ThoughtLeaders4 Competition • February 2024

TL4 Competition MAGAZINE

ISSUE 4

THE LEGAL GAMBIT

2024'S FIRST MOVES IN LAW AND LITIGATION

INTRODUCTION

"Competition is always a good thing. It forces us to do our best. A monopoly renders people complacent and satisfied with mediocrity."

- Nancy Pearcey

We are delighted to present Issue 4 by exploring of the Competition Magazine, our first edition of 2024. Once again exploring the complex territory of competition law and litigation, this edition navigates a multitude of topics. From carriage disputes and Italian litigation, to truck cartels and class actions, this edition boasts top thought leadership from those within the Competition space.

This issue marks the start of an exciting year within the TL4 Competition community, and we extend our sincere thanks to our readers, contributorsand valued community partners. We hope you enjoy reading the issue.

The ThoughtLeaders4 Competition Team

Paul Barford
Founder/
Managing Director
0203 398 8510
email Paul

Chris Leese
Founder/Chief
Commercial Officer
020 7101 4151
email Chris

Danushka De Alwis
Founder/Chief
Operating Officer
020 7101 4191
email Danushka

Peter Miles
Head of Event Production
& Community Director
020 3481 8843
email Peter

Helen Berwick
Commercial Director
Competition
0203 433 2281
email Helen

Maddi Briggs
Strategic Partnership
Senior Manager
020 3398 8545
email Maddi

Maximus McCabe-Abel
Strategic Partnership Executive
020 3998 9908
email Maximus

CONTRIBUTORS

Steven Weisbrot, **Angeion Group**
David Haughan, **Woodsford**
Riley King, **Woodsford**
Sarina Williams, **Linklaters**
Tom Kent, **Linklaters**
Andrew Leitch, **BCLP**
Anoma Rekhi, **BCLP**
Lauren McGeever, **Epiq**
Joseph Moore, **Travers Smith**
Imogen Nolan, **Travers Smith**
Giorgio Afferni, **Delex Law Firm**
Noah Wortman, **NRW Consulting**
Dr Carsten Krüger, **CDC Cartel Damage Claims**
Belinda Hollway, **Scott + Scott**
Ruth Manson, **Scott + Scott**
Patrick Edward, **Scott + Scott**
Elin Moen, **BAHR**
Aurora Luoma, **Skadden**
Michael Frese, **Skadden**
Caroline Janssens, **Skadden**
Clare Ducksbury, **Case Pilots**
Robert Gradel, **FORCYD**
Mélanie Bruneau, **K&L Gates**
Antoine de Rohan Chabot, **K&L Gates**
Graeme Thomas, **BCLP**
George Christodoulides, **BCLP**
Alan McLeod, **McLeod & Co.**

CONTENTS

Circle

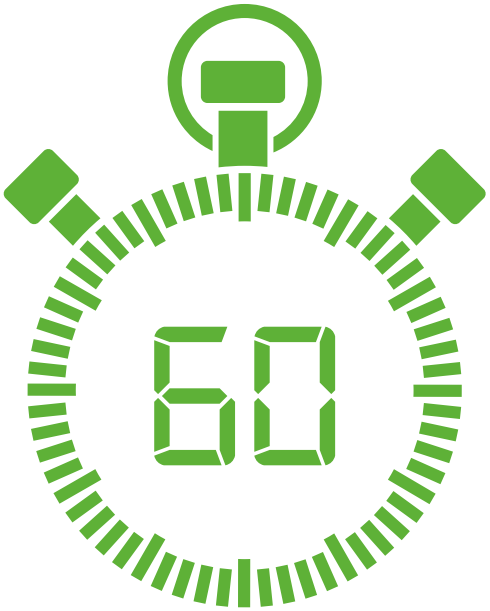
European Competition Litigation Circle

Royal Berkshire Hotel,
25-26 January 2024

For Circle enquiries, please contact maddi@thoughtleaders4.com

60-SECONDS WITH:

STEVEN WEISBROT
PRESIDENT & CEO
ANGEION GROUP



Q Imagine you no longer have to work. How would you spend your weekdays?

A I'd quite enjoy a nice bike ride by the coast, followed by leisurely reading some serious but not stuffy literature, and then cooking a large dinner for my family and friends, which we would eat outside with a few bottles of Bordeaux and an expertly curated playlist.

Q What do you see as the most important thing about your job?

A I see our role as notice and claims administrator as an essential element of providing access to justice in the truest sense of the phrase. By notifying and then verifying claimants, we make sure that the monies are distributed to as many legitimate claimants as possible. We also assure the justice or judge that all reasonable steps are being taken to reach claimants, which is of heightened importance in an opt-out situation since claimants will be bound by the judgment whether or not they see the notice of settlement.

Q What's the strangest, most exciting thing you have done in your career?

A When we were hired related to one the Dieselgate lawsuits against a German auto manufacturer, we helped organise a press conference at the Brussels Automobile Museum, which was previously used by the German army during WWII as a garage. To announce the litigation against this cultural backdrop made it a great success, and the press conference generated press in dozens of countries, diffusing news of the litigation far and wide.

Q What has been the best piece of advice you have been given in your career?

A Under promise, and over deliver.

Q What is one important skill that you think everyone should have?

A Emotional intelligence in speech and written form. I think this becomes incrementally more important as our communication increasingly shifts to online platforms. People are too reactive in emails. The simple tweaking of a word, or choice of phrase, can dramatically change the way someone perceives your meaning. Nuance is important. Also, my grandfather always said that everyone should know how to change a flat tire. I believe that.

Q What book do you think everyone should read, and why?

A My grandparents were survivors of the Holocaust and I often had trouble understanding how they could experience such immense trauma and move on with their daily life. Searching for answers around that question, I stumbled upon Victor Frankl's "Man's Search for Meaning." Frankl was an Austrian psychiatrist and Holocaust survivor. Perhaps, the most memorable and meaningful line from the book, "Everything can be taken from a man but one thing: the last of the human freedoms—to choose one's attitude in any given set of circumstances, to choose one's own way." That line has guided me throughout my adult life.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A Anthony Bourdain—hopefully whilst seated on a plastic stool at a Thailand Night Market with a steaming bowl of noodles and a cold beer.

Q What is the best film of all time?

Goodfellas. I will not debate this.

Q What advice would you give to your younger self?

A I would steal George Washington Carver's advice, which has always resonated with me: "How far you go in life depends on your being tender with the young, compassionate with the aged, sympathetic with the striving, and tolerant of the weak and strong. Because someday in your life you will have been all of these."

Q What is the most significant trend in your practice today?

A Class action notification and payments has, like the rest of the world, transitioned to the digital economy. In the last year, we made payments in over 95 countries-- all electronically. We have numerous technological solutions that can be used for the banked or unbanked and can navigate the intricacies of currency exchanges and disparate banking systems. Given the introduction of additional class action regimes across the world, understanding the interconnected finance systems is integral to success.

Q Do you have any hidden talents?'

A I make a mean brisket!

Q What is one work related goal you would like to achieve in the next five years?

A To make claimant notification programs as sophisticated as the best modern corporate advertising. Angeion Group was instrumental in moving notice into the 21st century by using big data, social media influencers, and other innovative forms of notice but there is so much more that can still be done. We are currently using elements of behavioral psychology, economic theory, user design and choice architecture every day. We account for cognitive biases and utilise the latest science on neurocognition, but in so many cases, there just isn't the budget for us to be able to use all the tools available. I want to show that the more sophisticated we are allowed to be, the more claims we will see, and as a result, the more legitimate the entire system will be perceived to be.

COLLECTIVE ACTION
ADMINISTRATION

EXPERIENCE IS INDISPENSABLE

1433/7/7/22 - DR LIZA LOVDAHL GORMSEN V. META PLATFORMS INC., META PLATFORMS IRELAND LIMITED AND FACEBOOK UK LIMITED

1468/7/7/22 - MR. JUSTIN GUTMANN V. APPLE INC., APPLE DISTRIBUTION INTERNATIONAL LIMITED, AND APPLE RETAIL UK LIMITED

1523/7/7/22 - BSV CLAIMS LIMITED V. BITTYLICIOUS LIMITED AND OTHERS

1527/7/7/22 - ALEX NEILL CLASS REPRESENTATIVE LIMITED V. SONY INTERACTIVE ENTERTAINMENT EUROPE LIMITED AND OTHERS

1443/7/7/22 - COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED ("CICC I") V. VISA INC. AND OTHERS

1572/7/7/22 - MR CLAUDIO POLLACK V ALPHABET INC., GOOGLE LLC AND OTHERS

www.angeiongroup.com

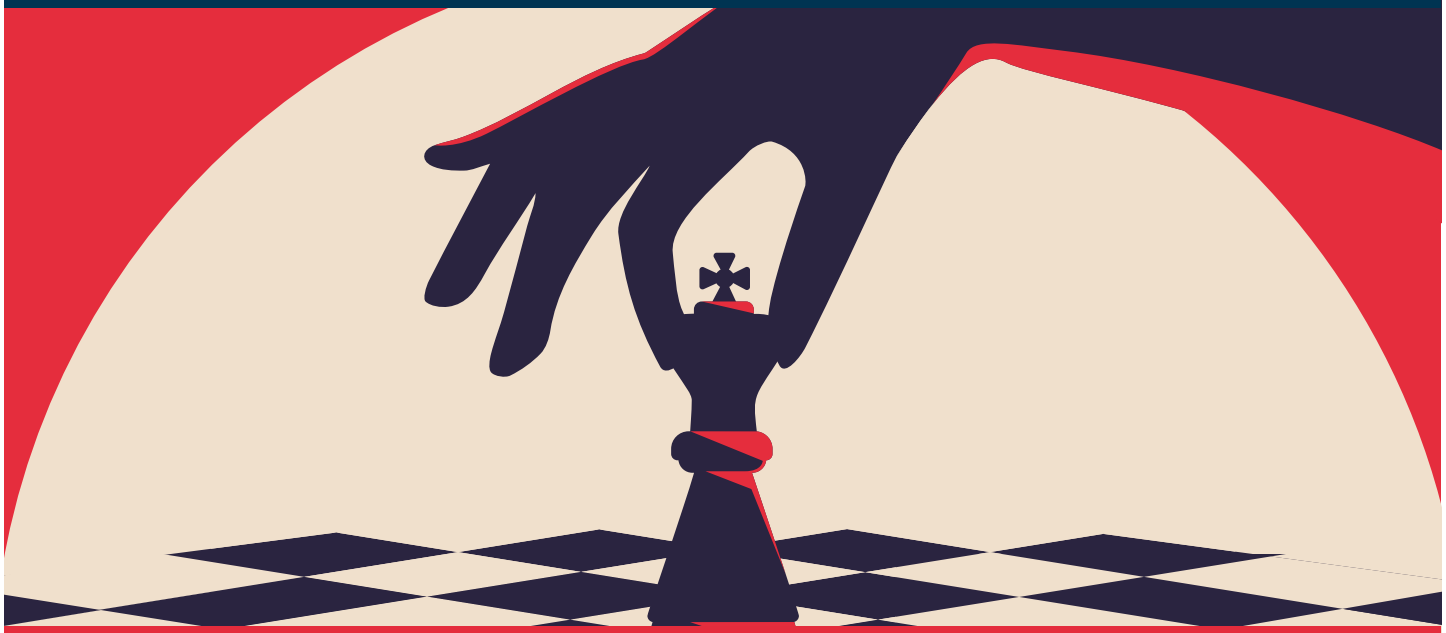
@angeion-group-international

@Angeion Group

@AngeionGroup

@angeiongroup5714

NAVIGATING CARRIAGE DISPUTES IN THE UK AND AUSTRALIA



A GLOBAL LITIGATION FUNDER'S PERSPECTIVE

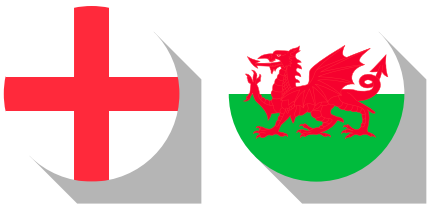
Authored by: David Haughan (Investment Officer) and Riley King (Investment Officer) – Woodsford

The introduction of a class actions regime in the Competition Appeal Tribunal (the CAT) has presented novel challenges in this jurisdiction, including so-called "carriage disputes", which can arise where two or more sets of proceedings are filed to claim substantially the same loss.

The CAT set out its approach to resolving such disputes in the FX litigation[1] on 31 March 2022, which was subsequently endorsed by the Court of Appeal on 25 July 2023[2]. It has also considered such issues in the Google AdTech litigation[3] and the Amazon Buy Box litigation[4]. The competing proceedings in the Google AdTech litigation were ultimately consolidated, negating the need for the CAT to hear the carriage dispute. The court's findings in the Amazon Buy Box litigation are reserved at the time of writing.

As the CAT continues to explore the resolution of carriage disputes, it may have regard to the approach taken in other opt-out regimes in common law jurisdictions, such as Australia.

Accordingly, this article considers the differences and similarities between the CAT's approach to carriage disputes and the approach adopted in Australia.



England and Wales

In the FX litigation, the CAT held that the criteria for resolving a carriage dispute were, to a considerable extent, interlinked with the conditions for class certification, as set out in Rules 78 and 79 of the Competition Appeal Tribunal Rules 2015 (CAT Rules).

1 1329/7/7/19 Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others, 1336/7/7/19 Mr Phillip Evans v Barclays Bank PLC and Others [2022] CAT 16.
2 [2023] EWCA Civ 876.
3 1572/7/7/22 Claudio Pollack v Alphabet Inc, Google LLC, Google Ireland Limited and Google UK Limited; and 1582/7/7/23 Charles Maxwell Arthur v Alphabet Inc, Google LLC, Google Ireland Limited and Google UK Limited [2023] CAT 34.
4 1568/7/7/22 Julie Hunter v Amazon.com, Inc. and others; and 1595/7/7/23 Robert Hammond v Amazon.com, Inc. & Others.

While these conditions are "absolute criteria" for the purposes of class certification, they can be treated as "relative criteria" in the context of a carriage dispute.

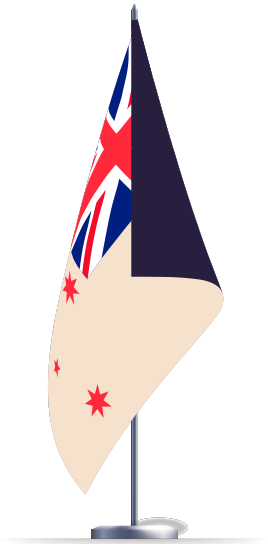
The CAT identified various considerations arising from the criteria in Rule 78 of the CAT Rules that may enable the CAT to determine that one action should be preferred over another, including:

- The nature and qualifications of each proposed class representative (PCR);
- Whether one of the PCRs is a pre-existing body whose purpose is to further the interests of the class concerned (e.g. a trade association or a consumer protection organisation);
- Whether an interested and well-informed member of the proposed class would have a concern or concerns about a proposed PCR; and
- Whether an interested and well informed member of the proposed class would have a concern or concerns about the proposed legal and expert representation; and
- The extent to which each PCR can pay the Respondents' costs, if ordered to do so.

The CAT also found that it should compare the manner in which the proposed collective proceedings are framed, and in particular, that the criteria in Rule 79(2) "lend themselves to an approach that allows one application to be evaluated against another, which is the essence of how a carriage dispute is determined".

It also confirmed that the first party to file would not necessarily prevail in a carriage dispute, because due consideration would always be given to whether the first application was filed prematurely with poorly formulated pleadings. However, the CAT held that where an applicant wishes to make a related or duplicative application to one which has already been made, it should seek permission to attend the initial case management conference for the original claim to enable the CAT to manage the carriage dispute.

The findings in this judgment were subsequently endorsed by the Court of Appeal, which found that the CAT's resolution of a carriage dispute was a "multifactorial evaluation" that would be difficult to overturn on appeal.



Australia

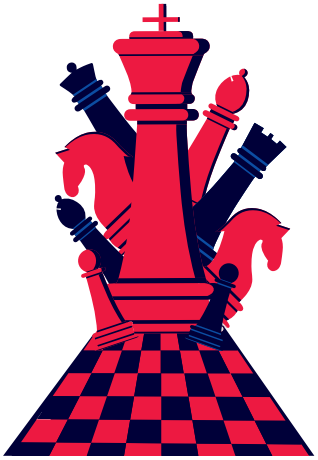
Australia has a mature opt-out class actions regime which has been in effect since 1992[5]. This has meant that Australian Courts have developed jurisprudence for resolving carriage disputes.

There are significant parallels between the approach adopted by the CAT and the "multifactorial approach" approved by the High Court of Australia in the seminal case of Wigmans[6].

In that case, five open class representative proceedings were commenced in a short period of time across two different jurisdictions.

The High Court held by majority that there is no rule or presumption that the proceeding commenced first in time ought to be preferred.

It found that the judicial task, when faced with competing class actions, was, acting in its supervisory role, to determine the outcome that would be in the best interests of group members. The relevant factors to this assessment were impossible to list exhaustively and would vary from case to case.



Factors which are commonly addressed in the court's multifactorial assessment include:

- The competing funding proposals, costs estimates and net hypothetical return to group members;
- The proposals on security for costs;
- The nature and scope of the causes of action advanced;
- The size of the respective classes;
- The extent of any bookbuild;
- The experience of the legal practitioners (and funders) and availability of resources;
- The state of progress of the proceedings; and
- The conduct of the representative plaintiffs to date[7].

In the course of 2023, the Australian courts resolved several carriage disputes, with different factors being determinative depending on the circumstances, for example:

- In Downer EDI[8], the Supreme Court of Victoria held that a joint proposition by two Australian law firms, Maurice Blackburn and William Roberts Lawyers, should prevail over a class action by Quinn Emanuel, owing to the proven track record of cooperation between the firms bringing the consolidated class action.
- In Star[9], the law firm with the lowest

5 Federal Court of Australia Act 1976 (Cth), Part IVA. State cognate regimes, based upon the federal regime, have been in existence since 2000 in Victoria (Supreme Court Act 1986 (Vic), Part 4A) and in New South Wales since 2010 (Civil Procedure Act 2005 (NSW), Part 10).

6 Wigmans v AMP Ltd (2021) 270 CLR 623.

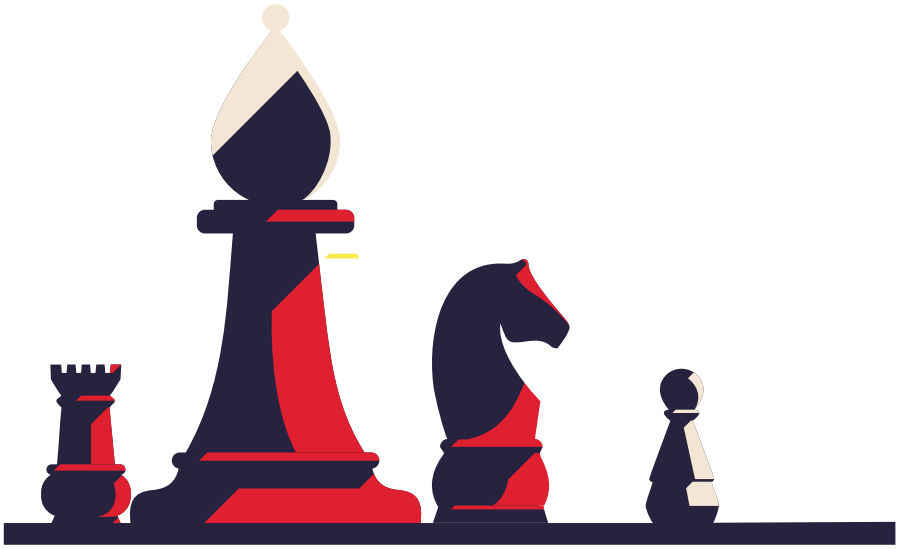
7 The multifactorial approach was endorsed by the Full Court of the Federal Court of Australia in 2018 in Perera v GetSwift Ltd (2018) 263 FCR 92, [195].

8 Lidgett v Downer EDI Ltd; Kajula Pty Ltd v Downer EDI Ltd; Jowene Pty Ltd v Downer EDI Ltd; Teoh v Downer EDI Ltd [2023] VSC 574.

9 DA Lynch v Star Entertainment Group; Drake v Star Entertainment Group; Huang v Star Entertainment Group; Jowene v Star Entertainment Group [2023] VSC 561.

pricing won carriage in the Supreme Court of Victoria. In particular, Slater & Gordon proposed to charge class members just 14% of any settlement or judgment award, which the Supreme Court considered would lead to a better outcome for class members than their competitors' proposals (a no-win, no-fee approach and two other contingency fee proposals).

- In Jaguar[10], the Federal Court sought to balance the benefits of Gilbert + Tobin's subject-matter expertise against the superior funding proposal of Maurice Blackburn. In that case, the court sought an undertaking from Gilbert + Tobin to match the competing funding proposal, which enabled it to win carriage.
- In Hino[11], the Federal Court favoured Maurice Blackburn over personal injury law firm GMP, finding there was "a substantial difference in the relative expertise and experience of the respective law firms in the two actions". Maurice Blackburn's funding proposal was also found to be superior, with the court rejecting a late application by GMP to adjust its proposed pricing.



Litigation Funding Perspective

As the Australian courts and the CAT continue to grapple with the same issues, it is likely that both jurisdictions can learn from experiences in the other. The approach to carriage disputes in both jurisdictions evidently needs to balance different policy considerations, including managing the burden on the courts while promoting the interests of class members by encouraging law firms to compete with one another on price and quality.

Another key question is whether the courts should prioritise establishing legal certainty over retaining their flexibility and discretion in the resolution of carriage issues.

From a litigation funder's perspective, carriage disputes entail significant financial risk because litigation funders may lose their entire investment in a strong claim if a competing action is favoured by the courts. If the courts can provide clear guidance on the criteria for the resolution of carriage disputes, including the consistent application of those criteria, that may reduce the burden on the courts to the extent that litigation funders can direct their funding only towards propositions that are likely to prevail over competing actions. Where carriage disputes are necessary, it is in the interests of the class members for such disputes to be resolved as quickly and cost-effectively as possible.

10 Greentree v Jaguar Land Rover Australia Pty Ltd (Carriage Application) [2023] FCA 1209.
11 Maglio v Hino Motor Sales Australia Pty Ltd; McCoy v Hino Motors Ltd [2023] VSC 757.

CAN DEFENDANTS IN COLLECTIVE PROCEEDINGS COMMUNICATE DIRECTLY WITH CLASS MEMBERS?

THE COURT OF APPEAL REWRITES THE RULES...

Authored by: Sarina Williams (Partner) and Tom Kent (Managing Associate) - Linklaters

On 8 December 2023, the Court of Appeal delivered an early Christmas present to defendants facing collective proceedings by overturning a CAT decision which restricted their communications with members of the claimant class.

Whilst the Court's judgment will make life slightly easier for defendants, it is unlikely to be the last word on the issue. In this article, we set out where the law has got to and where it might go next.

Background

The judgment relates to the McLaren collective proceedings, which seek damages arising from abusive conduct by providers of deep-sea freight services for motor vehicles.

In mid-2022, the defendants' solicitors wrote to certain large businesses that formed part of the proposed class pointing out that unless they opted out of the action, they could be required to disclose documents. They stated that this would involve time and expense and possibly require them to disclose confidential information, and if the businesses intended to form part of the class action, they should seek legal advice as to their document preservation obligations.

The class representative objected to the letters and brought an application to challenge them.

The CAT's Approach: No (or Very Restricted) Communications

In November 2022, the CAT sided with the class representative and found that the letters should not have been sent.

In essence, it found that defendants in collective proceedings should not communicate directly with actual or potential class members (i.e., including members of a proposed class prior to certification of the collective proceedings order ("CPO")) in relation to matters concerning the proceedings. Even if the

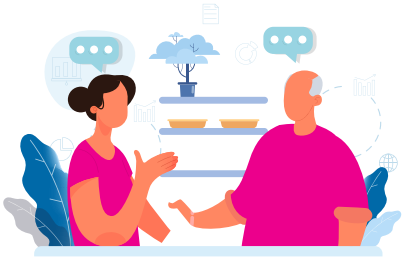
parties agreed to such communications, they would still be subject to the CAT's supervision.

The CAT's decision left several unanswered questions, some (but not all) of which were addressed by the CAT in the interchange fee and Kent v Apple collective proceedings[1].

In the interchange fee collective proceedings, the CAT clarified that the defendants could still respond to merchants who had approached them and asked to settle, but only where those merchants had already brought individual claims and were acting through legal advisers.

In Kent v Apple, the CAT allowed an application by a Brick Court barrister to opt out of the class as he was concerned that given the McLaren judgment, his friends and colleagues acting in the proceedings would otherwise need to "police their interactions" with him in relation to their work.

The CAT did not appear particularly concerned by the implications of their approach in either case, but it was clear from both cases that it was causing headaches for parties.



The Court of Appeal: a More Relaxed Approach

The Court of Appeal overturned the CAT's judgment and held that CPO defendants can communicate directly with class members without first seeking permission from the Tribunal[2].

It noted that there is no general rule in civil litigation which prevents defendants from communicating directly with claimants, and there are no material differences between CPOs in the CAT and representative actions or other forms

of group litigation in the High Court which would justify a different rule for CPOs.

The Court held that the CAT had misinterpreted its own rules by imposing such a restriction. In fact, CAT Rule 94(2), which prohibits defendants making settlement offers directly to class members, would be unnecessary if there was a general rule preventing defendants from communicating with class members at all.

The Court also found that there were several policy reasons why such a rule should not be applied:

- Class representatives are not "in a trusted position" prior to certification: Defendants should therefore not be bound to communicate with the class through a potentially unsuitable self-appointed representative.
- Timing unfairness: It would be unfair if, for example, the class representative gave a media interview and the defendants had to apply to the CAT before they could respond.
- Interference with the conduct of the defence: Defendants should not be obliged (for example) to apply to the CAT before approaching potential experts, who may happen to fall within the class definition, as such communications would likely be privileged.
- Interference with the conduct of the defendant's business: Similarly, defendants should not be required (for example) to apply to the CAT before reporting on the litigation to their investors.

How Should Defendants Now Approach Communicating with Class Members?

CAT Rule 94(2) continues to prevent defendants in opt-out class actions from approaching class members directly with settlement offers. However, beyond this, defendants now appear to be largely free to communicate directly with class members in relation to the claim.

The Court made clear that it had "no doubt" that the CAT could impose restrictions on communications under its case management powers in individual cases.

It invited the CAT to consider issuing a practice direction or making orders in individual cases to give guidance to parties. For example, the Court noted the potential harm of a misleading multi-media campaign urging class members to opt out shortly before the relevant deadline, and it cited Canadian case law which stated that correspondence should not be "inaccurate, intimidating or coercive or made for some other improper purpose aimed at undermining the process of the court"[3].

Our bet is that the CAT will take up the Court of Appeal's suggestion to issue guidance in the course of 2024, particularly focusing on the important topic of disclosure, which was of course one of the key concerns in its original decision in McLaren. However, we anticipate that such guidance will be far less restrictive for defendants than the CAT's original decision. We therefore expect that when looking to the year ahead, defendants in CPO cases will find their lives slightly easier thanks to the Court of Appeal.

1 CICC I v Mastercard and ors [2023] CAT 1; Reasoned Order in Kent v Apple dated 11 January 2023
2 Nippon Yusen Kabushiki Kaisha v Mark McLaren Class Representative Limited [2023] EWCA Civ 1471
3 [2023] EWCA Civ 1471 at [100] and [111]

AFTER PACCAR:

A NEW APPROACH TO FUNDING COLLECTIVE PROCEEDINGS IN THE CAT

Authored by: Andrew Leitch (Partner) and Anoma Rekhi (Associate) – Bryan Cave Leighton Paisner

In the first certification decision since the UK Supreme Court's judgment in PACCAR, the CAT has held that a litigation funding agreement (LFA) revised in light of PACCAR was not a damages-based agreement (DBA) and it was therefore enforceable for the purposes of opt-out collective proceedings in the CAT.

In its decision, the CAT found that it was permissible to include a provision in the LFA whereby the funder would be paid a percentage of awarded damages "only to the extent enforceable and permitted by applicable law".

In this article, we consider the implications for litigation funding and collective proceedings in the CAT, both as a result of this decision and the government's proposed amendment

(Clause 126) to the Digital Markets, Competition and Consumers Bill.

Background

Before the summer of this year, litigation funders assumed that LFAs under which their return is calculated as a percentage of awarded damages would not count as regulated DBAs, as long as the funder did not provide "advocacy services, litigation services or claims management services" (see s.588A(3) of the Courts and Legal Services Act 1990 (CLSA)). This assumption was shattered in the landmark decision of R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28[1], in which the majority of the Supreme Court held that such LFAs are in fact DBAs. Such LFAs must therefore comply with the Damages-Based Agreements Regulations 2013, failing which they are unenforceable.

The PACCAR decision prompted wholesale re-negotiations of LFAs to ensure their enforceability. This included LFAs for opt-out collective proceedings in the CAT, given that, under s.47C(8) of the Competition Act 1998, DBAs are unenforceable if they relate to opt-out collective proceedings.

The decision discussed here, Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd [2023] CAT 73, is the first time the CAT has considered the compliance of an LFA revised in light of PACCAR. The question was whether it remained an unenforceable DBA, or whether some

1 https://www.bclplaw.com/en-US/events-insights-news/paccar-a-new-direction-for-the-funding-of-class-actions.html

creative language in the LFA preserved the potential for a damages-based pay-out, whilst remaining complaint with the general prohibition on DBAs in collective actions under the CAT Rules.

The Claim and the Revised LFA

In this case, the Proposed Class Representative (PCR) brought a c.£5 billion claim on behalf of a class of 8.9 million UK users of Sony PlayStation videogame consoles against three Sony Entertainment entities (Sony). The PCR alleges that Sony abused its dominant market position in the digital gaming industry by compelling publishers and developers to sell their gaming software through the PlayStation Store and charging a 30% commission on these sales.

It was common ground between the parties that the original LFA was an unenforceable DBA due to PACCAR. It was amended so that the funder would be paid the greater of: (i) a multiple of its total funding obligation; or (ii) a percentage of the total damages and costs recovered by the PCR "only to the extent enforceable and permitted

by appliable law". The revised LFA also included a severance clause, which specified that the damages-based fee provision could be severed, if required, to ensure that the LFA was enforceable.

The CAT's Decision

The CAT held that the conditional wording was permissible and it did not render the agreement a DBA under s.58AA CLSA. The wording expressly recognised the current position in law, as "the use of a percentage [of damages] to calculate the Funder's Fee [would] not be employed unless it is made legally enforceable by a change in the law". The CAT found this "an entirely proper position to take".

The CAT also held that, in any event, the severance clause expressly enabled the damages-based provision to be removed if this brought the agreement within the statutory definition of a DBA without causing "a major change in the overall effect of the LFA". Here, the CAT referred to the test for effective severance clauses.

Implications: Opt-Out Collective Proceedings

The significance of the CAT's decision is apparent when considered alongside the government's proposed amendment to the Digital Markets, Competition and Consumers Bill which it introduced, as Lord Bellamy explained, "to mitigate the impact of [PACCAR] on [LFAs] for opt-out collective proceedings in the [CAT]".

If passed in its current form, the Bill would effectively reverse PACCAR for opt-out collective proceedings in the CAT, such that LFAs under which funders earn damages-based returns would not be DBAs.

The provision would also have retrospective effect; reinstating the enforceability of LFAs agreed before the Bill is made law. The Bill recently went through its second reading in the House of Lords on 5 December 2023.

Pending this, funders will be keen to incorporate similar clauses into their LFAs so they can immediately revert to damages-based returns once permissible. We therefore expect these clauses to become market standard for LFAs, particularly those backing opt-out collective proceedings in the CAT. This will trigger a second wave of re-negotiations for existing LFAs, which were revisited in the aftermath of PACCAR. Furthermore, following PACCAR, we have seen a dramatic increase in the prices demanded by funders where their returns are being calculated by reference to multiples of sums invested in pursuing the litigation, to offset their inability to seek damages-based returns (from 3x to as high as 15x multiples). If the Bill is enacted, it will be interesting to see whether the previous market rates return, or whether the higher multiples are here to stay. This will likely be informed by the CAT's willingness to certify collective claims with expensive multiples in the period between now and the Bill becoming law.

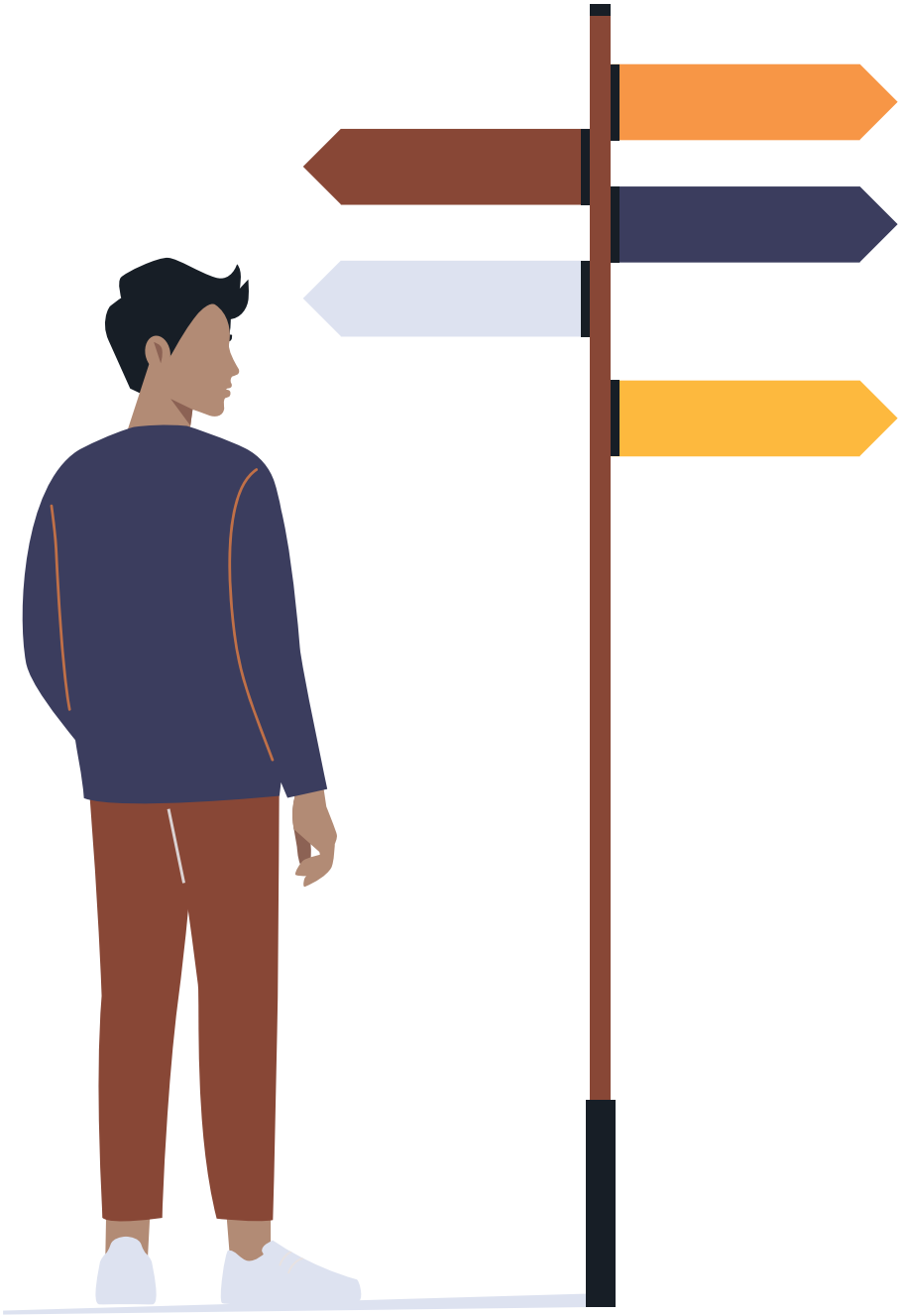
Implications: Other Claims

The government also confirmed that, in tandem with the above amendment to the Bill, it is "assessing the impact of [PACCAR] and considering options for non-CAT proceedings". It remains to be seen whether such a carve-out will be made for LFAs supporting claims in the High Court. During the second reading of the Bill in the House of Lords on 5 December 2023, Lord Sandhurst

confirmed that he had provided the government with a new, wider version of Clause 126, which seeks to reinstate the position before PACCAR for all claims, including those in the High Court and opt-in claims in the CAT. He argued that this is necessary to ensure that prospective litigants can obtain the requisite funding to bring (what would otherwise be too small) claims against larger entities, even if these claims do not take the form of opt-out collective proceedings in the CAT. It will be interesting to see whether Parliament approves an expanded version of the Clause.

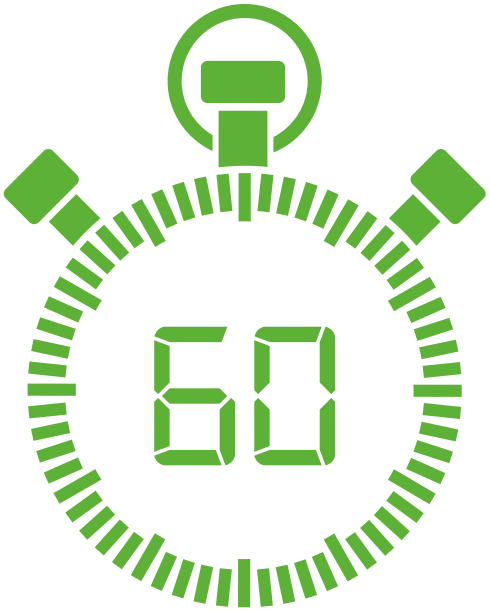
In the meantime, PACCAR will continue to apply for LFAs supporting High Court litigation, and they will have to comply with the regulations governing DBAs or be structured such that the funders' remuneration is a multiple of sums invested, rather than a percentage of damages recovered.

If Lord Sandhurst's proposed amendment is not approved by Parliament, we consider this will have a significant impact on claimants attempting to bring, and funders' willingness to fund, opt-in collective claims in the CAT. The Court of Appeal has confirmed that, for certification purposes, there is no presumption in favour of opt-in or opt-out actions in the CAT and opt-out claims allow claimants and funders to capture most or all claimants for a given claim, without the time consuming and expensive book-building required for an opt-in claim. If the lifting of restrictions on funding is limited to opt-out claims, this will be yet another reason why opt-in claims look increasingly unattractive by comparison.



60-SECONDS WITH:

LAUREN MCGEEVER, MANAGING DIRECTOR EPIQ



Q Imagine you no longer have to work. How would you spend your weekdays?

A Traveling. I am lucky enough to travel for work, but rarely do I have enough time to see the cities that I visit. I would love to go back to all of them and see everything that I missed the first time around.

Q What do you see as the most important thing about your job?

A Forming relationships and building trust. Having spent close to 20 years in this industry, some of my clients have become some of my closest friends. Building those friendships to the point that they know they can trust me to provide best-in-class service is truly the most important part of what I do.

Q What's the strangest, most exciting thing you have done in your career?

A I don't know if I would call it strange, but definitely the most exciting is chairing Epiq's Mass & Class conference. It's an incredible amount of work, and I find it so rewarding.

Q What has been the best piece of advice you have been given in your life?

A When life is at a high point, take a step back to reflect on what got you there and to appreciate that moment. You never know when it might change, so absorb it all and embrace the moment.

Q What is one important skill that you think everyone should have?

A The ability to feel and show empathy. The world would be a kinder place if we could all try to see things from a different perspective and remember that everyone is fighting a battle that you can't necessarily see.

Q What film do you think everyone should watch, and why?

A I wish more people of my generation and younger watched the old classics. There are no special effects, no blood and gore, and great storytelling. Start with Hitchcock movies. You won't be disappointed.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A My mother. She wasn't famous in the traditional sense, but she was well known in the class action industry, having been one of the first women to start a claims administration firm. I miss her terribly.

Q What is the best novel of all time?

A "The Great Gatsby." While being a true classic, I love everything from that era, and it took place close to where I grew up.

Q What legacy would you hope to leave behind?

A I hope that when people remember me, they remember laughing, having fun, and knowing they were loved. That, to me, is the most important legacy to leave.

Q What is the most significant trend in your practice today?

A Unfortunately, we are seeing more fraudulently filed claims than ever before in class action settlements. Epiq is at the forefront of identifying and deterring fraudulent activity to ensure only valid claims get paid.

Q Do you have any hidden talents?

A My lasagna is out of this world!

Q What is one work related goal you would like to achieve in the next five years?

A More countries are adapting laws to allow group litigations, and I hope to introduce notice and claims administration to more jurisdictions around the globe.

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COMPOUNDING INTEREST – WHERE TO NEXT FOR CPOS?

Authored by: Joseph Moore (Partner) and Imogen Nolan (Senior Associate) – Travers Smith

While the Supreme Court's decision in Mastercard v Merricks [2020] UKSC 51 ("Merricks") set a low threshold for the granting of a Collective Proceedings Order ("CPO"), a relatively firm handbrake was applied by the Competition Appeal Tribunal ("Tribunal") on remittal to one head of recovery –the claim for compound interest[1].

The result was perhaps not surprising given the requirement under Sempra Metals[2] to "plead and prove" one's actual interest losses, which is not a straightforward exercise in the context of a CPO.

However, the Tribunal's decision on certification in the McLaren3 proceedings suggests that the issue of whether a class (or part thereof) is able to recover compound interest through a CPO remains up for grabs, in the right circumstances.

Given the very significant sums at stake, class representatives look set to continue to seek compound interest, which in turn is likely to raise interesting questions around case management and pass-on.

When is Compound Interest Available?

One of the key questions for the Tribunal in Merricks, following remittal from the Supreme Court, was whether Mr Merricks' claim for compound interest should be included in the CPO. Notably, the pleaded value of the claim rose by £2.2bn if compound interest was included instead of simple interest[4].

The methodology advanced by Mr Merricks' expert for the purposes of addressing the issue of compound interest on an aggregate basis assumed that anyone who was a saver or borrower would have used the additional funds to reduce their borrowings or increase their savings. However, the Tribunal made clear that "it is not sufficient for a claim to compound interest to show that an individual had borrowing and/or savings.

1 See [2021] CAT 28 and more generally Case 1266/7/7/16 Walter Hugh Merricks CBE v Mastercard Incorporated & Ors.
2 Sempra Metals Ltd v Inland Revenue Commissioners [2007] UKHL 34.
3 See [2022] CAT 10 and more generally Case 1339/7/7/20 Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd & Ors.
4 As at January 2021. The Merricks class contains over 46m people, such that the £2.2bn differential amounts to an extra c. £48 per class member.

It is necessary to show, on the balance of probabilities, how they funded the additional expense or what they would have done with the additional money if there had been no overcharge".

Accordingly, as Mr Merricks had not advanced a credible or plausible methodology for estimating compound interest losses on an aggregate basis, the issue was not "suitable"[5] for inclusion in the CPO.

Nevertheless, the CPO regime provides a mechanism by which claims for compound interest might be pursued, namely, the sub-class. This is precisely the approach taken in McLaren, where compound interest is claimed on behalf of a sub-class of class members who acquired new vehicles using finance. A sub-class would appear, prima facie, to have better prospects of satisfying the requirements of Sempra Metals by demonstrating how they funded any overcharge. Further, this approach seems capable of transposition to other CPOs where part of the overall class used some form of finance to purchase the good/service in issue (e.g. the Musical Instruments CPO)[6]. Similarly, while Mr Gutmann's claim against Apple includes a claim for simple interest only, he has reserved his position to amend his case on interest should "evidence emerge that the [Proposed Class Members] have taken out finance to pay for their Affected iPhones"[7].

Le Patourel[8] is a useful counterpoint to the approach outlined above, given its apparent status as the only certified CPO that advances a claim for compound interest on behalf of the whole class (and where there is no suggestion that the class used some form of financing to pay for the telephony services in question). The Tribunal's judgment (following trial early this year) is likely to provide valuable further guidance on the application of Sempra Metals in the context of CPOs.

Compounding the Challenges of Case Management

Much like other issues (for example, pass-on), a claim for compound interest may not necessarily be considered until after certification, which is likely to have implications for case management.

For example, in Le Patourel, the issue of compound interest was not the subject of detailed consideration at the certification stage, but is being claimed by the class representative and appears to fall within the scope of the CPO[9].

The Tribunal may be flexible on this front, particularly if the methodology for calculating compound interest relies on data that was not available at the certification stage. However, to the extent the issue of compound interest must be considered by the parties and the Tribunal sometime after certification (but before trial), this is likely to add to the delay and cost of the overall claim, and may have significant implications for the disclosure and expert process (compared to a simple interest claim).

Of Interest When Approaching Pass-On

As noted above, in Merricks, the class representative's expert was unable to produce a methodology that was capable of calculating compound interest on an aggregate basis. It will be interesting to see whether the methodology put forward by the class representative's expert in Le Patourel is acceptable to the Tribunal, and more broadly, whether that methodology is capable of wider

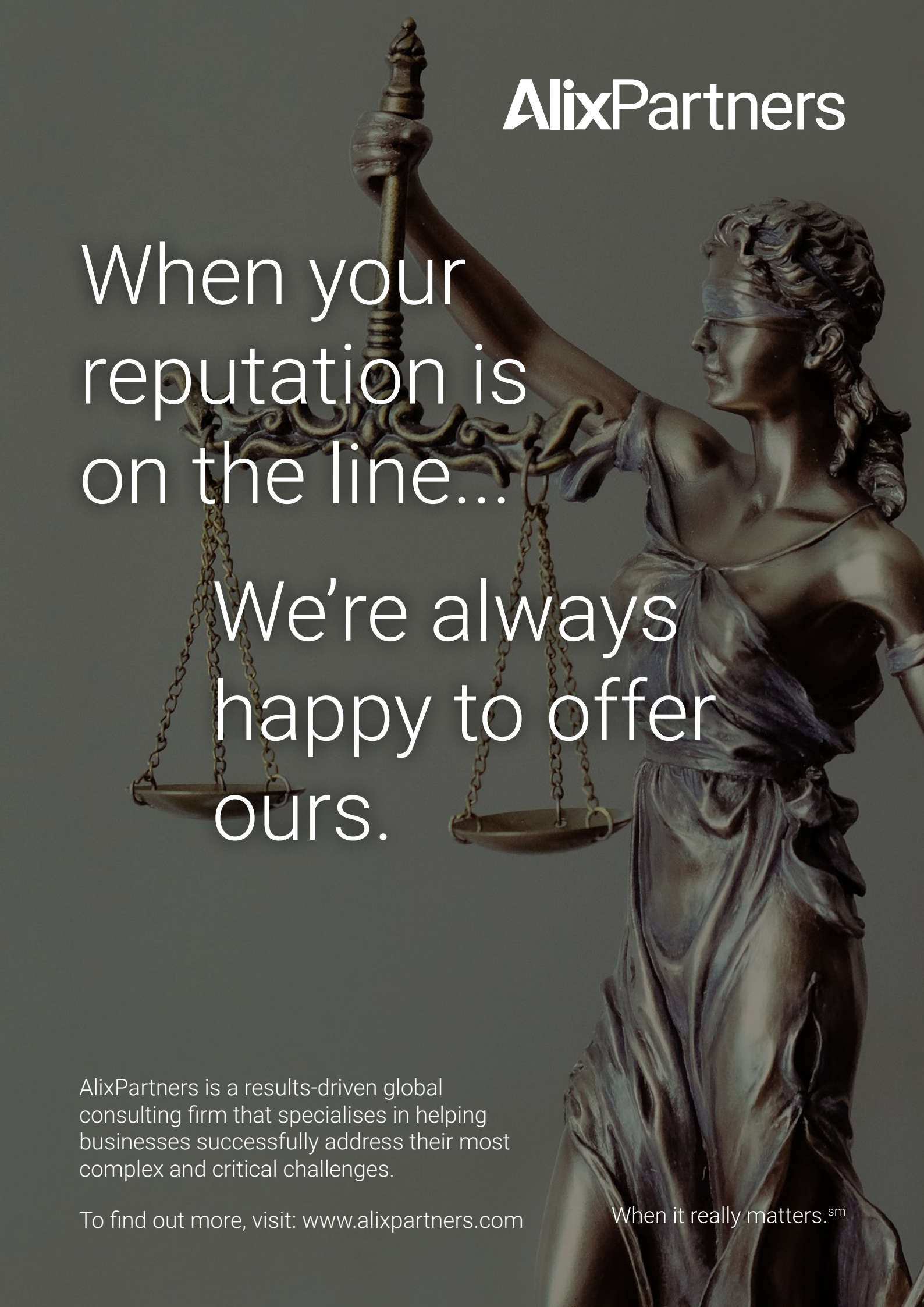
application in the context of consumer CPOs (where there is no specific "financing" sub-class).

Whether an acceptable methodology is developed for the purposes of calculating compound interest in the context of a consumer CPO, and the level of compounding effect that tends to produce (assuming that many consumer classes will have similar saving, borrowing and/or investment habits), may affect the trade-off faced by defendants subject to both individual claims from intermediate (corporate) purchasers, as well as a "downstream" consumer CPO. The availability and value of the compound interest claim at both levels of the supply chain will have implications for the optimal way to distribute the pre-interest losses in order to minimise the overall post-interest damages.

Defendants will therefore need to consider the strength of the claims for compound interest at the different levels of the supply chain in the context of their arguments regarding pass-on. That assessment will of course depend on the number of upstream claimants vis-à-vis the size of the consumer CPO class, as well as the relationship between the upstream and downstream markets (which has implications for the assessment and rate of pass-on).

In any event, these complex questions look set to arise on a regular basis, given the very significant value of claims for compound interest. Those involved in competition litigation will watch on with interest.

5 As required by Rule 79(1)(c) of the CAT Rules for a claim to be certified as eligible for inclusion in a collective proceedings. See also paragraph 97 of [2021] CAT 28.
6 Case 1437/7/7/22 Sciallis v Fender Musical Instruments Europe & Another.
7 See Case 1468/7/7/22 Gutmann v Apple Inc & Ors (summary of collective proceedings claim form). A general claim for compound interest (with simple in the alternative) has also be raised in Case 1572/7/7/22 Pollack v Alphabet Inc & Ors, Case 1598/7/7/23 Doug Taylor Class Representative Limited v MotoNovo finance Limited & Ors, Case 1599/7/7/23 Doug Taylor Class Representative Limited v Black horse Limited & Ors, Case 1600/7/7/23 Doug Taylor Class Representative Limited v Santander Consumer (UK) plc & Ors and Case 1601/7/7/23 Ennis v Apple Inc & Ors.
8 Case 1381/7/7/21 Justin Le Patourel v BT Group PLC.
9 See paragraph 3 of the CPO: "The remedy sought is an award of aggregate damages together with interest, costs and any further relief as the Tribunal may think fit". As per the summary of the collective proceedings claim form, the class representative is seeking "interest, calculated from the date each individual claim arose on either a compound, or alternatively simple, basis".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LEGAL ESPRESSO:

EXPLORING THE CAFFEINE-FUELED WORLD OF ITALIAN COMPETITION LITIGATION

Authored by: Giorgio Afferni (Managing Partner) – Delex Law Firm and Noah Wortman (Founder & CEO) – NRW Consulting

Until recently, Italy has not been perceived as an attractive jurisdiction for private enforcement of EU competition law or other large and complex collective redress actions. The conventional wisdom (also shared by many Italians) is that Italian civil proceedings take far too long. However, the reality is quite different.

According to the official statistics of the Italian Ministry of Justice, civil proceedings are becoming faster almost everywhere in Italy, and they are already aligned or rapidly aligning with other EU jurisdictions that are typically regarded as being efficient.

In addition, the Italian Government undertook with the EU Commission the obligation to reduce the length of civil proceedings by June 2026 by 40% compared to 2019 as a condition to having access to the EU Recovery and Resilience Facility. Therefore, our belief is that Italy has already started and will continue to become an attractive forum for private enforcement of EU competition law.

The development of private enforcement of competition law in Italy has been accelerated by the implementation of Directive 2014/104/EU on actions for damages for breaches of competition law by Law 19 January 2017, n.3, wherein it also established three Specialised Sections for Commercial Matters in the Tribunals of Rome, Milan, and Naples to hear antitrust claims (Art. 18, Law 19 January 2017, n.3).

Group Claims

To efficiently litigate competition claims in Italy, much like most other jurisdictions, it is often necessary to aggregate or bundle the claims for victims of the same infringement into a single proceeding. This is typically done via one of three ways:

(1) a traditional joinder of claims

(2) a class action, or

(3) the assignment or purchase of claims to/by a dedicated SPV.

As of today, the reality has been that the Italian class action regime has not been an attractive means to bring large, complex group actions. Even though the Italian class action mechanism is available for seeking legal redress of infringements of competition law, so far it has proven to be an inefficient means

to aggregate claims. Under the Italian class action regime, victims of the same infringement may opt-in both after the case has been admitted/certified ("early opt-in") and also after the decision on the merit of the case has been handed down by the Tribunal ("late opt-in").

Should the case be successful, then under the class action model, the Tribunal will award attorneys' fees to claimant's counsel that filed the case as a success fee equal to the percentage of all damages awarded to all members of the class that opted in.

It is important to note that this percentage is inversely proportional to the number of claimants who opted in with a minimum of 0.5% and a maximum of 9%. Given the relatively low percentages for potential attorneys' fees to be awarded in an Italian class action, this route has not been particularly attractive to prospective law firms or litigation funders to pursue expensive and complex competition or other types of collective redress cases as a class action in Italy. Indeed, to date, the largest and most complex competition and cartel claims (e.g., trucks and cardboard cartel claims) have been brought via a traditional joinder of hundreds of claimants' claims via a single proceeding.

The above being said, there is strong belief that the future of aggregating claims in Italy lies within the assignment of claims and purchasing of claims model. Under Italian law the purchase of claims is a perfectly valid and enforceable contract. Moreover, according to settled case law set forth by the Italian Supreme Court (most recently see Italian Supreme Court, 10 January 2012, n. 52), both consumers' and firms' claims may be assigned, both for pecuniary and non-pecuniary damages. However, the purchase of claims in a professional (i.e., recurring) basis is an activity reserved to certain entities directly or indirectly supervised by the Bank of Italy or another EU supervisory authority (banks, financial intermediaries, alternative investment funds or securitisation companies). As result, the only obstacle, in practice, is the choice and set up of the appropriate vehicle where the claims can be assigned to or purchased by as a means to aggregate or bundle all of the victims claims in one entity bringing the proceedings.

Adverse Costs

Italy, like all other European jurisdictions does have a "loser pays rule." However, adverse costs are typically lower as compared to other European jurisdictions, especially when compared to the adverse cost risk in the United Kingdom.

The Italian courts establish adverse costs based on binding regulation thereby making them fairly predictable.

There are several factors that may cause adverse costs to vary including: the type of activity performed, case value, complexity of the case, number of parties, etc. For example, a case with a value of €2-4 million with a high level of complexity (as is typical with competition claims) will have adverse costs of approximately €74,000. A similar a case valued at €8-16 million would have adverse costs of approximately €125,000. In case with multiple defendants, as a general rule, each one would be entitled to have its costs reimbursed if the action is dismissed.

Conclusion

Italy has arguably become a friendlier jurisdiction for firm, consumer and investor rights. The ability for victims of corporate malfeasance to seek collective legal redress has drastically improved and will continue to do so in the coming years.

As result, the volume of cases and decisions favorable to claimants is increasing and the methodologies applied by the courts to quantify damages are becoming increasingly sophisticated.

This positive trend is confirmed by the increase of third-party litigation funding being invested into Italian competition claims and other types of collective redress actions. This is evidenced by the increasing number of international litigation funders who have opened offices in Italy over the past couple of years.

We do not expect any of the above trends to wane in the coming years and will likely only contribute to an exponential increase in the number of cases filed in Italian courts in the next few years. After the recent legislative changes, it is clear Italy will continue to be an increasingly favorable environment for claimants.

TRUCK CARTEL CASE:

GERMANY'S SUPREME COURT RECOGNISES DAMAGES FOR LESSEES AND HIRE-PURCHASERS AND REQUIRES CARTELISTS TO PRESENT A SOUND THEORY OF NO HARM

Authored by: Dr Carsten Krüger (Associate Director) – CDC Cartel Damage Claims

On 5 December 2023, the German Federal Court of Justice (Bundesgerichtshof, BGH) issued its third landmark judgment (KZR 46/21, Truck Cartel III) on private enforcement following the European Commission's 2016 Trucks cartel decision. The BGH highlights two key points of this judgment: Firstly, lessees and hire purchasers of vehicles affected by the illicit agreements between truck manufacturers may be entitled to claim damages due to the cartel. Secondly, econometric regression analyses alone are not suitable for questioning the finding that any damage has occurred. Rather, defendants must present a comprehensive theory of no harm. As a result, the BGH dismissed Daimler AG's appeal, supported by several of its co-cartelists, against the ruling of the Higher Regional Court of Saxony Anhalt, according to which damages were justified on the merits due to several leasing and hire-purchase agreements concluded by a building materials dealer between 2005 and 2011.

Like Purchasers, Lesses and Hire Purchasers Benefit From a Presumption of Cartel Induced Harm

According to the BGH's settled case law, the principle of experience argues in favour of the plaintiff who has purchased cartelised goods; the prices achieved within the framework of a cartel are on average higher than those that would have been formed without the agreement restricting competition.

In its earlier decisions on the truck cartel[1], the BGH also established that the cartel's coordination of gross list prices for medium and heavy trucks affected the net prices paid by purchasers of those trucks, because the price was influenced from the start by the infringement.

From this, the BGH now concludes that instalments paid by a lessee or hire-purchaser to a financing company for vehicles affected by the cartel must be presumed to be excessive due to the cartel as well, if the leasing or hire-purchase agreements fully cover the respective purchase price (full amortisation), as is typically the case. This also applies to mileage-based leasing agreements that the plaintiff concluded with leasing companies

1 BGH, judgments of 23 Sep 2020, KZR 35/19 (Truck Cartel I), and of 13 Apr 2021, KZR 19/20 (Truck Cartel II).

affiliated with the manufacturers involved in the cartel.

In line with its previous decisions, the BGH therefore states that given the nature and gravity of the infringement, its duration of more than 14 years and the market coverage of its participants in the EEA of more than 90%, the empirical principle must have considerable weight in the overall assessment of all circumstances necessary for the assessment of damages in the present case.

Defendants Need a Well Founded Theory of No Harm

On the other hand, according to the BGH, it was up to Daimler to demonstrate that and for what reason the cartel's operation, known only to its members, had not led to higher prices.

The BGH thus required a sound theory of no harm, which Daimler was unable to provide.

Firstly, Daimler failed to weaken the empirical presumption of harm by alleged fluctuations in the truck manufacturers' market shares during the cartel period. It was precisely the cartel's mode of operation that competition between the manufacturers was not eliminated, but only dampened and jointly raised to a supra-competitive 'cost price level' reflected in the gross price lists. Market shares could still fluctuate due to changes in numerous competitive parameters other than price (e.g., vehicle quality, network of garages, and extended warranties).

Secondly, and more fundamentally, the BGH emphasised that the cartelists' regression analyses based on a temporal comparative market approach, according to which only an insignificant cartel effect was said to have occurred, did not prevent the lower court from finding that the plaintiff suffered damage in any amount. Those analyses can at most represent an approximation to reality in the sense of an estimate. However, Daimler's submission lacked qualitative arguments that explained, by presenting concrete and individual price behaviour, why the prohibited price coordination allegedly remained ineffective despite its long duration.

In Passing, Lingering Cartel Effects

In the next step, the lower courts will deal with the amount of damages to be compensated. As a side note, they will also consider that given the long duration of the cartel, its significant market coverage, and the fact that the exchange of information between the cartel members had an impact on future gross list price increases, any deviation of cartel members from the harmonised gross pricing strategies could only be implemented by regional sales intermediaries with a delay in their pricing. In this context, the BGH confirmed that the cartelists' prices merely fell continuously after the end of the cartel.

Key Takeaways

The findings of the BGH fit in well with its previous case law, but also with the case law of other European courts on the truck cartel. The BGH itself refers to the UK Competition Appeal Tribunal[2] and a recent report on the Spanish case law[3]. Overall, there are three different takeaways from Truck Cartel III:

Firstly, typical lessees and hire purchasers whose contracts are aimed at full amortisation at the end of the lease term are to be regarded as indirect customers of the cartelists. They can invoke the empirical principle of excessive cartel prices in the same way as direct and indirect purchasers of a cartelised product. In the case of a long-lasting and sustainable cartel such as that of the truck manufacturers, this factual presumption of harm carries considerable weight in the assessment of damages.

Secondly, the cartel members must present a well-founded theory of no harm that qualitatively addresses both their actual pricing behaviour and the modus operandi of the cartel. In particular, the cartel members whose participation in the infringement is established must explain why they took the associated risks – especially over a longer period – without the cartel having paid off.

Thirdly, related to the second point, but also generally applicable when evaluating econometric studies, courts consider statistical significance as part of the overall assessment of individual circumstances in determining whether damage has occurred.

However, a regression analysis that shows that a cartel effect is insignificant merely means that the statistically tested 'null hypothesis' (i.e., the cartel had no price effect) cannot be rejected with sufficient certainty.

Conversely, it does not constitute proof that a price increase effect and thus damage did not occur. According to the BGH, a statistically insignificant result can also contribute to the interpretation of the available data and other qualitative evidence in the overall assessment and thus to an approximation or estimation of the reality, e.g. by confirming the result of the statistically significant estimate of a price effect.

2 Royal Mail and BT v DAF Trucks Ltd. & Ors. [2023] CAT 6.

3 B Bornemann and J Suderow, Neue Zeitschrift für Kartellrecht (NZKart) 2023, p. 478.

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SET SAIL TO SETTLEMENTS: THE FIRST COLLECTIVE SETTLEMENT IN THE UK

Authored by: Belinda Hollway (Partner), Ruth Manson (Senior Associate) and Patrick Edward (Paralegal) – Scott + Scott

Eight years after the Consumer Rights Act 2015 introduced a collective action regime, the first ever collective settlement application was approved by the Competition Appeal Tribunal ("Tribunal") at a hearing on 6 December 2023 (the "Judgment")[1]. The settlement was in the Mark McLaren Class Representative Limited v MOL (Europe Africa) & Others claim, a follow-on damages claim which alleges that cartel conduct relating to 'Roll-on Roll-off' intercontinental shipping of vehicles led to increases in the delivery charges paid on new vehicles by individuals and businesses in the UK. The settling defendant was Compania Sud Americana De Vapores, known as CSAV, which is one of five corporate groups found liable by the European Commission for the anticompetitive conduct in Case AT.40009 – all are defendants in the McLaren claim. The remaining cartelists continue to litigate.

Given its groundbreaking nature, there were no precedents for the application and no previous English case law to guide the Tribunal's consideration of it.

Accordingly, a series of novel issues needed to be grappled with by the settling parties, the non-settling defendants (who had been granted permission to appear at the hearing) and the Tribunal. The novel issues included:

(i) When and how the settlement sum should be distributed;

(ii) Whether or not any of the damages could revert to CSAV; and

(iii) Barring provisions preventing the non-settling defendants from seeking a contribution from CSAV at any later stage.

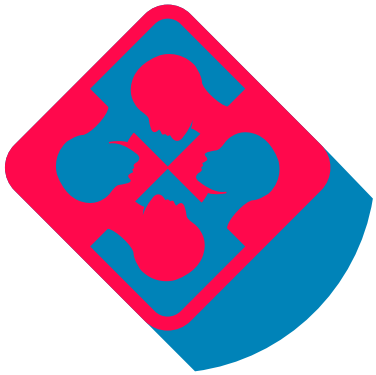
The application was supported by:

(i) Expert evidence from both the claim's economist and an independent expert on cartel damages settlements; and

1 1339/7/7/20 Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others [2023] CAT 75.

(ii) Witness evidence from the Class Representative, CSAV and their respective solicitors. Notice of the application was published, no Class Members or any third parties, other than the non-settling defendants, asked to be heard. The application was considered by the Tribunal at the 6 December 2023 hearing and an oral judgment was given on the day approving the settlement.

With novel legal issues comes the increased opportunity for appeal. It quickly became evident at the hearing that the Tribunal was keen for this settlement to be dealt with in a proportionate manner including, in so far as possible, reducing or eliminating the likelihood of any decision being appealed.



Damages and Distribution

CSAV was the smallest cartelist with only 1.7% of the relevant market share during the Cartel. Accordingly, the settlement was for a relatively modest sum of £1.12million. Using reasonable assumptions, this settlement sum amounted to between 45% and 106% of the claim value as against CSAV. With this background, the Tribunal quickly confirmed it was happy with the settlement figure.

The comparatively modest sum also factored into the Class Representative's submission that the monies should not be distributed to the Class at present but instead held in escrow until such time as the total monies (whether recovered by way of further settlements with the defendants or a judgment following a trial) held by the Class Representative makes the distribution process economically efficient. This submission was approved by the Tribunal.

However, one could see that where an initial settlement was significantly higher, the Tribunal might expect prompt distribution to class members and for a class representative not to wait for more sums to be obtained.

Where the risk of appeal by the non-settling defendants was more prominent, however, were two distinct issues before the Tribunal - the first of these was the so-called 'reverter' of monies to the defendant and the second is the appropriate barring provision that should be included in any order approving the settlement. Both of these issues are considered in turn.

The Reverter

The settlement agreement between the Class Representative and CSAV provided for the parties to seek Tribunal approval for a repayment to CSAV of the undistributed money recovered from CSAV, once the process of distributing the damages to the Class and paying any return to funders and other stakeholders was fully completed. In short, only once all appropriate methods of getting the damages to the affected Class have been exhausted, and only if money remains in the distribution pot, would the reverter become relevant. Importantly, the proposed reverter works on a 'first in, last out' basis.

This means that the money put into the damages pot from the first defendant to settle, in this case CSAV, would be the last monies to be paid out to as part of the distribution process. This process increases the chance that CSAV would get at least some of its settlement damages back, with the second to settle next in line and the third to settle after that (and so on).

At its core, the intention of a 'first in, last out' reverter is to promote early settlement and encourage the remaining defendants to get in line for the reverter of monies as soon as possible. Early settlement is, of course, encouraged throughout the legal system, as timely and expensive litigation should be avoided where the parties can instead reach a sensible compromise. This process can be compared to the leniency process adopted by the European Commission, where the first cartelist to provide information gets the greatest reduction in fine.

The Tribunal did not wish to make any decision on the reverter as part of its consideration of the application and instead considered that it was a matter to be determined only if and when it becomes a live issue (i.e., once the claim has been concluded against all defendants and the distribution process is complete)[2].

This means that class representatives and defendants in collective claims should factor in the chance that reverters could one day be approved to their advantage, when considering their litigation strategy.

The Barring Provision

The settling parties asked for a "barring provision" preventing the non-settling defendants from bringing a contribution claim against CSAV following the settlement. The Class Representative also asked the Tribunal to confirm that, in entering into the settlement with CSAV, it was settling no more than 1.7% of the total claim. The desire for the barring provision and related provision in favour of the Class Representative in the settlement was therefore twofold. For CSAV, it addresses the risk to

2 Paragraph 30; [2023] CAT 75.

CSAV that it might settle with the Class Representative but immediately find itself the recipient of a contribution claim from a non-settling defendant and thus back in the litigation. For the Class Representative, it sought to minimise the risk that it let a settling defendant off the hook using calculations assuming that market share was the correct proxy for its responsibility for the damage caused to the Class, but later face submissions from the non-settling defendants that CSAV had a larger portion of responsibility for the damages and so a larger portion of the claim was settled than was intended – i.e., the Class Representative accidentally settling too much of the claim for too little money.

Both of these scenarios are of importance to the non-settling defendants who want to minimise the risk that they are left to pay more than what they perceive as their fair share of the damages, particularly given the joint and several liability of the cartelists.

With this background, it is clear that the Tribunal's ultimate approach to apportioning the share of liability between defendants in collective settlements (and cartel cases more generally) was always going to be contentious.

The position of CSAV is contemplated by the Tribunal's Guide to Proceedings (at paragraph 6.131) which explicitly references the potential for a settling defendant to be granted a barring provision stopping the non-settling defendants from seeking contributions from it. By contrast, there is no explicit guidance allowing the Class Representative to benefit from similar protection. The written submissions of all parties, including, in particular, the non-settling defendants, focused on whether the Tribunal even had jurisdiction to make such an order.

It was at this point that the Tribunal's call for proportionality came to the fore. The Tribunal Chair, Mr Hodge Malek KC, was helpfully clear with the parties that, if he was required to decide this a novel legal question and irrespective of his decision, once he had heard full argument, he would grant permission to the unsuccessful party to appeal. He therefore encouraged the parties to consider trying to resolve this among themselves.

For the Class Representative, this meant considering whether the certainty and efficiencies that would be obtained for the Class by avoiding an appeal was worth giving up the request that the Tribunal make a binding – or even near-binding – finding that the market share basis of the settlement was the correct approach to allocating liability as between the cartelists. For the non-settling defendants, it meant considering whether they were willing to give up the right to bring a contribution claim against CSAV.

Ultimately, a commercial decision was reached by all parties outside of the courtroom and an order of the Tribunal was made by consent. The outcome was that:

(i) The non-settling defendants agreed that they would not bring a contribution claim against CSAV in the future;

(ii) The non-settling defendants remain free to argue at a future point in the proceedings that CSAV's responsibility for the loss caused by the cartel was more than the 1.7% of the claim on which the settlement was based; but

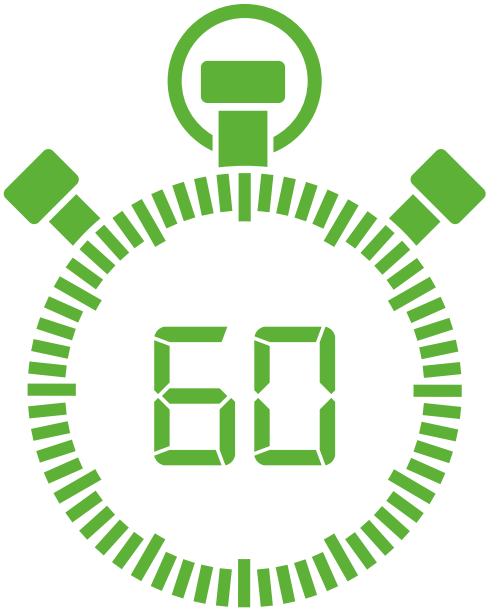
(iii) Importantly, the non-settling defendants agreed they would not appeal the approval of the settlement.

Going Forward

Eight years after the introduction of the collective action regime, it is comforting to see the first settlement being reached and to see pragmatic and sensible approaches being taken by the parties and the Tribunal. The Judgment provides useful guidance to class representatives and defendants considering further settlements, which are likely to come in many of the multiple collective actions currently before the Tribunal.

Nonetheless, there remain many issues to be resolved and subsequent issues may be subject to less pragmatic approaches by the parties. Future settlements may see appeals by defendants or class representatives, or objections from class members. Class representatives and defendants considering settlement have a lot to consider but the Judgment is a useful starting point for any such consideration.

60-SECONDS WITH:



ELIN MOEN
PARTNER
BAHR

Q Imagine you no longer have to work. How would you spend your weekdays?

A I would spend 1/3 of my time outdoors hiking, kayaking and camping, 1/3 volunteering for causes I am passionate about and 1/3 simply being around friends and family. Additionally, I would indulge in my love for reading.

Q What do you see as the most important thing about your job?

A Broadly speaking, it is ensuring that the rule of law is upheld and achieve fair outcomes for all parties involved.

Q What's the strangest, most exciting thing you have done in your career?

A That must be to work as a deputy judge at the district court. The judges are generalists and must tackle all sorts of cases within all fields of law. It really pushed me out of my comfort zone as a competition law specialist and was extremely rewarding. Working at district court level really helps you keep your feet on the ground and in sync with the struggles of the general public.

Q What has been the best piece of advice you have been given in your life?

A The best piece of advice I've been given is very simple: just be yourself and find your own way of doing things.

Q What is one important skill that you think everyone should have?

A I believe everyone should have the skill of critical thinking. It allows people to analyse situations and make informed decisions, a skill I believe is increasingly important as the world gets more complex and the information we are exposed to via inter alia social media is largely misguiding.

Q What film do you think everyone should watch, and why?

A I find it impossible to name one. On the other hand I know which movie I am really keen to see, namely "Ibelin" that just premiered at the Sundance Film Festival. It tells a true and beautiful story about how the internet can empower and connect people, which is much needed among all the tales of the web's dark sides.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A I would like to have dinner with the Dalai Lama. Not mainly because of the conversation, but to experience the holy man's presence.

Q What is the best novel of all time?

A Declaring the best novel of all time is a monumental task, but if I must choose "To Kill a Mockingbird" by Harper Lee stands out for its powerful themes and discussions about morality and justice. Alternatively, I would also point to "Shantaram" Gregory David Roberts, it is entertaining and beautifully lyrical.

Q What legacy would you hope to leave behind?

A A contribution to empower low-income families and eradicate child poverty, a cause that is close to my heart.

Q What is the most significant trend in your practice today?

A The most significant trend in my practice today is digitization and the increasing reliance on technology and artificial intelligence. It affects the type of anti-trust cases we see, as well as how we approach legal problems and client service.

Q Do you have any hidden talents?

A As for hidden talents, there are few surprises so far. I can bake quite fancy cakes.

Q What is one work related goal you would like to achieve in the next five years?

A One of my primary goals is to successfully manage the transition from in-house counsel back to private practice. I just returned "back to base" after almost eight years working with an international media group.

MARKET INVESTIGATION TOOLS

THE "NEW" PAN-EUROPEAN APPROACH TO COMPETITION CONCERNS?

Authored by: Elin Moen (Partner) – BAHR

In 2020, the European Commission launched the idea of introducing market investigation powers through the so-called "New Competition Tool". The idea behind the market investigation powers was to address structural competition problems on markets which the existing competition law framework could neither address nor consider in a sufficiently effective manner. Following the impact assessment[1] and the subsequent market consultation, the Commission received feedback from several national competition authorities and stakeholders. Eventually, the initiative was abandoned, and full focus was put on the Digital Markets Act to tackle novel challenges in competition policy.

The idea behind the "New Competition Tool" was not novel.

In the UK, a market investigation regime has existed for a long time and the current regime has roots going more than half a century back.

The UK Competition and Markets Authority (the "CMA") has the power to investigate and regulate markets through a two-stage process consisting of a market study and a market investigation. At the end of a market investigation, the CMA has powers to impose a wide range of remedies to address features of a market that are resulting in "adverse effect on competition" ("AEC-test"). Remedies that are imposed are prospective, not punitive, but can still have severe

1 For further information see 2020 new comp tool - European Commission (europa.eu)

consequences for businesses and other market participants. The CMA has used its discretion to apply the powers in several investigations, and perhaps the most invasive results to date appeared when Gatwick and Stansted had to be divested as a result of a CMA order following an airport market investigation opened in 2007[2].

In Iceland and Greece, the national competition authority has enjoyed market investigation powers like those of the CMA for years.

The tool has however been of limited importance as it appears to have been used only once in each jurisdiction to date.

Now, a new wave of legislative proposals concerning market investigation tools are flooding Europe. The proposals for investigative powers are largely accompanied with proposals for new call-in powers related to mergers falling below the merger filing threshold. Following what appears to be a somewhat co-ordinated exercise driven by national competition authorities, we may see a new pan European approach to competition concerns inspired by the long existing British model.

In Germany, a market investigation tool was introduced in November 2023 after a legislative process where the tool faced both support and criticism. While the Federal Cartel Office ("FCO") has enjoyed powers to conduct sector inquiries since 2005, the scope for intervention has been limited to illegal market practices. Following the legislative change, the FCO are now empowered to investigate any market in a two-step model resembling that in the UK.

If the FCA during the investigation identifies a "significant and persistent distortion of competition", the FCA may impose any structural or behavioral remedy necessary to overcome the market problem. This includes divestment orders.

In Norway, a legislative proposal providing the Norwegian Competition Authority ("NCA") with market investigation powers was tabled in March 2023. The proposal did not include call-in powers as the NCA already has powers to call in any transaction, including below thresholds as well as acquisitions of minority shareholdings. Following a public hearing, the proposal was heavily criticised for lacking important checks and balances and giving unnecessary wide powers to the NCA[3], and the outcome of the process is currently unclear.

Similarly, the Danish Government tabled a bill in November 2023 proposing a change to the Danish Competition Act, giving the Danish Competition and Consumer Authority ("DCCA") authority to initiate market investigations[4]. According to the proposal, the DCCA should also be warranted powers to call in transaction below the standard filing thresholds. The hearing was concluded in December 2023, and the outcome of the process is not yet clear.

In Sweden, the Swedish Government has commissioned an inquiry to assess whether there is a need for a market investigation tool to complement the Swedish Competition Act[5]. Similarly, extended call-in powers are also being considered. To the extent that need for further investigative powers is confirmed, the inquiry is mandated to suggest new supplementary legislation. The inquiry is to be concluded in February 2025.

While the national competition authorities are eager to get the power that comes with a market investigation tool, these tools must be carefully calibrated and used due to their invasive character.

A fundamental difference between market investigation regimes and traditional competition rules is that

the former enables the competition authorities to intervene and impose far-reaching obligations on market players without any suspicion of unlawful conduct.

In fact, the circumstances leading to the intervention does not have to be a result of acts or omissions by the undertakings affected at all and could just as well be a consequence of political decisions or consumer behavior. In the light of the potentially significant consequences that can result from a market investigation, as well as the burdens of the investigation itself, sufficient checks and balances are clearly required.

Some of the relevant concerns can be summarised in the words of the Nordic competition authorities as expressed in a joint report from 2020 addressing the proposal for the New Competition Tool in the EU[6]:

> "At the same time, we recognise that the new competition tool would mark a significant enlargement of the European Commission's powers of intervention, thus requiring adequate safeguards and proportionality checks. In this sense, we believe that there are a series of procedural and substantive issues that have to be carefully considered, including the legal standard adopted, the level of engagement of the undertakings involved, and the importance of engagement of relevant national competition authorities. (...)
>
> Overall, the Nordic competition authorities acknowledge that a new competition tool for the European Commission may be able to address some of the issues discussed in

2 See BAA airports market investigation (CC) - GOV.UK (www.gov.uk)
3 For further information see Høring av forslag til endringer i konkurranseloven m.m.- markedsetterforskning og utredning av overtredelsesgebyr og ledelseskarantene mot fysiske personer - regjeringen.no
4 For further information see Høringsdetaljer - Høringsportalen (hoeringsportalen.dk)
5 For further information see Nya konkurrensverktyg för väl fungerande marknader - Regeringen.se
6 The report is available on: https://konkurransetilsynet.no/wp-content/uploads/2020/09/Nordic-report-2020-memorandum-on-digital-platforms.pdf

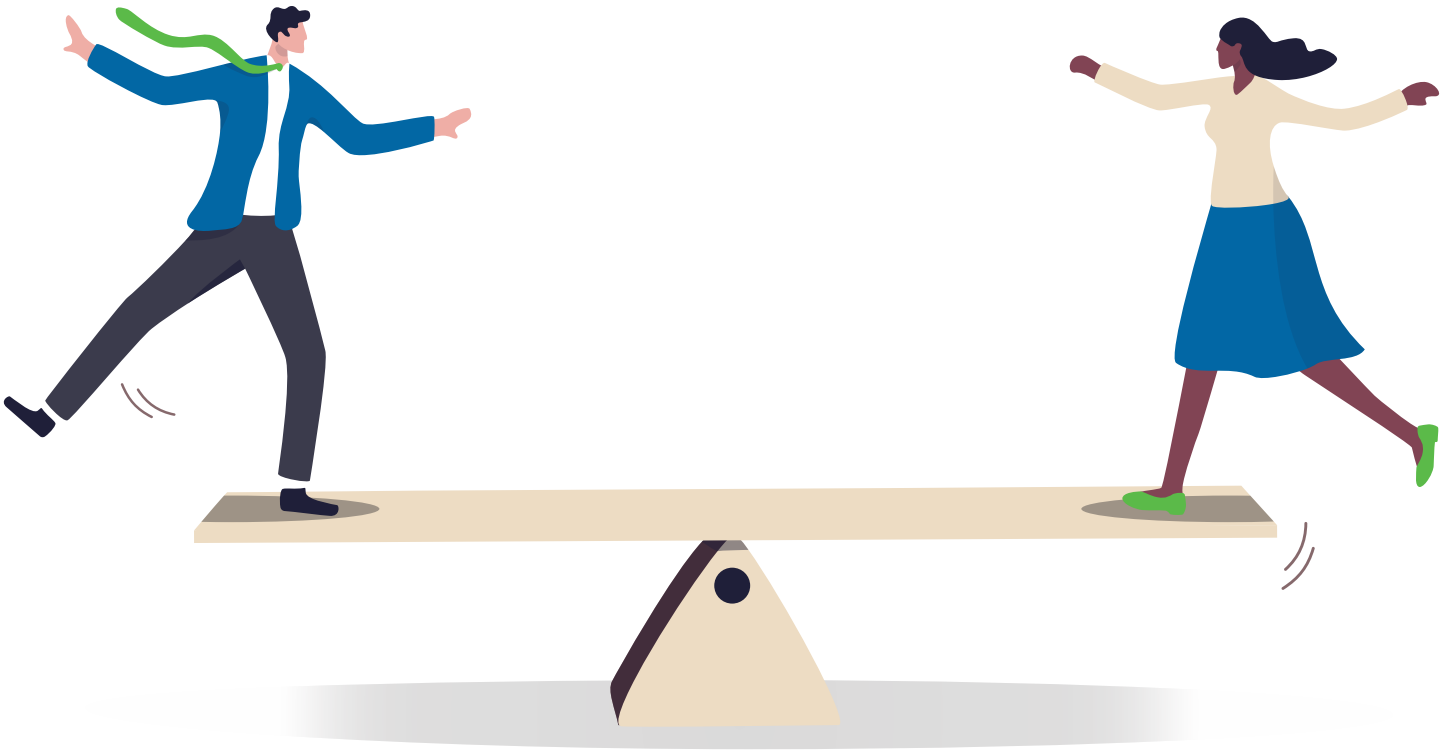
this report. However, we stress that transparency on the abovementioned aspects is paramount to ensure legal certainty and predictability, preserve incentives to invest and innovate, and ensure the effective use of the tool."

If and how these concerns are dealt with remains to be seen as the various legislative processes mature. Even with sufficient checks and balances in place, the discretionary nature of the powers requires that the various competition authorities show great caution when applying the tool. The timetable for a market investigation can be quite lengthy (typically 18 months or more), and the scope of investigations can range from very wide to very narrow. Broadly speaking, the same timetable applies in all cases whether small or large, and it questionable whether market investigations are helpful when it comes to addressing acute issues. In such instances, government intervention or regulation may still be required.

Given the number of countries that have amended or are in the process of amending the national legislation to introduce market investigation powers, it is reasonable to expect that more will follow.

Whether these regulatory efforts will lead to fragmented enforcement and put pressure on the effective functioning of various European markets – particularly for scalable business models on digital markets – does not appear to be broadly or holistically debated.

Similarly, it is reason to reflect upon how additional powers to regulate competition on the various markets relate to other key challenges of our time. While the powers are mainly discretionary, the fundamental concern underlying the enforcement is well functioning competition. While politicians are positioned to balance a wide range of interest when setting their agenda, competition authorities are generally not. National security, geopolitics, climate and democracy are examples of interest which may come under pressure, and it remains to be seen how this will play out as market investigation regimes are applied by competition focused regulators across Europe.



BRG Continues Expansion of Global Competition Practice with Appointment of David Parker in London.

David Parker

MANAGING DIRECTOR, LONDON | dparker@thinkbrg.com

BRG has announced the appointment of David Parker, a renowned economic consultant and expert in competition and antitrust matters, who joins the firm's London office. He advises on mergers, competition investigations, and disputes and offers support related to antitrust and economic regulation, with deep experience in the digital, financial services, and retail sectors, among others.

Mr. Parker regularly acts as the economic expert on standalone and follow-on damages cases resulting from breaches in competition law, including in relation to class actions, and has extensive testifying experience.

Mr. Parker's appointment follows the recent launch of BRG's European competition practice in Brussels and Paris, with whom he has significant synergies; and the appointments of Dr. Rosa Abrantes-Metz in New York and Dr. David Evans in Boston, continuing the firm's trajectory of rapid growth and expansion.

BRG Vice Chairman and Managing Director Dr. David Sunding, also a specialist in antitrust and competition who is spearheading BRG's expansion in Europe, said, *"David brings a wealth of experience to BRG and is a key addition to our growing antitrust and competition practice. His arrival reflects our ambition and momentum as we build out our global capabilities in this important area. We are particularly excited about David's experience with platforms and multisided markets that are central to the digital economy, a field that we expect will be at the forefront of competition policy for years to come."*

"We are delighted to welcome David to BRG," said BRG Principal Executive Officer and President Tri MacDonald. *"His deep expertise in the economics of competition and antitrust aligns with our strategic growth objectives and enhances our ability to deliver robust economic insights to our clients. David is highly regarded for his innovative and rigorous approach, and his appointment underscores our commitment to building a top-tier global antitrust and competition practice."*

Mr. Parker, who is recognized by Who's Who Legal as a Global Elite Thought Leader, said, *"I am excited to join BRG, a firm known for its precedent-setting approach to economic consulting. BRG's growth in Europe and the US offers a unique platform for me to leverage my expertise. I look forward to working closely with my new colleagues in London, Brussels, Paris, the US, and across the globe to serve our clients in these rapidly evolving markets."*

ANTITRUST AND SUSTAINABILITY: EU AND UK TAKE DIVERGENT ENFORCEMENT APPROACHES

Authored by: Aurora Luoma (Partner), Michael Frese (Counsel) and Caroline Janssens (Knowledge Strategy Lead) – Skadden

Competition authorities in the European Union (EU) and the United Kingdom (UK) are getting more attuned to sustainability interests. Following the example of the Dutch competition authority which issued (draft) guidance in July 2020 and January 2021, the European Commission (EC) and the UK Competition and Markets Authority (CMA) in 2023 each released much-needed guidance. This will help businesses navigate competition rules as they collaborate with their competitors on sustainability initiatives. There are some notable differences between the EU and UK approaches that businesses operating internationally should be aware of.

- The EC recognises both environmental and social objectives such as working conditions and human rights whereas the CMA focuses on environmental sustainability.
- The EC requires the benefits to accrue to consumers in the relevant market and, where appropriate, in a related market. The CMA does the same but introduces a more permissive approach with regard to climate change agreements.

This makes it more difficult to assess competition risk for some sustainability initiatives. As a result, some sustainability initiatives covering both the EU and the UK may still not benefit from much needed legal certainty.

Background

The transition to a more sustainable economy is harder to achieve through unilateral action by individual companies and has a greater chance of success through joint, collaborative initiatives. Competition law will have no bearing on many initiatives. However, some sustainability initiatives may increase companies' costs. Other initiatives may require the sharing of ideas or resources across the industry to reach the best solutions. Joint initiatives with a bearing on competition law could include, for example, commitments to minimum standards (such as using environmentally friendly materials), aligning resources (for example, logistics to reduce carbon impact), or joint research and development into green technologies.

Competition laws limit forms of cooperation between actual or potential competitors (so-called horizontal agreements) and between firms operating at different levels of the supply chain (so-called vertical agreements).

The EU and UK competition law frameworks provide that agreements which restrict competition are justified if:

- They bring efficiency benefits for consumers (for example, by improving the production or distribution of goods or services, or by promoting technical or economic progress);
- They give consumers a fair share of the benefit;
- They are indispensable to attaining efficiency goals; and
- They do not substantially eliminate competition.

Sustainability Agreements also Benefit From this Framework

Exemptions for Sustainability Collaborations

The EC and the CMA have now released guidance on sustainability justifications. These provide greater clarity to businesses and may encourage these initiatives.

EC Guidelines

On June 1, 2023, the EC adopted revised guidelines that clarify how to interpret the EC block exemption regulations on horizontal agreements and how to self-assess other cooperation agreements between competitors not covered by the safe harbor, including those that pursue sustainability objectives, i.e., the Horizontal Agreement Guidelines (the EC guidelines).

Under the EC guidelines, sustainability activities encompass activities that support economic, environmental and social (including labour and human rights) development.

The notion of sustainability objectives includes, for example, addressing climate change (through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc.

The EC guidelines offer a detailed assessment of the legality of industry environmental and social sustainability initiatives. They conclude that cooperation agreements that pursue sustainability objectives may be lawful even if they lead to some price increases or decreases in output. However, to be lawful, such initiatives must be indispensable for meeting environmental and social goals, and also must generate consumer benefits.

The EC guidelines allow for a broad range of sustainability benefits to be taken into account (e.g., the use of less polluting production or distribution technologies, improved conditions of production and distribution, more resilient infrastructure, better quality products). These efficiencies must be objective, concrete and verifiable.

The initiatives must generate a fair share of consumer benefits, that is the benefits for consumers deriving from the agreement must outweigh the harm caused by the agreement.

Although the weighing of the positive and negative effects of the restrictive agreements is normally done within the relevant market to which the agreement relates, the EC guidelines do give some flexibility.

Three types of consumer benefits have been recognised: (i) direct benefits from the use of a sustainable product, (ii) indirect benefits resulting from consumers' appreciation of the impact of their individual consumption of a sustainable product on others, or (iii) collective benefits to the consumers in the relevant market which accrue to a wider section of society than just the consumers in the relevant market (for example, drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air, if less polluting fuel were used). In addition, the EC guidelines also make clear that countervailing in-market consumer benefits are only necessary for sustainability initiatives that appreciably restrict competition.

CMA Guidance

On October 12, 2023, the CMA issued its new Green Agreements Guidance (CMA guidance) which supplements the CMA Guidance on Horizontal Agreements. Similar to the EC guidelines, the CMA guidance aims to provide greater clarity on the circumstances in which collaborations between competitors may be exempt from competition rules on the basis of the environmental sustainability benefits they bring.

In contrast with the EC's approach, the CMA guidance focuses on collaborations aimed at achieving environmental sustainability benefits, such as improving air or water quality, conserving biodiversity and natural

habitats, or promoting the sustainable use of raw materials.

The CMA guidance does not cover wider social objectives such as working conditions and human rights, but does note that the same principles may help to inform aspects of businesses' self assessment of these types of agreements.

However, the CMA guidance does take a more flexible approach than the EC in recognising environmental justifications for climate change agreements. These cover agreements designed to reduce the negative effects arising from greenhouse gases. These negative effects (and the benefits of reducing them) are typically global in nature and are realised over long time periods (for example, manufacturers, suppliers, or retailers minded to reduce carbon emissions by switching to green energy sources). For climate change agreements, the CMA may consider the totality of the climate change benefits arising from the agreement to the entire UK population rather than limiting its benefits to consumers which bear the costs of the competition restriction. For other sustainability justifications, the benefits need to accrue to the customer groups that bear the burden of the restriction.

Open-Door Policy

Both the EC and the CMA welcome requests for informal guidance on proposed sustainability collaborations.

The CMA published its first informal guidance on 14 December 2023 confirming that the Fairtrade Foundation's planned Shared Impact Initiative for the sourcing of Fairtrade banana, coffee and cocoa products by participating UK grocery retailers is unlikely to raise competition concerns. The objective of the initiative is to use longer-term supply arrangements between participating retailers and Fairtrade producers to provide the latter with the security they need to invest in sustainable practices, including farming practices. The CMA did not examine non-environmental benefits for the producers as these are outside the scope of the CMA's guidance and related open-door policy.

Navigating Divergent Enforcement Approaches

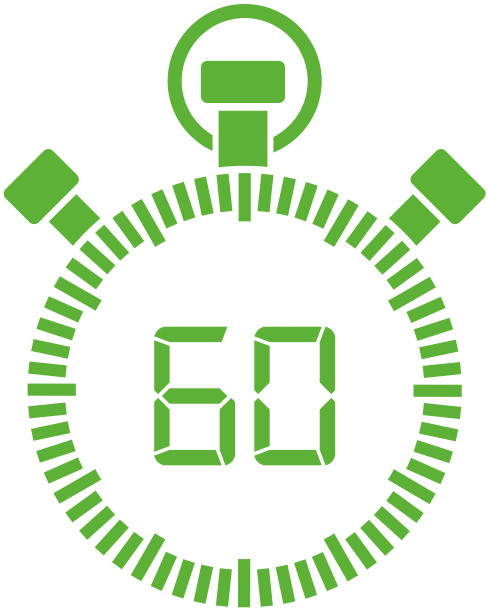
It follows that the EU and UK authorities take different approaches in assessing sustainability initiatives. For example, the CMA states that an agreement between financial service providers not to provide insurance to fossil fuel projects can benefit from the broader exemption criteria. As such, the agreement is more likely to have an overall positive impact in the UK, even where it gives rise to a restriction of competition. It remains to be seen how the EC will deal with such initiatives.

Conversely, an agreement between producers or manufacturers that ensure fair living wages for their workers will benefit from the safe harbor under the EC guidance, but are not covered by the CMA guidance.

Whereas the EC guidelines and CMA guidance bring helpful clarity within their jurisdictions, it is a missed opportunity that authorities were not able to align further. Companies operating internationally need to carefully consider the evolving patchwork of approaches when planning industry-led initiatives.

60-SECONDS WITH:

CLARE DUCKSBURY
FOUNDER & CEO
CASE PILOTS



Q Imagine you no longer have to work. How would you spend your weekdays?

A Learning another language. I am always in awe of people who are multilingual.

Q What do you see as the most important thing about your job?

A The opportunity to have a real impact on society, the people I know in my personal life, through innovation in the way mass claims are processed and paid out.

Q What's the strangest, most exciting thing you have done in your career?

A One of the highlights of my career was being invited by the International Criminal Court to advise on the participation in proceedings of victims of genocide and war crimes.

Q What has been the best piece of advice you have been given in your life?

A To always look forward, never look back.

Q What is one important skill that you think everyone should have?

A I think effective communication is key in all walks of life. It plays a pivotal role in building strong relationships and fostering teamwork in professional settings.

Q What film do you think everyone should watch, and why?

A It's got to be WALL-E! A story of love, environmentalism and humanity – all achieved with minimal dialogue. Plus, it's one you can enjoy with the kids!

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A Oprah Winfrey. An empowering female role model and philanthropist, with numerous strings to her bow. I'd love to have a conversation with the person behind all that success.

Q What is the best novel of all time?

A The Five People You Meet in Heaven (Mitch Albom). I love how this book makes you really think about the part played by people in your life, even when not at all obvious.

Q What legacy would you hope to leave behind?

A Inspiration. I really hope that through my work at Case Pilots, I can inspire the team to feel as passionate as I do about the possibilities in creating a level playing field when mass wrongdoings occur.

Q What is the most significant trend in your practice today?

A The future of technology. The tech team at Case Pilots continue to astound me with their innovative development of technical tools and solutions, to revolutionise access to justice.

Q Do you have any hidden talents?

A I have been known to write a poem or two in the past. Nothing published yet!

Q What is one work related goal you would like to achieve in the next five years?

A I can't wait for Case Pilots to work on the distribution of a class action settlement in the UK. Hopefully, that's sooner rather than later.

"ALL THE PEOPLE, SO MANY PEOPLE"

PRACTICAL CONSIDERATIONS IN BRINGING CLASS ACTIONS

Authored by: Robert Gradel (Head of UK Document Review Services) – FORCYD

Class actions are one of the fastest growing trends across the legal landscape, and as more jurisdictions across the EU adopt new regimes, this will only increase. However, bringing actions on behalf of very large numbers of claimants comes with a raft of practical considerations and challenges.

Opt In Versus Opt Out

There is a significant difference between opt in claims, where each claimant separately registers to become part of the claim, and opt out claims, which are brought on behalf of a generic class of claimant, with individual claimants identified at a later stage.

This article primarily looks at the challenges of opt in claims, where the challenges are immediate and the costs of dealing with them are front loaded.

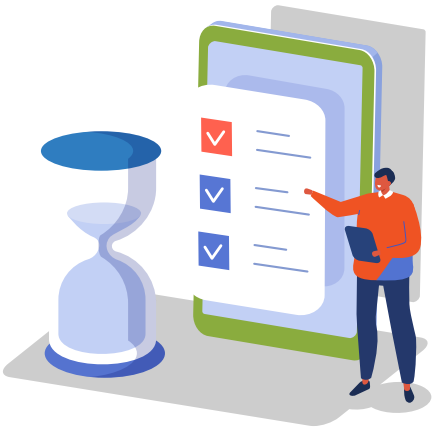
However even in opt out claims, these challenges should not be ignored or left until too late. This is discussed further towards the end of this article.

Initial Scoping Questions

Even before a claim is launched, any organisation bringing a class action should think about a range of practical questions alongside the legal issues in the case:

- How will claimants be identified and signed up?
- Will claimants be individuals, or corporate / commercial entities?
- What information and documentation will be needed to prove eligibility?
- What will the legal documentation look like and what compliance / KYC steps will be required?
- Are there any data privacy concerns?
- Are there limitation periods in play?

These questions may not be easy to answer. In the early stages of a claim there may be much that is unclear or speculative. The more that can be scoped out, the better, even if things change along the way.



Winning the Communication Battle

Dealing with large numbers of individuals with low levels of engagement in a claim is extremely challenging.

From the outset, a claimant organisation must assess how it will communicate with the cohort and what resources are needed. Will communication be by email, telephone, SMS or other social media? What about claimants who give invalid emails, and/or phone numbers on registration, whether deliberately or by error?

Members of the public will not easily hand over personal data. They need to be persuaded and their trust won. They may want to speak to humans, not just chatbots.

They will have questions and will expect responses. If trust is lost, or never gained, it will be increasingly difficult to get people back on board, if for example further information is needed from them.

Prior to a claim going live, a communication strategy should be devised that explains the background to the case, encourages sign up, keeps claimants updated regularly, and manages expectations about the likely timeframe for the claim and what will be needed from them. This will need to be carefully calibrated, and it should be assumed that the defendant(s) to the actions will be aware of all communications sent to the claimant cohort.

Project Management Mindset

The scale and complexity of class actions require longer term thinking and project planning.

It is important to map out the likely time frames and key points in time for the case, including what court documentation will need to be filed and when, and what claimant data will need to be included on those filings. It is essential to be able to keep track of every single claimant as the case works its way through the legal system.

Ongoing processes and accurate tracking are vital as the claimant cohort and each claimant's data can be ever changing. Client information can be dynamic as more information is requested and provided. Claimants may want to withdraw from the claim.

It is common for claimants to sign up multiple times for the same claim and/or with different claimant organisations. Claimants may pass away during the course of a claim, and co-claimants might divorce or separate.

And of course should the claim be successful or settle, checks and balances will be needed to manage payment of the proceeds, alongside an inevitable surge in communications from and to the claimants.

Technology

Underpinning all of the above is the need to get the technological infrastructure right. There are a mixture of requirements that may need multiple solutions – sending receiving and recording all communications with the cohort, case management, management information, review of the claimant data, but if there are multiple databases or platforms involved, will they align, and data move smoothly between them? Will they all be kept up to date in real time, and if not which will be the "source of truth?"

What About Opt Out Claims?

In opt out claims, it may be that some of these challenges can be postponed until much later in the case, but they will still arise if the case is successful.

Some jurisdictions may require some form of registration even in opt out actions and consideration needs to be given to how potential class members actually opt out.

There may be tactical or legal reasons to identify the cohort more precisely at an early stage.

Of particular interest is the Temper case, brought under the Dutch WAMCA collective action regime, where potential claimants could choose whether to opt in or out of the action. 20,398 opted out, and only 117 opted in. The claim failed. The defendant, Temper B.V. won the communication battle, publishing clear arguments as to why potential claimants should opt out and explaining how they could do so.

Conclusion

Class actions will be a major part of the legal landscape for the foreseeable future. Alongside the many legal questions that arise are a wide and varied set of practical challenges. Early consideration of these challenges and careful design of processes to meet them should form an essential part of the early planning stages of the claim, and will go a long way to ensure the smooth running of the claim.

Robert Gradel heads Forcyd's Document Review and Legal Projects division. Prior to joining Forcyd he established the Client Services Team at Keller Postman UK Ltd, a start-up class action law firm, servicing over 100,000 clients.

THE EU ARTIFICIAL INTELLIGENCE ACT: MAIN FEATURES AND NEXT STEPS

Authored by: Mélanie Bruneau (Partner) and Antoine de Rohan Chabot (Counsel) – K&L Gates

On 2 February 2024, the European Council, which is the body representing the EU Member States, agreed on a final version of the Artificial Intelligence Act (EU AI Act). This follows a provisional agreement reached on 9 December 2023 with the European Parliament on the EU AI Act. The text will now have to be formally adopted by the European Parliament, which is expected by the end of April 2024, before entering into force before becoming applicable in the course of 2026.

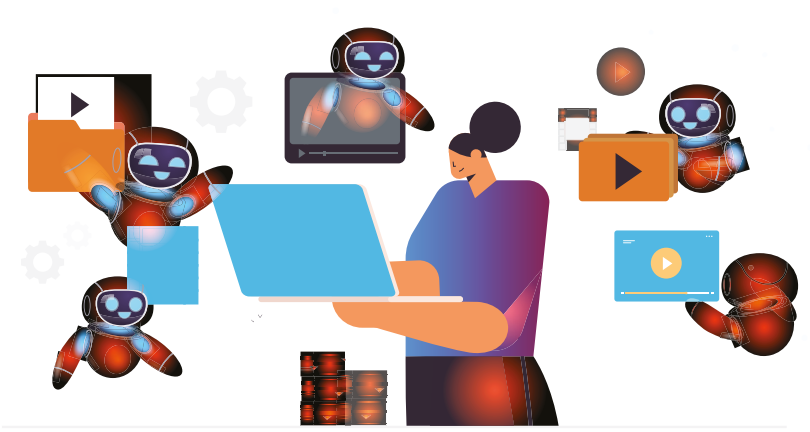
This is the outcome of a legislative process which started with the publication of the European Strategy on AI in 2018, the European Commission's White Paper on AI published in 2020 and a public consultation which elicited widespread participation from across the world.

Following this, the European Commission published on 21 April 2021 a proposal for an EU Regulation establishing harmonised rules on artificial intelligence.

The main objective of this EU AI Act is to position the European Union to become the first world leader in the development of a safe, reliable and ethical artificial intelligence (AI), by setting up horizontal rules for the development, commercialisation and use of AI systems.

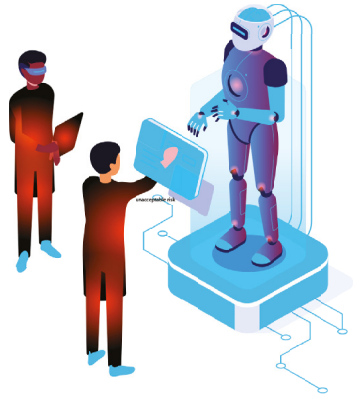
Main Provisions of the Drat EU AI Act

The draft EU AI Act defines an AI System as a "machine-based system designed to operate with varying levels of anatomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments" (Art. 3.1 EU AI Act).



Such a broad definition notably includes systems such as machine learning, logic and knowledge-based systems and statistical approaches, whether used on their own or as a component of a product.

In light of the potential risks associated with the use of a specific AI System in terms of infringement of fundamental rights and user's safety, the draft EU AI Act follows a risk-based approach, whereby legal intervention is adapted to the level of concrete risk classified as follows: (i) unacceptable risk, (ii) high risk, (iii) limited risk, and (iv) low or minimal risk:



The 'Prohibited Artificial Intelligence Practices' category (Title II EU Act) prohibits from the EU marketplace any harmful AI practices that are deemed to be a clear threat to people's safety and rights, and to present an unacceptable risk, such as:

- Biometric categorisation systems using sensitive characteristics (e.g. political, religious or philosophical opinions, sexual orientation, race) and real-time biometric identification systems by law enforcement authorities in locations accessible to the public (subject to certain limited exceptions);
- Untargeted extraction of facial images from Internet or video surveillance to create facial recognition databases;
- Recognition of emotions in the workplace and educational establishments;
- Social rating based on social behaviour or personal characteristics;
- AI used to exploit people's vulnerabilities (due to age, disability, social or economic situation); and
- AI systems that manipulate human behaviour to circumvent people's free will, such as toys using voice assistance encouraging dangerous behaviour of minors.

- Risk Systems' (Title III EU AI Act), while authorised, will be subject to a stringent set of rules and requirements, such as risk mitigation systems, high quality of data sets, logging of activity, detailed documentation, clear user information, human oversight, and a high level of robustness, accuracy and cybersecurity. Furthermore, an ex-ante conformity assessment, under which providers of high risk AI systems will be required to register their systems in an EU-wide database managed by the European Commission before using them. Both individuals and legal entities will have the right to lodge complaints about AI Systems to the relevant market surveillance authority (Art. 68b EU AI Act) and to receive explanations about decisions based on High-Risk AI Systems affecting their rights. The latter will need to be combined with the relevant information to be provided in case of automated decision-making personal data processing under Art. 22 GDPR.

- Examples of such High-Risk AI Systems include biometric identification, categorisation and emotion recognition systems, as well as certain critical infrastructures for instance in the fields of water, gas and electricity, medical devices, systems to determine access to educational institutions or for recruiting people, or certain systems used in the fields of law enforcement, border control, administration of justice and democratic processes.

- AI systems categorised as presenting a 'Limited Risk', i.e. that are designed to interact with physical persons, emotion recognition systems and biometric categorisation systems as well as AI systems used to generate or manipulate image, audio, or video content (i.e. deepfakes), shall comply with minimal transparency requirements to enable users to make informed decisions.

- Finally, the 'Low or Minimal Risk' category is expected to include the vast majority of AI systems such as AI-enabled recommender systems or spam filters. These AI systems may be used without requiring any 'specific compliance requirements under the EU AI Act. As the case may be, however, stakeholders may voluntarily, subject to the their Minimal Risk AI Systems to codes of conduct in order to apply the mandatory requirements applicable to High-Risk AI Systems.

The draft EU AI Act also introduces dedicated rules for General Purpose GPAI models which aim to ensure transparency along the value chain.

As such, for very powerful models that could pose systemic risks, there will be additional binding obligations related to managing risks and monitoring serious incidents, performing model evaluation and adversarial testing.

These new obligations will be implemented through codes of practices developed by industry, the scientific community, civil society and other stakeholders together with the European Commission.

In terms of governance, national authorities of EU Member States will be tasked to supervise the implementation of the new rules at national level, while the creation of a new European AI Office within the European Commission will ensure coordination at European level. This office will also supervise the implementation and enforcement of the new rules on general purpose AI models. In addition, for general purpose AI models, a scientific panel of independent experts will be in charge of issuing alerts on systemic risks and contributing to the classification and testing these models.

Scope of Application of the Draft EU AI Act

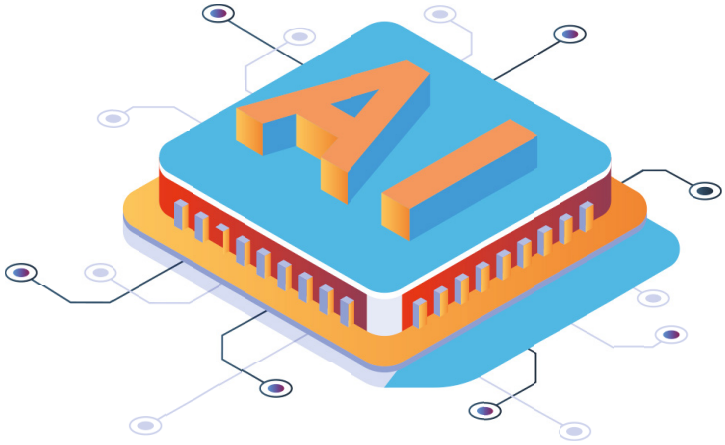
The draft EU AI Act shall apply to (i) providers of AI systems based in the EU or in a third country who place or put into service AI systems on the EU market, (ii) deployers of AI systems located in the EU and (iii) providers and deployers of AI systems based outside of the EU where the output produced by the AI system is used in the EU.

In addition, the draft EU AI Act specifies that it shall not apply to areas outside the scope of EU law and should under no circumstances affect Member States' competences in national security or any entity responsible for duties in this area. This provisional EU AI Act will not apply to people using AI for non-professional purposes and AI systems used exclusively for research and innovation purposes or exclusively for military or defence purposes.

Sanctions for Non-Compliance

The following fines will be imposed on companies found in violation of the EU AI ACT, notably by placing on the market or use of AI systems which do not comply with the requirements of the EU AI ACT:

- EUR 35 Million or 7% of global annual turnover for violations of banned AI applications;
- EUR 15 Million or 3% of their global annual turnover for violations of other obligations; and



- EUR 7.5 Million or 1% of their global annual turnover for supplying incorrect, incomplete or misleading information to the regulators

For administrative fines for SMEs and start-ups, the draft EU AI ACT provides that fines shall be calculated on the same basis as set forth above, whichever is lower.

Next Steps

The political agreement on the draft EU AI Act now requires a formal approval by the European Parliament and the European Council and will enter into force twenty days after its publication in the Official Journal of the European Union.

Once entered into force, it will progressively become enforceable, over a 36-month period as follows:.

- Within six months, for any provision relating to Prohibited AI Practices;
- Within nine months for codes of practice for GPAI;
- Within twelve months for GPAI not already placed on the market prior to the entry into force of the EU AI Act, for transparency obligation, notification to authorities and penalties;
- Within twenty-four months for GPAI which have already been placed on the market prior to the entry into force of the EU AI Act and all other provisions of the EU AI Axt; and
- Within thirty-six months for the obligation pertaining to High Risks AI Systems.

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LONDON – SINGAPORE

SHOWING ANTI COMPETITIVENESS THE RED CARD: THE ECJ'S HAT-TRICK OF SPORTS COMPETITION CASES

Authored by: Graeme Thomas (Senior Associate) and George Christodoulides (Associate) – Bryan Cave Leighton Paisner

Introduction

(NB: this article is a condensed version of the article published on BCLP's website.[1] The authors express their gratitude to TL4 for publishing this shorter form article).

The European Union's Court of Justice ("ECJ") went into the 2023 winter break in style, publishing a hat-trick of judgments (hereafter referred to as SuperLeague (C-333/21), ISU (C-124/21 P), and Royal Antwerp (C-680/21)) regarding the application of competition law to the governance of sport.

These judgments are an El Classico of sorts for sports and competition law aficionados, with far reaching implications for rule-makers (such as FIFA, UEFA, the ISU, national sports associations and other sports governing bodies), players, clubs, fans, and other sectors more generally.

This article briefly details the factual background of the judgments, before assessing key implications in terms of sports governance and competition law. The judgments strongly affirm the application of competition law to the governance of sports, and may subsequently result in many sports governing bodies revisiting the content and application of their rules.

Pre-Match Build-Up

The judgments in SuperLeague and ISU primarily relate to the legal status of authorisation rules: rules which, respectively, granted FIFA, UEFA, and the International Skating Union discretion on the authorisation of third party competitions. The ECJ was also requested to rule on the legality of eligibility rules which effectively sanction breach of the authorisation rules, and in SuperLeague specifically, FIFA and UEFA's original ownership of all media rights pertaining to matches between clubs. In Antwerp the ECJ was asked to rule on the legality of the home grown rules which require a certain percentage of players on a match sheet to be trained within the same national association for a certain duration.

A Game of Two Halves – Key Takeaways

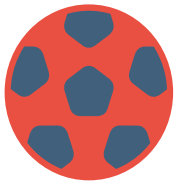
Sports as an economic activity and Article 165 TFEU

The ECJ re-affirmed that the practice of sport, insofar as it constitutes an economic activity, is subject to EU law. This includes the home-grown rules and the authorisation and eligibility rules detailed above. Whilst unsurprising, there was some uncertainty heading into SuperLeague in relation to the role of Article 165 TFEU.

1 https://www.bclplaw.com/en-US/events-insights-news/showing-anti-competitiveness-the-red-card.html

Article 165 provides that the Union shall "contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function".

Advocate General Rantos in his SuperLeague opinion considered that Article 165, as a "standard in the interpretation and application" of Articles 101 and 102 may be relevant for any objective justification of certain sporting rules that restrict competition. In that sense, Advocate General Rantos held open the idea that Article 165 TFEU could have scope in exempting sporting rules from the application of competition law.



The ECJ firmly rejected this idea, confirming that Article 165 TFEU must not be regarded "as being a special rule exempting sport from all or some of the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application". Whilst there are specific characteristics of sport, these factors should be taken into account when assessing whether the conduct in question should be considered as having the object, or effect, of the prevention, restriction or distortion of competition, rather than potentially disapplying the competition rules.

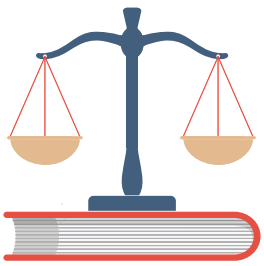
VAR Check - The Lawfulness of the Authorisation, Eligibility, and Home-Grown Rules

The authorisation and eligibility rules

The judgments in SuperLeague and ISU are of extreme importance and novelty: they apply certain responsibilities subject to public (or quasi-public) undertakings through Article 106 case-law to private undertakings which, by their own means, occupy functionally equivalent roles.

Article 106 TFEU subjects public undertakings, and/or undertakings granted special or exclusive rights by a Member State of the Union, to the rules of the Treaties (particularly the rules on competition). Article 106 applies in tandem with Articles 101 and 102 to these types of undertakings, usually prescribing stricter obligations by virtue of any anti-competitive behaviour being attributable to state measures.

The ECJ in SuperLeague and ISU extended the principles inherent in Article 106 to undertakings such as FIFA, UEFA, and the ISU, which whilst not being public undertakings, and lacking an exclusive or special right granted by a Member State, have de jure or de facto power to determine which undertakings are authorised to engage in their economic activities, and to determine the conditions under which that engagement may be exercised. The ECJ noted that an undertaking (i.e. FIFA, ISU) being able to exercise this power gives rise to a "conflict of interests", putting itself at an "obvious advantage" over its competitors and denying equality of opportunity between undertakings. The powers to determine the conditions on which a competitor may access the market (such as the authorisation rules) must be placed within a framework of "substantive criteria which are transparent, clear and precise" which ensures these powers are exercised without discrimination, and that these must be placed within a framework of "transparent, non discriminatory detailed procedural rules" which allow for sanctions (such as the eligibility rules) only to the extent that these are "objective and proportionate".



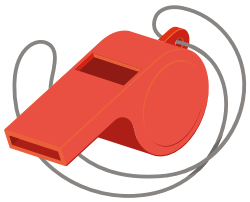
The Court explains that these requirements "are all the more necessary when an undertaking in a dominant position, through its own conduct…places itself in a situation where it is able to deny potentially competing undertakings access to a given market".

The authorisation and eligibility rules did not satisfy this criteria. The ECJ concluded that these rules were therefore restrictive by object under Article 101 TFEU, and, in the case of SuperLeague (including the announcements from FIFA/UEFA which acted to implement these rules), constituted an abuse of dominance under Article 102.

This conclusion by the ECJ is significant for sports governing bodies which have the effective role of authorising third party competitions whilst undertaking the economic activity of organising their own competitions. Any authorisation rules (in combination with the threat of sanctions) which are not subject to objective transparent and precise criteria with corresponding procedural rules are liable to be found as infringing Articles 101 and/or 102 TFEU, and therefore void (unless they are exempt under Article 101(3) or objectively justified).

In addition, the read-across of Article 106 case-law in relation to private undertakings potentially opens the door in respect of other obligations pursuant to Article 106 in combination with Articles 101 and 102.

Lastly, a read-across of the judgments in ISU and SuperLeague is unlikely to be confined to sports governing bodies. These judgments are likely applicable and significant for any entity which, through its own conduct, has unfettered ability to authorise or reject any potential competitor from engaging in an economic activity.



The Home-Grown Rules Back to 4-4-2

The ECJ in Royal Antwerp was slightly less adventurous than in SuperLeague and ISU, outlining that it is for the referring court to reach a position as to whether the home-grown rules are restrictive of competition by object or effect.

The ECJ restated the factors relevant

for finding a restriction of object which, in the case of sports includes the specific characteristics of sport, in addition to general factors such as the functioning and structure of the market to assess whether the restriction is sufficiently harmful to competition.

In relation to the legal and economic context of home-grown rules, the ECJ noted that it is generally open for sports governing bodies to adopt rules governing the participation of athletes, provided no EU law rights or freedoms are limited. In relation to the characteristics of sport, the ECJ tendered a suggestion that it is legitimate for sports bodies to regulate the conditions in which football clubs can put together teams, and that a central characteristic of football is sporting merit such that teams have a certain equality of opportunity.

In relation to the real conditions of the functioning of the 'market' the ECJ noted that the rules governing sport may "continue to refer, on certain points and to a certain extent, to a national requirement or criterion".

The ECJ affirmed that it is for the referring court to assess the content of the home-grown rules to conclude whether they present a sufficient degree of harm to competition in limiting the access of football clubs to 'resources' (players) essential for their success upstream on the player recruitment markets and downstream in relation to inter-club matches[2]. To that extent, the ECJ stressed the particular importance of the proportion of players the home grown rules cover, and that it is necessary for the referring court to take into consideration the characteristics of sport and the economic and legal context of the home-grown rules as outlined above, to assess whether the home-grown rules have the objective of restricting clubs' access to players, of partitioning or re-partitioning markets according to national borders, or of making interpenetration of national markets more difficult by establishing "national preference".

Offside! The Ancillary Restraints Doctrine Does Not Apply to "Object" Restrictions

One of the most intriguing aspects of the judgments relates to the assessment of the ancillary restraints doctrine. The ancillary restraints doctrine acts to exclude from the application of Article 101(1) agreements which are justified by the pursuit of a legitimate objective and which are necessary and proportionate towards that objective. This doctrine can apply to particular restrictions which are necessary and proportionate towards a pro-competitive commercial agreement (Pronuptia, Remia), or towards legitimate objectives in the public interest (such as in Wouters).

It was anticipated that the concept of ancillary restraints would play a big role in the judgments of ISU and SuperLeague. However, the ECJ gives the concept very short shrift, outlining that the Wouters and Meca-Medina line of case-law does not apply in relation to object infringements of Article 101, therefore only Article 101(3) can exempt object restrictions from Article 101. The ECJ outlined that the ancillary restraints doctrine applies only to restrictions of Article 101 by effect.

This conclusion is perhaps unsurprising in relation to restrictions ancillary to pro-competitive commercial agreements (which, in light of a pro-competitive objective, in some way presupposes that an object restriction isn't applicable). However this conclusion is slightly surprising in relation to case-law such as Wouters and Meca Medina which did not obviously exclude the possibility of an object restriction being exempted from Article 101 when pursuing a legitimate public policy objective.

Article 101(3) and Objective Justification in Sports Cases

The ECJ in SuperLeague and Royal Antwerp outlined that the individual exemption in Article 101(3) may apply to the authorisation rules and the home-grown rules. However the ECJ stressed in SuperLeague that, no matter how "laudable" the principles and values of football are, in particular the "open, meritocratic nature" of the competitions concerned and the form of "solidarity redistribution" generated by them, any pursuit of these objectives must translate into "genuine, quantifiable efficiency gains" in order to be exempted under 101(3). Similarly in Royal Antwerp the ECJ stressed that the benefits of the home-grown rules must be assessed in relation to "whether those rules are of an economic, statistical or other nature".

It is clear therefore, that insofar as sporting rules may be exempted by Article 101(3) in respect of any 101(1) findings, the benefits of such rules must be genuine quantifiable efficiency gains, and cannot rely on the social benefits of organised sport. The ECJ applied the same considerations in respect of the efficiency gains limb of the "objective justification" exemption under Article 102 (finding that in SuperLeague the 'objective necessity' limb was not available).

Media Rights - Exclusive Exploitation

In SuperLeague the ECJ also considered the compatibility of FIFA and UEFA's rules which granted these bodies complete control over the supply of rights related to interclub competitions (such as the power to authorise the broadcast of matches and events involving those interclub competitions) against Articles 101 and 102 TFEU.

The Court considered that these media rights (which are a key source of revenue) are a parameter

2 Interestingly the ECJ did not assess the impact of the home-grown rules on the labour market as a relevant market.

of competition between clubs, which FIFA and UEFA's rules removed from the control of those clubs, thereby preventing any competition between these clubs in the marketing of media rights, but also affecting the functioning of competition across a range of downstream media markets to the detriment of consumers.

The ECJ concluded that, unless it could be proven that these rules were justified under Article 101(3) or objectively justified against Article 102, they must be regarded as an object infringement of Article 101 and an abuse of a dominant position under Article 102. To that end, comments from the ECJ in respect of potential efficiency gains for buyers of rights from two exclusive vendors (including UEFA and FIFA's brand power and ability to sell rights for a whole competition rather than on a per-match basis), and the apparent 'solidarity redistribution' of revenue accrued from these rights to clubs, players, and ultimately television viewers, may be instructive in this regard.

The Importance of Judicial Review

The Commission previously found that the arbitration rules in ISU (which confined appeal against the ISU's implementation of its authorisation rules before the Court of Arbitration for Sport ("CAS") in Switzerland) reinforced the infringement of Article 101 identified (in relation to the authorisation and eligibility rules). While the ECJ recognised that requirements relating to the effectiveness of arbitration proceedings may justify the judicial review of arbitral awards being limited, this judicial review must be able to cover the question of whether those awards comply with fundamental provisions of EU law such as Article 101 and 102, as Articles 101 and 102 directly create rights for individuals which must be protected by national courts.

It would not be sufficient for an affected party to bring damages proceedings before the Courts or for a complaint to be made to the Commission or national competition authority in substitution of this direct right.

The Court concluded that CAS awards must be subject to judicial review by a court that can refer questions of EU law to the ECJ. This conclusion is significant beyond the remit of sports governance to any quasi-regulatory body with rules which affect competition within the EU, where rights of appeal are subject to an arbitral body unable to refer questions of EU law to the ECJ.

Looking to Next Season

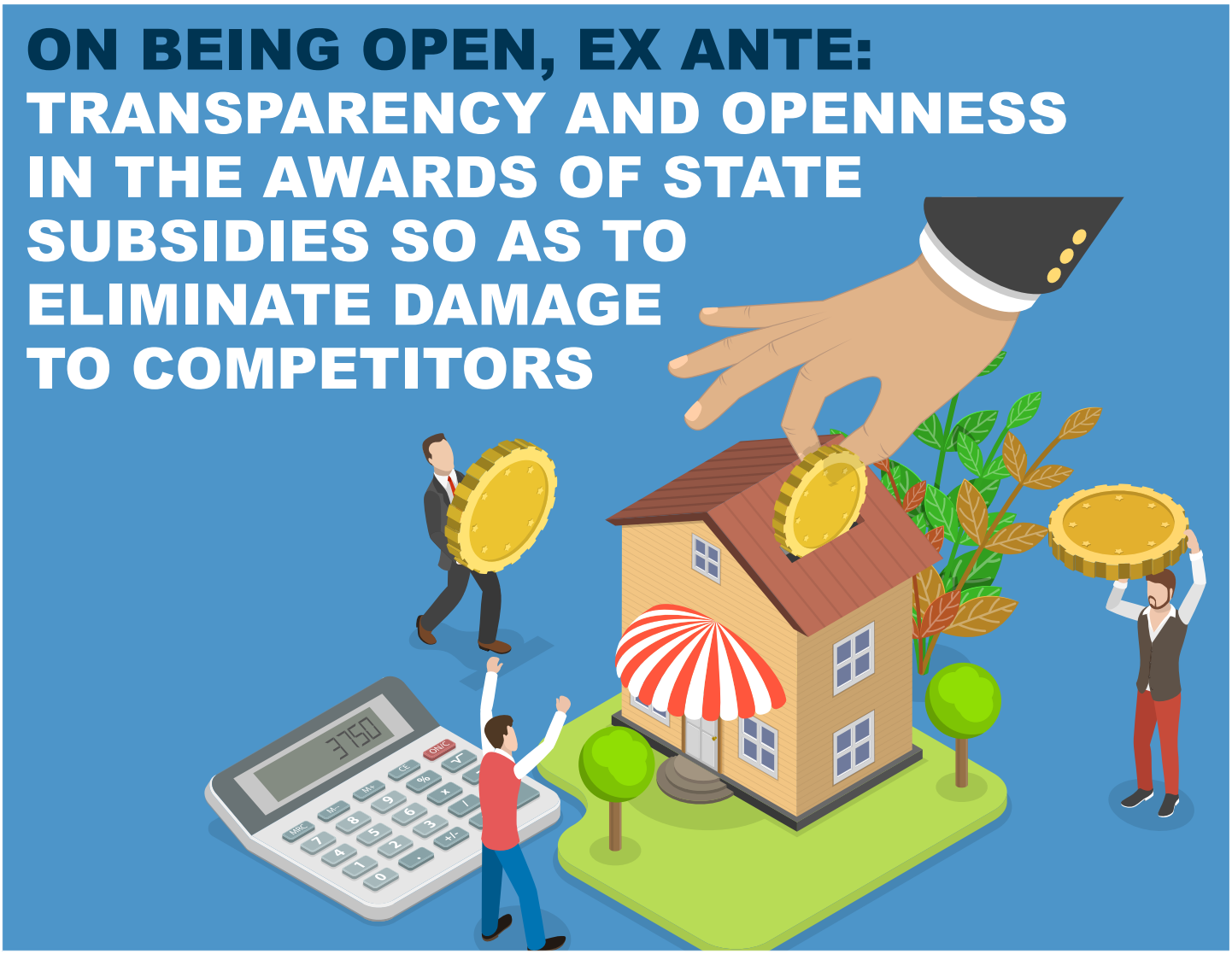
If 2023 was a bumper year for sports and competition law aficionados, 2024 will also not disappoint as sports bodies, clubs, players, and fans absorb the impact of these judgments.

Competition lawyers will be keenly looking out for the final judgment of the referring court in Royal Antwerp in respect of its findings in relation to the legitimateness of the home-grown rules. Furthermore, lawyers will be keeping an eye on the forthcoming ECJ decisions in the requests for preliminary rulings in respect of non-poaching agreements between Portuguese clubs and caps to agent fees established by the new FIFA Football Agent Regulations (FFAR) (in particular following a recent FA Rule K arbitral award in England that such caps (if implemented) would amount to object and effect infringements and an abuse of a collectively dominant position under the Competition Act 1998). That FA Rule K decision has created significant interest within English football and had an impact on the scope of the FA Football Agent Regulations which came into effect on 1 January 2024 without inclusion of the commission cap; the ECJ decision will generate similar interest from the football sector.

In relation to sports governance, and other sectors more widely, it would be wise for bodies which are able to authorise or reject any potential competitor regardless of a measure from a state to undertake a competitive assessment of their rules in line with requirements under Article 106 in tandem with Articles 101 and 102, in particular to the authorisation and eligibility of third party competitors.

In relation to SuperLeague especially it remains to be seen whether the Commercial Court in Madrid will consider that Article 101(3) and the objective justification defence for Article 102 apply. The oral hearing has been listed for March 2024. It is worth emphasising that, even should the restrictions assessed in SuperLeague fail to be exempted, it is still not the case that the SuperLeague project will be ultimately allowed to proceed, as FIFA and UEFA may still reject the project on the basis of "substantive criteria which are transparent, clear and precise". The SuperLeague decision will certainly embolden those who still hope to rekindle the project, notably the European clubs who wish to break the Premier League's commercial dominance, but it will not be the last word on the matter.

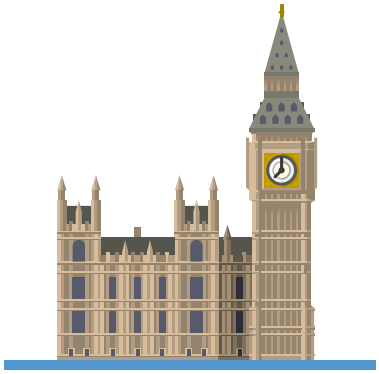
ON BEING OPEN, EX ANTE: TRANSPARENCY AND OPENNESS IN THE AWARDS OF STATE SUBSIDIES SO AS TO ELIMINATE DAMAGE TO COMPETITORS



Authored by: Alan McLeod (CEO) – McLeod & Co.

If there is no openness and transparency in the awarding of subsidy then competitors, markets and our country cannot thrive.

In 2016, I led a State Aid Case in the Court of Session [LCMS, (formerly Port Services), against Highlands and Islands Enterprise, (an emanation of the Scottish State)]. This Case is now the subject of a Complaint to DGCOMP



in the EU. Whilst awaiting DGCOMP's Judgement, I have drafted a Petition on Subsidy Law. The UK Parliament has just accepted this Petition. It is now being considered by the Petition Committee. This Petition should be of interest to every reader of Competition.

Why would I spend seven years fighting such a Case, raising a Complaint in Europe and now Petitioning Parliament? The answer is quite simple. I have seen first-hand what Adam Smith argues for. Smith argues that markets and trade are social goods but for only so long as there is competition and regulation. Why? Competition keeps selfishness and rapacity at bay. In the absence of competition, Smith argues that markets are susceptible to being taken over and dominated by monopolists. This is a profitable outcome for the monopolist but is disastrous for everyone and everything else.

In the film* 'Four Weddings and a Funeral' *the vicar asks, "if anyone can show with just cause why they may not lawfully be joined together, let them speak now or else hereafter forever hold their peace". Charles (Hugh Grant) is called upon to utter his truth. The marriage ceremony crashes to an inglorious end with his betrothed delivering a powerful blow.

Planning Applications are somewhat similar. How much better it is that we are alerted to proposed developments before they are consented to rather than having the information hidden from us until it is too late and the spade is in the dirt.

My Petition works on the same principle. Competitors are alerted to the intention to award subsidy to their competitor before, not after, the cash hits the competitor's account.

Despite delivering 78,000 pages of evidence to the grantor of State Aid in my Case, the grantor continues to say that the offer to prove competition is too late. Why? Because the grantor did not know there would be damage to competitors when it awarded. This is madness! This is like a dictator sticking his head in the sand before he presses the red button so that he can claim plausible deniability. I am sure the drafters of State Aid and Subsidy Law never intended for grantors to claim plausible deniability on account of their ignorance.

The UK, EU, OECD and WTO all agree that Subsidy is distorting. So, why is it allowed? The answer is that it is not. That is unless there is Market Failure. If the market is failing, then the State can intervene. Adam Smith would agree with this. Step forward the genius of Vilfredo Pareto who more than a hundred years after his model was published is still used to identify Market Failure. In the last seven years, I have not met one officer of a subsidy-awarding-body who has heard of Pareto, never mind what it means for a market to be either Pareto efficient or inefficient. (I shall explain Pareto Efficiency and Market Failure in a follow-up article).

Whilst I was fighting the Case at hand, HM Treasury wrote to my team confirming that the UK was a political economy that sought to prosper because it was committed to open and fair competition. The Treasury, Adam Smith and most if not all readers of Competition are on the same page in this regard.

I do concede that they can offer a counter-factual argument to my Petition. Their argument runs like this. The cost of sacrificing a few competitors for the greater good is negligible compared to the new Gross Value Added that is unleashed by the intervention of the State through its backing of the monopolist. This is in philosophical terms extreme Utilitarianism bordering on Sociolatry where the feel-good of the many justifies the destruction of the troublesome few. A recent example of this weird ethic was the proposition that the UK should not lockdown in the face of covid but rather "let it rip" given that those who might die would die regardless, thus rendering them expendable for the greater good. I therefore go beyond Smith and argue monopolists are not just bad for the market but are savagely destructive to society.

When all is said and done, a competitor has an inalienable right to compete in a marketplace without fear of the State intervening to finance one competitor to the detriment of others. My Petition simply asks that each competitor is given a heads-up so that if the market is going to be inevitably distorted where there is no Market Failure by an award of Subsidy then, like Planning Law, and wedding ceremonies, market operators can object and force the grantor and applicant to justify themselves in the crucible of public opinion and the amphitheatre of democracy.

My Petition will result in a net success for the UK. The State will only be able to use taxpayers' cash where there is (i) market failure (ii) increases in GVA (iii) and no damage to competition by giving competitors advance warning of intervention. My Petition will result in more additional tax revenues for the Treasury from carefully targeted, open and transparent investment of public subsidy. What is not to like? Especially when society knows about it before it is allowed to happen.

The Petition reads:

"To Introduce new rules on transparency of subsidy applications and awards.

We want the Government to require subsidy-awarding bodies to publish applications for subsidy before subsidy is provided, to improve openness and transparency, so competitors are aware of intervention in their markets.

The Subsidy Application should be published after the awarding body has decided in-principle to award a subsidy. An applicant should also be required to confirm that no relationships exist between the applicant and the awarder. As it stands, openness and transparency only apply after the event, i.e. society only learns about the award after the awarding deed. This means competitors only learn about the impact on their market after the Award and the Damage is done."

ThoughtLeaders Competition

Meet ThoughtLeaders

Paul Barford
Founder/
Managing Director
0203 398 8510
email Paul

Chris Leese
Founder/Chief
Commercial Officer
020 7101 4151
email Chris

Danushka De Alwis
Founder/Chief
Operating Officer
020 7101 4191
email Danushka

Peter Miles
Head of Event
Production &
Community Director
020 3481 8843
email Peter

Helen Berwick
Commercial Director
Competition
0203 433 2281
email Helen

Maddi Briggs
Strategic Partnership
Senior Manager
020 3398 8545
email Maddi

Maximus McCabe-Abel
Strategic Partnership
Executive
020 3998 9908
email Maximus

Our Competition Community Partners:

AlixPartners

ANGEION GROUP INTERNATIONAL

BRG

BHN | BLACKHAWK NETWORK

Fountain Court

Gilardi & Co LLC

RBB Economics

epiq