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A STANDALONE ACTION FOR SINGAPORE'S COMPETITION LAW REGIME

Challenges and Opportunities

This article discusses whether introducing a standalone private action for damages to Singapore's competition law regime is a good idea. Currently, there is only a follow-on action for damages available – private claimants have to wait for an infringement decision from the Competition Commission of Singapore before they have a chance of receiving damages. The policy goals and potential benefits of implementing a standalone action will be analysed. Practical issues with introducing this new action are examined – including a possible clash with the leniency regime of the Competition Commission of Singapore. Finally, several workarounds to these problems that have been implemented in other jurisdictions are discussed.

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I. Introduction and outline

1 Singapore's competition law regime has celebrated its ten-year anniversary. The Competition Commission of Singapore ("CCS"), responsible for the public enforcement of competition law, has produced jurisprudence in the form of infringement and clearance decisions on all three substantive aspects of the law[1] and the Competition Appeal Board ("CAB") has issued eight appeal decisions.[2]

* The author would like to thank Associate Professor Burton Ong for his comments on an early version of this article. The views expressed in this article are the author's, and are not representative of the views of Rajah & Tann Singapore LLP.

1 Section 34 of the Competition Act (Cap 50B, 2006 Rev Ed) regulates anticompetitive agreements, s 47 regulates the abuse of a dominant position and s 54 regulates anticompetitive mergers.

2 Seven on anticompetitive agreements and one on abuse of dominance.

2 However, little discussion has been had regarding how competition law is enforced. In 2010, the current Chief Executive of the CCS said that "rights of private actions may be a trend to watch".[3]

3 Currently, there is a follow-on private right to bring a claim for relief following an infringement decision by the CCS, provided the party bringing the claim has suffered loss or damage, established by s 86 of the Competition Act.[4]

4 The prevailing view is that s 86, which creates the statutory follow-on action, is meant to be exhaustive in the sense that no other rights to private action (including any rights to a standalone action) exist.[5] The fact that s 86 is meant to exhaustively detail all available rights of private action can be implied from the Second Reading of the Competition Bill 2004, where the Minister said that "violators of the competition law are liable to be sued by parties who suffered loss and damage" and that "Clause 86 provides for such rights".[6] Thus, although there has never been any formal pronouncement that there is no standalone right in Singapore, it seems unlikely that such a right currently exists.[7]

5 In the UK, parties have the right to initiate an action in the ordinary courts for breach of competition law rules.[8] Any person or undertaking that has suffered loss or damage as a result of an infringement of UK (or European Union ("EU")) competition law rules may bring a claim for damages or other relief before the Chancery Division of the High Court.[9] These standalone claims are brought as

3 Toh Han Li (then the Assistant Chief Executive), speaking at the CCS-SAL Competion Law Seminar 2010.

4 Section 86(1) of the Competition Act (Cap 50B, 2006 Rev Ed) establishes that any person who suffers loss or damage directly as a result of an infringement of the s 34 prohibition, the s 47 prohibition or the s 54 prohibition shall have a right of action for relief in civil proceedings. Section 86(2) limits the application of s 86(1) to situations where there has been a prior infringement decision by the Competition Commission of Singapore, and any appeals that are in process have been exhausted.

5 Cavinder Bull & Lim Chong Kin, *Competition Law and Policy in Singapore* (Singapore: Academy Publishing, 2nd Ed, 2009) at p 274.

6 *Singapore Parliamentary Debates, Official Report* (19 October 2004) vol 78 at col 868 (Dr Vivian Balakrishnan, Senior Minister of State for Trade and Industry).

7 Cavinder Bull & Lim Chong Kin, *Competition Law and Policy in Singapore* (Singapore: Academy Publishing, 2nd Ed, 2009) at p 274.

8 *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130.

9 Judges in the Chancery Division have reportedly undertaken specialist training in examining competition claims. Therefore, standalone competition law cases are now typically allocated to this Division with the intention that it will eventually develop a specialist understanding of competition law issues. See *The Enforcement*

(*cont'd on the next page*)

tortious claims for breach of statutory duty.[10] It is clear that Singapore's current enforcement model is not the only way to do things.[11]

6 It is the aim of this article to stimulate a discussion on whether Singapore should reform its private enforcement system by adopting the standalone right to bring a private action ("standalone right" or "standalone action").

7 The next four parts of this article will progressively examine if we should adopt the standalone right which exists in the UK.

8 Part II[12] will explain why private enforcement, specifically a standalone right, is desirable in the first place.

9 Part III[13] will present an empirical analysis as to whether the UK standalone right has been utilised, and if so, how many of these cases brought by private plaintiffs have been successful.

10 Part IV[14] will analyse potential areas of conflict with the public enforcement model – inconsistency between the ordinary courts and the CCS, and leniency applications and their vulnerability to discovery. This will be analysed in the context of the position at general law in Singapore.

11 Part V[15] will evaluate whether the legal framework in Singapore can accommodate the standalone right. Standalone actions (for the breach of competition law) before the UK High Court are brought as tortious claims for the breach of a statutory duty. The state of tort law in Singapore, and its amenability to the same kind of action in the UK, will be evaluated.[16]

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of Competition Law in Europe (Thomas M J Möllers ed) (Cambridge University Press, 2010) at p 403. There is also a reform that recently passed through the UK Parliament that allows the Competition Appeal Tribunal to hear standalone claims as well. This reform took effect on 1 October 2015.

10 *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130 at 141, *per* Lord Diplock. See also Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2014) at p 119.

11 Parties in the UK also have a greater choice of where to bring follow-on actions – the ordinary courts or the Competition Appeal Tribunal ("CAT"). The idea is that the CAT can dispose of follow-on actions more quickly than the ordinary courts, and thus gives claimants a better option.

12 See paras 13–56 below.

13 See paras 57–68 below.

14 See paras 69–97 below.

15 See paras 98–104 below.

16 If the state of tort law is not suitable to the same kind of action, then an express statutory right to a standalone action will have to be legislated into the Competition Act (Cap 50B, 2006 Rev Ed).

12 Having shown in Parts II to V that the standalone action introduces benefits that the follow-on action cannot provide,[17] and that the difficulties surrounding its implementation are not insurmountable, Part VI[18] will analyse some major changes that are proposed at the UK and EU levels to make the standalone action more attractive to claimants. Part VI[19] will then conclude the article, recommending that Singapore should adopt the UK-style standalone right, but only with the additional reforms proposed.

II. What goals of competition law can standalone actions help to serve?

13 First, the goals that private enforcement of competition law can serve, as well as the criticisms of the ability of private enforcement to achieve these goals, will be laid out. Second, why the standalone action can serve these goals in ways that the current follow-on action cannot – *ie*, why the availability of the follow-on action is insufficient – will be specifically addressed.

14 John Locke famously distinguished two rights:[20]

> … the one of punishing the crime, for restraint and preventing the like offence, which right of punishing is in everybody, the other of taking reparation, which belongs only to the injured party.

15 This applies more specifically to competition law too. The Competition Law Association (UK) has stated that "public enforcement is aimed at preventing antitrust infringements, whereas private enforcement has the task of compensating the victims".[21] This statement, while helpful in illustrating the two goals of competition law, is perhaps overly simplistic. Private enforcement is not merely limited to achieving the compensatory goal – the threat of being on the receiving end of a private action, in addition to public investigation by the competition law authority, also acts as a deterrent to would-be competition law infringers.

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17 See paras 33–44 below.

18 See paras 105–131 below.

19 See para 132 below.

20 John Locke, *The Second Treatise on Civil Government* (1690) available on the Project Gutenberg website <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm> ch II at para 11 (accessed 1 February 2017).

21 Department for Business Innovation & Skills, "Private Actions in Competition Law: A Consultation on Options for Reform – Government Response" (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf> at p 60 (accessed 1 February 2017).

16 To contextualise the following discussion on the twin goals of competition law, it might be appropriate to say a few words about the rationale behind this body of law.

17 Modern competition law had its genesis in the US, with the enactment of the Sherman Antitrust Act in 1890. The aim of the Act was to restore and maintain competitive conditions in the market by prohibiting abusive practices, be they anticompetitive agreements to fix prices, or abuses of dominance by monopolistic entities.

18 The Sherman Antitrust Act has been said to be the synthesis of two ideologies.

19 The first ideology (the evolutionary vision) sees the market as a mechanism for facilitating free exchanges among individuals in the pursuit of their best interests as well as the best interests of the group as a whole – Adam Smith's invisible hand.

20 The second ideology (the intentional vision) views the market as a mechanism that can be exploited by powerful interests to coerce consumers, labour and small businesses. In this vision, the harmful outcomes of market processes can and should be corrected by governmental intervention.[22]

21 Sitting in the middle of these ideologies, competition law recognises the power of the free market to generate wealth and opportunity, but also sees the potential for abuse by powerful market players.

A. Private enforcement and the compensatory goal

22 Upon the successful litigation of a private action alleging the breach of competition law rules, the plaintiff receives damages. The goal here is to "correct for the consequences when a violation has taken place, by making the party which wrongfully committed the violation compensate other parties who innocently suffered the consequences of

22 William H Page, "The Ideological Origins and Evolution of US Antitrust Law" 1 *Issues In Competition Law and Policy* 1 (ABA Antitrust Section, 2008).

the violation".[23] The European Court of Justice ("ECJ") in *Courage and Crehan*[24] held that:

> The full effectiveness of Article 85 of the Treaty … would be put at risk if it were not open to any individual to claim damages for loss caused to him … by conduct liable to restrict or distort competition.

23 There is some academic debate as to the proper range of remedies for private actions in the UK – should they be compensatory, punitive or restitutionary? However, the courts in the UK have come to the position that in private actions, only compensatory damages are available, and "a restitutionary award is not an available remedy in an anti-trust case".[25]

24 Of course, the identification of the victims of an anticompetitive practice will depend on which competition law rule was breached. Breaches of s 34 of the Competition Act (which deals with anticompetitive agreements), generally speaking, tend to have more widespread effects. Price-fixing affects all consumers, and has a direct impact on consumer welfare. Abuse of dominance (regulated by s 47), on the other hand, often has more readily identifiable victims – for example, firms that have been forced out of the market by the abusive conduct of a dominant firm.[26]

B. Private enforcement and the deterrence goal

25 Private actions can have an impact on deterrence[27] as well. The deterrence goal of competition law is this – to ensure that "the antitrust prohibitions are not violated and that the anticompetitive effects which the antitrust prohibitions aim to avoid are indeed avoided".[28] This is done by creating a credible threat of sanction, which affects the

23 Wouter Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?" (2003) 26(3) *World Competition: Law and Economics Review* 473 at 479. Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another. See Ernest Weinrib, "Corrective Justice in a Nutshell" (2002) 52 *University of Toronto Law Journal* 349, citing Aristotle's treatment of justice in *Nicomachean Ethics, Book V*.

24 Case C-453/99 *Courage and Crehan* [2001] ECR I-06297 at [26].

25 *Devenish Nutrition Ltd v Sanofi Aventis SA* [2008] EWCA Civ 1086 at [4]. The court held that a restitutionary award could not be awarded on a claim for a non-proprietary tort.

26 Of course, the reduction in competition also leads to harm to economic welfare, particularly consumer welfare, as a result of lower levels of economic efficiency.

27 Contrary to the statement by the UK Competition Law Association cited at para 15 above.

28 Wouter Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?" (2003) 26(3) *World Competition: Law and Economics Review* 473 at 478.

cost/benefit analysis of potential violators, thus causing them to refrain from violations.

26 Potential infringers of competition law would be more cautious in their behaviour[29] if they had to worry about both the possibility of an investigation by the CCS, and lawsuits from private parties who have suffered loss. The *threat* of private actions thus acts as a deterrent, making potential infringers take their compliance obligations more seriously.

27 In fact, there is a kind of natural symbiosis – through the use of the notification system, private actors can alert the competition authority to possibly infringing conduct (in the hopes of generating a public prosecution and then suing in a follow-on action for damages). If the authority does not commence an investigation, the private actor can start a standalone action.

C. Private enforcement and its critics

28 Of course, criticisms have been raised regarding the ability of private enforcement to achieve the goals of compensation or deterrence.

29 Wils argues that society does not attach much value to the pursuit of corrective justice in the antitrust context. Speaking in the European context, he states that he is "not aware of any evidence that the citizens … are seriously disturbed by the current absence of compensation for antitrust offences".[30] In support of this point, Schwarz argues that the losses from antitrust violations are generally widely dispersed.[31]

30 As far as the argument goes that the victims of antitrust violations are hard to identify in certain circumstances, this author agrees with Wils and Schwarz. Where the alleged victims are consumers who suffer from increased prices as a result of a drop in productive and allocative efficiencies, it is indeed difficult to identify any one consumer who has suffered "enough" to bring a lawsuit. The consumers suffer individually in a *de minimis* fashion. This weakness, however, can be

29 This idea of potential infringers doing a "cost-benefit analysis" prior to their infringing acts is well documented. See, *eg*, Nadia Calvino, "Public Enforcement in the EU: Deterrent Effect and Proportionality of Fines" in *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Claus-Dieter Ehlermenn & Isabela Atanasiu eds) (Oxford: Hart Publishing, 2007) at p 317.

30 Wouter Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?" (2003) 26(3) *World Competition: Law and Economics Review* 473 at 487.

31 W F Schwarz, *Private Enforcement of the Antitrust Laws: An Economic Critique* (Washington: American Enterprise Institute, 1981) at p 32.

addressed by reforms to the standalone action, namely collective proceedings.[32]

31 Furthermore, competitors disadvantaged by anticompetitive practices or an abuse of dominance would be readily identifiable, and indeed, self-identifying victims.

32 Wils also makes the point that public enforcement does a better job of deterrence than private enforcement. The national authority, generally speaking, has more financial resources than the average victim of an anticompetitive practice, and also has investigative powers at its disposal. It has statutory powers of investigation that allow it to obtain information from suspected parties,[33] and also has the benefit of information gleaned from leniency applications, and trained economists to analyse economic data gathered. These are certainly valid arguments – however, it is submitted that this does not mean that private enforcement does not have a role to play in deterrence. The author does not argue for private enforcement to *replace* public enforcement but that private enforcement can *supplement* the deterrent role that public enforcement plays. Therefore, the fact that public enforcement does a better job does not undermine the argument being made here.

D. Role of standalone actions in achieving these goals – Why follow-on actions are not enough

33 Having shown what goals *private enforcement* (the general category that both follow-on and standalone actions fall under) serves, it is now argued that standalone actions serve an important role in the pursuit of these goals.

34 Standalone actions serve a function that follow-on actions do not, and therefore, having just a follow-on action is insufficient for the proper pursuit of these goals.

35 There are four contributions that standalone actions make to the pursuit of the goals of the competition regime that follow-on actions do not.

(1) Private parties are afforded the possibility of redress even in the absence of an investigation by the national competition authority

36 With regard to the compensatory goal, standalone actions enable parties to pursue compensation even in the absence of a prior

32 Addressed at paras 105–131 below.

33 See Competition Act (Cap 50B, 2006 Rev Ed) Pt III, Division 5.

infringement decision from the national competition authority ("NCA").[34] This is important for two reasons. First, national competition authorities have limited resources. For example, the CCS is almost completely reliant on government funding, receiving $14.3m in grants in 2014, and spending $14.5m in the same year.[35] Any increase in the scope of their operations would require justifying a bigger budget to the Government.

37 Thus, NCAs often prioritise certain cases in their enforcement policies. It is virtually a truism in the scholarship that not every competition law breach can be investigated by the NCA. Indeed, the CCS has stressed the need to "prioritise its resources and focus its investigations".[36] To date, out of the ten infringement decisions that the CCS has issued on the s 34 prohibition, eight have involved "hardcore" cartel activity, and only two have involved non-hardcore conduct that infringed the s 34 prohibition.[37] From this, it can be seen that the CCS maximises its limited resources by targeting the most egregiously anticompetitive behaviour.

38 Quite apart from the egregiousness of the violation, the CCS also seems to focus its enforcement on certain *kinds* of infringements. Compared to the ten infringement decisions for breaches of s 34, the CCS has only issued one infringement decision[38] regarding s 47, which deals with the abuse of a dominant position. Arguably, this is because the s 47 analysis is significantly more complex, involving market definition[39] and counterfactuals.[40]

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34 In Singapore, the national competition authority is the Competition Commission of Singapore. Both these terms will be used in this article, depending on the appropriate context.

35 See Competition Commission of Singapore, "Annual Report 2013/2014" <https://www.ccs.gov.sg/Custom/CCS/content/publications/annual-report/on-top-of-our-game/index.html> at p 70 (accessed 1 February 2017). The shortfall was made up by the small amount of revenue the Commission generates from application fees and interest on its investments.

36 Raymond Choo & Angela Png, "The Competition Law Landscape – Recent Developments and Challenges" *Singapore Law Gazette* (December 2010) <http://www.lawgazette.com.sg/2010-12/feature3.htm> (accessed 1 February 2017).

37 The only two instances of non-hardcore conduct resulting in an infringement decision are *CCS Imposes Financial Penalties on Two Competing Ferry Operators for Engaging in Unlawful Sharing of Price Information* (2012) CCS 500/006/09 and *Financial Advisers Penalised by CCS for Pressurising a Competitor to Withdraw Offer from the Life Insurance Market* (2016) CCS 500/003/13.

38 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (2010) CCS/600/008/07.

39 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (2010) CCS/600/008/07 at p 47.

40 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (2010) CCS/600/008/07 at pp 5 and 116.

39 Standalone actions are thus superior to follow-on actions when the NCA does not commence an investigation, as it still affords claimants the possibility of compensatory redress.

40 Second, industry players might in fact have a better idea of whether infringements are taking place, as compared to the competition authority, as they are closer to the ground. Discussing private actions, the ECJ in *Courage and Crehan* said:[41]

> [T]he existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert … From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

41 The ECJ's emphasis on the "*frequently covert*" nature of agreements or practices carries with it the implied assertion that even with its superior resources and powers of investigation, these cartels often elude the NCAs, and private parties have a better idea of whether these cartels exist due to their familiarity with the industry in question. This factor of *knowledge* serves to support the factor of *resources* mentioned above. Even though private parties may indeed pass their knowledge on to the competition authority, the competition authority may not have the resources to prosecute. Therefore, standalone claimants, with both *knowledge* and, in some cases, the *resources* to do so, can pick up the slack. Lastly, they also have the *incentive* to bring cases – they are directly motivated by the prospect of receiving compensatory damages.

(2) Private parties are afforded the possibility of timely compensation

42 Standalone action affords the claimant the possibility of *timely* compensation. Unlike a follow-on claimant, he does not have to wait and see if the NCA will initiate an investigation. It is a truism that "justice delayed is justice denied".[42] Any party who has suffered loss would be interested in obtaining compensation as fast as possible, and not wait years[43] before initiating a follow-on action, by which time the relevant evidence might be harder to garner, and witnesses harder to

41 Case C-453/99 *Courage and Crehan* [2001] ECR I-06297 at [27].

42 *Rv Lawrence* [1982] AC 510 at 517, *per* Lord Hailsham.

43 Section 86(3) of the Competition Act (Cap 50B, 2006 Rev Ed) provides that a follow-on action may only be brought after the infringement decision is issued, and after any appeals (to the Competition Appeal Board, and following that, to the High Court) are exhausted, if such appeals are pursued.

track down. The standalone action gives the claimant some degree of control over *when* he will get his compensation.

(3) Potential infringers of competition law are exposed to additional liability

43 Standalone actions contribute to the deterrence goal in a way that follow-on actions do not. Standalone actions can be initiated at any time, where there is no investigation, and even where an investigation is already ongoing. This *additional* exposure to liability makes it more costly for a potential infringer to embark on infringing conduct. Potential infringers have to worry about both standalone actions and an investigation by the NCA – whereas in a follow-on only system, they only need to worry about an investigation by the NCA, as follow-on actions are predicated on an infringement decision.

(4) Private parties are offered the possibility of obtaining injunctions

44 The standalone action offers the claimant the opportunity to immediately *prevent* serious harm to itself. In a situation where the anticompetitive behaviour in question is *still occurring*, and the continuance of this anticompetitive behaviour will cause serious harm to the claimant, the claimant can apply for an interim injunction in a standalone action. This is clearly not possible in a follow-on action, as by the time the NCA investigates the behaviour and publishes the decision, the damage is already done. In *Cutsforth v Mansfield Inns Ltd*,[44] the claimant was in danger of having his business operations irreparably damaged by the anticompetitive conduct of the defendant.[45] The court held that the claimant was entitled to an interim injunction (pending a full trial) to stop the defendant's conduct, as there was "a serious question to be tried" and "the denial of interim relief would virtually put an end to [the claimant's] business".[46] It also held that waiting for the relevant authority[47] to investigate the infringement would be prejudicial to the claimant, as "the mills of Strasbourg grind very slowly indeed".[48] It might be argued that the CCS, under s 67 of the Competition Act, has the power to give directions with regard to interim measures, and these directions may be registered and enforced in the District Court. However, on a close analysis of s 67, it appears that the CCS is obliged to

44 [1986] 1 WLR 558.

45 The claimant was a manufacturer of amusement equipment that supplied several bars in the north of England. The defendant (the new landlord of the bars) entered into an agreement with the bars to purchase amusement equipment from a pre-approved list of vendors, which excluded the claimant.

46 *Cutsforth v Mansfield Inns Ltd* [1986] 1 WLR 558 at 567.

47 At the time, the European Commission.

48 *Cutsforth v Mansfield Inns Ltd* [1986] 1 WLR 558 at 567.

give written notice to the person to whom it proposes to give the direction and give that person an opportunity to make representations. Further, under s 85, the CCS "may" register the direction in the District Court – it is not compelled to. These additional procedural hurdles take up time, and time is of the essence when applying for an interim injunction to prevent harm. Therefore, the option of applying independently to the courts for an interim injunction, without the involvement of the CCS, is a superior option for claimants. This idea of "prevention of harm" is related to both the compensatory and deterrence goals, as the claimant benefits from it, and it stops the infringing conduct temporarily.

E. Negative effects of adopting a standalone action

45 It remains to consider what considerations Singapore might have had in mind for not adopting the standalone action in the first place. There is no discussion of standalone actions in the various parliamentary debates[49] on the Bill and its amendments, therefore one might reasonably draw the conclusion that the existence of the standalone action simply did not occur to the drafters of the Competition Bill.

46 An interview conducted with a leading practitioner revealed that the major concern with standalone actions from a broad policy perspective is the impact on Singapore's predictable and stable business environment. Where the enforcement of competition law is driven by the CCS, companies can order their behaviour and make business decisions based on the enforcement policy of the CCS. However, with a standalone action available to claimants, businesses operating in Singapore may face greater uncertainty as to whether their business practices will be challenged by competition law rules.

47 A related problem with introducing standalone actions involves concerns about the quality and legitimacy of the claims that private claimants might bring. Posner claims that "wild and woolly antitrust suits"[50] have been brought by the private bar, many of which would not have been brought by a public agency, and that "the influence of the private action on the development of antitrust doctrine has been on the

49 *Singapore Parliamentary Debates, Official Report* (19 October 2004) vol 78 at cols 863–919; *Singapore Parliamentary Debates, Official Report* (21 November 2004) vol 80 at col 1823; *Singapore Parliamentary Debates, Official Report* (21 May 2007) vol 83 at cols 726–749.

50 Richard Posner, *Antitrust Law* (Chicago: Chicago University Press, 2nd Ed, 2001) at p 275.

whole a pernicious one."[51] Kovacic, taking a countervailing position, states that "expansion of private rights could lead judicial tribunals to adjust doctrine in ways that shrink the zone of liability."[52] Kovacic's prediction makes sense – there is no great danger in claimants bringing "unpredictable" standalone actions, as the courts will, through the operation of the common law, develop clear doctrines that demarcate the zones of liability, and businesses can react accordingly. There might be a brief period of unpredictability when the standalone action is *first* introduced, as the courts would not have had a chance to expound on competition law doctrine yet, but this is only a temporary problem that, on its own, should not hinder the implementation of the standalone right.

48 The above concerns are perhaps best framed as follows: how would the introduction of standalone actions negatively impact the goals of Singapore's competition policy? Private actions are part of the overall competition law framework of a country, and it is important that they do not undermine the larger purpose undergirding the country's competition policy.

49 Singapore's competition policy is focused on the maximisation of total welfare, as opposed to merely consumer welfare.[53] In economics, total welfare (or total surplus) is the sum of consumer surplus (or consumer welfare) and producer surplus (or producer welfare). Consumer welfare refers to the difference between consumers' valuations (the most they would be willing to pay) of the products they buy and the price they actually pay. Producer welfare is the difference between the price that producers are paid for what they sell and the cost of production.[54]

50 In comparison, there are other jurisdictions (the EU being the prime example) that focus their competition policies on consumer

51 Richard Posner, *Antitrust Law* (Chicago: Chicago University Press, 2nd Ed, 2001) at p 275.

52 William Kovavic, "Private Participation in the Enforcement of Public Competition Laws" (2003) <https://www.ftc.gov/public-statements/2003/05/private-participation-enforcement-public-competition-laws> (accessed 1 February 2017).

53 Competition Commission of Singapore, "The Interface Between Competition and Consumer Policies: Contribution from Singapore", submitted to OECD Global Forum on Competition 2008, DAF/COMP/GF/WD(2008)3 at p 4, cited in Burton Ong, "Competition Law and Policy in Singapore" *ERIA Discussion Paper Series* (2015) at p 4.

54 Louis Kaplow, "On the Choice of Welfare Standards in Competition Law" *Harvard John M Olin Discussion Paper Series* (Discussion Paper No 693) <http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_693.pdf> (accessed 1 February 2017).

welfare. The difference between these jurisdictions and Singapore is the perceived importance of producer welfare.

51 The introduction of a standalone action in Singapore may have a negative impact on producer welfare in Singapore. It is reasonable to think that the threat of legal action from their competitors may have a chilling effect on the way businesses operate. Out of an abundance of caution, they may refrain from conduct that is in fact legitimate under the existing competition rules, resorting instead to less efficient methods of production and distribution.

52 One good example would be vertical arrangements. Vertical agreements are agreements relating to the conditions under which parties may purchase, sell or resell goods or services, that are entered into between two or more parties that operate at different levels of the production or distribution chain. An agreement between a supplier of high-end electronic products and a distributor, which requires the distributor to sell the supplier's goods exclusively, is one such vertical agreement. On the face of it, this agreement restricts competition, as it prevents the distributor from being approached by other suppliers. However, it is likely to result in reduced transaction costs for the supplier, as it limits the number of distributors it has to deal with. Assuming that the supplier is very selective about the distributors that it contracts with (for branding or image reasons), it may well be that the supplier has to invest considerable resources in selecting and grooming these distributors, and thus it would want to deal with as few distributors as possible.

53 If this supplier only had to worry about CCS investigations, it might be bolder in pursuing this efficiency-enhancing conduct, as it has a reasonable case for falling within the vertical restraint exemption, in relation to any possible s 34 infringement.[55] However, the private bar, unlike the NCA, has no fixed budget, and our hypothetical supplier's competitors might be very willing to pursue claims that do not have a great deal of merit. Certain preliminary issues, such as whether the parties to the agreement operate at different levels of the production or distribution chain may not be as cut-and-dry as one might think, and may involve issues of market definition to be proved by expert evidence. Courts that are new to competition law may require time to grapple with these issues. All of this would contribute to legal costs, which our hypothetical supplier would be keen to avoid.

55 See para 8 of the Third Schedule to the Competition Act (Cap 50B, 2006 Rev Ed).

54 Therefore, this supplier may refrain from entering into the vertical arrangement with the distributor, driving up its own costs, harming its business strategy and reducing producer welfare.

55 Quite apart from the factor of deep pockets mentioned above, private parties may wish to bring standalone actions, regardless of their merit, in order to strategically disadvantage their business competitors.[56] The very fact of involvement in litigation has an impact on a company's share valuations and may have implications for the renewal of lines of credit.

56 All that said, this problem of unmeritorious claims that discourage legitimate arrangements should not be overstated. It is submitted that this problem may be ameliorated by the passage of time. Greater understanding of competition law rules amongst the private bar and potential claimants may lead to less of these claims emerging, especially with parties who bring unsuccessful private actions having to pay their opponents' costs. Furthermore, as the courts develop jurisprudence and expertise in this area, claims that do not disclose a reasonable cause of action would be struck out more easily.

III. Empirical analysis of UK standalone actions

57 The abovementioned benefits of having a standalone action will, of course, only accrue if this action is actually utilised by private parties. Seeing as there is no available data in Singapore regarding either standalone or follow-on actions (as there have been none), this article will look to the UK to evaluate how well-utilised their standalone action has been.

A. Quantity of standalone cases in the UK

58 The following table sets out the number of standalone and follow-on actions in the UK from 2005–2008 and 2009–2012.

56 R Preston McAfee, Hugo Mialon & Sue Mialon, "Private v Public Antitrust Enforcement: A Strategic Analysis" (2008) 92 *Journal of Public Economics* 1863 at 1875; see also William Baumol & Janusz Ordover, "Use of Antitrust to Subvert Competition" (1985) 28 *Journal of Law and Economics* 247.

Type of Action/ Period	Number of Standalone Actions	Number of Follow-on Actions	Total Number
2005–2008[57]	29	12	41
2009–2012[58]	15	29	44

59 For a jurisdiction the size of the UK, these numbers seem somewhat dismal. Barry Rodger suggests that the comparative popularity of follow-on actions in the UK (from 2009–2012) might be due to the activity of the NCAs, which allows these actions to exist. However, Rodger also points out that with actions before the normal civil courts, the "hidden story" of competition litigation settlements means that the visible litigation practice is effectively the "tip of the iceberg".[59]

60 In other words, one does not see all the settlements that took place that presumably led to payouts to the victims of these competition law infringements. The numbers we examine here only represent those standalone actions that were actually litigated. Knowing how many settlements took place would be relevant and material to the analysis here, as it would tell us how seriously competition law infringers take the *threat* of private actions. Unfortunately, the data is not available.

B. Success of standalone cases in the UK

61 The following table sets out the number of successful standalone cases, compared with the number of successful follow-on actions in 2009–2012 (by unsuccessful it is meant that the competition law issue raised was rejected, and by successful that the court ruled that there was some breach of competition law and granted some form of remedy in respect of it).

Type of Action / Period	Successful Standalone Cases	Successful Follow-on Cases
2009–2012	2	8

57 Barry Rodger, "Competition Law Litigation in the UK Courts: A Study of All Cases 2005–2008: Part 1" (2009) 2(2) GCLR 93 at 96. Between 2005 and 2008 there were 41 judgments relating to competition law, of which 29 were standalone cases.

58 Barry Rodger, "Competition Law Litigation in the UK Courts: A Study of All Cases 2009–2012" (2013) 6(2) GCLR 55 at 60. Between 2009 and 2012 there were 44 competition law judgments. Of these 44, 16 were judgments by the Competition Appeal Tribunal, 19 by courts of first instance and nine by courts of appeal (of these nine, four were appeals from the Competition Appeal Tribunal). Fifteen judgments out of these 44 involved standalone proceedings.

59 Barry Rodger, "Competition Law Litigation in the UK Courts: A Study of All Cases 2005–2008: Part 1" (2009) 2(2) GCLR 93 at 97.

62 With the exception of *Purple Parking Ltd v Heathrow Airport Ltd*[60] and *Murphy v Media Protection Services Ltd*,[61] all standalone claims in that period were unsuccessful.[62]

C. Reasons for the dismal number of standalone actions

63 According to Rodger, "costs are the key to the castle in competition damage cases".[63] Thus far, financing problems have stunted the potential for bringing standalone cases even when there is established cartel activity. Gerber points out that complex economic analysis is institutionally embedded in the practice of competition law.[64] Parties have to grapple with proving issues of fact that can only be proved by a trained economist. Bringing a competition suit thus involves rather formidable costs.

64 Bringing standalone cases is surely more risky than bringing a follow-on action, as there is no prior infringement decision to rely on. The private litigant has to prove all the elements of the anticompetitive conduct, and also prove that he has suffered harm as a result. This accounts for the low number of successful standalone actions.

65 Rodger argues that the English rule of cost-shifting, the likelihood of paying up-front costs as well as the other party's costs if unsuccessful are all major disincentives. This is further exacerbated by the generally heavy costs involved in bringing a competition law claim, due to the need for substantial documentary evidence and economic analysis that is sometimes necessary.

66 Rodger's analysis might also explain why there have been no follow-on actions in the High Court in Singapore, even though the CCS has produced a considerable number of infringement decisions upon which such follow-on actions could have been started.

67 The approach to costs in civil litigation in Singapore is broadly similar to that taken in the UK. The default rule that courts follow with

60 [2011] EWHC 987 (Ch).

61 [2012] 1 CMLR 29.

62 Barry Rodger, "Competition Law Litigation in the UK Courts: A Study of All Cases 2009–2012" (2013) 6(2) GCLR 55 at 60. See *Purple Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987 (Ch) and *Murphy v Media Protection Services Ltd* [2012] 1 CMLR 29.

63 Barry Rodger, "Competition Law Litigation in the UK Courts: A Study of All Cases 2005–2008: Part 2" (2009) 2(3) GCLR 136 at 144.

64 David Gerber, "Competition Law and the Institutional Embeddedness of Economics" (2009) <http://scholarship.kentlaw.iit.edu/fac_schol/219> at p 25 (accessed 1 February 2017).

regard to party-and-party costs in Singapore is "costs follow the event". The losing party has to pay party-and-party costs to the winner, in addition to his own solicitor-client costs. The prospect of having to pay these costs serves as a serious disincentive for plaintiffs thinking of commencing litigation. Even a winning party does not recover *all* of his costs – the rule is that even party-and-party costs awarded on an indemnity basis generally do not serve as a complete indemnity of the actual solicitor-client costs incurred. Therefore, even assuming he wins, a plaintiff still has to be sure that the damages he receives can off set any solicitor-client costs he still has to pay, for the litigation to be worth his while.

68 Possible solutions to these issues will be discussed in Part VI[65] below.

IV. Interaction with the public enforcement system

69 It is important that the standalone right, if enacted, will not negatively impact the public enforcement system. There is much scholarship about how *private* (both standalone and follow-on) enforcement interacts with public enforcement *generally*, but here we will consider only how *standalone actions* interact with public enforcement *specifically*, on a technical level (as opposed to a policy/goals level, which was covered in Part II above).[66]

A. Inconsistency between ordinary courts and the national competition authority

70 One danger with regard to standalone actions is that the courts might interpret the relevant facts or the applicable law differently from the NCA and impose civil liability in situations where the NCA has chosen not to pursue the case. Courts might also find that there is no liability, contrary to a subsequent NCA decision that finds there is liability. These inconsistencies, if they occur, might cause confusion and undermine the authority of the NCA.

71 One solution to this problem would be to ensure that the ordinary courts are bound by decisions of the NCA. This is the approach taken in the UK, under s 58A of the Competition Act 1998.[67] Therefore, if a standalone action is commenced, and a decision of the NCA is

65 See paras 105–131 below.

66 See paras 13–56 above.

67 c 41. See s 20 of the Enterprise Act 2002 (c 40) (UK) which amends the Competition Act 1998 by inserting s 58A.

issued after, the courts will not decide issues of liability, and instead only hear arguments on damages.[68] It should be pointed out that this does not address one scenario: where a standalone action is already concluded in the ordinary courts, and the decision of the NCA comes about later. The prudent course of action in this scenario might be for the defendant to appeal the case, to ensure that the appellate court can take cognisance of the decision of the NCA.

72 Another measure that has been taken in the UK is to stay proceedings in the ordinary courts when an investigation by the NCA is ongoing. This was at issue in *Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd*[69] ("*Synstar*"), where the court ordered a stay of proceedings, citing the "need for a stay to obviate the risk of inconsistent decisions".[70]

73 Of course, in *Synstar*, both parties to the suit agreed to the stay[71] (this was also the case in *Emerald Supplies Ltd v British Airways plc*[72] ("*Emerald Supplies*")) – they only disagreed about when the stay should occur. It is an open question as to what would have happened if one party seriously contested the stay. The public proceedings in *Synstar* and *Emerald Supplies* were proceeding swiftly and decisions were imminent; it remains to be seen what a court will do if the NCA proceeding is sluggish.

74 As a matter of principle, proceedings should be stayed when a decision of the NCA is imminent or it is unequivocally clear that the NCA will make a decision. This is because a situation where the ordinary courts hand down a decision that conflicts with that of the NCA will only serve to undermine the authority of the NCA.[73]

75 Assuming we adopt the standalone action, can a Singaporean court stay proceedings if the CCS is about to produce a decision on the same infringement? The Rules of Court[74] clearly do not specifically provide for this situation, as Singapore currently has no standalone action. It is submitted that if it is possible, it would have to come under

68 This would necessary convert the standalone action into a follow-on action, as the court is bound by the finding of liability, and the only issue left to determine is quantum of loss.

69 [2001] UKCLR 585; [2001] WL 395266.

70 *Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd* [2001] UKCLR 585; [2001] WL 395266 at [14].

71 *Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd* [2001] UKCLR 585; [2001] WL 395266 at [11].

72 [2010] Ch 48; [2009] EWHC 741 (Ch).

73 This was the key concern in *Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd* [2001] UKCLR 585; [2001] WL 395266, as well as *Emerald Supplies Ltd v British Airways plc* [2010] Ch 48; [2009] EWHC 741 (Ch).

74 Cap 322, R 5, 2014 Rev Ed.

the inherent jurisdiction of the court.[75] The Singapore Court of Appeal in *Wee Soon Kim Anthony v Law Society of Singapore*[76] ("*Wee Soon Kim*") has indicated that the inherent jurisdiction is to be construed broadly, but within certain principles it has laid out.[77] The "essential touchstone is really that of 'need'".[78] Furthermore, the court in *Wee Soon Kim* held that there must be a "reasonably strong or compelling reason" for the exercise of the inherent jurisdiction. Preventing a conflict with the CCS would be a compelling reason, and would fall within the criterion of "need".[79] This is because the CCS is statutorily entrusted with the public enforcement of the Competition Act, and thus the courts would not want to be seen to undermine that aspect of competition enforcement. Furthermore, the Singapore courts might look to the English case of *Synstar* as authority for the staying of proceedings when a decision from the NCA is imminent.

76 It might be argued that as the ultimate forum for the appeal against a decision of the NCA is the High Court (decisions of the NCA may be appealed to the CAB, and from there, the High Court), the High Court might take the view that it can hear a private action in parallel with the NCA's investigations, regardless of the prejudice to the NCA's investigations that might follow. This would, however, be disregarding the important difference between the High Court's role as an appellate body in reviewing NCA decisions, and as a court of first instance in a private action.

77 With all that said, if this does not fall within the inherent jurisdiction of the court, then it would be for Parliament to consider law reform, in order to allow our courts to stay standalone proceedings when a decision from the CCS is imminent.

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75 See O 92 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) which states:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

76 [2001] 2 SLR(R) 821.

77 See Jeffrey Pinsler, "Inherent Jurisdiction Re-Visited: An Expanding Doctrine" (2002) 14 SacLJ 1 at 1 and 11–12.

78 *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [27].

79 Interestingly, the court noted in *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [24] that O 92 r 4 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) talks of preventing injustice or an abuse of process, but seemed to loosen this requirement at [27] when it said that the exercise of the inherent jurisdiction, whether as set out in O 92 r 4 or the common law, should not be "circumscribed by rigid criteria or tests".

B. Possible interaction between private actions and the public enforcement system's leniency programme

78 Leniency programmes differ from jurisdiction to jurisdiction, but certain general features may be observed. If one of the infringing parties voluntarily offers information to the NCA about the anticompetitive agreement or practice, it will be offered immunity from penalties or a reduction in penalties.

79 In its *Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases 2009*[80] ("*CCS Guidelines*"), the CCS emphasises that:[81]

> [U]ndertakings participating or which have participated in them should be given an incentive to come forward and inform the CCS of the cartel's activities. The benefits of granting lenient treatment to undertakings who cooperate with the CCS outweigh the need to impose financial penalties on these undertakings.

80 We will first consider the interaction of the leniency system with follow-on actions, then it will be demonstrated how the problem is compounded when a standalone action is introduced.

81 Where the right to a follow-on action exists, the leniency applicant may be deterred from making leniency applications if the application is discoverable in the follow-on proceedings. This is because "third party damages claims may represent a significantly larger financial liability than any reduction in fine received from the regulator".[82] The leniency application often contains detailed insider information regarding the cartel's activities as well as a statement implicating itself in the cartel. This makes it much easier for the follow-on claimant to prove his loss, and has the effect of singling out the leniency applicant amongst the cartel members.

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80 Competition Commission of Singapore, *Guidelines on Lenient Treatment For Undertakings Coming Forward With Information On Cartel Activity Cases 2009* <https://www.ccs.gov.sg/legislation/~/media/custom/ccs/files/legislation/ccs%20guidelines/guidelinelenienceprogramme220109final.ashx> (accessed 1 February 2017).

81 Competition Commission of Singapore, *Guidelines on Lenient Treatment For Undertakings Coming Forward With Information On Cartel Activity Cases 2009* <https://www.ccs.gov.sg/legislation/~/media/custom/ccs/files/legislation/ccs%20guidelines/guidelinelenienceprogramme220109final.ashx> at para 1.5 (accessed 1 February 2017).

82 Department for Business Innovation & Skills, "Private Actions in Competition Law: A Consultation on Options for Reform – Government Response" (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf> at p 56 (accessed 1 February 2017).

82 According to the UK Department for Business Innovation & Skills, "given the highly secret nature of cartels, any reduction in the incentives to come forward could have a damaging impact on the public enforcement regime and the overall detection and deterrence of anticompetitive behaviour".[83] Therefore, as a matter of principle, leniency documents should not be subject to disclosure, in order to protect the public enforcement system.

83 This problem exists with regard to standalone actions too. However, the scope of the interaction between standalone actions and leniency applications must not be overstated. Standalone actions can be brought regardless of whether there is an investigation by the NCA or not, and regardless of whether there is a leniency application. Thus, standalone actions may spring up even in the complete absence of any activity on the part of the NCA. Follow-on actions, on the other hand, can only be brought where there is already an infringement decision after an investigation. Where there is an infringement decision, it is easy to see why follow-on claimants will try to get hold of any leniency applications in order to bolster their case. Therefore, the danger that the potential availability of incriminating leniency applications to private claimants might undermine the attractiveness/efficacy of the leniency system already exists with regard to follow-on actions, and any interaction with standalone actions will only be supplementary to this.

84 That said, there are two scenarios in which standalone actions might interact with leniency applications. First, where the standalone action is brought while an investigation is ongoing, but before an infringement decision has been issued. This was the case in *Emerald Supplies*. In this type of scenario, there might be a leniency application that has already been filed, and the standalone claimant might seek to discover that.[84]

85 Second, where the investigation was commenced (and leniency applications filed) but was eventually dropped. A standalone claimant might find it worth his while to bring a claim, even though the NCA has

83 Department for Business Innovation & Skills, "Private Actions in Competition Law: A Consultation on Options for Reform – Government Response" (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf> at p 56 (accessed 1 February 2017).

84 As to *why* a claimant would want to bring a standalone claim when there is already an investigation going on, it is possible thathe might want to do so for reasons of expediency, as investigations can drag on, depending on the efficiency of the National Competition Authority. He might also want to utilise the standalone claim as an additional bargaining chip, in the hopes of forcing a settlement from the infringer or forcing a favourable contract renegotiation.

dropped the investigation, and seek to discover that leniency application. In both these scenarios, a standalone claimant has much more to gain from the discovery of a leniency application, as compared to a follow-on claimant. This is because a standalone claimant has to prove both liability and quantum of loss, whereas a follow-on claimant does not have to prove liability. Therefore it is submitted that it is worthwhile to briefly consider the potential effects standalone claims might have on the leniency application system.

C. How the negative interaction between standalone actions and the leniency system can be mitigated against

86 In the EU, the Directive on Antitrust Damages Actions[85] ("EU Directive") was signed into law on 26 November 2014. Amongst other provisions, Art 6.6 states that:[86]

> Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: (a) leniency statements; and (b) settlement submissions.

87 This expressly mitigates against the problem, by making leniency statements undiscoverable.

88 In Singapore, there has been very little said about the interaction between leniency applications and private litigation. A logical starting point would be the *CCS Guidelines*. The *CCS Guidelines* state that the CCS will endeavour, to the extent that is consistent with its obligations to disclose or exchange information, to keep the identity of leniency applicants confidential throughout the course of its investigation.[87] However, this deals with the disclosure of the *identity* of the undertaking, and has little to do with the actual leniency file.

89 The *CCS Guidelines* also state that leniency does not protect the undertaking from other consequences of infringing the law, which

85 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 (hereinafter "EU Directive on Antitrust Damages Actions").

86 EU Directive on Antitrust Damages Actions Art 6.6.

87 Competition Commission of Singapore, *Guidelines on Lenient Treatment For Undertakings Coming Forward With Information On Cartel Activity Cases 2009* <https://www.ccs.gov.sg/legislation/~/media/custom/ccs/files/legislation/ccs%20guidelines/guidelinelenienceprogramme220109final.ashx> at para 8.1 (accessed 1 February 2017).

include rights of private action.[88] This says nothing about whether *leniency applications* are protected from disclosure in private actions.

90 Thus, in the absence of any legislation or directives that are directly on point, we need to consider the position at general law.

91 In theory, a standalone claimant could try to discover the leniency document from the alleged infringer he is suing, or from the CCS. These situations will be discussed *seriatim*.

92 When a standalone claimant is trying to discover the leniency application from the party he is suing, the question is whether the leniency application is protected by any privileges. Sebastian Peyer opines that leniency documents are unlikely to benefit from either litigation privilege or legal advice privilege.[89] Furthermore, on an empirical level, cases in the UK dealing with the disclosure of leniency applications have not applied rules of legal privilege. Rather, following the direction of the Court of Justice of the European Union ("CJEU") in *Pfleiderer AG v Bundeskartellamt*,[90] the courts have "weighed the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency".[91]

93 It also seems that "without prejudice" privilege is unlikely to apply, as the rationale behind the privilege is to encourage settlements between parties.[92] When the applicant for leniency submits his application to the CCS, he is not doing so on a "without prejudice" basis – indeed, he is admitting guilt and fully expecting that the CCS will use it against him and the rest of the cartel in legal proceedings, but will immunise him from the consequences as a reward.

94 However, this issue of discovery from the leniency applicant himself may not be such a big problem in practice. In the EU, to prevent the leniency applicant from being ordered by a court to disclose a copy

88 Competition Commission of Singapore, *Guidelines on Lenient Treatment For Undertakings Coming Forward With Information On Cartel Activity Cases 2009* <https://www.ccs.gov.sg/legislation/~/media/custom/ccs/files/legislation/ccs%20guidelines/guidelinelenienceprogramme220109final.ashx> at para 9.1 (accessed 1 February 2017).

89 Sebastian Peyer, "Disclosure of Leniency Documents in the United Kingdom: Is the Draft Directive Creating Barriers?" (2013) 1 *CPI Antitrust Chronicle* 1 at 4.

90 Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161

91 Sebastian Peyer, "Disclosure of Leniency Documents in the United Kingdom: Is the Draft Directive Creating Barriers?" (2013) 1 *CPI Antitrust Chronicle* 1 at 4.

92 See *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [30], where the court held that "the public policy of the 'without prejudice' privilege is precisely aimed at encouraging out-of-court settlements".

of the corporate statement he submitted to the Commission in order to obtain leniency, the European Commission may, upon the applicant's request, accept that statements of guilt be provided orally.[93] Thus, the leniency applicant has no documentary copy of his statement of guilt. This practice is specifically designed to prevent discovery, and seems to be a practical solution to the problem.

95 The next question is whether the leniency application can be discovered from the CCS itself. The CCS will clearly not be a party to the standalone action. Currently, the position is that discovery cannot be ordered against the Government (of which the CCS, as a statutory board, is a part[94]) when it is not a party to proceedings.[95] This was the position taken locally in *Re E (guardianship of an infant)*,[96] where the court held that discovery could not be ordered against the Immigration and Checkpoints Authority ("ICA"), because the Government is not bound by O 24 r 6 of the Rules of Court concerning discovery against third parties, and thus the "only act giving the court power to order discovery against the Government is … Section 34 of the GPA".[97] Section 34 of the Government Proceedings Act[98] ("GPA") requires the Government to be a party to the proceedings before discovery can be ordered against it, and therefore the court found that discovery against the ICA was not possible.

96 Furthermore, even if discovery could be ordered against the CCS when it is not a party, it could avail itself of state immunities in the Evidence Act.[99] However, it is beyond the scope of this article to discuss them in detail.

97 Thus, the leniency regime of the CCS would not be seriously threatened by the introduction of a standalone right. However, to make sure that leniency applications are protected, especially when the leniency applicant has a written copy of it in his possession, legislative reform should be considered, with the goal of granting leniency applications an absolute protection from disclosure, mirroring what was done in the EU.

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93 See Caroline Cauffman, "The Interaction of Leniency Programmes and Actions for Damages" (2011) 7(2) *The Competition Law Review* 181 at 198.

94 Section 2 of the Interpretation Act (Cap 1, 2002 Rev Ed) defines "Government" to mean the Government of Singapore. This would naturally include its Ministries and Statutory Boards.

95 See Supreme Court of Singapore, "Review of Discovery in Civil Litigation, Consultation Paper" (2011) at p 36.

96 [2003] SGDC 84.

97 *Re E (guardianship of an infant)* [2003] SGDC 84 at [23].

98 Government Proceedings Act (Cap 121, 1985 Rev Ed).

99 See ss 215 and 216 of the Evidence Act (Cap 97, 1997 Rev Ed).

V. The state of tort law in Singapore and its amenability to a standalone action

98 In the UK, standalone actions are brought under the framework of tort law, specifically the *tort of breach of a statutory duty*.

99 As Singapore is a common law jurisdiction, one could probably get away with assuming that what applies in the UK could apply here. However, it would be prudent to examine the law in Singapore to ensure that the tort exists here as well.

100 On an examination of the case law, it seems that the tort does exist in Singapore, and has existed since 1933. However, the tort has been applied mainly in the context of industrial safety cases.[100]

101 Fordham points out that for the tort to apply, the court must be satisfied that the Legislature intended, when drafting the provision that is claimed to have been breached, "to create an entitlement to damages at common law".[101]

102 Given that there is no mention of standalone actions in the parliamentary debates on the Competition Bill and its amendments, and the Competition Act only provides for the follow-on action, it is safe to say that the Legislature did not intend for there to be a standalone entitlement to damages at common law.

103 However, this does not mean that the standalone action cannot be implemented using this tort in Singapore. Indeed, there is a chicken-and-egg problem here – if the Legislature intended it, then there would already be a standalone action in Singapore. Since the problem here is legislative intent, the following solution is proposed: Given the benefits that introducing a standalone action will offer,[102] Parliament may simply legislate a provision into the Competition Act that unequivocally demonstrates its intent for a standalone action to exist. The courts would then be enabled to allow parties to bring standalone actions under the tort of breach of statutory duty.

104 Thus it can be seen that the state of tort law poses no insurmountable difficulty to the implementation of a standalone action.

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100 See Margaret Fordham, "Breach of Statutory Duty – A Diminishing Tort" [1996] Sing JLS 362 at 369, citing *Straits Steamship Co Ltd v Attorney-General* [1933] MLJ 170. *Soon Pook Seng, Arthur v Oceaneering International Sdn Bhd* [1993] 2 SLR(R) 518 is one such industrial safety case.

101 Margaret Fordham, "Breach of Statutory Duty – A Diminishing Tort" [1996] Sing JLS 362 at 364.

102 See paras 33–44 above.

VI. Additional reforms

105 Our analysis so far has revealed that the introduction of a standalone action in Singapore will theoretically serve both the compensatory and deterrence goals of competition law in ways that the follow-on action cannot (see Part II),[103] will not undermine the public enforcement model if proper measures are taken (see Part IV),[104] and is possible to implement given our current state of tort law (see Part V).[105] The main concern that emerges from the analysis is this: judging from the UK experience, private claimants do not seem to be using the standalone action very often (see Part III).[106]

106 In other words, as the standalone action introduces benefits that the follow-on action cannot provide, and the difficulties surrounding its implementation are not insurmountable, all that remains is to encourage claimants to use the proposed standalone action, to maximise the benefits obtained.

107 Therefore, it is suggested that Singapore should adopt the standalone action but also adopt the reforms suggested below, to increase the likelihood of private parties utilising the proposed standalone action.

A. Enhancing access to information for private claimants

108 As mentioned above,[107] "competition-law litigation is characterised by an information asymmetry".[108] Private claimants face an uphill battle – to prove the legal elements of competition law offences, they need a wide range of information. They would require information about the market and information about the business practices of the infringer. Such information is rarely in the hands of the claimant, and it is costly to gather. Applying economic analysis to the raw information gathered is the next hurdle that has to be crossed. Standalone claimants are particularly affected, as they have to prove both liability and loss.

109 To help facilitate private claims, reforms at the EU level have been proposed to allow limited access to information on the NCA's file.[109] Article 5(1) of the EU Directive envisions empowering courts to

103 See paras 13–56 above.
104 See paras 69–97 above.
105 See paras 98–104 above.
106 See paras 57–68 above.
107 See paras 57–68 above.
108 EU Directive on Antitrust Damages Actions Preamble at para 15.
109 It is worth pointing out that these reforms would aid standalone claimants more than follow-on claimants, because the standalone claimant must prove both the

(*cont'd on the next page*)

direct controlled disclosure of information on the NCA's files. Of course, this is related to the discussion above about protecting leniency documents. Therefore, in the same reform, the EU Directive orders that leniency documents be protected from disclosure.[110]

110 The principle to take away here is this: information gathered by the NCA (excepting leniency applications) should also be made available to the private claimants, to the extent that it does not hamper the work of the NCA, especially the leniency programme.

111 This strikes a fair balance between (a) addressing the information asymmetry in competition litigation and (b) protecting the public enforcement regime, especially the leniency system.

112 An exhaustive analysis as to how exactly this principle will be implemented in Singapore will not be undertaken here – only some preliminary remarks that frame the situation. Currently, the position is that discovery cannot be ordered against the Government (of which the CCS is a part) when it is not a party to proceedings, by virtue of s 34 of the GPA.[111] It is not proposed that this provision be amended, as that might have ramifications far beyond competition law. It is suggested instead that an amendment be inserted into the Competition Act, allowing for discovery of non-leniency documents in the possession of the CCS.

113 In principle, standalone claimants can benefit from the information possessed by the CCS even when the CCS has no specific information (leniency documents or otherwise) relating to the specific infringement. This is because the CCS has information relating to *industries* or *markets*, gathered from its previous decisions. For example, the CCS has gathered extensive information about the ticketing industry[112] as well as the freight forwarding industry.[113] However, this

infringement and loss, and thus needs any information that the National Competition Authority might have about the industry in general, or any specific information gathered about the alleged infringement.

110 See para 86 above.

111 See discussion at paras 86–97 above.

112 The Competition Commission of Singapore collected extensive market share data about the ticketing industry in *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (2010) CCS/600/008/07 at p 81. It also highlighted important features of the market such as indirect network effects, gathered through interviews with market players (see p 88).

113 The Competition Commission of Singapore collected general background information about the freight forwarding industry as well as detailed information about the breakdown of freight forwarding rates. See *Infringement of the Section 34 Prohibition in Relation to the Provision of Air Freight Forwarding Services for Shipments from Japan to Singapore* (2014) CCS 700/003/11 at pp 14 and 16.

information is not readily available in full from the publicised infringement decisions, due to the redaction policy of the CCS with regard to market data and detailed information in general.[114] Standalone claimants who want to pursue infringements relating to these industries will very likely need this information (*ie*, the number of players in the market and relative market shares) to pursue their claim.

114 This is part of a larger debate about the role of the CCS in relation to private claims for damages. Should it, as a specialist institution, play the role of aiding private claimants in overcoming their difficulties of proof? As private enforcement achieves goals that public enforcement cannot,[115] the CCS may want to re-evaluate its institutional role to help facilitate private action too.

B. Collective action

115 The idea of collective action has been brought up in various jurisdictions to address the issue of consumers not receiving proper compensation for competition infringements.

116 As a matter of principle, it can be argued that collective actions are beneficial, as they will help solve the incentive problem identified above.[116] The individual consumer might not be incentivised to bring an action by himself, as the loss to him, as an individual, may not justify the cost of bringing a lawsuit. This problem is worsened by the high costs in bringing competition claims in particular, due to the institutional embeddedness of complex economics in competition law. However, the aggregated losses of many claimants may represent a significant sum that is not *de minimis*, and further, the costs of the lawsuit may be spread amongst many claimants.[117]

117 In the EU, two kinds of collective action have been proposed to strengthen private enforcement of competition law.[118]

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114 For example, in *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (2010) CCS/600/008/07, there were 812 redactions in total. Of these, 491 were redactions of information presented in tables, and 321 were redactions of information presented in the main text of the infringement decision. Out of 615 total paragraphs in the infringement decision, 28 were entirely redacted.

115 See paras 13–56 above.

116 See discussion at paras 13–56 above.

117 See *Private Enforcement of EC Competition Law* (Jurgen Basedow ed) (The Netherlands: Kluwer Law International, 2007) at p 212. The pooling of interests through collective action "significantly reduces the risk of litigation in terms of legal expenses".

118 See European Commission, "White Paper on Damages Actions For Breach of the EC Antitrust Rules" (2008) <http://ec.europa.eu/competition/antitrust/actions damages/files_white_paper/whitepaper_en.pdf> at p 4 (accessed 1 February 2017).

118 The first kind of collective action is the representative action, which is brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims.

119 The second kind of collective action is the opt-in[119] collective action, in which victims expressly decide to combine their individual claims for harm they have suffered into a single action.

120 These two variants on the collective action seem to complement each other. The "qualified entities" such as consumer or trade associations can act as watchdogs, looking for infringements that the NCA has not picked up on, or has no resources to act on. The opt-in collective action, where the victims decide to collectively come together, acts as another option for claimants, where they do not have the benefit of a qualified entity representing them.

121 It remains to briefly consider the current state of the law in Singapore, and if any reforms need to be made to accommodate these collective actions. In essence, what is desirable would be a legal framework that allows victims of competition infringements to bring their actions collectively, at a manageable cost, or to allow a qualified entity to do so on their behalf.

122 The option of consolidating actions under O 4 of the Rules of Court would not be a cost-efficient option, as it would require separate actions to already exist. Plaintiffs would then have to incur the cost of commencing these separate actions.

123 In comparison, the O 15 r 12 representative action seems to be the best bet available.

124 Jeffrey Pinsler SC, commenting on the state of collective action locally, said:[120]

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119 There has been considerable debate in the European Union on opt-in versus opt-out collective proceedings. The current consensus is that opt-in systems, which require the individuals to affirmatively request inclusion in the lawsuit, strikes a fair balance between the need for collective redress and the interests of business stakeholders in not being exposed to an unidentified class of claimants, which would be the case under an "opt-out" system. "Opt-out" actions should thus only be permitted in exceptional circumstances. See *Comparative Private Enforcement and Collective Redress Across The EU* (Barry Rodger ed) (The Netherlands: Kluwer Law International, 2014) at pp 160–161.

120 Jeffrey Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at para 07.053, cited in *Koh Chong Chiah v Treasure Resort Pte Ltd* [2013] 4 SLR 1204 at [33].

> Unlike other jurisdictions which recognise class actions or a case-managed group litigation system, the representative action under Order 15 rule 12[121] of the Rules of Court is the only general process in Singapore which enables a large number of persons to be directly involved.

125 Pinsler also commented that "[t]he representative action was introduced so that persons interested in the proceedings could be directly involved, not by being parties themselves, but through representation".[122]

126 In *Koh Chong Chiah v Treasure Resort Pte Ltd*[123] ("*Koh Chong Chiah*"), it was held that the "'same interest' requirement is really the crux of O 15 r 12(1)".[124] It is unclear if claimants in a standalone collective action for breach of competition law will meet this requirement, as the quantum of damages they can prove is almost certainly going to differ from individual to individual. If the claimants are undertakings who have been harmed by an anticompetitive agreement or an abuse of dominance, then the losses incurred will depend on the scale of their business.

127 However, the court in *Koh Chong Chiah* did take the position that the "same interest" requirement does not mean that the interests of the claimants must be "identical in all respects before this requirement is met. The main thing is that the claimants must share some common interests in relation to a substantial question of fact or law".[125] Further, the court held that "the rule be interpreted as flexibly as possible to preserve the principle of access to justice".[126]

128 Interestingly, the court also considered *Emerald Supplies*,[127] a UK case where representative actions in a competition law suit was in issue. In *Emerald Supplies*, the fact that the defendant could raise different defences against different claimants meant that the claimants did not have the same interest. *Koh Chong Chiah* held that the approach

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121 "Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

122 Jeffrey Pinsler, *Singapore Court Practice 2009* (LexisNexis, 2009) at para 15/12/1, cited in *Koh Chong Chiah v Treasure Resort Pte Ltd* [2013] 4 SLR 1204 at [26].

123 [2013] 4 SLR 1204.

124 *Koh Chong Chiah v Treasure Resort Pte Ltd* [2013] 4 SLR 1204 at [26].

125 *Koh Chong Chiah v Treasure Resort Pte Ltd* [2013] 4 SLR 1204 at [26].

126 *Koh Chong Chiah v Treasure Resort Pte Ltd* [2013] 4 SLR 1204 at [33], citing Jeffrey Pinsler, *Principles of Civil Procedure* (Singapore: Academy Publishing, 2013) at para 07.053.

127 See para 73 above.

taken in *Emerald Supplies* might have been too broad, and that it would prefer to rest the rule on whether there are common issues of fact or law which arise from each claimant's claims. This is a promising sign, as it suggests that the Singaporean courts might be willing to allow opt-in competition law claims to be brought under O 15 r 12(1).

129 That said, despite the promising signs outlined above, in the absence of a definitive judicial pronouncement locally, it is ultimately *unclear* if opt-in competition claims can be brought using the current representative rule. It also seems unlikely that qualified entities (such as consumer associations) can bring suits on behalf of consumers using the current representative rule.

130 Therefore, as far as standalone competition claims are concerned, it would be better for Singapore to adopt a statutory class action regime instead.[128] The differences between Singapore's current representative action and the statutory class action regime were clearly highlighted in *Koh Chong Chiah*.[129] According to Mulheron, statutory class action regimes have express provisions that resolve uncertainties which would otherwise be present in a representative action.[130] For example, the uncertainty regarding the "same interest" criteria is resolved in Australia's statutory class action regime, as it expressly provides that the relief sought need not be the same for every member of the class.[131] This, it is submitted, would resolve any uncertainty about whether competition claims can be brought as class actions.

131 A statutory class action regime for competition law claims could also be crafted to allow for representative actions brought by qualified entities, such as consumer associations. The Spanish class action regime specifically allows certain qualified entities to bring claims on behalf of a group of claimants.[132]

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128 Rachael Mulheron, "From Representative Rule to Class Action: Steps Rather Than Leaps" [2005] CJQ 424 at 448, cited in *Koh Chong Chiah v Treasure Resort Pte Ltd* [2013] 4 SLR 1204 at [37].

129 *Koh Chong Chiah v Treasure Resort Pte Ltd* [2013] 4 SLR 1204 at [37].

130 Rachael Mulheron, "From Representative Rule to Class Action: Steps Rather Than Leaps" [2005] CJQ 424 at 436.

131 Federal Court of Australia Act 1976 S 33C(2)(a)(iv).

132 Freshfields Bruckhaus Deringer, "Class Action Litigation in Europe: An Overview of Recent Developments" (2006) at p 2. See also *The Private Competition Enforcement Review – Edition 7* (Ilene Knable Gotts ed) (London, Law Business Research, 2014) at p 168, which outlines the French class action regime. The French regime enables "a group of individuals represented by an association authorised by the government (of which there are fifteen) to claim damages for material harm resulting from a contract or resulting from anticompetitive behaviour".

VII. Conclusion

132 This article has outlined the benefits and drawbacks of having a standalone action (in light of Singapore's competition policy), as well as the concerns that come with introducing a standalone action. As has been shown, none of the concerns with implementing the standalone action are insurmountable, and can be overcome with law reform, implementing solutions that have been recommended in the UK and EU. Furthermore, it has been shown that implementing a system of collective action and increasing access to information will likely increase the efficacy of the standalone action. Therefore, the author would recommend that the standalone action be adopted in Singapore, but only with the additional reforms proposed.