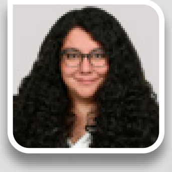
HITTING THE "RETURN" KEY: DISGORGEMENT IN UK/EU ANTITRUST LAWS

BY ROBERT O'DONOGHUE KC & SARAH O'KEEFFE[1]

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Expressly restitutionary remedies have yet to be ordered in a competition law case. Yet disgorgement is not an unfamiliar principle in the field. Excessive pricing and other abuses of dominance see undertakings compelled to return the profits of their wrongdoing. Similarly, administrative authorities explicitly consider disgorgement of gains as an element of their penalty calculations. Given the theoretical 'fit', do or should disgorgement remedies now have a role to play in private antitrust actions, particularly where (i) damages are difficult to calculate, especially in multi-sided and/or zero-price markets; (ii) collective action regimes already depart from strict, bottom-up compensatory principles; and/or (iii) rights are engaged that would otherwise attract restitutionary remedies?

I. INTRODUCTION

The use of disgorgement as an antitrust remedy has been a long-running debate.[2] This is hardly surprising. There is a simple attraction to the argument that those who compete unfairly should not be allowed to keep their ill-gotten gains. There are also obvious parallels between disgorgement and antitrust's other non-compensatory remedies, such as penalty fines and, to an extent, structural divestment.[3]

Interest in disgorgement-type remedies is being driven by several factors. First, as discussed in Section II, there has been a resurgence in recent years in the EU and UK in unfair pricing cases, which are the type of claim most obviously related to disgorgement (and where the law in the EU/UK differs materially from U.S. antitrust law). Second, as discussed in detail in Section III, gains-based penalties are increasingly common in administrative proceedings in which pecuniary penalties are imposed for antitrust infringements. Third, as discussed in Section IV, there has been an enormous increase in antitrust and other private litigation involving so-called "Big Tech" or "Big Data" where, at least under English law, an approach based (in part) on gains to the defendant from unlawful use of data has been found to be consistent with compensatory damages principles. Fourth, the complexities associated with multi-sided markets where one side is zero-price may lead to a shift away from traditional compensatory damages towards more restitutionary-type remedies rooted in a defendant's gains — a point likely to be a fortiori for collective, or class, action regimes involving aggregate class-wide losses.[4] Finally, disgorgement is likely to play a role in the context of pass-on defenses in damages actions, since the legal theory of pass-on being permitted as a defense under EU and UK competition is likely to run into difficulties when it collides with reality (which is the main reason why U.S. Federal antitrust law bans such a defense in direct purchaser claims).

In sum, for a variety of reasons, it is very likely in our view that disgorgement-type remedies will play a greater role in future. Indeed, very recently, the English Court of Appeal had this to say:[5]

> For instance, in a case where there is evidence that defendants have gained from their unlawful conduct but it is difficult to determine to what extent this caused loss to the class, it might be possible for the Court to adapt less standard remedies, for instance by ordering disgorgement of profits. One purpose behind the collective damages regime is the public interest in wrongdoers not retaining their unlawful gains. The use of an account of profits, or some equivalent remedy, is by no means unknown in tort claims. It might even be considered that the gain made by the wrongdoers amounted to a proxy for the loss of the class.

One issue we observe is that the discussion of disgorgement in antitrust is guilty of the twin cardinal sins that often bedevil legal analysis. The first is that the term is used loosely when in truth it refers to a number of distinct principles of law or different legal settings. The second is that multiple categories and sub-categories of legal principles develop seemingly in isolation without any overall unifying principles underlying them. Neither cardinal sin aids clarity, and both are apt to confuse and mislead.

This short piece has two aims: (i) to unpack some of this confusion; and (ii) to plot a clearer trajectory as to how and where disgorgement-related principles and remedies might apply in future in antitrust. When this article uses the term "disgorgement," it does so in its proper legal sense, of stripping a wrongdoer of the profits made from its wrong. For reasons of parochiality and expertise, the assessment that follows focuses on EU and UK competition laws.

2 Notably in Einer Elhauge, Disgorgement as an Antitrust Remedy, 76 ANTITRUST L.J. 79, 83 (2009). For a recent summary of the ongoing U.S. debate, see Kathryn Buggs, *"Gotta Get Those Ill-Gotten Gains: Improving the FTC's Authority to Seek Disgorgement in Antitrust Cases,"* 121 MICH. L. REV. 1235 (2023).

3 See Reuters, "*EU Regulators May Demand Google To Sell Part Of Ad-Tech Business,*" June 13, 2023 and Yahoo! News, "*Justice Department Sues Google To Break Up Its Advertising Empire*," January 24, 2023. Regulators may increasingly take the view, in the context of enforcement efforts against so-called 'Big Tech', that conflicts of interest in monopolistic multi-sided platforms – that is between the platform owner's own products/services and those of non-associated third parties who also depend on the monopoly platform to access users – are so endemic and intractable that *ex post* enforcement with pecuniary penalties is ineffective, and that structural remedies are necessary.

4 See e.g. *Gormsen v. Meta Inc and others* [2023] CAT 10, footnote 30. See generally Rachael Mulheron, "*Restitutionary Relief In Competition Law Class Actions: An Evolving Landscape*," (2018) 26 Restitution Law Review, 1 ("*Mulheron*").

5 *Foreign Exchange*, [2023] EWCA Civ 876, §106 (per Green LJ).

II. SUBSTANCE

The most obvious difference between EU and UK competition laws on the one hand and U.S, antitrust law on the other is that there is legislation[6] and a developed body of case law concerning unfairness,[7] or exploitation, abuses in EU/UK competition laws that have no counterpart under U.S. antitrust law.[8] The key insight is that, at their core, unfairness abuses clearly involve elements of disgorgement in the sense that the challenged price or term at issue is benchmarked against whether it is consistent with prices or terms sustainable under conditions of normal and sufficiently effective competition. While the law does in practice permit some "headroom" above the competitive price/term before conduct is considered abusive,[9] the gravamen is that a monopolist cannot exploit its market power by imposing unfair prices or terms, and the law may compel a firm to act as if it faced normal and sufficiently effective competition (subject, as noted, to some "headroom" being permitted). In practice, this is achieved by condemning the unfair price or term through the use of one or more benchmarks of fairness. In this way, the "gain" above the competitive price benchmark may be wholly or substantially disgorged as a key element of proving the infringement in question.

The core principles on unfair pricing have been summarized as follows:[10]

> (i) The basic test for abuse, which is set out in the Chapter II prohibition and in Article 102, is whether the price is "unfair." In broad terms a price will be unfair <u>when the dominant undertaking has reaped trading benefits which it could not have obtained in conditions of "normal and sufficiently effective competition," i.e. "workable" competition</u>.
> (ii) A price which is "excessive" because it <u>bears no "reasonable" relation to the economic value</u> of the good or service is an example of such an unfair price.
> (iii) There is no single method or "way" in which abuse might be established and competition authorities have a margin of manoeuvre or appreciation in deciding which methodology to use and which evidence to rely upon…
> (v) If a Cost-Plus test is applied the competition authority may compare the cost of production with the selling price in order to disclose the profit margin. Then the authority should determine whether the margin is "excessive." This can be done by comparing the price charged against a benchmark higher than cost such as a reasonable rate of return on sales (ROS) or to some other appropriate benchmark such as return on capital employed (ROCE). When that is performed, and if the price exceeds the selected benchmark, the authority should then compare the price charged against any other factors which might otherwise serve to justify the price charged as fair and not abusive…
> (vii) If a competition authority chooses one method (e.g. Cost-Plus) and one body of evidence and the defendant undertaking does not adduce other methods or evidence, the competition authority may proceed to a conclusion upon the basis of that method and evidence alone.

The parts in emphasis above underscore the disgorgement aspects of unfairness abuses: the monopolist is not permitted to reap a *"trading benefit"* that could not be obtained under conditions of normal and sufficiently effective competition; nor can it charge whatever the customer is willing to pay—there must be a "*reasonable relation*" to "*economic value*."[11] The monopolist is stripped of the profits that flowed from the "wrongful" (i.e. excessive) element of the price it abusively charged.

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6 Namely, Article 102(a) TFEU and Section 18(2)(a) of the Competition Act 1998.

7 See generally O'Donoghue & Padilla, The Law and Economics of Article 102 TFEU, 3rd edition (2020) (Hart Publishing), Chapters 14 (Excessive Pricing) and 16 (Other Exploitative Abuses).

8 Indeed, not only is unfair pricing not an offence under antitrust law but the charging of high prices is considered potentially desirable since it will act as a magnet for entry or expansion by other competitors, thus improving competition. As Justice Scalia noted in the Trinko case *(Verizon Commc'ns Inc. vs. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, p. 407 (2004)): "*The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices — at least for a short period [emphasis added] — is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.*"

9 Case C-177/16, *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība* EU:C:2017:286, §§52-56 ("…*There is in fact no minimum threshold above which a rate must be regarded as 'appreciably higher', given that the circumstances specific to each case are decisive in that regard. Thus, a difference between rates may be qualified as 'appreciable' if it is both significant and persistent on the facts, with respect, in particular, to the market in question, this being a matter for the referring court to verify. It should be emphasised in this regard that, as observed by the Advocate General in point 107 of his Opinion, the difference must be significant for the rates concerned to be regarded as 'abusive'. Furthermore, that difference must persist for a certain length of time and must not be temporary or episodic.*").

10 *Competition and Markets Authority v. Pfizer UK Limited and others* [2020] EWCA Civ 339, §97 (per Green LJ) (emphasis added).

11 Regarding the obligations of dominant standard essential patent owners to offer fair, reasonable, and non-discriminatory ("FRAND") terms, the courts have also noted "*what is striking is the extent to which the language of excessive pricing in abuse cases uses the language of FRAND*" and concluded that, as a result, "*there is a very close alignment between a price that exceeds FRAND and a price that infringes the Chapter II prohibition.*" See *Optis Cellular Technology LLC and others v. Apple Retail UK and others* [2023] EWHC 1095 (Ch.), §439

The core principles on unfair non-price terms are very similar to unfair prices. The English Court of Appeal has recently summarized the principles on unfair terms as follows:[12]

> The law relating to abuse is concerned with consumer unfairness because when an undertaking is dominant it is, by definition, freed from the competitive shackles which otherwise incentivise and discipline it to maximise consumer welfare and benefit. This is why most laws worldwide which prohibit abuse of dominance include within the prohibition the imposition of some form of "unfair" terms and prices. These are often described as 'exploitative' abuses. There is no single definition of unfairness set out in case law. One leading commentary (O'Donoghue & Padilla, "The Law and Economics of Article 102 TFEU," 3rd Edition, 2020), provides a useful summary of the case law (ibid pages [1031] – [1045]) and observes (page [1037]) that the test includes asking whether the disputed term is "reasonable" bearing in mind the legitimate interests of the dominant undertaking, its trading parties and consumers. It is commented that the reasonableness test seems vague but that a more developed definition from case law is one which involves two stages and entails an analysis of (i) whether the disputed term serves a legitimate purpose and if so (ii) whether it is proportionate relative to that purpose.

Importantly, in relation to unfairness abuses, there is also no (separate) need to show a distortion of competition in order to establish an abuse: the distortion comes from the unfairness itself. This underscores even more that unfairness abuses have a direct relationship to disgorgement: the fact that the monopolist imposes a price or term that could not be imposed under conditions of normal and sufficiently effective competition is sufficient,[13] and there is no need to show any further, or separate, effect on competition (albeit that may be present and may of course bolster the case). As Roth J stated in *Preventx v. Royal Mail, "the authorities on excessive pricing, and the United Brands test, show that it is not necessary to show a distortion of competition to establish that form of exploitative abuse."*[14]

The "first wave" of growth in excessive pricing cases, mainly driven by Commission and CMA enforcement against "Big Pharma," is well-known. Now, the collective action regime is witnessing a spate of abuse litigation against "Big Tech," typically combining excessive pricing claims with claims of allegedly unfair terms. For instance, collective consumer actions were certified against Apple and Google last year in respect of developer commissions and contractual terms,[15] with similar claims by developers[16] and against Sony[17] also currently going through the CAT. Disgorgement in the sense described above, of whether the defendants will be ordered to return profits gained from unfair prices and/or terms, will undoubtedly be in play. It remains to be seen exactly how the analysis will manifest, particularly in the context of difficult-to-measure losses and a collective action regime that already diverges from traditional compensatory principles, the relevance of which is explained further below.

III. PENALTIES

It is trite that a penalty—whether pecuniary or otherwise—should seek to punish and deter. In this context, antitrust penalty guidance from both the EU Commission and UK Competition and Markets Authority ("CMA") makes clear that those regulators may seek to impose gains-based penalties. The EU Commission penalty guidance states that "*[t]he Commission will also take into account the need to increase the fine in order to*

12 *London & South Eastern Railway Limited and others v. Justin Gutmann* [2022] EWCA Civ 1077, §93.

13 This may, however, not be necessary. In *London & South Eastern Railway Limited and others v. Justin Gutmann* [2022] EWCA Civ 1077, §102, Green LJ stated "*To show that a term is unfairly abusive it is not always necessary to show that it is causally connected to the dominant position. In some cases it might be possible to establish that absent dominance the undertaking, in all likelihood, would not have been able to impose the term in question and this might be relevant to whether a term is unfair: See e.g. Case 27/76 United Brands v. Commission EU:C:1978:22 at paragraphs [248] and [249]. But that is but one means of establishing abuse in cases of consumer harm. In neither DP (ibid) nor DSD (ibid) did the CJEU consider whether the terms in question would have been imposed in a genuinely competitive market. In both cases the Court simply examined the fairness of the disputed term as a standalone proposition. The same point was made in Facebook (ibid) at paragraphs [65ff] of the judgment of the Federal Supreme Court.*"

14 [2020] EWHC 2276 (Ch), §95. In its *Football World Cup* decision, the EU Commission also stated: "*Consumers' interests are protected by Article [102], such protection being achieved either by prohibiting conduct by dominant undertakings which impairs free and undistorted competition or which is directly prejudicial to consumers. Accordingly, and as has been expressly recognised by the Court of Justice, Article [102] can properly be applied, where appropriate, to situations in which a dominant undertaking's behaviour direct[ly] prejudices the interests of consumers, notwithstanding the absence of any effect on the structure of competition.*" See 2000/12/EC Commission Decision of 20 July 1999 (*Case IV/36.888 - 1998 Football World Cup*), §100.

15 *Kent v. Apple* [2022] CAT 28.

16 Professor Sean Ennis has recently applied for certification to represent a class of developers in a collective action against Apple.

17 *Neill v. Sony* CAT Case No 1527/7/7/22.

exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount."[18] The CMA Guidance states:[19]

> The penalty figure reached after steps 1 to 3 may be increased to ensure that the penalty to be imposed on the undertaking will deter it from breaching competition law in the future… Such an increase will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of penalty reached at the end of step 3. Where relevant, the CMA's estimate would account for any gain which might accrue to the undertaking in other product or geographic markets as well as the "relevant" market under consideration" (emphasis added).

In recent years, the CMA has routinely made use of the possibility to impose a gains-based penalty, very frequently calibrating its penalty before a deterrence increase by comparing it to the defendant's: (i) annual worldwide turnover; (ii) net assets and adjusted net assets; (iii) profit after tax; and (iv) operating profit.[20] This has some indirect relationship with disgorgement but might more properly be considered as an assessment of whether further deterrence is required (or not). However, in a much more direct example of disgorgement, in several unfair pricing cases the CMA has also sought to work out the "excess" above the competitive benchmark and, therefore, the "fruits" of the abuse in terms of incremental profits, and factored this analysis into its assessment of penalty. In Liothyronine, for example, the CMA explained its motivation for a more direct disgorgement-based penalty in unfairness cases in the following terms:[21]

> In order to have a sufficient deterrent effect, the penalty for each of the liable undertakings needs to not only meet, but exceed by a material amount, the minimum direct financial benefit accrued by Advanz in each relevant ownership period from its strategy of exploiting the absence of effective competition and regulation to impose unfair selling prices for the supply of Liothyronine Tablets in the UK, at the expense of the NHS and ultimately patients.
>
> It is an important part of effective deterrence that an undertaking should not be in a position to earn a profit from infringing competition law even after paying a penalty in respect of that infringement. Nor is it sufficient for any penalty to only neutralise an infringing undertaking's direct financial gains resulting from an infringement. If the penalty imposed on an undertaking for a competition law infringement only neutralises the gains made (i.e. puts the undertaking in the same position as it would have been absent the infringement) there is little economic incentive for the undertaking not to infringe competition law again: at most, it would risk losing its gains if it was caught and sanctioned.
>
> The need for any penalty imposed in relation to an infringement to exceed the direct financial gains from the Infringement by a material amount is particularly relevant for infringements involving the imposition of unfair selling prices where the gains are accrued as a direct result of the infringing conduct (i.e. charging excessive and unfair prices). The CMA considers that simply asking a company to repay the minimum level of its unlawful direct gains (or a small percentage more) would not be sufficient to deter the company from taking the risk of engaging in the same or similar breaches of competition law again in future, in the pharmaceutical sector or in any sector of the economy. This is particularly the case given the possibility that future unlawful conduct may not be detected or subject to enforcement.

On appeal in *Liothyronine*, the Competition Appeal Tribunal ("CAT") regarded the CMA's analysis as "*unimpeachable*," stating at §480 that:[22]

> "…the CMA's approach in calculating a deterrence uplift by reference to the financial benefit which accrued to Advanz as a result of its infringing conduct was unimpeachable. The Penalty Guidance states that an increase in the Step 3 penalty will be appropriate 'where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of penalty reached at the end of step 3.' In the present case, the financial benefit made by

18 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), point 10.

19 CMA73, 18 April 2018, §2.21.

20 See, e.g., *Pre-Cast Drainage Products*, 23 October 2019, §6.69.

21 *Excessive and unfair pricing with respect to the supply of liothyronine tablets in the UK*, Case 50395, 29 July 2021, §7.153*ff*. Similar reasoning was applied in *Hydrocortisone tablets*, Case 50277, 15 July 2021 and *Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK*, Case 50908, 21 July 2022.

22 *Hg Capital LLP and others v. CMA* [2023] CAT 52, §480.

> the infringing undertakings was below the penalty reached at the end of Step 3 but it was legitimate for the CMA to conclude that a further uplift was appropriate."

Notably in this context, the CAT also distinguished its earlier case, *Genzyme*, where it had stated that "*the penalty is not to be fixed in terms of the 'gain' to the infringing party, but in terms of the sanction appropriate for the conduct, having regard to the need for deterrence.*"[23] The CAT reasoned as follows, at §§482-483:

> First, the Tribunal's judgment in Genzyme predated the Penalty Guidance which the Tribunal is now required to apply. Second, the Tribunal's observation was not purporting to lay down a hard-and-fast rule and needs to be read in context. As the CMA explained in the Decision, the reason why the Tribunal in Napp and in Genzyme was disinclined to calculate the penalty by reference to the gain generated by the infringing party was the difficulty in those cases of assessing the gain and hence of fixing a penalty which would be an effective deterrent. In Genzyme the Tribunal prefaced the observation relied on by the Appellants by the following statement: 'In this case, as a result of the OFT's intervention, it is difficult to show that Genzyme has made a significant gain from the infringement.'
>
> There is no such difficulty in the present case. Nor is there any basis for the contention that determining the gain would lead to complication and unfairness in subsequent damages claims.

In short, the question of penalties at minimum securing disgorgement of, or at least taking into account, financial benefit is increasingly an accepted feature in antitrust infringements.

IV. PRIVATE DAMAGES

Perhaps the most interesting, and controversial, aspect of disgorgement concerns private damages for infringements of EU or UK competition law. At the EU level, the Damages Directive created a legislative right to damages for breach of competition law,[24] albeit prior to the Directive it was already the case that several Member States recognized such rights under national law.

The starting point is that the Damages Directive appears rooted in traditional compensatory principles — comparing what the plaintiff actually paid under the infringement with what it would have paid absent the infringement — or at least that there is no express indication in the legislation that disgorgement-type considerations are relevant to damages. Recital 12 expressly refers to the plaintiff paying overcharges or losing sales because of the infringement, both of which are pecuniary losses to the plaintiff:

> Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law.

Similarly, in the UK, the right to damages under competition law has traditionally been treated as a species of statutory tort based on normal compensatory damages: it is "*the compensation necessary to put the class in the position they would have been in, had the wrong not been committed*" and "*competition law does not operate a form of compensation based upon the recoupment or clawing back of unlawful gains: it compensates for loss.*"[25] Moreover, recent legislation has expressly excluded exemplary, or punitive, damages for antitrust collective/class actions and also removed that right from other (individual) claims arising after 2017.[26]

On this basis, the position concerning disgorgement in private antitrust might appear straightforward. However, the position is much more nuanced, and there is a good basis for suggesting that disgorgement-type principles already play a significant role and could play an even greater role in future in antitrust cases in the UK.

23 *Genzyme Limited v. Office of Fair Trading* [2004] CAT 4.

24 Directive 2014/104/EU of The European Parliament and of The Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2003 L/349/1.

25 *Gormsen v. Meta Inc and others* [2023] CAT 10, §32.

26 See Schedule 8A of the Competition Act, Part 8, section 36 ("*A court or the Tribunal may not award exemplary damages in competition proceedings*").

First, it is clear, under traditional compensatory damages principles, that a direct or indirect victim of an unfair price can recover damages (subject, as appropriate, to pass-on issues) for the abusive "excess." In this context, the damages will, directly and/or indirectly, be linked to the "gain" that the monopolist has made. It may be directly linked in a case where the benchmark for unfairness is a cost plus measure. This may be a permissible approach where in fact no other good benchmark for unfairness applies: "*if a competition authority chooses… Cost-Plus… and the defendant undertaking does not adduce other methods or evidence, the competition authority may proceed to a conclusion upon [that] basis… alone.*"[27] In such a case, the impugned price would be compared to some notionally "fair" profit and the damages would, subject, perhaps, to allowing some "headroom," be the difference between the price under this "fair" level of profitability and the price actually charged. Alternatively, the damages may be indirectly linked to the "gain" that the monopolist has made where benchmarks of comparable products are used: these benchmarks will either place an effective cap on what the monopolist can charge or provide a proxy for a "permissible" profit level. This is clearly an instance where compensation and disgorgement correlate, but (a) that is by no means unique in restitutionary remedies,[28] and (b) what is interesting about the excessive price analysis is that its mechanics are practically concerned with the defendant's gain, whether or not as a proxy for consumer loss.

Second, in the context of FRAND obligations under competition law, it is clear that "*the FRAND price payable by an Implementer to an SEP Owner ought to take account of the value of the Standard to the Implementer.*"[29] While the precise licensee value will vary from case to case, it certainly cannot be excluded that the gain from using the input in question would be a relevant measure. Indeed, in a non-FRAND context, it has been held that the economic value of data provided to another commercial operator was relevant to fairness; in other words, it is accepted that fairness should include consideration of the "*revenue-earning potential*" of the input to the person who acquires it.[30]

Third, under English law, in other cases of tortious competition, the Courts have awarded damages based on a notional royalty or capitalized value for the input in question.[31] The Supreme Court in *Lloyd* said that such damages "*can be assessed by postulating a hypothetical negotiation and estimating what fee would reasonably have been agreed for releasing the defendant from the duty which it breached.*"[32] In *Force India*,[33] a case concerning misuse of confidential information, Arnold J identified a number of principles in relation to "user damages":

> (ii) The primary basis for the assessment is to consider what sum would have [been] arrived at in negotiations between the parties, had each been making reasonable use of their respective bargaining positions, bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place…
>
> (iii) The fact that one or both parties would not in practice have agreed to make a deal is irrelevant …
>
> (v) Where there has been nothing like an actual negotiation between the parties, it is reasonable for the court to look at the eventual outcome and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain.

User damages are available for infringements of intellectual property rights more broadly. In *Kohler Mira*,[34] for example, the court relied on the "*available profits*" method to assess the reasonable royalty payable for infringement of an unregistered design right, which involved: (i) calculating the profits actually made by the defendant; (ii) assuming that the parties would have accurately predicted this figure in advance and had it in mind when negotiating the license; and then (iii) working out how the profits should be split between the parties.

This typifies that, in the context of such a hypothetical negotiation, it will often be relevant to consider the valuable use to which the infringer (unlawfully) put the asset in question, including its commercial gain. To be clear, and despite the contrary school of thought prior to

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27 *Competition and Markets Authority v. Pfizer UK Limited and others* [2020] EWCA Civ 339, §97(vii) (per Green LJ).

28 See e.g. Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed), p340, in the context of actions for money had and received.

29 *Optis Cellular Technology LLC and others v. Apple Retail UK and others* [2023] EWHC 1095 (Ch.), §452i.

30 See *ATTHERACES Ltd & Anr v. The British Horse Racing Board & Anr*, [2007] EWCA Civ 38, §§189, 218.

31 See e.g. *Seager v. Copydex Ltd (No 2)* [1969] 1 WLR 809, 813, recently approved by the Supreme Court in *Morris-Garner and another v. One Step (Support) Ltd*, [2018] UKSC 20, §120 (Lord Sumption).

32 [2021] UKSC 50

33 [2012] EWHC 616 (Ch), §386

34 [2014] EWHC 1931 (IPEC).

Morris-Garner, these are compensatory damages cases: they are not restitution claims or restitutionary damages. Rather, a notional release fee is simply an evidential tool for assessing a party's true loss.[35]

By parity of reasoning, there can be no objection (at least under English law) in an antitrust case to using a hypothetical negotiation as part of the evidence, or methodology, to assess compensatory damages. Thus, the UK Supreme Court has confirmed that, where a defendant wrongfully obtains and uses a person's data, it is consistent with compensatory damages principles to award compensation based on the commercial value of the data as an asset to the wrongdoer:[36]

> 141. … damages may be awarded for the misuse of private information itself on the basis that, apart from any material damage or distress that it may cause, it prevents the claimant from exercising his or her right to control the use of the information. Nor can it be doubted that information about a person's internet browsing history is a commercially valuable asset. What was described by the Chancellor in the Court of Appeal [2020] QB 747, para 46, as 'the underlying reality of this case' is that Google was allegedly able to make a lot of money by tracking the browsing history of iPhone users without their consent and selling the information collected to advertisers.
>
> 142. The view has sometimes been expressed that asserting privacy in information is inconsistent, or at least in tension, with treating such information as a commercial asset… But once the basis of the right to privacy is understood to be the protection of a person's freedom to choose and right to control whether and when others have access to his or her private affairs, I think that any tension largely disappears. It is common experience that some people are happy to exploit for commercial gain facets of their private lives which others would feel mortified at having exposed to public view. Save in the most extreme cases, this should be seen as a matter of personal choice on which it is not for the courts to pass judgments. Moreover, where the defendant's very purpose in wrongfully obtaining and using private information is to exploit its commercial value, the law should not be prissy about awarding compensation based on the commercial value of the exercise of the right. As was confirmed in Morris-Garner, the fact that the claimant would not have chosen to exercise the right himself is no answer to a claim for user damages. It is enough that, as Lord Reed JSC put it at paras 30 and 95(1) of his majority judgment, the defendant has taken something for nothing, for which the owner of the right was entitled to require payment.

Fourth, as set out above, the English Court of Appeal in *Foreign Exchange* very recently indicated that "*disgorgement of profits*" may be an appropriate remedy in an antitrust setting specifically, particularly in the context of class/collective actions where the loss is difficult to determine and where "*[o]ne purpose behind the collective damages regime is the public interest in wrongdoers not retaining their unlawful gains.*"[37] More generally, it is also important to appreciate that the introduction of class/collective action regimes based on a top-down, aggregate, award of damages is itself a departure from traditional compensatory damages principles where each plaintiff would need to prove a loss specific to that plaintiff on a bottom-up basis. As the English Court of Appeal stated, such an aggregate damages award "*serves to ensure disgorgement of the fruits of the breach.*"[38]

Finally, in addition to compensatory damages, English law also recognizes the specific concept of restitutionary damages, as well as causes of action based on unjust enrichment. For instance, awards of money had and received are available for certain proprietary torts, while an account of profits is commonly ordered in response to IP infringements. Such remedies have obvious attractions in antitrust settings, where calculating compensatory damages may also be extremely difficult. They could, for example, be useful where intractable pass-on issues arise. U.S. Federal antitrust law does not permit a pass-on defense to be raised in a direct purchaser claim[39] (albeit some

35 *Morris-Garner, ibid.*, §123 (Lord Sumption).

36 *Lloyd v. Google* [2021] UKSC 50, §§141-142 (emphasis added).

37 *Foreign Exchange*, [2023] EWCA Civ 876, §106 (per Green LJ).

38 *London & South Eastern Railway Limited and others v. Justin Gutmann* [2022] EWCA Civ 1077, §63.

39 See *Hanover Shoe, Inc. v. United Show Machinery Corp.,* 392 U.S. 481 (1968). See also *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which found that the corollary was that indirect purchasers did not have Federal claims either. Again, however, many States also permit indirect purchaser claims.

State laws do), in material part because of the intractability of such issues.[40] By contrast, pass-on is a permitted defense under EU and UK antitrust law.

In practice, however, the courts have yet seriously to grapple with a true pass-on situation. In the only two litigated English cases to date – *BritNed*[41] and *Trucks 1*[42] – pass-on issues were essentially side-stepped since the courts found that the claimant entities in question were regulated entities.[43] It is clear that, outside of this relatively simple and unusual setting, issues of pass-on may well be intractable in the context of complex value chains, particularly where litigation concerning different parts of the chain is being conducted in separate proceedings that are separated in time.

Gains-based remedies may also be attractive where the long antecedents of a cartel mean that the data needed to run regression models in compensatory damages cases is lacking or patchy (in general, it will be easier to work out a gain than a counterfactual price difference).

However, at least under English law, gains-based remedies face what, at first sight, seems to be a significant obstacle that antitrust claims are a species of tort of breach of statutory duty and restitutionary damages have not been awarded for such torts. This is based on the distinction between proprietary and non-proprietary rights, with antitrust claims – as a tort of breach of statutory duty – falling into the latter category. By contrast, for proprietary rights like patents or real property, there is no difficulty under tort in granting restitutionary damages, where the gain to the wrongdoer governs the damages assessment.[44]

That said, as a leading textbook on damages notes, because antitrust claims are considered a tort of breach of statutory duty, the English courts have, in at least in one case, decided <u>against</u> restitutionary damages in antitrust cases:[45]

> The contours of [the] tort [of breach of statutory duty] depend upon the relevant statute but it is rarely, if ever, available without proof of conventional loss. In *Pickering v. Liverpool Daily Post and Echo Newspapers Plc* Lord Bridge said that he knew of no authority where, in the absence of evidence that the statute conferred a cause of action for damages, the claimant could recover without proof that the breach caused 'either personal injury, injury to property or economic loss'. In *Devenish Nutrition Ltd v. Sanofi Aventis SA,* the reasons of the Court of Appeal strongly suggest that licence fee damages would be unavailable for the tort of breach of statutory duty, at least unless there were a clear basis for an implication of availability of that measure in the statute. The breach of statutory duty concerned competition law in which European Community law had been integrated into domestic English law. Large vitamin manufacturing companies had entered into worldwide cartels designed to raise prices unlawfully. Many of those to whom vitamin products had been supplied joined together in this action claiming repayment of the illegal over-charges. Those over charged [sic] had been passed on by them to their own sub-buyers so loss was going to be difficult or impossible for them to prove. Although the issue before the Court of Appeal was the award of an account and disgorgement of profits and although the Court

40 The U.S. Supreme Court noted as follows in *Hanover Shoe* (pp.492-493): "*A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labour market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge, or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defence would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defence is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories. In addition, if buyers are subjected to the passing-on defence, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.*"

41 *BritNed Ltd v. ABB AB & others*, [2019] EWCA Civ 1840, [2019] WLR(D) 610, [2020] Bus LR 1073.

42 *Royal Mail plc and British Telecommunications plc v. DAF and others,* [2023] CAT 6.

43 There was, however, a dissenting judgment in *Trucks 1* on pass-on, finding there was pass-on notwithstanding regulation (indeed, regulation made pass-on more likely, not less).

44 Under English contract law, it is also clear that negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset: see *Morris-Garner and another v. One Step (Support) Ltd,* [2018] UKSC 20, §95(10) (Lord Reed).

45 *McGregor on Damages,* Sweet & Maxwell, 21st edition (2022), §14-035, citing *Devenish Nutrition Ltd v. Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086.

of Appeal treated licence fee damages as restitutionary, all members of the Court considered that the decision in Wass should be applied to deny recovery of remedies for other than conventional loss in the context of breach of statutory duty.

Nonetheless, it is highly unlikely that the above represents the last word on the availability of restitutionary damages under antitrust law in the UK. The following points bear emphasis:

- There is nothing in the statutory wording of a "*claim for damages*" under section 47A(3)(a) of the Competition Act 1998 that precludes such a claim or restricts them to purely compensatory damages.[46]
- The legal position is not as clear and settled as it would seem. The CAT has certainly expressed doubts as to whether restitutionary damages are ruled out[47] and has very recently suggested that the position might need to be revisited.[48] As noted above, the English Court of Appeal has also very recently indicated that it might be open to disgorgement-type antitrust damages remedies, particularly in class/collective actions.[49]
- In principle, antitrust can apply in any factual setting, including property rights, e.g., patents. As such, an apparent principle that restitutionary damages cannot apply to antitrust claims at all would lead to an incoherent position that the same would be true even when proprietary rights are at issue and where English law otherwise does permit restitutionary damages for wrongs. More generally, as Mulheron notes:[50]

> …certain law reform opinion and academic commentary have suggested that restitutionary damages should become more generally available for non-proprietary torts, to achieve a degree of coherence with their proprietary cousins, and on the basis of the maxim (one of 'public policy', according to recent case law) that 'no man shall profit from his own wrong'... For example, in Devenish, Arden LJ remarked that the 'overall holding in Blake is that the law on remedies ... should be coherent, and that the same remedies should be available in the same circumstances, even if the cause of action is different.'

- In the context of class/collective actions in particular, it is more likely that the conditions under which compensatory damages might not be available would be satisfied, thus providing greater justification for restitutionary damages and restitutionary claims. In particular, whilst English law requires that restitutionary damages are exceptional, it may be that, e.g., the significant class fragmentation sometimes seen in collective actions would satisfy this test, particularly where pass-on issues arise.[51]

V. CONCLUSION AND LOOKING FURTHER AHEAD

Disgorgement in antitrust is an unhelpful omnibus term that elides the distinction between multiple different legal principles and settings. As a matter of substance, it is clear and settled under EU/UK antitrust law that a monopolist may commit various unfairness abuses that have in common assessing whether the same price (or term) could be imposed under reasonably effective competition, and 'disgorging' the excess if not (subject to leaving some headroom). Regarding penalties, there is an increasing tendency for public authorities in the EU/UK to try to work out the 'gain' from the antitrust infringement and to peg penalties in a way that comfortably off-sets, or disgorges, that gain. This applies in particular, but not only, in unfairness abuse cases.

46 For a detailed analysis, see *Mulheron*, above note 4, section C.1. She also concludes that class/collective actions can result in restitutionary damages awards.

47 See *BCL Old Co Ltd v. Aventis SA*, [2005] CAT 2, §28 (in creating the CAT, Parliament had created a specialized jurisdiction that *"facilitat[ed] claims for damages or restitution on the part of those who have suffered loss as a result of infringements of domestic or European competition law."*). To similar effect, the CAT in *Albion Water* [2011] CAT 1, §§4-5 refused to strike out restitutionary claims.

48 *Gormsen v. Meta Inc and others* [2023] CAT 10, footnote 30 ("*it may well be appropriate to revisit this area*"). It is also wrong to read *BritNed Development Ltd v. ABB AB*, [2019] EWCA Civ 1840 as precluding restitutionary damages. In that case, the Court of Appeal emphasized (at §234) that BritNed had only "*claimed compensatory damages relating to the losses by way of overcharge*" so there was no consideration of restitution issues. In that context, it held that the High Court was wrong to focus on a benefit to the cartelist, rather than a loss to the plaintiff (§§235-236). On the facts, there was no evidence of a link between any cartel savings and a price effect in this case; indeed, the judge had expressly found that any such savings had been competed away. That conclusion, however, does not *per se* prevent a claim for restitutionary damages being advanced in an appropriate case.

49 *Foreign Exchange*, [2023] EWCA Civ 876, §106 (per Green LJ).

50 *Mulheron*, above note 4, pp.26-27 (citations omitted).

51 *Mulheron*, above note 4, Section D.1-D.2. She argues for (at least) two possibilities. First, restitutionary damages for breach of statutory duty ought to be available. This reflects case law that damages for a tort can also be measured according to the gain that the defendant has obtained or the value that the right infringed might have had to the plaintiff (see *R (Lumba) v. SSHD* [2011] UKSC 12, §254). Second, an account of profits to reverse an unjust enrichment, which would fall under the "*any other claim for a sum of money*" rubric under s 47A(3)(b) of the Competition Act 1998.

The most interesting new frontier for disgorgement in antitrust is undoubtedly in the sphere of private damages, both collective and individual. It is already clear, following the UK Supreme Court ruling in *Lloyd v. Google*, that there will be considerable interest in antitrust claims in arguing that the misuse of private information for commercial exploitation should lead to wrongdoers paying compensation based on the commercial value of the exercise of the right (albeit, to be clear, this should be understood as involving a traditional application of compensatory principles). These arguments will gain momentum following the recent EU Court of Justice ruling in *Meta Germany* that a breach of EU Data Privacy law may well be relevant to whether a firm has abused its dominant position.[52] These principles are likely to be of considerable interest when it comes to dealing with unfairness abuses committed by dominant platform operators in multi-sided markets, particularly where one side of the market pays a zero price but nonetheless gives valuable consideration in the form of personal data from which the platform operator generates substantial commercial value.

The novel — and as yet underexplored — area of the law is whether the English courts will expressly permit restitutionary damages and/or restitutionary claims in antitrust settings, particularly within the collective action regime. As noted, there are indications that they might,[53] and leading academics argue that these issues are sure to arise and ought to be treated receptively, at least in appropriate contexts.[54] These changes coincide with a general direction of travel in English law to systematize remedies and to avoid pigeonholes that may be as much based on historical accident as they are on distinctions of principle. In particular, the suggestion that restitutionary damages should be precluded simply because English law treats antitrust as a species of tort of breach of statutory duty appears difficult to maintain, given the essentially infinite number of settings in which antitrust law can bite (including cases involving proprietary claims, which is an area where English law does permit restitutionary damages in various contexts). The commercial value of personal information, and significant efforts, at least in Europe, to ensure strong protection for personal data will likely lead to growing calls that the law now needs to move with the times. The enormous growth in antitrust class/collective actions will only strengthen these calls.

52 Case C252/21, *Meta Platforms Inc. and others v. Bundeskartellamt*, judgment of 4 July 2023.

53 See *Gormsen v. Meta Inc and others* [2023] CAT 10, footnote 30; *Foreign Exchange*, [2023] EWCA Civ 876, §106 (per Green LJ).

54 *Mulheron*, above note 4. Note also that Rachael Mulheron has recently been appointed as a Member of the CAT.