

**CDR COMPETITION LITIGATION SYMPOSIUM
ANTHONY MATON KEYNOTE ADDRESS 14.11.19**

Michael Hausfeld was originally slated – and honoured - to give this keynote address, drawing on his long experience in anti-trust actions in the United States and his parallel experience in developing private enforcement in Europe, focusing in particular on the development of class action or collective redress mechanisms in anti-trust actions on both sides of the Atlantic. Unfortunately, Michael needed to remain in the US, so you have me instead, the Morecombe to his Wise. What I say here is a reflection of both mine and Michael's thoughts based on our experience and on what we believe has been and remains the central issue in anti-trust litigation – namely how litigation systems effectively react to anti-competitive market wide harm. Two views for the price of one. I will also, as well as trying to draw together the threads on collective actions, reflect on a couple of other recent important developments in private enforcement.

Let's look at the development of the well-established US class action system

In Europe there are two abiding perceptions of US Class action litigation. First, that they have been around since the dawn of time – a sort of Meet the Flintstones competition policy; second, that they are ripe for abuse – a sort of Good Fellas meets Reservoir Dogs competition approach. In fact, Class actions in the United States were transformed by the amendment of Rule 23 of the Federal Procedure Code in 1966 – sadly the year of my birth - a deliberate policy move aimed to make class actions more readily available and more readily effective. It was originally envisaged that the class action would be used particularly for race discrimination cases – a need arising out of the Supreme Court's decision in Topeka - but it quickly expanded to other areas of discrimination, free speech, prison rights, the environment, mass accidents, product defects and consumer matters.

The new class action began quickly to be used in anti-trust claims where the new procedures allowed US wide anti-trust infringements to be aggregated. For the first time market wide abuse could be captured in a single action. At first, these actions focused on price-fixing claims in which the affected parties were consumers who each had small individual damages that

had not previously been the subject of private litigation. Of course, the threat of treble damages made these actions particularly potent.

These changes to the rules, which made class actions easier to bring, occurred at the same time that the composition of the legal profession in the United States as well as its economics and culture, was shifting significantly. A wider group of attorneys were qualifying, but not being allowed access to traditional firms, so had to find outlets elsewhere. Amongst these, dare I say it, was one Michael Hausfeld, fresh out of Brooklyn and keen to stir things up.

So grew the claimant bar, enabled by the rule changes and the size and scale of the actions that could be brought. This was further helped by the fact that contingent fee arrangements were legal in the US; that litigation costs are left where they fall; and the common-law principle that a fee can be awarded to those who produce a common benefit for the class members – so that significant fees became available to class attorneys. In many ways, these factors all created a perfect storm that encouraged the growth of the anti-trust class action. At the centre of which one Michael Hausfeld found himself sitting quite comfortably.

These claims quickly became commonplace and moved beyond being class consumer claims to being class business claims.

At the high water-mark in 1974 in *Eisen v. Carlisle and Jacquelin*, the Supreme Court underscored that Rule 23 was procedural, and a court should not conduct an inquiry into the merits of a case in order to determine whether a class could be certified. Critical to the success of this was the approach the Courts took to certification of a class – the standard was relatively low and classes were easily certified. Things were also made simpler in anti-trust class actions when the Illinois Brick doctrine was adopted by the Supreme Court in 1977 – meaning that indirect purchasers generally

did not have standing to seek damages under federal anti-trust laws so that direct purchasers do. This doctrine makes things much simpler, avoiding the complications caused by analysis of pass on – so that the direct class doesn't need to consider whether loss is passed on to an indirect purchaser further down the sales chain.

Notwithstanding this the high-water mark for US anti-trust class actions was reached by the turn of the 20th century. Since then, that tide has steadily receded. Today, no longer is certification of damages a foregone conclusion; rather, the United States Supreme Court has instructed the federal trial courts to undertake a rigorous analysis of the requirements of Rule 23 of the federal rules to ensure that a case is amenable to class treatment. That analysis now includes extensive facts enquiry and will inevitably touch on the merits of a claim.

With apologies to those watching in black and white I have to delve into some Technicolor. What does Fed. R. Civ. P. 23 require? In broad lines Fed. R. Civ. P. 23(b)(3)(A)-(D) covers:

- a. That the Plaintiff must establish by a preponderance of the evidence that each of the four elements of Federal Rule of Civil Procedure 23(a) and one of the bases for certification under Rule 23(b) are satisfied;
- b. 23 (a) provides that a class may be certified if the plaintiff demonstrates numerosity, commonality, typicality, and adequacy of the class plaintiffs;
- c. Class actions are permitted to proceed when two prerequisites are met: (1) “*questions of law or fact common to class members **predominate** over any questions affecting only individual members*” and (2) “*a class action is **superior** to other available methods for fairly and efficiently adjudicating the controversy.*”;
- d. The superiority requirement is often satisfied when plaintiffs have satisfied

the afore mentioned four elements prerequisites and demonstrated predominance. Four nonexclusive factors are to be considered in determining whether a class action is superior to other methods of adjudication: “(A) *the class members’ interests in individually controlling the prosecution or defense of separate actions*; (B) *the extent and nature of any litigation concerning the controversy already begun by or against class members*; (C) *the desirability or undesirability of concentrating the litigation of the claims in the particular forum*; and (D) *the likely difficulties in managing a class action.*”

In anti-trust class actions, these multi-coloured requirements have become more difficult in a number of ways over time. A succession of court decisions, beginning with *Twombly* in 2007, have made the pleading requirements more difficult; the tests on commonality have become tougher; the evidence requires much more testing; and *Apple v Pepper* this year has even seen the Illinois Brick doctrine questioned. These judicial decisions have been accompanied by continuing changes in the judiciary and a strident and successful campaign in the business world against class actions.

And recently a major setback for Plaintiffs occurred in the 2013 Comcast case. A class of cable television subscribers alleged that Comcast violated §§ 1 and 2 of the Sherman Act. The expert proposed four liability theories of injury but the trial court rejected all but one. The Supreme Court ultimately reversed certification of the antitrust class action because plaintiffs attempted to rely on a damages model that fell “*far short of establishing that damages are capable of measurement on a class wide basis.*” Plaintiffs had failed to present a valid damages model which raised the question of whether individual damage calculations would “overwhelm” questions common to the class. Specifically, the Court

reversed certification because there was a “*disconnect between the theory of impact and the theory of damages.*” That is, the expert’s model did not quantify the damages attributable to the impact theory that the district court had allowed to go forward, and instead, plaintiffs’ damage analysis incorrectly “*assumed the validity of all four theories of antitrust impact initially advanced by respondents.*”

The result of this is that the anti-trust class action in the United States today is more difficult and more expensive to bring and more uncertain in its chances of success. The Rule 23 inquiry now involves mini-trials touching summary judgment standards and invading the province of jury rights. These mini-trials are also more heavily focused on economics over facts and specificity as opposed to flexibility in demonstrating aggregate damage based on the best available data.

The recent Rail freight antitrust class action failure to be certified and the foreign exchange class action being certified only to a limited extent are good examples of these trends. In Rail Freight, which went up and down to the Appeals Court twice, the concept of no model, no damage, no class was made abundantly clear. It appears that the anti-trust class action in the United States is contracting and that its heyday is passed.

Ironically, at the same time the approach of European courts to class actions - or as we like to refer to them on the more demure side of the Atlantic - collective redress has - particularly in the private enforcement arena – become more welcoming.

This brings me to the position in Europe

When Hausfeld opened in Europe in 2009 there was no effective class action process for competition law claims, nor were there barely any competition law claims at all. I distinctly remember Michael and I walking

the streets of corporate Germany together, like two wandering minstrels, our tunes distinctly falling on deaf ears. The contrast to the United States at the time could not have been starker (perhaps the tunes were better). In the United States, notwithstanding the changes that were beginning to occur, it was inevitable that any regulatory finding – or indeed any hint of regulatory finding – would be followed by class litigation, often a rush of class litigation. In contrast, in Europe where the European Commission was beginning to make a raft of regulatory findings of competition infringement - car glass, candle waxes, flat glass, synthetic rubber etc. - there would very infrequently be any litigation related to that infringement at all. In Global competition infringements there would frequently be very substantial litigation and so settlements in the United States on a class wide basis, but no actions of any consequence in Europe leading to the result that US consumers and businesses were being compensated for the damages caused by such anti-competitive behaviour but Europeans were not.

In 2009, Hausfeld, joined by some other early pioneers in Europe such as Omni Bridgeway, Michelin and Cartel Damages Claims – CDC - began to bring private enforcement actions on behalf of clients in European courts. These actions were often – when we could find and persuade them - by groups of clients affected by the infringement. As no developed procedures existed to bring private enforcement claims on a group basis this meant that whilst the imbalance between US and European recovery was corrected to some extent, the overall level of damage recovered from the harm caused by the cartel remained small. This problem was exacerbated by two decisions either side of the Atlantic. First, in the United States, the courts restricted attempts to allow recovery of damage suffered outside of the United States so that broadly only US-based damage could be recovered. Second, an attempt in England to revive the representative action which

had served as a class action mechanism in Victorian times, was roundly rejected by the English Court of Appeal.

Regulators in Europe, both at the National and European level began to realize that without active encouragement and without collective redress, the levels of harm caused by these abuses would only be recovered to a small extent. In the United Kingdom, the then Office of Fair Trading - later the Competition and Markets Authority - led attempts in the United Kingdom to introduce a collective regime for competition claims. The European Commission also pushed for collective redress and a clearer and more level playing field for competition claims across Europe. This eventually led to the introduction of the 2014 Damages Directive on competition claims which provided the more uniform playing field, but without any form of collective redress. Eventually the work of the CMA in the UK led to the introduction of a genuine, critically opt out collective process in the United Kingdom under the 2015 Consumer Rights Act.

These actions have subsequently been followed by others, namely:

First, a number of European jurisdictions have brought in new collective regime mechanisms, most noticeably in the Netherlands where a broad ranging opt out class action regime, which includes competition claims, will be introduced in the new year, but also in other jurisdictions, such as Spain and Portugal.

Second, the European Union is once again looking at the idea of a directive on collective address across Europe with the publication of a 2018 draft directive, albeit this is under attack and amendment from the business lobby.

Third, the UK collective action reform has begun to bear fruit. Initially cases struggled to be developed and gain traction but there are now 5 claims before the Competition

Appeal Tribunal. Recently, the Court of Appeal, in Merricks, has now set the test at certification as a “*real prospect of success*”. This is akin to the test for granting summary judgment, set out in Part 24.2 CPR, “*Real*” meaning that the claimant has to have a case which is better than merely arguable – a relatively low hurdle.

In addition, on Calculation of an aggregate award of damages – the statutory test in the UK regime - the Court of Appeal in Merricks has determined that each individual claimant is not required to establish a loss in relation to his or her own spending and the court cannot base eligibility on comparison of each individual claim, which would require an analysis of the pass-on to individual consumers on a very detailed level. So aggregate damages mean aggregate damages.

Further, the Court of Appeal said that the CAT demanded too much of the proposed representative/expert, stating as follows that: “*the approach taken to the expert evidence in this case was based on a misdirection as to the correct test to be applied in relation to whether the proposed representative had demonstrated that the claims were suitable for inclusion in collective proceedings (and, in particular, for an aggregate award of damages) so far as they were based on an allegation of pass-on of the MIFs to consumers.*” So expert evidence is not going to be US style expert evidence.

And on the Distribution of the aggregate award the Court of Appeal disagreed with CAT that damages must be awarded on a compensatory basis as a matter of principle and highlighted that distribution is “*a matter for the trial judge to consider following the making of an aggregate award.*” So, no distribution bar.

All a very positive playing field for UK Collective Redress, meaning that at present some 12 or so further collective actions soon await the light of day.

Having said this the Merricks decision in the Court of Appeal is obviously going to the Supreme Court next year and the position could change. Alongside of this many of the points in collective actions are or will be litigate in the near future – whether it be the funding issues we have seen debated and decided in trucks recently or the “carriage dispute” which it is anticipated will need to be determined in the FX proceedings in due course. These issues, I am sure, will come up for discussion and debate during the panel of experts on “Certification and the CAT” later this morning, when a panel of experts will discuss the evidence and arguments needed for success on both sides of the Courtroom. Much road remains to be travelled.

A note on the Canadian experience

In the context of ‘road’ it is worth stopping to consider the approach in Canadian collective actions as the London Court has relied heavily on Canadian authorities in its approach to these class actions issues to date. Canadian jurisdictions each describe the test as to when proceedings are properly brought slightly differently but the Canadian rules all require that a class action procedure be preferable to other available procedures for resolving the dispute.

The appropriateness of class action proceedings is essentially the same as the justification in the US but are framed as judicial economy, behaviour modification and access to justice per *Hollick v Toronto (City)* [2001] 3 SCR 158, 170.

Canadian legislation, unlike US Rule 23, commonly prevents the Canadian courts from denying certification based on certain factors, including that the relief may require an individualized damages assessment and that the size of the class is not known.

The Party seeking certification needs “*to show some basis in fact for each of the*

certification requirements (...) other than the requirement that the pleadings disclose a cause of action.” The “some basis in fact” test represents a very low threshold; meeting it does not require the applicant to prove any facts on a balance of probabilities, for example. The Applicant just has to demonstrate—beyond a mere assertion in the pleadings—the existence of facts supporting the certification tests.

For example, the *Ontario Class Proceedings Act 1992* provides that the court may make an aggregate award of damages in cases where “*the aggregate or a part of the defendant’s liability to some or all class members can reasonably be determined without proof by individual class members.*”

In *Pro-Sys Consultants Ltd. V. Microsoft Corp.* Judge Rothstein says that “*the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class...the methodology cannot be purely theoretical or hypothetical, but must be grounded in the particular facts of the particular case in question. There must be some evidence of the availability of data to which the methodology is to be applied.*”

And in *Fantl v Transamerica Life Canada*: ‘*an aggregate assessment is not the tallying of the individual class members’ claims. Rather, it is a communal assessment of the totality of the class members’ claims where the underlying facts permit this to be done with reasonable accuracy.*’

So, in Canada we don’t see the retrenchment we see in the US, and whilst the test is not set as low as the current UK test, it is set in a sensible and sustainable place.

A comparison of experiences – the US

What does this comparison of experiences tell us and what can we predict the landscape will look like over the next 10 years?

The United States class experience has taught us a number of things.

First, that a regime that allows effective class actions within a legal environment that encourages entrepreneurship ensures effective private enforcement. As I noted there is virtually no competition infringement that occurs within United States that is not litigated. The result of this is that such infringements do lead to private damages being paid to those who have suffered loss as a result of the infringement. This in turn has a strong deterrent effect, serving the aims of the public policy that lies behind the class action.

Second, that there is something of a myth that this encourages the bringing of frivolous actions. Whilst there may be some truth in this in other areas it is rare for a fruitless competition class claim to be brought because of the technical difficulty and expense of such claims. If you could see our economist’s bills you would winch. Those who bring anti-trust class actions in the US are almost always bringing actions of substance. – otherwise you wouldn’t bother.

This leads me to the third point, that even in a class context these claims remain difficult and expensive to bring. Where the class is large and the defendants many, the evidence is likely to be significant and the challenges of the economic evidence required to prove the loss considerable. It is not inevitable that actions that are brought succeed - class claims can and do fail at trial, the jury system playing both ways – take for example the recent loss at class stage in Railroads and in Trial in Ramen Noodles – again both Hausfeld examples – I

am sure/ hope there are others. Cases can, and do, lose, even when the allegations are serious. And the consequences in lost costs are significant.

Fourth, even in a system that has been established for over 50 years the challenges of how to properly determine whether a class action is appropriate or not remain very real. The boundaries continue to shift in the United States around the requirements for, amongst other things, class certification. Whereas one would think the law would be certain, the opposite is the case; the case law continues to move with time, and with judicial and public sentiment.

A comparison of experiences – Europe

In contrast what have we learnt from the rather shorter life of private enforcement claims in Europe – especially in the collective space.

Notwithstanding the growth driving private enforcement the reality remains that only a relatively small segment of the market is able to recover the damage suffered as a result of competition infringements. Even in the Air Cargo litigation, brought both in the UK and in the Netherlands, the percentage of the market represented, even with over 250 corporates in the respective actions, was relatively small. It is only with the trucks cartel that we have seen for the first time wide spread actions across many jurisdictions by very many claimants. Even here, however, it is unlikely that more than 30% of the market is represented in litigation.

Parallel to what we have learnt from the US, these claims are difficult, complicated and expensive to bring and fought very hard by the defendants. The issues of the economic evidence, proof of the loss, of the difficulties of direct and indirect claimants, etc., are all very real. Very few of the claims brought have reached trial and, of those that have, as in the United States some have failed – take the recent example of the ABB

Judgment in England as an example (thankfully not a Hausfeld case).

The future for Collective Private Enforcement

So, what does the future hold for private enforcement – especially in the collectives?

First, a convergence between the regimes in the United States and Europe. The reality is that the attempts to trim the class regime in the United States are likely to continue with success, so that class actions become more difficult and more expensive to bring. In Europe, in contrast, we are likely to see the introduction of – importantly – opt out class regimes, certainly on a jurisdiction by jurisdiction basis, and possibly across the entirety of Europe in the next 10 years. This will lead to many more competition infringements being more widely litigated across more of Europe.

Second, that the growth of these class regimes in Europe will not be smooth. We have seen in the UK regime that the first attempts to bring claims have inevitably unearthed some of the difficult issues that have to be dealt with in class regimes. These include for example - What are the relevant standards of commonality for certifying the class? What funding arrangements are adequate for the class? Can damages be awarded on aggregate rather than individual basis? Can parallel actions be allowed? Can competing groups of lawyers be allowed to run claims?

In addition to these case and jurisdictions specific issues, European courts are going to have to grapple with the issues of competing claims in competing jurisdictions. We are already seeing this in the context of the trucks cartel. Claims have been brought in 17 European jurisdictions in this, and two putative class claims have been brought in the United Kingdom. At present, conflicting and competing claims, and now judgements, are being made in different jurisdictions. This is difficult enough where

individual claims are being brought; it is further complicated where large group claims are being brought and will be extraordinarily difficult where class regimes exist in some jurisdictions and not in others. Inevitably, in my view, the concept of a single unified European Court for private enforcement will need to be considered, rather like in the US class actions started in different states are brought together before one Judge to determine which court will have carriage of the actions. Whether I am alive to see this however, is a somewhat different issue...

Third, that the resolution – that is settlement - of these claims will be more complicated in Europe than in the US unless and until there is a unified class regime. In the United States the existence of the class mechanism, the Illinois Brick rule and the absence of contribution proceedings, even where there is joint and several liability, mean that the actions can be relatively easily resolved with certainty. In the European regime, with no European wide class mechanism, the very real issues of competing classes of Claimants and the reality of contribution proceedings, the task of settlement is much trickier. The larger the group of claimants bringing proceedings or the wider reach of proceedings, the more difficult settlement becomes. There has been much discussion about the use of the Dutch WCMA procedure to resolve competition claims but, to date, in contrast to shareholder actions, no competition claim has been settled through use of this procedure. The reason for this I think is obvious – contribution makes settlement of these claims difficult, and even more difficult on a class wide basis.

Additionally, the growth of these claims will continue to be fuelled by litigation funding. Claims that can be aggregated, even more so claims that are backed by regulatory decision, are attractive to a funder as they offer a potentially large return related to common issues and risks. We have already seen the expansion of litigation funding from its Anglo-Saxon roots into the continent.

This growth of funding will continue, further encouraging actions, whether on a group or class basis. We have seen this in Trucks in Europe. The trend will continue.

Fourth, that these complications will be enhanced by the growth of private enforcement and class regimes in other jurisdictions. There are already several established class regimes in jurisdictions such as Canada, Australia and South Africa. We also see the beginnings of private enforcement in South America and Asia. Inevitably many of the infringements in the competition arena are global so that we will see actions across the world, sometimes on a group basis, where allowed on a class basis, creating multi layered litigation.

This will mean a complicated playing field both for claimants and defendants. The approach of defendants to date in Europe has typically been to play it long and increase costs. As the playing field becomes more complex, and more open to more claimants bringing more claims in more jurisdictions, the claimant will and the defendants in response will have to revise, or at least rethink, these tactics.

Taking you on the slight tangent - for these claims to be successful it is critical for lawyers to be able to construct profitable means for them to be brought. In this context it is worth noting, that after the disaster brought by the LAPS Act of 2013 through abolishing the recoverability of CFA uplifts and ATE Premium coupled with the introduction of the complex and uncertain Damages Based Agreement regime – there may be light at the end of the UK tunnel – at least for group claims - as to the ability of lawyers to bring clear contingency claims. Perhaps I am just being an optimist at heart, but at long last an attempt is on hand to try and resolve this problem. Under the hand of Professor Rachael Mulheron and Nick Bacon QC a new draft set of DBA Rules have been published which remedy the issues of credit for costs and allow Hybrid DBAs.

If the Ministry of Justice can be persuaded to adopt these rules, I firmly believe, that once again it will be possible to bring more meritorious claims before the courts – even for claimants without deep pockets. With Brexit, general elections and trade deals to negotiate it is key that the government does not lose sight of the domestic agenda. It is our duty as lawyers to make sure we do everything within our power to make that happen.

The landscape beyond collective redress

If you will allow me, I would like to devote the last minutes of my time behind this lectern to look at the landscape for competition litigation beyond collective redress – and a bit closer to home.

During the last 12 months it has been difficult to ignore the litigation against Big Tech. In London two claims – by Infederation and Kelkoo – have been brought against Google in relation to the European Commission’s infringement decision of 2017 concerning Google Shopping. Since then, the European Commission has issued two other infringement decisions against Google: Android in 2018 and AdSense in 2019 and is reported to be investigating various further aspects of Google’s, Amazon’s, Apple’s and Facebook’s conduct.

In the UK, 2019 saw the Furman Report in March; and the launch of the CMA’s “Digital Markets Strategy” and online platforms and digital advertising market study in July. Technology regulation by competition authorities and national regulators across Europe will remain firmly on the radar in 2020. The strong likelihood is that litigation – at least in Europe - will not be far behind. As to the US it is difficult to be certain. Only now are regulatory heads coming out of rabbit holes and private lawyers seeing some light. We will see.

Turning our head to ‘Pharma’ we can see

that Investigations into anti-competitive practices in the pharmaceutical sector have been omnipresent in the CMA’s workload in recent years and, before that, at the European Commission.

The NHS has brought big ticket litigation against “Big Pharma”: in particular, the 2011 claim against Servier and generics manufacturers related to the Commission’s “pay-for-delay” decision - ultimately adopted in 2014 - concerning the drug Perindopril ; and a claim against Lundbeck and generics manufacturers in June this year related to the Commission’s “pay-for-delay” decision - adopted in 2013 - concerning the drug Citalopram.

The Servier litigation – which is ongoing – has encountered a number of challenges in the English courts, in part arising out of the fact that the damages litigation is proceeding in parallel with the pharmaceutical companies’ appeals against the Commission decision to the European courts.

The Servier litigation may well continue to give rise to important decisions in the coming year regarding the courts’ approach to damages claims that run in parallel with European court proceedings in the Article 102 TFEU sphere (these issues also arise in the Google litigation, since the Commission’s Google Shopping decision is being appealed to the European courts while the English litigation continues). The position regarding such parallel litigation in the cartel follow-on arena is relatively clear: National Grid Electricity Transmission Limited and ors v ABB and ors , stemming from the Gas Insulated Switchgear cartel sanctioned by the Commission back in 2007, holds that damages claims can proceed provided no trial is held in the national courts before final disposal of the appeals in the European courts. Whether the courts will depart from this position in abuse of dominance claims remains to be seen. In the Servier context, the next hearing in the litigation is scheduled for

October 2019, notwithstanding the General Court's partial annulment of the Commission's decision in a judgment of December 2018 (both the Commission and Servier have appealed that judgment to the CJEU). Clarity around these issues may therefore emerge in the coming months.

Also noteworthy in this context is the CMA's ongoing probe into anti-competitive conduct by Aspen Pharmacare relating to the drug Fludrocortisone. This investigation relates to arrangements that Aspen entered into with two rival pharmaceutical companies in 2016, as the CMA suspected competition law had been broken by Aspen paying competitors to stay out of the market, leaving Aspen as the sole supplier of fludrocortisone. This is a novel development insofar as it secured a payment to the NHS as part of a CMA probe and without the need for litigation, and it will be interesting to see whether any of the ongoing or future CMA investigations in the pharma sector – of which there are several – will lead to similar settlements, part of which was concluded in August 2019 with (among other things) an £8 million pay-out to the NHS.

Given the number of ongoing investigations in the pharmaceutical sector by the CMA and infringement decisions on appeal the English courts, coupled with the NHS's obvious interest in them, more cases or settlements of the Aspen Pharmacare type might be expected in the coming years if infringement decisions continue to be issued.

So how do we see the overall competition landscape developing in the next few years. Here's a few guesses:

- Class actions will continue to become more difficult in the US;
- Private enforcement will develop globally and if you are a claimant, opportunities to seek compensation for competition infringements will multiply;
- Collective actions will grow like mushrooms across Europe, possibly on a European wide basis;
- The "big 3" of competition litigation in Europe – UK, the Netherlands and Germany – will no longer be the only jurisdictions in which to litigate as Italy, France, Spain adopt private enforcement and the Directive;
- London will lead on collective actions notwithstanding Brexit;
- Which brings me to the 'B' word. Brexit will drive litigation away from London although our robust legal system and independent judiciary should remain strong draws; on the other hand, there may be litigation because of Brexit.
- More damages will be recovered for more victims;
- If you are the GC of an infringer your headaches – and damages - will grow;
- BUT corporates will continue to violate competition law.



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Legal 500 UK, 2020

Conclusion

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