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The important role of civil class actions in the enforcement of corporate criminal law

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ABSTRACT

Recent experience in civil litigation, particularly with opt-out class actions against corporations for competition law offences, has highlighted the efficiency of 'dual enforcement' as a strategy for fighting corporate crime. The success of the opt-out class action regime has resulted in innovation and developments that have pushed the boundaries of competition law, involving cases that are traditionally considered matters of environmental, data or consumer protection law. However, although private litigation can overcome the deterrence deficit associated with criminal enforcement by deferred prosecution agreement, and is an increasingly important tool in the fight against corporate crime, the Supreme Court's recent decision in the PACCAR case has created uncertainty in the third-party litigation funding market, upon which these class actions rely. Given the woefully inadequate funding afforded to public enforcement agencies, including the UK's Serious Fraud Office, there is a clear economic case for the availability of dual enforcement, and thus an urgent need for Parliament to enact amending legislation, with retrospective effect, to reverse the PACCAR decision. Furthermore, the dual enforcement model should be extended to enable individuals to enforce consumer protection law through opt-out class actions. This would avoid the current situation in which claims are being framed as competition law infringements, such that success may well turn on the finest of distinctions. Lacking the various constraints associated with the criminal law, this extension would also enable the private enforcement of various types of corporate misconduct that, viewed through alternative the lens of the criminal law, are tantamount to fraud.

Following the Law Commission's recent work on corporate criminal liability,[1] the Economic Crime and Corporate Transparency Act 2023 has introduced provisions aimed at improving the criminal accountability of corporations for fraud and for other economic crimes. Specifically, it has enacted a bespoke corporate offence of 'failure to prevent fraud',[2] expected to come into force later this year,[3] and it has also sought to address the deficiency of the common law's identification principle. Under this principle, an individual's guilt can only be attributed to the corporation if he or she is deemed to be the so-called "directing mind and will" of the company, for instance as a member of the board of directors or as the managing director,[4] and the individual had been delegated absolute responsibility and autonomy for that function.[5] The new statutory provision, which is already in force, addresses this limitation by setting out that, for a number of specified economic offences, including fraud,[6] the guilt of a broader range of senior officers can be attributed to the corporate entity.[7] Although the extension of corporate criminal liability through the attribution of senior officer liability responsibilizes more individuals in senior management positions than does the common law identification principle, the reform is

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[1] Law Commission, *Corporate Criminal Liability: an options paper* (Law Com, 10 June 2022).

[2] Economic Crime and Corporate Transparency Act 2023, s.199. The applicable fraud offences are listed in Schedule 13 and liability includes the aiding, abetting, counselling or procuring of one of the listed offences.

[3] This is pending the government's publication of guidance on the statutory due diligence defence regarding what constitutes reasonable measures, ibid., s.219(8).

[4] *Tesco v Nattrass* [1972] AC 153.

[5] *Serious Fraud Office v Barclays* [2018] EWHC 3055 QB, [2020] 1 Cr App R 28.

[6] For the range of offences to which the provision applies, see ibid., s.196(2) and Schedule 12.

[7] Ibid., s.196.

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disappointingly limited in scope[8] in that the failure to prevent offence will only apply only to large corporations.[9] Furthermore, notwithstanding these developments in the substantive law, the now pervasive use of deferred prosecution agreements (DPAs) will continue to result in a deterrence deficit and thereby undermine the efficacy of public enforcement.[10] While they are not available to individuals facing criminal proceedings, DPAs are agreements that can be made between a prosecutor and a corporate defendant that allow the corporate prosecution to be suspended for an indefinite period on the condition that the corporation meets certain specified conditions.[11] While the introduction of a whistleblower incentivisation scheme would mitigate an inherent weakness of the current approach,[12] namely that DPAs purchase of evidence at the price of deterrence,[13] it should be remembered that the threat of criminal proceedings is just one way to induce corporate self-regulation. Recent experience in the realm of civil litigation, and particularly in relation to large opt-out class actions against corporations for competition law offences, has highlighted the usefulness of 'dual enforcement' as an efficient strategy for fighting corporate crime. Since large class actions pose a financial threat of damages that can far exceed the level of punitive fines typically imposed for the same misconduct, they are a valuable deterrent to corporate criminality. Furthermore, whether brought in parallel with public enforcement of the criminal law, or as stand-alone cases, privately funded civil litigation incurs no cost to, or other burden on, already under-resourced prosecution agencies. Notwithstanding this efficiency, and the win-win nature of the co-existing mechanisms, the potential for dual enforcement has been significantly undermined by a decision in the Supreme Court, creating uncertainty in relation to the third-party litigation funding arrangements upon which these large civil claims rely.[14] Although Parliament had sought a statutory reversal of the court's decision, the amending legislation was not passed in the pre-election wash up, and the position for litigation funders, and those funded, remains unclear. This article offers a novel perspective in the literature pertaining to corporate criminal liability by focusing on the use of dual enforcement. It makes an economic case for the availability of dual enforcement as a response to corporate wrongdoing, calls for the urgent enactment of the proposed amending legislation, and argues that a further extension to the availability of large class actions would be desirable to address other forms of corporate misconduct.

Since dual-enforcement is a particular feature of competition law, the first part of the article sets out in brief some comparative approaches to this form of corporate crime, and, from the domestic perspective, it considers the recent increase in the numbers, as well as the innovative variety, of civil class actions being brought for competition law violations. Identifying that this development has been made possible by the growth of the litigation funding market, the second part of the article addresses the stultifying impact of the Supreme Court's 2023 PACCAR judgment on class actions,[15] and the further uncertainty caused by the failure to enact a statutory reversal in advance of the July 2024 general election. The third part of the article thus calls for timely statutory intervention, makes an economic case for third-party funding for both opt-in and opt-out civil class actions, and considers the extent to which this model can be employed more widely in the fight against corporate crime.

Competition Law – comparative approaches

It is in the realm of anti-competitive commercial behaviour that distinct and innovative approaches to corporate criminality have emerged in various jurisdictions. Irrespective of the differences between the general models of corporate criminal liability that have been adopted at national level,[16] a common feature of competition law, in the US and, more recently, the EU and the UK, is the availability of dual enforcement, such that parallel private enforcements of a civil nature can be brought under the respective anti-trust rules.[17] In the US, dual enforcement was available at an early stage in the development of the anti-trust regime,[18] whereby a provision in the Clayton Act 1914, somewhat controversially, provides that successful private claimants can recover to the extent of triple damages.[19] Accordingly, private enforcement through civil action has become a prevalent feature of the US anti-trust landscape[20] and Europe has followed suit with a dual enforcement policy of its own in the area of competition law. Indeed, since the possibility of civil claims was considered necessary to ensure the effectiveness of the law, this was seen as a priority for regulators and for EU institutions,[21] and the European approach to competition regulation is innovative in other respects too. For example, it is the subject of direct supranational European control, whereby the Commission plays the central administrative role[22] and, although it is an administrative regime in form, the procedural enforcement of competition regulation has evolved as something of a 'quasi-criminal' hybrid, due to the severity of the civil sanctions available. Accordingly, proceedings for competition breaches are conducted as if they are criminal

[8] For a full discussion, see Alison Cronin, 'Fixing Fraud: Flaws in the Economic Crime and Corporate Transparency Act and the current enforcement approach', Institute of Economic Affairs 2024 forthcoming.

[9] The offence only applies to companies with at least two of the following criteria: a turnover of at least £36 million; a balance sheet total of at least £18 million; a total of at least 250 employees, although the resources of a parent company and its subsidiaries can be considered cumulatively, ibid., ss.119, 201 and 202.

[10] Ibid., see too Christopher Harding and Alison Cronin, *Bad Business Practice, Criminal Law, Regulation and the Reconfiguration of the Business Model* (Edward Elgar 2022) chapters 5, 6 and 7.

[11] Crime and Courts Act 2013, sch. 17.

[12] Alison Cronin, 'Fixing Fraud: Flaws in the Economic Crime and Corporate Transparency Act and the current enforcement approach', Institute of Economic Affairs 2024 forthcoming.

[13] Ibid.; Alison Cronin, 'Corporate Criminal Liability Discussion Paper Response' available at https://eprints.bournemouth.ac.uk/37244/3/Law%20Commission%20-%20Cronin%20Corporat%20Crime%20Response%20-%20final%20draft.pdf > accessed October 8, 2024, 1.23 – 1.49.

[14] *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28.

[15] Ibid.

[16] For example, the US common law principle of *respondeat superior* attributes corporate criminal liability on an entirely different basis than the English common law's identification principle.

[17] Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (2nd edn, OUP 2010) Ch. XI.

[18] The Sherman Act 1890 was the first to criminalize commercial monopolies.

[19] Clayton Act 1914, s4. The rationale for the multiplication in "hard core" antitrust offences, such as price fixing and bid rigging, is that it accounts for both detection and proof problems, and risk aversion, see Gary S. Becker, 'Crime and Punishment: An Economic Approach', (1968) 76 J. Pol. Econ. 169, 199. However, it is arguably less justifiable for other violations, such as those relating to large mergers, that are easier to detect. Furthermore, even when applied to the "hard core" offences, the multiplication is not necessarily correct. If, for example, only 20 % of cartels are detected, a multiplier of five might be more appropriate, Robert H. Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 Ohio St. L. J. 115, fn. 1. Similarly, whereas actual or single damages simply compensate the injured party for the wealth transfer from plaintiff to the defendant, anti-competitive practices also cause a reduction in total output and the lost surplus value of the foregone production is not compensated. The standard award of triple damages therefore relieves the court of the difficulty in measuring that deadweight loss and it also addresses the injury to commerce, Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (2nd edn, OUP 2010) Ch XI.

[20] For a fuller discussion of US competition law, see Christopher Harding and Alison Cronin, *Bad Business Practice, Criminal Law, Regulation and the Reconfiguration of the Business Model* (Edward Elgar 2022) Ch5.

[21] Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (2nd edn, OUP 2010) Ch XI.

[22] For those with membership to the EEC, the forerunner of the EU, Articles 81 and 82 of the Treaty of Rome imposed liability on corporations for anti-competitive conduct.

matters, and those investigated are afforded the appropriate rights of defence.[23] Furthermore, since the quasi-criminal supranational regime addresses large corporate actors directly, rather than individuals, and it concerns corporate rule-breaking rather than individual wrongdoing, it differs from the traditionally individualistic approaches to corporate criminality that have generally developed in national criminal laws. In this respect, the EU has neatly obviated the need to overcome the issues of agency and corporate blameworthiness that typically arise in the application of the substantive criminal law to corporate actors. The dual enforcement rules, whereby private individuals and companies can claim compensation for damages resulting from cartel activity, were harmonised in 2014, and emphasis was placed on greater private enforcement in the Member States' courts.[24]

In the UK, the jurisdiction of the Competition Appeal Tribunal (CAT) was expanded by the Enterprise Act 2002 to facilitate greater access to justice and allow representative civil actions for damages on behalf of groups of named and identifiable consumers.[25] However, the strict need for class members to share the same interest in the claim, as well as the need to prove each member's claim individually, limits the suitability of representative actions to cases involving a relatively small group of easily identifiable claimants, each of whom has a potentially sizeable claim.[26] In other instances, such as those with much larger class sizes, and where the individual losses are relatively small, litigation via representative action is as impracticable and financially unviable as bringing individual private claims.[27] This concern was subsequently addressed by the Consumer Rights Act 2015 which introduced a new form of mechanism for class actions, although this is limited solely to competition law claims. Schedule 8 of the 2015 act thus amends the Competition Act 1998, substituting a new section 47B, to provide an opt-out collective action procedure for a) follow-on competition law claims, i.e. those based on a competition authority's prior decision establishing the defendant's liability for an infringement; and for b) stand-alone claims, whereby the claimants need to prove the defendant has breached competition law.[28] The opt-out mechanism obviates the need for each person to express their will to become involved in the litigation, and they must therefore actively opt out if they do not wish to be bound by the subsequent decision of the CAT.[29] Prior to the Consumer Rights Act 2015 coming into force, the law was such that only specified consumer groups could bring claims for damages on behalf of two or more individuals, and these claims were restricted to 'follow-on' actions on a purely 'opt-in' basis.

The Competition Appeal Tribunal (CAT) has thus become the sole forum for opt-out collective action claims[30] that are otherwise too small in value to justify individuals, or small businesses,[31] assuming the risk of expensive litigation. Since the claims can be bundled together, this form of action is ideal for cases involving a large class of victims, even if the individual claims are relatively small. By way of illustration, the Gormsen v Meta action, in which an abuse of a dominant position by Facebook's parent company is alleged, has a potential class size of a staggering 45 million members,[32] and the claim is potentially worth £3 billion, equating to around EUR 3.5 billion. Unlike the US competition regime, claims for competition violations in the UK are restricted to actual damages, with no provision for a punitive calculation. While the financial recompense for each victim, if successful, will be a small, relatively inconsequential sum, the financial impact on Meta will considerably exceed the estimated EUR 3.5 billion in damages, bearing in mind the total costs likely to be incurred through their involvement in the litigation. When compared with the size of the fines being imposed by the EU in the public enforcement of such infringements, the overall cost of the related private litigation can far exceed the penal sums. For example, at the time of writing, the largest fine for an abuse of a dominant position stands at EUR 4.3 billion, imposed in relation to Google's Android mobile operational system,[33] and the highest fine[34] imposed on a company for participation in a cartel violation is that issued to Daimler in relation to the truck pricing agreement. At just less than EUR 1.1 billion,[35] this amount is nonetheless a fraction of the potential costs yet to be incurred as a result of the private class actions originating from the same misconduct.[36] Similarly, the Forex litigation, involving a £2.7 billion class action claim against six investment banks for foreign exchange manipulation,[37] follows the European Commission's imposition of fine for EUR 1.07 billion on finding that the banks had operated as a cartel. Indeed, as against the sobering expenses associated with defending collective private litigation, that can run to multiple billions, the total EU fine of just EUR 875 million, for example, imposed on the cartelists for their part in the car emissions scandal, is paltry by comparison.[38]

The availability of private enforcement not only racks up the stakes for corporations publicly sanctioned for anti-competitive criminal behaviour, it also provides a means for enforcement in cases that are not publicly pursued. For example, the first opt-out class action to reach trial in the UK, and which began in January 2024, is the £1.3 billion stand-alone claim against BT for an alleged abuse of a dominance involving the overcharging of approximately 3 million landline customers

[23] Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (2nd edn, OUP 2010) 198–204.

[24] Directive 2014/104/EU 2014.

[25] Enterprise Act 2002, ss 17–19 and Civil Procedure Rules 1998, 19.8.

[26] For example, in proceedings relating to aircraft and railway accidents, healthcare and industrial industries.

[27] Klara Hamulakova, 'Opt-Out Systems in Collective Redress, EU Perspectives and Present Situation in the Czech Republic' (2018) 59 (1) Hungarian Journal of Legal Studies 95–117.

[28] There is a legal framework governing regulatory intervention in private proceedings, set out in Competition Law Practice Direction, paragraph 3; Practice Direction 52D, paragraph 7.1(3), such that copies of the statement of claim, defence and reply must be served on the CMA with a view that it may elect to intervene, be kept appraised of developments, submit oral or written observations. Of note, many of the opt-out actions to date have been brought without any parallel regulatory investigation.

[29] It depends on the decision of the court which system it will choose, Competition Act 1998, s.47B(7)(c), and only those who have actively opted out can bring individual actions for infringement.

[30] Representative litigants can apply to it for 'certification' to bring proceedings which automatically include all persons affected by the wrongdoing alleged as members of the group.

[31] In *Evans v Barclays* [2023] EWCA Civ 876 the Court of Appeal confirmed that opt out claims can be brought on behalf of businesses as well as individual consumers.

[32] *Case no. 1433/7/7/22: Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*.

[33] Yun Chee Foo, Reuters Graphics, Highest ever fines at https://fingfx.thomsonreuters.com/gfx/editorcharts/EU-GOOGLE-ANTITRUST/0H0012Y9L1DV/index.html > accessed August 21, 2024.

[34] At least until July 2021.

[35] See European Commission, Cartel Statistics at https://competition-policy.ec.europa.eu/document/download/b19175c3-c693-410b-b669-27d4360d359c_en?filename=cartels_cases_statistics.pdf > accessed August 14, 2024.

[36] For example, the Road Haulage Association is bringing an action valued at around EUR 2 billion, funded by Therium, and Nera Capital is funding another action estimated at EUR 1 billion, CDR, First-of-its-kind UK class action reignites funding feud at https://www.cdr-news.com/categories/litigation/21220-first-of-its-kind-uk-class-action-reignites-funding-feud > accessed August 21, 2024.

[37] *Mr Phillip Gwyn James Evans v Barclays Bank Plc & Ors and Michael O'Higgins FX Class Representative Ltd v Barclays Bank PLC & Ors* [2023] EWCA Civ 876.

[38] European Commission, Cartel Statistics at https://competition-policy.ec.europa.eu/document/download/b19175c3-c693-410b-b669-27d4360d359c_en?filename=cartels_cases_statistics.pdf > accessed August 21, 2024.

for their service.[39] Of note, the regulator, Ofcom, intervened on a limited basis in relation to the alleged misconduct, but did not take action regarding the price charged to split-purchase customers.[40] The availability of private enforcement, either alone or in addition to public enforcement, thus offers a sobering disincentive to corporate violations of competition law. Indeed, the effect of the Consumer Rights Act 2015 has been to increase significantly the number of class actions brought for anti-competitive behaviour in the UK,[41] particularly in relation to stand-alone claims, and this avenue for enforcement was further enhanced, in 2020, by the Supreme Court's relaxation of the certification thresholds for opt-out proceedings.[42]

Crucially, however, it is the growth of the litigation funding industry that has facilitated the expansion of the private class actions regime. Both representative claimants and class members depend upon third party funders to finance the litigation, and thus also to assume the financial risks of losing.[43] Since funders select the litigation that they will back, with regard to the relative strength of the claim(s), and to the size of the potential award in damages, litigation funding is proving a lucrative niche market, typically operating in the realms of high value commercial, arbitration or group litigation claims. While government policy, unlike the US,[44] dictates that law firms, acting on behalf of representative claimants in opt-out class actions, cannot enter contingency fee agreements with returns based on a percentage of damages awarded,[45] it is the availability of these agreements with third party funders that has enabled the private enforcement of competition law to thrive.

Since the CAT provides the only forum for these large, and therefore profitable, opt-out class actions, it has witnessed an increase in not only the number, but also in the novelty, of the claims. This has led to some notable developments and innovation in competition law itself.[46] For example, the Meta case, in which the imposition of an unfair trading condition is alleged,[47] would traditionally have been considered in the realm of consumer or data protection law, and the diesel emission claims against a number of car manufacturers are essentially a matter of environmental regulation.[48] Likewise, the opt-out claims against six water companies,[49] based on unlawful discharges of sewerage contrary to environmental law, are also creatively constructed in order to bring them within the CAT's remit. This has been achieved by reframing the allegations as issues of corporate abuse of a dominant market position, effected through the under-reporting of pollution incidents, thereby enabling the overcharging of customers.

PACCAR 2023 - the shock to the third party litigation funding market

The dynamic developments in competition law, and its private enforcement, were disrupted in July 2023 when the Supreme Court gave judgment in the PACCAR appeal.[50] The case concerns a private class action arising from the infamous trucks cartel, and in which the Supreme Court held that agreements to pay litigation funders a percentage of winnings constitute damages-based agreements. Since the Competition Act 1998 prohibits this form of funding agreement in opt-out mass actions in the CAT, they are therefore unenforceable, unless certain requirements are met.[51] This was a shock to all involved in the litigation funding industry, funders and funded alike, since most of the collective claims were being financed in this way. Although there are compelling arguments that neither government nor Parliament ever intended third party litigation funding agreements to be considered damages-based agreements, but an altogether different form of funding, the Court's decision nonetheless rendered unlawful the funding for all opt-out class actions that had been filed since the Consumer Rights Act 2015 came into force, as every one of them was financed by third parties on precisely this basis.[52] Indeed, as Mulheron points out, with no other realistic source of funding currently available for such actions, the judgment undermines the feasibility of the entire opt-out regime.[53] As for opt-in claims, these must now comply with the formal requirements of the Damages-Based Agreements Regulations 2013.

Tellingly, in November 2023, the UK government proposed to reverse the PACCAR decision,[54] as it applied to opt-out class actions for competition breaches, and to reinstate, with retrospective effect,[55] the enforceability of the third party damages-based funding agreements. This was to be effected by an amendment to the then Digital Markets, Competition and Consumers Bill[56] to ensure that all of the ongoing

[39] *Justin Le Patourel v BT Group PLC*, at https://www.catribunal.org.uk/cases/13817721-justin-le-patourel > accessed August 21, 2024. The trial ended on 22 March 2024 and at the time of writing the judgment is reserved.

[40] Chris Ross and William Carter, RPC, BT case may shape UK class action landscape at https://www.rpc.co.uk/thinking/commercial-disputes/bt-case-may-shape-uk-class-action-landscape/ > accessed August 21, 2024.

[41] In the five years prior to the Consumer Rights Act 2015 provision coming into force, there were less than ten standalone actions whereas over twenty standalone actions have been commenced alongside over fifteen collective actions since its enactment, the majority filed in the last two years, see Nicole Kar et al., CAT-led law: 'What does the exponential growth of private enforcement mean for public enforcement', at https://www.catribunal.org.uk/sites/cat/files/2023-09/Public%20Privat%20Enforcement%20%28Linklaters-Kar%29.pdf > accessed August 21, 2024.

[42] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51; *1266/7/7/16 Walter Hugh Merricks CBE v Mastercard Incorporated and others*, [2021] CAT 28. See too Euen Burrows, Ashurst LLP, The Relationship between Public and Private Enforcement at https://www.catribunal.org.uk/sites/cat/files/2023-09/The%20Relationship%20between%20Public%20and%20Privat%20Enforcement%20%28Ashurst-Burrows%29.pdf > accessed August 21, 2024.

[43] Rachel Mulheron, 'The Funding of the United Kingdom's Class Action at a Cross-Roads' King's Law Journal, 2023 at https://doi.org/10.1080/09615768.2022.2161350 > accessed August 21, 2024, p. 4.

[44] BIS, Private Actions in Competition Law: Government Response (Jan 2013), 6, 41, 63 and 35, [5.33].

[45] Damages-based agreements are defined in the Courts and Legal Services Act 1990, s.58AA(3), as 'an agreement between a person providing advocacy services, litigation services or claims management services' by which the recipient of the services is to make payment to the service provider (if the recipient obtains a financial benefit from the litigation), where the payment amount is 'determined by reference to the amount of the financial benefit obtained'.

[46] Nicole Kar et al., Linklaters LLP CAT-led law: What does the exponential growth of private enforcement mean for public enforcement?, at https://www.catribunal.org.uk/sites/cat/files/2023-09/Public%20Privat%20Enforcement%20%28Linklaters-Kar%29.pdf > accessed August 21, 2014.

[47] *Case no. 1433/7/7/22: Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*.

[48] In addition to breaches of contract and consumer protection law.

[49] The companies involved are Thames Water, Severn Trent, Northumbrian, United Utilities, Anglian Water, Yorkshire Water and the estimated total value of the claim is £800 million.

[50] *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28.

[51] The Supreme Court held that litigation funding agreements calculated as a percentage of recovery are caught by the Courts and Legal Services Act, s.58AA(3), and are therefore unenforceable, given the prohibition at s.47 C(8), and subject to the DBA Regulations 2013.

[52] Rachel Mulheron, 'The Funding of the United Kingdom's Class Action at a Cross-Roads' King's Law Journal, 2023 at https://doi.org/10.1080/09615768.2022.2161350 > accessed August 21, 2024, p. 1.

[53] Rachel Mulheron, 'The Funding of the United Kingdom's Class Action at a Cross-Roads' King's Law Journal, 2023 at https://doi.org/10.1080/09615768.2022.2161350 > accessed August 21, 2024, p. 3. Furthermore, if litigation funding agreements for *opt-in* class actions, or any other litigation, were to be deemed damages-based, it is likely that they would also fall foul of the DBA Regulations 2013.

[54] *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28.

[55] At least as far as 1998.

[56] This would have amended the Competition Act 1998 such that litigation funding agreements would not be considered Damages Based Agreements for the purposes of the opt-out collective actions in the CAT, distinguishing the scope of damages-based agreements between s.58AA Courts and Legal Services Act 1990 and the Competition Act 1998, s.47 C(9), as amended.

cases before the Competition Markets Authority and the CAT would be funded by agreements that would be enforceable again by the time of their respective judgments.[57] However, although the Bill was passed by Parliament in May 2024, in the 'wash up' prior to the election, it no longer contained the vital amendment provision. Unfortunately, as it transpired, a separate Litigation Funding Agreements (Enforceability) Bill had been subsequently introduced in Parliament,[58] setting out to address the impact of PACCAR for all types of claims,[59] and it had therefore rendered superfluous the provision of the earlier bill. However, the Litigation Funding Agreements (Enforceability) Bill, unlike the Digital Markets etc Bill, remained outstanding when Parliament was dissolved prior to the July general election, and its future remains unclear. This means that litigation funders, and indeed claimants, continue to operate in an uncertain regulatory landscape, with the need for outstanding funding agreements to be hastily redrawn on an alternative basis. The question of whether specific forms of funding agreement, such as those now based on a multiple of the funder's costs, are also to be considered as damages-based agreements, and are not therefore permitted for opt-out collective proceedings, is the subject of various appeals by corporate defendants, following CAT decisions, and that remain pending at the time of writing.[60] Given that the fate of the proposed Litigation Funding etc. Bill is, as yet, unknown, these appeals take on a renewed significance for funders who have already advanced huge sums under the now unenforceable, or potentially unenforceable, arrangements, as well as for the viability of future funding of collective actions.

The economic case for dual enforcement in the fight against corporate crime

The transnational nature of much corporate misconduct means that criminal enforcement cannot be considered from a purely domestic perspective. Although models of corporate criminality differ in substance according to jurisdiction, the enforcement style and process has been influenced by a heightened comparative awareness and, in cases of criminal activity spanning across a number of jurisdictions, the desirability of a collaborative approach.[61] At least in respect of sizeable corporations, this has led to a practice whereby criminal enforcement is almost inevitably by way of US-inspired deferred prosecution agreements (DPAs), in preference to the traditional trial process. This approach duly avoids a corporate conviction, and the reputational damage that this event would incur to the detriment of otherwise innocent stakeholders, such as shareholders and employees. Accordingly, and with the express aim of mitigating the effects of any such collateral damage,[62] defendant corporations are incentivised to exchange cooperation, involving the self-disclosure of incriminating evidence, in return for the DPA's regulatory, and morally neutral form of disposal. Since prosecution agreements address the problems associated with the obtaining of evidence in the complex, and often obscure, corporate environment, and do so by shifting the task to the party that can most easily provide it at the lowest possible cost, their use appeals to expertise and efficiency arguments.[63] However, it is unclear whether all corporations disclose the existence and/or true extent of their criminal activity,[64] and, while DPAs are premised on the core assumption that corporations are genuinely committed to compliance, numerous examples of corporate recidivism, for the same types of offences,[65] calls this assumption into doubt.

The shortfall in deterrence associated with the use of DPAs can be readily explained in economic terms. First, the optimal level of violations of the law is not zero,[66] and, bearing in mind that corporations are ethically neutral, and that their legitimate aim is typically profit-maximisation, the threat of enforcement will only deter criminal activity if that threat is credible[67] and the benefits of the crime are significantly outweighed by the price of discovery.[68] Since DPAs are designed to limit collateral damage, however grave or damaging their criminal behaviour,[69] and sanctions calibrated to preserve the defendant corporation's financial viability, this results in an inevitable deterrence deficit. In such circumstances, the exercise of ethically neutral corporate rationality will result, if not positively encourage, criminal conduct.[70]

The flaws in the collateral damage argument, used to justify the use of DPAs, and the exercise of constraint in calibrating the ensuing

[57] See the discussion in Rupert Macey-Dare, 'Preserving 3rd Party Funding in UK Competition Law Opt-Out Class Proceedings – Imminent Legislative Response to Detonate the "PACCAR Torpedo" (Nov. 15, 2023) at http://dx.doi.org/10.2139/ssrn.4634289 > accessed August 21, 2024.

[58] On 19th March 2024.

[59] It would have amended s.58AA Courts and Legal Services Act 1990.

[60] For example, *Kent v Apple Inc. & another [2024] CAT 5.*

[61] Christopher Harding and Alison Cronin, *Regulating Bad Practice: Criminal Law, Regulation and the Reconfiguration of the Business Model* (Edward Elgar 2022) Ch. 5, 6 and 7.

[62] Deferred Prosecution Agreements Code of Practice available at https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf > accessed August 21, 2024, at 2.4.

[63] Jennifer Arlen and Samuel W. Buell, 'The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement' (2020) 93 University of Southern California Law Review 697–761; M. Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* (Demos 2004) p 21; R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999) 126; Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992).

[64] J. Arlen, 'Prosecuting beyond rule of law: corporate mandates imposed through deferred prosecution agreements' (2016) 8(1) Journal of Legal Analysis 191–234.

[65] John C. Coffee Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler Publishers, Inc 2020) p. 9; Wulf A. Kaal and Timothy Lacine, 'The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013' (2014) 70(1) Business Lawyer 61–120; Marshall B. Clinard and Peter C. Yeager, *Corporate Crime* (Transaction Publishers 2006) citing Pfizer's 4 deferred prosecution agreements that were made between 2002 – 2009; Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' [2015] 49 UCDL Rev 407 at https://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf > accessed Aug 29, 2021 and includes examples of Aibel Group Ltd and Marubeni Corporation, 514; Brandon L. Garrett, 'The Rise of Bank Prosecutions' (2016 – 17) 126 Yale LJ Forum 33 which gives examples of AIG, Barclays, Credit Suisse, HSBC, JP Morgan, Lloyds, Royal Bank of Scotland and UBS, 38. Brandon Garrett, *Too Big To Jail: How Prosecutors Compromise with Corporations* (Belknap Press of Harvard University Press 2014); Nicholas Ryder, ''Too Scared to Prosecute and Too Scared to Jail?' A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK' (2018) 82(3) JCL 245–263.

[66] Parkinson, J.E., *Corporate Power and Responsibility (*Oxford: OUP 1993); Fischel, D.R. 'The Corporate Governance Movement' (1982) V&L Rev 35 (6), 1259.

[67] Lord, N., 'Prosecution Deferred, Prosecution Exempt: On the Interests of (In) Justice in the Non-Trial Resolution of Transnational Corporate Bribery' (2023) 63 (4) The British Journal of Criminology 848–866

[68] The price of the offence, calculated as the penalty multiplied by the probability of its imposition, must significantly outweigh the financial benefit of the criminal activity, while the optimal price will be just high enough to pay for the harm inflicted on the rest of us, F. H. Easterbrook, 'Criminal Procedure as a Market System' (1983) 12(2) J. Legal. Stud. 289; G. S. Becker, 'Crime and Punishment, An Economic Approach' (1968) 76 J. Pol. Econ., 169.

[69] The judiciary are rationalizing the use of DPAs in even the most egregious conduct, see Lord, N., 'Prosecution Deferred, Prosecution Exempt: On the Interests of (In)Justice in the Non-Trial Resolution of Transnational Corporate Bribery' (2023) 63 (4) The British Journal of Criminology 848–866.

[70] Alison Cronin, 'Fixing Fraud: Flaws in the Economic Crime and Corporate Transparency Act and the current enforcement approach', Institute of Economic Affairs 2024 forthcoming.

corporate sanctions, discussed at length elsewhere,[71] are so profound that they significantly undermine the public enforcement of corporate crime. Furthermore, since DPAs, and the penalties imposed under them, are generally perceived in terms of the ethically neutral cost of doing business,[72] they lack the level of reputational damage that accompanies criminal conviction, and that would otherwise incentivize corporate self-regulation.[73] Although the introduction of a whistleblower incentivization scheme could address the problem, namely that of obtaining evidence without compromising the deterrent threat,[74] recent US experience suggests that public enforcement agencies will still lack the resources to pursue more than a small fraction of potential corporate crimes.[75]

The case for dual enforcement and litigation funding for private collective claims

Given that the inadequacy of resourcing is a common feature of public enforcement agencies, including the UK's Serious Fraud Office,[76] the utility of a dual enforcement regime, as a means to increase the likelihood of an enforcement action, and thus the credibility of the deterrent threat, is not in doubt. Indeed, in the US, the availability of civil actions for corporate anti-trust offences has long been recognised as a significant additional deterrent,[77] and, likewise, the availability of private action is deemed fundamental to ensuring the efficacy of EU law.[78] However, it is not just by making the prospect of some form of enforcement more likely that prevention is increased with the availability of civil enforcement, it is also that the collateral damage constraint, the issue at the heart of the criminal law's deterrence deficit, is simply not a consideration in civil awards for damages. Since there are no comparable concerns regarding wider stakeholder impacts, and, given that there is no fundamental difference between criminal sanctions and civil damages,[79] the civil law's relatively unconstrained approach may better motivate genuine corporate compliance. To serve as a successful deterrent, the price of the offence, calculated as the penalty multiplied by the probability of its imposition, must significantly outweigh the financial benefit of the criminal activity. Put simply, although civil damages are not designed to be punitive, the availability of a dual regime certainly increases both the likelihood of enforcement and the potential cost of the crime.

Indeed, civil damages can dwarf the largest regulatory fines, including those imposed globally, since the Competition and Markets Authority can impose fines up to 10 % of worldwide turnover, whereas damages in, for example, Collective Proceedings Orders are calculated in part by reference to the class size.[80] Furthermore, corporations involved in competition offences face the prospect not only of one or other form of enforcement, criminal or civil, but the risk of multiple private actions that could lead to the parallel imposition of multiple liabilities for damages caused to different 'victims' of the same underlying conduct. While DPAs are purposed to ensure the ongoing financial viability of corporations, whatever the harm or extent of their crimes, it is the availability of parallel civil actions that gives additional credibility and financial sting to the threat of enforcement. Similarly, whereas DPAs are used to reduce the perception of corporate criminal conduct to something quasi-regulatory in nature, and thus import a more morally neutral quality, a link has been established between significant reputational damage and meritorious civil class action claims.[81] Since reputational damage in the white-collar context can be very costly,[82] to the extent that corporations fear adverse publicity more than the law itself,[83] private enforcement provides a valuable deterrent that, for corporate defendants, may well outweigh the threat of potential financial sanctions.[84]

Given the relative lack of resources for public enforcement, and that DPAs fail to adequately deter in any event, private litigation performs an important quasi-public role in inducing corporate self-constraint and compliance with the substantive law.[85] Under-enforcement results in the misallocation of resources because corporations engaging in criminal behaviour get to retain the unlawful profits. Since they are thus afforded a competitive advantage over law abiding competitors, this constitutes a market failure that needs correction. Third party litigation funding enables individuals, and medium sized businesses, access to sufficient funding to bring these large and complex claims against bigger, better resourced corporations. Without incurring costs to the public purse, it therefore

[71] Ibid.; Christopher Harding and Alison Cronin, *Regulating Bad Practice: Criminal Law, Regulation and the Reconfiguration of the Business Model* (Edward Elgar 2022) Ch. 5, 6 and 7.

[72] Harding, C., 'The System of EU Antitrust Law: Characteristics, safeguards, and differences from tradition criminal law' (2019) Revue Internationale de Droit Penal 90.

[73] Christopher Harding and Alison Cronin, *Regulating Bad Practice: Criminal Law, Regulation and the Reconfiguration of the Business Model* (Edward Elgar 2022).

[74] The introduction of a whistleblower inducement scheme would also address concerns that the availability of follow-on civil actions will undermine the leniency regime available for corporations that self-report cartel activities.

[75] Alison Cronin, 'Fixing Fraud: Flaws in the Economic Crime and Corporate Transparency Act and the current enforcement approach', Institute of Economic Affairs 2024 forthcoming.

[76] The Bureau of Investigative Journalism, City Law Firms Make Millions While Top Corruption Cases Tumble at https://www.thebureauinvestigates.com/stories/2021-11-15/city-law-firms-make-millions-while-top-corruption-cases-tumble/ > accessed August 21, 2024.

[77] Robert H. Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 Ohio St. L. J. 115. Given the deterrent value of the availability of civil action, the dampening effect of the 'indirect purchaser' doctrine, by which only direct purchasers can claim against corporations, per *Illinois Brick v Illinois*, 431 U.S. 720 (1977), has been addressed in many states such that 28 states have passed laws enabling consumers at all stages in the supply chain to claim relief and the courts in 7 other states have provided for indirect purchaser standing.

[78] Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (2nd edn, OUP 2010) Ch XI.

[79] Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 (4) American Crim Law Rev 1481.

[80] Nicole Kar et al., Linklaters LLP CAT-led law: What does the exponential growth of private enforcement mean for public enforcement, at https://www.catribunal.org.uk/sites/cat/files/2023-09/Public%20Privat%20Enforcement%20%28Linklaters-Kar%29.pdf > accessed August 21, 2024.

[81] Importantly, there is no evidence of reputational damage in the wake of non-meritorious actions, see Dain C Donelson et al., 'The Merits of Securities Litigation and Corporate Reputation' (2024) 41(1) Contemporary Accounting Research 424–458. This addresses concerns about defendant corporations settling in unwarranted (blackmail) actions, Werlauf, Erik, 'Class Action and Class Settlement in a European Perspective' (2013) 24 European Business Law Review 173–86, 184.

[82] There is a rich literature on this point, see John C. Coffee, Jr, *Corporate Crime and Punishment, The Crisis of Underenforcement* (Berrett-Koehler Pubs Inc 2020) p. 67; Jonathan M. Karpoff and J.R. Lott, Jr, 'The Reputational Penalty That Firms Bear from Committing Criminal Fraud' (1993) 36 Journal of Law and Economics 757–802; Jonathan M. Karpoff et al., 'The Cost to Firms of Cooking the Books' (2008) 43 Journal of Financial and Quantitative Analysis 581–612.

[83] Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (University of New York Press, Albany, 1983) p. 249; Opinion Research Corporation, *Executive Attitudes toward Morality in Business* (Princeton, N.J.: Opinion Research Corporation, 1975).

[84] Roy Shapira, 'Reputation Through Litigation: How the Legal System Shapes Behaviour by Producing Information' (2016) 91 Wash L Rev 1193, 1201; Jonathan R Macey, *The Death of Corporate Reputation* (Financial Times/Prentice Hall 2013)10–20; Jonathon M Karpoff and JR Lott, Jr, 'The Reputational Penalty That Firms Bear For Committing Fraud' (1993) 36 JL and Econ 757.

[85] Robert G. Bone, Economics of Civil Procedure, in OXFORD HANDBOOK OF LAW AND ECONOMICS (Francesco Parisi ed., 2017).

provides an efficient means for holding corporations to account. Equally, by concentrating lawsuits, there are efficiencies for both defendant corporations and for the courts.[86] Collective proceedings facilitate the easier administration of such proceedings, reduce overall costs and also avoid the potential for different decisions in similar cases.[87] Furthermore, experience from other jurisdictions shows that there is a recognised preventative and educational function of collective actions, and that this can only be achieved through the introduction of an opt-out system, because only this involves the participation of the relevant number of persons in the large class cases.[88] There are no costs to public bodies associated with this approach,[89] and no other compelling reason not to facilitate class actions that are therefore suited to the opt-out mechanism. While it has been suggested that third party litigation funders may skew the private enforcement market, to focus on claims offering the highest possible profit from the most deep-pocketed defendants,[90] this is arguably more desirable than the alternative prospect of under-enforcement of corporate crime. It is therefore imperative that the Litigation Funding Agreements (Enforceability) Bill is now prioritised on the legislative agenda.[91]

The limits of the dual enforcement model

Although opt-out collective proceedings can only be brought in the UK in respect of competition law breaches, this contrasts the position in the EU whereby representative actions have been made available for the protection of the collective interests of consumers in all Member States.[92] Although an amendment to the then Digital Markets, Competition and Consumers Bill was debated in the House of Lords late last year, which would have expanded the opt-out class action regime to consumer protection legislation, and thus enabled consumers who could not otherwise bring a claim on their own to seek collective redress, the amendment was not supported by the government. Accordingly, in order to seek collective redress for consumer law breaches in the UK, consumers will either need to reframe the violations as competition law infringements, most likely by alleging abuse of a dominant position, to come within the collective action regime in the CAT. Otherwise, they will need to structure the claim as a representative action,[93] opt-in group litigation,[94] or as case-managed multi-party litigation.[95]

As now enacted, the Digital Markets, Competition and Consumers Act 2024 does give the Competition and Markets Authority (CMA) the power to directly enforce consumer protection law, expected to come into force in 2025, such that the Authority will be able to sanction breaches and impose remedies, including the offer of compensation, or other redress, for consumers.[96] Inter alia, the Act also updates the law on unfair commercial practices, which encompasses misleading consumers, and acting aggressively, and it gives the CMA the power to impose fines up to 10 % of global turnover.[97] Prior to the 2024 Act, the CMA lacked authority to order non-compliant businesses to cease illegal practices under consumer protection legislation, and had to go to court to secure an order for compliance. Even then, the court had no power to impose fines and, since the CMA relied solely on voluntary undertakings from non-compliant companies, this did little to deter businesses who could thus continue to profit from such breaches.[98]

The introduction of dual enforcement, featuring an opt-out mechanism, would have been a significant development in consumer protection, putting it on an equal footing with competition law. Given that various violations of consumer law can also amount to criminal frauds, if viewed through the alternative lens, this would equally enhance the enforcement of corporate fraud. For the reasons outlined above, this availability, backed up by a third-party funding regime, would provide for an efficient enforcement of consumer protection law, including many frauds, by putting consumer-facing corporations, whatever their size, at risk of large-scale collective litigation. Moreover, had this been enacted, civil enforcements would have been significantly easier to litigate than are the breaches of competition law, since they would not involve the complicated legal and economic assessments the latter necessitates, while the inclusion of specified practices deemed automatically unfair would have further lowered the burden for private claimants. The failure to extend the dual enforcement model to the protection of consumer law sits uneasily, and in questionable contrast, to the creative spirit with which competition law is being developed. While there is certainly an economic case to avoid the over-regulation of businesses generally,[99] in practice, the operation of the third-party litigation funding market would have delimited the risk of civil enforcement to those corporations involved in the very worst excesses of consumer violations. Furthermore, allowing consumers who are cheated of their money to recover it if it is due to cartel activity, but not if it results from a consumer law breach, defies logic and justification. The failure to extend the approach will also inevitably result in further straining of the boundaries of competition law, leading to the undesirable position that the ability to recover, or not, may well turn on the finest of distinctions.

Although the dual enforcement model has not been formally extended beyond the confines of competition infringements (flexibly

[86] Thomas S. Ulen, The Economics of Class Action Litigation, in THE LAW AND ECONOMICS OF CLASS ACTIONS IN EUROPE 79 (2012).

[87] Klara Hamulakova, 'Opt-Out Systems in Collective Redress, EU Perspectives and Present Situation in the Czech Republic' (2018) 59 (1) Hungarian Journal of Legal Studies 95–117.

[88] Ibid.

[89] See Ministry of Justice, Litigation Funding Agreements (Enforceability) Bill 2024 – Impact Assessment at https://assets.publishing.service.gov.uk/media/65faac85aa9b760011fbdb3c/lfa-bill-impact-assessment.pdf > accessed August 21, 2024.

[90] Nicole Kar et al., Linklaters LLP CAT-led law: What does the exponential growth of private enforcement mean for public enforcement, at https://www.catribunal.org.uk/sites/cat/files/2023-09/Public%20Privat%20Enforcement%20%28Linklaters-Kar%29.pdf > accessed August 21, 2024.

[91] The Ministry of Justice also observed that the new legislation would make an 'important change to further bolster UK's thriving £34 billion legal services sector that contributes to the economy', see https://www.gov.uk/government/news/new-law-to-make-justice-more-accessible-for-innocent-people-wronged-by-powerful-companies?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=a74da286-56a6-465f-b5c2-fb95e74d0bdc&utm_content=daily > accessed August 21, 2024. Due to the confidentiality of many LFAs, the size of the UK market for litigation funding cannot be certain, but industry sources estimate the size for 2023 to be between £1.5bn to £4.5bn, Litigation Funding Agreements (Enforceability) Bill Fact Sheet, https://assets.publishing.service.gov.uk/media/65faac9e703c42001158eff9/lfa-bill-fact-sheet.pdf > accessed August 21, 2024.

[92] Directive 2020/1828.

[93] Civil Procedure Rules 19.8.

[94] Civil Procedure Rules 19.22.

[95] See Dentons, The Digital Markets, Competition and Consumers Act: a watershed moment in consumer protection law at https://www.dentons.com/en/insights/articles/2024/june/5/the-digital-markets-competition-and-consumers-act > accessed August 21, 2024.

[96] Digital Markets, Competition and Consumers Act 2024, Parts 3 and 4.

[97] Ibid., s.158.

[98] Hansard, Digital Markets, Competition and Consumers Bill, Vol 834: debated on Tuesday 5 Dec 2023 at https://hansard.parliament.uk/Lords/2023-12-05/debates/8A9A99FB-CD4C-4591-B357-02A1FA287FCB/DigitalMarketsCompetitionAndConsumersBill > accessed August 21, 2024, per Lord Offord of Garvel.

[99] Digital Overload: How the Digital Markets, Competition and Consumers Bill's sweeping new powers threaten Britain's economy (September 18, 2023). Institute of Economic Affairs, IEA Perspectives 4, September 2023, at https://iea.org.uk/publications/digital-overload-how-the-digital-markets-competition-and-consumers-bills-sweeping-new-powers-threaten-britains-economy/ > accessed August 21, 2024.

construed), it is of note that shareholder activism, particularly in the part of institutional investors, is also on the rise. This form of civil action has resulted in claims for eye-watering sums being made against corporations that have engaged in misconduct. Highlighting the significance, and indeed the value, of the corporate reputation, these shareholder claims are based on the demonstrable drop in the company's stock price that follows adverse corporate publicity. For example, in the US, where opt-out proceedings can be brought, it is estimated that companies have shelled out $115bn since 1996 to settle around 2900 securities class action lawsuits.[100] The first such case in the UK was brought in the aftermath of the global financial crisis, when groups of Royal Bank of Scotland shareholders, who lost about 80 % of their investment, alleged that the bank had misrepresented its financial health when, in 2008, it made a £12 billion cash call. Consequently, during 2016 and 2017, the bank settled with the claimants in the sum of around £900 million. Similarly, in 2021, Tesco shareholders secured a payout to the tune of £193 million from the supermarket group, in settlement for the drop in share value caused by the 2014 accounting scandal[101] for which it had faced criminal proceedings, and was given a DPA.[102] Indeed, the civil claim by far exceeded the criminal penalty, in that the fine imposed was £129 million, with an additional £3 million payable for investigation costs. More recently, Serco's involvement in a contract overcharging scandal in 2013, in relation to its provision of electronic tagging and prisoner escort services, resulted in a DPA, made in 2019. With the imposition of a financial penalty of £19.2 million, and liability for the full amount of the SFO's investigative costs of £3.7 million, Serco Geografix Ltd took responsibility for three offences of fraud and two of false accounting.[103] When news of the scandal emerged, the share price collapsed by as much as 70 per cent as a result, and the company has since settled with the institutional investor claimants on undisclosed terms in a landmark lawsuit, the first of its kind to go to trial in England. While shareholders were given strengthened powers in 2006 to sue UK listed companies for making "untrue or misleading" statements, including dishonest delays in publishing information,[104] through Section 90 A of the Financial Services and Markets Act 2000 (FSMA), it is only recently that lawsuits seeking to use them have gained momentum.[105] Common law claims in the context of fraudulent statements have included claims of a breach of the directors' tortious duty to use reasonable care and skill when communicating with shareholders. Although it is only in the arena of competition infringements that dual enforcement is formally prescribed, there are healthy signs that corporate misconduct, that may otherwise amount to criminal fraud, is increasingly the subject of private civil enforcement.

Conclusion

The dual enforcement regime implicitly acknowledges, and indeed goes some way to address, the practical reality that public enforcement agencies are woefully under-resourced. The availability of opt-out private class actions enables individuals, typically consumers, and small businesses, to enforce the law against powerful corporations where, due to the obvious financial disparity, they would otherwise have no form of redress. The success of private enforcement, particularly where vast numbers of claimants have suffered relatively small losses, rests entirely on the availability of third-party litigation funding, a market that is now, post-PACCAR, in a sorry state of uncertainty. From the perspective of the civil law, where an actionable wrong has occurred, and where losses have resulted, there is no justifiable reason to effectively deny claimants access to justice. Giving the right to compensation, but no practical ability to enforce, is tantamount to political dishonesty,[106] and, given the relative impunity with which large corporations can then act, it effectively undermines the rule of law. Not only should private enforcement be encouraged as a matter of efficiency, relieving the burden on already over-stretched public enforcement agencies, civil proceedings, and the calculation of civil damages, are relatively unconstrained by comparison with the criminal law's substantive and policy considerations. The cause of the deterrence deficit, the collateral damage constraint, does not apply in the calculation of damages. By increasing both the probability of enforcement and the cost of the misconduct, the availability of civil action counteracts the deficiencies associated with the criminal regime's use of DPAs, and it provides a stronger deterrent against corporate crime. Since, in contrast to the US system,[107] the UK's loser pays rules deter the abuse of the class action process, there is every reason to hasten the enactment of the Litigation Funding Agreements (Enforceability) Bill and thus to reinvigorate the litigation funding market with the certainty desired. For precisely the same reasons, this reform should be accompanied by an extension to the current opt-out regime, to facilitate the provision of the large class actions for consumer protection breaches, that had previously been rejected. In this regard, there is no logical reason to distinguish competition from consumer law. The dual enforcement approach should be embraced and developed as an important supplement to criminal enforcement, and as an efficient step forward in the ongoing fight against corporate economic crime.

CRediT authorship contribution statement

Alison Cronin: Writing – original draft.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

[100] Cornerstone Research, Securities Class Action Filings at https://www.cornerstone.com/insights/reports/securities-class-action-filings/ > accessed August 21, 2024.

[101] The Times, Tesco pays shareholders £193 m to settle accounting scandal claims, October 7, 2021.

[102] See Serious Fraud Office, Deferred Prosecution Agreement Between the SFO and Tesco published at https://webarchive.nationalarchives.gov.uk/ukgwa/20210301134047/https://www.sfo.gov.uk/download/deferred-prosecution-agreement-statement-of-facts-sfo-v-tesco-stores-ltd/ > accessed August 21, 2024.

[103] Serious Fraud Office, Serco Geografix Ltd Statement of Facts at https://www.sfo.gov.uk/2021/04/28/serco-geografix-ltd-statement-of-facts-published > accessed August 21, 2024.

[104] These collective claims are, of course, only available on an 'opt-in' basis.

[105] Financial Services and Markets Act 2000, s.90 addresses misleading information published in listing particulars, and is therefore addressed to the market as a whole.

[106] George Peretz KC, 'Santa Clause: adding the "Buckland Clause" to the Digital Markets Bill would be a gift for UK consumers' December 22, 2023, at https://georgeperetzkc.substack.com/p/santa-clause-adding-the-buckland > accessed August 21, 2024.

[107] See for example the comments of J Ginsberg in Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 445 (2010) and those of C-J Posner in re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995).