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Competition MAGAZINE

ISSUE 5

RIDING THE RAPIDS

Q2'S COMPETITION LAW AND LITIGATION UPDATE

INTRODUCTION

"Competition has been shown to be useful up to a certain point. But co-operation, which is the thing we must strive for today, begins where competition leaves off"

- Franklin D. Roosevelt

We are delighted to present Issue 5 of the TL4 Competition magazine, our second edition of 2024: Riding The Rapids: Q2's Competition Law & Litigation Update. Delving into the ever-changing landscape of law and litigation, this edition navigates countless unique topics and covering a range of jurisdictions.

We extend our sincere thanks to all the authors, contributors, readers, and to our valued community partners for their support. We hope that you enjoy reading Issue 5 of the magazine.

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The European Class Action Forum 2024
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Amsterdam, Netherlands

The UK Competition Law Forum
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UK Collective Redress Circle
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Royal Berkshire Hotel, UK

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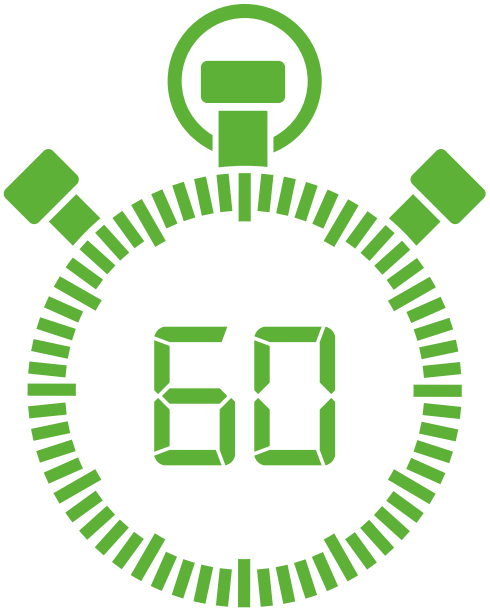
European Competition Law Regulatory Circle
17 - 18 October 2024
Royal Berkshire Hotel, UK

EU Competition Litigation Forum
20 November 2024
Amsterdam, Netherlands

UK Enforcement & Investigations Forum
4 December 2024
Central London

60-SECONDS WITH:

CLAIRE VAN DER ZANT
DIRECTOR OF STRATEGIC PARTNERSHIPS
SHIELDPAY



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

A Strange and exciting is an interesting question. For me, excitement always comes from people, so designing and facilitating offsites where you get to forge new levels of relationships and engagement with your team is where I get most excited. They can often feel strange to begin with, especially if you're all staying away together, but by the end it feels like you've made new friends and family.

Q What motivated you to pursue a career in law?

A I love driving change, and there are a few industries that are inherently more challenging to transform. The legal sector has an incredible opportunity to go on a transformation journey, and I'm so lucky to be in a position to be part of that drive towards positive change.

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

A Weight training, gardening, cooking, hiking and riding my motorbikes. Heaven.

Q What piece of advice would you give to your younger self?

A Having a squiggly career isn't a weakness, it's a super-power. Worry less about not having a 'normal' career path.

Q What are the biggest challenges facing legal practitioners nowadays?

A Time. Compliance, regulation and risk can heavily impact on billable hours, not to mention adding additional stress and pressure to people's roles. Technology has an important role to play here to help lawyers and firms get back to what they do best - law.

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

A *The Surrender Experiment* by Michael Singer. It's a wonderful journey of a man who decides to stop resisting the universe and follow the path that is laid before him. A professor turned yogi who went on to found WebMD. Such a beautiful read.

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

A Nelson Mandela. His patience, belief in good and respect for people in the face of the greatest adversity was awe inspiring and to be able to have dinner with him would be a privilege.

Q The greatest film of all time is…

A *The Big Blue.* I still listen to the soundtrack today.

Q What legacy would you hope to leave behind?

A The legacy I want to leave behind is probably not achievable in my lifetime, because I think I was born to live amongst the stars. So in a different life, the legacy of being one of the first people to colonise Mars. Let's see, you never know!

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

A Shieldpay isn't a law firm, but from a supplier/partner perspective, we see a growing appetite to move away from handling client money, though I think there's a lot more to do before law firms completely move away from handling funds.

Q What is the biggest life lesson you have learned?

A If you don't ask, you don't get.

Q What is one goal you would like to achieve in the next year?

A Personally, to climb one of the peaks in the Dolomites. Professionally, to establish Shieldpay as the Monzo of corporate banking and to disrupt the last big area of banking that is ripe for change.

GUIDING A SUCCESSFUL COMPENSATION PAYOUT PROCESS: A BLUEPRINT TO DISTRIBUTION

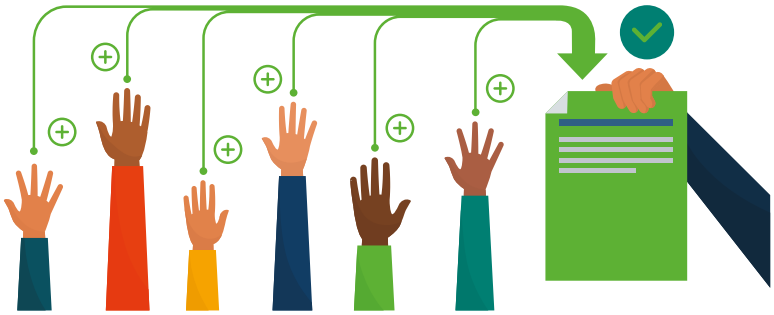
Authored by: Claire Van Der Zant (Director of Strategic Partnerships) – Shieldpay

Getting litigation right is complex when it's between two individuals but when it involves thousands, this complexity is exponentially greater. From commercial litigation and international arbitration through to class actions and GLOs however, we are seeing increasing complexities in managing settlements for litigation.

Class actions for example have long been thought of as a primarily American phenomenon. Now however, such actions are growing in popularity outside the US.

Class action cases are rising in Europe: according to the 2023 CMS European Class Action Report, as of 2022, the total claimed value of class actions in the UK is in excess of €120bn, up from €89.5 billion in 2021

Recent high-profile class action cases include a £3.3 billion lawsuit brought against EE, Vodafone, Three and O2 for customer 'loyalty penalties',

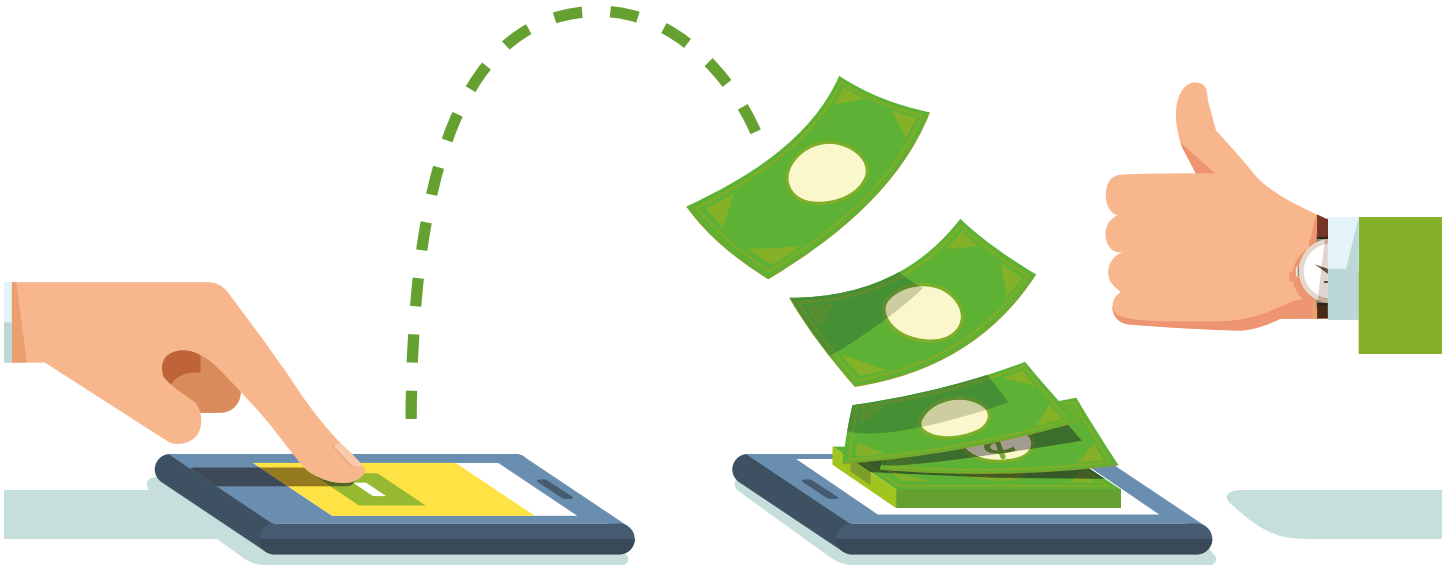


announced in December, and in 2023 the EU mandated minimum procedural rules to facilitate class actions in its Representative Actions Directive. In Australia too, class actions are a growing trend with more than $1 billion in settlements approved between 1 July 2022 and 30 June 2023.

High-profile GLOs are also becoming more prevalent and of increasing numbers of claimants. The 'Dieselgate' scandal for example is reported to include 1.25m claims against 1,500 defendants, with potential settlements valued in the billions.

While much of the attention in such cases goes to the David v Goliath stories of people extracting justice from powerful organisations, much less attention is paid to the mechanics of delivering compensation. With potentially thousands of payees and potentially billions in compensation to be paid, bringing a distribution to a close is a huge logistical challenge.

Planning for compensation payments early on in such actions is key and should be considered as soon as litigation is



commenced. This will ultimately mean a simpler, streamlined and more secure process.

Taking The Pain Out of Payments

The task of managing payments to payees can be momentous. Whether you're distributing to one claimant or thousands, the process of verifying parties, holding and distributing large sums of money and processing international payments is neither straightforward nor easy. And yet, these payments are ultimately why these cases exist, and are crucial to getting justice and recompense to those who've brought it. And yet, these payments are the ultimate point of an action and crucial to giving justice and recompense to those who've brought it.

Getting it wrong can not only cause further anxiety to claimants who may already be fatigued by a lengthy legal process but can also undermine the reputation of the law firm involved. The payment process cannot be an afterthought.

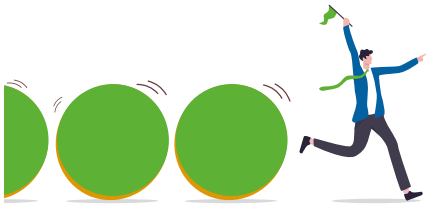
How do we ensure that the distribution of funds, therefore, is set up for success?

At the outset, firms involved should be getting clarity on key questions:

- How many claimants are there (confirmed or estimated), and where are they based?
- Are the claimants individuals, corporates or a mixture, and are there any special considerations to be made, such as catering for vulnerable clients?
- What's the value of the settlement and what are the amounts due to claimants?

Asking these questions early will allow a firm to determine the most appropriate payout method and estimate the distribution cost, giving much needed clarity.

Alongside this, a robust data policy will need to be developed to manage the collection, sharing and processing of personal and financial information, such as payee bank accounts and personal details. Poor data handling risks noncompliance, cyber-security and inefficiency in the payout process, whereas modern data handling solutions can help law firms work with accuracy, speed and security.



Go With The Flow

Another key thing to consider at the outset will be the funds flow, in other words, the question of how payments will be made.

Payee information will be crucial here but where is that information coming from? This is vitally important as any errors could lead to misdirected payments and financial loss. With many thousands of payees however, handling this data can get very complicated, very quickly.

Questions to ask at this stage will be where claimant data is coming from; CRM software, a case management system, a claims administrator? Dare we say from a spreadsheet?

Having this information early will ensure that the project can be properly set-up with clear steps and processes agreed to embed a systematic and secure process for the handling of data.

Equally, where will the funds be coming from? It could be from just one source, or it could be from multiple sources, and potentially from multiple jurisdictions, in multiple currencies. And once funds have landed, who will authorise these payments? Planning the flow of funds will provide a smoother process. Good for payees, good for your firm.

Building Trust

The information age has empowered ever more people to seek out information and redress where they've been wronged by a business or other organisation. This means a growing market for litigation and

class action. Indeed, the Portland Class Action Report 2023 found that 64% of UK respondents would sign up to a class action, given the chance.

The other side of the information age however is the rise of financial scams, often very sophisticated, which may exploit high-profile cases and convince people to hand over personal and financial data, in pursuit of claims which don't exist.

Gaining claimant and public trust is essential, and again, ensuring that payments are planned and communicated effectively will be key to upholding that trust. Communicating early and clearly around payments is an important piece to get right. Explaining the process and any partners that you're working with to educate and inform claimants is key to the process.

The Right Partner

Handling large and/or complex claims brings with it many challenges and risks, and it's easy to postpone thinking about payment solutions until the case is won. The problem for law firms, however, is that they don't necessarily have payments expertise in-house, and processing payments in-house can also cost a lot of billable time.

Partnering with a payment provider then is an increasingly popular choice and will likely continue to be the preferred approach, as the market for multi-party claims grows. Asking key questions early in the process will be key to determining the kind of payment partner that will ultimately be needed, so these questions should be central to determining a strategy.

Litigation is playing a critical and growing role in delivering justice to those who have been wronged by institutions, governments and businesses.

There is an enormous amount of work involved by legal and administrative teams to successfully achieve a settlement, but getting the money into the hands of claimants is the aim for every case.

As this regime develops in the UK and Europe, and across the world, developing a blueprint to deliver a successful litigation settlement will determine public perception of whether these lawsuits are viable mechanisms to pursue justice. We hope that by giving a comprehensive view of how to complete a distribution, you can continue to evolve and innovate your own blueprints and deliver bigger and better outcomes for claimants in the future.

For more information, download our free eBook here.

THERE'S METHOD(OLOGY) IN THE MADNESS: EXPERT METHODOLOGY IN CAT COLLECTIVE ACTIONS

Authored by: Ian Li (Solicitor) – Austen Hays

It is well-established that expert methodology is fundamental to quantifying damages in competition claims. Buzzwords like counterfactuals, pass-on and regression analyses feature routinely at the CAT. For follow-on cartel claims, the discussion on expert methodology primarily trails the disclosure and witness evidence procedures. However, since the rise of the UK collective actions regime, expert methodology has become more front-loaded due to the requirement for collective actions to be certified by the CAT before substantive proceedings begin.

The CAT's gatekeeper role also requires the CAT to be satisfied that the expert's report(s) establish a 'blueprint to trial'.

At an early stage of the proceedings, experts must provide a sufficient level of detail to meet the CAT's satisfaction and arguably navigate a fluctuating methodology threshold, whereby more recent certifications such as Gormsen v Meta[1] are trending towards a seemingly higher threshold. Whilst not based on merits, by the time the expert methodology reaches the CAT's eyes, it must be fully articulated. This will have profound effects on claimant firms and funders when calculating expert costs (particularly in the pre-certification stage), and when such costs arise

Has The Expert Methodology Threshold Changed in 2024?

The Pro-Sys test, transplanted from Canada into UK caselaw, set the threshold floor for expert methodologies to meet the evidential hurdle required for the certification of a CPO. The expert methodology must not be purely theoretical, but plausible and grounded in facts.[2] It is a non-onerous low bar that only requires defeating strike-out/reverse summary judgment.[3] This caused a wave of collective claim filings, some of which have now passed certification. There is a general feeling among competition litigation practitioners that these types of claims have become increasingly creative, and true consumer claims have been strong-armed through the CAT by conjoining a competition law dimension.

1 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others [2024] CAT 11
2 Pro-Sys Consultants Ltd v Microsoft Corp [2013] SCC 57
3 Walter Hugh Merricks CBE v Mastercard Incorporated and Others [2020] UKSC 51

The CAT has since restricted the floodgates by expanding its 'broad axe' to protect defendants from litigating unviable proceedings.

Since 2022, certain claims have failed certification and were invited to 'have another go'.4

Having failed initially to evince an adequate expert methodology, and by corollary a suitable 'blueprint to trial', some of these claims are now passing the certification stage on the second attempt in 2024 (see Gormsen v Meta and Gutmann v Apple).

The CAT's elucidatory approach has shed light on the level of granularity required for the blueprint. Every CAT ruling is assembling new criteria required to prove an adequate expert methodology. At the very least, these criteria are arguably not novel, but have now been elucidated expressly by the CAT and must be satisfied moving forwards. Amongst other things, the expert must:

(1) Produce a methodology for each cause of action alleged[5]

(2) Identify the correct counterfactual of which there should only be one[6]

(3) Articulate fully the disclosure required by the defendant to avoid what the CAT calls the St. Augustine fallacy[7]

(4) Ensure the methodology is plausible/ credible[8]

(5) Identify loss on a class-wide basis, not a gain to the Defendant[9]

(6) Identify problems within their methodology with suggestions to overcome them[10] and address issues raised by the Defendant(s) or the CAT. Even where a Defendant does not raise a point, the CAT[11] may, of its own volition, inspect any prospective issues which may derail the blueprint to trial.[12]

Whether the aforementioned criteria constitutes a higher threshold than the Pro-Sys test that the CAT started with may depend on which camp you reside in.

Defendant-side parties might argue that the CAT has always necessitated this threshold to ensure that a claim is suitable for certification, whereas claimant-side firms and funders will lament that new rulings are supplying additional tick-box criteria that must be included in the methodology.

This writer avers that the requirements for new certifications are markedly different to previous rulings, and that certain CPOs which have already been granted would receive higher scrutiny, or even fail to meet the methodology threshold, if presented at a certification hearing now. An example is the Maritime car carriers claim.[13] Here, the Appeal Court ruled that the CAT erred by stopping short of interrogating the PCR when the Defendants brought a rival theory of overall pricing. The Appeal Court was damning and criticised the CAT for not addressing the problem where it 'seems almost inevitable that [the expert] will in due course have to modify or adapt its methodology to address the Appellants' overall pricing case'. Here, the Appeal Court raised the bar. If the claim reached the certification hearing now, it is quite possible that it would not have been granted a CPO.

Hunter/Hammond V Amazon Carriage Ruling

Carriage claims, where two competing PCRs clash to establish who is more suitable to represent the claimants, present a further complication, which also serves to bring expert methodology earlier in the process. In this ruling, the CAT had to decide which PCR was most suitable to apply for the CPO in relation to a case about whether Amazon Marketplace self-preferenced its own products and those who purchased its fulfilment services over other retailers.[14] Crucially, the key differentiator between each of the PCR's proposals was the expert methodology, in particular, the counterfactual identified. In the case of Hammond, his expert identified the correct counterfactual which was 'closely aligned to the abuse'. Hammond's expert methodology was clearly and distinctly better to articulating the claim. By providing a methodology that approximated the functioning of the Amazon algorithm, the CAT considered Hammond's methodology to be favourable and allowed Hammond to proceed in a close fought race. Hunter/Hammond has highlighted the importance of addressing the correct

4 See for example: Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others and Mr Phillip Evans v Barclays Bank PLC and Others [2022] CAT 16; Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others [2023] CAT 10; and Mr Justin Gutmann v Apple Inc., Apple Distribution International Limited, and Apple Retail UK Limited [2023] CAT 35.
5 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others [2023] CAT 10
6 London & South Eastern Railway and Others v Mr Justin Gutmann [2022] EWCA Civ 1077
7 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others [2023] CAT 10
8 Mr Justin Gutmann v Apple Inc., Apple Distribution International Limited, and Apple Retail UK Limited [2023] CAT 67
9 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others [2023] CAT 10
10 MOL and Others v Mark McLaren Class Representative Ltd [2022] EWCA Civ 1701
11 Ibid
12 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others [2023] CAT 10
13 MOL and Others v Mark McLaren Class Representative Ltd [2022] EWCA Civ 1701
14 Julie Hunter v Amazon Inc and Others and between Robert Hammond v Amazon Inc and Others [2024] CAT 8

methodology and has introduced an element that further shifts the importance of expert methodology: Not only will PCRs have to contend with ensuring they present an adequate methodology at certification, but may have face the prospect of a show-down in the event of a carriage hearing.

Conclusion

Through its rulings, the CAT and Appeal Court have covertly made the expert methodology threshold more onerous.

While each collective action runs on its idiosyncrasies, the threshold is difficult to pin down. At present, it is a tick-box exercise, to create a blueprint that is not at odds with the burgeoning caselaw.

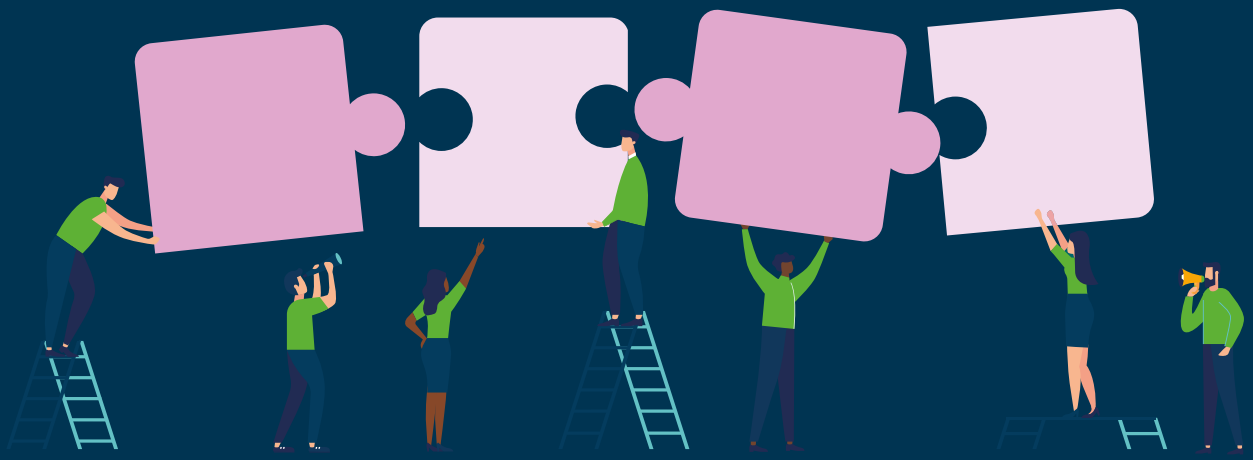
The CAT's level of scrutiny and increased level of review of expert methodologies appears higher than the low bar set in Merricks. Rather, by allowing cases to retry certification, the CAT has also allowed the Appeal Court to further elucidate on the threshold. Consequently, PCRs must seize expert advice earlier and, by the time of issue, it is highly likely that a number of expert reports will already have been drafted to explain the methodology proposed to help make good the PCR's case.

By shifting the engagement of experts earlier in the timeline, funders will need to outlay a higher budget for expert costs at the front-end of the proceedings.

Claimant firms must establish the blueprint, not only for the CAT, but also the funders to establish the viability of a claim. Subject to how Le Patourel[15] deals with issues such as distribution, we may see funders adopting deviceful funding structures, such as co-funding with other funders/claimant firms to distribute exposure on riskier claims. This need is compounded by the increased prospect that a second certification hearing may be required. For carriage claims, this is even more acute, as seen by the contest between Hunter/Hammond, which pitted the experts' methodologies against the other even before certification bringing the timeline even earlier. In any event, claimant firms will, like the threshold, continue to rise to the challenge and fight for recompense for consumers who have suffered detriment.

15 Justin Le Patourel v BT Group PLC (1381/7/7/21)

AMALGAMATION & PERSPIRATION:



THE PRACTICAL CHALLENGES OF JOINING LARGE-SCALE CLAIMS FROM AN INSURANCE PERSPECTIVE

Authored by: Robert Warner (Director) – Erso Capital / TheJudge Group

In October 2023, the UK's Competition Appeals Tribunal ("CAT") consolidated two separate, competing actions against Google. The two multi-billion-pound claims relate to losses suffered from Google's dominant position in the advertising technology ("ad tech") market and were originally brought as separate claims by individual class representatives Charles Arthur and Claudio Pollack. Having been amalgamated, they will now proceed as one.

The combination of two previously competing claims was a first for the CAT, which would otherwise have been required to determine which of the two carriage claims would be the most suitable to be certified and proceed to trial.

As these claims were the first-ever amalgamation in the CAT, they created some interesting issues around duplicated resources. While the amalgamation of these matters is a first, the CAT's endorsement of the approach means it may not be the last time we see this tactic used by practitioners.

What Drove The Decision To Amalgamate?

CAT practitioners know the risk posed to a competition damages action by a competing claim. Ultimately only one claim can proceed to certification and beyond. The CAT continues to develop its nuanced and flexible approach to carriage. For example, in the Hunter and Hammond carriage dispute (an opt-out claim against Amazon for abuse of dominance in connection with its 'buy box' feature) the CAT ruled that whilst the competing Hunter claim was "not hopeless", it simply came "second [to Hammond] in a hard-fought race". Rather than dismissing the Hunter claim (as Amazon would have liked), it was stayed, with the CAT noting that 'access to justice' required the court to keep the alternative application alive, so that it could be revived if necessary.

Just as with the CAT's decision to keep the Hunter claim 'alive', amalgamation might provide a similar – but even more desirable -solution from the perspective of the claimant classes and broader access to justice principles. Two (or more) competing actions, with legal teams and experts having prepared the cases, voluntarily join to create a wider, better-resourced, and potentially better-financed claim.

While it may sound idyllic to unify in the pursuit of justice, the process of amalgamation – even

before it is proposed to the tribunal – is likely to be a complex exercise, which requires careful consideration, negotiation, and management by stakeholders across all the potential claims.

Such a process is likely to include not only the class representatives but also law firms, chambers, funders, insurers and many other litigation support services. Based on TheJudge's experience of amalgamating the insurance arrangements in the ad tech claims, we explore the level of detailed negotiation and reorganisation which is necessary. Warning – it's not for the faint of heart!

Amalgamation of Insurance Cover

Competing class representatives typically acquire distinct After-the-Event (ATE) insurance policies. Coverage commonly spans from £15 - £30 million, distributed among several insurers. The premium arrangement typically includes a non-refundable portion of the premium to be paid upfront to insurers. Where two matters are amalgamated there's a high likelihood of excessive coverage, potentially doubling what would be deemed reasonable.

While additional coverage may seem advantageous, it may not always be the case, as it's in the interest of all parties to maximise potential distributions to the affected class of claimants.

Over-insuring may lead to an unnecessarily large premium reducing the claim proceeds. Therefore, in most instances, the optimal approach would be to consolidate the two separate policies and coverages into a single policy with a limit more suitable for a single-class representation.

Amalgamation in Practice

The consolidation of two insurance policies is challenging. It would be uncommon to have exact matching premium structures. There must be careful negotiation with insurers as the most likely result is that all insurers will be asked to reduce their coverage to make the policy viable and proportional for the amalgamated claim to proceed. There will be internal and external factors affecting insurers' willingness and ability to do so. This is not helped by the fact that most single Managing General Agents (MGAs) will bind coverage for their participation across multiple insurers. (Bottom line: there are likely to be far more moving parts and stakeholders than meet the eye). There is also the matter of effectively renegotiating terms to get to the ideal position of having all insurers subject to common premium structures going forward to avoid any potential friction further down the line.

When working to consolidate insurance coverage, careful attention should be paid to upfront premiums already paid versus those that are contingent upon success.

If one insurer has been paid a larger premium upfront, reducing the amount of cover already paid for would not make sense, and it will be better to reduce any cover which relates to a contingent premium as this is more likely to have pro rata reduction on premium and maximise claim proceeds.

Can You Plan For a Potential Amalgamation?

Should practitioners wish to leave the chance of amalgamating open, it might be wise to have it in mind when negotiating with insurers. It may be possible to build into the terms a pro-rata reduction in coverages and premium rates that take effect in the unlikely event that the claim is involved in a carriage dispute and amalgamation presents the best way forward. It's an area in which an experienced ATE broker could provide a huge amount of value to the legal team.

Conclusion

Time will tell whether amalgamation is added to the procedural tool kit of CAT practitioners to mitigate the risk of losing carriage. However, it is not a process to be embarked upon lightly. In the ad tech matters the Tribunal commented that "where a carriage dispute is resolved by agreement…between… rival applications… this Tribunal will be slow to second guess that agreement". Is it preferable, and in the best interests of claimants, to join forces rather than have no part in the case at all? It certainly seems to be a win for access to justice, where firms and other legal service providers are willing to put the work in to make it happen.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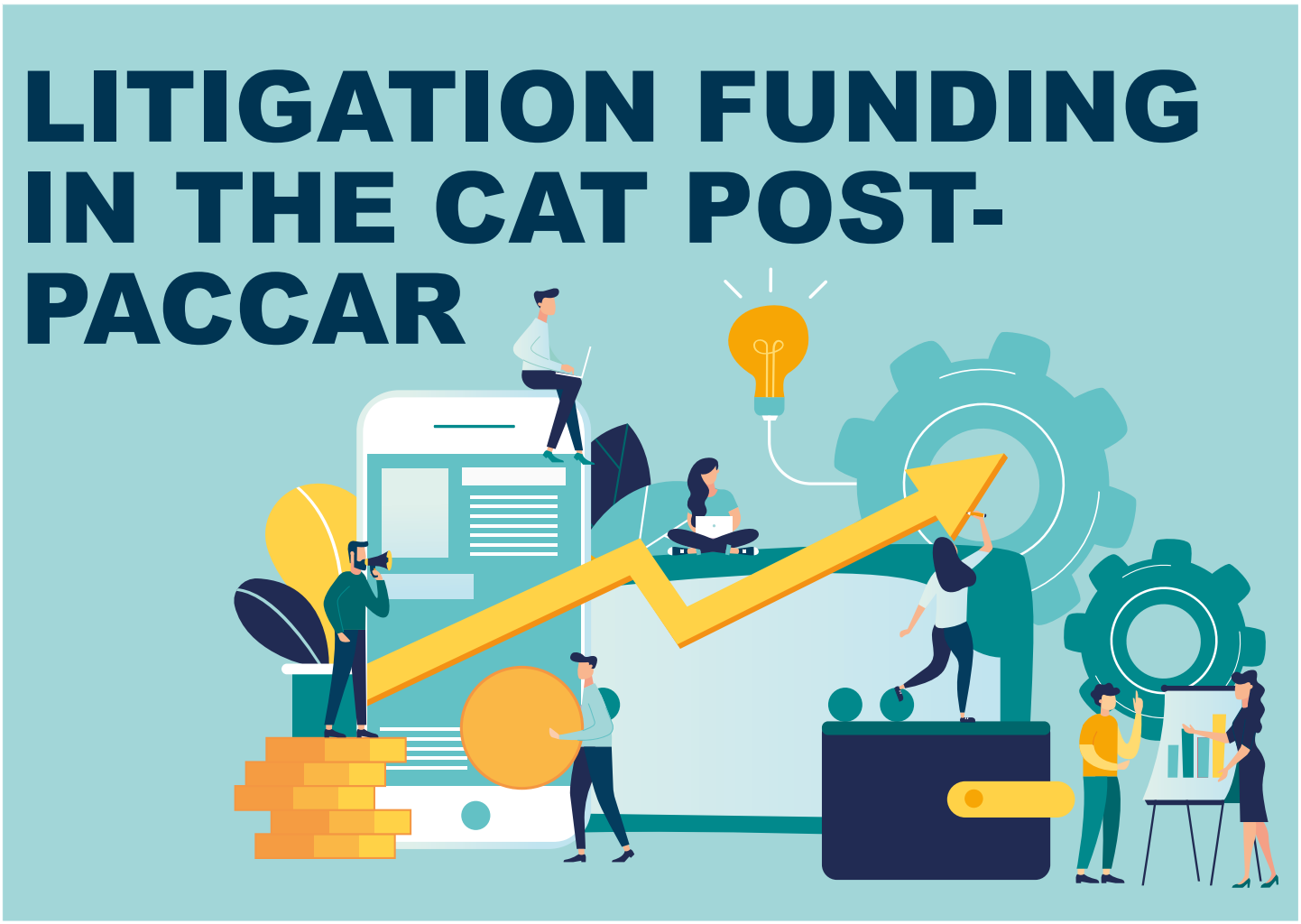
LITIGATION FUNDING IN THE CAT POST-PACCAR



Authored by: Ben Lasserson (Partner) and Audrey Dwyer (Of Counsel) – Mishcon de Reya

This article considers the approach of the Competition Appeal Tribunal (CAT) to questions of funding for opt-out collective actions following the Supreme Court's judgment in PACCAR,[1] as well as addressing the proposed Litigation Funding Agreements (Enforceability) Bill (LFA Bill).

PACCAR

In PACCAR, the Supreme Court held that litigation funding agreements (LFAs) where the funder's return is calculated as a percentage of damages were damages-based agreements (DBAs), which need to be compliant with the Damages-Based Agreements Regulations 2013 to be enforceable. This triggered serious concerns regarding funding for opt-out collective actions in the CAT, and therefore material revisions to existing LFAs, as DBAs are not permissible for opt-out claims.

The CAT's Approach Post-PACCAR

Neill v Sony

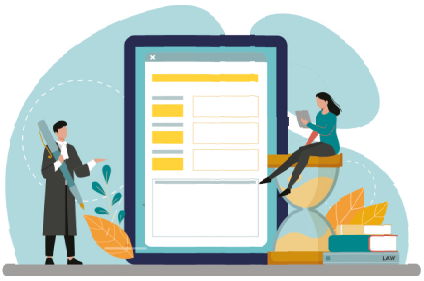
in Neill v Sony,[2] the revised LFA provided that the funder would be paid the greater of (i) a multiple of its total funding obligation, or (ii) a percentage of the total damages and costs recovered by the class representative "only to the extent enforceable and permitted by applicable law". The amended LFA contained a severance clause which specified that the damages-based fee provision could be severed if required. The CAT held this was not a DBA, considered the conditional wording permissible and that the severance clause could be used without causing a "major change in the overall effect of the LFA".

Sony sought permission to appeal on:

- Whether the clause permitting damages-based payment to funders "to the extent permissible by law" is enforceable;
- The severability issue; and
- Whether the fact LFAs are naturally capped by the amount of damages recovered means that such LFAs are actually DBAs.

1 R (PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28
2 Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd and others [2023] CAT 73

The CAT stated it considered there was no real prospect of Sony succeeding on appeal, but recognised that the uncertainty following PACCAR required a conclusive view from the Court of Appeal and therefore granted permission to appeal. The CAT also foresaw that permission would likely be granted in other similar cases, and it would be expedient for those to be dealt with together at the appellate level.



Kent v Apple

In Kent v Apple[3], the CAT followed its reasoning in Neill and approved an amended LFA where the funder's return was based on a multiple of the costs expended by the funder, instead of the percentage-based return in the original LFA. The potential application of a "ratchet" provision, which would incrementally affect the funder's return based on the duration of the proceedings, did not warrant intervention by the CAT at this stage. The CAT had case-management powers to manage the proceedings and the funding outcome and "will have ample opportunity to ensure that any fee payable to the funder is proportionate and appropriate".

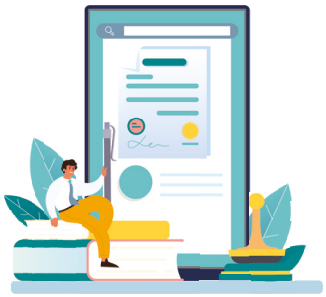
Apple had not formally applied for permission to appeal but had asked the CAT to grant permission if its arguments were rejected.

Recognising the similarities with Neill, the CAT considered there was no real prospect of success but nevertheless granted Apple permission to appeal.

McLaren v MOL[4]

In McLaren, the CAT found that the revised LFA was materially similar to the Neill LFA except that the operative clause calculating the funder's fee in Neill was based on a multiple of "the Costs Limit", rather than a fixed fee. Both LFAs contained the same conditional 'permissible by law' wording for a percentage payment.

Following its Neill reasoning, the CAT held the revised LFA was enforceable but noted that the enforceability of conditional 'permissible by law' percentage payment provisions is subject to the appeals in Neill and in Kent.



Commercial and Interregional Card (CICC)s v MasterCard/Visa[5]

At the CPO stage these sets of opt-in and opt-out proceedings had been rejected, but ahead of those CPO applications being revisited the funding arrangements were challenged.

The CAT considered the differing financial arrangements for the opt-out and opt-in actions as well as the ATE position, and concluded that they were not DBAs as they were "firmly and primarily based on a determination of the funder's fee by reference to a multiple of outlay by the funder (or insurer)".

The CAT considered there was no prospect of success on appeal but granted permission on the basis that it might be helpful for the Court of Appeal to consider a different pattern of funding arrangements alongside Neill and Kent.

Gutmann v Apple[6]

In Gutmann, the revised LFA entitled the funder to receive an amount based on drawn-down funds as well as a "Funder's Return".

The Funder's Return would be calculated by reference to a multiple of the capital committed. The CAT held that the revised LFA was not a DBA.

Separately, the revised LFA provided that, if successful, Gutmann would apply to the CAT for approval that the litigation funder be paid first, out of the total recovered damages and costs, before the class members. Importantly, the CAT held that it is not necessarily inappropriate that a funder could be paid before the class members; once a claim is successful, the CAT can order that a funder is paid first if deemed proportionate given the funder's contribution to the claim.

LFA Bill

In March 2024, the government published the LFA Bill which would restore the legal position that existed prior to PACCAR. The LFA Bill is drafted to apply to all types of funded cases and provides that damages-based LFAs are exempted from being deemed DBAs. Such LFAs can therefore be used in opt-out collective proceedings. The LFA Bill will apply both to LFAs entered into before it becomes law as well as future LFAs.

Takeaways

Whilst the Court of Appeal is yet to opine on the position, it seems clear from the CAT's approach and the LFA Bill that there is considerable recognition of the importance of litigation funding in the UK generally and the need to ensure that this is fully supported going forward.

3 Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd [2024] CAT 5
4 Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others [2024] CAT 10
5 Commercial and Interregional Card Claims I Limited v Visa Inc. & Others, Commercial and Interregional Card Claims II Limited v Visa Inc. & Others, Commercial and Interregional Card Claims I Limited v Mastercard & Others and Commercial and Interregional Card Claims II Limited v Mastercard. & Others [2024] CAT 16
6 Mr Justin Gutmann v Apple Inc., Apple Distribution International Limited, and Apple Retail UK Limited [2024] CAT 18

DISCLOSURE FOR CATS:

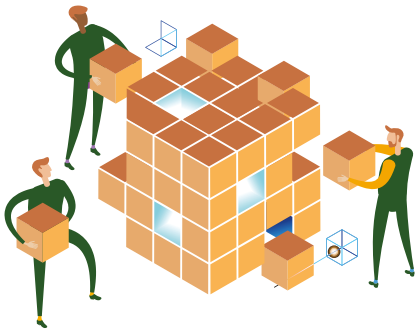
AN eDISCLOSURE PERSPECTIVE ON IMPROVING PROCESSES FOR COLLECTIVE ACTIONS AND DISCLOSURE IN THE COMPETITION APPEAL TRIBUNAL (CAT)

Authored by: Gary Bassett (Senior Consultant) – Sky Discovery

The Consumer Rights Act 2015 came into force on 1 October 2015, expanding the jurisdiction of the CAT and introducing new procedures for collective proceedings orders (CPO) in UK competition claims. Initially, their use was limited, with only low single-digit CPO claims registered annually from 2016 to 2020. However, there has been a surge in the number of CPO claims registered since 2021, and in both 2022 and 2023, the number of CPOs registered each year has entered double digits.

As the CAT becomes increasingly busy processing CPO cases, flexible approaches are encouraged by the CAT when conducting disclosure exercises.

There has been a prevalent theme in recent CPOs granted by the CAT for claims against big tech for alleged abuse of a dominant market position. It appears that collective actions by theme, targeting specific industries or anti-competitive practices will persist. For instance, several CPOs were registered in 2023 against water companies alleging underreporting of pollution incidents to regulators.



Tackling The Challenges of Big Data

The growth of CPO cases involving major corporations, holding vast and often complex datasets, will undoubtedly come with big data challenges for both the claimant and defendant sides of disputes.

Engaging with an eDisclosure provider from the outset is key for

scoping data management and the development of a robust and defensible disclosure strategy. Circumventing specialist support can result in lost time, adverse cost implications and the risk of indefensibly collected data.

Several aspects of a CPO case can be addressed by tailored eDisclosure specialist processes for accuracy and efficiency.

Streamlining and Analysing Datasets

eDisclosure platforms have a wealth of well-established analytics tools to ease the burden of searching and reviewing documents for disclosure. Handling large data volumes without these tools is no longer manageable; in some cases, AI and machine learning offer robust solutions.

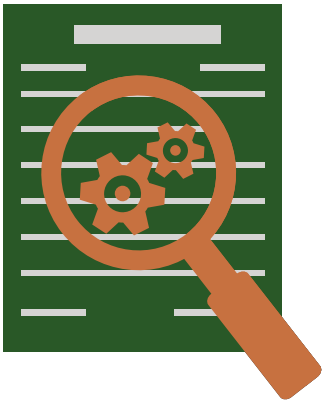
Claimant Tracking

An eDisclosure tool like Relativity can manage all information related to a CPO and claimants. Claimant firms can integrate an eDisclosure platform with their existing systems to efficiently capture claimant information and collaborate on manual tasks such as data validation for opt-in CPOs.

Single Source of Truth

Managing all claims information and the disclosure exercise within an eDisclosure platform provides a fully auditable single source of truth for a CPO. Data management for large actions such as CPOs can be extremely challenging, and using email and Office programs, such as Excel, quickly becomes untenable.

Many stakeholders initially seek to collect data and documents using



their internal systems and resources. However, limitations and other risk factors associated with collecting data should be managed to avoid significant time and cost implications or, worse yet, negative impacts on the outcome of a matter.

For example, keyword searching in Outlook and Windows Explorer can undermine the accuracy of the reviewable data set, while extracting the data from its source without the right process can inadvertently modify the document metadata, making it non-compliant.

When managed with best practices from the outset, an entire team involved in a case, such as the law firm, counsel, experts, and clients, can work in a single platform with accurate data. Additionally, co-claimants or co-defendants can use the same platform to minimise expenses while restricting access to private documents and work product.

Analysing Claims Information

There are many options for data analysis and visualisations so that individual claimant information can be analysed in aggregate and on a more granular, class representative, or individual claim basis.

Making Disclosure Better

The complexity, size, and data types involved in CPOs increase the need for specialised disclosure, which is further supported by CAT's progressive approach to disclosure handling.

In several rulings (such as Kent v Apple Inc. & Others [2023] CAT 20 and Coll v Alphabet Inc. & Others [2023] CAT 47), the CAT has expressed the general need for both parties to be proactive, cooperative, and constructive in their approaches to disclosure. Cooperation was also emphasised in the now permanent Disclosure Pilot Scheme under Practice Direction (PD) 57AD for disclosure in the Business and Property Courts.

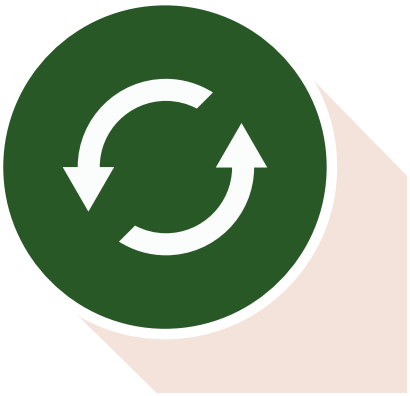
PD 57AD was developed to provide a better structure for handling disclosure and dealing with the exponential growth in digital data volumes, something that the existing Civil Procedure Rules (CPR) 31B were perceived not to be suitable for addressing. In a 2023 speech, Procedural Issues Relating to Disclosure, with reference to the permanent adoption of the "disclosure pilot", Sir Marcus Smith offered his critique of the disclosure regimes under CPR 31B and PD 57AD and the further advancements required. In an era of expanding data volumes and complex unstructured data sources, Sir Marcus Smith stated that our thinking is too focused on paper, not yet electronic documents. Disclosing information is not uniform and can be a significant expense in legal cases.

Two examples of the flexible approaches being considered by the CAT include:

Expert-Led Disclosure

This process involves experts requesting specific documents, which the parties produce and submit for consideration. The CAT considered this approach in The Merchant Interchange Fee Umbrella Proceedings [2022] CAT

31. In certain situations, it has been suggested that a precise and regulated disclosure, led by an expert, may be appropriate. It was said that in certain circumstances, "some form of tightly controlled, expert-led, disclosure, provided that it was focussed, cost-effective and proportionate" would be appropriate but tempered this by stating that the CAT was "conscious that precluding a party from adducing evidence that it wishes to adduce is an extreme exercise of the Tribunal's case management powers".



Reverse or "Over-Inclusive" Disclosure

Alternatively, the disclosing party can provide the receiving party with all relevant documents, excluding privileged and easily identifiable irrelevant ones. The receiving party is then to search and analyse this data using eDisclosure tools as they see fit, cutting through much of the adversarial approach to disclosure and front-loading the costs of review for the disclosing party.

Presiding over the High Court claim in Genius Sports Technologies Ltd v Soft Construct (Malta) Ltd. [2022] EWHC 2637 (Ch), which was being jointly heard in the CAT, Sir Marcus Smith ordered "massive over disclosure" of documents. A counter-intuitive approach known as "document dumping" has long been thought of as a strategic ploy by disclosing parties to overwhelm receiving parties. However, with the appropriate use of technology on the part of the receiving party, this could be the most cost-effective approach.

Sir Marcus Smith cited this case in his 2023 speech referred to earlier and in particular, the added benefit that it could circumvent the mistrust of how the disclosing party has used technology by allowing the receiving party to run the process themselves in the first instance – as many times as they like; and at whatever cost they are prepared to incur on the understanding that excessive costs will not be recoverable.

This approach was also implemented in the CAT's disclosure ruling in Kent v Apple Inc. & Others [2023] CAT 20, where the Defendants were not required to conduct a relevance review of certain document repositories. Instead, all documents from those repositories were to be disclosed with the direction that "the starting point should be how the thoughtful use of technology can reduce the numbers to a sensible size before a manual review takes place" by the Claimants, with the parties, "to proceed to co-operate with each other to progress the agreed process" and a fallback position that they, "should notify the Tribunal if difficulties are encountered".

A key concern in cases of reverse disclosure is preventing the release of privileged information to the receiving party. Through search, analytics, machine learning, and artificial intelligence tools, technology allows law firms to take precautionary steps to identify privileged material rather than rely solely on human review.

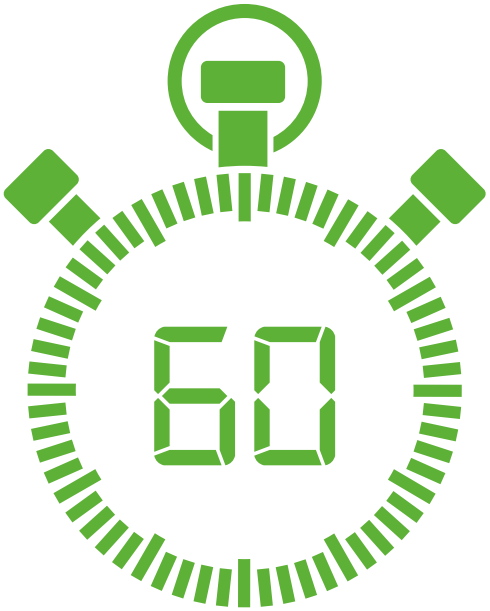
In the CAT's ruling of Sportradar AG v Football Dataco Ltd [2022] CAT 29, these precautionary measures should have captured the without prejudice privilege email disclosed; however the disclosing party released an unredacted version that it later claimed was disclosed in error. The receiving party did not accept that the email was protected by privilege and sought to rely on it's contents and made an application to this effect. Thankfully for the disclosing party, the CAT took a broad approach in confirming that Without Prejudice privilege applied and, pursuant to Rule 65 of the CAT Rules 2015, refused permission of the receiving party to use the document. However, this case serves as a cautionary tale that disclosure of privileged materials can be avoided and should be a focus of disclosing parties in future instances of reverse disclosure.

The growing approval of CPOs by the CAT signals an increasing need for the appropriate use of eDisclosure technology, which is crucial to the smooth running of these matters, and therefore, it is both advisable and strategic to engage an eDisclosure specialist early.

As the large pipeline of CPOs progress through case management in the CAT, it will be fascinating to see whether more creative approaches to disclosure follow and whether this leads to changes in strategy under other disclosure regimes, too.

60-SECONDS WITH:

MARK BOSLEY
DIRECTOR
BRG



Q What motivated you to pursue a career in economics?

A I have always wanted to understand why the world is the way it is, and to be able to explain it to others. In particular, what drives the value which people and businesses place on certain things, why markets produce certain outcomes, and why they sometimes don't work properly. I also enjoy the challenge of debating these concepts with other experts and the rigour that is demanded when your analysis will be scrutinised by courts or regulators.

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

A I would love to go back to academic study because I think economics is vital to help us understand and overcome the challenges our generation will face, such as dealing with the impact of environmental degradation, and how to manage an ageing and shrinking population. On the side, my passion projects would be competitive motorsport and to start a vineyard. (I assume a lottery win is also implicit in this question!)

Q What piece of advice would you give to your younger self?

A Spend as much time as you can doing the things that really interest you; success will naturally follow.

Q What are the biggest challenges facing expert witnesses nowadays?

A Courts and tribunals are (rightly) demanding that experts provide evidence which is both independent and grounded in the facts, and are becoming increasingly skeptical of 'hired guns'. This puts the expert under pressure to both understand the detail of the case, and to be able to justify all the assumptions made in reaching their views. It's really important to show that the economic analysis put forward is balanced and actually relevant to the case at hand.

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

A It's hard to pick a single book that everyone should read, but I would very highly recommend *The Signal and the Noise* by Nate Silver. It's a very well-written book that gives an accessible and intuitive understanding of why robust statistical thinking is so important in the real world.

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

A It's probably a cliché answer, but I would say Leonardo da Vinci. It would be fascinating to talk to somebody who was a true polymath and conceived of new machines centuries before it was even technologically possible to build them.

Q The greatest film of all time is…

A *Jurassic Park*

Q What legacy would you hope to leave behind?

A The most important legacy you leave is personal; who you are to family, friends and colleagues. Anything grander risking sounding presumptuous, but professionally I hope my legacy will be one of showing that economics is genuinely able to illuminate complex matters and that good economics leads to good judgements. (If I do win the lottery and didn't have to work any more, perhaps I'll leave behind a great vineyard instead?)

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

A The need to unite theory with facts and to test economic predictions empirically. Expert economics is not a game of academic top trumps; the English courts in particular are sophisticated and want to get into the detail of economic evidence, which means you have to be able to explain it to them properly.

Q What is the biggest life lesson you have learned?

A That I will probably never be great at golf.

Q What is one goal you would like to achieve in the next year?

A Run another marathon. I ran London in 2022, so I'd like to try another city now.

LG Display Defence Reduces Claim by 93 Percent

In only the third fully litigated cartel damages trial in the UK, *Granville Technology Group Ltd (in liquidation) and others v. LG Display Co. Ltd and others*, the court sided with LG Display on the key issues of overcharge and pass–on.

The claim originated from the 2010 finding that a group of LCD panel manufacturers infringed Article 101 of the Treaty on the Functioning of the European Union (TFEU) through engaging in a cartel, prompting Granville (a group of computer manufacturers and retailers) to seek damages in excess of £60 million. Acting in defence of LG Display, BRG expert David Parker's evidence was preferred on all material points,* resulting in the damages awarded being around 7 percent of the amount originally claimed.

The Analysis

In follow-on matters the existence of a cartel is not disputed: the case focused on the amount by which the cartel impacted the claimants and therefore the damages that should be awarded. This required analysis of three main issues:

i. estimation of overcharge

ii. assessment of pass-on

iii. lost volume of commerce to the claimants resulting from (i) and (ii)

(i) Econometric estimation of overcharge

Mr. Parker and his team identified suitable control variables, assessed how to control for the "endogeneity" of demand and considered the role and importance of statistical tests in choosing between different regression models.

(ii) Assessment of upstream and downstream pass-on

Mr. Parker and his team considered the importance of different types of evidence, including economic theory; whether it was necessary to trace a particular cost increase through to a particular price increase to demonstrate pass-on; what can be drawn from evidence of pass-through of other types of cost; and the extent and implications of 'psychological price points' for pass-on.

(iii) Lost-volume effect resulting from pass-on of overcharge

Mr. Parker and his team analysed the elasticity of downstream demand, the relevant margin and the extent of any sales recapture by Granville that would have taken place on other (unaffected) products.

The Result

The judgement, handed down on 8 February 2024, preferred the defendants' evidence almost exclusively regarding issues (i) and (ii), which were the key material elements in this case; and favoured both sides in different aspects of issue (iii). These findings resulted in damages of approximately £4.4 million (over half of which was interest) being awarded against a claim of over £60 million.

** Mr. Parker joined BRG in December 2023. This engagement took place while Mr. Parker was working for a previous firm.*

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RBB| Economics

Trouble in store(s): The CMA's new approach to local mergers post-MAGs

When the UK CMA published its revised Merger Assessment Guidelines back in 2021, it signalled that it would put less weight on market shares, and more on closeness of competition and the individual merits of each case.

However, in local merger cases, it has moved in the opposite direction. Taking a more mechanistic approach, with 'decision rules' often based entirely on market shares and an unwillingness to consider evidence on individual local areas.

This approach has not produced more consistent and predictable outcomes. To the contrary, because the detail of the CMA's approach varies from case to case – often without much explanation – it is difficult for businesses and advisers to predict the outcome, even in an industry the CMA has looked at recently.

This is creating considerable uncertainty for businesses. So what is going wrong, and how can a firm prepare for a CMA merger investigation in this new world?

In our latest article, we break down the key aspects of a local merger assessment, highlight the key issues to be aware of, and provide practical advice to firms contemplating an acquisition in markets where geographic location is relevant. We also suggest ways in which the CMA could improve its approach. With the EC introducing catchment areas to its newly published market definition notice, our article has relevance for defining geographic markets in a broad range of jurisdictions.

DOWNLOAD THE FULL ARTICLE HERE

SINGING FROM THE SAME HYMN SHEET: HARMONISING ANTITRUST ENFORCEMENT IN BRAZIL: THE BRAZILIAN ANTITRUST AUTHORITY'S CALL FOR UNIFIED LEGAL INTERPRETATIONS

Authored by: Alessandro P. Giacaglia (Antitrust Attorney) – Pinheiro Neto Advogados

The Prelude: Harmonising Legal Interpretations

Navigating the realms of anticompetitive practices in Brazil has traditionally been comparable to listening to an orchestra performing without a conductor: each section plays its masterpiece, yet the absence of harmony often leaves the audience bewildered. At the heart of this dissonance is the Administrative Council of Economic Defense, widely known by its acronym CADE, which enforces the Brazilian Competition Act (Law No. 12,529/2011) within the administrative domain. Meanwhile, private plaintiffs and prosecutors venture through civil courts wielding the Brazilian Civil Code and the Brazilian Competition Act, and public prosecutors address criminal violations under Law 8,137/1990.

This trifecta of legal pathways means that a single anticompetitive act might face sanctions from three different angles, each acting on its own.

For years, this fragmented approach resembled an audacious attempt to blend Mozart's Serenade No. 13, Beethoven's Symphony No. 9, and Bach's Air on the G String into a single performance. While each piece is a celebrated work of art, their simultaneous execution can be more cacophonous than symphonious to even the most forgiving ear. The legal landscape allowed for such discord, where one court could negate the occurrence of an anticompetitive act while another found guilt for the same deed.

Recent strides towards legal harmony have emerged, with both the Brazilian Supreme Court (STF) and the Superior Court of Justice (STJ) championing a unified front among criminal, civil, and administrative jurisdictions. This shift, echoing the collateral estoppel doctrine in the United States, seeks to prevent relitigating issues already adjudicated by a competent authority. Thus, the mandate is clear: Brazil's courts must now orchestrate their judgments in concert, ensuring that the assessment of facts across different domains resonates with a cohesive tone.

The Legal Basis: Orchestrating Between Independent Movements

In the grand composition of Brazilian legal proceedings, the civil, criminal, and administrative courts are reminiscent of distinct musical sections within an orchestra—each playing its critical part, yet ideally contributing to a harmonious symphony.

The independence of these sections is foundational, much like the sections of an orchestra—strings, brass, woodwinds, and percussion—each bringing its unique timbre to the performance.

However, specific legal provisions, akin to a conductor's cues, guide the interplay between these sections, ensuring they coalesce into a unified piece.

At the heart of this inter-sectional dialogue are key articles from the Civil Code and the Criminal Procedure Code, acting as the sheet music directing the performance. Specifically, article 935 of the Civil Code lays down a fundamental rule: civil courts are not to question the existence of a fact or the identity of its perpetrator once the criminal justice system has settled these matters.

The Criminal Procedure Code further elaborates on this theme. Articles 63 and 64 underscore the finality of criminal decisions as a foundation for civil claims, particularly for the reimbursement of damages. Moreover, the Code, specifically article 64's sole paragraph, authorizes civil courts to await a criminal decision before resuming their part in the legal symphony.

Yet, the Criminal Procedure Code also outlines exceptions to this rule, resembling to improvisational solos that diverge from the main theme yet remain integral to the performance.

For instance, civil actions can proceed independently when criminal investigations are concluded without charges (as indicated by article 66), or when criminal prosecution is barred by the statute of limitations (article 67). These provisions introduce a layer of complexity to the legal symphony, allowing for independent movements that still respect the composition's overall structure.

In essence, while the civil and criminal spheres perform their pieces largely independently, the law conducts them to ensure they do not stray too far from each other. Specific legal articles—article 935 of the Civil Code, and articles 63, 64, 65, 66, and 67 of the Criminal Procedure Code—act as the conductor's baton, guiding when one section should take precedence or when another should pause, ensuring the entire orchestra—civil, criminal, and administrative courts—plays in concert. But the law was insufficient to keep the music in harmony.

The Call For More Harmony: Tuning The Legal Instruments

As our legal symphony approaches its crescendo, we encounter a pivotal movement in the interplay between criminal and administrative enforcement in antitrust matters.

Defendants, in an effort to introduce a motif of legal respite, have often argued before CADE that a criminal court's decision should preclude further administrative pursuits. However, CADE's Tribunal, much like a section of the orchestra steadfast in its unique tempo, has consistently maintained its autonomy, creating dissonance with this line of defense.

Illustrative of this, CADE's Tribunal has echoed its independence through various rulings. A notable decision from

2016, highlighted by the Reporting Commissioner João Paulo de Resende (Administrative Proceeding No. 08012.001029/2007-66), draws a distinction in the evidentiary standards required in criminal versus administrative realms. This distinction, parallel to the difference in pitch between instruments, underlines the Tribunal's stance on its autonomy. Further, in 2019, Commissioner Luiz Augusto Azevedo de Almeida Hoffmann (Administrative Proceeding No. 08012.005069/2010-82) reaffirmed this independence, reinforcing the Tribunal's position as a separate melody within the broader legal composition.

Yet, the legal symphony experienced a dramatic modulation in 2024. A decision by Reporting Commissioner Victor Oliveira Fernandes (Administrative Proceeding No. 08700.009165/2015-56) signaled a shift towards a more harmonious relationship between criminal and administrative proceedings. This decision, referencing a pivotal STJ ruling (Appeal 33827/RJ), acknowledged the discord created by independent spheres reaching contradictory conclusions about the same facts. Similarly, for the Supreme Court, a criminal acquittal can mute an administrative action, even if it is based on the lack of evidence (Appeal 41557). Based on such rulings, CADE's Tribunal concluded that: "…mere acquittal in the criminal sphere does not necessarily imply acquittal in administrative proceedings…" but the CADE's Tribunal cannot "adopt different interpretations for the same indirect evidence of communication", i.e., regarding the inexistence of illicit communications between the defendants. Thus, CADE's Tribunal joined the STF's and STJ's critique of this disharmony, emphasizing the need for coherence, which suggests a movement towards blending the distinct legal melodies into a more unified composition.

This new direction, underscored by CADE's Tribunal, recognizes that an acquittal in the criminal sphere, while not directly mirroring into the administrative domain, demands a re-evaluation of the evidentiary chorus.

It highlights the necessity of interpreting indirect evidence consistently across different legal sections, avoiding dissonant interpretations of the same facts. This adjustment in CADE's stance is a significant step towards synchronizing the administrative proceedings with criminal outcomes, seeking to resolve the cacophony of inconsistent verdicts.

The evolution in CADE's jurisprudence orchestrates a new era of legal harmony, where the administrative, criminal, and civil spheres are encouraged to resonate more closely. Also, this development demands defendants to conduct their defense strategies with greater attention to coherence across different legal forums, ensuring their narratives weave through the complex legal score without discord.

DIVING INTO CLASS ACTION LITIGATION IN PORTUGAL

Authored by: Rita Samoreno Gomes (Partner) & Petra Carreira (Managing Associate) – PLMJ

Essential Insights

Legal Framework – The Class Action Act provides the general legal framework for class actions, supplemented by sector-specific rules (e.g., the Private Damages Act in cases of competition law breaches).

Specialised Court – In Portugal, there is a specialized court to adjudicate competition law cases, including class actions. This court operates at the national level.

'Opt-Out' Representative Basis – In Portugal, class actions typically operate on an opt-out representative basis. Once accepted by the court, class members receive notice to either actively participate or decline representation. Opting out is permitted until the conclusion of the evidential stage; failure to do so implies automatic participation.

Absence of a Stand-Alone Certification Stage – Portuguese law lacks a standalone class certification process. Instead, for a class action to proceed, the court conducts a preliminary analysis where it may summarily reject claims considered unlikely to succeed. While the absence of proper class representation can result in early rejection, such instances are rare. Parties may discuss class membership before judgment, but generally, the court adjudicates on all substantive matters, including class membership, in the final judgment.

Relatively Low Costs For Bringing Class Actions – The "loser-pay rule" generally applies, covering court fees and the prevailing side's counsel fees. In class actions, if the court partially favors the claimant, they are spared from court costs. If the claim fails entirely, claimants may be ordered to pay a portion of ordinary civil claim amounts, typically ranging from 10% to 50%, based on circumstances. The court considers claimants' economic situation and reasons for failure in determining the amount. Defendants, like in other civil proceedings, bear court costs in class actions.

Third-Party Funding – Until very recently, third-party funding was rare. However, since December 2020,

several class actions backed by litigation funding arrangements have been brought before the Portuguese courts. While Portugal has recently transposed the EU Directive on Representative Actions (EU 2020/1828) into domestic law, there is currently no established case-law, and there are still legal ambiguities.

Typical Defences – Several procedural and substantive defences are accessible in class action proceedings in Portugal.

Key procedural defences in class action litigation include (i) lack of jurisdiction of the Portuguese courts; (ii) limitation; (iii) the absence of interests covered by the class action regime (diffuse interests); and, in class actions where the claim is brought by consumer associations, (iv) a defence regarding whether the association in question meets the requirements as a class representative and therefore has standing to bring the claim.

The key substantive defences raised in class action litigation in Portugal include (i) the absence of any unlawful behaviour or, in standalone competition litigation, any infringement of EU and/or domestic competition law; (ii) the absence of causation of any damage arising from the conduct at issue; (iii) the absence or miscalculation of any alleged damage to the claimant(s); and (iv) pass-on (in the case of competition law class actions). Additionally, there are several other defenses currently being utilized in Portuguese class action litigation, such as defenses against disclosure requests or EU law arguments related to the principle of effectiveness. The availability of these defenses in the future hinges on the results of ongoing litigation.

Global compensation – The court has the discretion to set the compensation for unidentified claimants, considering the overall damage. This amount must be reduced by the amount of compensation due to claimants who opted out. Identified claimants will be compensated according to the general rules of civil liability, meaning they will receive compensation based on the damage they have sustained.

Current Landscape and Emerging Trends

The class action landscape in Portugal is undergoing rapid growth and transformation. Since December 2020, consumer associations have launched numerous class actions against both multinational and domestic companies, particularly in areas such as competition and consumer law. Many of these cases echo actions observed in other jurisdictions. We anticipate a sustained high volume of class actions soon, accompanied by emerging trends in privacy/data breaches, Big Tech & Crypto, and cases related to the recent transformational EU digital legislation.

Anticipating Potential Pitfalls

Businesses should consider the following key points in mind when facing a claim in Portugal:

- Anyone can bring a class action and the general rule is that class actions are opt-out.
- There is no separate class certification stage. A decision on the class of potentially harmed consumers is only made on the final judgment. This means that a claimant is not burdened by a procedural hurdle which, in other jurisdictions, can result in delays to a final hearing on the merits and final judgment.
- The costs associated with bringing class actions are relatively low. Judicial costs are only due upon final judgment, and the claimant is exempt from any court costs if the claim is totally or partially upheld. If the claim fails entirely, judges have the discretion to cap cost orders against claimants. Based on past judicial practice, it is unlikely that a claimant will be burdened with an order to pay a large amount of the defendant's costs if the claim is dismissed in its entirety.
- Portugal operates as a one-shot jurisdiction. While certain key points can be developed through expert reports or legal opinions submitted post-filing of the defence – such as causation/quantum of damages and discrete points of law, all the key procedural and substantive defences that a defendant wishes to make must, in principle, be presented in the initial defence. This can often place a defendant at a disadvantage, given the stringent timeframes for presenting a defence. A local defendant must reply to a claim within thirty calendar days from the last defendant's service, while a foreign defendant has sixty days from the last defendant's service to respond.

The combination of these reasons makes Portugal an attractive jurisdiction for class action claimants and can position Portuguese proceedings at or near the forefront of a defence strategy for a defendant facing similar or identical claims across jurisdictions. This is because, as noted, a defendant must submit all defences at an early stage of litigation. As a result, while in other jurisdictions a defendant may be focused on litigating class certification, in Portugal the same defendant will have to have developed all its arguments on the merits of the case in addition to presenting any procedural defences.

COLLECTIVE COMPETITION CLAIMS:

A LEGAL LANDSCAPE IN FLUX

Authored by: Sylwester Frazzoni (Editor-in-Chief) – Competition.Claims

The collective actions regime in the Competition Appeal Tribunal (CAT) has grown to be an industry of its own. Where there once was Quinn Emanuel and their funder, there are now nearly 50 cases with legal professionals, and a host of supporting players, this ecosystem pulsates with energy. While the CAT's current success is evident, it is the unwritten chapters that will truly define its success.

Since the regime's overhaul in 2015, 49 collective actions have been filed in the CAT, with 14 receiving certification as of 8 April 2024.

Despite appearing modest for a regime nearly a decade old, the CAT's collective actions have become a formidable force in competition claims in recent years.

Chart I

The filing of Merricks' application for collective proceedings order (CPO) in 2016, with its £14 billion claim against Mastercard, was perceived as extraordinary. Now, numerous claims exceed the billion mark, including another near-£14 billion claim lodged at the end of 2022. The current value of claims exceeds £65 billion, based only on 34 of the 47 active claims where the valuation is either stated or can be estimated.[1]

1 Where a range is given, a higher end of the range was used to calculate the total.

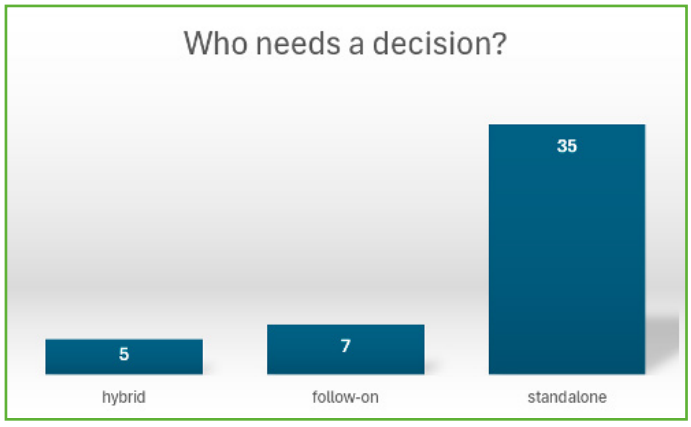
To put this abstract number into some context, the European Commission's DG-Comp has levied fines totalling approximately £19 billion for cartel and dominance abuse infringements during the same timeframe (2015–2024).

Public and private enforcement are intended to be complementary, with competition authority-imposed fines forming only part of the retribution. This rationale underpinned the introduction of the Damages Directive in 2014, facilitating easier compensation claims for competition infringements.

Interestingly, the current collective claim cases in the CAT rarely follow infringement decisions. This is complimentary to public enforcement but in a different way.

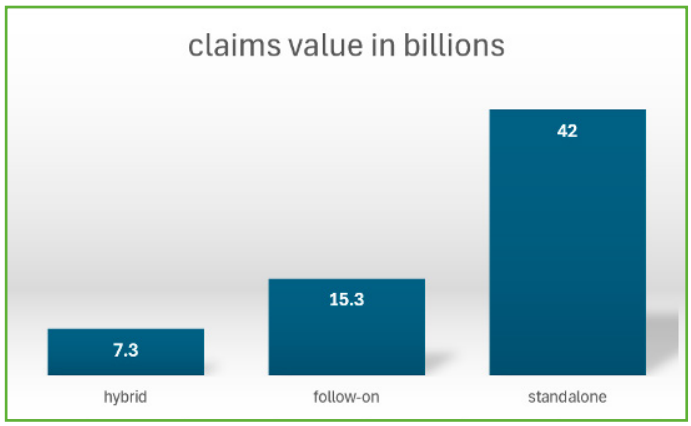
One can argue that standalone cases, if successful, will bring even more benefit as more ground will be covered between the competition authority and the private actions regime – and that will be true for all standalone actions, not just collective. That means that if the claimants are successful, collective actions will become potentially the strongest pillar of enforcement, at least in money terms. And money can be a very strong deterrent.

Chart II



Out of the currently active 47 claims, 35 are standalone, though some support their claims by decisions or may rely on one in the future as ongoing investigations overlap with claims. In value, that is £42 billion out of £65 billion.

Chart III



This also means the potential lack of suitable decisions from competition authorities for follow-on claims is unlikely to impede the influx of new claims.

There are predictions, including by ThoughtLeaders4, that those actions will continue to grow exponentially. Since they do not always follow-on enforcement decisions, there is nothing to say that will not happen. But that is not the only factor that matters and though there are many, funding is a key one.

Encouragingly, more claims are being certified than not at this stage. Also, the time to certification has been decreasing steadily. Excluding the record time for certifying Merricks'

claim—over five and a half years—the CAT has, on average, taken just over three years to issue other CPOs. However, all CPOs for claims filed since 2021 have been issued within an average of only 15 months.

The CAT has adeptly kept pace with these developments. Since 2015, there has been a notable expansion in its size, attributable not solely to collective action but worth mentioning in this context.

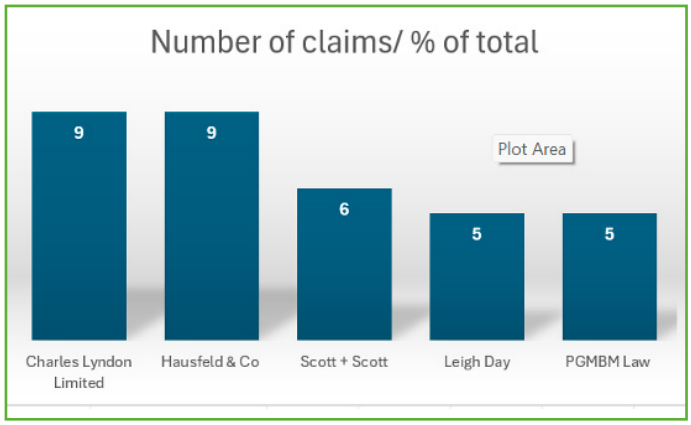
In 2015, the president was The Hon. Mr Justice Roth, there were 17 chairs, 15 ordinary members and the registrar.

Now, with the president Sir Marcus Smith at the helm, there are 34 chairs, and 39 ordinary members with the registrar's office expanding as well, according to the Tribunal's annual reports.

Who Is Initiating These Claims?

Consumers, businesses and law firms representing them. On the claimants' side, there are 17 law firms' names on the claim summaries. The top five law firms represent over 70% of the claims – indicating a higher concentration than in other CAT cases.

Chart IV



In terms of the value of the current claims, the top five law firms represent nearly 80% of the collective action claims' total value.

The numbers also show that this landscape is changing. The currently highest value claim was filed at the end of 2022 by a law firm new to the collective regime in the CAT, a litigation boutique Humphries Kerstetter LLP.

Although multi-billion-pound claims grab attention, it is good to see that not all claims are for hundreds of millions or more. In some cases, the cost of an application for a CPO was £3 million and that level can be prohibitive for some potential claims.

So far, the low-value claims – mobility scooters and replica football kits – we successful only in paving the way for the current claims.

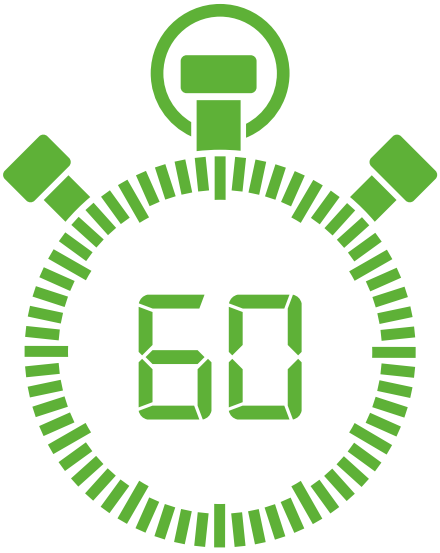
The lowest value claim is currently for £75 million and several current CPO applications are likely to have significantly lower values once disclosed.

The regime possesses all the necessary elements for success and has been moving in the right direction since its upgrade in 2015, bolstered by law, procedure, and increasingly rich case law, underpinned by a well-staffed expert tribunal. The case supply appears robust.

What remains essential is a balanced mix of cases to ensure access to justice across the board, not just where significant financial interests are at stake. The regime's true success will be measured when class members receive their compensation and the CAT's gatekeeping role is fulfilled, weeding out bad claims— milestones we may still be a few years from reaching. Patience is advised, but the future indeed looks promising.

60-SECONDS WITH:

MARIA JOSÉ AZAR-BAUD
GLOBAL COLLECTIVE ACTIONS EXPERT
ANGEION GROUP



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

A I am passionate about the strong liaison between theory and practice in my professional life. My research activities (lecturing, publications, conferences and the Observatory of Class Actions I founded in 2017) and my practice (as an international collective redress lawyer advising practitioners from several countries, third-party funders and a major claim administrator, and as Board member of two European NGOs which have brought more than 50 class actions) allow me to participate in highly interesting circles at different levels (institutional, political and academic) that open up debates which lead to important developments and positively impact lawmakers, officials, and judges.

Q What motivated you to pursue a career in law?

A Justice! Or rather, the feeling of injustice I had as a child, when purchasing something at the price of $ 0,99. I paid $ 1,00 and never got the cent back. At that time, I already wanted to tackle those situations on behalf of the silent millions of persons in the same situation. Further, at school, I would stand for others' rights. My motivation still relies on fairness and deterring unlawful behaviours in the market which are detrimental to people, and challenging the recidivism caused by the lack of redress of the former.

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

A If I no longer had to work, I would travel around the world, and trek in the nicest forests and the highest mountains. I would start every day with an early meditation session before a long-lasting yoga practice. I would dedicate to my environment all the attention it may need, read books, and keep on writing about collective justice: there is still so much to do and say!

Q What piece of advice would you give to your younger self?

A Seeking a balanced life does not need to wait until the force de l'âge. The sooner the better.

Q What are the biggest challenges facing legal practitioners nowadays?

A I can only speak to the challenges faced by those who are both academics and lawyers. That is the feeling of belonging everywhere, and not properly anywhere at the same time. Sometimes it is difficult to cope with multiple agendas, especially for women who assume too many responsibilities. In the field of collective redress, the biggest challenge for me is to promote symmetrical justice, so that frauds do not remain unpunished just because legal regimes are less developed. Hence, my efforts in building an international networking team to achieve that objective.

Q Where has been your favourite holiday destination and why?

A It is difficult to choose between a week of horse riding in the Cordillera de los Andes, for the beauty and the experience of escaping from the ordinary world, and the joyful years with my family in Corsica.

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

A Gandhi, of course, who had been trained as a lawyer at an early stage, for a never-ending aperitif.

Q The greatest film of all time is…

A *Life Is Beautiful* (1997).

Q What legacy would you hope to leave behind?

A Justice and fairness should not be the exception but the rule. Through fighting for the acknowledgment, the effectiveness, and the enforcement of people's rights, in particular consumers when facing companies who have infringed the law, my inspiration relies on making a slight positive difference in societal life. As for my family, love, happiness, devotion and responsibility in everything we undertake.

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

A Akin to many infringements, the collective redress practice has become global. Once a scandal is revealed, there is a "domino effect" in the quest for justice. To cope with it, international actors cooperate and bring parallel or consecutive actions around the world. This triggers comparative reasoning by jurists and judges which blurs the legal frontiers between the countries. The outcome is a tendency towards a sort of universal case law. Therefore, mass torts and liability should be addressed worldwide. Global class actions thus present themselves as global peace facilitators. Additionally, my continuing efforts to enhance symmetrical justice.

Q What is the biggest life lesson you have learned?

A Perseverance and passion are crucial to achieve our goals smoothly and confidently. When we have the chance to do what we believe in, an inner inspiration leads us, and we seem to be aligned with the world. But it might take time…

Q What is one goal you would like to achieve in the next year?

A With the implementation of the Representative Actions Directive for the protection of the collective interests of consumers, I would like to bring successful and influential cross-border representative actions in Europe… and beyond.

REFLECTIONS ON THE *FAST-MOVING* UK COMPETITION LITIGATION SPACE

Authored by: Jon Adlard (Director), Fraser Davison (Associate Director) and Vicky Sedgwick (Associate Director) – Frontier Economics

A series of recent judgments and ongoing case and regulatory developments will have potentially wide-ranging implications for UK competition litigation on a number of fronts. We reflect on what these may mean for class actions, digital firms and the role of expert evidence against a background of the ever-growing number of private enforcement cases in the UK.

Class Actions

Collective actions remain an area of growth in the UK. At the start of 2024 the Competition Appeal Tribunal (CAT) had listed over 40 collective action cases, a number that continues to increase. The cases currently before the CAT span the full lifecycle of the litigation process, including certification, post-certification case management and trial. Areas to watch at these different stages include:

- **At the certification stage:** new claims continue to be lodged, including a recent claim against UK mobile operators relating to loyalty penalties and claims against water companies alleging abuse of dominance through the provision of misleading information to regulators. At the same time, there is no let-up in claims against digital firms, with around one quarter of the claims filed before the CAT relating to the digital sector. Most claims to date have cleared the bar for certification, but a small number were not certified following initial hearings in 2023 (namely Lovdahl Gormsen v Meta, a class action case relating to consumer data; and the CICC cases, relating to interchange fees on commercial cards). The CAT held a second certification hearing on Lovdahl Gormsen v Meta in early 2024, after which it certified the revised abuse of dominance claim, subject to the class representative filing a short summary of the case. It remains to be seen how other cases that do not initially meet the certification test will evolve.
- **At the post-certification stage:** for cases that have been certified, many of which are complex and involve standalone competition claims, active case management techniques are being applied. For example, in a number of cases the CAT has sought to deal with substantive issues via a series of sequential trials. The tribunal has also engaged the economic experts in early discussions on methodology in an attempt to avoid "ships passing in the night". And, generally, it has closely supervised progress to trial, for instance by holding mini-hearings every few weeks to deal with disputes as they arise.
- **At the settlement stage:** settlement of collective actions requires approval by the CAT, and in late 2023 the CAT approved the first such settlement – albeit the value at stake was relatively small. The settlement was agreed between Mark McLaren and CSAV,

the class representative and a defendant respectively in the RoRo proceedings, a follow-on claim relating to deep sea carriage of new motor vehicles.

- **At the trial stage:** Merricks v Mastercard proceeded to trial on the issue of factual causation in 2023 and the CAT has recently handed down its judgment, with a further judgment awaited on the issue of limitation. Similarly, the trial in Le Patourel v BT has recently concluded. More collective actions are heading to trial on substantive issues in 2024, including Gutmann v First MTR, Govia & Stagecoach, while some cases are already slated for trial in 2025, such as Kent v Apple. It is an open question how the CAT will deal with cases that rely on theories of harm at the intersection of competition law and consumer protection (e.g. the boundary fares cases, which allege abuse of dominance by rail operators by failing to make extension tickets at the boundary of London travelcard zones sufficiently available to holders of London Travelcards). The approach the tribunal takes in these cases will be of particular interest to those involved in other claims with similar theories of harm that are at an earlier stage.

There have also been a number of recent judgments and case developments in competition litigation outside the class action space that nonetheless may raise relevant issues for class action cases. For example,

the recent pharmaceutical products judgments (relating to Liothyronine and Hydrocortisone) address excessive pricing within a regulatory and healthcare context. And a judgment was recently handed down by the High Court in Granville v LG Display, a follow-on cartel damages case relating to LCD panels. This constitutes one of only a small number of cartel damages judgments in the UK, with findings on overcharge and pass-on, amongst other issues, that may be relevant to class action claims.

Litigation Relating To New Digital Competition Regulation

The regulation of digital competition similarly continues to see significant developments. The Digital Markets Act (DMA) came into force in 2023 after the European Commission (EC) designated a number of large firms as platform "gatekeepers", and the UK Digital Markets, Competition and Consumers (DMCC) bill was laid before Parliament in late 2023.

While litigation relating to breaches of the DMCC law will be possible, including under the collective action regime, this is not an immediate prospect as the bill has not yet become law; at the time of writing, it is expected to receive Royal Assent around spring 2024.

In contrast, in Europe firms designated as digital gatekeepers have been required to comply with the DMA since March 2024, with the Commission opening proceedings against Apple, Alphabet and Meta to investigate potential non-compliance. Private enforcement is widely expected to follow where firms are alleged to be in breach of their obligations.

In the UK, an amendment to the DMCC bill that would have broadened the class action regime before the CAT to include consumer protection cases failed to pass the House of Commons, although it garnered some support at second reading in the House of Lords. If this expansion in scope does not occur, we may expect to see a continuation of the existing trend of standalone abuse of

dominance collective actions involving end-consumers being brought before the CAT. In a number of instances, these consist of competition claims with consumer protection and privacy issues, as seen in cases to date such as the one relating to boundary fares. It remains to be seen how these claims will be addressed as they work through the courts. What is clear is that novel approaches will likely be needed to adjudge the cases.

The Role Of Expert Economic Evidence

In 2023 there was much soul-searching in the UK on a number of aspects of expert economic evidence in competition damages claims. These included:

- **How to develop an appropriate body of expert evidence in large and complex cases** – for example, the CAT is grappling with considerable case management challenges in the interchange and Trucks proceedings, which both include a large number of individual cases and related class actions.
- **How to get the best out of economic expert evidence** – for example, the Trucks 'Trial 1' judgment expressed "concerns about the manner in which certain issues were dealt with in expert evidence, both written and oral" ([2023] CAT 6, paragraph 236), while the Court of Appeal found that in the McLaren certification judgment "the CAT identified the battle lines [between the experts], but said that the battle along these lines was for trial. In our judgment this was an error in approach" ([2022] EWCA Civ 1701, paragraph 50).

These challenges have spurred the CAT to implement a variety of innovative approaches to dealing with expert economic evidence. For example:

- In several cases the tribunal has adopted an expert-led approach to case management, with experts playing a more prominent role all the way through to trial. Notably, they have been tasked with leading the disclosure process via direct expert-to-expert interaction and submitting overarching 'positive cases' incorporating both expert evidence and supporting factual evidence.
- In light of the Court of Appeal's McLaren judgment and the complex issues involved in other cases, the tribunal has requested input from the experts on their proposed methodologies at a relatively early stage of various proceedings in order to inform case management decisions. This has involved use of 'hot tubs' where the experts give evidence concurrently – which have historically been used primarily at trial rather than as a case management tool – as well as requests for experts to attend regular case management hearings.
- The CAT has also taken initiatives that are more structural in nature. In the interchange cases, the tribunal has implemented the Umbrella Proceedings Practice Direction, which makes it easier to group different cases that raise similar issues. It is also seeking to resolve cases by holding series of mini-trials to address issues that it sees as distinct but sequential, with the aim of minimising the costs of litigating certain aspects of the claims if they were to fail at trial on an antecedent issue.

It seems likely that in the coming months we will see further innovation in competition litigation and perhaps a growing understanding of where novel approaches involving expert evidence have succeeded, where tweaks are required and where it might be necessary to go back to the drawing board. However, one thing is already clear: experts will need to be flexible to best assist the CAT.

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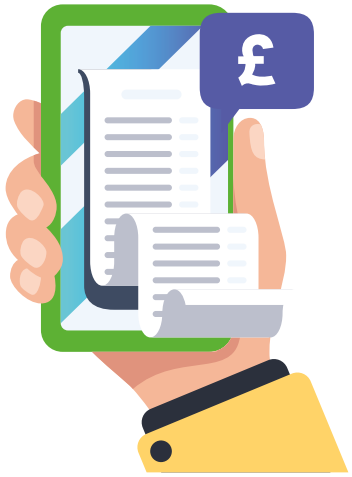
MODERNISING CLASS ACTION DISBURSEMENTS: THE POWER OF DIGITAL PAYMENTS

Authored by: Chris Ford (Senior Director) – Blackhawk Network

As we move ever closer to some major decisions being made, following trial, on the disbursement of damages for class actions across the UK and European regions, it seems eminently sensible to start focusing on how funds will be distributed to claimants.

Unlike their counterparts in the US, where disbursement has been happening for many years, UK and European litigators face the challenges of understanding and managing the many intricacies of payment processing and fund management.

Fortunately, companies like Blackhawk Network (BHN), who have been active across the globe in processing damages to claimants in support of the legal industry, come with extensive experience. Specifically, regarding local regulatory payments knowledge to support the last, and most important, step of the legal process, getting the damages to the claimant.



The Challenges of Traditional Payment Methods:

Traditional payment methods such as BACS transfers and cheques have long been the default choice for disbursing funds in class action settlements. According to the UK Finance Payments Market Report 2023[1] cheque volumes continued to fall in 2022, accounting for less than 0.5% of payments made in the UK. Furthermore by 2032 cheque volumes will account for less the 0.1% of all transactions as business and consumers navigate towards more digital approaches that are more cost effective to deliver, offering instant distribution potential across regions.

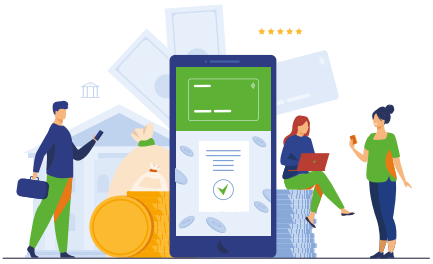
Equally challenging, when using traditional payment methods, is the need for each claimant to provide personal data such as home address and bank account information to receive their damages.

Claimants can often drop out of the process due to concerns over the legitimacy, if they haven't been fully involved in the case that may have gone on for many years, at the request for personal data, which means ultimately less people receive the damages they so rightly deserve.

By removing cost, inefficiencies and

1 https://www.ukfinance.org.uk/system/files/2023-09/UK%20Finance%20Payment%20Markets%20Report%202023%20Summary.pdf

complexities in the settlement process, all of which can become a huge drain on the overall claimant fund value, not to mention the user experience of the recipient when they need to cash-in the cheque, legal settlement distribution can be significantly enhanced.



The Simplicity of Digital Payments:

In contrast to traditional methods, digital payment solutions offered by BHN, provide a modern and efficient alternative for class action settlements. Prepaid cards or E-codes enable instant value to be delivered to recipients, eliminating the need for lengthy processing times associated with BACS and cheque payments, and without the need for personal data, alleviating the barriers or concerns from claimants.

Research conducted by McKinsey & Company found that digital payments can reduce the cost of fund disbursement by up to 50%, offering substantial savings for businesses and legal entities alike, and of course meaning that more of the agreed damages go directly to claimants, with less consumed in fees and charges.

Furthermore, digital payments offer greater flexibility and convenience for claimants, who can easily access and redeem their funds online or via mobile devices. With 37% of all UK payments being made through contactless interactions, and 94% of all registered mobile payment users using mobile payments to make at least one payment during 2022: it's clear there's a rise in this payment method when looking at a recent UK Finance Report*. Likewise, the most used payment method with 23 billion payments accounting for half of all UK payments was through debit cards.

From our experience providing email and SMS notifications to recipients, a digital-first approach can greatly increase redemption rates, creating more effective and impactful disbursement programmes and initiatives. This accessibility is especially important in class action settlements, where claimants may be dispersed geographically and have varying preferences with regards how and where they spend their funds.

Unlocking the Benefits of Digital Payments:

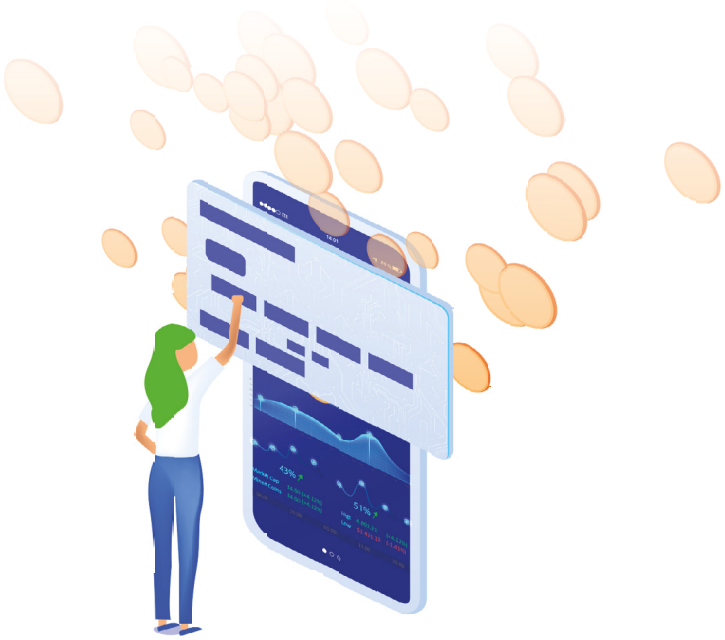
By embracing digital payment solutions, class action administrators, lawyers, and mass torts specialists can overcome the challenges of traditional payment methods and deliver a more streamlined and user-friendly settlement experience. With BHN's innovative technology, funds can be disbursed securely and efficiently, reducing administrative burden and ensuring compliance with financial regulatory requirements across jurisdictions.

As the demand for delivering damages to people that have been harmed continues to rise, it's clear that traditional payment methods are no longer sufficient.

By leveraging the power of digital payments, BHN is empowering the legal profession to modernise their settlement processes and to deliver greater fund value, more frequently, to a greater volume of claimants, across regions.

With instant value delivery, enhanced security features, and a user-friendly redemption experience, digital payments offer a compelling alternative to outdated payment mechanisms. By embracing innovation and technology, legal professionals can optimise the settlement process, reduce costs, and improve overall efficiency, ultimately driving better outcomes for all parties involved.

To learn more about how BHN can help, and to see some of the work we have completed in the legal settlement space, click here.



DIGITAL INFRASTRUCTURE INVESTMENTS ARE EXPENSIVE. HERE'S WHERE THE DEBATE STANDS ON SECURING FUNDING FOR A MARKET-WIDE ROLLOUT IN THE EU – *THE "FAIR SHARE" PROPOSAL, TELECOM M&A, AND WHAT TO EXPECT IN 2024 AND BEYOND FOR DIGITAL INFRASTRUCTURE.*

Authored by: Laurent Eymard (Managing Director) – BRG

To meet key elements of the European Commission's ("Commission") digital strategy,[1] European telecommunications operators need to make significant investments in 5G deployment and fibre rollout to replace aging existing infrastructure.

This comes with a hefty price tag and fierce debates about who will foot the bill.

For example, while the European Court of Auditors estimates that 5G deployment in the EU could cost approximately €400 billion,[2] only around €60 billion[3] has been invested to date.

And according to the European telecom operators in question, the massive investments required to connect 450 million Europeans to gigabit broadband and 5G by 2030 are placing a considerable strain on their resources.[4]

Plenty is at stake. Should Europe lag other regions in making critical infrastructure upgrades, it could have wide-ranging and long-term economic consequences. Yet the fragmented nature of the region's telecoms market is throwing up roadblocks and slowing down investments.

With three possible solutions under consideration, here's what industry stakeholders need to know about the debate.

Making Data Drivers Pay a "Fair Share"

Big Tech companies' consumer services account for a large share of the growth in network use. In the past few years, leading European telecom providers rallied around the idea of having the companies that generate traffic pay their "fair share" of the needed investments in maintaining and improving network infrastructure.

After all, they benefit from these improvements, attracting audiences and building revenue on faster, more reliable, and more widespread connectivity.

This suggestion aligns with the European Union's (EU) 2022 Declaration on Digital Rights and Principles,[5] which argued for having all market actors that benefit from digital transformation make a "fair

1 https://digital-strategy.ec.europa.eu/en
2 https://op.europa.eu/webpub/eca/special-reports/security-5g-networks-03-2022/en/
3 https://etno.eu/news/8-news/788-state-of-digital-communications-2024-etno.html
4 https://www.politico.eu/article/telecom-netflix-tiktok-youtube-fair-share-why-telcos-are-going-at-war-with-big-tech/
5 https://digital-strategy.ec.europa.eu/en/library/european-declaration-digital-rights-and-principles

and proportionate contribution to the costs of public goods, services and infrastructures." The proposal drew support from EU Commissioner and former telecom CEO Thierry Breton and the European Parliament.[6]

Yet not everyone supports the idea. The companies that would foot the bill[7] —Google, Amazon, Netflix, Meta, and Microsoft—have decried it as an "internet tax" that would unfairly penalize the biggest content and application providers. They're not alone: The Dutch[8] government and Body of European Regulators for Electronic Communications[9] (BEREC) argue that 1) tech companies already make substantial investments in telecom infrastructure; 2) the "Fair Share" proposal poses a threat to net neutrality, which treats all internet traffic the same; and 3) it could lead to price hikes for European customers.

Without consensus, the European Commission postponed further discussion on the matter[10] until 2025, after this year's election. There is unlikely to be much movement on this front until then, and the proposal's future is uncertain.

Easing Restrictions around Mergers

While the "Fair Share" proposal could help shift the burden of building out more advanced infrastructure, most telecom companies see mergers as a more expedient option to reach scale and speed up investments.

Compared to the US, which has just three main providers, each of the twenty-seven countries in the EU has multiple providers (Luxembourg, for example, has four[11] despite having only around 650,000 people).

This makes it challenging to develop the economies of scale that can help build and update telecom infrastructure across the bloc, particularly in rural areas.

Providers argue that allowing them to merge within their country's borders would enable them to pool their resources and lower the cost of rolling out new infrastructure. Yet regulators have long been sceptical about the positive investment impact from such consolidation and are worried about the immediate chilling effects on competition. In 2016, the Commission decided to block the Three-O2[12] merger and impose large divestment conditions on the H3G-Wind[13] merger.

Since then, the industry has been working under the assumption that, though there is no "magic number"[14] of operators, the Commission is typically loath to approve intramember state consolidations that reduce the number of providers from four to three.[15]

However, in February, the Commission cleared the creation of a joint venture between Orange and MasMovil, two of the four existing multinational organizations in Spain. To some, this could signal[16] that the Commission's competition regulator, DG Comp, has softened its stance on intramember state consolidation. However, the Commission has denied such a suggestion,[17] and given the significant remedies[18] the parties had to offer to secure clearance, this development alone cannot be heralded as a true paradigm shift.

6 https://www.telecomtv.com/content/access-evolution/european-parliament-backs-controversial-fair-share-resolution-47723/
7 https://www.reuters.com/technology/big-tech-fair-share-debate-set-dominate-barcelona-mobile-meet-2023-02-26/ https://www.reuters.com/technology/big-tech-fair-share-debate-set-dominate-barcelona-mobile-meet-2023-02-26/
8 https://www.reuters.com/technology/dutch-warn-against-internet-toll-eu-looks-big-tech-fund-networks-2023-02-27/
9 https://www.reuters.com/business/media-telecom/eu-telecoms-regulators-group-criticises-forcing-big-tech-pay-5g-rollout-2023-05-19/
10 https://www.reuters.com/technology/eus-breton-likely-set-out-strategy-big-tech-telco-funding-debate-next-year-2023-10-10/
11 https://www.bloomberg.com/news/newsletters/2023-11-09/eu-fair-share-setback-is-a-win-for-big-tech?embedded-checkout=true
12 https://competition-cases.ec.europa.eu/cases/M.7612
13 https://competition-cases.ec.europa.eu/cases/M.7758
14 https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_16_1713
15 https://link.springer.com/article/10.1007/s40319-018-0677-3
16 https://www.lemonde.fr/economie/article/2024/02/21/avec-la-fusion-des-operateurs-espagnols-orange-et-masmovil-bruxelles-adoube-la-concentration_6217691_3234.html
17 https://globalcompetitionreview.com/article/guersent-relaxing-competition-rules-not-the-answer-more-telecoms-investment
18 https://www.euractiv.com/section/digital/news/orange-masmovil-merger-approved-with-very-good-remedy-says-eus-vestager/

Fostering Integration of the Telecoms Single Market

With the prospect of intramember state consolidation remaining largely uncertain, European operators could seek to integrate across borders. Proponents suggest that this would help them reach scale and foster integration of the telecoms single market.

The Commission has repeatedly signalled that it would welcome such consolidation[19] and that competition rules do not stand in the way.

Yet rules around mergers are just one impediment to the creation of a single telecoms market in the EU. Other major challenges[20] include differences in consumer demands and pricing models in markets that are deeply fragmented across EU countries, variations between member states' spectrum management and telecom regulations, and disparities in network architectures across the continent. What works in France may not work in Germany, and vice versa. And while the EU previously has taken steps to break down these barriers, such as eliminating roaming charges across the EU, integration is still a long way off.

As a result, even if providers could merge across borders, the advantages that stem from such consolidation could be too limited without further harmonisation of the regulatory environment. While the EU could move toward such a model, this reality is likely years away.

The Future of Telecom Infrastructure in the EU

According to the Commission,[21] "The future competitiveness of all sectors of Europe's economy depends on […] advanced digital network infrastructures and services…" This makes financing the necessary investments all the more crucial to the EU's future.

With the funding debate ongoing and a major Commission election on the horizon in 2024, stakeholders would do well to keep an eye on how these proposals evolve. Hundreds of billions of dollars in investment—whether come from fees levied on Big Tech or the creation of a single market—will fuel a transformation in connectivity that will have profound implications for one of the world's most powerful regions.

Laurent Eymard[22] has more than fifteen years of experience advising clients in a wide range of competition cases and civil litigations across many sectors. He has been involved in merger, antitrust and state aid cases before the European Commission and other European jurisdictions, primarily in France and Belgium.

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19 https://ec.europa.eu/commission/presscorner/detail/en/ip_24_941
20 https://digital-strategy.ec.europa.eu/en/news/consultation-electronic-communications-highlights-need-reliable-and-resilient-connectivity
21 https://digital-strategy.ec.europa.eu/en/library/white-paper-how-master-europes-digital-infrastructure-needs
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NAVIGATING THE CROSSROADS: THE FUTURE OF THE AS-EFFICIENT COMPETITOR TEST IN EU COMPETITION LAW

Authored by: Dr Miroslava Marinova (Lecturer in Commercial Law) – University of East London

The As-Efficient Competitor (AEC) test is a key aspect of European Union (EU) competition law. It was created to distinguish between conduct that is anti-competitive and conduct that is procompetitive.

The AEC test has played a crucial role in defining the competitive landscape in the EU. However, recent judgments have raised questions about the future of the AEC test.

Recently, the European Commission published a communication indicating amendments to its Article 102 TFEU Guidance Paper in light of the latest EU Courts' judgments. This brief paper explores the challenges and implications facing the AEC test in EU competition law. By examining its development and current issues, we aim to provide insight into the ongoing debate about the AEC test and its impact on competition policy within the EU.

Fundamentals Of The AEC Test

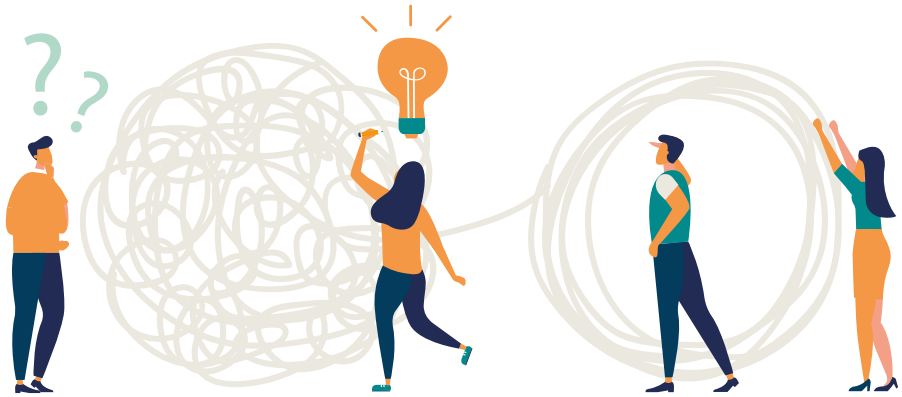
The AEC test was introduced by the European Commission in its 2008 Guidance Paper, wherein it posited that conduct should be considered anti-competitive only if it hampers or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.

The underlying principle behind this framework is that competition law ought to safeguard competitors who are at least as efficient as the dominant firm, thereby ensuring an effective competitive environment to the benefit of end consumers, in line with the primary objective of EU competition law - the maximisation of consumer welfare.

The Commission's view was that assessing anti-competitive foreclosure could be evaluated through a price-cost test, which serves as a specific tool to assess whether an as efficient competitor could survive competition or not.[1] Consequently, the AEC test has often been conflated with a price-cost test, as the latter serves as a methodological approach to assess potential exclusionary abuses.[2]

1 European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Art. 102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] O.J. C 45/7 (2008 Guidance Paper), paras 23 – 27.

2 For a full analysis about the difference between the price cost test and the as efficient competitor test as a concept see M. Marinova, 'The EU General Court's 2022 Intel Judgment: Back to Square One of the Intel Saga' (2022) 7(2) European Papers - A Journal on Law and Integration, 627, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4553869; According to Kühn and Marinova, the AEC test should be interpreted as a concept, not as a formal price-cost test: see K-U. Kühn and M. Marinova, 'The role of the 'as efficient competitor' test after the CJEU judgment in Intel' (2018) 4(2) Competition L. & Pol'y Deb. 64. See, in general, M. Marinova, Fidelity Rebates in Competition Law: Application of the 'As Efficient Competitor' Test (Wolters Kluwer, 2018).



Key Cases Shaping The Aec Test - Criticisms And Challenges Faced By The AEC Test In Practice

The application of the AEC test in the decisional practise of the Commission turns to be problematic in numerous cases that has been subject to judicial scrutiny. The EU courts have rejected the application of the AEC test in cases involving anti-competitive behavior not linked to pricing practices. This includes judgments such as Intel in 2014,[3] Post Danmark II,[4] and Google Shopping.[5] In the Google Android[6] and Qualcomm judgments,[7] the General Court nullified the Commission's decisions, primarily due to procedural errors in applying the AEC test. The CJEU's 2017 judgment in Intel did not offer significant clarification on the AEC test's application.[8] It emphasized the Commission's obligation to assess all circumstances and consider potential strategies aimed at excluding equally efficient competitors. However, it did not specify whether a price-cost test is mandatory for evaluating such strategies. The core issue disputed in these cases was the application of the AEC price-cost test, persisting since its introduction in Intel. The principle that Article 102 is concerned only about the exclusion of equally efficient rivals stands.

In this regard, it is now accepted that the AEC test should be interpreted as a conceptual principle; whereas the price-cost test is only one type of evidence that may be used to verify a possible exclusionary abuse.

Though not explicitly stated by the Court, this interpretation aligns with the European Commission's position, evident in its Amended Guidance Paper from March 2023. The latest CJEU ruling on the AEC price-cost test, in Unilever Italia, seems to reaffirm the position established in Intel.[9]

Future Directions And Conclusions

Recent case law highlights the lack of clarity surrounding the conditions and circumstances necessitating the application of the AEC test by competition authorities. Notably, this test is prone to implementation errors and imposes significant administrative burdens. The inherent complexity and practical challenges involved raise concerns about justifying resources for its implementation. This could introduce further legal uncertainty and the risk of enforcement errors and costs.

Consequently, it may be advisable for the Commission to differentiate between the predation price-cost test for price-based abuses and the modified price-cost test for conditional rebates.

Abandoning the former is suggested due to its lack of administrability and legal certainty, stemming from its complexity, susceptibility to errors, and absence of judicial endorsement thus far.

3 Case T-286/09 Intel Corp. v Commission EU:T:2014:547.
4 Case C-23/14 Post Danmark A/S v Konkurrencerådet EU:C:2015:651.
5 Case T-612/17 Google LLC and Alphabet, Inc v Commission EU:T:2021:763.
6 Case T-604/18 Google LLC and Alphabet, Inc. v. Commission, EU:T:2022:541. Case T-235/18 Qualcomm Inc. v. Commission EU:T:2022:358.
7 Case T-235/18 Qualcomm Inc. v. Commission EU:T:2022:358.
8 Case C-413/14 Intel Corp. v Commission, EU:C:2017:632.
9 See, M. Marinova, Rethinking the As-Efficient Competitor Test: Assessing the wider impact of the CJEU's Judgment in Unilever and its Implications in Shaping the European Commission's agenda to Reform Article 102 TFEU (n 1).

60-SECONDS WITH:

LISA CUTTING
DIRECTOR
MAZARS

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

A Before becoming a monitoring trustee, I worked as family lawyer which accounted for many strange and exciting career experiences. A large proportion on my case load related to the issue of implacable hostility in child contact proceedings which were always long running, difficult cases to resolve and led to my involvement in a reported case in this area. After 10 years I decided to move into something different, which was an exciting move in itself as I went to Université Aix Marseille to study an LLM in European Business Law, following which I embarked on my career as a monitoring trustee.

Q What motivated you to pursue a career in law?

A I was offered the opportunity to do GCSE and A Level law at school as an experiment, and really enjoyed it, hence it seemed logical to continue in that direction.

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

A It sounds very boring but I would most likely try to sort out the annoying small DIY jobs in the house we moved into 2 years ago that we complain about but never have time to fix (understanding why none of the doors close properly, why the kitchen light switch is so far away from the kitchen…..) and pottering in my garden.

Q What piece of advice would you give to your younger self?

A To have more confidence in my own ability and to listen more to those who provide positive guidance.

Q What are the biggest challenges facing legal practitioners nowadays?

A In the world of remedies, predictability - the development of technology has led to regulators having to consider remedies where it cannot always foresee the long-term effects. This together with the global nature of business means that geographically, a remedy accepted in one jurisdiction, may not be accepted in another which presents challenges to practitioners in predicting what lies ahead for merging companies navigating potential risks/obstacles and delays for their clients.

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

A Everyone should read books that they enjoy in my view, so this is an impossible question for me to answer. My daughter is currently at the age where she is just starting to understand the story, rather than trying to understand each word, which has led me to revisit many of my childhood favourites. We've read most Roald Dahl (her favourite is the *Magic Finger*) and have just started on Enid Blyton (*Malory Towers* – my daughter now fantasises about being sent off to boarding school!)

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

A Damian Lewis - My husband and I met him once, not long after we'd become seriously addicted to *Homeland*. My husband is Moroccan and most of *Homeland* (so Damian told us) was filmed in Morocco because they weren't allowed to film in Tehran. We'd love to invite him over for a tajine, I'm sure we'd be great friends…….

Q The greatest film of all time is…

A *Top Gun*, without a doubt, closely followed by *Top Gun Maverick.*

Q What legacy would you hope to leave behind?

A Happy and contended children.

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

A The client experience = the importance of listening, responding and collaborating. Understanding our clients, empowering our team and designing our business to deliver outstanding client experiences. At Mazars, we are encouraged to strive towards the delivery of first class, professional service and committed to being trusted advisers and partners. Our clients' experience of working with us is as important as our professional capabilities. Mazars is continually working to improve the client experience; to listen and better understand our clients, respond to their needs and to build the right frameworks and infrastructure that supports us to work together to deliver outstanding experiences.

Q What is the biggest life lesson you have learned?

A Preparation is key….. I was advised as a trainee that the best way to win the court over was through thorough preparation and anticipating questions. I try to apply this to life in general.

Q What is one goal you would like to achieve in the next year?

A As a team our goal is to work more closely with UK law firms and with the Competition and Markets Authority. Given the recent steps taken to overhaul the approach in the UK, we see an opportunity to have more of a role in not only the effective monitoring of remedies in the UK, but also to provide advice on the design and sufficiency of proposed remedies.

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1603/7/7/23 - PROFESSOR CAROLYN ROBERTS V SEVERN TRENT WATER LIMITED AND SEVERN TRENT PLC

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1595/7/7/23 - ROBERT HAMMOND V AMAZON.COM INC. AND OTHERS

1582/7/7/23 - CHARLES ARTHUR V ALPHABET INC. & OTHERS

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

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

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

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

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

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

1336/7/7/19 - MR PHILLIP EVANS V BARCLAY BANK PLC AND OTHERS

ON PROVING MARKET FAILURE

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

In a previous article [Issue 4, February 24, 'On Being Open'] we considered the proposition that subsidy about to be awarded should be publicised before the actual award so that competitors and stakeholders can raise legitimate objections. This proposition was likened to the planning application, consultation and determination process.

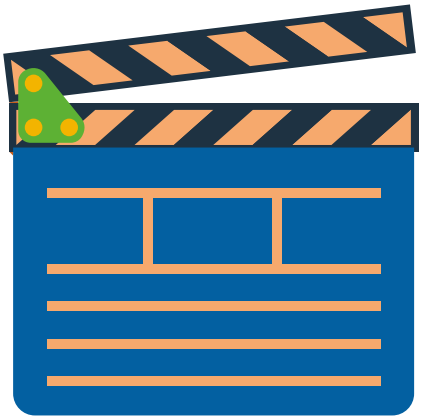
A movie analogy was offered:* Four Weddings and a Funeral, *where a vicar asks for legitimate objections to the sacred union to be made before, not after, the marriage.

The previous article also referenced the sine qua non of Market Failure. The UK, the EU and the WTO all agree that state aid and subsidy ought to only be awarded where there is Market Failure. Vilfredo Pareto (1848-1923: Italian economist and sociologist) was cited as the definitive authority in identifying whether or not a market is failing. Pareto successfully argued that if a market is efficient, (termed as optimal, nowadays referred to as being Pareto-optimal), then that market is not failing.

The corollary is this: that a market is failing when it is not Pareto-optimal. Therefore, to grant subsidy, the State must prove the market it is intending to intervene in is not Pareto-optimal. So, what is Pareto-optimal?

For Pareto, a market is efficient and optimal where it is no longer possible to redistribute outcomes without making

at least one party in the market worse-off. Intriguingly, such a calculus is now being trialled for use by AI in driverless cars in order to help decide who ought to perish in a crash if and when at least one death, among potentially many others, is unavoidable.



This may sound abstract. Our film analogy is helpful here. Consider one of those successfully concluded marriages and specifically how the wedding cake is shared out. If 10 guests 'divvy-up' the cake leaving no cake for poor number 11, then, albeit an unequal distribution, it is Pareto-optimal. Why? Because to intervene and redistribute cake to number 11 means to take cake away from guests 1 through 10, meaning someone is worse-off in consequence of the intervening redistribution.

However, it is important to note that if all 11 guests had cake but yet some cake remained uneaten then Pareto would intervene because the existing distribution is sub-optimal, i.e., it is possible to intervene without anyone being worse off. In Pareto terms it is necessary to intervene in such a case.

In the UK, awarding subsidy is only justifiable where the market is failing; where it is proven to be Pareto-sub-optimal.

In other words, in the UK the State cannot intervene on the grounds, albeit noble, that some, maybe most, will be better-off. Rather, the State can only intervene on the grounds that none will be worse-off.

Pareto raises a high bar for the State, especially in this regard: how does the State know who are the competitors and stakeholders in the market; and how can it predict who among them will be worse-off? The answer lies in the previous article: as argued, by publicising ex ante its intention to award subsidy, the State is alerting those with an interest to object and to record how much worse-off they will be. If any party with an interest in the market will be rendered worse-off then the market is already Pareto-optimal and so there is no Market Failure; meaning the State has no valid, sound justification for intervening.

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