



COMPETITION APPEAL TRIBUNAL

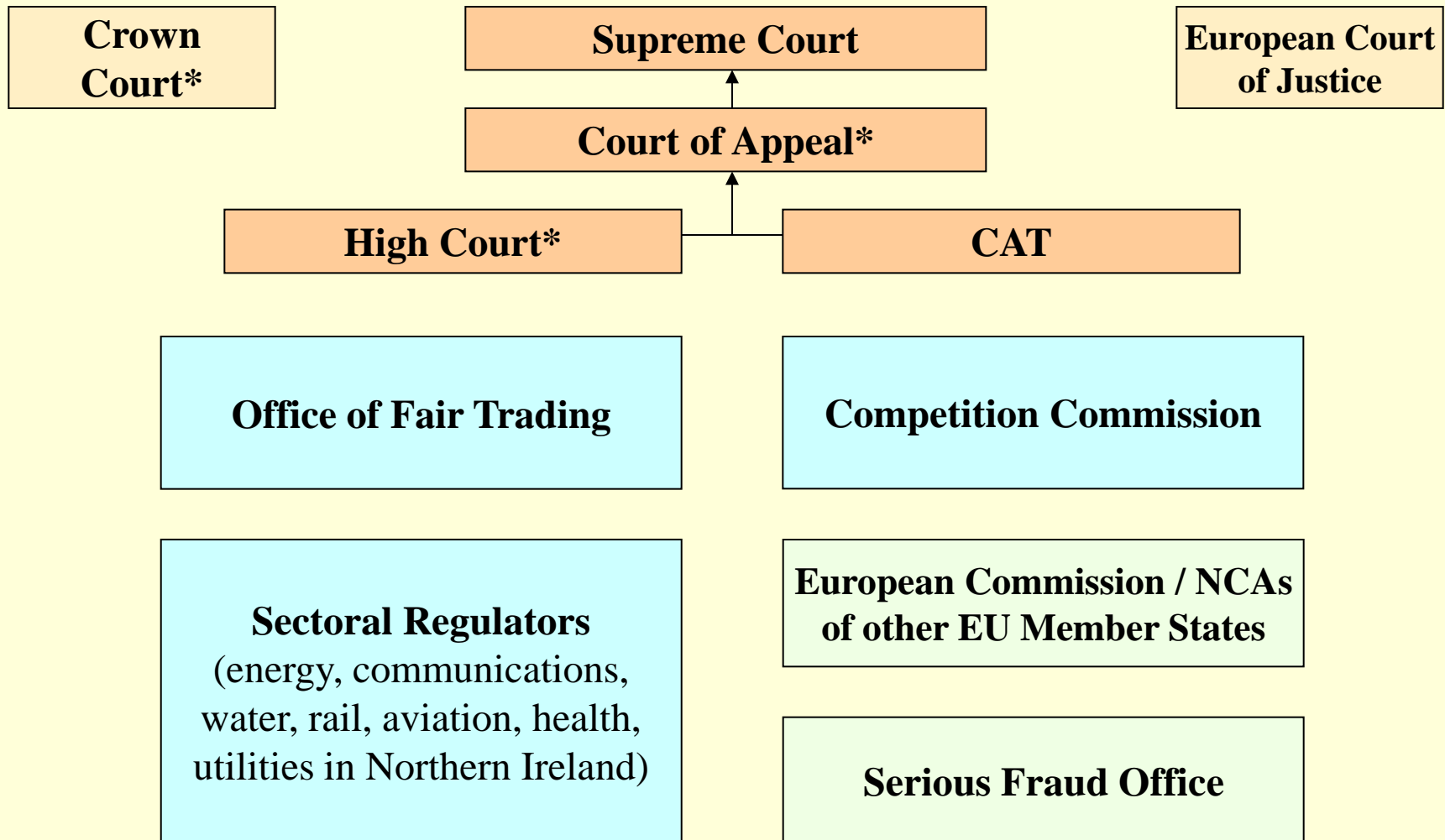
Evidence, burden and standard of proof in competition cases

Sir Gerald Barling

Overview

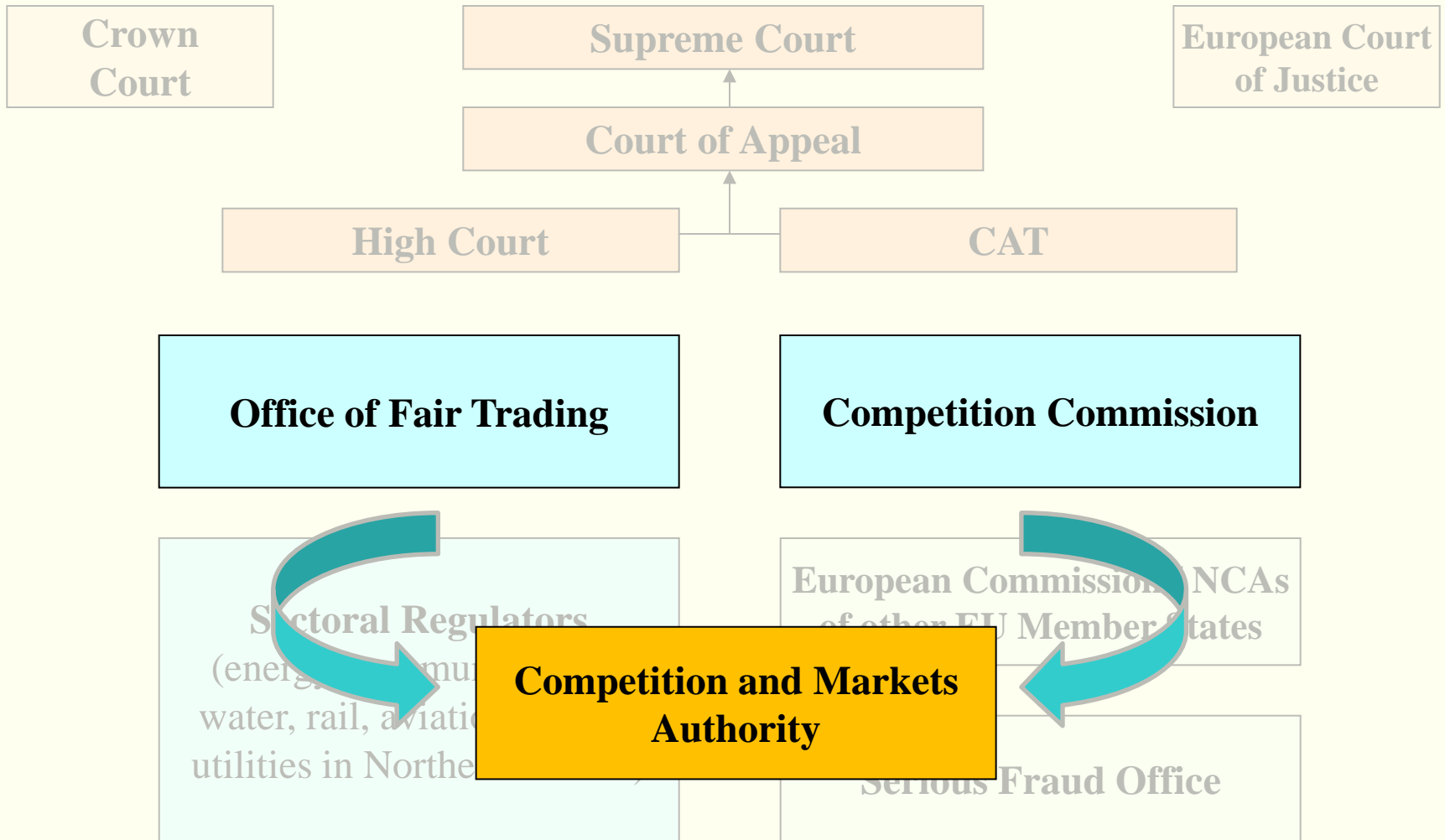
- The UK and EU competition enforcement regimes
- Burden of proof
- Standard of proof – EU and UK
- Proving an infringement
 - ⇒ Nature (and sources) of evidence in competition cases
 - ⇒ Public vs. private enforcement
- Establishing causation and quantum of loss in damages actions

The UK competition authorities and courts

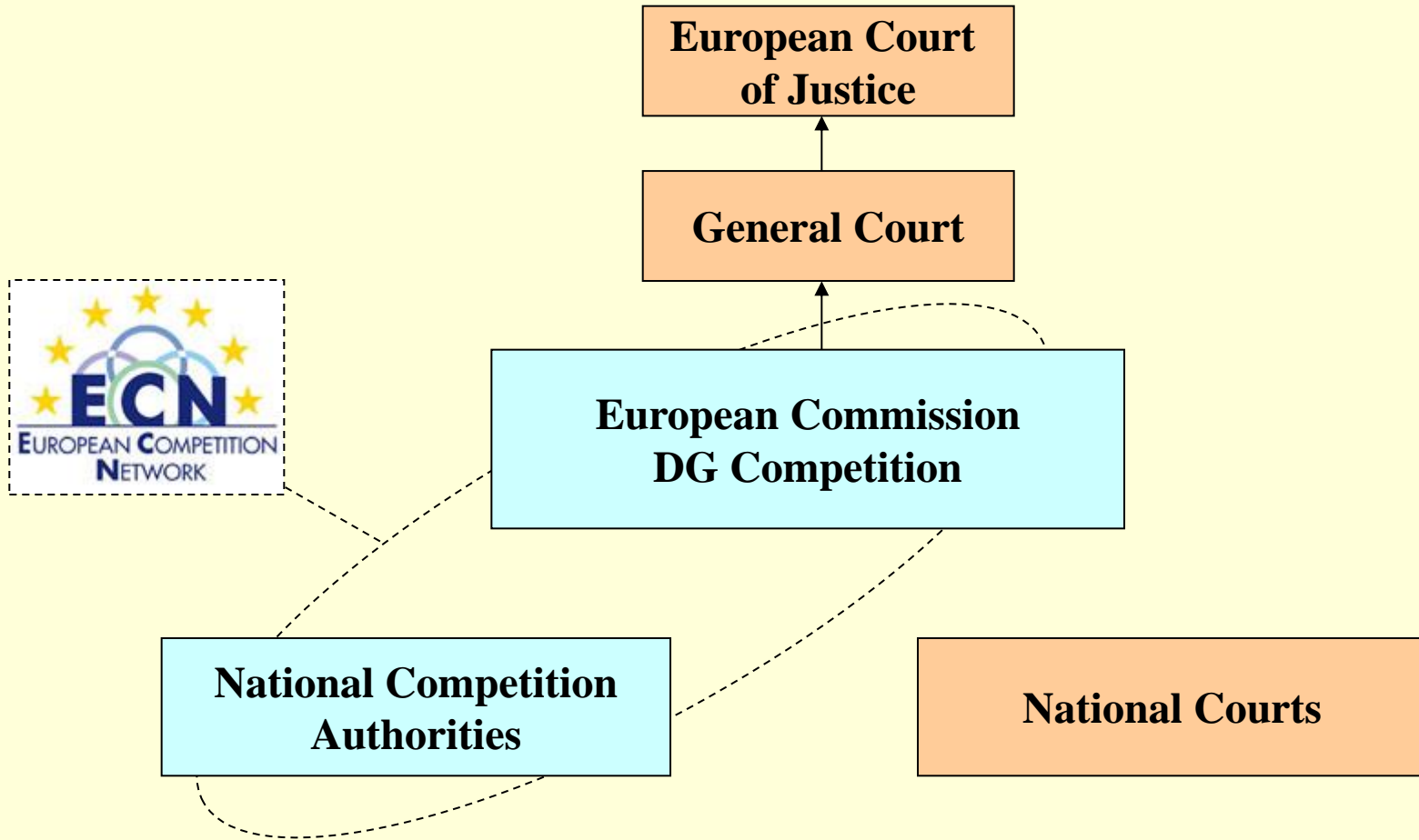


* Only courts in England & Wales are shown, for simplicity. The Scottish and Northern Irish courts play a similar role within these separate jurisdictions.

Proposed reform – from April 2014



The EU competition authorities and courts



Burden of proof

- Burden of proving an infringement of Article 101(1) or 102 TFEU rests on the party or authority alleging the infringement (Article 2, Reg. 1/2003)
 - ⇒ However, “...the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged.” (Case C-204/00 P, *Aalborg Portland v. Commission*, para 79)
 - ⇒ E.g., requirement for a party to show it has “publicly distanced” itself from the cartel discussions (Case C-199/92 P, *Hüls v. Commission*)
- Burden of proof shifts where a party claims benefit of criteria for exemption under Article 101(3) TFEU
- Human rights
 - ⇒ Undertaking accused of an infringement is entitled to presumption of innocence: Article 6(2) ECHR

Standard of proof: EU

- No specific EU legislation / guidance
- Court judgments
 - ⇒ “...it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement.” (Case C-185/95 P, *Baustahlgewebe v. Commission*, para 58)
 - ⇒ “...the Commission must produce precise and consistent evidence to support the firm conviction that the infringement took place, since the burden of proof concerning the existence of the infringement and, therefore, its duration, falls upon it...” (Case T-67/00, *JFE Engineering v. Commission*, para 341)
 - ⇒ The benefit of any doubt must be given to the undertaking accused of the infringement (Case 27/76, *United Brands v. Commission*, para 265)

Standard of proof: UK

- English law “balance of probabilities” test
 - ⇒ “The civil standard of proof always means more likely than not... But... some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. [On] this basis, cogent evidence is generally required ... But the question is always whether the tribunal thinks it more probable than not.” (*Home Secretary v. Rehman* [2001] UKHL 47, para 55, per Lord Hoffmann).
- Stricter test for criminal cartels: “beyond reasonable doubt” (or “sure”)
- Competition cases involving substantial penalties:
 - ⇒ “...the standard of proof in proceedings under the [Competition Act 1998] involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the [OFT] to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.” (*Napp Pharmaceutical v. DGFT* [2002] CAT 1).
 - ⇒ “There has, in recent years, been a great deal of debate as to whether, in serious cases, there is a “heightened standard” of civil proof. We consider that this debate has been laid to rest in a series of decisions of the [Supreme Court], in particular ...[*Rehman* at para 55]...” (*North Midland v. OFT* [2011] CAT 14, para 16).

Nature of evidence in competition cases (I)

■ Clandestine nature of competition infringements

- ⇒ “...it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret ... and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.” (*Aalborg Portland*, paras 55-57)
- ⇒ “...even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard” (*JJB Sports plc v. Office of Fair Trading* [2004] CAT 17, para 205)
- ⇒ “Competition cases are particularly fact-intensive. Much of the key evidence necessary for proving a case for antitrust damages is often concealed and, being held by the defendant or by third parties, is usually not known in sufficient detail to the claimant.” (*European Commission’s 2008 White Paper on Damages Actions*)

Nature of evidence in competition cases (II)

- Information asymmetry and use of presumptions
 - ⇒ Presumption that information gained from even a single cartel meeting will affect a market participant's conduct (Case C-8/08, *T-Mobile Netherlands v. Nma*)
 - ⇒ "...the OFT may well be entitled to draw inferences or presumptions from a given set of circumstances, for example, that the undertakings were present at a meeting with a manifestly anti-competitive purpose, as part of its decision-making process." (*Claymore Dairies v OFT* [2003] CAT 18, para 10)

Sources of evidence

- Documents, e.g. notes, minutes, tender documents, diaries
- Statements and testimony from “whistleblowers”
- Absence of evidence and document retention
- Behaviour
 - ⇒ Evidence of undertakings’ bidding behaviour
 - ⇒ Observation of price movements
- Oral evidence at trial

Example: the UK construction cases

ANNEX 1

0527

TENDER SHEET.

JOB:- NEW HOUSE AT WESTERN TERRACE THE BRICK NOTTINGHAM.	FILE NO. 2578
ARCHITECT: MARSH & GROCHOWSKI.	JOB NO. 136
Q.S.	200 A.

SUBMISSION DATE: MONDAY 22nd JAN 2001

TENDERERS:

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Example: the UK construction cases (contd)

- Evidence relied on by OFT to establish practice of “cover pricing” in relation to house-building project in Nottingham
- View of the Tribunal on appeal (*North Midland v. OFT* [2011] CAT 14):
 - ⇒ “The system Bodill is said to have used to record its tenders is described in [an explanatory document] by reference to a single Bodill tender sheet. Neither North Midland nor we have been able to test the explanation in the [document] by reference to other tender sheets, nor to hear evidence from the persons who are said to have made the entries ... This is an unsatisfactory position.

It may well be that the Bodill tender sheet looks suspicious. It is possible that the concerns and questions that exist in respect of this document could be answered satisfactorily. But they have not been, and we therefore have concerns about the evidential value of this document.” (Paras 27-28)
 - ⇒ “We are not satisfied on the balance of probabilities that North Midland has infringed the ...prohibition”. (Para 31)
 - ⇒ “...Where crucial facts are disputed it may ... be very difficult to resolve the issues in the absence of evidence from a witness who has been deposed in the ordinary way and whose assertions are available to be tested in cross-examination by those who dispute them. Where central issues of fact cannot be resolved, the outcome may have to turn on the burden of proof.” (Para 34)

Establishing the infringement: public enforcement

- Extensive information and document-gathering powers in the EU and UK:
 - ⇒ Attractive immunity / leniency regimes, including possibility of criminal immunity for individuals in the UK
 - ⇒ Power to search business premises, private homes and vehicles, seize / copy documents and conduct electronic searches
 - ⇒ Requests for information and documents and power to take statements at interview
 - ⇒ Information-sharing mechanisms between EU member states
 - ⇒ Penalties for failing to comply, for example
 - €38m fine imposed on E.ON Energie for breaking a seal affixed during Commission investigation
 - Criminal sanctions in UK for failing to comply with competition investigations (section 42, Competition Act 1998)

Establishing the infringement: follow-on damages actions

- UK / EU infringement decisions are binding on the UK courts (section 58A, Competition Act 1998; Article 16(1), Regulation 1/2003), although the practice varies in EU member states
- Power to request information from the European Commission (Article 15(1), Regulation 1/2003)
- Impact of settlement decisions
- Obtaining information from the competition authority's investigation file (including leniency materials)
 - ⇒ Court of Justice judgment in Case C-360/09, *Pfleiderer v. BkA* and subsequent national cases (*National Grid* in the UK)
 - ⇒ Distinguishing corporate statements from pre-existing material
 - ⇒ Use of EU's transparency legislation: T-344/08, *EnBW v. Commission*
 - ⇒ Anticipated EU legislation on access to leniency documents

Establishing the infringement: stand-alone damages actions

- Can be expensive and difficult

- ⇒ High Court judgment of 15 April 2011 in *Purple Parking v. Heathrow Airport* [2011] EWHC 987 (Ch)

- Disclosure

- ⇒ Civil Procedure Rule 18 – court can order a party to give additional information in relation to any matter in dispute in the proceedings

- ⇒ Civil Procedure Rule 31 – standard disclosure requires a party to disclose:

- documents on which he relies
 - documents which (1) adversely affect his own case; (2) adversely affect another party's case; or (3) support another party's case

Proving causation in damages actions

- The “but for” test – constructing the “counterfactual world”
 - ⇒ “The courts are concerned, not to identify all of the possible causes of a particular incident, but with the effective cause of the resulting damage in order to assign responsibility for that damage. The “but for” test asks: would the damage of which the claimant complains have occurred “but for” the negligence (or other wrongdoing) of the defendant?” (*Clerk & Lindsell on Torts*, 20th Ed (2010))
 - ⇒ “The Tribunal must, therefore, decide what would have happened in the counterfactual, or ‘but for’ world, had [X] not committed the abuses on which this claim is based. We must then compare the money that [Y] would have made in that counterfactual world with the money it in fact made ... to see if [Y] has suffered any loss as a result of [X]’s abuse of its dominant position. The parties dispute many of the elements that go to make up the counterfactual world.” (*Albion Water v. Dwr Cymru* [2013] CAT 6, para 60).
 - ⇒ The “counterfactual world” is purged, not only of the particular infringement of competition law, but any other illegal behaviour (*Enron Coal v. EWS* [2009] CAT 36, para 90).

Establishing quantum of loss

- Use of (rival) expert reports and testimony – e.g. conflicting expert views of passenger numbers in “bus wars” case (*2 Travel v. Cardiff Bus* [2012] CAT 19)
- European Commission’s 2011 draft guidance on quantifying harm in damages actions for breach of competition law
- Controversial suggestion in UK government consultation paper that 20% cartel overcharge should be presumed
- Passing-on defence
- *Albion Water* damages action – submission of rival quantum “models” by the parties to reflect the many disputed variables
- Exemplary damages - awarded for the first time in a competition case in *2 Travel*, although circumstances were exceptional:
 - ⇒ Retaliatory predatory strategy had been disguised as an experimental launch of a new type of “no frills” service: “...Cardiff Bus’s description of its intention to test the market was no more than a deliberate smoke-screen, designed to make palatable to the outside world extremely unpalatable conduct. They were, not to put too fine a point on it, lies.” (Para 586)
 - ⇒ No penalty had been imposed by the competition authority in relation to the infringement.

Causation and quantum: the dividing line?

- In “loss of a chance” cases, or where loss depends on the actions of a third party, one needs to draw a careful distinction between questions of causation and quantification
 - ⇒ “What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists in some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact...
Once established on the balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury.
Questions of quantification of the plaintiff’s loss, however, may depend upon future uncertain events... It is trite law that these questions are not decided on a balance of probability, but rather on the court's assessment, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which, it should be noted, depends in part at least on the hypothetical acts of a third party...
In many cases the plaintiff’s loss depends on the hypothetical action of a third party... In such a case does the plaintiff have to prove on the balance of probability... that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages? ...I have no doubt that... the second alternative is correct.”
(*Allied Maples v Simmons & Simmons* [1995] 1 W.L.R. 1602 per Stuart-Smith LJ)

Other relief

- Interim and final injunctions
 - ⇒ More likely to be used in abuse of dominance cases
 - ⇒ Cross-undertaking in damages by the applicant is usually required as a condition of granting interim relief
 - ⇒ UK Government's proposal on private enforcement actions notes that interim relief may be the only relief needed by SMEs, but it is needed quickly (e.g. in refusal to supply cases)