



14th Annual Conference of the GCLC “Remedies in EU Competition Law: Substance, Process & Policy”, Brussels, 31 January – 01 February 2019

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

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# Role of public and private remedies

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

# Enforcement priorities and gap(s)

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

# Private remedies complementing public enforcement

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- ❖ Follow-on damages actions increase overall punishment
  - ❖ Cartel enforcement
- ❖ Stand-alone damages actions increase detection
  - ❖ Rare especially against horizontal agreements, e.g. *Sainsbury's v MasterCard*
- ❖ Nullity as a 'contract remedy' (e.g. *Courage v Crehan*)
- ❖ Injunctions against vertical restraints and abuse of dominance
  - ❖ Damages actions seem to 'follow' injunction claims

# Injunctions in private enforcement

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

# Limits of private remedies

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- ❖ Damages actions
  - ❖ Compensate ultimate victims?
  - ❖ Consumer claims are cumbersome, e.g. *Merrick v MasterCard*
- ❖ Sound theory of harm in abuse cases
  - ❖ Problematic concepts, e.g. excessive pricing
  - ❖ What is competition on the merits in quickly developing markets?
- ❖ Risk of diverging decisions – *Mastercard* and *Visa* litigation in the UK

# Outlook

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