

COMPETITION LITIGATION AND COLLECTIVE REDRESS: A COMPARATIVE EU ANALYSIS WITH FOCUS ON PORTUGAL AND RECENT DEVELOPMENTS IN THE UK

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Times Higher Education Awards



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PART 1-The AHRC Project- COMPARATIVE PRIVATE ENFORCEMENT AND COLLECTIVE REDRESS IN THE EU



Private Enforcement- Introduction 1

- US comparison- mature system of private antitrust litigation:- discovery/funding/class actions/treble damages
- EU and UK- traditional public/admin enforcement- (Commission/OFT)
- Note direct effect doctrine and UK reform- Competition Act 1998

Private Enforcement- Introduction 2

- Developments in last 20 years:-
- Competition Act 1998/Enterprise Act 2002
- ECJ rulings- Crehan and Manfredi
- Leniency and Regulation 1/2003
- See Commission White Paper of 2008 and OFT Recommendations in 2007
- EU- focus on collective redress
- UK Context, CAT and BIS proposed reforms (2013)

Private Enforcement- Introduction 3

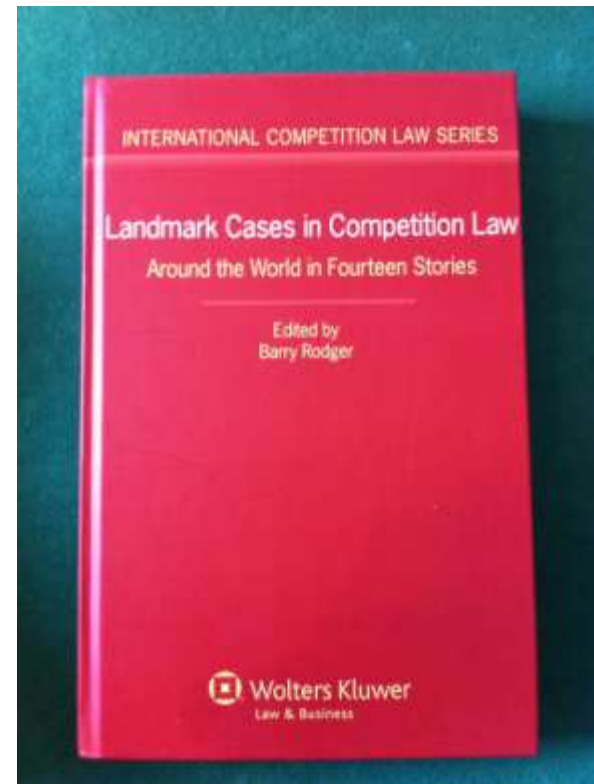
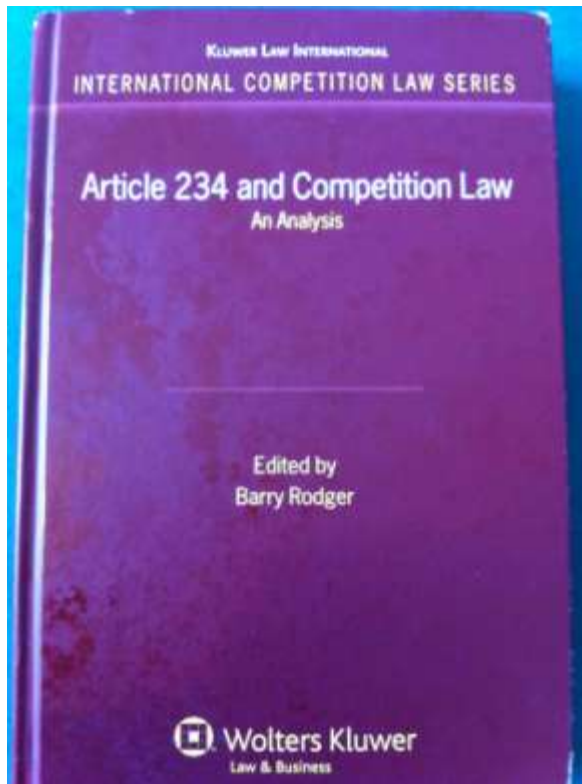
- Ashurst Report- 2004- 60 damages actions
- White Paper, External Study- further 96
- See Rodger 2006 ECLR re all UK cases to 2004/Rodger 2009 GCLR >2008
- Hidden story of settlement activity (2008 ECLR)- marked difference from US
- See also work of Sebastian Peyer (Germany)

Empirical work in competition law

Work on compliance in 2000 and 2005- and study of compliance following OFT infringement action- 2007/2008

- Quantitative private enforcement research re UK litigation and Article 234 project
- Looking at settlements:- ‘Private Enforcement of Competition Law, The Hidden Story..’ [2008] ECLR 96
- ‘Why not court?: A study of Follow-on Actions in the UK?’ Journal of Antitrust Enforcement (2013)1-28

Recent Collaborative projects



Rationale/proposed outcomes of the research project 1

- To provide quantitative data regarding litigation involving EU and/or domestic competition law within the relevant time framework within each Member State, and thereby identify trends in terms of frequency of competition law cases
- To provide insights into the context of competition law private enforcement within each Member State, to include:- eg the availability/form of follow-on actions/specialist courts etc.

Rationale/proposed outcomes of the research project 2

- To consider the extent to which consumer enforcement of competition law is available, by considering the legislative context and the case-law involving consumers,, with a view to assessing the effectiveness of the regime for consumer redress,
- To contribute to academic and policy debates about the future place and role for private enforcement of competition law in the UK and across the European Union.

AHRC Project

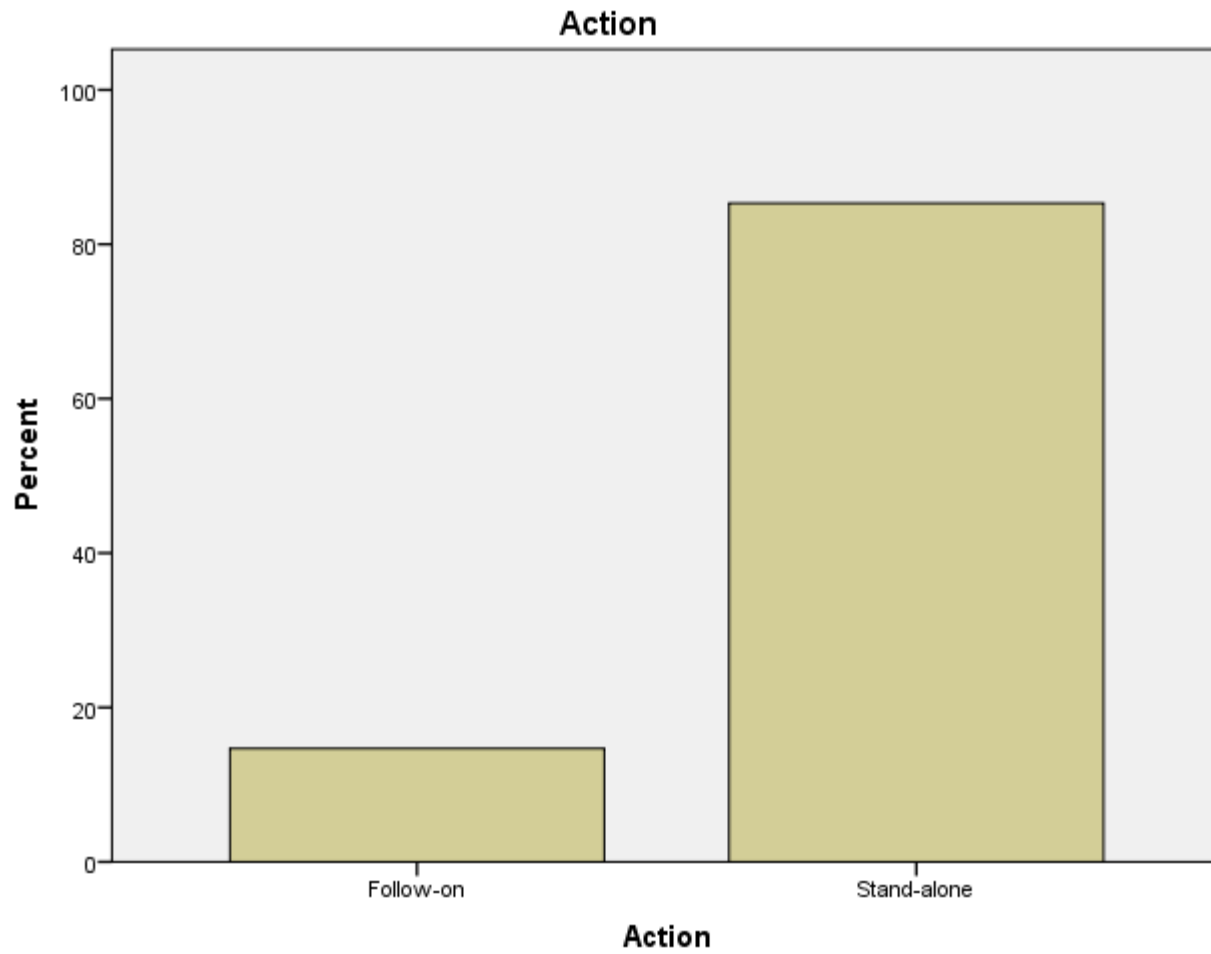
- Submission of Funding application
- Funding approval (long review process)
- Role of national rapporteurs- 27 States
- Workshop in Glasgow, March 12, to finalise agreed methodology
- Conference, London, Sep 12, to present draft reports and related presentations
- See www.clcpecreu.co.uk

Institutional Background

- Legislative background
- Specialist Court/Tribunal?
- Discovery/Costs and Funding issues
- Remedies
- Collective Redress Mechanisms
- Reform
- Difficulties of a comparative approach...

INSTITUTIONAL ISSUES 1

- National Courts' hierarchies- (methodology)
- Specialist Courts/Tribunals
- Certain Member States- Including the UK (CAT), see also Austria (Cartel Court); Denmark (Maritime and Commercial Court)
- Follow on/Stand alone actions



INSTITUTIONAL ISSUES 2

- Collective Redress focus
- Mechanisms, Opt-in/Opt-Out Spectrum-see Mulheron
- Various approaches across Member States- eg UK opt-in(and reform); Austria (collective action Austria style); Denmark – opt-in/out; Finnish class actions; German aggregation; Ireland group actions; Italy azione di classe (2009); Lithuania- theoretical?; Malta Collective Proceedings Act 12; Netherlands Portugal and France each have well-recognised (little used) systems.etc developing area national/EU
- Limited Case-Law- see below

Case-Law :Methodology

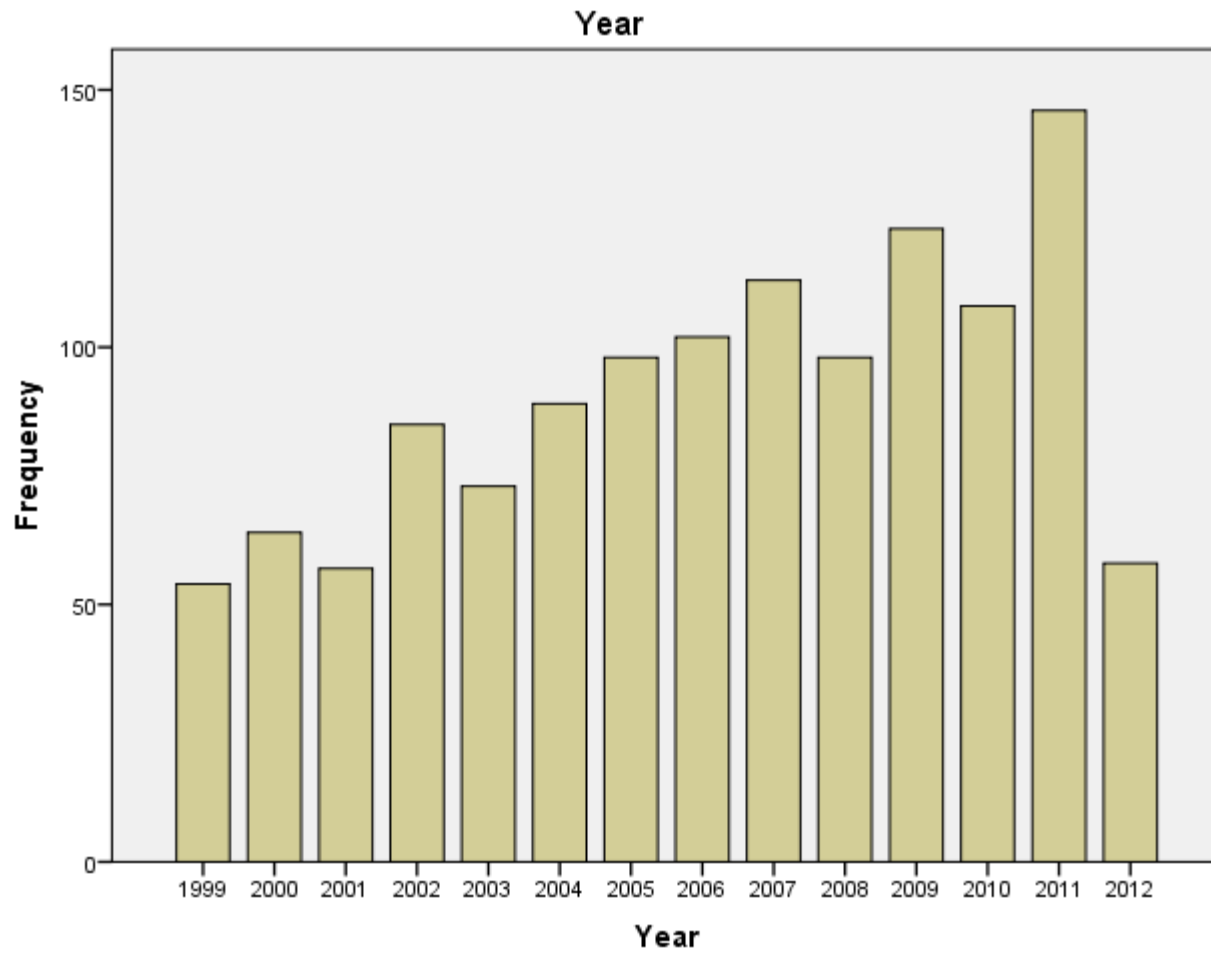
- **Role of National Rapporteurs**
- **Timescale (1 May 1999-1 May 2012)**
- **Particular national difficulties- locating case-law**
- **general problems/difficulties in understanding/consistency of approach**
- **The scope of ‘competition law-related rulings’- judgments only (not settlements)**
- **Private not public enforcement**
- **Any stage of litigation process**
- **Not only damages actions- other remedies/shield**
- **Not ADR- eg mediation**

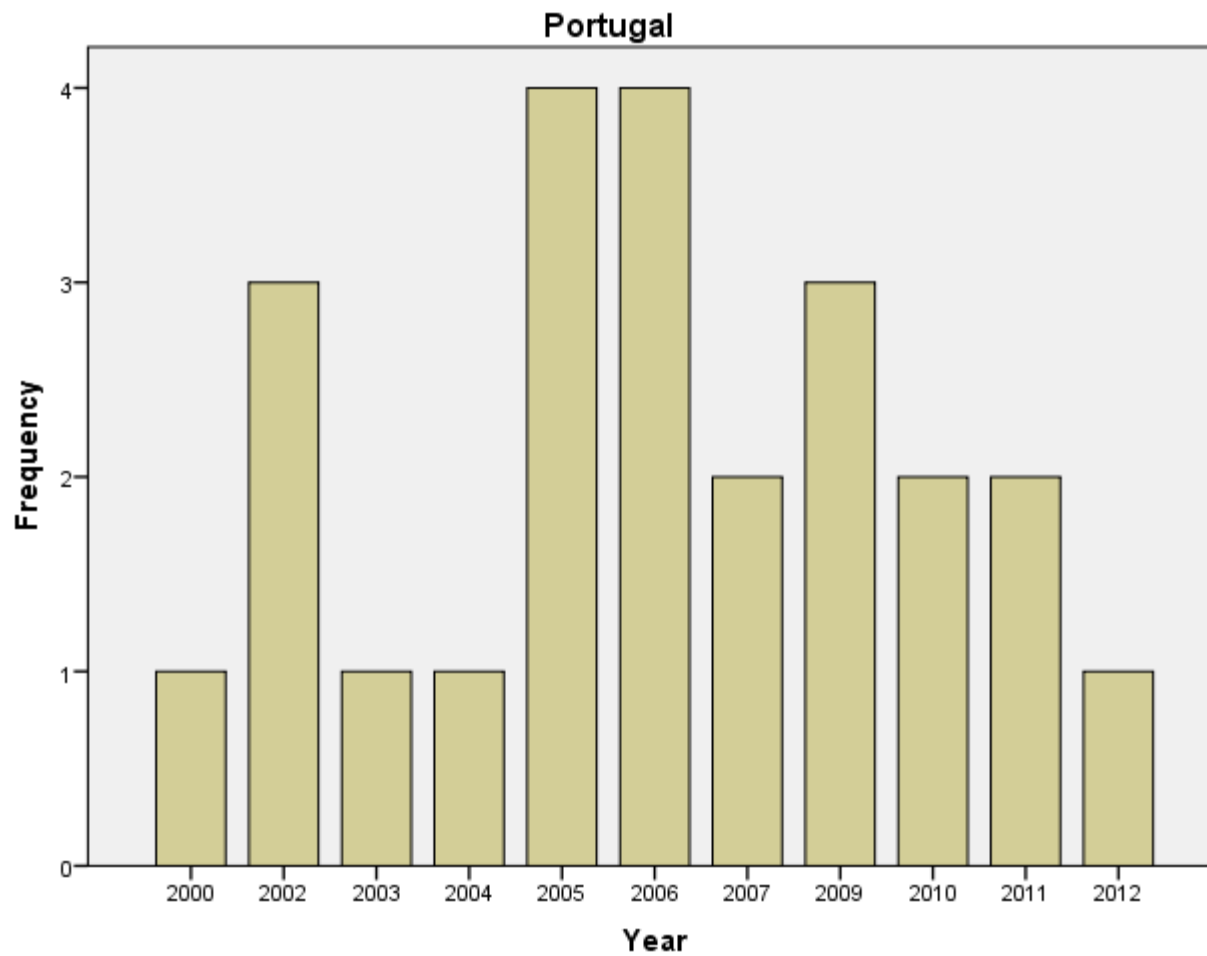
Empirical data

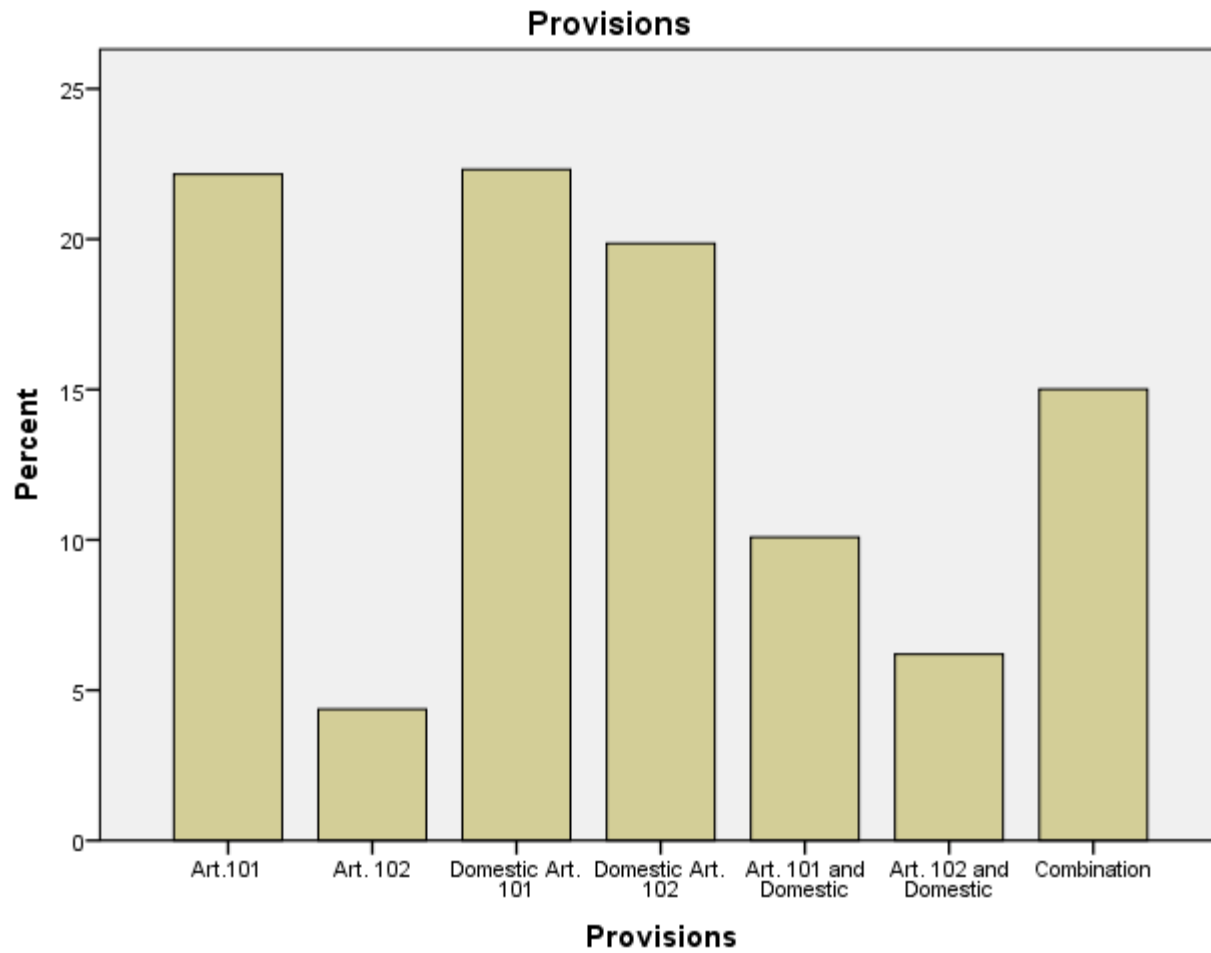
- Number of cases/Years
- Follow-on and stand alone
- Success rates
- Stage of litigation
- Provisions relied upon
- Remedies
- Collective/consumer redress case-law

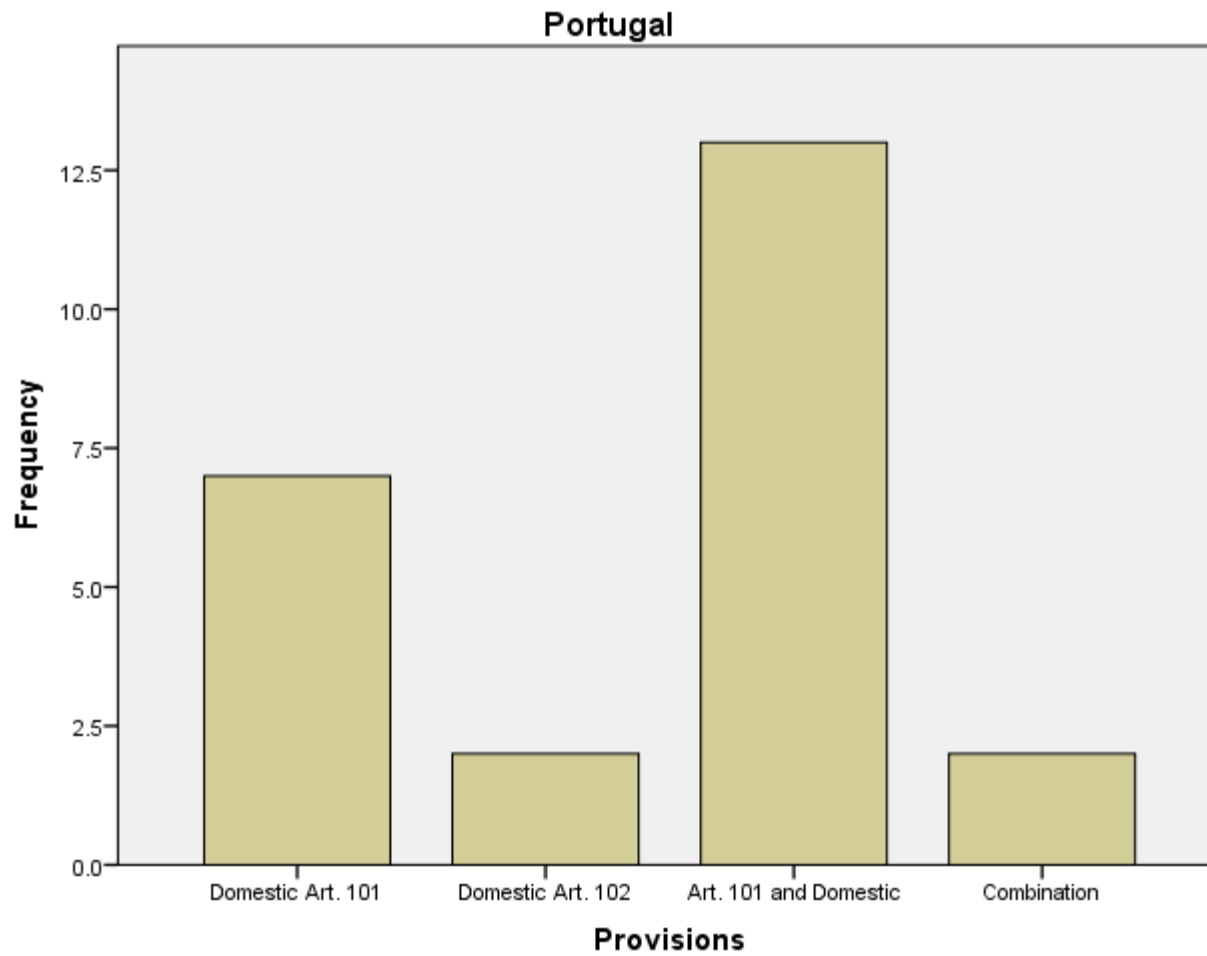
DISCUSSION OF EMPIRICAL CASE LAW

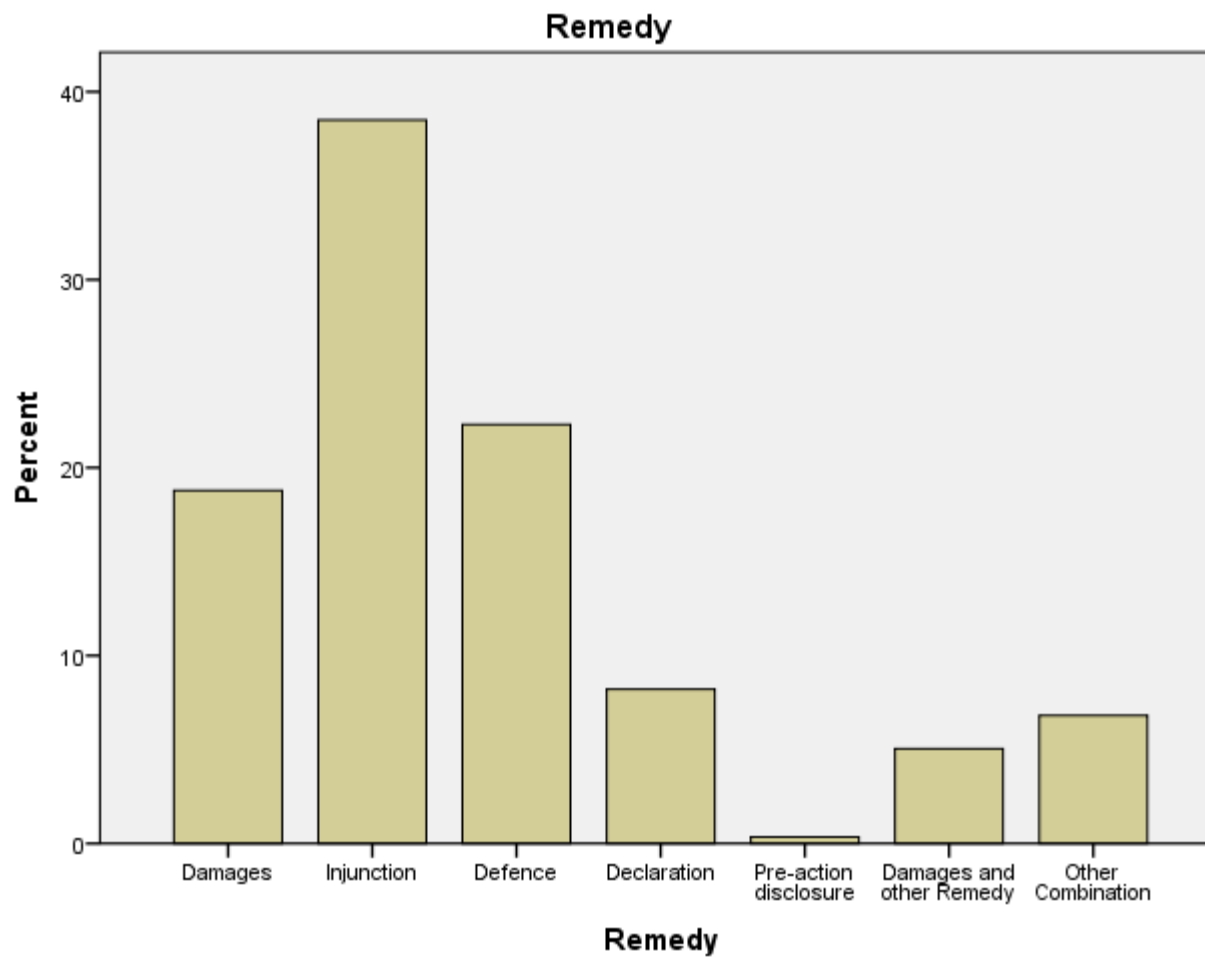
- SPSS to analyse data
- Note special position of Bulgaria and Germany
- Note analysis of individual countries/combined data for each issue
- Also crosstabs eg year v follow-on action
- Combined data (1268 cases included)-
Year/Provisions/Remedy/Success/Consumer

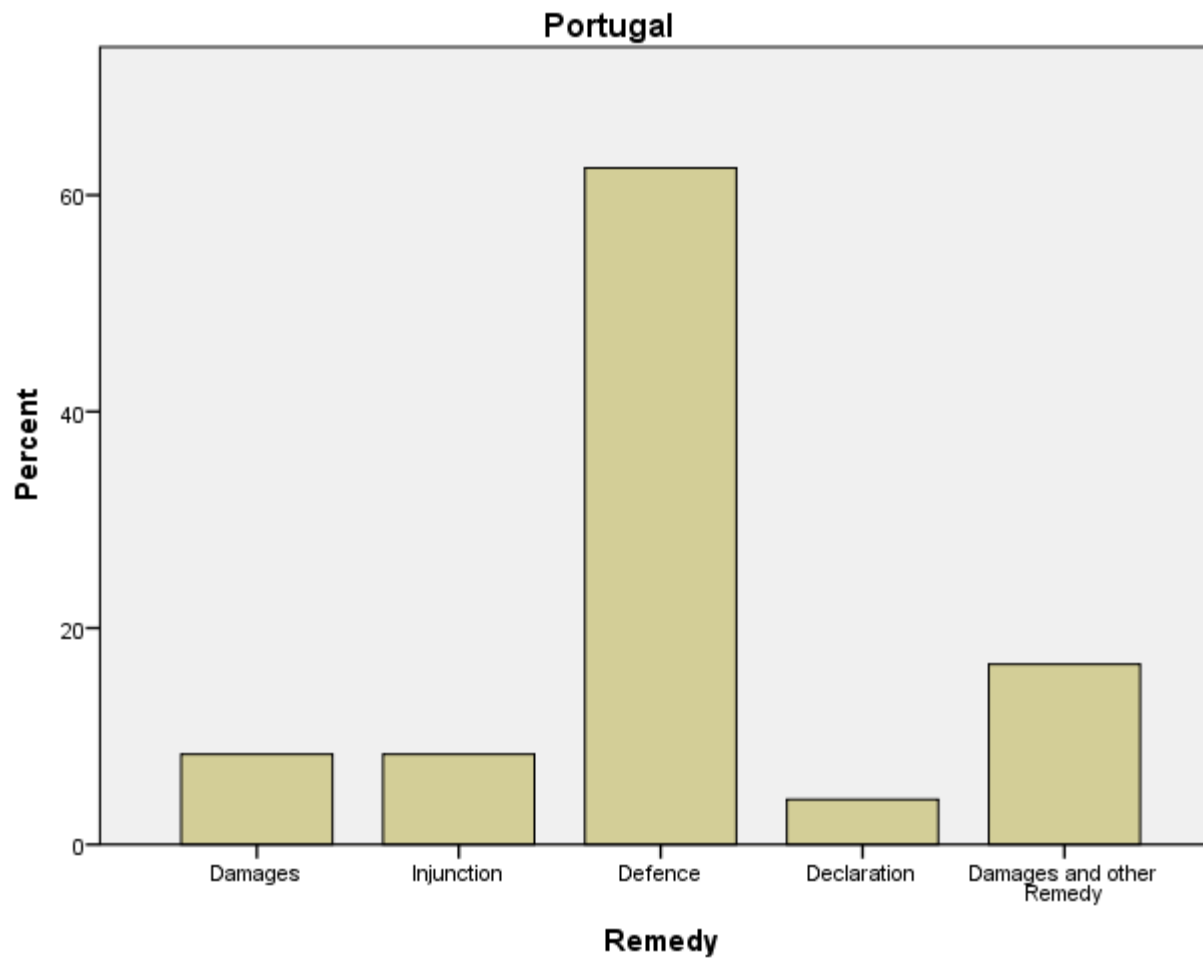




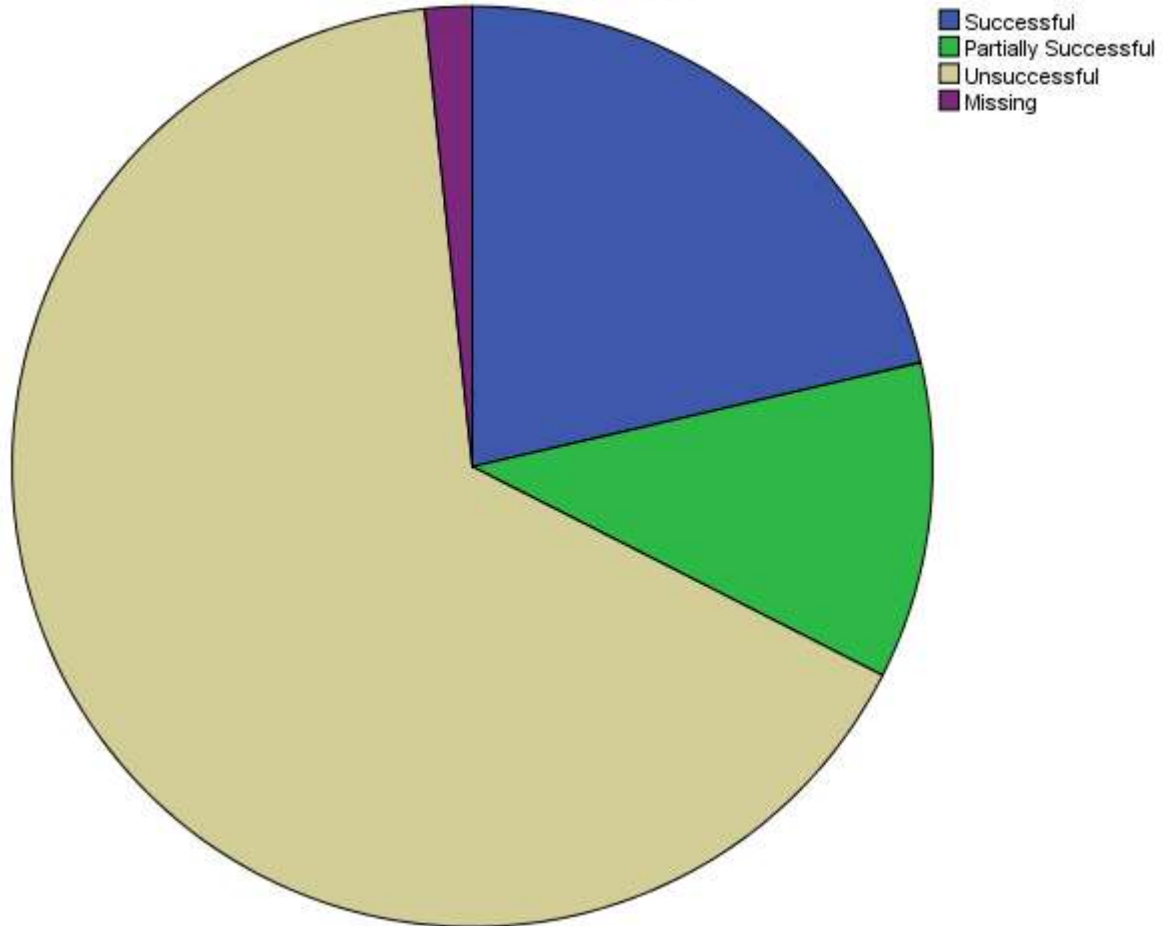




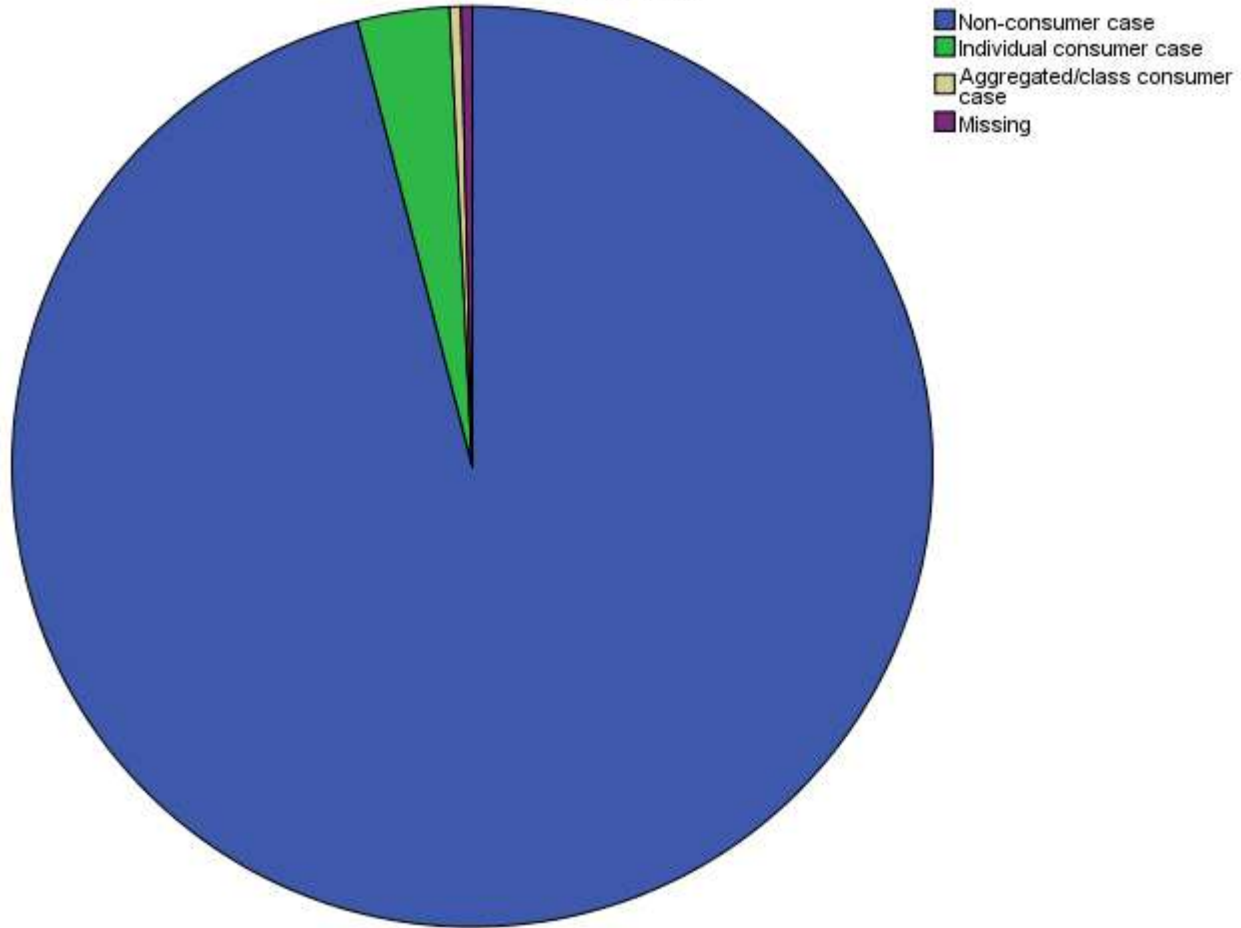




Success



Consumer



PROJECT OVERVIEW

- Work in progress!!
- Mixed landscape (Germany > Bulgaria)
- More cases than anticipated
- Affected by national cultures, competition architecture and civil procedure (eg remedies, follow-on, courts)
- Most common- business contractual disputes, very few consumer cases (<4%)
- Widespread use as defence/injunctions (increase re damages 10/11 (UK) and more successful...)

PART 2- Competition Law Private Enforcement in the UK: Case-Law, Recent Developments and Proposals for Reform



The Changing Landscape of UK Competition law- Post 1998- I

- Competition Act 1998 - Chapter I and II prohibitions modelled on 81/82 (now Arts 101 and 102 TFEU)
- Investigative and fining powers
- Role for OFT and CAT (and regulators)
- CAT a specialist tribunal to hear appeals, judicial review and monetary claims
- Enterprise Act 2002- Personal sanctions- Cartel offence and Director Disqualification

The Changing Landscape of UK Competition law- Post 1998- II

- Enterprise and Regulatory Reform Act
- Key Change, OFT and CC combine to form Competition and Markets Authority ('CMA')
- Royal Assent 25th April 2013

UK Legislative Framework- Private Enforcement

- Competition Act 1998- s58, though no express provision
- Enterprise Act 2002
- Section 47A- follow on actions before the CAT (High Court still available)
- s47B- consumer representative action
- Which? (The Consumers' Association) v JJB Sports

FOLLOW ON ACTIONS IN THE UK

‘The Public Private Enforcement Relationship: Follow-on Actions in the UK’ In *Il Private Enforcement del Diritto Comunitario della concorrenza: Ruolo e Competenze dei Giudici nazionali*, pp157-180
CEDAM, 2009, G A Benacchio and M Carpagnano eds.(and
‘Competition Law Litigation in the UK Courts: a study of all cases 2005-2008’ [2009] 2 GCLR 93-114; 136-147)

Ten Years of UK Competition Law Reform, DUP, 2010-
UK Competition Law and Private Litigation

‘Why not court?: A study of Follow-on Actions in the UK?’ *Journal of Antitrust Enforcement* (2013)1-28

Follow On Actions 1

- Limited number of claims to date (but leave footprint and increasing)-disappointing, partially explained by systemic reasons below
- Mostly following Commission decisions, judgments mostly procedural skirmishes
- s47B? Representative actions- *Which v JJB*-settled

Follow On Actions 2

- High Court- why?
- eg non monetary claims- *EWS*
- *Devenish post Vitamins* claim(High Ct/CA)
re unjust enrichment- limitation period
rationale
- Another rationale- suspensive requirements
for CAT action
- National Grid – High Court action raised
during appeal process- jurisdiction reasons

Follow On Actions 3

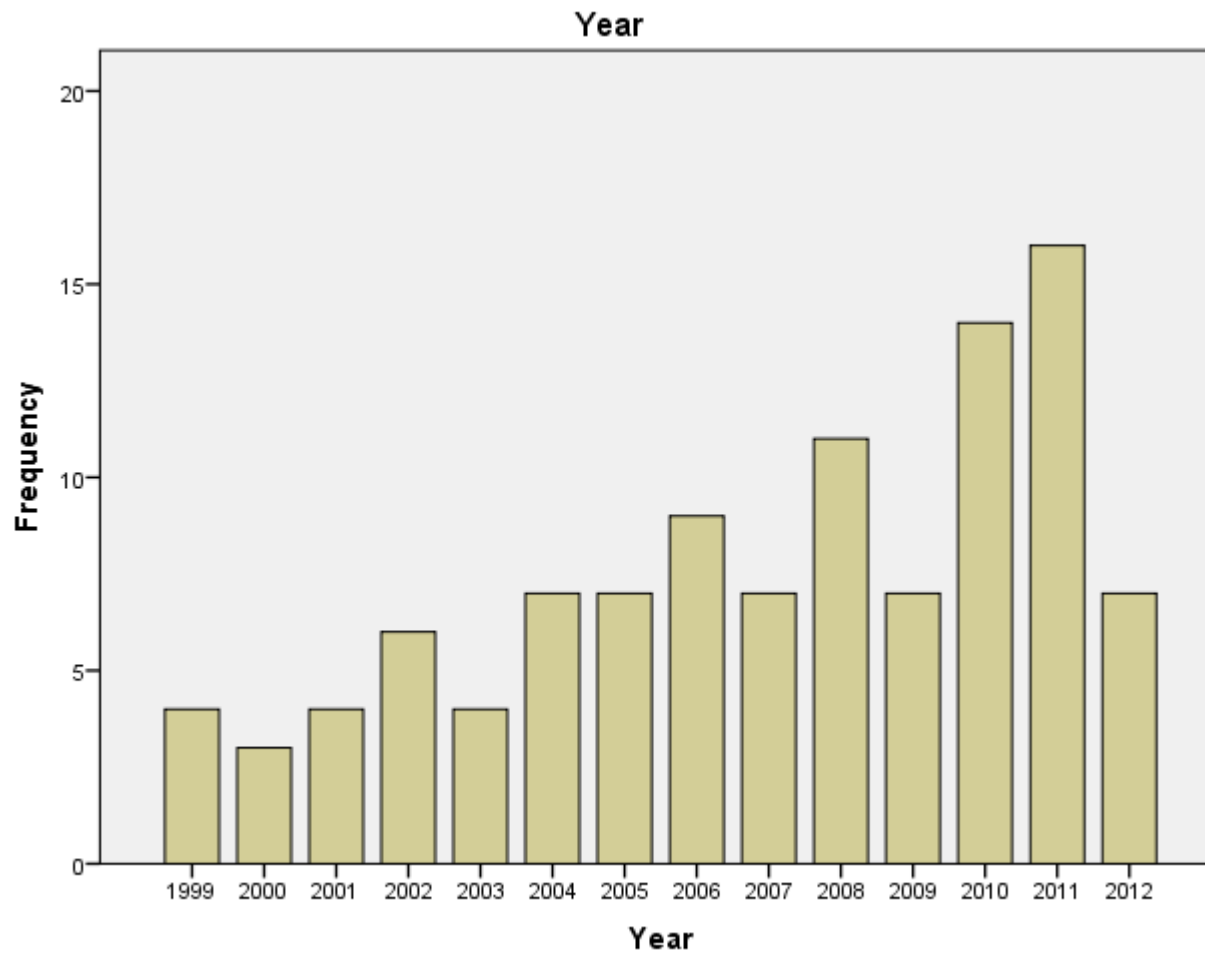
- Limitation rules before the CAT- dependent on the post-infringement appeal process
- 2 years from relevant date
- Considerable case-law
- *BCL Old Co Ltd v BASF I*-> CA held that application to annul fine did not extend period, time-barred
- Cf *Deutsche Bahn* re claim v non-appealing addressee

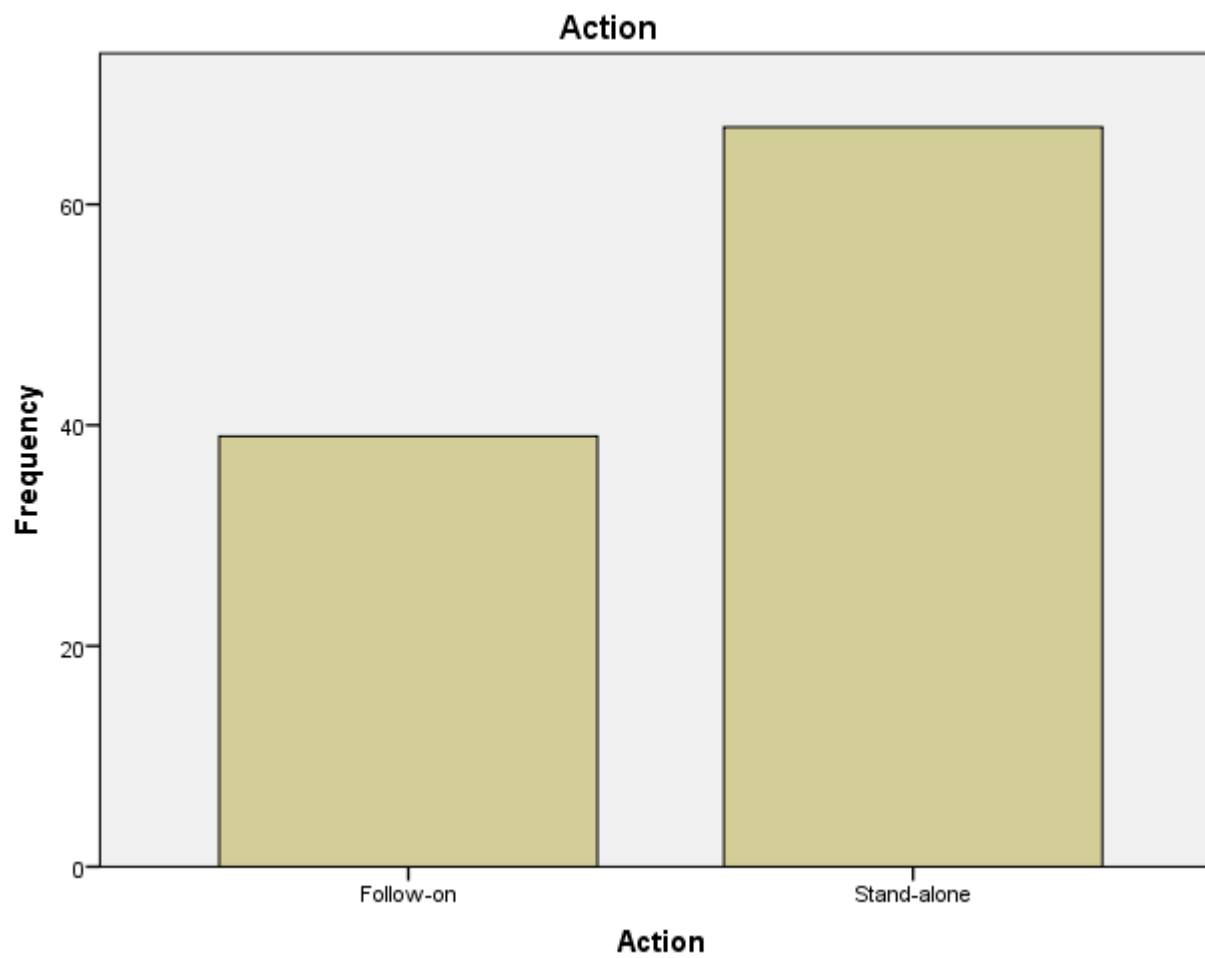
Follow On Actions 4

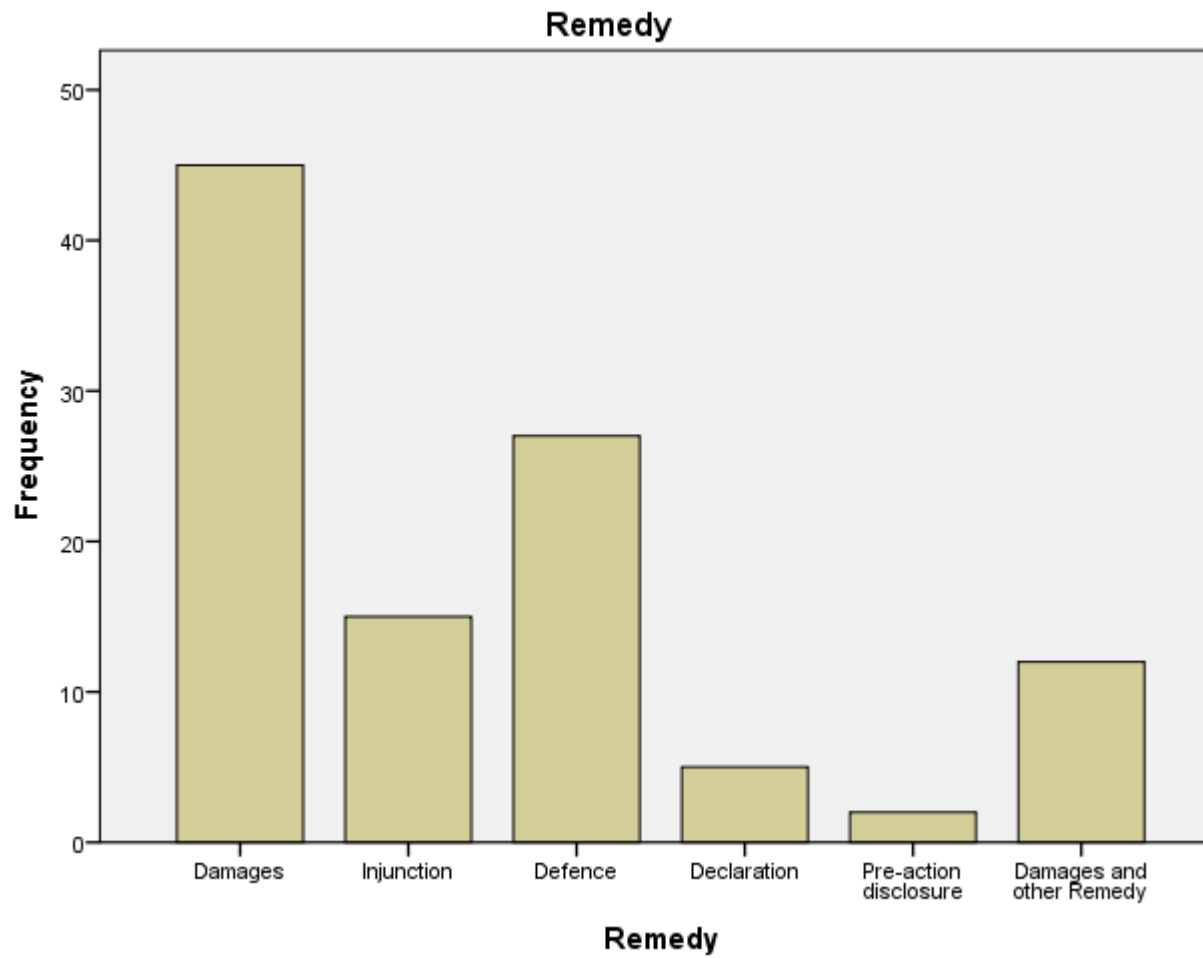
- Success?
- *Enron v EWS* (follow on to ORR decision), Overcharge claim-difficulty in relying on a complex infringement decision- CA
- First Trial- lost opportunity- unsuccessful
- But note *Healthcare at Home Ltd v Genzyme* and interim payment of £2m
- And see *2 Travel Group* success (?) incl award of exemplary damages and £1.6m award in *Albion Water* (28/3/13)

Stand-alone Actions

- Change in recent years- shield>sword
- *BAGS v Amalgamated Racing Ltd*- not covert cartel type cases
- Abuse cases- eg refusal to supply/EF doctrine/predatory pricing
- See eg Purple Parking (2011)
- Note also exploitative- excessive pricing but difficulties eg CA in *AttheRaces Ltd v BHRB*







UK- Review

- Slow, steady increasing practice (106 judgments in 80 disputes in period)
- Limited success and limited impact of 'success'- few final substantive judgments but note interim process /settlements
- Limited follow-on, recent increase but mainly procedural rulings on limitation etc
- Representative action system criticised
- How best to facilitate and encourage private enforcement in the UK?
- Immature system compared to US- need development of procedural/substantive rules but signs of progress 2 *Travel Group/Albion Water*

Key themes

- Funding/costs- CFA's, ATE and *Arkin* third party funding- contingency fees?
- LASPO Act 12- damages-based agreements
- Damages- multiple? Compensation focus per *Devenish*. Generally unresolved issues.
- But see 2 *Travel Group/ Albion Water*
- Collective Redress- (CJC and OFT Recs). Note the limitations on s47B- *Which v JJB*

Proposals for Reform

- EU Level
- Commission White Paper
- Stalled Draft Directive > Collective Redress Consultation process and EU measure?
- Non-binding recommendation on Collective Redress/Reg or Directive re PE and Leniency??
- UK Level
- OFT proposals for reform on Collective redress opt-in/opt-out mechanism
- English procedural limitations demonstrated by *Emerald Supplies v British Airways*

OPTIONS FOR REFORM

- Dept of Business Innovation and Skills (BIS)
- January 2013 : Private Actions in Competition Law: A Consultation on options for reform- government response at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf
- Follows consultation doc, April 24, 2012

BIS PROPOSALS

- Enhance the role of the CAT as a venue for competition actions in the UK
- Introduce opt-out collective actions regime
- Promote ADR
- Ensure private actions complement the public enforcement regime

ROLE OF CAT

- Extend role to stand-alone actions- and harmonise limitation periods with normal civil courts
- Power to grant injunctions
- Fast-track for simpler cases



The CAT as a plaything of business only?

Collective Actions Regime

- Limited opt-out regime with safeguards
- Certification basis (real complexities re commonality – pass through problems!)
- Either consumers or businesses or a combination of the 2
- Only applies to UK domiciled claimants!
- Contingency fees prohibited
- Judicial approval of opt-out settlement and new opt-out collective settlement regime

Conclusions

- Final damages judgment- *2 Travel Group* and subsequently *Albion Water*
- Significant developments- statute and CAT
- Relatively limited case-law- Settlements
- Funding and cost rules disincentives but indications that increasing resort to court- High Court
- *2 Travel* and *Albion Water* damages breakthrough- exceptional
- Fairly radical BIS proposals, CAT as a European hub and for consumer redress
- CAT > Tiger?



THE END/ o Fim

- Thank you for listening
- Muito obrigado