced proceedings against Facebook. Legislation has been drafted and is proposed before the US Congress.

The UK has announced a G7 initiative and is part of an international effort to coordinate actions by many governments worldwide.[30]

Under US litigation it is standard practice for evidence to be sought by the US Attorney General by way of a system of legally enforceable demands. Both the Federal and State US Attorney General's offices and private parties can also benefit from the common law system of disclosure of evidence. Also known as "discovery", document disclosure is a system by which defendants are required to deliver up documents that they hold that are relevant to the issues in cases brought against them. This system is both vital for gathering evidence before cases start to identify breaches of the law by the authorities. It also helps to provide visibility of internal business behaviour by internal legal functions and enables compliance and governance to function more effectively.

One feature of the US system is USC 1782. This provides a mechanism whereby an applicant, whether public or private, can get discovery of documents that are disclosed by defendants in US court proceedings. That US law states:

"the district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person. ... The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing…"

In essence, an applicant under Section 1782 merely needs to show three things:

a. it is an "interested person" in a foreign proceeding,
b. the proceeding is before a foreign "tribunal," and
c. the person from whom evidence is sought is in the district of the court before which the application has been filed.[2]

The type of evidence that may be obtained under Section 1782 includes both documentary evidence and testimonial evidence. [3]

Currently it is debatable whether any procedure that is operated by a competition authority in the UK could benefit from this procedure. This means that UK enforcement could be at a disadvantage by comparison with other countries or system that used the court process in the way that the US does. International Treaties which provide mechanisms for coordination[31] among administrative authorities can operate as an aid to coordination but are unlikely to be a substitute for seeing the evidence available in internal documents.

A UK Attorney General responsible for antitrust could take advantage of this procedure. This would support international comity and coordination of enforcement action worldwide.

## *2. RECOGNITION OF THE POLICY PROBLEM?*

Most recently the Penrose Report, entitled "Power to the People" identified that the system of competition law only functions to the benefit of consumers if *"the system is set up in the right way in the first place, so it is on the side of customers rather than politicians, bureaucrats or company bosses".*

It recognizes that *"UK competition and consumer choice has weakened in the last two decades…in many sectors the largest firms have a more powerful market position than in 2008 and it is harder for smaller firms to displace them. …the UK ranks 11th out of 30 European states for being on the side of customers ... the gap between the UK and EU has got wider as well."*[32]

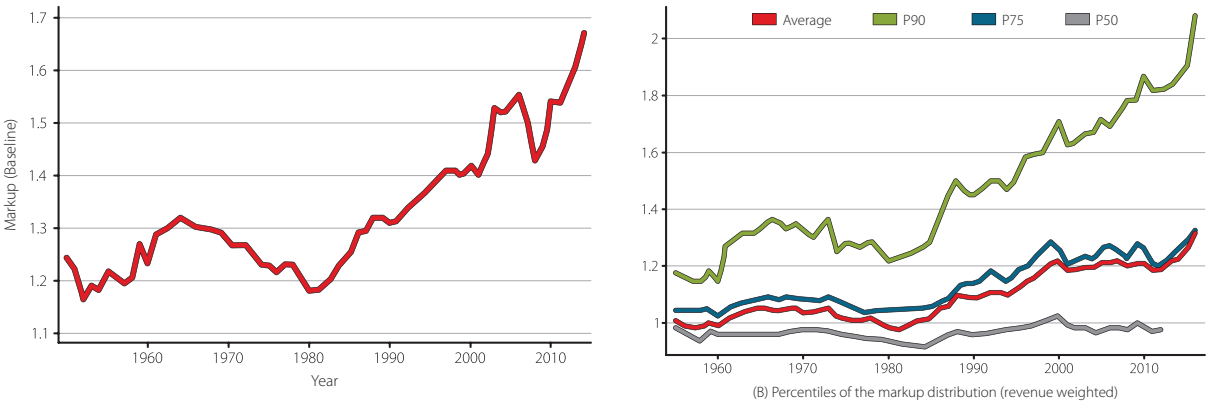
And that *"making customer choice and competition work properly for everyone doesn't happen by accident: it needs a world-class legislative and regulatory regime to underpin and maintain it."* The Report suggests that the UK authorities are lagging other countries and the EU Commission. It then states:

A recent review of competition enforcement legislation[33] said *"long cases are undesirable"* and *"stakeholders raised concerns about case timescales following EU exit, as […] more complex cases could […] expose the more time-consuming aspects of current procedure, such as access to file."* As far back as 2003 the Competition Appeal Tribunal (CAT), which hears appeals from the CMA, was warning of the danger of *'hypertrophic growth of documentation and evidence, and inordinate duration of proceedings'.*[34]

The Penrose Report identifies the core concern as the speed of enforcement in the system. In the words of the Report the policy concern is that:

*"This puts smaller, disruptive and entrepreneurial firms at a disadvantage, because they find it harder to afford the expert advice without which it is increasingly impossible to take part in the processes successfully. It also gives large, deep-pocketed and well-lawyered incumbent firms the advantage of using legal process delays to 'walk backwards slowly', bogging things down when they're faced with otherwise-legitimate challenges so entrepreneurs are prevented from bringing new technologies to market for years, until the commercial window of opportunity has closed and it's too late. If we allow our competition laws and processes to become more complex, expensive and slow at the same time as digitisation is pushing businesses to become cheaper, faster and more convenient, we will weaken competition and hamstring British firms severely."*

These points echo concerns raised by others over many years: see for example the work of Jan Eeckhout, showing that markets have become increasingly concentrated, as referenced in the Furman Report and ResPublica: *Technopoly and What To Do About It, Justice delayed is Justice denied*[35]: see also the Stigler report, the CMA's Online Platforms and Digital Markets Report, and the EU's Three Wise Men reports.




Figures 1 and 2: Graphs showing the significant increase in markup since 1980 (De Loecker and Eeckhout, 'The Rise of Market Power and the Macreconomic Implications' (2020) 135(2) Q J Econ, 561-644[36])

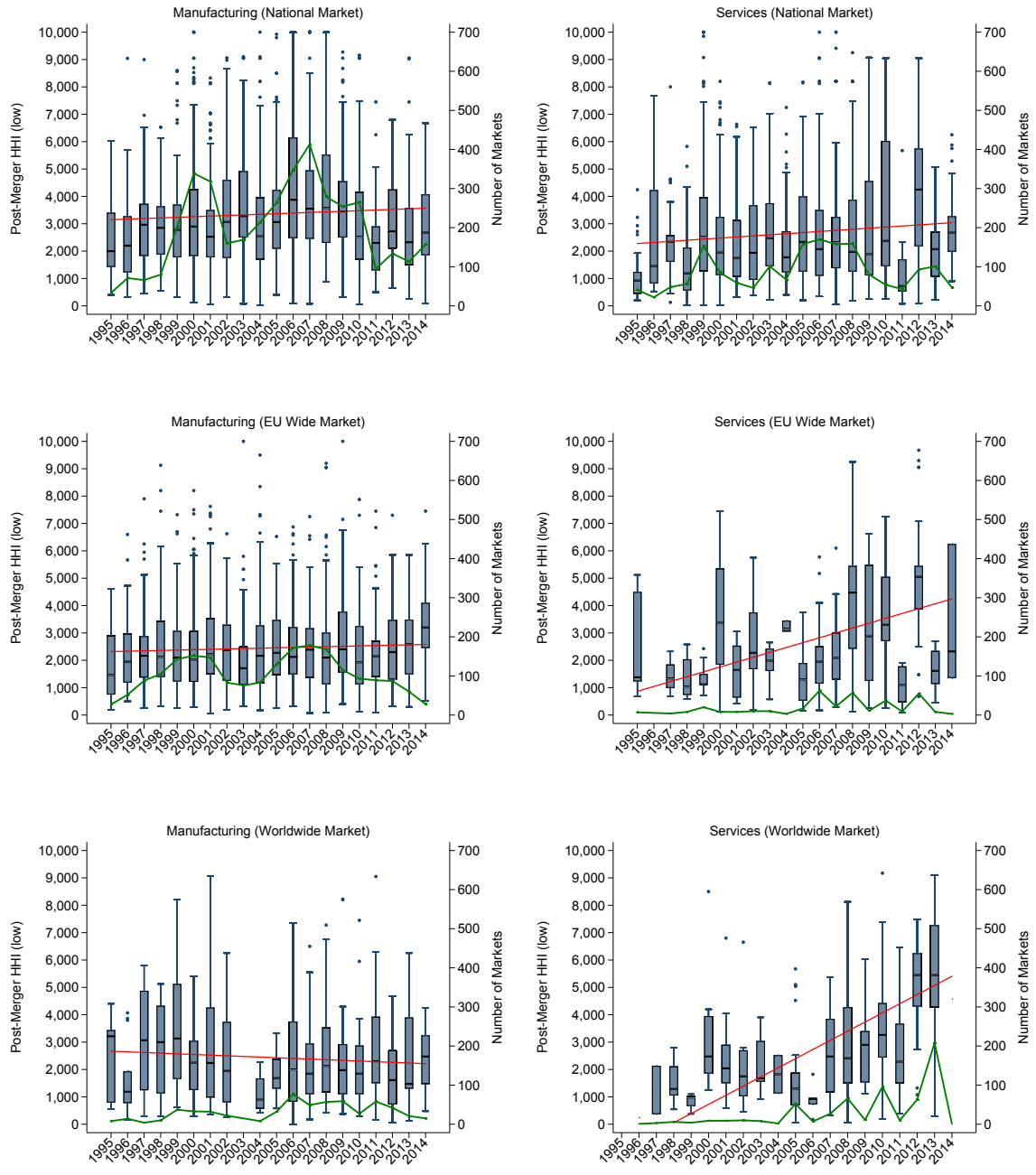



Figure 3: Evolution of market concentration (HHI) in European antitrust markets over time[37]

## *NATURE OF THE ENFORCEMENT PROBLEM*

The policy issues identified above are likely to mainly arise from the lack of enforcement, and experience of enforcement or capability and knowledge of how to bring enforcement actions in abuse of dominance or "David vs Goliath" cases. Mergers are routinely vetted and dealt with quickly.[38] Cartels are notoriously difficult to find under any system, but the slow policing of abusive conduct[39] that affects large numbers of small players, particularly in the tech sector, appears to be highly relevant causes for the to the policy concerns raised.[40] Key issues include:

- Information.
- Knowledge.
- Asymmetry and Quality of Evidence.
- Incentives in litigation.
- Experience, capability and capacity in government to take enforcement actions.
- Inconsistency of law and policy toward public and private enforcement.
- Lack of use/usefulness of interim relief.
- Compliance incentives.

## *INFORMATION ISSUES*

Public authorities are not market participants and lack information about what is happening in markets. They start with a major information asymmetry problem. Full understanding of market dynamics may be hampered, playing on authority fears of "regulatory capture" and "complicity with complainants" leading to isolation in the attempt to ensure impartiality. Specifics include:

- Reliance by authorities on complainants individually affected to highlight a competition issue or case. Systemic issues affecting many smaller firms are then difficult to identify. Analysts and academics may have valuable insight but do not fulfil the legal requirements for legal standing to bring cases, even in public interest situations, and are ignored.
- Dominant firms often hold a lot of the relevant information needed to prove causation of harm as required by law.
- Prioritisation principles[41] set by officials bear no relation to competition harms and scale of impact on digital markets.
- Authority guidelines disparaging evidence because of its origin, rather than being objectively evaluated.[42]
- Business people affected only having partial information.
- Failure to appreciate the important role of lawyers in assembling evidence and translating issues into their relevant legal context.
- Overly arms-length relationship of competition authorities with all market participants.[43]
- Lack of meaningful dialogue between competition authorities and professionals and market participants.

The consequence of the above is the effective isolation of public authorities from markets, so that they cannot easily identify the activities taking place – or if they can, they may be taken too late to make a difference.

## *KNOWLEDGE ISSUES*

Understanding the dynamics of markets over time requires information and knowledge, accumulated via experience. Digital players know this is a core competence and are organised to accumulate and exploit knowledge for profit. A number of the systems and values of government make equivalent accumulation more difficult. Specifics include:

- Teams of officials with no sector specific knowledge are assembled for each case. Once investigations take place, the knowledge gathered may dissipate swiftly as teams are disbanded.
- Civil servants move to different posts over time, and personal development profiles do not sufficiently build up sector specific knowledge.
- Knowledge of market dynamics needs to be complimented with knowledge of evidence gathering, assessment, analysis and the critically important litigation skill of case characterization (how to characterize a case and plead it given the fact pattern and chains of evidence available in a way that will be most likely to be understood by a court). Fears of regulatory capture by incumbents or complainants over many years may feed on legitimate concerns, creating impartial administration officials but lacking necessary sector specific knowledge.

The DOJ in the USA has for many years sought to maintain internal teams of litigators who are especially knowledgeable about digital markets. They have regular off the record meetings and calls with industry affected by the abuse of dominance and hence keep up to date. The DOJ also operates a revolving door policy44. This has not happened in the UK or EU in the same way and. UK and EU officials take a highly restrictive approach to the development of a dialogue with market participants: a key learning point for new organisation such as the Digital Markets Unit within the CMA.

## *INFORMATION ASYMMETRY AND QUALITY OF EVIDENCE ISSUES*

All cases whether in administrative process or in court depend on high quality evidence. "Cases" refers to administrative procedures, and competition appeals, as well as civil proceedings in the High Court or CAT.

Civil court claimants are clearly in a more difficult position than those bringing complaints to competition authorities as they do not have access to the investigatory powers vested in competition authorities.

Most cases come down to a small number of highly relevant core bundles of documents and two witness statements or less. Getting to that point, however, takes time and expertise from those on both sides of the dispute as well as active case management by the judge or authority overseeing the case.

Winning cases requires the authorities or private claimants to sift the evidence available and adduce evidence showing abuse, causation and harm to both claimant and to competition as a process. Specific issues here include:

- Proof of the effect on competition may be known by the dominant player whose actions affect many competitors but is not known to each small market participant/competitor.[45]
- Evidence showing likely or actual harm to competition as well as to an individual company or business is legally required by the authorities.
- Dominant digital businesses have market power via, among other things, controlling information – parsimonious provision of evidence in response to enquiries and managing responses to requests for information may also be a core defendant business competence.
- Dominant players are likely to have higher quality evidence of both actions and likely consequences on the markets concerned than the authorities or the broad ranges of markets and parties affected.
- Dominant players affect many different markets.by contrast with actions that may affect many throughout a supply chain and it is in the nature of legal process, to identify issues that are disputed and resolve them. This is done by narrowing down the issues and resolving them carefully. Focusing on consequences on relevant antitrust markets are all inevitably narrow – but since the system forces focus on detail it may miss important industry context. Defendants know this well.

Public authorities have been provided with extensive powers of search, and seizure to address the information asymmetry. Equivalent ability to obtain evidence via disclosure in private enforcement actions must be relevant to the individual claim and is inevitably much more limited to that held by the defendant.

## *INCENTIVES IN LITIGATION*

The Penrose Report's reference to defendants "bogging down" the process and the CAT's warning of *"hypertrophic growth of documentation and evidence, and inordinate duration of proceedings"* and the slow speed of the CMA, reflects a lack of understanding of the system of law and the practical reality of its operation.

Firstly, the authorities appear to operate on the assumption that knowledge is to be solely imparted from the documents without the benefit of business expertise and witness statements from businesspeople involved. It needs to be appreciated that witness statements in civil proceedings are crafted by lawyers from the claimant's perspective and form succinct and coherent evidence: these are not routinely requested from affected businesses in competition cases whether in the UK or EU.

The authorities seem to prefer to request basic data and evidence, as if conducting academic research, without appreciating the value of narrative from a credible source for context and relevance.

Without a dialogue and guidance from affected businesses, understanding how evidence cross-corroborates other evidence and how the market works is inevitably going to take a huge amount of time.[46]

Secondly, all courts and investigative procedures require evidence from defendants which, if the request are not targeted, will mean that relevant evidence is overlooked or missed, while casting a wider net wastes time and resources. Focus on relevance can be hampered by defendants in many ways. Defendants may delay responses to questions, avoid answering fully, answer the precise question asked but not the ones that should have been asked, and limit or delay key information or relevant information.

Thirdly, the importance of how interim relief changes incentives is underappreciated by the authorities and in policy circles. For example:

- An order maintaining the status quo has the beneficial effect of immediately getting the attention of a major digital platform at an early stage in the proceedings. Of the thousands of cases brought against an entity – interim relief requires priority assessment.
- If an order granting interim relief maintains the status quo pending the further investigation, the incentives on the defendant change dramatically. For example, if an interim order freezing the status quo has been issued, from then on any delays are contrary to the defendant's interests. This makes a difference to speed of the defendants' responses (whether in process, in production or resolving questions of relevance of evidence or confidentiality or other matters that might, in the words of the Penrose Report, be used to "bog down" the process)
- It is clearly vital that the authorities and the Government rapidly reappraise their position on the use of interim measures.

## *EXPERIENCE, CAPABILITY, AND CAPACITY IN GOVERNMENT TO TAKE ENFORCEMENT ACTIONS*

As described above, the current system that has been designated as responsible for enforcement has evolved slowly over time. It is based on the EU system of notification and administrative oversight.

That system was designed to obtain evidence of market activity in the form of agreements that might distort competition whether, for example in distribution, specialisation or technology licencing, or joint venturing in all of its forms under a notification system by which agreements were notified for evaluation to the EU Commission.

Abuses of dominance were recognised in the 1970's as capable of arising from mergers.[47] For example, a company can do a "merger to monopoly" or acquire a business that supplies an essential input to a range of competitors that is vital for its competitors thereby affecting competition. The notification system was abandoned at EU level and was never put in place at national level, save for merger control.

Aside from notification of mergers the current enforcement system under general competition law can be thought of as a "catch me if you can" system. This is out of date and needs to change.

Merger control operates under a notification regime and is a clear example of ex ante control- where the abuse of dominance is prevented before it can arise48. It was also put in place to prevent abuse of dominance – and avoid the difficulty of intervening after the fact once the eggs have been scrambled.

The major technology platforms all benefit from economies of scale and scope, network externalities, low variable and very high fixed costs and barriers to entry. They thus operate in ways that others depend on and market foreclosure is a major risk. The consequences of their actions may affect many businesses very quickly, and the structure and functioning of the competition system may be harmed beyond repair by abuse if not "nipped in the bud" at an early stage.

A true ex ante approach to enforcement against technology platforms needs to address these basic facts. These economic characteristics raise different considerations for enforcement than general enforcement of competition law toward other parts of the economy. They affect:

- Internal governance and management processes; EU and UK level government administrations operate in a traditional hierarchical model with multiple sign-offs and internal review and checking processes. These all take time and are not designed for swift decision making.
- Internal technology systems and working practices; it is often the case that governmental authorities and agencies have limited technology refresh cycles and operate cost control systems that do not prioritize or need to adopt the latest technology adapted to litigation requirements.
- Budgets, costs of employment and capital expenditure. Government is not created for litigation. As such, government enforcers are likely to be at a massive disadvantage when compared with the technology available to the Trillion-dollar market capitalization tech platforms that with no exaggeration can be described as the wealthiest companies known in the history of mankind.
- Each has almost unlimited technology, resources, and budgets. These can be deployed to maximum effect both to use the latest technology to be faster, more effective and more in control of issues, evidence and case strengths and weaknesses, and to hire the most skilled and experienced lawyers and economists from the private sector. Enforcement by government officials is a battle in which there is likely to be no equality of arms – but not simply in the ability to hire expensive help- in the creation and formulation of cases, and the building of fortifications against the next battle and the ability to invest and to prevent the battle after that one.
- Availability and levels and type of experience of people employed. Government and government authorities are administrative agencies typically existing with a remit to manage important activities in the economy for the public good. Enforcement capability, litigation skill and experience should not be confused with the capability skill and experience needed to formulate policy or prepare and propose legislation.

- Decisions concerning prioritisation, relevance and importance of a given matter. The management of the provision of public services that are never changing should not be compared with the need to address public interests in the ever-changing technology sector.

Incremental change will not deliver effective enforcement against technology platforms. It would be a mistake to think it would be.

## 3. *INCONSISTENCY OF LAW AND POLICY TOWARD PUBLIC AND PRIVATE ENFORCEMENT. THE ATTORNEY GENERAL SYSTEM AND THREE BASIC ISSUES ANONYMITY, EVIDENCE AND MONEY*

Complainants in public proceedings, or private litigants, need to see a benefit from bringing a claim and, in appropriate cases, be protected from the risks of adverse consequences when presenting a case. They also need to have the evidence and the money to fund their cases.

Businesses affected may take "stand alone" actions via the courts, including the CAT. Courts are public by default. Stand-alone cases can thus only be brought by businesses willing to risk the consequences of retaliation from the dominant player. They also have to have enough of the relevant evidence needed to bring a case and can afford to do so. They are thus rare.

The core differences between making a complaint and bringing a court action are:

- The public authority's powers of enquiry vs court disclosure process;
- Broader evidence available to the authority from wider numbers of respondents than in an individual case against the defendant; and
- Much of the evidence gathering is funded via the public authority using public funds, with no adverse risks of paying the defendant's costs and need for a cross undertaking in damages in obtaining an injunction from a court.

Whether to take a case to an authority depends on the following:

- Whether the authority is willing to prioritize the case. The prioritisation principles currently operate more as a barrier than a gate.
- Most abuse of dominance cases are started by a complaint to an authority[49]. In the UK the authorities receive many times more cases than they investigate. Thousands of cases were filed with the CMA during the 2020. This is an unusual year, and the shortages caused by pandemic raised the number of claims.[50] Nevertheless, the number of enforcement actions taken each year is usually in single figures, representing a small fraction of the number of complaints and harms from abuse.[51]

- Risk of retaliation. Complainants risk retaliation from defendants, particularly the digital platforms, on which they depend for their business. Contemplating action involves considering the total loss of business in many cases. For this reason, complaints are fewer than the number of companies suffering harm. Complainants in competition cases need to be encouraged to provide evidence in the wider public interest, to be able to trust the authority and to be afforded protection from disclosure of their identity by the authority[52].
- Standard practice in US Federal and State Attorney General Cases is to seek evidence from those affected on a confidential basis and to ensure that the identity of those providing evidence is kept off the record. This provides the basis on which the authority then obtains evidence from the perpetrator via their powers of investigation (such as Civil Investigatory Demands), and a range of other evidence gathering powers, so that evidence from internal defendant documents are typically relied on as best evidence proving infringement.

  In mature, court-based, enforcement systems in the USA, a dialogue and a trusted relationship is created between those affected and the relevant litigation teams working for authorities. These teams will establish lines of enquiry, undertake case characterization, and support the identification of suitable and credible expert witnesses that may eventually be on the record in proceedings. This does not happen in public enforcement in the UK and the EU; those with a similar interest in ensuring that the law is properly enforced in the public interest, which should align closely with the position of the public authorities have described the experience as a one-way street.

All mature systems (in the EU, UK and the USA) recognise that the public interest may better be served on behalf of many businesses if a public authority is provided with powers to investigate and take appropriate action[53].

In the EU, the public system is notoriously slow and addressed, if at all, via the EU Commission. Follow-on damages actions depend on EU enforcement decisions – and are consequently few and far between.

The UK is currently primarily an EU-like jurisdiction, with no public authority organised on the same basis as the Federal DOJ or States Attorney's General. Private "stand alone" civil claims are also rare and actions typically follow-on from public enforcement decisions. There were no UK public enforcement actions against Google, Amazon, Apple, Facebook or Microsoft (the main digital platforms) over the past 20 years and consequently no private follow-on cases from adversely affected UK businesses.

The common law recognition that certain public interest cases require public interest enforcement involves entrusting court action to a public, (or in some cases licenced private) Attorney General to safeguard the public interest with the support of affected businesses. This could be considered further in the UK. This may help to address the issue of cases being brought to address public interest.

The Attorney General has a public interest function.[54] *Halsbury's Laws* describes the role of the AG as: *"represent[ing] the public as a whole in insisting that the law shall be observed. The court therefore has jurisdiction to grant an injunction at the suit of the Attorney General in any case where there has been a breach of statutory duty, or where a statutory offence has been committed, for which no other remedy is adequate."*[55]

Lord Wilberforce in Gouriet v AG [1978] AC 435 claimed that:

*"In all these matters the Attorney-General's role is to* ***seek a just balance between often conflicting public interests****. … Thus Parliament has again and again recognised his particular role in this sphere of seeking to balance the public interest in matters of the character which have been mentioned."*

Annex A to a 2007 Consultation on the Role of the Attorney General lists the powers and duties that the Attorney General holds, which includes, inter alia:

- power to represent the interests of charities in certain proceedings; and
- power to bring or intervene in legal proceedings in the public interest (e.g. to seek injunctions restraining publication of sensitive material where this is contrary to the public interest).[56]

The Lord Chancellor in London County Council v AG [1902] AC 165 also held that:

*"In a case where as a part of his public duty he has a right to intervene … the determination of the question whether it is a* ***proper case for the Attorney-General to proceed in****, is a matter entirely beyond the jurisdiction of this or any other Court. It is a* ***question which the law of this country has made to reside exclusively in the Attorney-General.****"*

In 2016, Jeremy Wright, who held the office of AG at the time, said that his role:[57]

*"also specifically requires me, in certain cases, to take responsibility for ensuring that the public interest is taken into account when deciding whether to bring or discontinue prosecutions.*

*The unifying characteristic of all these functions is that they are a 'backstop' to prevent or remedy injustice in or pressures on other parts of the justice system."*

Additionally:

*"Another function is the appointment of an advocate to the Court; or amicus curiae. So if a novel and important point of law arises in proceedings in which the Court feels that it would benefit from the assistance of argument from independent Counsel, then it is my office that will consider whether independent Counsel should be appointed as an advocate to the Court. These functions are interesting because they frequently involve judges coming directly to me asking for safeguards to the trial process; an unusual intersection between the judiciary and the executive."*

This evidence asserts that the Attorney General reserves the right to decide whether an intervention in any case is justified, granting them sole discretion. As such, it is possible that the Attorney General could intervene in a public interest case such as those arising in abuse of dominance cases in competition law, alongside its US cousins[58].

It may also be taken where the issues raised go beyond purely competition cases and such as those which raise cross-cutting public policy issues where the abuse raises issues for other laws – a competition authority will always face defences that its remit is restricted if it takes cases that deal with privacy or security or plurality of the media or environmental protection as well as competition law. An attorney general can take the case under multiple laws and see that all are properly enforced.

Where large numbers of small businesses are affected, each having limited funds and bearing significant risks of retaliation, which is arguably the most important type of case from a public policy perspective, private actions are very rare. Most businesses are highly sensitive to the risks of retaliation, have limited evidence (of harm, to them rather than competition more generally) and have limited funds.

Smaller businesses lack funds and have limited contingency and executive time to devote to any form of dispute. As a consequence, businesses affected by abuse are typically advised by their lawyers to seek redress from public authorities first, and then to take a follow-on action if a public authority prioritizes the case, investigates, and makes a finding of infringement.

## *4. INSUFFICIENT USE OF INTERIM MEASURES AND INTERIM INJUNCTIONS*

As described above, interim relief in a court process or in gathering evidence from dominant players alters their incentives toward compliance with the process. In simple terms, it also provides the authority or court with important leverage over the business concerned and achieves both high levels of attention and a reversal of the incentive toward non-compliance. While, technically, interim relief is not a final order, but only a temporary order pending full investigation, it cannot resolve the case as a final matter, but it can help ensure that the relevant evidence is disclosed, and the matter resolved more swiftly than might otherwise be the case.

Interim injunctions are not normally as complex as a final trial, and do not require as much evidence; nor do courts take a long time to reach decisions on applications for injunctions whether on an interim or final basis. Applications for interim injunctions are normally dealt with in days, if not immediately. An application notice needs to be created detailing the order the applicant is seeking, the reasons for the order, and the date and time of a requested hearing. The application is usually accompanied by witness evidence or a statement of truth from a solicitor, or both.

Interim injunctions routinely take a matter of days to assemble and can be made either with or without

notice and with or without the other side attending a hearing. They may prevent harm from occurring, typically for a temporary period by restraining the behaviour of the other party and freezing the position pending the full investigation of the case. This preserves the status quo pending the trial, and prevents the matter becoming a fait accompli.

Breach of competition law is a form of civil wrong, also known as a tort. Torts are routinely addressed and prevented (in thousands of cases every year), and disputes resolved by way of private court action. Courts are familiar with and adept at dealing with interim injunctions, and the rules for awarding interim injunctions are well known. It is vital to appreciate that they are routinely issued by the courts in civil cases generally, but used extremely rarely by the authorities and, in abuse of dominance cases, by private litigants in court proceedings[59].

| JURISDICTION | NUMBER OF INTERIM MEASURES IMPOSED |
|---|---|
| United Kingdom | 2[60] |
| European Commission (EU) | 9[61] |
| France | 169 |
| Italy | 2 cases in 2020 alone[62] |

*Figure 4: Table showing number of interim injunctions issued by competition authorities.*

The reasons that interim relief is little used by the authorities appears to be based on limited appreciation of the benefits, limited experience of general litigation, and limited enforcement activity over many years.

The law and practice on interim relief in competition cases is further set out in Appendix II. There are three basic guidelines used by the courts when assessing whether an interim order will be issued[63]:

- Is there a serious issue to be tried?
- Are damages likely to be an adequate remedy for the claimant or (via the cross-undertaking in damages) for the respondent?
- If so, what is the balance of convenience?

1. Each point is examined in turn:

Is there a serious issue to be tried? This means:

*"The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts*

*of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.'* – Per Lord Diplock, American Cyanamid at 407H

In the circumstances where the public authority or the courts are dealing with a dominant digital platform, the market is already weakened and not functioning as it could. The need for intervention to secure compliance with the duties imposed by law on the dominant platform are hence heightened. The usual risks of intervention in competitive markets where the authorities might intervene and cause more harm than good, thereby creating a situation which distorts the market that would otherwise sort itself out, are not present.

Use of the interim relief powers does not involve changing the burden of proof or other changes to the law that have been canvassed in various reports[64], but does mean that the claimant or authority does not need to adduce as much evidence at the threshold stage as is needed on full investigation at trial.

2. Are damages an adequate remedy?

This part of the test is to be considered as follows:

a. Will damages be an adequate remedy for the applicant if he succeeds at trial? If so, then interim injunctive relief will not normally be granted.
b. If damages would not be an adequate remedy for the claimant, will the applicant's cross-undertaking in damages provide adequate protection for the respondent if the court were to grant interim injunctive relief which, following trial, proves to have been wrongly granted?
c. If not, that points against the grant of interim relief.

The important take away on this point is that the standard court process presupposes a broad equivalence of bargaining position and that the applicant for the injunction can afford to give an undertaking that it will pay for the other party's losses if the injunction is ill founded on full investigation. In a David vs Goliath situation, such as a case against a digital platform, the ordinary rules can render relief virtually impossible.

For example, Google makes approximately $60 bn a quarter. Where Google is proposing browser changes that would wipe out that company's business, or where Google is making anticompetitive changes to its search engine that would promote its rivals or Google's own competing products, a company may seek an injunction to prevent those change staking place. In such a case, if a cross undertaking in damages is required to compensate Google for potentially lost revenue is at such a high level as to be imposing a potential multibillion dollar liability on the applicant that would be impossible to fulfil. Smaller businesses thus are unlikely to be able to afford to satisfy the cross undertaking in damages in cases against a dominant digital platform, and the risk that the court would require it as the price of an interim injunction represents a powerful disincentive to the making of an application.

Given that dominance weakens the competitive market, and since such platforms should be complying with the legal duties imposed on dominant players, there is a compelling case that if justice is to be served in a situation of dominance and dependency[65] it would best be served if interim injunctions could more readily be issued without the cross undertaking in damages where this is appropriate.

This has in part been recognised through CAT judges being able, in their discretion, not to require a cross undertaking. However, the prospect that it may be ordered is sufficient disincentive to the making of many applications and would allow a defendant to make its case that a cross undertaking should issue and appeal any determination to the contrary. This eventually needs to be dispensed with for justice to be served.

3. Should an injunction be granted on the balance of convenience?

If there is doubt as to the adequacy of damages in applying the above tests, the court will consider the balance of convenience more generally. It will consider the particular factual circumstances in which the injunction is sought. These are sometimes referred to in case law as "special factors". Where such factors remain evenly balanced, it is prudent to preserve the "status quo".

## *USE OF INJUNCTIONS*

The reasons for relatively infrequent use of interim injunctions in the private court process for competition, and in particular abuse of dominance, cases include:

- **Knowledge** of anticompetitive abuses before they take place is unusual when dealing with digital platforms that take action without seeking permission. They are from a world where the idea of disrupting markets and a strategy of "move fast and break things" are highly rewarded.
- **Damages could be an adequate remedy** in some cases, and the major platforms are likely to be able to show that they are financially able to pay them. This said, damage to reputation and any other type of harm that is hard to quantify in damages can be used as the basis of seeking an interim injunction, as was sought in Unlock'd vs Google. That case is an example of the issues facing the David vs Goliath claimant - the court did not move swiftly and stayed the claimant's application for disclosure shortly before the claimant filed for insolvency.
- **Anonymity of the applicant.** In court cases the default setting is one of open justice[66]. This is a fine and important principle, but one that acts in many instances as a bias in favour of dominant entities and against the interests of justice in abuse of dominance cases. Unless anonymity of the applicant can be guaranteed, the applicant's risk of retaliation is often too great to contemplate making the application for an injunction. Where a small business is dependent on a tech platform, the risk of the loss of the entire business is a risk that is simply too high.

- **Evidence.** The courts do not require a high hurdle and there is no need to test the evidence at the threshold stage, so a single small firm may have enough evidence to obtain an injunction to preserve the status quo pending disclosure. However, this is unlikely to be the case where a dominant player abuses its position to the detriment of often large numbers of market players who are aware only about the harm done individually to themselves. The current disclosure system operates, in the main, after pleadings and assumes that those bringing cases have knowledge of the harms done to themselves and the harm done to competition. There is currently no mechanism through which facts and evidence of harm to others and harm to competition can routinely be known by individual firms at the threshold stage sufficient to ground an injunction application. This is because prelitigation disclosure is rarely provided by defendants, and is effectively optional. The timing of the usual application for disclosure, where evidence of harm to the market may be known to the defence, is not disclosed until after the pleadings, often late in the process, usually some considerable time after proceedings have been issued. This means that the application for interim relief has to be made on the limited evidence known only to the one of many that have been harmed. This makes injustice toward those abused by dominant players a serious problem in many cases.
- **Disclosure**, not enquiry. A private court action is limited by the evidence available to the claimant and obtainable in disclosure. Moreover, the High Court process and practice limits the extent of the disclosure from the defendant and its availability to the claimant in abuse of dominance cases[67]. In no case brought by an individual claimant will evidence of harm to others be readily available unless it is being brought as test case or a collective action of some sort. To date, these types of case have not be brought for abuses of dominance in the UK[68]. See further Appendix II which provides a more detailed explanation of the practice in granting interim injunctions in competition cases.
- **Money**. The cross undertaking in damages in a case against a big tech platform will often raise the stakes to an impossibly high level.

There is scope for revisiting some of the principles in certain cases. For example, Sachs LJ formulated and explained the question of whether damages would be an adequate remedy in Evans Marshall & Co. v Berto/a SA [1973] 1 W.L.R. 349 as follows:

*"The standard question in relation to the grant of an injunction, "Are damages an adequate remedy?", might perhaps, in the light of the authorities of recent years, be rewritten: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?"*

5. Penal Damages for compliance with the Rule of Law

In line with the theme of altering the incentives toward compliance, we outline below how the sanctions for breach might revert to their common law position now that the UK has left the EU.

The use of exemplary damages to ensure that the law is respected and observed is a feature of the common law and available in certain rare cases. One of those cases would be where an abuser calculates that it can get away with the abuse, break the law, pay the fine and continue to make profits. This offends the elementary principle that the lawbreaker is able to profit from its own wrongdoing.

It was in the past available under English law to ensure observance with the Rule of Law in rare cases including for abuse of dominance. There are two CAT cases where it was considered and one in which it was awarded.[69]

However, the availability of exemplary damages was changed by the EU's Damages Directive for reasons of cross border harmonisation, under lobbying pressure from US firms. UK law was changed in line with EU obligations. This could now be changed back to the previous common law position and, thereby increase compliance incentives.

A not entirely hypothetical example is provided by way of illustration of the importance of penal damages being available to secure compliance with the rule of law:

Dominant Company A supplies essential inputs that all downstream businesses rely on, including its own downstream business. There are 10 competitors in the downstream business, Company B, is one of these competitors. It uses the inputs, as do all of its downstream competitors. Company A discriminates in the supply of inputs in favour of its own downstream business, severely affecting Company B and the 9 other competitors in the downstream business. Company B takes action and is paid damages for its loss. Company A continues to routinely abuse its dominant position in favour of its own business; all 9 other players do not take action, suffering the consequences with their businesses dwindling. Competition does not deliver benefits for consumers. Company A continues to make money in breach of the law and pay off claimants. The law is not observed as the economic calculation is to pay Company B's loss. Any fine is subject to a limit as a percentage of turnover, typically limited to 10%. Breach of the law pays the dominant company to continue in breach. The common law jurisdiction of the courts sought to ensure that wrongdoers do not profit from their own wrongdoing and strip the defendant of the profits gained illegally in a case such as this.

## 6. Proposals

The UK competition authorities and Attorney General's office charged with taking public interest cases could learn from the US Attorney General's process and take public interest cases, working more closely with claimants in accordance with US practice.

The UK could adopt the US practice of appointing a Deputy Assistant Attorney General responsible for antitrust enforcement.

While officials have criticized the existing system[70] they have not examined the issues causing delay or proposed reform of existing laws. What is proposed is a new Digital Markets Unit inside the CMA which is hoped to provide a swifter administrative mechanism[71]. In the meantime, these issues can be addressed in management processes adopted by the DMU - which needs to be staffed with people with the appropriate level of experience and expertise.

Here the UK could do something that could be practical and effective, building on the UK's historical reputation as a leader in the Rule of Law.

Since many reports and policy statements have identified the problem very clearly, there is little further need to establish that there is a "need for speed". Actions could now include:

- Identity protection. In abuse of dominance cases the law could be changed to ensure that the policy of protecting the identity of a claimant business in competition proceedings before the public authorities be reflected in private proceedings by enabling the courts in abuse of dominance cases to protect and treat as confidential the identity of the claimant. The policy toward enforcement of the current law by the authorities is one which does already allow confidential claimant complaints to be made[72].

  The policy recognises the information asymmetries, the need for information to be provided to the authorities and the risk of retaliation, as well as the wider benefit of enforcement felt by all those similarly situated and harmed by abuse or potential abuse. A similar policy could be applied to court application in David vs Goliath situations. Again, the enforcement of the law for all would better be achieved if those directly affected could make their case, and abuse could be restrained or stopped before more damage is done. Similarly, the authority is aware of the identity of a complainant, in a way that a court could be aware – but the identity of the applicant could be protected.

  At present, the system of enforcement taken as a whole suffers from the fact that there is a public intermediary. If private actions could be approached on a similar basis, they would have the effect of enabling greater enforcement – without the need to satisfy public authority prioritisation principles, or be subject to public body resource constraints, public body information asymmetries or knowledge and expertise gaps. Maybe there is a case to be made about how a competitive market can more readily fulfil the needs of private litigants in the public interest at less cost to the public purse? Confidentiality rings are routinely used in competition cases, but the claimant could be granted protected status where it can show that it risks retaliation, in similar circumstances to those where such protection is made available by EU and UK competition authorities. One can see that this would pose difficulties in damages claims, but there appears to be scope for greater protection in certain injunction cases.

- Cross undertaking in damages. In abuse of dominance cases, in an application for interim or final injunction, the law could require that the court give serious consideration to not requiring a cross undertaking in damages in appropriate circumstances.
- Flexible disclosure. In abuse of dominance cases, the courts could be required to adopt a flexible approach enabling the claimant to seek evidence by enquiry at an early stage and follow up with applications for further disclosure. They might also recognise that the burden to the defendant is often immaterial.
- Damages/ exemplary damages; the law that was changed to implement the EU Damages Directive could be reversed and strengthened to ensure that the English Courts can, where appropriate, impose penal or exemplary damages to secure compliance with the rule of law.

# APPENDIX I

## INTERIM INJUNCTIONS IN COMPETITION CASES IN THE UK

Both the High Court and the CAT may grant an interim injunction, i.e., an order prohibiting a person from doing something (prohibitory injunction) or requiring a person to do something (mandatory injunction). As is set out below, the substantive legal test for the granting of an injunction is the same in both the High Court and the CAT, but there are important procedural differences. The purpose of an interim injunction is to improve the chances of the court being able to deliver justice after a determination of the case on the merits at trial.

### *HIGH COURT: PROCEDURE*

The granting of an interim injunction is governed by the Civil Procedure Rules (CPR) Part 25. Pursuant to CPR 25.1(a), the court may grant an interim injunction. It may do so whether or not there has been a claim for a final injunction: CPR 25.1(4). It may do so before proceedings have been started (CPR 25.2(1)(a)), but only if the matter is urgent or it is otherwise desirable to do so in the interests of justice (CPR 25.2(2)(b)); this will be in exceptional cases only. If an interim injunction is granted before a claim is commenced, the court should give directions requiring a claim to be commenced: CPR 25.2(3) and Practice Direction 25A – Interim Injunctions ("**PD25A**"), para. 5.1(5).

The court may grant an interim injunction if it appears to it be 'just and reasonable to do so': Senior Courts Act 1981, s.37(1). The order by which an interim injunction is granted may be unconditional or on such terms and conditions as the court thinks just: s.37(2). As a general rule, a court is less likely to grant a mandatory injunction (as it has a greater risk of irremediable prejudice to the respondent) than a prohibitory injunction (which merely requires the respondent to refrain from taking or continuing with a course of conduct).

An application for an interim injunction must comply with CPR 23. An application must be supported by evidence: CPR 25.3(2). This evidence may be contained in a witness statement, the application notice or a claim form, in each case verified by a statement of truth: PD 25A, para. 3.2. This evidence must set out the facts on which the applicant relies for the claim being made against the respondent, including all material facts of which the court should be aware: PD 25A, para, 3.3.

An application will generally be made 'on notice' (i.e. by notice to the respondent), but in some, rare circumstances an application may be made without notice (e.g. urgency or because giving notice may provide the respondent with an opportunity act in a manner that would defeat the purpose of the application): CPR 25.3(1). The general principle is that an interim injunction should be granted only after the court has heard both sides. A respondent may give undertakings in lieu of an injunction.

Where an interim injunction is granted, the applicant will be required to provide a cross-undertaking in damages, in respect of any losses that may be suffered by the respondent as a result of the injunction, should the court, at final trial, determine that an interim injunction should not have been granted: PD 25A, para, 5.1(1).

## *COMPETITION APPEAL TRIBUNAL: PROCEDURE*

The CAT also has jurisdiction to make interim injunctions. An injunction made by the CAT has the same status as injunction granted by the High Court and is enforceable as if it were an injunction granted by the High Court: CA 1998, s.47D(1).

The procedure for an interim injunction (or 'interim remedy') is governed by the CAT Rules, rr 67 to 69: see also CAT Guide to Proceedings, 5.119 to 5.138. It should be made in a separate document to the Claim Form: CAT Guide to Proceedings, 5.124.

The grant of an interim remedy will ordinarily be made 'on notice' (i.e. following notice to the respondent and a contested hearing), but may be made without notice if there are good reasons to do so (r.69(1)). Where there are grounds for an urgent application without notice (which the CAT considers will be in wholly exceptional circumstances), informal notice (by email) should still be given to the respondent and the injunction will apply only until a full hearing of all the parties: CAT Guide to Proceedings, 5.134 to 5.136.

An application for an interim remedy must be supported by evidence setting out why the interim injunction should be granted (r.69(2) and (3)). A draft order should also be provided, setting out the relief (i.e. what the respondent must not do) and the cross-undertaking in damages: CAT Guide to Proceedings, 5.129.

The CAT may grant an interim or final injunction if it is just and convenient to do so: r.67(2). An injunction may be granted either unconditionally or on such terms and conditions as the CAT thinks just: r.67(3).

An interim injunction may be granted at any time, including before proceedings are started (r.68(1)(a)), but only if the matter is urgent or it is otherwise necessary to do so in the interests of justice (r.68(3)).

Ordinarily, the CAT will require the claimant to give a cross-undertaking in damages and to submit evidence of its ability to pay under such a cross-undertaking: r.69(3)(a). If the claimant does not have sufficient assets in the jurisdiction, it may be required to provide security: CAT Guide to Proceedings, 5.132. However, in a case in which a fast-track designation has been made, the CAT may order that no cross-undertaking is required or that it be subject to a cap (r.68(5)).

## *SUBSTANTIVE RULES FOR GRANTING AN INTERIM INJUNCTION AND HIGH COURT AND CAT PRACTICE IN COMPETITION CASES*

### *Principles for granting an interim injunction*

The High Court and CAT will apply the same substantive criteria in determining whether to grant an interim injunction, in accordance with the principles laid down in American Cyanamid v Ethicon Limited (No 1) [1975] AC 396 and subsequent cases (these are summarised in the CAT Guide to Proceedings, 5.126). These principles are the following:

a. there is a serious issue to be tried: i.e. the applicant has to show a real prospect of success (although this does not require an in-depth analysis of the merits of the case): this is similar to the test for summary judgment under CPR 24, i.e. that there is some prospect (chance) of success which is 'real', i.e. not false, fanciful or imaginary and is more than merely arguable (it is not necessary for the applicant to show that it will succeed at trial and the 'real prospect of success' test may be satisfied even if success at trial is considered to be improbable);
b. damages (at final trial) would be an inadequate remedy for the applicant;
c. if an injunction were granted, compensation under the applicant's cross-undertaking in damages would be an adequate remedy for the respondent in the event that it succeeds at trial and it has suffered loss as a result of compliance with the (incorrectly granted) interim injunction;
d. the balance of convenience is in favour of the grant of an injunction (or which carries the least risk of injustice as between the parties); and
e. whether there are any special factors applicable to the case, e.g., whether an interim injunction would effectively determine the case or have an effect on third parties.

In *National Commercial Bank Jamaica Limited v Olint Corpn (Practice Note)* [2009] UKPC, Lord Hoffman, giving judgment of the Privy Council, described the role of the court and the purpose of an interim injunction thus:

"The purpose of [an interim] injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result." (at [16])

"The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other." (at [17])

"What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low, that is to say, that the court will feel… 'a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted.'" (at [19])

## *HIGH COURT PRACTICE IN GRANTING INTERIM INJUNCTIONS IN COMPETITION CASES*

The High Court has considered these principles in several competition cases.

*Dahabshiil Transfer Services Limited v Barclays Bank plc* [2013] EWHC 3379 (Ch) concerned a withdrawal of banking services by Barclays from a moneytransfer business. Dahabshiil alleged that this was an abuse of a dominant position. Judgment on the application was given within seven weeks of Dahabshiil issuing its claim form and applying for an interim injunction. The court granted an interim injunction, requiring Barclays to continue supplying services to Dahabshiil. It is notable that the application was supported by expert economic evidence on market definition and other witness and documentary evidence on the (asserted) relevant markets involved and Barclays' position on those (asserted) markets. (Barclays also submitted economic evidence on these matters.) The court was satisfied that:

a. there was a triable issue as to whether Barclays was dominant on the markets pleaded by the applicants (at [50] to [73]);
b. the issue of abuse could be considered only at trial, so could not be dismissed at this stage (at [74]): i.e. there was a triable issue on abuse;
c. Barclays' defence of objective justification could be considered only at trial (at [74] and [75]), so the court could not assume it would succeed, such that the claim could not be dismissed at this stage on the basis that Barclays' conduct was objectively justified and not abusive (at [75]); and
d. damages would not be an adequate remedy at trial for Dahabshiil, as there was a far greater danger of irreparable damage to Dahabshiil if an injunction were not granted (as it would likely have ceased

trading if it could not receive banking services from Barclays) than to Barclays (which would merely be required to continue providing banking services and would be protected from any losses incurred by a cross-undertaking in damages), such that the balance of convenience was in favour of the grant of an injunction (at [76]).

An interim injunction was also granted in *Adidas-Salomon AG v Draper and others* [2006] EWHC 1318 (Ch). This concerned rules for professional tennis regulating the clothing that may be worn by players at the four 'Grand Slam' tournaments. Adidas's case was that the rules prevented players from wearing clothing bearing its 'three stripes' logo and that this infringed Articles 81 and 81 EC (now Articles 101 and 102 TFEU) by affecting sales of its clothing to retailers and consumers. It sought an interim injunction restraining implementation of the relevant rules, pending trial, at the Wimbledon, US Open, Australian and French Open tournaments. The injunctions were granted on the following basis:

a. as the court had refused applications to strike out Adidas's case, as it had a real prospect of success under Article 81 (see [49]) and Article 82 (see [53]), there was clearly a triable issue;
b. damages would not be an adequate remedy at trial for Adidas: sales of clothing are uncertain and vary from period to period, such that damages could not readily be quantified at trial (at [68] and [69]);
c. even though the defendants and other manufacturers might not be fully compensated by the cross-undertakings offered by Adidas (at [70] and [71]), the balance of convenience was in favour of maintaining the status quo prevailing before the dispute (which was what was sought by Adidas in applying for an interim injunction) (at [72] to [78]);
d. an interim injunction would not effectively determine the matter (without a full trial on the merits) as a full trial would take place unless settlement was reached first (at [82]);[73] and
e. the injunction could cover the US Open (which would be before trial), as implementation of the rules challenged by Adidas in the US could affect its clothing sales in the EU, so having effects on competition within the EU (at [83] to [85]).

Interim injunctions have also been granted in cases where, absent the injunction, the claimants would have been threatened with complete loss of their businesses: e.g., *Cutsforth v Mansfield Inns* [1986] 1 All ER 577 and *Holleran v Thwaites* [1989] 2 CMLR 1.

In *Arriva The Shires v London Luton Airport Operations* (2013, unreported), an interim injunction was refused, despite Arriva having a realistic prospect of success at trial in proving that LLOA had abused a dominant position (which was indeed borne out, when it succeeded at trial), for a number of reasons, including that:

a. there was no evidence Arriva would, due to the abuse, have been forced out of the market (at most, it asserted that the viability of its service would have been threatened);
b. damages would have been an adequate remedy at trial;

c. an injunction (which would have required LLOA to cease implementing a contract which gave another operator, National Express, the exclusive right to operate a coach service from the airport) would have caused losses to National Express; and
d. there were a variety of practical issues inherent in granting the relief sought, i.e. in granting on-going access to LLOA's bus station (which was a remedy that it would not in any event have been possible for the court to have granted on a permanent basis if Arriva were to have succeeded at trial).

An injunction was also refused in a Scottish case raising similar issues, Arriva Scotland West Limited v Glasgow Airport Limited [2011] CSOH 69. Although the Court of Session accepted that Arriva had an arguable case under the Chapter II prohibition (at [15]), this raised complex issues of fact and law that could not be determined in an application for an interim interdict[74] and Arriva's case was not "compelling" and so could not be determined at an interlocutory stage (at [16]). In addition, the balance of convenience (although finely balanced) was not satisfied, in particular given the possible effects of an interim interdict on the provision of bus services at the airport and the impact on other operators (at [18] and [21]).

Injunctions have been refused in other cases. In Chemistree Homecare Limited v Abbviecc [2013] EWCA Civ 1338, the Court of Appeal upheld a refusal to grant an interim injunction (requiring the defendant to continue supplies to the claimant) in a case brought under Article 102. The High Court had refused an injunction inter alia because there was no triable case as to either dominance or abuse (the claimant's case being based on mere assertion and unsupported by clear evidence). This was upheld on appeal (at [45] and [47]; at [48], the Court of Appeal considered the claimant's case to be "based on evidentially supported theory" and it had not made good its assertions). In Intecare Direct Limited v Pfizer Limited [2010] EWHC 600 (Ch), a mandatory injunction (requiring Pfizer to continue supplies) was refused because: the claimant had failed to establish a 'high degree of assurance' that it would succeed at trial (at 50]) (its likelihood of success was "low" (at [66]); any loss suffered by it was financial and could be compensated in damages (at [57]); and Pfizer's undertaking to undertake some supplies reduced the risk of such loss, as Intecare would not be forced out of the market (at [55] to [57]).

## *CAT PRACTICE IN GRANTING INTERIM INJUNCTIONS*

In practice, there have been very few applications for an interim injunction and none has been granted. The CAT has, however, listed the hearing of an application for the grant of an interim injunction within a short period after the application is filed with the CAT Registry, demonstrating that it will hear such applications promptly.

In *NCRQ Limited v Institution of Occupational Safety and Health*, the CAT ordered (by consent) that the application for an interim injunction would be heard by the CAT after both parties had filed and served evidence and skeleton arguments. A time estimate of one day was made for the hearing, which was

scheduled for approximately four weeks after the claimant had made its application for an interim injunction. In the event, the case settled before this hearing. In *Westpoint Group Trading Limited and others v XL Farmcare UK Limited and others*, a hearing was listed for 17 days after the application was filed, but the hearing was stayed to permit mediation to take place (with agreement between the parties on certain steps being taken by them, which would appear to relate to resolving the matters giving rise to the application for an interim injunction), as a result of which the case subsequently settled.

In *UKRS Training Limited v NSAR Limited*, it would appear (in claim based upon the Chapter II prohibition), that the defendant gave an undertaking as its conduct[75] (pending resolution of a preliminary issue as to whether the defendant was an 'undertaking' and thus subject to competition law), such that it was not necessary for the CAT to hear an application for an interim injunction. The CAT did, however, require the claimant to give a cross-undertaking in damages (see Order of 21 July 2016).[76]

In *Unlockd vs Google*, the High Court transferred to the CAT the competition issues arising in the case, directing an expedited trial of the preliminary issues of abuse and objective justification, on the assumption that Google is dominant on the relevant markets. The High Court had already granted Unlockd Ltd an interim injunction against Google to prevent the latter withdrawing or suspending services used by the app for the delivery of advertisements on mobile telephones. The claim was withdrawn by Unlockd after it went into administration and was unable to obtain third party funding.

# ENDNOTES

1 For example, The Penrose Report, '*Power to the people*' (February 2021); The Furman Review, 'Unlocking digital competition, Report of the Digital Competition Expert Panel' (March 2019); Tim Cowen and Phillip Blond, 'Technopoly and what to do about it: Reform, Redress and Regulation' (Res Publica, June 2018). See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3992591

2 See e.g. Concentration and Competition: evidence from Europe and implications for policy by Koltay, Lorincz, and Valetti 23 2021. The data shows moderately increasing average industry concentration over the last two decades, a considerably increasing proportion of high concentration industries, and an overall tendency towards oligopolistic structure. Estimates of aggregate profitability also show a sustained increase over the recent decades coupled with decreasing or stagnating investment rates. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3992591

3 See CMA report Online Markets and Digital Advertising Market Report 1 July 2020 para 13, 4.57, 6.46,

4 See fn 1 extensivley referenced in *"Technopoly and what to do about it Res Publica."*

5 Increasing profitability can be a sign of business improvement. At single firm level the better, faster, more innovative business succeeds where the less effective, efficient, or innovative competitors fall behind. In a competition where the race is run over many years, leaders in some years become followers in others. Competition between rivals drives innovation better products are made at lower prices to meet consumers' needs. Prices and profits should settle just above long run costs. The above is not a picture of that nirvana. It shows a dynamic system, over time, becoming monopolised. What the above shows, is that profits are increasing over time suggesting that either the markets have become concentrated and have an oligopoly, duopoly or monopoly problem.

6 See Council of Economic Advisors to the President referred to in Res Publica "Technopoly and What To Do About It" fn1 above.

7 See e.g. Concentration and Competition: evidence from Europe and implications for policy by Koltay, Lorincz, and Valetti 23 2021 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3992591

8 Market Concentration in Europe: Evidence from Antitrust Markets January 20, 2021 Pauline Affeldt, Tomaso Duso, Klaus Gugler and Joanna Piechucka. https://www.cesifo.org/DocDL/cesifo1_wp8866.pdf

9 The significant increase in markups since 1980 has been further researched. See De Loecker and Eeckhout, 'The Rise of Market Power and the Macreconomic Implications' (2020) 135(2) Q J Econ, 561-644 https://academic.oup.com/qje/article/135/2/561/5714769

10 See e.g. Concentration and Competition: evidence from Europe and implications for policy by Koltay, Lorincz, and Valetti 23 2021 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3992591

11 Case T-201/04

12 Case C-413/14

13 Case AT.39740

14 Interim Measures: An overview of EU and national case law https://www.concurrences.com alec_j._burnside_adam_kidane_-_interim_measures_an_overview_of_eu_and_national_case_law.pdf

15 Broadcom, Commission decision of 16 October 2019. EU Commission European Commission, *Statement by Commissioner Vestager on Commission decision to impose interim measures on Broadcom in TV and modem chipset markets*, 16 October 2019 link.

16 See G7 CMA hosts first two-day digital summit of G7 competition heads and publication of the Compendium of G7 Countries coordinated initiatives: Compendium of approaches to improving competition in digital markets, pages 88 and 89, in which the EU Commission in particular reviews its initiatives that are designed to increase the speed of its enforcement actions. See also Joint Statement from UK Competition and Markets Authority, U.S. FTC and DOJ Antitrust Division leadership following.

17 The Digital Markets Unit (DMU) has been established within the CMA to begin work to operationalise the future pro-competition regime for digital markets, see https://www.gov.uk/government/collections/digital-markets-unit

18 The Penrose Report, *'Power to the people'* (February 2021)

19 https://techcrunch.com/2022/01/05/germany-fco-google-decision/

20 PRACTICE DIRECTION 25A – INTERIM INJUNCTIONS

*21* *London Metal Exchange* (OFT Decision of 27 February 2006); CMA

22 Alec Burnside and Adam Kidane, 'Interim Measures: An overview of EU and national case law' Concurrences e-Competitions Bulletin, N°86718. This number also includes the Broadcom case, decided after publication of this article.

23 AGCM Case no. I840 - Ostacoli alle Arene a Titolo Gratuito and AGCM Case no. A536 - Regione Toscana/Gara per L'affidamento del Servizio di Trasporto Pubblico Locale.

24 See DCMS and BEIS Consultation on 'A new pro-competition regime for digital markets', July 2021.

25 Cabinet Office Policy Paper, 'Global Britain in a Competitive Age: the Integrated Review of Security, Defence, Development and Foreign Policy', July 2021.

26 See ACCC's Digital platform services inquiry 2020-2025.

27 See, e.g., *Google Android* (Case AT.40099) Commission Decision C(2018) 4761 final [2018] OJ C402/19; Case C-413/14 P *Intel Corp. v European Commission* (2017) EU:C:2017:632; Microsoft (Case COMP/37.792) Commission Decision C(2004)900 [2004] OJ L32/23; European Commission Press Release IP/20/2077 of 10 November 2020, 'Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into its E-Commerce Business Practices'; European Commission Press Release IP/20/1073 of 16 June 2020, 'Antitrust: Commission opens investigations into Apple's App Store rules'.

28 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' COM(2020) 842 final; European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act)' COM/2020/825 final.

29 G7, 'Compendium of approaches to improving competition in digital markets', 29 November 2021.

30 G7 Ministerial Declaration, 'G7 Digital and Technology Ministers' meeting, 28 April 2021'.

31 See, e.g., US Department of Justice, 'Agreement between United States of America and the European Communities on the application of positive comity principles in the enforcement of their competition laws' (1991).

32 The Penrose Report, *'Power to the people'* (February 2021), pages 9-11.

33 BEIS, 'Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013', 2019.

34 Competition Appeal Tribunal Memorandum, 'The Accountability of Regulators to Citizens and Parliament', 2004.

35 Tim Cowen, '"Justice Delayed is Justice Denied": The Rule of Law, Economic Development and the Future of the European Community Courts' (2008) 4(1) European Competition Journal 1; Tim Cowen and Phillip Blond, 'Technopoly and what to do about it: Reform, Redress and Regulation' (Res Publica, June 2018).

36 https://academic.oup.com/qje/article/135/2/561/5714769

37 Pauline Affeldt, Tomaso Duso, Klaus Gugler and Joanna Piechucka, 'Market Concentration in Europe: Evidence from Antitrust Markets', January 20, 2021.

38 As suggested by the Lear report for the CMA in 2019, the increased concentration and oligopolistic industrial structure may be a consequence, in part, of the lax enforcement of merger control.

39 E.g. the EU Commission enforcement actions in *Microsoft, Intel* and *Google* have all taken over 10 years.

40 Jason Furman's reports for the Obama administration and the UK, and those of Eckhout and others point to structural failures and lower levels of business start-ups, increased profitability and higher rates of exit and lower rates of entry. The causes of these market structures may have arisen from failure to police mergers as suggested by Lear in its 2019 report for the CMA. Here we set out potential remedial action in dominated or oligopolistic markets, and what can be done via enforcement to address current issues arising from delay.

41 See recently revised Prioritisation Principles for the CMA 2014 and Rule 24 of the Competition Appeal Tribunal Rules 2015, but still a major issue.

42 Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8, 2020.

43 Retaining impartiality is important but the CMA is institutionally biased against engaging in a dialogue with complainants which hampers swift understanding. Frank Easterbrook's Type 1 and Type 2 error framework is often cited by officials but is also a narrative promoted by defendants at public conferences as sage rationale for inaction. Unfortunately, Easterbrook's concerns about justice in the US legal system suggested an error framework that was coined many years ago for a US setting, and was addressing over enforcement in open competitive markets. None of these factors are currently present in the UK or EU. The framework assumed markets are likely to be self-correcting which is a dangerously misplaced assumption in dominated markets where intervention to prevent further harm is urgently needed.

44 Ethics laws in many countries set mandatory waiting periods before a public official or employee may register as a lobbyist or engage in lobbying activities. These are typically highly appropriate to prevent corruption or prevent former officials from influencing the award of contracts to the benefit of their new private sector employer. Such concerns are justified and should not be confused with the proposals here. As is usual in all developed systems of law, qualified and practicing lawyers are subject to binding professional obligations and accumulate experience by working both for defendants and claimants for an against different parties over time. The current systems that apply to government bodies do not recognise this and hence government has no people with any relevant experience, let alone expertise, and its policy is denying itself from developing that capability over time.

45 It may not be needed in some cases as a strict matter of law (for example "by object" infringements).

46 Describing the way in which a market works has been compared to the philosophical problem of describing something beyond a human's experience (i.e., Plato's Cave).

47 See e.g., Case 6-72 *Europemballage Corporation and Continental Can Co v Commission of the European Communities* (1973) EU:C:1973:22; Joined Cases 142 and 156/84 *British-American Tobacco Company Ltd and R J Reynolds Industries Inc v Commission of the European Communities* (1987) EU:C:1987:490.

48 See for an early example, *Europemballage Corporation and Continental Can Co v Commission of the European Communities* (1973) EU:C:1973:22.

49 See, e.g., the *Intel* and *Microsoft* cases (n 7), where complainants were on the record: ARM and Sun Microsystems respectively. The Google cases before the EU Commission were triggered by ICOMP and FairSearch; consortia of complainants adversely affected by Google's practices in Search, AdSense and Android.

50 With the CMA estimating over 150,000 claims.

51 See CMA Annual Report and Accounts 2019 to 2020.

52 The personal and business consequences may be devastating see for example the case of Stanley Adams (Hoffman La Roche complainant): C-145-83 *Adams v Commission of the European Communities* (No 1) (1985) EU:C:1985:448.

53 See EU, UK etc guidelines and protections of complainant confidentiality.
54 The Attorney General's Office, 'The Governance of Britain: A Consultation on the Role of the Attorney General' (2007), page 5.
55 *Halsbury's Laws of England* (4th), Vol. 24, para 943.
56 The Attorney General's Office, 'The Governance of Britain: A Consultation on the Role of the Attorney General' (2007), Annex A, page 26.
57 The Rt Hon Jeremy Wright QC MP, Speech on 'The Attorney General on who should decide what the public interest is' (9 February 2016).
58 It is common for the US Attorney General to bring proceedings on behalf of the public by virtue of the following: Section 4 of the Sherman Act (15 U.S.C §4) empowers the *"States attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations [of sections 1 to 7 of the Sherman Act]". Section 15c of the Sherman Act (15 U.S.C §15c) empowers the Attorney General of a State to bring "civil action … as parens patriae … on behalf of natural persons residing in such State … to secure monetary relief for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 [of the Sherman Act]".*
59 In the UK, the CMA has used the power very infrequently and has only once used the current powers (since the law was changed to make bringing a case easier) in the Online Auctions case. Ofcom has used its powers against Royal Mail, to limited effect.
60 *London Metal Exchange* (OFT Decision of 27 February 2006); CMA
61 Alec Burnside and Adam Kidane, 'Interim Measures: An overview of EU and national case law' Concurrences e-Competitions Bulletin, N°86718. This number also includes the Broadcom case, decided after publication of this article.
62 AGCM Case no. I840 - Ostacoli alle Arene a Titolo Gratuito and AGCM Case no. A536 - Regione Toscana/Gara per L'affidamento del Servizio di Trasporto Pubblico Locale.
63 Applications for interim injunctions are dealt with in the English High Court by a single judge sitting alone. The courts powers to grant an injunction are founded in the Senior Courts Act 1981. The principles upon which the Court approaches the exercise of these powers, and derived from Lord Diplock's speech in *American Cyanamid Co Ltd v Ethicon Ltd* [1975] AC 396. Applications may also be brought in the CAT, which applies similar principles.
64 See e.g., The Furman Review, 'Unlocking digital competition, Report of the Digital Competition Expert Panel' (March 2019)
65 For situations of dependency and digital platforms, see also Article 19 as amended of Germany's GWB.
66 The principle of open justice is the starting point for any consideration of the identity of a claimant. It has been approved numerous times and remains a fundamental principle in English common law *(see R (C) v Secretary of State for Justice (Media Lawyers Association intervening)* [2016] UKSC 2, citing "The principle of open justice is one of the most precious in our law". There is discretion for a judge to make a ruling that identity should not be disclosed, but it has never operated to protect the identity of the claimant in antitrust proceedings. Civil Procedure Rule 39.2(4) which in principle provides, *"(4) The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness." XXX v Camden London Borough Council [2020] 4 WLR 165, para 24 reads, "It is right to record that the White Book does suggest in the notes at para 39.2.14 that the court undertake a two stage test: first a threshold test showing that the grant of anonymity was necessary; and secondly, if that threshold is passed, balancing the interests of the parties and the public interest in open justice … In my judgment, when confronted with an application for anonymity pursuant to CPR r 39.2(4) , the court should have regard to the relevant principles set out in the authorities referred to in paras 17 to 21 above, and carry out the balancing exercise of the relevant interests under CPR r 39.2 to determine whether "non-disclosure is necessary to secure the proper administration of justice and in order to protect the interests of that party or witness"."* Para 19 reads, *"The common law has long recognised a duty of fairness towards parties and persons called to give evidence, see In re Officer L [2007] UKHL 36; [2007] 1 WLR 2135 , and balanced that against the public interest in open justice in specific cases. Under the common law test subjective fears, even if not based on facts, can be taken into account and balanced against the principle of open justice. This is particularly so if the fears have adverse impacts on health, see In re Officer L at para 22 and Adebolajo v Ministry of Justice [2017] EWHC 3568 (QB)*. See also, Civil Procedure Rule 39.2(4) to protect the identity of a public company. "There is compelling evidence before me that AAA is the victim of blackmail and that the perpetrators threaten and intend to make further demands with menaces against the other companies. Refusing anonymity would be to deny the companies a potential judicial remedy for such wrong: *LJY v. Persons Unknown [2017] EWHC 3230 (QB); [2018] E.M.L.R. 19*."
67 See Civil Procedure Rules Practice Direction 31A
68 See for example, *Streetmap.EU Ltd v Google Inc. & Ors* [2016] EWHC 253 (Ch), where general disclosure was ordered but limited to the pool of documents disclosed in the EU proceedings against Google and no specific disclosure was ordered. See also *Infederation v Google LLC* [2020] EWHC 657 (Ch).
69 *Albion Water Ltd v Dwr Cymru Cyfyngedig* [2012] CAT 10.
70 Letter from Andrew Tyrie to the Secretary of State for Business, Energy and Industrial Strategy, 2019.
71 See CMA Online platforms and digital advertising Market Study Final Report, July 2020; DCMS and BEIS Consultation on 'A new pro-competition regime for digital markets', July 2021; The Penrose Report, *'Power to the people'* (February 2021); DCMS and BEIS, 'Response to the CMA's market study into online platforms and digital advertising', November 2020. G7 Ministerial Declaration, 'G7 Digital and Technology Ministers' meeting, 28 April 2021'.
72 See paragraph 3.20 of the Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8, 2020.
73 The case was in fact subsequently settled, before trial.
74 The Scottish equivalent of an injunction.
75 Not to implement a suspension of the claimant's accreditation under a safety scheme applicable to railway workers, the suspension of which was alleged to constitute the abuse of a dominant position.
76 Whilst the claimant had applied for fast-track designation, this application had not been heard when the undertaking and cross-undertaking were given by the parties.

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## ABOUT RESPUBLICA

The ResPublica Partnership Ltd (ResPublica) is an independent non-partisan think tank. Through our research, policy innovation and programmes, we seek to establish a new economic, social and cultural settlement. In order to heal the long-term rifts in our country, we aim to combat the concentration of wealth and power by distributing ownership and agency to all, and by re-instilling culture and virtue across our economy and society.

Big tech markets have become highly monopolised. This is a major growth-inhibiting and innovation-limiting issue for smaller tax-paying tech firms in the UK. Government recognition and awareness of this issue seems almost entirely absent, which perhaps is why UK enforcement and legislation is lagging other countries.

UK firms seeking to get the law enforced also face the difficulty of taking private court action where their identity must be disclosed, and risks of retaliation are high. They depend on the CMA acting well and using the full remit of its (already limited) powers which sadly it hardly ever does. The CMA does not routinely use injunctions to protect the market and "freeze the scene of the crime" pending further investigation, as it could. In digital markets, where data is critical, investigations in cases may reveal breaches of other laws (data protection and other consumer protection laws).

We propose reforms that enable private whistle blower action, and a broader remit for a specialised Digital Markets Unit so multiple laws can be investigated by a single investigating team under the authority of the Attorney General's Office, to better protect the public interest and the rule of law.

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