may sometimes be seen as personal data); or (3) misuse of personal and formerly private information (e.g. if one Googles "abortion" and wants to keep this information private). This ambiguity springs from how, on a factual level, the categories of data, personal data, and personal and private information relate to each other. Unfortunately, it is hard to tell which of the three meanings the courts had in mind. Warby J. probably used the first meaning, while Sir Geoffrey Vos C. vacillated between the second and the third. GDPR Recital 85 offers no further clarity, relating as it does to an entirely different matter.

The Supreme Court has granted leave to appeal. The decision will be important not just for the litigants but also for all those who compete for our data and attention in the digital economy as well as for those who guard our freedom against these omnipresent practices. Importantly, the concept of damage pursuant to DPA, s. 13 overlaps with damage as defined by the Data Protection Act 2018 (s. 169) and the GDPR (art. 82), which is why it would be helpful if the Supreme Court decides which of these accounts of damage (if either) is relevant, and keeps them distinct. Further, if the Supreme Court will consider whether an award for this damage can be assessed as "negotiating damages" (Warby J. rejected this, but Sir Geoffrey Vos C. thought it not unarguable), it should be kept in mind that the right to consent with the processing of personal data, namely the "private" dimension of data, cannot be waived (GDPR, art. 7(3)). If loss of control over this dimension is non-waivable, can the courts imagine any legitimate negotiation over such assets? Online platforms as well as those of us who click "I agree" several times a day deserve more clarity on this point.

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BEAR RAIDS AND MARKET MANIPULATION: MUDDYING THE WATERS?

ARTICLE 15 of the Market Abuse Regulation (Regulation (EU) No 596/2014 (OJ 2014 L 173 p.1)) (MAR) states that "a person shall not engage in or attempt to engage in market manipulation". In accordance with Article 16 of the MAR, prevention and detection of such manipulation on the London markets is a matter for the London Stock Exchange (LSE) and Financial Conduct Authority (FCA) (Financial Services and Markets Act 2000 (as amended) (FSMA) and Financial Securities and Markets Act 2000 (Market Abuse) Regulations, SI 2016/689, r. 3). In *Burford Capital Limited v London Stock Exchange Group plc.* [2020] EWHC 1183 (Comm), Andrew Baker J. was asked to consider whether

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an issuer has a private right of action for alleged share price manipulation under the MAR.

Burford's shares are listed on the Alternative Investment Market. In August 2019, Muddy Waters launched a short-selling attack – or a "bear raid" – on Burford, publicly alleging irregular accounting practices and corporate governance failures, which caused a significant fall in the firm's share price over a two day period. Burford believed that publicly unknown traders had engaged in "spoofing" or "layering" in respect of its shares, which are forms of market manipulation as defined by Article 12(1) of the MAR and thus prohibited by Article 15. Briefly stated, spoofing and layering involve traders using visible, non-bona fide orders to send false signals to other traders as to the true levels of supply or demand in the market (at [74], [76]). Orders made by manipulators are then cancelled, or amended, prior to execution, which has the effect of altering the share price and facilitating the execution of orders at a more favourable position. However, both the LSE and the FCA concluded that Burford's evidence did not support a claim that such activity had occurred.

Dissatisfied with this outcome, Burford sought to discover the identities of those involved in the 360,000 or so trades which concerned them, information which would enable it to establish its allegations of manipulation. As this information is held by the LSE, Burford asked for an order disclosing the information under the well-known *Norwich Pharmacal* principle ([1974] A.C. 133). Burford offered various bases for its claim to such information (at [26], [28]), including to assist a private law claim based on Article 15 (at [157]). Relying on Case C-253/00, *Antonio Muñoz y Cia S.A. et al. v Frumar Ltd. et al.* EU:C:2002:497, [2002] E.C.R. I-7289, it alleged that Article 15 had so-called "horizontal direct effect", which vested it with an EU-level private right of action (at [166]). Importantly, therefore, Burford was relying on *Norwich Pharmacal* relief to vindicate an EU right.

The court held that the evidence provided by Burford did not amount to a "good arguable case" as required for granting *Norwich Pharmacal* relief (at [120]–[126]), whatever the purpose for which it intended to use the information. Moreover, the court indicated its view that issuers have no private right of action for share price manipulation in the UK under the MAR (at [143], [171]). Baker J. (at [167]) referred to the earlier decision of Teare J. in *Hall v Cable and Wireless plc.* [2009] EWHC 1793 (Comm)), at [16], [23] which concerned provisions of the FSMA that had implemented the Market Abuse Directive 2003/6/EC (OJ 2003 L 96/16) (MAD). Teare J. considered that Parliament could not have envisaged an independent, private right of action because it would be inconsistent with the critical role conferred on the public regulator. In *Burford*, Baker J. said he saw no reason to come to a different view with respect to the MAR. This result turned on there being no material difference in the relevant legislative language between the two instruments (at [167]). According to Baker J.,

the FCA protects issuers' rights exclusively through regulatory investigation and discretionary remedial action. The "remedies provisions of MAR, and the exclusive role of national regulators (here, the FCA) in relation to them, seem to me a very significant obstacle" for a finding that a private right of action exists (at [168]).

However, one may doubt whether the court was right in this respect. First, although the language of the MAD and the MAR may be the same in terms of the particular rule against market manipulation, the context has changed. While directives do not, at least generally, create horizontal direct effect (A. Albors-Llorens [2014] E. L. Rev. 851), it is less straightforward whether individual provisions within a specific regulation create horizontal direct effect. The transposition of the MAD into Member States' respective legal regimes had produced divergences in the domestic application of the law on market abuse across the EU. The lack of uniformity, coupled with new developments in areas like insider trading and market manipulation, led to the enactment of the MAR. As an integral component of a uniform Capital Markets Union, the MAR is, inter alia, designed to increase market integrity and the attractiveness of EU securities markets for raising capital. It is therefore arguable that a different conclusion might be appropriate under the MAR (and other Member States do in fact recognise the MAR as creating a private right of action). Second, EU law "does not operate on the notion that enforcement by means of private law is precluded where provision is made *expressis verbis* solely for enforcement under public law" (Opinion of the Advocate General (A.G.) Geelhoed in *Muñoz*, EU:C:2001:697, [2002] E.C.R. I-7306, at [57]). As such, the court's cementing of the FCA's regulatory control was irrelevant to the calculation. Given these two considerations, Baker J. ought to have made a preliminary reference to the CJEU, as it is the sole arbiter of the meaning of the MAR (*R. v International Stock Exchange, ex parte Else* [1993] Q.B. 534, 545).

This leads to a deeper objection to the approach which the court took in *Burford*. Although Burford sought *Norwich Pharmacal* relief, this was as the national mechanism giving effect to (what it hoped to establish as) an EU-level private right of action. Normally, before deciding whether a party has a good arguable case, it is necessary to ascertain whether the claimant's action relates to an actionable wrong (*Financial Times Ltd. v Interbrew S.A.* [2002] EWCA Civ 274). Remarkably, the court took a different approach, asking whether there was an "arguable case" before considering the character of any actionable wrong. As a result, Baker J. did not consider that definitively answering whether Article 15 created a private right of action added anything to his decision. He viewed Burford's claim through an interlocutory – and by extension a common law – lens, in the sense that, if Burford had been successful in making out a good arguable case, it would be for a future court to decide that question (at [38], 44 (i), [170]). However, for Burford, obtaining the non-anonymised trading

data from the LSE and actually bringing private civil proceedings were indissociable. That is to say, whether a private right could be exercised at all was a function of the extent to which the relevant information was accessible. Indeed, any issuer in similar circumstances would have faced the same problem of exercise of the private right being directly contingent on accessing the relevant information. The logical result of this inseparability is that it was erroneous to dispose of the case on an interlocutory, common law basis – the proceedings were squarely within the orbit of EU law. That Baker J. ought to have been exercising judicial powers stemming principally from EU law meant that it was necessary to consider whether his application of *Norwich Pharmacal* relief *qua* national remedy complied with the principle of effectiveness (Case 45-76, *Comet BV v Produktschap voor Siergewassen* EU:C:1976:191, [1976] E.C.R. 2043; Case 14-83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* EU:C:1984:153, [1984] E.C.R. 1891), and, if potentially not, whether a preliminary reference to the CJEU on this point was also required (Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd. and others* EU:C:1990:257, [1990] E.C.R. I-2433).

According to section 3 of the European Union (Withdrawal) Act 2018, after 31 December 2020, the MAR will become retained EU law. However, preliminary references to the CJEU will no longer be possible. The decision in *Burford* may effectively put the law in this area at odds with the rest of Europe and place UK issuers (and potentially shareholders) in a less favourable position, as it is far from obvious what regulatory protection the FCA directly provides to issuers that incur the type of loss (allegedly) suffered by Burford.

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RESTRICTIONS BY OBJECT UNDER EU COMPETITION LAW

IN Case C-228/18, *Gazdasági Versenyhivatal v Budapest Bank* (ECLI:EU:C:2020:265), the Court of Justice has provided important guidance on the requirements for an agreement to be categorised as a "restriction by object" for the purposes of Article 101(1) TFEU. It is the latest in a line of cases emphasising that the concept of restriction of competition by object is to be interpreted restrictively.

The case arose from an agreement entered into in 1996 between Hungarian banks operating within the Visa and MasterCard card payment schemes, setting uniform multilateral interchange fees (MIFs) for

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