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TL4 Competition MAGAZINE

ISSUE 6

HITTING THE MARKS FOR Q3:

YOUR QUARTERLY UPDATE ON COMPETITION LAW AND LITIGATION

INTRODUCTION

"Taste the relish to be found in competition - in having put forth the best within you."

- Henry Kaiser

We are delighted to present Issue 6 of the TL4 Competition magazine, our third edition of 2024: Hitting The Marks For Q3: Your Quarterly Update on Competition Law and Litigation. Exploring the complex landscape of Competition law and litigation, we are proud of the quality of contributions of this issue and the calibre of unique topics. With articles focusing on global mergers, class actions, cartels, and everything in between, we hope you find the issue stimulating reading.

Thank you very much to our authors, contributors, readers, and valued partners for their support. Don't forget to book your place at The Competition Next Gen Summit and The UK Digital Markets Competition Regulation Forum 2024 - 2nd Annual.

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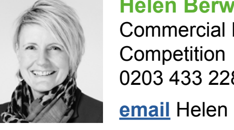

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CONTENTS

| Law |

Is Anybody out There? Take-Up Rates in Collective Proceedings 5

60-Seconds with: Camelia O'Brien, Director, AlixPartners .. 8

With Great Power Comes Great Responsibility – The CMA's Guidance On Its Digital Markets Competition Regime........ 10

If Access to Justice is the Key Goal for the Collective Redress Regime, Then Surely That Means all Claimants Should Receive Their Rightful Damages? 13

No Substitute for Economics: The Commission's Updated Market Definition Notice 16

Limitation In Competition Claims: A Divergence Between the EU and English Courts 21

The CMA's Open-Door Policy on Green Agreements: Don't all Rush in! What do we Know Following the First Half Year of The CMA's Green Agreements Guidance 23

From Challenges to Solutions: The CMA's Approach to Digital Market Regulation 25

Navigating Large-Scale Document Productions in Global Merger Reviews 28

Grand Interface Designs: The Competition and Markets Authority's Enhanced Powers to Tackle Potentially Harmful Online Choice Architecture 30

| Litigation |

60-Seconds with: Cameron Azari, Senior Vice President, Business Development, Epiq 33

Historic Opt-Out Settlement Administration Underway: Representative Persons in 'Boundary Fares' Collective Settlement now Filing Claims for Redress 35

Economic Expert Evidence in Truck Cartel Damages Claims in The UK and EU – Pass-On" 37

60-Seconds with: Chris Ross, Partner, RPC 42

Joint Expert Evidence in Cartel Damages Claims – Cost Effective Case Management or Cartelising Defence Strategies? 43

The Beginning of the End: Lessons Learned From the First Collective Settlements in the Competition Appeal Tribunal 46

UK Competition Appeal Tribunal Approves First Significant Class Action Settlement 50

The New Age of Discovery: Plaintiffs Navigate Jurisdictional Waters From Brazil to Europe 53

Certification of Competition Collective Proceedings: A More Settled Path? 55

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IS ANYBODY OUT THERE?

TAKE-UP RATES IN COLLECTIVE PROCEEDINGS

Authored by: James Harvey (Director) & Aastha Mantri (Associate Director) – Economic Insight

It had to happen eventually.

Eventually, somebody had to ask the difficult questions on everyone's mind:

- What is the likely take-up rate of collective settlements?
- How do different distribution arrangements affect the likely take-up rate?

This article outlines some of the challenges associated with answering these questions and what could be done to help address them.

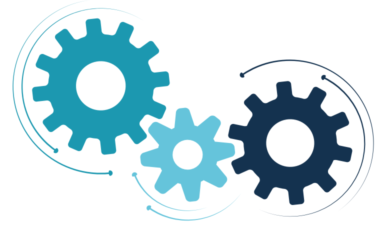
What Is The Likely Take Up Rate Of Collective Settlements?

On the 10 May 2024, the Competition Appeal Tribunal (CAT) published its judgment regarding the proposed collective settlement between Justin Gutmann and Stagecoach South Western Trains Limited, in the so-called Boundary Fares case.[1]

In the judgment, the CAT made it very clear that it wants to know what the likely take-up rate of the collective settlement could be. For example, it said (emphasis added):

> "Where the amount of damages to be paid is to be limited by the number and total amount of valid claims, as in this case, the Tribunal should be provided with a properly reasoned and researched estimate of the likely take up by class members, so the Tribunal will be able to assess the likely range for the total amount claimed by class members."[2]

> "As regards the estimated take-up, the CR [class representative], at the request of the Tribunal, provided his estimate... We would hope that, in future, such an estimate is provided in the original application for a CSAO [collective settlement approval order]."[3]



How Do Different Distribution Arrangements Affect The Likely Take-Up Rate?

A week before on the 3 May 2024, the CAT also published the Collective

1 1304/7/7/19 Justin Gutmann v First MTR South Western Trains Limited and Another - Judgment (SSWT Collective Settlement) | 10 May 2024 (catribunal.org.uk)
2 Ibid, paragraph 65.
3 Ibid, paragraph 66.

Proceedings Order (CPO) for the claim by Clare Spottiswoode in relation to the Power Cables cartel.[4] The CAT made several points.

First, the CAT noted that class members may not be able or incentivised to engage with the distribution process.

"The Tribunal considers that there may well be particular challenges to effective distribution in this case, given the large size of the class and the potential difficulties for consumers in recalling and proving what, if any, electricity bills they paid over the course of an infringement period going back over twenty years, as well as recalling and proving when they first started paying, which may be relevant for limitation purposes. Even if the aggregate amount of any settlement or damages award is large, there is a risk that if that aggregate award is simply distributed in cash among all members of the Class, each individual member might regard the amount receivable as small and so may not be sufficiently incentivised to engage actively in the distribution process leading to a small take up. It would obviously be unattractive if tens of millions of pounds of legal and funder's fees, and lots of Tribunal time, are spent on complicated proceedings only to find that few consumers actually come forward to claim damages. If that were the outcome, it might fairly be said that the litigation has benefitted no-one but the lawyers and funders."[5]

Second, the CAT noted that at the CPO stage it wants to satisfy itself that the distribution process would result in sufficient take-up of any damages, in view of the difficulties the class members may face when they eventually engage with it.

"The issue raised by the Tribunal in this case is not as to whether the amount of damages received by class members will accord with common law principles but as to whether a practical and effective process will be found for distributing a settlement or damages award to the class as a whole."[6]

Third, the CAT indicated that it would be willing to revoke a CPO if it was not satisfied.

"Having regard to the novelty of Collective Proceedings, the possible difficulties in distributing a settlement or damages award to the Class in this case, the need to explore innovative and creative methods of distribution and the substantial costs which are predicted to be incurred, the PCR should give detailed consideration to plans for the distribution now so that the Tribunal is in a position to make a properly informed assessment of the costs/benefit balance as the proceedings progress. It would be unsatisfactory to defer consideration of proposals for distribution until after an award has been made by which time the majority of the costs will already have been incurred. The Tribunal does not regard the current absence of a developed plan for distribution as precluding certification, but it has directed the PCR to report to the Tribunal within three months on her proposals. The PCR's response will be relevant to the Tribunal's ongoing "gatekeeper" function in relation to these proceedings. If a proposal for distribution does not emerge that addresses the Tribunal's concerns, one option available will be to revoke the CPO under Rule 85."[7]

What Are The Challenges Associated With Estimating Take Up Rates In Collective Proceedings?

If the proposed distribution process is designed such that it "does not leave any proceeds of a settlement or damages award undistributed"[8] then, of course, these take-up rate issues would fall away.[9] The type of distribution process that would achieve this would be "automatic" from the perspective of class members. That is, the class members would not need to expend any effort to obtain compensation, they would simply receive it.

However, if the proposed distribution process is designed such that class members do have to do some legwork to obtain any or the full amount of compensation, the possibility that they will not be able or willing to do so is a real one.

Indeed, in Gutmann, the CAT referred to an FTC analysis of take-up rates in US settlements, which suggests that the rate might be less than 10%.[10]

But every case is different in a way that will affect the take-up rate. The benefits of take-up – the damages per class member – will vary.[11] The costs of take

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4 1440/7/7/22 Clare Mary Joan Spottiswoode CBE v Nexans France S.A.S. & Others - Judgment (Collective Proceedings Order) | 3 May 2024 (catribunal.org.uk)
5 Ibid, paragraph 45.
6 Ibid, paragraph 53.
7 Ibid, paragraph 55.
8 Ibid, paragraph 56.
9 Albeit a different issue is created regarding how funders and others will be remunerated.
10 Ibid, paragraph 90.
11 Of course, noting that the extent to which proof of purchase is required, and what that proof is, is of course influenced by the distribution process.

up – for example, the ease with which the class members can obtain any necessary proof of purchase – will also vary. The attitude of the class to the case itself (e.g., the extent to which the sector or issue is of concern to the public) may have a bearing on take-up too.

So, what can and should be done to obtain an estimate of a "case-specific" take-up rate?

Again, in Gutmann, the CAT provided an indication of the broad type of empirical research it would like to see:

"Had this application not been made so close to trial, with the threat of escalating costs if there was any delay in the approval process, and in an ideal world, the Tribunal would have required empirical research based on class members as to the likelihood of them making claims...whether they would be bothered to satisfy the evidence requirements."

What Could This Type of Empirical Research Look Like in Practice?

A survey? Plainly, asking a class member "Would you make this claim if you had to do x, y, z to get it?" is a crude question and it is unlikely that anyone would ask it by itself, but it usefully illustrates some of the challenges that conducting this type of research poses.

- Will all of those class members answering "yes" really do so when push comes to shove?
- Are those class members who are willing to spend time answering a survey more likely than the "average" class member to spend time making a claim too?

An experiment? Another approach is to avoid asking hypothetical questions altogether and instead put the respondents to work. This type of research would involve asking respondents to complete a time-consuming (and presumably quite tedious) information gathering exercise for the opportunity to earn a sum of money of a similar size to the possible compensation available. One could then measure how many sign-up for the task, and how many actually complete it. But how confident could we be that such an exercise would properly mimic what engaging with the proposed distribution process would be like in practice?

A trial? To test the effect of something on something else in other circumstances, one could run a "trial". In this context, this would involve inviting a sample of class members to claim "compensation" by following the proposed distribution process(es) and seeing what proportion actually go through steps required. But some of the difficulties of this are obvious. For example, one could not present the sum as compensation for an alleged harm that has not yet been proven, and presenting it as something else (say, a payment for participation in a trial) would somewhat undermine the validity of a trial and, in effect, take us back to an experiment.

A Longer-Term View

It seems obvious that whatever type of research is done, it will be imperfect. It is not hard to imagine that the results of it could be contentious and, as such, the CAT will no doubt be concerned about balancing obtaining the information it requires against time and cost.

But do the challenges set out above imply that undertaking this type of research is not worthwhile?

No. By gathering this type of information, it may allow future parties and the CAT to better understand the relationship between "expected" and "actual" take-up rates so that any estimates are better informed in future cases. With this in mind, it would be in the public interest to share whatever is learned for the benefit of others.

60-SECONDS WITH:

CAMELIA O'BRIEN
DIRECTOR ALIXPARTNERS

Q What motivated you to pursue a career in competition economics?

A I have always loved that economics as a subject requires the perfect amalgamation of quantitative skills, logical reasoning abilities as well as real world application. When I was doing my Masters in Economics, I was trying to figure out which area of economics I wanted to specialise in. When I attended my first lecture on competition economics and game theory, I was immediately fascinated and have never looked back.

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

A That any work I do is grounded in facts. In my view, it can be easy to challenge economic analysis that is too conceptual and is not tied to the facts of each specific case.

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

A I recently fostered my 10th trainee guide dog. I am passionate about training guide dogs that can be partnered with someone who has a visual impairment and would love to volunteer for Guide Dogs full time.

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

A Always make choices based on what makes you happy – think less about others' opinions.

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

A There is no substitute for hard work and preparation.

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

A *The Alchemist* – I read this when I was a teenager, and the message still resonates with me - it celebrates the power of dreams and the importance of being true to ourselves. As a plus, Coelho's poetic writing is a delight to read.

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

A Rabindranath Tagore – He is from my hometown (Kolkata) and I have always loved his poems, in fact I was even named after one of them. He was also the first non-European and first lyricist to the win the Noble Prize in Literature.

Q Where has been your favourite holiday destination and why?

A South Africa – you get to see lions, penguins and whales, all in one place, and also taste some pretty good Cabernet in Stellenbosch!

Q What legacy would you hope to leave behind?

A One where there is more diversity (in the broadest sense of the word) in senior positions at economist firms and in expert witness roles.

Q What is one skill you think everyone should have?

A Adaptability – there will always be uncertainties and changes at work and in life. Being adaptable makes life smoother and happier for everyone.

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

A There has been an explosion of competition class action cases – I think this trend is going to continue for a while, especially in the tech space. I hope to see some changes in consumer protection redress mechanisms so that there is greater scope to bring a wider variety of consumer rights class actions.

BRG Further Expands in Europe with Addition of Expert Team in Brussels.

Aleksandra Boutin
Managing Director, Brussels

Xavier Boutin
Managing Director, Brussels

Cyril Hariton
Director, Brussels

Berkeley Research Group (BRG) has expanded its European Competition practice in Brussels with the additions of **Dr Aleksandra Boutin** and **Dr Xavier Boutin** and their team of economic consultants from **Positive Competition.** This significantly reinforces BRG's existing practice, which has offices in Brussels, Paris and London. They join managing directors *Dr Adina Claici, Konstantin Ebinger, Laurent Eymard and Prof Kai-Uwe Kühn,* who formed the practice in September 2023; and *David Parker,* who joined in January 2024.

Aleksandra Boutin explained the appeal of the move: *"We are joining a team with complementary expertise and skills and a strong international presence to enhance our value proposition for our clients. This will allow us to reach jurisdictions in Europe and beyond in our core business of mergers, antitrust and litigation. In addition, we will further expand our specialist expertise in key areas such as state aid, Foreign Subsidies Regulation and matters relating to the Digital Markets Act".*

Xavier Boutin added: *"Having successfully built Positive Competition in Europe, we have now found a global team at BRG that shares a similar entrepreneurial spirit and dedication to client service. We have known each other for years and are excited to join forces with a team of experts who share our forward-looking ethos. Together, we make one of the largest on-the-ground teams in Brussels, and with seven of us ranked by Who's Who Legal, we are also one of the most experienced".*

Prof Kühn said: *"I worked with Aleksandra and Xavier, as well as Cyril Hariton, in my role as chief economist at the European Commission and hugely value their expertise and experience, particularly in merger control and antitrust matters. Bringing together our two success stories gives us the scale and reach to handle cases of any size across multiple jurisdictions. I very much look forward to collaborating with them again".*

The expanded European Competition practice now includes around 40 professionals in Brussels, Paris and London, speaking ten European languages natively. Eight are ranked by Who's Who Legal, and six have significant senior-level experience at the European Commission's Directorate-General for Competition. BRG also works closely with a network of academic affiliates, including two Who's Who Legal-ranked experts. BRG numbers almost 1,600 professionals worldwide.

About BRG

Berkeley Research Group, LLC (BRG) is a global consulting firm that helps leading organizations advance in three key areas: disputes and investigations, corporate finance, and performance improvement and advisory. Headquartered in California with offices around the world, we are an integrated group of experts, industry leaders, academics, data scientists, and professionals working across borders and disciplines. We harness our collective expertise to deliver the inspired insights and practical strategies our clients need to stay ahead of what's next.

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WITH GREAT POWER COMES GREAT RESPONSIBILITY – THE CMA'S GUIDANCE ON ITS DIGITAL MARKETS COMPETITION REGIME

Authored by: David Parker (Managing Director), Edan Miles (Associate Director) & Greg Wilkinson (Associate Director) - BRG

Introduction

On the 24 May this year, the UK's landmark Digital Markets, Competition and Consumers Act ("DMCCA") was made law. It represents a considerable update to the UK's competition regime, with the aim of giving the Competition and Markets Authority ("CMA") "tools to stop technology businesses with strategic power from misusing their position to disadvantage competitors and consumers".[1]

This is undoubtedly an interesting time for the UK's competition community, and many will be closely watching the evolution of this new regime.

The CMA recently publicly consulted on its draft guidance setting out how it would exercise its powers. We responded to that consultation with the aim of identifying some key challenges the CMA is likely to face, and provided suggestions for how it might avoid these challenges (or at least mitigate the risk) through increased clarify and careful implementation of the regime. As an economic consultancy, our comments were focused on the CMA's guidance in relation to strategic market status ("SMS") designation (including criteria and procedure), the conduct requirements ("CRs") for SMS firms and the pro-competition interventions ("PCIs") that the CMA may make to address adverse effects on competition ("AEC").

We summarise below the key themes of our response to the CMA, but encourage readers to read our consultation response in full, available on our website.[2]

Strategic Market Status Designation

Under the DMCCA, the CMA will investigate firms it considers may have SMS within one or more 'digital activities'. If the CMA concludes the firm does have SMS, it is designated as an SMS firm, and becomes subject to the broad powers of regulation conferred on the CMA by the DMCCA. Necessary conditions for a firm to have SMS are if it provides digital content or services via the internet, is linked to the UK,[3] and meets a minimum revenue threshold. If these criteria are met, the substantive portion of the SMS investigation is concerned with whether a firm holds 'substantial and entrenched market power' ("SEMP") and holds a 'position of

1 UK Government DMCCA press release, 24 May 2024.
2 https://www.thinkbrg.com/insights/publications/response-to-cma-consultation-on-new-digital-markets-competition-guidance/
3 Having a significant number of UK users, carrying on its digital business in the UK, or the digital activity having an effect on trade in the UK.

strategic significance' ("POSS") in respect of a digital activity.

SEMP[4] and POSS are new concepts, and the CMA makes clear that it does not require a formal market definition exercise to assess either, instead holistically drawing upon a large range of quantitative and qualitative evidence.

It does not set out any clear quantitative thresholds or prescriptive criteria for how SEMP and POSS will be determined (other than in relation to the revenue threshold).

While we understand the CMA's desire to avoid extensive market definition debates and retain flexibility, we are concerned that insufficient clarity on how these tests will be applied will lead to increased pressure during the designation process, from both potential SMS firms and their competitors. We suggest that it would be helpful for the CMA to provide a further level of guidance beyond that currently available, which sets out some principles for the nature, type and strength of evidence that will be required to demonstrate SMS.

The CMA will conduct SMS investigations in relation to individual firms, and given resource constraints, one would assume these will need to be staggered. The CMA states it will rely on its Prioritisation Principles to guide it on which firms and digital activities it should prioritise, which could mean that the CMA designates certain firms as having SMS in a given digital activity (e.g. the largest firm), while other potential SMS firms in that activity are yet to be investigated. If this were the case, it could mean that SMS firms' competitors – even if they are ultimately designated themselves – would have a period in which they are unregulated and therefore competing with the SMS firm on uneven terms, which would distort competition.

Once a firm has been designated as having SMS, the CMA may impose two types of remedy to address concerns:

1. CRs oblige an SMS firm to behave in a way that achieves a certain outcome. CRs may leave it up to the SMS firm to decide how to achieve this outcome, or the CMA may issue a set of actions the SMS firm must take.

2. PCIs have a higher legal threshold than CRs, and require a formal investigation. A PCI allows the CMA to impose further-reaching remedies, such as divestiture of part of an SMS firm's business.

Conduct Requirements

CRs must meet a set of fairly broadly defined statutory requirements before they can be imposed. They must be intended to achieve an objective of the DMCCA, such as 'fair dealing' and 'open choices'; however, it is not clear how these objectives will be interpreted. Similarly, while the guidance sets out an 'exhaustive' list of permitted types of CR, these too are defined broadly (e.g. a requirement not to '[use] data unfairly'). We consider that this could lead to either CRs being imposed inconsistently, or their requirements being unclear, leading to difficulties in compliance and an increased risk of unintended effects.

The CMA indicates it 'may' publish 'interpretive notes' alongside a CR that provide its view of what compliance might look like. These could go a long way to ameliorating the concerns above.

CRs may also be imposed on activities outside the designated digital activity, if the undesignated activity is operated in such a way as to increase the SMS firm's SEMP and/or POSS. This is somewhat vague. It could be interpreted to include conduct which may benefit consumer welfare (e.g. it could be read to apply to any and all bundling of products/services, which may improve products for users). Given many technology firms operate 'ecosystems', this could also lead to a perception that successfully launching any new products within an existing ecosystem could constitute an increase to the SMS firm's SEMP and lead to the imposition of a new CR, discouraging innovation.

The CMA may impose either 'outcome-focused' CRs (which give the SMS firm leeway to decide how to achieve a required outcome) or 'action-focused' CRs (which set out specific steps the SMS firm must take). Where an outcome is easily measurable, outcome-focused CRs will be preferred, but otherwise action-focused CRs may be necessary. If a firm has historically failed to comply with previous CRs, or the CMA has 'identified clear and persistent existing issues', the CR is likely to be more prescriptive.

This approach is broadly worded, and the CMA is explicit that it will apply it 'flexibly'. We therefore consider it will be important for the CMA to apply this approach transparently and consistently between SMS firms, to ensure a level playing field and to reduce the risk of legal challenge.

As to proportionality, the CMA will have regard to the likely positive and negative effects of a proposed CR on all stakeholders. It acknowledges that such effects may arise both immediately and in the future, but explains that it will 'consider their magnitude in the round' rather than quantifying the effects precisely. It is unclear how the CMA will weight between more certain short-term effects, and potentially more substantial longer-term effects, and between the pro-competitive outcomes of CRs and the

4 The CMA also makes clear that SEMP is distinct from dominance.

possibility of unintended consequences. In our view, it will be difficult for the CMA to deal with these issues consistently and transparently without further clarity in the guidance.

Pro-Competition Interventions

To impose a PCI, the CMA must first undertake a PCI investigation and conclude there has been an AEC. This mirrors terminology in the CMA's existing Market Investigation regime, and therefore suggests that AECs for the purpose of the DMCCA may have an equivalently broad scope.

It will be important for the CMA to consider carefully what truly constitutes an AEC. As drafted, the guidance may encompass key features of digital markets, e.g. network effects.

The CMA states that 'an AEC… may be a structural characteristic of a sector such as high levels of market concentration or high barriers to entry or expansion'.

The presence of network effects can lead to "winner takes most" outcomes, which could meet the guidance's definition of an AEC; however, network effects are driven by user benefits from the number of other users of a service, so it is far from clear that consumers would benefit from a PCI aimed at "correcting" them.

The CMA will consider whether competition-enhancing efficiencies arising from a factor causing an AEC outweigh its anti-competitive effects. It will consider, amongst other factors, whether the efficiency strengthens competition between the SMS firm and its rivals; however, it is not clear whether the CMA intends to consider efficiencies which improve the competitive offering of the SMS firm itself, but do not necessarily increase competition between firms. Taking bundling by an SMS firm as an example: this may result in consumer benefits and improve the competitive offer of the SMS firm, but might not be interpreted as strengthening competition between the SMS firm and its rivals (rather, rivals might argue the opposite). We consider it would be beneficial if the CMA could clarify its approach in this area.

Finally, we observe that the timeline for PCI investigations is short compared to that for Market Investigations (nine versus eighteen months, with the latter typically preceded by a six-month Market Study), but the remedies that may be imposed are just as far-reaching. We would encourage the CMA to consider carefully whether there is sufficient time, and the process sufficiently comprehensive, to reach a clear and well-evidenced view around imposing a PCI.

Conclusion

We understand the CMA's desire to retain considerable flexibility in how it operates its digital markets competition regime; however, we consider that there is a strong case for increased clarity and more specific guidance. This would provide more certainty to all stakeholders, and reduce both the scope/incentive for stakeholders to attempt to unduly influence the CMA and the risk of appeal (with resulting Judgments possibly constraining the CMA in the future). This dynamic could obstruct the CMA and lead to delays and costs for all parties. If the CMA were to take the opportunity to update its guidance to be clearer and more tightly-specified, it may find its regime easier to administer in the long run.

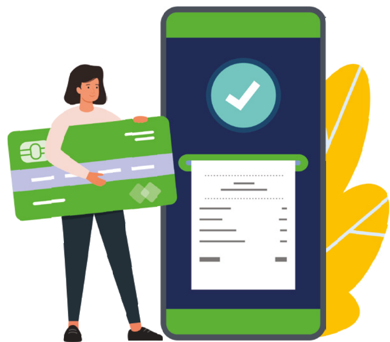
IF ACCESS TO JUSTICE IS THE KEY GOAL FOR THE COLLECTIVE REDRESS REGIME, THEN SURELY THAT MEANS ALL CLAIMANTS SHOULD RECEIVE THEIR RIGHTFUL DAMAGES?

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

According to Sir Marcus Smith (President of the UK Competition Appeal Tribunal) at the recent TL4 Competition Collective Action Forum in June, the Collective Proceedings regime will ultimately be measured on how many claimants involved in a case receive a payment, whether after settlement is agreed or full trial proceedings conclude.

Sir Marcus mentioned 40% to 50% of people receiving their eventual pay-out would not be acceptable in the UK, quoting these as typical US payment rates. A range of other contributors on the day suggested that these numbers are closer to 10% to 20%.

So, to put that into context, a Collective Proceeding that has 100,000 validated claimants in the class, which may well have been in progress for several years and has accrued significant costs to all parties, would end up paying out to only 10,000 to 20,000 harmed individuals? That would feel like the regime is significantly unperforming wouldn't it?



In 2019, Reuters created a report[1] that suggested claim rates in the US regime were very low. Of course, as with all things linked to high level measurement at any given moment, the devil is very much in the detail.

5 years on from this initial report and it is clear to see that things have changed significantly on four key fronts, all of which improve the ability to pay more claimants, more often. Dissecting these four key elements:

1. Greater Awareness, Trust and Confidence from consumers in the validity of Collective Proceedings.

According to research from legal communications firm Portland "64% of respondents indicated that they would sign up to a class action." A percentage that is like that now reported in the US, which highlights 68% would wish to engage in the process. These numbers have leapt forward in the UK as more people become aware of the regime and feel more confident in engaging in the process through legitimate sites. There is without doubt a groundswell of information building with media outlets now frequently announcing a new case against the world's most recognisable brands.

2. The ability to Reach and Engage people across communications channels is a prerequisite of a best practice Collective Proceeding.

1 https://www.reuters.com/article/idUSKCN1VV2QT/

Today we are actively seeing claimants referring cases to others to become part of the class membership where everyone affected receives what is rightfully theirs and often in a completely digital process.

3. The level of Knowledge and Experience across the legal eco-system has significantly involved.

From the Class Action Representatives and Litigators to the CAT, from the CAT to the Courts and from Class Action Administrators to Payment Processors. Every case that gets to settlement or has a trail outcome has learnings from it. As more cases conclude the legal eco-system evolves a little further enabling more and more people to benefit from Access to Justice.

4. And finally Technology, which never stands still and enables us all to perfect the very latest management and processing techniques to help turn Collective Proceedings into something that really does benefit everyday consumers.

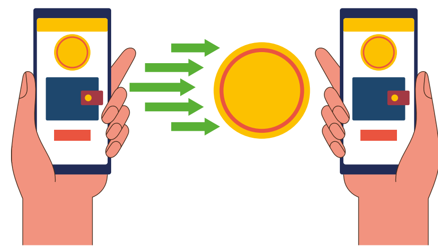
Within this technology function and alongside the developments in consumer engagement, case management, data validation and data processing sits the world of payment processing. The ability to deliver the final leg of the Collective Proceeding to the individual that has been harmed in a consumer friendly, auditable, and managed fashion.

Payment Processing encompasses not only traditional banking transactions such as bank transfers and cheque payments but also alternative payment processing services such as Paypal and Prepaid cards.

In the Feb 2024 report by Mastercard they state "With card penetration in the UK representing 57% of transactions, card payments facilitated an estimated 6.5% of GDP in 2022, or up to £161bn of UK GDP - the equivalent of around 2.1 million jobs. In other terms, the GDP facilitated by card payments in the UK in 2022 was equivalent in scale to the number of people employed in the financial, insurance and real estate sectors combined."

Since 2022 prepaid cards (both physical and digital) have continued to soar in popularity as a relevant alternative to traditional payment processing. The Fintech Times reported in May 2024 that "21% of Adults (11.4m) in the UK are now using prepaid cards as their primary payment vehicle.

Thirty-four per cent of users (3.9 million) said they use prepaid cards to stay in control of their finances, while 26 per cent (around three million) use them to avoid going into debt."



As the popularity of alternative payment mechanisms grow, prepaid cards and e-codes have become a very useful option to deliver damages to claimants, especially when they are traditionally hard to reach or prefer not to provide their personal banking information and / or home address. Often this additional request of a claimant, to provide more sensitive personal data to receive a bank transfer, acts as a key drop out point for claim members, leading to less people receiving what is rightfully theirs.

At BHN we have delivered millions in disbursements across the globe for Collective Proceeding cases and continue to be a thought leader in providing insight and expertise in achieving the highest possible rates of distribution. Once we have the data on claimants, including their first name, last name, mobile phone number and email address and the relevant funds, securely held within safeguarded accounts across the globe, we are confident of issuing 100% of all the value at a fraction of the cost of traditional payment processing techniques. Our latest distribution has delivered over £1.4m to claimants who each received on average £200, all within 4 days and culminating in 100% issuance completion.

Without doubt to reach the collective goal of Access to Justice which entails holding big businesses accountable to consumers when damage is caused, then the entire Collective Proceedings eco-system needs to collaborate often and early.

As a group of specialists, all with their individual contributing skill levels, we have the foundations to maintain high levels of claimants throughout the legal process and create pay-out rates well above current industry benchmarks, turning consumer rights into cross regional settlement that ultimately gets more money into the hands of real people who have been harmed. We all have a role to play in underpinning the Collective Proceedings regimes reason for existing.

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NO SUBSTITUTE FOR ECONOMICS: THE COMMISSION'S UPDATED MARKET DEFINITION NOTICE

RBB| Economics

Authored by: RBB Economics

In February 2024, the Commission issued an updated and significantly expanded version of its market definition notice (the "Notice").[1] The publication of the original notice in 1997 (the "Old Notice") marked a major change in approach and was an important step in the development of the Commission's enforcement practice towards a more economic approach.[2]

After more than 25 years, a period during which the Commission has gained a considerable amount of experience and many new developments have occurred (such as the growth of digital markets and ecosystems), an update was clearly due.

The Notice is largely to be welcomed. It restates the continued value and importance of market definition in all relevant European competition cases, including mergers and Article 102 investigations. Importantly, it maintains the core principles of demand-side and supply-side substitution, stressing the importance of economic analysis in market definition. The Notice also explains how the existing market definition framework can be applied to digital markets.

However, when defining geographic markets, the Notice downplays the role of demand-side substitutability in favour of greater prominence of less (economically) relevant and vaguer principles based on the case law. As this Brief explains, this marks a departure from the otherwise sound economic basis that the Notice rightly adopts.

A Continued Key Role For Market Definition And Economic Evidence

If page length is a measure of progress, the Notice (at 35 pages, compared to fewer than 9 for the Old Notice) shows that the Commission's market definition practice has evolved considerably over the past 25 years. Nonetheless, the core principles of market definition remain.

In particular, the Notice confirms the hypothetical monopolist test ("HMT") as

1 Commission Notice on the definition of the relevant market for the purposes of Union competition law, 22 February 2024, C(2024)1645.
2 Commission Notice on the definition of relevant market for the purposes of Community competition law, 9 December 1997, 97/C 372/03.

the relevant conceptual framework for market definition.[3] Put briefly, under the HMT, a relevant market is found when a single supplier of all products within the putative market could profitably sustain a price above competitive (or prevailing[4]) levels.[5]

Like the original version, the Notice highlights the importance of both demand- and supply-side substitution to identify sources of effective competitive constraints on firms.[6] Moreover, the Notice reaffirms the importance of market definition as a first step in an assessment of market power.[7] Further, the Notice helpfully clarifies that while market shares in a properly defined market can be a guide to market power, this is not always the case.[8]

The Notice extensively discusses the various types of economic evidence on demand- and supply-side substitution that can inform market definition.[9] For example, analyses of the impact on customer switching of past changes in supply ("shocks") can provide useful insights into demand-side substitution.[10] Where sufficient data are available, quantitative measures of demand-side substitutability may be obtained by estimating price elasticities and/or diversion ratios.[11] In practice, these estimates can be used to determine whether products compete closely enough to be within the same relevant market, or whether they are distant substitutes that do not constrain each other to any material degree. The Commission may also rely on evidence on how customers are likely to react to hypothetical changes in supply conditions.[12] In this context, the Notice usefully conveys a willingness to deal with ad hoc surveys conducted for the purpose of transactions, provided these are carefully designed and are based on representative samples of customers.[13]

Market Definition Is A Relevant Tool In The Digital Sector

The digital sector is often associated with strong network effects and zero price services, which can raise challenges for market definition.[14] These features have led some commentators to propose bypassing market definition in investigations involving large digital service companies and simply presuming such firms to be dominant (i.e., to hold significant market power).[15]

Relatedly, and concerningly, in the UK, the CMA proposes not to define markets formally for the purpose of assessing whether firms have strategic market status (and hence entrenched and substantial market power) in its draft guidance on its digital markets competition regime.[16]

In contrast, the Notice stresses that market definition remains crucial for assessing market power, even in the digital sector. To this end, the Notice describes the Commission's approach to market definition in the presence of multi sided platforms and digital ecosystems.

In relation to multi-sided platforms, the Notice indicates that the Commission may define a single market encompassing the platform service on all sides, or separate markets for each side. When substitution possibilities are similar for platform users (irrespective of which "side" of the platform they use), this may lead the Commission to define a relevant market for platforms, in particular if indirect network effects are significant. Alternatively, when the choices available to users depend on which side of the market they are on (e.g., whether they are buyers or sellers), defining separate product markets might be more effective to assess market power, in particular when users on one side can substitute to non-platform alternatives.[17] In this way the Notice rightly highlights the flexibility of market definition, which can be adapted appropriately to the facts of the case.[18]

The Notice also provides a helpful reminder that the standard market definition framework remains relevant for digital ecosystems. As the Notice explains, the complementary products within an ecosystem can be analysed as competing bundles or, depending on the facts, as aftermarkets (i.e., where

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3 Paras 27-31.

4 If market definition is being used to shed light on the existence of market power, the correct conceptual benchmark is whether price(s) could be sustained profitably above competitive levels. In the case of a horizontal merger, the question addressed by market definition is different, namely whether the merger would cause prices to increase relative to prevailing (or counterfactual) levels (which need not be competitive levels).

5 In other words, one considers whether a small but significant non-transitory increase in price ("SSNIP") is profitable. The HMT may also be implemented in relation to other parameters of competition. For example, the HMT can be applied by considering a change in quality as opposed to price, and assessing the effect of a small but significant non-transitory decrease in quality ("SSNDQ"). The Notice acknowledges this (see, for example, para 30).

6 See, e.g., para 23.

7 Para 8. Footnote 14 defines market power as the ability to profitably maintain prices above (or maintain output below) competitive levels for a period of time.

8 Paras 106 and 110.

9 Paras 48-75.

10 Para 51.

11 Para 53.

12 Para 54.

13 Para 81.

14 Customers often do not pay a monetary price for digital services or content but instead provide firms with their private data in order to consume digital services "for free". Where there is no price, the HMT can be implemented by considering a SSNDQ as noted above.

15 See, for example, Jacobides and Lianos (2021) who consider that defining narrow markets based on a single product fails to account for "the competitive dominance that a powerful ecosystem orchestrator/gatekeeper enjoys". Michael G. Jacobides and Ionnis Lianos, "Ecosystems and competition law in theory and practice", Industrial and Corporate Change, 2021, 30, pp. 1199-1229.

16 CMA consultation on "Guidance on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024" 24 May 2024, paras 2.10, 2.43. See also para 4.9.

17 Para 95.

18 In the UK, the Competition Appeal Tribunal ("CAT") in Compare The Market took the view that each side of multisided platforms should always be assessed separately, contrary to the CMA's approach in this case. Though, in principle, the CAT's approach still allows for a single platform market to be defined when each side is found to be subject to the same competitive constraints. See BGL (Holdings) Limited & Others v CMA, [2022] CAT 36, para 147.

purchases of a "primary" core product lead to consumption of complementary "secondary" products).[19]

In summary, the Notice confirms that the established market definition framework still applies, even as digital markets continue to evolve.

Geographic Market Definition: Homogeneity Versus Substitutability

From an economic perspective, the appropriate approach to product market definition, i.e., one that is focused on substitutability, applies equally to geographic market delineation.[20] The extent of demand- and supply-side substitution was clearly identified in the Old Notice as a core feature of both product and geographic market definition. In particular, the Old Notice highlighted that the scope of the relevant geographic market hinges on the extent to which customers "would switch their orders to companies located elsewhere" in response to a change in relative prices.[21]

In comparison, the current Notice follows the case law and recent Commission enforcement practice by focusing to a greater degree on whether conditions of competition are "sufficiently homogeneous".22

Put differently, while substitution has not been entirely disregarded, it is presented as having become less central to the analysis.

The Notice does indicate that demand side substitution is important when suppliers do not discriminate between customers based on their location and/or by geographic areas (e.g., as is often the case for supermarkets, airports, and petrol stations), or when they do not negotiate with individual customers.[23] But when suppliers can discriminate between customers based on their locations or by geographic areas (which happens also when suppliers negotiate with individual customers), the Notice emphasises that conditions of competition must be sufficiently homogeneous for areas to belong to the same relevant market.[24]

There are a number of problems with this approach.

- The Notice suggests that demand side substitution is a more important consideration when suppliers do not negotiate with (or price differentiate between) individual customers than when suppliers engage in such negotiations. There is no sound economic basis for this view. This is because when suppliers negotiate with individual customers, their bargaining leverage depends largely on the buyer's outside options (i.e., other suppliers to which the buyer can switch should prices rise). In other words, while the ability to price differentiate between customers may impact market definition, the concept of demand-side substitution for any customer group being considered is nonetheless central even when prices are negotiated.

- The Notice suggests that conditions of competition are "usually" not sufficiently homogeneous when market shares vary significantly across areas.[25] However, leaving aside the risk of circularity when markets are defined by reference to market shares, two areas can belong to the same market despite having different structural features. Consider, for example, two neighbouring Member States, A and B. A has three suppliers of a standard industrial product, while B has five. Transport costs between countries are a negligible share of costs. Suppliers in both countries have substantial spare capacity and domestic competition is effective. For that reason, limited trade is observed between countries A and B, despite the absence of barriers to trade. In this context, because the market structures differ, one might presume (applying the logic of the Notice) that each Member State is a separate market. In practice, however, higher prices in country A could attract a substantial inflow of volumes from country B (and vice versa). If so, the "true" relevant market – based on assessing substitution patterns through the HMT – could

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19 Para 104.

20 Products have numerous features, including not only price and quality but also the location of sale. That is, from a consumer perspective, where a product can be purchased can be thought of as a product feature. Consider, for example, two identical products, A and B, sold at the same price in the same area. From a consumer perspective, there is no difference between: (i) increasing the price of A by 5%; and (ii) keeping the price of A unchanged but making it available in a less convenient location (such that it costs the consumer an amount equivalent to a 5% price rise in terms of hassle to purchase the product). Logically, if it makes sense to employ the HMT framework for product market definition, then it is right to apply the same framework for defining geographic markets.

21 In para 29, the Old Notice rightly draws a parallel between product and geographic market definition. It states (in relation to geographic market definition): "The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost."

22 See, e.g., para 38

23 In such cases, the Notice indicates that the geographic market should be based on supplier location, see para 40.

24 In such cases, the Notice indicates that the geographic market is centred around customer location, see para 41.

25 Para 64.

well be A and B together.[26] In short, the Notice could usefully have made clearer the key point that differences in market structure need not imply the absence of scope for effective demand-side substitution.

A more general point is that the Notice could have done more to emphasise the value of the HMT thought experiment to assess the strength of the competitive constraint from imports. While the Notice rightly acknowledges that any existing imports should count as part of the market share assessment, it has missed a chance to clarify the critical point that the competitive constraint from imports may be substantially greater than current levels of imports would suggest.

Suppose, for example, that imports currently account for 10% of sales in the EEA but, if prices in the EEA were to increase by 5-10%, then imports would reach a 30% share because additional production from spare capacity outside of the EEA could rapidly be brought into the EEA. In this case, it would be incorrect to ignore spare capacity outside of the EEA that would be quickly diverted to the EEA in the event of a SSNIP.

Put another way, even if spare capacity is located in a country where conditions of competition are not sufficiently homogeneous, this does not mean that this capacity is outside the relevant market.

This reflects a broader concern that, without applying the HMT framework, there is a risk that supply-side constraints are not given their due weight. This risk is evident from the statement in the Notice that supply-side substitution is only relevant when "most, if not all, suppliers are able to switch production between products in the range of related products".[27] A proper application of the HMT instead suggests that a putative market should be widened if a sufficient proportion of suppliers can switch their capacity so as to defeat a hypothetical price increase. The relevant market should then include this capacity.

To reconcile the case law with economic analysis, the Notice could have stated that conditions of competition between two areas can be "sufficiently homogeneous" where sufficient demand and/or supply-side substitution exists between them such that they form part of the same relevant market. However, the Notice has not seized this opportunity.

Conclusion

In summary, we welcome most aspects of the Notice. It rightly highlights the importance of the HMT framework and its component parts, demand- and supply-side substitutability, when defining the relevant product market. These concepts have withstood the passage of time and gathering evidence on them remains a key part of a market power assessment. The Notice also rightly stresses that the market definition framework is sufficiently flexible that it can be applied appropriately to the digital sector.

However, when it comes to defining the relevant geographic market, the Notice takes a step backward. It downplays the core question of how customers would respond to a change in relative prices, which featured in the Old Notice, and gives greater weight to the less relevant and vaguer question, found in the case law, of whether conditions of competition across areas are sufficiently homogeneous.

The Notice misses the opportunity to shape the case law by emphasising that sufficient substitutability is what matters rather than sufficient homogeneity.

Ultimately, the value of any Notice hinges on its real-world application. The Commission is to be congratulated (subject to the above comments) for setting out an approach to market definition that is firmly rooted in economics. However, whether the enforcement practice of the Commission and national competition authorities will live up to the Notice's promise remains an open question.

26 Asymmetric competitive constraints may also matter. For example, even if conditions of competition are dissimilar in two areas (X and Y), suppliers in area X may exert a strong competitive constraint on suppliers in area Y (even if the reverse is not true). If the aim is to understand constraints on a supplier in area Y, then the relevant market may be X+Y. If the issue is to identify constraints on a supplier in area X, the relevant market may be X alone.

27 Para 33.

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LIMITATION IN COMPETITION CLAIMS: A DIVERGENCE BETWEEN THE EU AND ENGLISH COURTS

Authored by: Joseph Moore (Partner) & Natalie Puddicombe (Senior Associate) – Travers Smith

Recent decisions on limitation show that there is a divergence emerging between the approaches taken by the English and EU courts. We consider below how these differences between English and EU law emerged and whether continued divergence is likely in the future.

The EU Approach

Whilst questions around limitation are notoriously fact sensitive, in recent times the approach of the EU Courts appears to have been to take a permissive approach to the analysis of limitation periods in the context of claims involving breaches of competition law.

The CJEU, at paragraph 61 of its 22 June 2022 Volvo[1] judgment explains that "limitation periods applicable to actions for damages for infringements of the competition law provisions of the Member States and of the European Union cannot begin to run before the infringement has ceased and the injured party knows, or can reasonably be expected to know, (i) the fact that it had suffered harm as a result of that infringement and (ii) the identity of the perpetrator of the infringement". This reflects Article 10(2) of Directive 2014/104/EU (the "Damages Directive").

In follow-on damages claims, the publication of the press release relating to the confidential version of the Commission Decision has often been seen as a potential (relatively early) trigger for time to begin for any limitation defence.

However, in the Volvo decision, the CJEU found that the initial press release did not give the claimants sufficient information to meet the knowledge thresholds in Article 10(2).

Instead, the CJEU considered that the appropriate starting point in the Trucks cartel was the date of the publication of the summary of the Commission Decision, which came over a year after the initial press release.

Further potential assistance was provided to claimants by Advocate General (AG) Kokott's 21 September 2023 opinion in Heureka v Google[2] on the application of limitation rules in the context of the Google Shopping Article 102 infringement. AG Kokott invited the CJEU to determine that the limitation period does not start to run until the infringement ceases in its entirety, even though the infringement under consideration did not involve a secret

1 C-267/20.

2 Opinion Of Advocate General Kokott, 21 September 2023, Heureka Group a.s. v Google LLC (C-605/21) ECLI: EU:C:2023:695.

cartel. She opined that this should also be the position for claims that pre-date the implementation of the Damages Directive, to ensure that the principle of effectiveness is satisfied.

The English Approach

To date, under English law, the question of limitation in the context of competition litigation has often been considered through the lens of section 32 of the Limitation Act 1980, which serves to suspend the usual six-year limitation period in cases where there has been "deliberate concealment" by the defendant. Accordingly, in claims involving "secret cartels", typically time only begins to run from that point at which the claimant discovers the concealment or "could with reasonable diligence"[3] have discovered it.

However, the English courts have been somewhat less accommodating than the EU Courts to claimants seeking to navigate limitation defences.[4] In Gemalto,[5] the Court of Appeal endorsed the High Court's decision that the European Commission's press release relating to a Statement of Objections and related press articles from that time gave a claimant sufficient information to plead its claim, such that the limitation clock in fact started running much earlier than the publication of the European Commission's non-confidential Decision and possibly even before the infringement has ceased.

Further, in July 2023, the CAT in Umbrella Interchange[6] found that it was not bound by paragraph 61 of the CJEU's Volvo decision, as it did not form part of the "dispositif", and the decision post-dated the end of the UK's Brexit transition period. Instead, the CAT considered that time had started to run for the purposes of Mastercard's and Visa's limitation defences before the infringement ceased.

The CAT further noted that, even if it had been bound by the Volvo decision, it disagreed with the CJEU's reasoning that the infringement must have ceased before a limitation period starts to run, particularly for claims which do not involve a secret cartel.

Defendants seeking to rely on limitation defences to competition damages claims in England may have received further assistance from the Supreme Court in its recent decision in Canada Square.[7] Here the Supreme Court found (in a case that did not involve an infringement of competition law) that the defendant's concealment of a relevant fact or facts must deliberate in the ordinary sense of the word, i.e. done knowingly, if the usual six year limitation period is to be extended by virtue of deliberate concealment. "Reckless" non-disclosure of relevant facts will not suffice. On this basis, if a defendant inadvertently keeps a claimant in ignorance of a fact that the claimant needs to know to plead its claim within the usual time limit, the defendant could still have the benefit of a limitation defence (provided that section 32(2) of the Act doesn't apply).[8]

The Scope For Divergence Under The Damages Directive

It seems increasingly clear that the English courts are less likely to give the benefit of the doubt to claimants, even if it constitutes a different approach to that taken by the CJEU. This divergence will become more acute if the CJEU decides to adopt AG Kokott's opinion in Heureka v Google in due course.

The implementation of the Damages Directive should, at least in theory, limit future divergence. Schedule 8A of the Competition Act 1998 provides that the limitation period begins with the later of the day on which the infringement ceases and the day of the claimant's knowledge.

However, for the purposes of the Act, the day of the claimant's knowledge can be the day on which the claimant could reasonably be expected to know of the infringement, the damage they have suffered and the infringer's identity.

It remains to be seen how the English Courts approach the interpretation of this crucial aspect of the legislation.

The English courts could well interpret this limb of the test through the familiar lens of deliberate concealment – given the similarity between the wording of this aspect of Schedule 8A of the Competition Act and section 32(1) of the Limitation Act. Accordingly, notwithstanding the implementation of the Damages Directive, and its increased relevance over time as more cases fall within its scope, the prospects for future divergence in the approaches taken by English and EU courts to this thorny issue remain.

3 Section 32(1) of the Limitation Act 1980.
4 For infringements that ceased from 9 March 2017 onwards, Part 5 of Schedule 8A of the Competition Act 1998, which implements the Damages Directive into UK law, applies.
5 Gemalto Holding BV and others v Infineon Technologies AG and others [2022] EWCA Civ 782.
6 Umbrella Interchange Fee Claimants v Umbrella Interchange Fee Defendants [2023] CAT 49.
7 Canada Square Operation Ltd (Appellant) v Potter (Respondent) [2023] UKSC 41.
8 Section 32(2) of the Limitation Act 1980 provides that " deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty".

THE CMA'S OPEN-DOOR POLICY ON GREEN AGREEMENTS:

DON'T ALL RUSH IN! WHAT DO WE KNOW FOLLOWING THE FIRST HALF YEAR OF THE CMA'S GREEN AGREEMENTS GUIDANCE

Authors: Mark Hills (Counsel) & Sarah Wilks (Professional Support Lawyer) – Mayer Brown

With the CMA's formal Green Agreements Guidance (the "Green Guidance"[1]) having been in effect for more than six months, we now have early indications of the UK competition regulator's approach, in practice, to assessing collaboration between competitors seeking to achieve green goals. The CMA has issued informal guidance on two collaboration projects:

1) Fairtrade Foundation's 'Shared Impact Initiative', concerning the extension by various UK retailers of the existing Fairtrade scheme by providing qualifying producers with greater security of supply allowing them to invest in sustainable practices (the "Fairtrade Guidance"[2]); and

2) a WWF-UK scheme, involving proposed commitments by a number of UK supermarkets to reduce greenhouse gas emissions in their supply chains (the "WWF-UK Guidance"[3]). Further, in April 2024, the CMA published a Submission Guide detailing best practice in submitting a request for informal guidance to the CMA. This article draws out key takeaways for businesses considering green collaboration projects and related competition law risks.

Key Practical Lessons

When preparing a request for informal guidance, the most important lessons learned so far are:

- What is the 'but for': as in other areas of CMA decision-making, the CMA assesses any collaboration against the market that it considers would have emerged absent the relevant collaboration. For those considering a request for informal guidance, it is an important reminder to focus on the incremental benefits of a proposal over and above the status quo.
- Refer to the Guidance: both the informal guidance and the Submission Guide frequently refer back to the Green Guidance. Familiarity with this document, therefore, appears of paramount importance, and careful consideration should be given to how any proposed collaboration might be bought clearly within the parameters of, and examples within, the Guidance.

1 https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf
2 https://www.gov.uk/government/publications/cma-informal-guidance-fairtrade-environmental-sustainability-agreement#:~:text=The%20stated%20objective%20of%20the,reduce%20the%20environmental%20impact%20of
3 https://www.gov.uk/government/publications/informal-guidance-on-wwfs-proposal-wwf-basket-climate-action

- Appreciable effect on competition: in the Fairtrade Guidance, the CMA accepted that the proposal did not affect the main parameters of competition (such as price), and did not cover an appreciable share of the overall market. It therefore fell outside the prohibition of anticompetitive agreements altogether. In addition, the CMA noted that while the proposal restricted the commercial autonomy of the participants, this was objectively necessary and proportionate to the objective pursued (a so called "ancillary restraint").
- Self-assessment expected: both Fairtrade and WWF-UK carried out their own self-assessments which the CMA seems to have relied upon in its own "light touch" analysis. Indeed, the CMA has stressed that it can only offer informal guidance based on the information it has been given, and it's down to businesses to give the CMA all the details it needs to make an assessment. Parties' considering collaboration on sustainability initiatives should, therefore, be prepared to undertake a relatively detailed self-assessment before approaching the CMA. In its analysis, the CMA has considered carefully the potential for proposals to lead to market exit and/or increased concentration and, therefore, a reduction in consumer choice or lessening of competitive pressure on remaining participants. These areas should, therefore, be addressed in self-assessment.
- No independent fact finding: as a corollary to the above, the CMA does not seem to have engaged in fact finding exercises of its own, in particular in relation to potentially affected markets and players. For instance, the CMA's WWF-UK Guidance emphasises that the CMA did not seek feedback from upstream suppliers who could be affected. Any supplier complaints during implementation would, therefore, need to be taken into account by the supermarkets, possibly necessitating reengagement with the CMA. This may make the informal guidance process less suitable for potentially contentious or controversial projects.
- Need for monitoring and review: in each case, the CMA analysis is clearly tied to the specific facts at the time of consultation. It is clear that, if the facts change, so might the CMA's assessment, and parties will need to keep this under review.

Benefits In The Balance

Where the CMA considers that there may be harm to competition, it will go on to consider whether that harm would be offset by any relevant customer benefits resulting from the agreement, notably adopting a wider approach to assessing such benefits in the case of climate change agreements. The key points to note on the practical application of this test are the following.

- Some uncertainty is okay: the CMA is prepared to draw conclusions based on the information available without agonised crystal ball gazing. In the WWF-UK Guidance, the CMA seems to have been satisfied with a fairly macro view of the benefits i.e., not the precise size of the resulting emissions reductions. While the CMA states that it will expect cogent empirical evidence to support the objective benefits of any agreement, the standard applied by the CMA in its assessment in practice (i.e., reasonable grounds to expect) seems quite a low bar.
- CMA approach grounded in climate science: unsurprisingly the CMA refers to climate metrics utilised by the wider UK government (such as those in HM Treasury's Green Book). Parties should, therefore, quantify the anticipated benefits of sustainability agreements against recognised metrics endorsed by government where possible.
- Indispensability: the collective action proposed must be indispensable to achieving the objectives sought. The Green Guidance indicates that indispensability is not limited to scenarios where the outcome would otherwise be unachievable and may also include situations where benefits can be achieved more efficiently (at reduced cost or more quickly). For instance, in the WWF-UK Guidance, the CMA considered, in its assessment of indispensability, the necessity of achieving a consistent approach across common supply chains.

So Where Are We?

The CMA's Green Guidance sought to increase legal certainty, allowing businesses to pursue green goals confidently. The informal guidance issued to date is undoubtedly a positive step in that direction. It provides a useful roadmap for similar initiatives. However, even then, given the material caveats in the Green Guidance, informal consultation with the CMA is likely to be prudent on significant environmental collaboration that could affect key parameters of competition. Finally, particular care should be given to how competition authorities in other relevant jurisdictions might respond. For instance, there is a markedly different regulatory backdrop in the U.S. in respect of collaboration on environmental grounds. In the EU, there is no favourable regime for climate change agreements which may necessitate more involved economic assessment of benefits to consumers.

FROM CHALLENGES TO SOLUTIONS: THE CMA'S APPROACH TO DIGITAL MARKET REGULATION

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

Introduction

The Digital Markets, Competition, and Consumer (DMCC) Bill, which received Royal Assent and was adopted on 24 May 2024, represents a landmark development in the United Kingdom's regulatory framework.[1] This bill brought the most significant changes to the UK's competition and consumer protection laws since establishing the Competition and Markets Authority (CMA). Central to this reform is the introduction of specific conduct rules for companies classified as having 'Strategic Market Status' (SMS).

These companies are considered to have a significant impact on the functioning of the digital markets, which require their close monitoring to ensure fair competition and protection of consumer interests.

The CMA has been granted the authority to enforce these rules, marking a shift towards a more proactive regulatory stance in digital markets Implementing the DMCC Bill highlights the UK's dedication to promoting a fair and competitive digital marketplace. It reflects a strategic approach that balances the need for innovation with regulatory oversight, emphasising the importance of robust competition in delivering high-quality products, services, and value to consumers. As digital markets evolve, the CMA's proactive and adaptive regulatory strategies will be essential in shaping an inclusive digital economy that benefits all stakeholders. This brief paper summarises the CMA's approach to digital market regulation under the DMCC Bill and explores the main challenges it may face, considering the complexities of digital regulation.

The CMA's Approach To Digital Market Regulation

Following the adoption of the DMCC Act, the CMA issued draft guidance to provide clarity and direction to firms with SMS.[2] This Guidance serves as a foundational document for the new regulatory landscape, aiming to ensure transparency and consistency in the application of the DMCC Act's provisions.

The Guidance provides a detailed framework for assessing whether a firm qualifies as having SMS.[3] This includes an analysis of market share, control over key digital infrastructures, and influence on market dynamics.

This assessment is critical, as firms designated with SMS are subject to specific conduct requirements (CRs).[4]

The Guidance also outlines the processes for evaluation, ensuring

1 Digital Markets, Competition and Consumers Act 2024 https://bills.parliament.uk/bills/3453 accessed 20 June 2024. The new digital markets regime is expected to enter into force in autumn 2024 following consultation on CMA guidance.

2 Digital markets competition regime guidance CMA194, con DRAFT Guidance on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024, 24 May 2024 (hereinafter 'the Guidance').

3 The Guidance, section 2.

4 The Guidance, section 3.

that the assessment is objective, proportionate, and transparent. It elaborates on how the CRs will be imposed, emphasising the importance of proportionality and relevance to the firm's market impact. The Guidance also elaborates on assessing adverse effects on competition (AEC), a crucial element in identifying practices that may prevent, restrict, or distort competition in connection with the relevant digital activity in the United Kingdom and implement timely interventions to prevent market distortions. Next, the Guidance explains how the CMA can impose pro-competition interventions (PCIs) on firms with SMS in case an investigation identifies AEC.[5] PCIs aim to address these effects by providing remedies or preventing further issues. The Guidance outlines the CMA's approach, including identifying suitable and proportionate PCIs, conducting PCI investigations, and reviewing or modifying them to ensure they remain effective. In addition, the Guidance specifies how the CMA will exercise its investigative powers, including the ability to request detailed information from firms. It outlines processes for tracking compliance, assessing the impact of CRs and PCIs, and identifying areas for improvement. A critical component of the CMA's approach is enforcing breaches and imposing penalties.[6] The Guidance details the enforcement mechanisms available to the CMA, including financial penalties, remedial actions, and legal proceedings. It stresses the importance of proportionality in enforcement, ensuring that penalties are commensurate with the severity of the violation and serve as effective deterrents. The Guidance also acknowledges the importance of engaging with industry stakeholders and independent experts to enhance the legitimacy and fairness of its regulatory decisions. By incorporating regular consultations and feedback mechanisms, the CMA aims to ensure that its decision-making is informed by diverse perspectives and aligned with industry realities.

Navigating Challenges to Achieve Regulatory Success

The DMCC Act grants the CMA significant discretion in setting rules for firms with SMS, which allows for tailored regulation but risks inconsistent enforcement and challenges in ensuring proportionality. Since CMA's decisions are subject only to judicial review (focusing on legality rather than substance), they could be upheld even if flawed, potentially hindering market freedom and innovation.

Although the CMA must ensure interventions are proportional to the competition harm addressed, its guidance lacks clarity on what proportionality entails, risking inconsistent application.

Proportionality requires measures to be necessary, appropriate, and balanced relative to the issue's severity, which involves a cost-benefit analysis (CBA) of regulatory actions.[7]

Efficiency defenses can also enhance the proportionality requirement by ensuring that interventions do not stifle innovation or burden businesses. Similar to the Digital Markets Act (DMA), considerations like integrity, security, and privacy can serve as defenses. Additionally, incorporating the AEC test into the proportionality analysis aligns regulatory measures with competition and consumer welfare goals. A comprehensive legal and economic discussion on the proportionality requirement will refine its application, ensuring it supports innovation while safeguarding consumer interests.

The CMA's investigative powers are essential for enforcing compliance but must uphold due process and rule of law principles. Clear guidelines on managing sensitive information are needed to balance transparency and confidentiality. By clarifying how it handles protected information, the CMA can create an equitable regulatory environment. Another challenge in digital market regulation is AI, which presents both challenges and opportunities. AI can disrupt established market dynamics and allow smaller firms to challenge dominant platforms. To encourage competition between platforms, the CMA should lower barriers to entry for new companies and support innovation driven by AI. AI can challenge established market power more effectively than traditional methods, so the regulations must support AI disruption.

Conclusion

The CMA's draft guidance represents a comprehensive and proactive approach to digital market regulation under the DMCC Act. By providing clear and detailed instructions for assessing SMS, imposing CRs, evaluating AEC, implementing PCIs, and enforcing compliance, the CMA sets a robust framework for achieving regulatory success. Through continuous monitoring, stakeholder engagement, and adaptive strategies, the CMA is well-positioned to navigate the challenges of digital market regulation and promote a fair, competitive, and innovative digital economy. The CMA's approach to digital market regulation must navigate proportionality, due process, and AI disruption challenges. By adopting a balanced strategy, the CMA can foster a competitive digital economy that benefits consumers and promotes innovation.

5 The Guidance, section 4.

6 The Guidance, section 7 and 8.

7 On this point, see: Miroslava Marinova, 'Digital Market Regulation in the UK: How Can the Proportionality of Interventions be Guaranteed in the CMA's New Framework? Available at: https://competitionlab.gwu.edu/uks-digital-market-regulation-need-proportionality-principle-cmas-new-framework

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NAVIGATING LARGE-SCALE DOCUMENT PRODUCTIONS IN GLOBAL MERGER REVIEWS

Authored by: Megan Granger (Partner), Neil Rigby (Partner), Nafees Saeed (Partner), Bella Springs (Senior Counsel), Marie-Marie de Fays (Associate), Venetia Hudd (Associate) – Weil, Gotshal & Manges & Andrew Johnston (Senior Managing Director), Laura Kippin (Managing Director) – FTI Consulting

Antitrust agencies routinely require the disclosure of thousands (or more) of internal documents, including those produced or received by senior executives. Merging parties should therefore anticipate the need for substantial document productions when planning their transactions.

Whilst the many practical issues may seem entirely process-driven, document production can have a significant impact on the substantive prospects of the case.

Agencies increasingly use ordinary course and deal-specific documents as a core piece of evidence when assessing a transaction, so they can often be pivotal to whether a transaction gains approval.

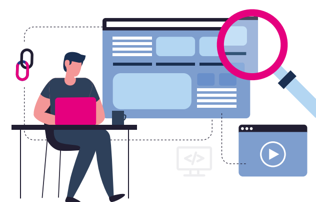
At the same time, document requirements are not uniform across jurisdictions, and handling multiple large-scale productions can affect the transaction timetable.

Weil, Gotshal & Manges LLP and FTI Consulting have joined up to highlight five issues to consider when navigating the complexities of document production in parallel merger processes. Planning this work stream ahead of engagement with the regulators may help to avoid procedural pitfalls and minimise unnecessary delays to a transaction timetable.

What Types Of Data Need To Be Disclosed?

Agencies are increasingly focused on the evolving types of data being created within companies. Requests are becoming more intrusive, going beyond routine document and email searches to include communications via chat platforms such as Teams, Slack, WhatsApp, Signal, SMS messages and other ephemeral communication applications.

Another important focus area is “modern attachments”, which are links to collaborative documents in emails or chat platforms. During collection, the attachment itself is not collected. In order to identify and collect this data, additional custom work is required to determine where the data resides and ultimately gather the data. This can result in additional back-end processing and iterative requests from agencies to track down unproduced documents from specific links they see in other documents, and will need to be factored into the production timeline.



How Do You Search For Responsive Documents?

Agencies’ willingness to accept the parties’ methodology for document collection and review differs considerably. Some agencies will negotiate search terms ahead of the document collection, while others do not agree upfront on a set of search terms and instead request

incremental search terms to be run, generating additional and follow-up productions, as their review progresses.

This iterative process is burdensome for the parties, who need to organise document collections and productions of the identified custodians on a rolling basis, usually under significant time pressure.

In addition, search terms frequently yield large volumes of irrelevant documents, burdening reviewers with extensive manual review, and leading to longer review and production timelines. Technology-assisted review models – known as TAR – enable a faster and more efficient review of documents, as a small set of documents coded by attorneys is extrapolated by the technology to a larger set as a one-off, or the ongoing coding by the reviewers is used to develop an evolving TAR model. In the US, FTC and DOJ practices are converging and parties typically must provide metrics on the underlying TAR model and sample null sets (documents the TAR model deems non-responsive) for agency staff review. There will be circumstances where other global agencies will accept TAR, especially where the process has already been completed in the US, but otherwise TAR-based production may need to be topped-off with manual productions based on search terms/key words.

Beware Diverging Attorney-Client Privilege Rules

When producing documents to the agencies, the merging parties have the right to withhold or redact parts of documents that benefit from legal professional privilege. The definition and scope of privilege varies across jurisdictions, adding a layer of complexity to the document review and production process for cross-border transactions.

For instance, most – if not all – jurisdictions recognise that attorney-client privilege protects certain communications between a client and an attorney in private practice. However, EU law – unlike US/UK law – does not recognise privilege over communications with in-house attorneys.

In practice, this means that they could be producible before the EC, but withheld from the CMA or the US agencies. Similarly, EU law – again unlike US/UK law – does not recognise that disclosure of privileged material to a third party sometimes does not constitute a waiver of privilege (so-called "common interest privilege").

To explain whether and why any document has been withheld or redacted for privilege reasons, the parties generally have to submit "privilege logs", including information such as document production ID ("bates numbers"), document authors and recipients, document types, and the basis for claiming privilege.

These logs are typically supplied to the regulators and, to avoid inadvertent waivers of privilege, parties should put in place privilege log protocols to ensure that documents that must be disclosed to one agency under a narrower interpretation of privilege are not disclosed to another agency with a broader interpretation of privilege. Further, if documents being prepared for production in the US are likely to be requested later in the process by the EC, for efficiency merging parties may want to consider adopting a review protocol that addresses coding for EU privilege on the first pass.

Where Should The Data Be Hosted?

Different countries have varying legal frameworks for data protection and privacy, which affects the consideration of where to host client data. For example, some EU countries require that data stored in folders labelled "Private" is handled and searched separately as this is deemed to be private data and will likely be added to a Privacy log. Alternatively, some regulations mandate that data cannot leave a specific jurisdiction, which affects options on where the data can be hosted.

Even in some US-based cases, where custodian data must be hosted in the UK/EU, the entire data set across all custodians is hosted in the UK/EU to have the data efficiently centralised in one platform.

This avoids complications that can emerge when using multiple hosting platforms for a single matter. For example, deduplication, the use of TAR (see above), and visual analytics are harder to execute across the entire dataset or across platforms.

The Final Production: Be Aware Of Different Production Specifications

Once a final set of responsive documents has been identified, it will need to be prepared and transferred to the agencies. Here too, production specifications vary between agencies. Some will accept the use of FTPs to transfer a production, while others still require a hard drive to be delivered.

Agencies also require documents in different formats for their review. For instance, some agencies will only accept PDF files for all the producible documents, while others require the documents in native and/or image-format (where redactions are applied).

Even if a document universe is properly coded and ready for production, merging parties should factor in the timing implications of applying different production specifications to prepare the submission to another agency.

GRAND INTERFACE DESIGNS:

THE COMPETITION AND MARKETS AUTHORITY'S ENHANCED POWERS TO TACKLE POTENTIALLY HARMFUL ONLINE CHOICE ARCHITECTURE

Authored by: Patrick Todd[1] (Associate) – Cleary Gottlieb Steen & Hamilton

Regulators globally are introducing new rules and rigorously enforcing existing ones to tackle potentially harmful "online choice architecture" (OCA)—the way businesses design their digital interfaces such as websites, apps, and operating systems. This article examines the Competition & Markets Authority's (CMA) recent enforcement activity in this area, OCA's likely relevance to the new enforcement powers the CMA will acquire under the Digital Markets, Competition, and Consumers Act 2024 (DMCC Act), and how businesses can prepare for compliance.

The CMA's Recent Enforcement Against Potentially Harmful OCA Practices

The CMA is a prominent enforcer in this area. In 2022, it published a research paper and accompanying evidence review analysing the potential harms to competition and consumers from practices such as defaults, search result rankings, "dark nudges", "sludges", and "drip pricing".

Since then, the CMA has taken action to address potentially harmful OCA practices under consumer protection law and through market studies and investigations. It has opened consumer law investigations into Emma Sleep, Wowcher, and Simba Sleep, covering OCA practices such as:

- Urgency claims: Claiming that a product is on sale for a limited time, for example by using countdown timers.
- Scarcity claims: Claiming that a product is only available in limited quantity.
- Pre-ticked options: Automatically opting users into additional fee-based services.

The CMA is concerned that these practices may mislead consumers. It accepted undertakings from Wowcher

1 Associate, Cleary Gottlieb Steen & Hamilton LLP, London, UK. The opinions expressed in this article reflect the authors' personal views and are not attributable to his firm or clients, in particular those firms that the author has represented and advised in matters mentioned in this article, including Alphabet Inc.

in July 2024 and Simba Sleep in August 2024'.

OCA is also relevant to the CMA's 2022 market study into Mobile Ecosystems and subsequent market investigation into mobile browsers and cloud gaming, where it is examining the impact of default settings on user behaviour.

The CMA's enforcement work in this area is expected to expand further. It has, for example, identified OCA as having the potential to shape competition and consumer behaviour in the nascent generative AI space. As stated in its Foundation Model (FM) review, the CMA expects "FM developers and deployers [...] to avoid harmful choice architecture or product design that might lead to customer lock-in."

The CMA's New Powers Under the DMCC Act

The DMCC Act introduces swingeing reforms to the UK competition and consumer law regimes. These reforms significantly increase the CMA's remit to scrutinise firms' OCA practices, fine firms for breaches of relevant rules, and order remedies to change digital designs.

Pro-Competition Regulatory Regime. The first major reform is the new "pro-competition regulatory regime" for digital markets, applicable to firms designated as having "strategic market status" (SMS) in respect of one or more digital activities. Once the CMA's Digital Markets Unit designates a firm with SMS, it can impose "conduct requirements" dictating how the firm should operate. The CMA can also implement "pro-competitive interventions" if it finds an adverse effect on competition. Both types of requirements can order SMS firms to behave—or not behave—in certain ways that will necessitate changes to their OCA practices.

Direct Consumer Law Enforcement. The DMCC Act grants the CMA direct consumer law enforcement powers, enabling it to determine that firms have breached consumer law and impose remedies and fines up to 10% of global turnover. Unlike the digital markets regime, consumer law applies to all firms, irrespective of size or market power. In its 2024/25 Annual Plan, the CMA emphasised its commitment to tackling unfair or misleading OCA practices with these new powers.

Pertinently, the DMCC Act empowers the CMA to impose "online interface orders" if it finds an infringement, without a court order. Such notices can include directions for a trader to:

- Remove or modify content on an online interface.
- Disable or restrict access to an online interface.
- Display warnings to consumers accessing an online interface.
- Delete a fully qualified domain name and facilitate its registration by the CMA.

Planning for Compliance-Ready OCA

Overall, the DMCC Act grants the CMA significant powers to scrutinise, challenge, and tinker with firms' digital designs. To plan for compliance, firms subject to the rules described above should take account of the following four considerations when evaluating their OCA practices:

- High stakes for non-compliance. The CMA can impose fines of up to 10% of a firm's global turnover for breaches of the rules described above. Potential significant financial penalties underscore the importance of adhering to the new regulations.
- CMA's readiness to engage on OCA. The CMA is well-equipped to engage with businesses regarding their OCA practices. The establishment of the Behavioural Hub within the CMA's Data, Technology and Analytics (DaTA) Unit demonstrates the CMA's commitment to understanding and addressing the impact of digital interfaces on consumer behaviour. Engaging with the CMA—which it welcomes under the new digital markets regime—can help firms navigate the regulatory landscape, implement necessary changes, and demonstrate a commitment to compliance, while minimising the risk of enforcement.
- Testing and experimenting with OCA. Regulators are increasingly seeking to test their hypotheses on the impact of OCA on user behaviour by reference to research, testing, and experiments. As part of the CMA's information-gathering powers under the new digital markets regime, for example, it can order firms to "perform a specified demonstration or test." Proactive testing will also be important for firms to demonstrate compliance.
- Third-party consultation. When a firm's OCA practices can impact competition, for example through user choices of default settings, third-party firms often take an active interest in how the OCA is designed and how the firm complies with relevant rules. Consulting with third parties early on choice designs to understand any concerns can help head off the risk of complaints to the CMA.

The Road Ahead

With the DMCC Act and the CMA's new enforcement powers, businesses must prepare for a new era of OCA regulation. The penalties for non-compliance with consumer law and the digital markets regime are significant. As the digital landscape evolves, firms should pay close attention to their OCA practices and ensure they are ready for up-front compliance. submission to another agency.

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

A Working on the notice plan for the Deepwater Horizon settlement. Other than being such a high-profile settlement, I really enjoyed being heavily involved with both plaintiff and defense counsel for the many long hours and in-person meetings in New Orleans. We were an intregal part of the team to help settle this case and we had a very high level of exposure to the top attorneys in the country. Staying up till the morning hours consulting with both parties and drafting notices made this a really unique experience.

Q What motivated you to pursue a career in law?

A My LSAT test score was better than my golf swing, so here I am.

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

A Golf. A lot of golf. And I would spend more time in Arizona and work on my garden.

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

A Be more confident. Confidence is the key to most everything. Have confidence in yourself and don't worry so much about what others are thinking.

Q What are the biggest challenges facing legal practitioners nowadays?

A There is an expectation of instant response time. Lawyers operate in a 24-hour news cycle and this poses challenges in work quality when the expectation is to be immediately available at all times without giving pause to think things through.

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

A Anything by David McCullough. His books give a real truthful telling of American history.

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

A Muhammad Ali. My dad idolised Ali. I'd like to have dinner with him and invite my dad to join.

Q The greatest film of all time is…

A *Lawrence of Arabia.*

Q What legacy would you hope to leave behind?

A I hope to have properly prepared my kids to be good citizens in our society and to be generally happy and content in their lives.

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

A I see a strong movement towards electronic communication and utilisation of artificial intelligence. It's significant because at least in the short term, these trends are offering convenience, a perceived cost savings, and sometimes greater speed. However, there are also downsides to digitalisation and a long-term AI reliance. Loss of humanisation, job displacement, bias and integration challenges are reasonable concerns.

Q What is the biggest life lesson you have learned?

A All people are deserving of respect. Even those you disagree with or who come from a different background. It is critical to see value in everyone you encounter.

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

A In this stage of my career, I am focused on making sure those who I mentor are as prepared as possible for the next steps in their own individual careers.

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HISTORIC OPT-OUT SETTLEMENT ADMINISTRATION UNDERWAY: REPRESENTATIVE PERSONS IN 'BOUNDARY FARES' COLLECTIVE SETTLEMENT NOW FILING CLAIMS FOR REDRESS

epiq

Authored by: Loree Kovach (Senior Vice President) & Lauren McGeever (Managing Director) – Epiq

The collective actions landscape in the United Kingdom has undergone remarkable shifts in recent years, with the addition of opt-out cases having a drastic impact on the system.

Collective actions where consumers are considered included unless they opt-out (as opposed to having to proactively opt-in) were permitted into the practice after passage of the Consumer Rights Act of 2015. Now, after years of progressing through the system, the first settlement administration process is now occurring for an opt-out collective action.

History of the 'Boundary Fares' Claims

On 27 Feb. 2019, Justin Gutmann filed a collective actions lawsuit against First MTR South Western Trains Limited, Stagecoach South Western Trains Limited, and London & South Eastern Railway Limited, the operators of the South Western and Southeastern routes.

He filed a similar lawsuit on 24 Nov. 2021 against Govia Thameslink Railway Limited, Govia Limited, The Go-Ahead Group PLC, and Keolis (UK) Limited, the operators of the Thameslink, Southern, Great Northern, and Gatwick Express routes.

Gutmann, the class representative, alleged millions of rail passengers paid twice for parts of their journeys on these routes because these operators abused their dominant position in the marketplace.

The cases are similar, with the key distinction being which route people traveled. It is possible, if they traveled the routes related to both cases, they could be eligible for compensation in both instances.

The suits allege Section 18 of the UK's Competition Act of 1998 was violated because the railways charged travelcard holders too much for travel and that they did not make cheaper "boundary" fares or "extension" fares available, or sufficiently available, for purchase on their services.

Gutmann is represented by Charles Lyndon and a specialist litigation funder, Woodsford, is financially supporting the claims.

Claims' Status

Stagecoach settled for £25 million and has admitted no wrongdoing. The claims against First MTR and the operators of the TSGN routes are ongoing. The first trials regarding those claims began in June.

A notice and administration plan for the Stagecoach claim was approved by the Competition Appeal Tribunal (CAT) in May. A mechanism has been established by the claims administrator and the six-month period in which Representative Persons can file a claim began in July.

The Process of Claims Administration

Neutral third-party claims administrators play a vital role in the settlement process. They will notify potential Representative Persons, verify eligible claims and prevent fraudulent ones, and provide Representative Persons with their compensation.

Not only does a claims administrator notify Representative Persons about the action and disburse to them the settlement's funds, but the settling parties also consult with the administrator's subject-matter experts prior to settlement to optimize the redress.

Working with the settling parties, the CAT, and the class representative in a neutral facilitation role to implement administration services based on the negotiated terms of a settlement, a reputable claims administration service should include:

- Coordination of all notice requirements
- Design of notice documents
- Establishment and implementation of notice fulfillment services
- Electronic noticing
- Claim website development and maintenance
- Registration portal for potential represented persons
- Dedicated phone lines with recorded information and/or live operators
- Receipt and processing of opt-ins and opt-outs
- Claims database management
- Claim adjudication
- Funds management
- Award calculations and distribution services
- Reporting to the parties and the CAT

How Representative Persons Obtain Their Fair Share Of A Settlement

The objective of all communications with Representative Persons is to notify the greatest percentage of them, while being mindful of the budget for the proceedings.

Class actions have been a part of the judicial system in the United States for decades. Therefore, Americans are familiar with how they are notified if they could potentially be a Representative Person, from seeing ads on television, social media, and the internet, to receiving notices by post or email.

Because the Boundary Fares settlement is the first time the public in the U.K. could receive compensation as a result of an opt-out collective action settlement, a robust and targeted media campaign is critical to ensuring an optimal claims rate.

Additionally, a list of individuals or businesses who qualify for compensation for this particular settlement does not exist, making the Representative Persons and their contact information unknown to the parties, thereby adding a layer of complexity to reaching them.

A website has been established for individuals or businesses to submit their claims. According to the notice and administration plan, three "pots" have been created. How much evidence Representative Persons have of their purchases of the fares will determine from which pot their compensation will come and how much they are eligible to receive.

Once the filing deadline has ended and the claims have been verified, the Representative Persons will receive their financial compensation from the claims administrator.

Setting The Stage For Future Administrations

There has been a marked increase in the number of collective actions filed with the CAT in 2024, and that number is anticipated to grow in 2025. Moreover, many of these actions are against large corporations, such as Apple, Google, and Amazon, meaning most citizens are likely to be affected by these claims.

Therefore, it will be incumbent upon the settling parties, relying on the expertise of claims administrators, to educate the public about these cases. Members of the public should understand these claims have been approved by the CAT, and they are legitimate redress programs.

ECONOMIC EXPERT EVIDENCE IN TRUCK CARTEL DAMAGES CLAIMS IN THE UK AND EU – PASS-ON"

Authored by: Iona McCall (Partner & Managing Director) & Felix Hammeke (Director) - AlixPartners

Introduction

This article follows up on a previous publication in the TL4 Competition Magazine, in which we discussed the economic expert evidence relating to the estimation of the overcharge in various trucks damage claims across the EU and the UK.[1] As foreshadowed, this article deals with another important input for the estimation of damages: the issue of pass-on of any overcharge to downstream customers (or "supply pass-on" in the Competition Appeal Tribunal's ("CAT") terminology[2])

As in the previous article, we aim to highlight the most relevant findings and reasoning and contrast this with judgments from other European courts. We also take account of more recent developments, including the Court of Appeal's ("COA") judgment in Royal Mail v DAF,[3] and various judgments from courts across the EU.

Assessment of Supply pass-on by the CAT and COA

As clarified by the UK Supreme Court, the compensatory principle requires that any mitigation of the loss suffered by the Claimants is considered as part of the calculation of damages.[4] If the claimants passed on any overcharge via higher prices to their customers (referred to as "Supply Pass-on" by the Tribunal) or into higher resale prices of trucks ("Resale pass-on"), the resulting benefits would need to be estimated and deducted from the overcharge. We focus on the issue of Supply Pass-on below.

In the UK trucks case, the Defendants failed to convince two of the three panel members that Supply pass-on had occurred based on a legal test for causation: i.e., whether there is the "requisite degree of proximity to establish a direct causative link between the Overcharge and the prices charged by the Claimants".[5] The non-exhaustive list of factors that were identified as relevant for this assessment are:[6]

(i) Knowledge of the Overcharge or the specific increase in the cost in question;

1 The authors would also link to thank their colleagues Claudia Beckman and Paula Marco for the support in conducting research for this article.

2 Judgment of the Competition Appeal Tribunal dated 7 February 2023 in Cases 1284/5/7/18 (T) Royal Mail Group Limited v DAF Trucks Limited and Others and 1290/5/7/18 (T) BT Group PLC and Others v DAF Trucks Limited and Others, [2023] CAT 6.

3 Judgment of the Court of Appeal (Civil Division) dated 27 February 2024 in Cases CA-2023-001010 Royal Mail Group Limited v DAF Trucks Limited and Others and CA-2023-001109 BT Group PLC and Others v DAF Trucks Limited and Others, [2024] EWCA Civ 181.

4 UK Supreme Court judgment of 17 June 2020 in Sainsbury's v Mastercard, UKSC 2018/0156, para 196; cited in Royal Mail v DAF, para 181.

5 Royal Mail v DAF, para 550.

6 Ibid.

(ii) The relative size of the Overcharge against the Claimants' overall costs and revenue;

(iii) The relationship or association between what the Overcharge is incurred on and the product whose prices have been increased; and/or

(iv) Whether there are identifiable claims by identifiable purchasers from the Claimants in respect of losses caused by the Overcharge.

Two panel members found that none of these factors were present, highlighting inter alia that the estimated overcharge would account for just 0.007p of the price of a stamp.[7] Even though both Claimants were regulated entities and their prices were determined based on incurred costs, the panel members found that the tiny size of the overcharge in combination with the degree of regulatory discretion and the use of rounded numbers in the price control formula made it unlikely that anything would have "changed" in the counterfactual.[8]

The dissenting panel member (Mr Ridyard, an economist) found that it was likely that both Claimants passed on a "substantial amount" of the overcharge.[9]

The main reason for the disagreement appears to be his different characterisation of the relevant question. Instead of asking whether the Claimants would have "fine-tuned" their prices if the "tiny" overcharge had not been present, he considers that one should instead compare the actual and counterfactual scenarios more broadly.[10] This led him to the conclusion that "small pass-on effects can exist even if they are not easily identifiable" and that "Mr Bezant's [(the Defendant's forensic account expert)] evidence of a causal connection between the Claimants' input costs and downstream prices is sufficient to meet that test."[11]

Nevertheless, Mr Ridyard concluded that the damage award should not be reduced because this would "jeopardise the principle of effectiveness [in this specific case]".[12] He explains that there is a "high risk" that downstream claims for any passed on damage in this case would be "excessively difficult or impossible", which he believes would undermine the principles set out by the Supreme Court.[13]

In light of this disagreement between the panel members and the importance of the pass-on debate for other cases, the Tribunal allowed DAF to appeal this issue.[14]

The COA sided with the Claimants, endorsing their characterisation of DAF's case on Supply pass-on as being "strikingly ambitious".[15]

The small size of the overcharge (the second factor) appears to have been the most important factor that led the COA to this conclusion; the judgment describes the idea that a cost increase that represents just 0.025% of Royal Mail's revenues caused a price increase as "completely unreal".[16]

Having endorsed the CAT's findings with regards to the remaining factors,[17] and having established that there was no error of law, the COA concluded that it could not interfere with the CAT's evaluation of the evidence.[18]).

Overview Of EU Jurisdictions

Pass-on has also been a key issue across many EU jurisdictions that have had to grapple with trucks claims. Unsuccessful pass-on defences were mounted inter alia in Germany,[19] Spain[20] and Portugal.[21] We discuss parallels between the CAT's reasoning and the approach taken by judges in Germany and Spain below.[22]

The German courts seem to have adopted a similar stance as their UK counterparts. In its first trucks judgment the Federal Court of Justice (or Bundesgerichtshof, "BGH"), Germany's highest appeals court, concluded that pass-on can be taken into account insofar as the defendants can establish a causal link,[23] but that the defendants had failed to establish such a link in the evidence.[24] In its second trucks cartel judgment the BGH provided further clarity, establishing that defendants need to plausibly demonstrate that passing on of the cartel-related cost increase is at least a serious possibility on the basis of the general market conditions.[25] According to the court, such general market conditions include the elasticity of demand, price trends and product characteristics.[26]

7 Royal Mail v DAF, para 557.
8 Royal Mail v DAF, para 658, 672, 667 & 688.
9 Royal Mail v DAF, para 692.
10 Royal Mail v DAF, para 723 & 724.
11 Royal Mail v DAF, para 727.
12 Royal Mail v DAF, para 692.
13 Royal Mail v DAF, para 731-732.
14 Ruling of the CAT dated 16 May 2023 in Cases 1284/5/7/18 (T) Royal Mail Group Limited v DAF Trucks Limited and Others and 1290/5/7/18 (T) BT Group PLC and Others v DAF Trucks Limited and Others, [2023] CAT 31.
15 Royal Mail v DAF (COA), para 149.
16 Royal Mail v DAF (COA), para 149.
17 Royal Mail v DAF (COA), para 150-154.
18 Royal Mail v DAF (COA), para 156.
19 See Hannover District Court, judgment of December, 18, 2017, 18 O 8/17, Truck cartel.
20 Provincial Court of Zaragoza, judgment of July 27, 2020, AP Z 2008/2020 - ECLI:ES:APZ:2020:2008.
21 See Judgement Transfrugal v. DAF Trucks NV, MP: J. M. Mateus Araújo, 71/19.6YQSTR.
22 We do not discuss the case of Portugal as limited information is available.
23 See BGH, 23/09/2020 – KZR 35/19 – LKW-Kartell I. This had been previously established in a decision regarding the rail tracks cartel, see BGH, 23/09/2020 – KZR 4/19 – Schienenkartell V.
24 LKW-Kartell I, para 98.
25 BGH, 13/04/2021 – KZR 19/20 – LKW-Kartell II, para 96.
26 See BGH, 13/04/2021 – KZR 19/20 – LKW-Kartell II, para 97.

While the German courts did not develop a list of factors that can be relied upon to establish a causal link, there are some notable overlaps in the reasoning provided with factors three and four in the CAT's list:

(a) Similar to the CAT's third factor, the Regional Court of Dortmund found that pass-on requires material uniformity ("Stoffgleichheit") or congruence between the cartelised input factor and the good or service on the downstream market.[27] The Regional Court excluded such congruence between trucks and the downstream haulage market. In response to public criticism of this judgment by economists,[28] the presiding judge of the Regional Court suggested that the question of whether congruence is relevant for pass-on may be one where lawyers and economists seem to lack mutual understanding of each other's approach.[29]

(b) Similar to the CAT's fourth factor, the BGH also places weight on the scope for downstream customers of the claimants to bring successful claims. In the rail track cartel case (another case that created a large number of judgments in Germany), despite finding that the defendants had successfully established pass-on of the overcharge into higher train ticket prices, the Court rejected the pass-on defence because there would only be an "atomised" or "scattered" cartel effect for individual ticket sales, making claims by end customers unlikely.[30] In its decision the Court highlights the risk of cartelists avoiding their liability if a pass-on defence was allowed in such circumstances, which would undermine the deterrent function of private competition law enforcement.[31]

A large number of Spanish provincial and appeal courts,[32] as well the Spanish Supreme Court,[33] also dealt with the pass-on question. The relevant legal test had already been established in the sugar cartel case, where the Supreme Court had established that the defendants must demonstrate that the claimants did not only pass-on the price increase, but also any economic harm resulting from it (i.e., establish the absence of any volume effects).[34]

In the first instance cases where the issue was discussed in most detail (Grúas Jordán v. Volvo and Llácer y Navarro v. Volvo), the defendants' economic experts tried to establish pass-on by reference to what appears to have been mostly qualitative evidence relating to the nature of the claimants' business and the "favourable economic conditions" that should have allowed the claimants to "pass on any cost increases […] without experiencing a decrease in sales."[35]

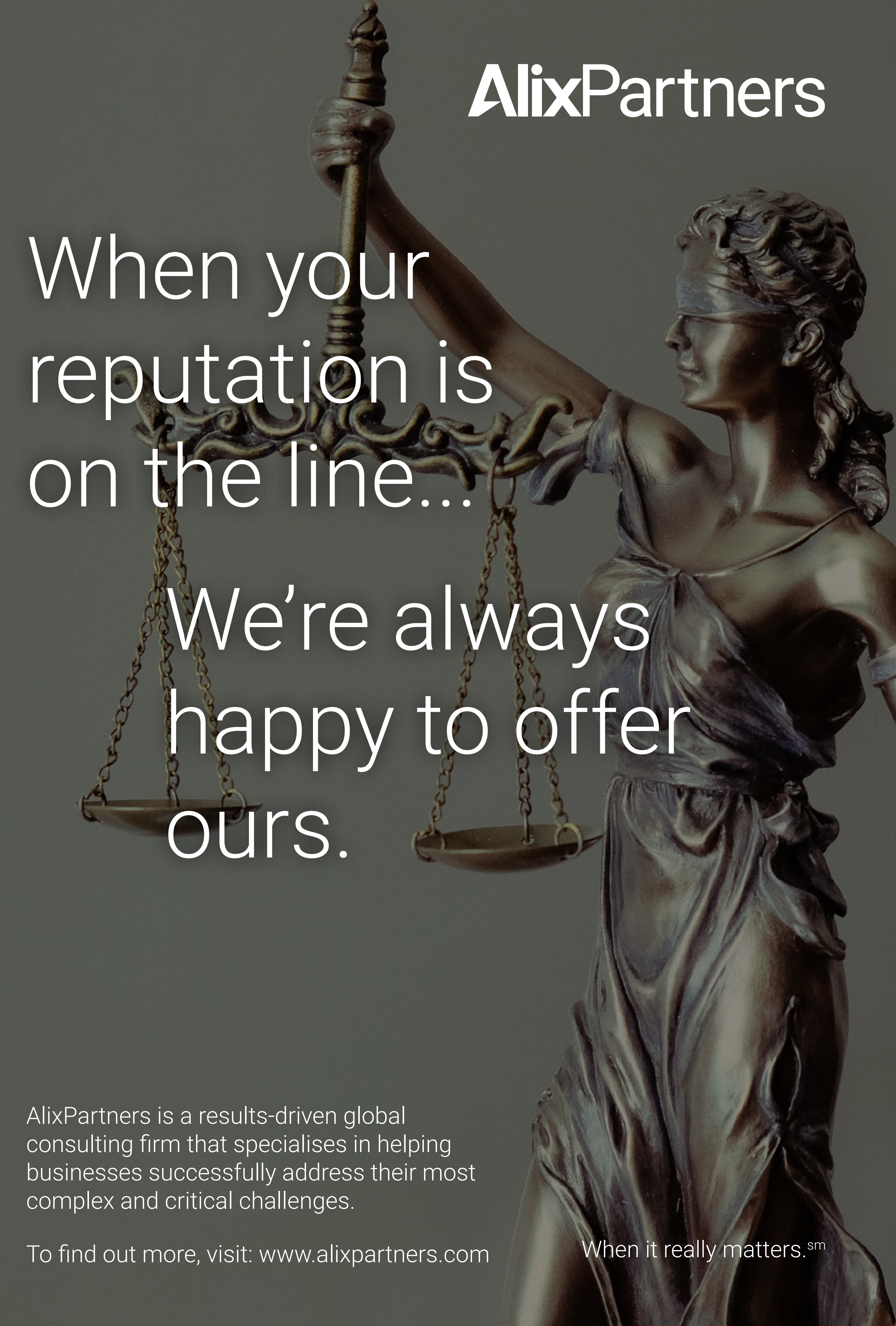
However, they also acknowledges that "a correct quantification of pass-on could not be made, primarily due to the need for additional disclosure [that was not made available]."[36]

Across all judgments that we have seen, the Spanish courts found that the defendants had failed to substantiate pass-on in line with the test set down in the sugar cartel case, and therefore dismissed the argument.

Conclusion

Pass-on defences in trucks-cartel cases appear to have been held back by an apparent lack of evidence for a causal link between the overcharge and a downstream price increase that would satisfy the requisite legal test. Whether this issue affects all trucks cases – including cases where trucks account for a much larger share of a claimant's total costs – is yet to be seen, as many judgments are still outstanding (including in the UK). The existence of potential downstream claimants is another interesting sticking point and was identified as relevant in the UK and Germany. It remains to be seen how the emergence of class action regimes across Europe will affect this going forwards.

27 LG Dortmund, 27/06/2018 – 8 O 13/17 [Kart] – LKW-Kartell, para 158.
28 Maier-Rigaud, F. P., Heller, C.-P., & Hanspach, P. (2019). Zur Weiterwälzung von Preisaufschlägen. Wirtschaft und Wettbewerb.
29 Klumpe, G. (2024). Zur prozessualen Behandlung wettbewerbsökonomischer Gutachten im Kartellschadensersatz. Wirtschaft und Wettbewerb.
30 Schienenkartell V, para 56 & 57.
31 Schienenkartell V, para 50.
32 See Marcos, Francisco, Trucks Cartel Damages Claims: Thousand and Odd Judgments issued by Spanish Appeal Courts (October 07, 2022). Zeitschrift für Europäisches Privatrecht 1/2023, Available at SSRN: https://ssrn.com/abstract=4255889, page 8., footnote 35).
33 See for example STS 2480/2023 - ECLI:ES:TS:2023:2480.
34 See Provincial Court of Zaragoza, judgment of July 27, 2020, AP Z 2008/2020 - ECLI:ES:APZ:2020:2008.
35 See Provincial Court of Valencia, judgment of December 20, 2019, SAP V 5941/2019 - ECLI:ES:APV:2019:5941.
36 Ibid.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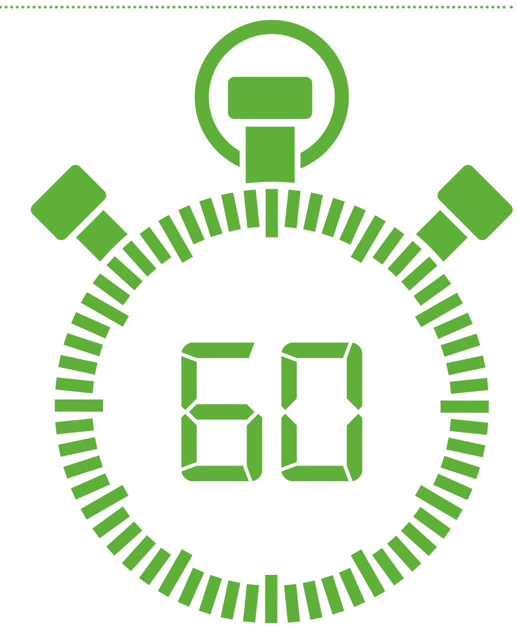


Q What's the strangest, most exciting thing you have done in your career?

A A meeting with an Indonesian lawyer in Jakarta who habitually carried a gun to work was memorable.

Q What motivated you to pursue a career in law?

A I was good at humanities at school (less so science) and law seemed like an interesting way to make use of some of those skills.

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

A Trying to improve my tennis from "moderately bad" to "moderately better".

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

A I think there is a lot to be said for not doing law as your undergraduate degree: if there is a subject you are passionate about, do that. A lot of the best lawyers I've worked with didn't study law at university.

Q What are the biggest challenges facing legal practitioners nowadays?

A Work can be all-consuming. Trying to balance doing the best job you can with making it sustainable over the long term remains a challenge. Maybe AI will help with that…

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

A *A Study in Scarlet* by Arthur Conan Doyle, the first Sherlock Holmes novel. It's a great story and completely different from any of the other Holmes books.

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

A I think the travel journalist Simon Reeve would be great company and have some fascinating tales to tell.

Q The greatest film of all time is…

A *Tremors.* Obviously.

Q What legacy would you hope to leave behind?

A Professionally, to have continued to build out the practice and helped younger lawyers come through and develop their careers.

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

A The growth in class actions over the past few years has been remarkable. I would expect to see this trend continue for the foreseeable.

Q What is the biggest life lesson you have learned?

A You're not the sort of person who does something until you actually do it.

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

A I'd like my tennis serve to go where I aim it.

JOINT EXPERT EVIDENCE IN CARTEL DAMAGES CLAIMS – COST EFFECTIVE CASE MANAGEMENT OR CARTELISING DEFENCE STRATEGIES?[1]

Authored by: Cian Mansfield (Partner) & Adi Marciano (Associate) – Scott + Scott

Introduction

In June 2024 the Court of Appeal ("CoA") handed down judgment in Stellantis v Autoliv and ZF TRW,[1] confirming the Competition Appeal Tribunal's ("Tribunal") decision in relation to expert evidence by defendants in cartel damages claims.

The CoA upheld the Tribunal's decision, which ruled that economic expert evidence should be given by a joint expert for all defendants (two groups),2 and provided further guidance to be applied when a court or tribunal is considering single joint expert evidence in future (the "CoA Judgment").

This article discusses the implications for claimants. Defendant joint expert evidence should reduce costs significantly, and also shorten proceedings due to the reduced volume of expert material to address. But there is a certain irony and danger in former cartelists being ordered to cooperate, once again, against their customers.

Accordingly, claimants must remain able to challenge defendants' claims and methodologies and any court-ordered defendant unity must not work unjustly to the detriment of the claimants.

As an immediate learning point, however, one thing which the CoA Judgment makes clear is that cartel damages claims are not a special case. They are subject to the same case management considerations as other claims, and both claimants and defendants should remember this in raising any objections to Tribunal case management proposals.

Background

The Stellantis claim relates to the occupant safety system (e.g. seatbelts and airbags) cartels (the "Stellantis Claim") identified by the European Commission in settlement decisions dated 22 November 2017 ("OSS1") and 5 March 2019 ("OSS2") respectively, which identified six cartels (the "Decisions"), covering different time periods. The defendants are members of the Autoliv and the ZF TRW groups ("the Defendants") who were addressees of the Decisions (Autoliv were addressees of both decisions while ZF TRW were addressees of

1 [2024] EWCA Civ 609.

2 [2023] CAT 66.

OSS2 only). The Claimants are car manufacturers who purchased occupant safety systems from the Defendants and seek damages of +€734 million.

Neither OSS1 nor OSS2 relate to sales to the Claimants. Rather, the Claimants plead a single cartel, involving both Defendants (on a joint and several liability basis) and covering at least the period addressed by OSS1 and OSS2. In the alternative, the Claimants argue that:

- Even if these were individual cartels, they had the same membership and features as contended in the Claimants' primary case;[3] or
- In the further alternative, the cartels had "umbrella" effects, i.e. even if there were no cartels directed at the Claimants, the effects of the cartels established "would have been to increase the prices charged by the cartelists of supplies to other OEMs" by lessening competition in the market.[4]

The Tribunal of its own motion raised the possibility of a joint expert at a CMC in March 2023, noting the dangers of three different defendant methodologies and approaches (as there was a third defendant group at the time, Tokai Rika), and the impact this would have on the length of trial.[5]

The Defendants opposed. They applied to have separate evidence, but the Tribunal rejected the application. A further application by the Defendants to have separate experts on overcharge was rejected by the Tribunal on 22 April 2024.

The CoA found the Tribunal had "consistent reasons" for its approach, namely:

- The court can order a joint expert if it "is in accordance with the governing principles of dealing with the case justly and at a proportionate cost".[6] The Tribunal addressed two aspects of what is 'just' in a case like this, the first being the risk of a conflict of interest and the second, the complexity of the proceedings.
- If a conflict of interest exists in relation to the matters which the expert evidence is directed, "it will not ordinarily be appropriate to order joint experts". The conflict must be "real rather than merely theoretical".[7]
- Regarding complexity, while "challenges of reconciliation may arise from evidence presented by a single claimant expert and a single defendant expert (where the opinion of one is not being dismissed altogether)", these challenges are more pressing when each defendant advances separate and unreconciled positions.[8]
- Where the value of the claim means instructing multiple experts will not be disproportionate, and no relevant conflict of interests exists, separate economic experts could still introduce unnecessary complexity impacting on the quality of justice.[9]

The Defendants appealed. The appellants' case was that: (i) the Tribunal failed to identify the relevant conflicts; and (ii) if such a conflict exists, separate experts must be permitted as a matter of principle.]

The CoA Judgment

The CoA dismissed the appeal, finding that there was no conflict of interest relating to the expert evidence and no error of law by the Tribunal in reaching that conclusion.[10] The CoA noted:

- CPR Rule 35, which relates to expert evidence does not have "an express analogue in the CAT Rules",[11] but the Tribunal's approach was based on the same three features as the CPR: a duty to restrict expert evidence; the overriding duty of the expert; and the power to direct evidence from a single joint expert;
- The Tribunal was correct in rejecting the submission that there was an "established practice" of allowing individual experts in cartel cases,[12] which the Defendants argued can be inferred from UK Trucks;[13]
- There are, however, relevant precedents and guidance on this question from outside the cartel damages space, and referred to multiple non-competition precedents; court guides which address this point; and material relating to dispute resolution pre-action;[14]
- This all led to the CoA's conclusion that the overriding principles in both the court and the Tribunal are "that the court or Tribunal will seek to ensure that the case is dealt with justly and at proportionate cost" and the "duty to restrict expert evidence … to that which is reasonably required";[15]
- While many of these authorities relate to low value claims, the principles are the same regardless of the claim's value, as while proportionality considerations will account for differences in practice, proportionality is not the only question;[16]
- "[W]hile the existence of a conflict of interest between the relevant parties is a material factor to take into account" its existence" is no trump card".[17] This

3 CoA, [7]; see also CAT, [7].
4 CAT, [8].
5 29 March 2023 transcript, for example in page 112 lines 17-25 and page 115 lines 16-23.
6 CoA, [18].
7 CAT, [19(2)].
8 CAT, [19(3)].
9 CoA, [18].
10 CoA, [67-77].
11 CoA, [25].
12 CoA, [14].
13 UK Trucks Claim Limited v Stellantis NV & Others [2023] EWCA Civ 875.
14 See paragraphs 40-46 of the CoA Judgment.
15 CoA, [47].
16 CoA, [66].
17 CoA, [49].

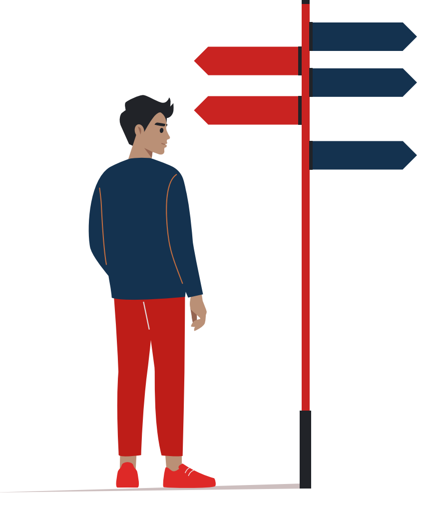
was inferred from situations where a single joint expert is appointed by the courts (e.g. property value disputes).

More specifically in the context of cartel damages claims, the CoA considered UK Trucks (relating to a truck cartel), where there were two classes of victims and a single class representative. The CoA found a conflict of interest existed between the two classes regarding pass-on.

While the CoA in UK Trucks ruled that if managed appropriately this conflict did not prevent the representative representing both classes, it held that the Tribunal had been wrong in accepting that a joint economics expert evidence of the two classes should be allowed due to the divided loyalty of the class representative to the separate classes of victims.[18] However, the CoA here distinguished UK Trucks and rejected the appellants' submission that the existence of a conflict of interests necessitates separate experts.

The CoA agreed with the suggestion based on Oxley v Penwarden that if there was more than one school of thought then separate experts may be permitted. But it caveated this by saying that the existence of multiple schools of thought is a distinct situation, and that the use of different regression models, for example, does not fall into that category.[19]

In making its decision, the CoA noted that the Defendants' positions on the merits of the case are aligned, and they are "running mutually consistent defences rather than conflicting defences".[20]



Potential Implications

Economic analysis plays a crucial role in cartel damages claims, and the CoA's Judgment will no doubt have an impact on future competition litigation case management.

As an initial point, the CoA Judgment is a useful reminder to cartel damages lawyers that, quite frankly, they are not special. The CoA has made clear that precedents from low value claims apply equally to cartel damages claims as they do to other claims. There is no separate, rarefied world for cartel defendants where they have carte blanche to argue what they want regardless of its effect on case management.

This was clearly reflected throughout the CoA's judgment: starting with the procedural conclusion that "the approach applicable in the CAT is based on the same foundations as the approach in court", through to the reliance on non-competition case law and court guides, and further emphasised by the coherent conclusion that these principles are the same regardless of the value of the claim.

Regarding the substantive impact, joint expert evidence presents compelling benefits for claimants and potential new strategies for defendants, while simultaneously entailing potential disadvantages to both.

Claimants will benefit by having more streamlined proceedings and controlled defendant costs.

Joint expert evidence enables claimants to have manageable reports to respond to, instead of being burdened with reviewing and responding to several separate economic experts reports and methodologies.

On the other hand, it's not all positive for claimants. Court ordered cooperation by the defendants means they will likely present a more unified approach, putting forward their best expert, and benefiting (once again) from cooperation/collusion. Assuming discussions between the different defendants and experts will be covered by common interest privilege, claimants may not be able to identify potential fault lines and inconsistencies which they could otherwise seek to exploit. The potential blurring of the differences between the defendants could also lead to them uniting against the claimants and disincentivising individual defendants from settling. From a behavioural perspective, one might see this as the cartel conduct repeating itself – the defendants uniting against their victims.

Furthermore, as the CoA recognised that different schools of thought may lead the Tribunal to permit separate experts, defendants may seek to 'over-egg' their differences or put forward distinct methodologies without justification, potentially leading to additional complexity rather than efficiency.

Summary

In summary, perhaps it is best to simply watch this space. Stellantis involved "mutually consistent defences". Accordingly, the courts' approach is not a precise prediction of future cases, which will potentially involve more complexities in terms of the defendants' contradicting strategies and methodologies.

If anything, the clearest lesson from the CoA Judgment is that cartel damages claims are not special, and are subject to case management as any other claim. Defendants' arguments regarding value and alleged complexity as justification for extra leeway should be treated with the scepticism they deserve.

18 [2023] EWCA Civ 875, [96].
19 CoA, [63].
20 CoA, [69].

THE BEGINNING OF THE END: LESSONS LEARNED FROM THE FIRST COLLECTIVE SETTLEMENTS IN THE COMPETITION APPEAL TRIBUNAL

Authored by: Laura Whyatt (Partner), Catriona Munro (Consultant), Cansin Karga (Senior Associate) & Ellen Curran (Associate) – Dentons

Over 50 collective proceedings have been filed in the Competition Appeal Tribunal ("Tribunal") since the collective actions regime was introduced in 2015. The initial focus was on the test for certification, with a number of significant appeals to the Court of Appeal and Supreme Court.[1] However, the focus is now shifting to the resolution of claims, including by way of settlement.

Certified opt-out collective proceedings can only be settled on the terms of a collective settlement approval order ("CSAO") issued by the Tribunal. Before issuing a CSAO, the Tribunal must be satisfied that the terms of the proposed settlement are "just and reasonable".

The Tribunal has now approved two collective settlements, providing welcome guidance for future settling parties.

The First Two Collective Settlements

Roll on Roll off deep sea carriage services

The first CSAO was made on 13 December 2023 in certified opt-out collective proceedings Mark McLaren Class Representative Ltd v. MOL (Europe Africa) Ltd and Ors 1339/7/7/20, between the Class Representative and settling defendant Compañia Sudamericana de Vapores ("CSAV").[2]

CSAV is one of twelve defendants, following a decision by the European Commission in February 2018 finding that the defendants were involved in a cartel in the market for roll-on roll-off deep sea carriage services in the European Economic Area.[3]

Whilst the European Commission's decision found the defendants were jointly and severally liable for the cartel, the terms of settlement were premised on CSAV being responsible for 1.7% of the value of commerce affected by the cartel. The settlement made available £1.2 million in damages and £380,000 in costs.

The settling parties sought a barring order precluding future contribution claims by the non-settling defendants, which was ultimately agreed between all parties – sparing the Tribunal from ruling

1 Walter Hugh Merricks CBE v Mastercard Incorporated and Others [2019] EWCA Civ 674, [2020] UKSC 51; Justin Le Patourel v BT Group PLC [2022] EWCA Civ 593; Justin Gutmann v First MTR South Western Trains Limited and Another [2022] EWCA Civ 1077; Justin Gutmann v London & South Eastern Railway Limited [2022] EWCA Civ 1077; Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others [2022] EWCA Civ 1701; Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others [2023] EWCA Civ 876; UK Trucks Claim Limited v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others [2023] EWCA Civ 875; Road Haulage Association Limited v Man SE and Others [2023] EWCA Civ 875.

2 Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others [2023] CAT 75.

3 Case AT.40009 – Maritime Car Carriers, 21 February 2018.

on whether it has jurisdiction to make such an order before any contribution claims have been brought.

The Tribunal had little hesitation approving the terms of the settlement. Mindful that proceeding to trial would be a costly and lengthy process, the Tribunal deferred to the parties' experts, independent witness and counsel in finding the sums reasonable.

Distribution was deferred pending the outcome of the substantive trial, as was the question of whether any unclaimed damages should revert to CSAV. The Tribunal has subsequently declined to make an order for payment of further costs out of the damages amount prior to distribution.[4]

Boundary Fares

The second collective settlement – a much more significant claim in terms of value and one where therefore greater scrutiny from the Tribunal was to be expected – was approved in April 2024 on a no admission of liability basis, between Stagecoach South Western Trains, one of four defendants in related proceedings, and the Class Representative in Justin Gutmann v First MTR South Western Trains Limited and Stagecoach South Western Trains Limited.[5]

The standalone claim alleges that it was an abuse of dominance that train operating companies did not make boundary fares sufficiently available, resulting in people who could have bought a boundary fare allegedly paying twice for a portion of their journey.

Given the standalone nature of the claim and the novel nature of the allegation, this was in quite a different category to the CSAV settlement.

Considering the time elapsed since the alleged infringement period (over a decade, between 1 October 2015 and 20 August 2017), the settlement was structured such that class members who could produce differing levels of documentation as evidence of their claim could access gradated amounts from distinct pots of money, up to a total amount of £25 million available to eligible class members. The settlement also provided for payments to the Class Representative for costs at the time of CSAO, with the facility for the Class Representative to apply to the Tribunal for an order for payment of further costs if less than £10.2 million is distributed to class members by the end of the claim period.

The Tribunal initially expressed dissatisfaction with elements of the proposed settlement prompting the parties to amend it, principally to make more funds available to those who cannot provide any evidence to prove their claim. The Tribunal also took account of the apparent merits of the claim (which it did not consider to be strong) and its expectation that take-up would be low, in directing the parties as to how they might satisfy the Tribunal that the settlement should be approved. The modified settlement was ultimately approved, and the distribution process commenced immediately following the issuance of the CSAO.

Lessons Learned And Uncharted Territory

The Tribunal rules on their face provide for a binary approach – a settlement is either approved or rejected. However, the first two collective settlements show the Tribunal is prepared to engage with the parties and indeed, offer views on what arrangements might be acceptable. Settling parties should not expect the Tribunal to act as a "rubber stamp" and stand ready to answer its questions.

The Tribunal's approach to the first two collective settlement provides useful guidance on factors it will consider relevant to the issue of a CSAO:

1. Merits of the case. In a case where the merits are strongly in favour of the class representative the Tribunal may not be satisfied by a settlement that could lead to the defendant paying out a relatively modest amount in damages, especially if the settlement is structured as an "up-to" amount, not a fixed sum. This being the case, the Tribunal can be expected to take a more conservative approach in follow-on claims where liability has already been established.

2. Empirical evidence of expected take up. The Boundary Fares settlement judgment indicates that the Tribunal expects future applications should include properly reasoned and researched estimates of the likely take-up rate by class members, ideally involving empirical research based on class members. How such a survey would be conducted confidentially in the course of a settlement process, without causing significant delay and on

4 Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others [2024] CAT 47.
5 Justin Gutmann v First MTR South Western Trains Limited and Another [2024] CAT 32.

a scale substantial enough to be representative, remains to be seen.

3. Unclaimed damages. The question of take-up is central to settlement under this regime, with reversion of unclaimed damages to the settling defendant being a key attraction of settlement. In Boundary Fares, the Tribunal demonstrated it is willing to accept such arrangements, but not without careful scrutiny. Indeed, the Tribunal indicated that in a claim where the merits are strong, the Tribunal may decide that the matter should go to trial as damages would have to be paid in full and any unclaimed balance would go to charity. Future settling parties should carefully consider whether a charitable payment should be part of the settlement offer.

The potential for conflicts of interest is rife, particularly where settlements have structures that may incentivise fewer claims to increase the sums available for the Class Representative's lawyers and funders and a potential reversion to the defendant. In CSAV, the Tribunal demonstrated a willingness to look behind the final settlement to unpick settlement negotiations (which may typically be considered privileged) to ensure the settlement structure was designed to offer sufficient redress to class members.

In cases where the Tribunal is open to approving a reversion mechanism, it has indicated that the distribution plan must also operate to protect against conflict of interest, to prioritise ensuring "valid claims are met under a plan that is well advertised and is user friendly such that it encourages and does not deter claims".[6]

In both of the approved settlements to date, the extent of any reversion to the settling parties is yet to be determined pending distribution. The level of take-up will no doubt be of interest to the Tribunal in scrutinising the relative costs claimed by the Class Representative's funders and lawyers. The Tribunal's approach is eagerly anticipated by prospective settling class representatives and defendants alike.

Dentons acted for Stagecoach South Western Trains.

6 Justin Gutmann v. First MTR South Western Trains Limited and Stagecoach South Western Trains Limited [2024] CAT 32, paragraph 81.

COLLECTIVE ACTION ADMINISTRATION

EXPERIENCE IS INDISPENSABLE

- 1631/7/7/23 - PROFESSOR CAROLYN ROBERTS V (1) ANGLIAN WATER SERVICES LIMITED AND (2) ANGLIAN WATER GROUP LIMITED
- 1630/7/7/23 - PROFESSOR CAROLYN ROBERTS V (1) NORTHUMBRIAN WATER LIMITED AND (2) NORTHUMBRIAN WATER GROUP LIMITED
- 1629/7/7/23 - PROFESSOR CAROLYN ROBERTS V (1) YORKSHIRE WATER SERVICES LIMITED AND (2) KELDA HOLDINGS LIMITED
- 1628/7/7/23 - PROFESSOR CAROLYN ROBERTS V (1) UNITED UTILITIES WATER LIMITED AND (2) UNITED UTILITIES GROUP PLC
- 1603/7/7/23 - PROFESSOR CAROLYN ROBERTS V SEVERN TRENT WATER LIMITED AND SEVERN TRENT PLC
- 1601/7/7/23 - DR SEAN ENNIS V APPLE INC. AND OTHERS
- 1599/7/7/23 - DOUG TAYLOR V BLACK HORSE LIMITED AND OTHERS
- 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

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UK COMPETITION APPEAL TRIBUNAL APPROVES FIRST SIGNIFICANT CLASS ACTION SETTLEMENT

Authored by: Anna Morfey (Partner), Tim West (Partner) & Hayden Dunnett (Senior Associate) – Ashurst

On 10 May 2024, the UK Competition Appeal Tribunal (CAT) approved a collective settlement in Justin Gutmann's collective action against Stagecoach South Western Trains (SSWT), which alleged that SSWT overcharged consumers by failing to make boundary fare tickets sufficiently available to customers. The CAT's approval of the settlement provides welcome guidance to claimants and defendants on how the CAT will assess future collective settlements.

Key Points

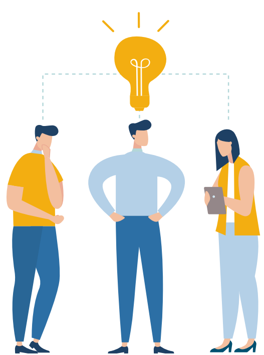
- The CAT approved a collective settlement of up to £25 million, plus costs and distribution expenses on the basis that the settlement was just and reasonable.
- The proposed settlement only requires SSWT to pay out actual claims (as opposed to a fixed sum). The settlement includes three "pots" of compensation for class members, with monetary caps imposed on class members who have little or no evidence to substantiate their claims.
- While ultimately approved, the distribution plan was closely scrutinised by the CAT and the parties made a number of amendments to the proposed settlement to address the CAT's concerns.
- The CAT also outlined its expectations for future class actions settlements, to ensure it is able to make a fully informed decision on whether a proposed settlement just and reasonable.

Background

In 2021 the CAT issued a number of collective proceedings orders to Justin Gutmann to act as class representative (CR) in a claim for damages against a number of train operating companies, including SSWT.

The CR alleges that each train operating company abused their dominant position by failing to make "boundary fare" tickets sufficiently available to customers and resulted in consumers who had a TfL travel card being overcharged for certain portions of a rail journey.

Ahead of the first of a number of hearings due to commence in June, the CR and SSWT agreed a settlement and submitted a joint application to the CAT for approval of their collective settlement and distribution plan.



The Tribunal's Assessment Of The Proposed Settlement

Under the Competition Act 1998, the Tribunal may approve a proposed settlement only if it considers the terms are just and reasonable. Rule 94(9) of the CAT's rules provide that it will take account of all relevant circumstances in determining whether a settlement is just and reasonable and includes a number of matters relevant to the assessment.

Proposed Terms Of Settlement

When the parties initially submitted their Collective Settlement Approval Order application to the CAT, the CAT sent the parties a number of questions about the proposed settlement, following which the parties revised their proposed agreement. The key terms of the revised settlement include:

- Payment of damages up to £25 million, split into three "pots", as set out in the table below. SSWT's liability to pay damages will be based on the amount of valid claims submitted by members of the class, with £25 million being the maximum liability SSWT potentially owes to the class.
- In respect of costs and expenses, SSWT would make an initial payment of £4.75 million. A further £750,000 was allocated for distribution costs.
- The CR can apply, at a later hearing, for a further payment for costs and expenses, once class members have submitted their claims. The additional payment is capped at £10.2 million (Non-Ringfenced Costs) and reduces by £1 for every £1 claimed by the class. So if, for example, class members make valid claims totalling £4 million, the class representative is entitled to apply for an additional payment of £6.2 million.
- SSWT would only be required to pay damages for amounts actually claimed by class members. That is, the maximum liability of SSWT is £25 million, although its actual liability is dependent upon class members submitting valid claims.

	Amount*	Caps	Evidence	Waterfall
Pot 1	£19 million	No cap for individual claims	Proof of purchase of a train ticket and TfL travelcard	No transfer to pot 2 or 3
Pot 2	£4 million	£5 per claim, with an individual limit of £100 (20 claims)	Other proof of purchase of train ticket or travel card	If undersubscribed, balance to be transferred to Pot 3
Pot 3	£2 million	£5 per claim, with an individual limit of £30 (6 claims)	Ability to self-certify and no need to provide details of relevant journeys	If undersubscribed, balance to be transferred to Pot 2

The CAT's Assessment

Before considering the CR and SSWT's proposal, the CAT noted that it was incumbent on the CR and settling defendant to make full and frank disclosure to the CAT in respect of a settlement proposal. The CAT also recognised there was a strong public interest in encouraging the settlement of claims to ensure the Courts are not overburdened.

In addition, close scrutiny of the distribution plan was considered necessary, since the defendant's liability was an "up to", as opposed to a lump sum. The CAT noted that if the evidential bar for class members to make a claim was set too high, very little of the settlement would be taken up.

Against this background, the CAT ultimately found that the revised settlement put forward by the parties was just and reasonable. In reaching this conclusion, the CAT had regard to the following key issues:

- **Value Of The Claim:** The CAT noted the expert evidence demonstrated that the settlement amount represented 64% of the claim value, with an average class member claim being £27.90 and an estimated loss per journey of £5. The CAT accepted expert evidence which indicated that the settlement amount was fair and reasonable and it was not likely that the CR would obtain damages that materially exceed the settlement amount at trial.
- **Strength Of The Claim:** The total settlement was considered fair and reasonable by the CAT in view of its assessment of the merits of the claim, as to which the CAT noted that, "we do not regard this as a wholly speculative claim with a low prospect of success, but we do not regard it as an overwhelming case either, and, at trial, there is a real possibility that the CR may lose". The CAT went on to note that, had they considered that the merits were strongly in favour of the CR, they may not have accepted the settlement and that "it may have been the decision of the Tribunal that the matter should go for trial".
- **Approval Of "Pots":** The CAT approved the settling parties' approach to have different pots of damages for class members to claim from, depending on the evidence each class member is able to produce. Class members able to produce full documentation have no cap on

their potential recovery (pot 1). In contrast, class members unable to produce evidence can claim on pot 3 for up six £5 claims (£30). The cap in Pot 3 was estimated to be slightly above the average claim (£27.90). The CAT considered that due to the passage of time, this would be the most popular pot for class members to claim from.

- **Level Of Evidence Required To Make A Claim:** The CAT considered that class members who can fully evidence their claim should be entitled to claim the full amount of their losses (from the £19 million in pot 1). In contrast, the CAT indicated that the threshold for class members who do not have such evidence should not be set in a way to automatically exclude class members. In this regard, the CAT endorsed a self-certification process for Pot 3, without requiring class members to produce details of journeys they have taken; and was clear that class members who had paid in cash should not be disadvantaged in making their claims. The CAT noted that the application form includes warnings and a declaration that the class member is aware that action can be taken against them if they make a claim that they know to be untrue.
- **Likely Take-Up Rates:** The CAT noted that the parties estimated a take-up rate of 10-20% which, based on the CR's estimate, would result in between 140,000 to 280,000 individual claims. The Tribunal considered 10% may be an over estimate. Having commented that it would have been better had the settling parties undertaken empirical research to estimate the likelihood of claims, the Tribunal independently considered the general research on take-up rates in North American class actions and stated that while "[i]t is obvious to the Tribunal that the majority of potential claimants will not claim… quite frankly, no one knows for sure what that [take-up] is likely to be".
- **Costs And Expenses:** the CAT approved the split approach to payment of the CR's costs and expenses, with £4.75 million payable by SSWT upfront and £750,000 for distribution costs. The CAT stated that reasonable costs were "probably well in excess of £10 million" for the claim and that further payments for legal expenses and funder's fees, in respect of Non-Ringfenced Costs, would be considered once class members have submitted their claims.

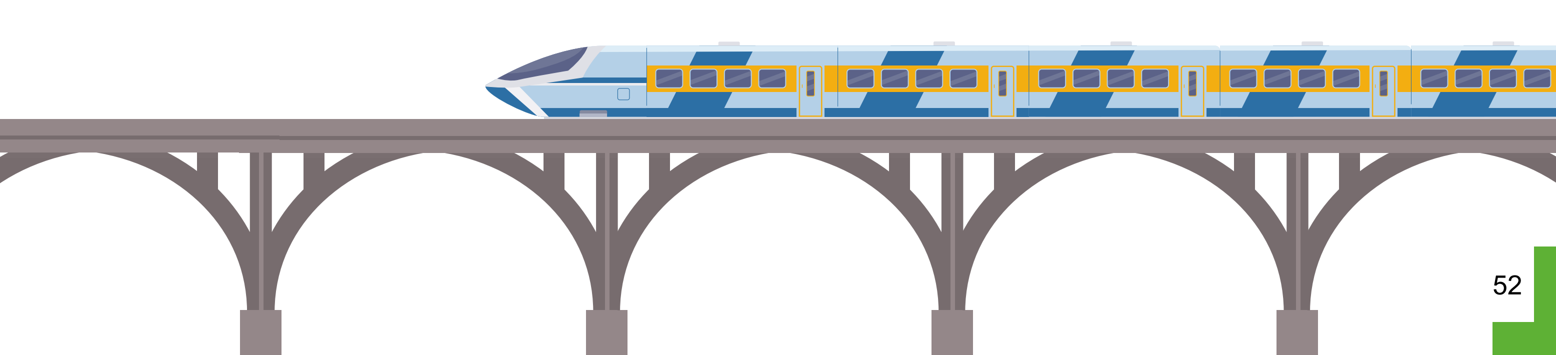
Implications For Future Collective Settlements

The CAT's decision is the second collective settlement order made by the CAT and first time it has approved a settlement distribution plan.

With nearly 50 ongoing collective actions before the CAT and a clear statement from the Tribunal that there is a strong public interest in parties settling their claims, the decision provides welcome guidance for CRs and defendants considering how to frame potential settlement discussions.

The decision provides clear guidance for both CRs and defendants on key issues relevant to structuring collective settlements, including:

- **Lump-Sum Or "Up-To" Settlement Amounts:** The CAT outlined that while it approved the proposal for SSWT to pay an "up to" damages sum, in cases with stronger merits, it may not be appropriate for the CAT to approve up-to settlements, particularly if the take-up is likely to be a low proportion of the class. The endorsement of an "up to" amount gives defendants more flexibility in structuring settlement agreements in contrast to a fixed sum, which may revert to them at a future date if unclaimed.
- **Take-Up Rates:** in future applications for collective settlement approval orders, the Tribunal will require applicants to produce estimates of likely take-up rates for members of the class, based on empirical research they have undertaken assessing the total amount likely to be claimed. While the CAT considered the take-up rate for the settlement is likely to be very low, it remains to be seen what these rates will be in this jurisdiction (compared to the evidence before the CAT, which related to take-up rates in North America). If take-up rates are very low, this may impact the CAT's assessment of future settlements, particularly those involving "up to" settlement amounts.
- **Legal Costs And Funders Fees:** while the CAT approved a partial payment of the CR's costs and expenses (£4.75 million), the degree to which further costs are be paid out is contingent on both the take-up rate being low such that there are Non-Ringfenced Costs available for distribution and the CAT making a future costs order. The Tribunal recognised the important role of funders in providing the capital to bring claims, but it remains to be seen whether the CR's funder will receive a reasonable return when, on the CAT's own estimate, reasonable costs for the claim are in excess of £10 million.
- **Flexibility In Addressing The Cat's Concerns:** as with applications for a collective proceedings order, the CAT took a flexible approach in considering the revised settlement proposals which it found addressed its concerns. In the context of this settlement, the CAT indicated that it would have refused the parties' original proposal.



THE NEW AGE OF DISCOVERY

PLAINTIFFS NAVIGATE JURISDICTIONAL WATERS FROM BRAZIL TO EUROPE

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

A heated debate has emerged in Brazil regarding plaintiffs' choice of jurisdiction when filing lawsuits. This issue has become such a bone of contention that law firms have urged the Brazilian Bar Association to file a class action against a British firm for purportedly violating Brazilian law by pursuing cases in foreign courts to address Brazilian issues.

Some contend that selecting a venue allows appropriate redress of damages in complex cases involving multinational companies.

Others decry this practice as 'forum shopping,' viewing it as an abuse of choice that harms the justice system and sovereignty. This debate presents a stimulating challenge for legal professionals and scholars.

Now, this issue has infiltrated antitrust litigation, forcing lawyers to grapple with the ironic situation of whether jurisdictions' competition is ultimately beneficial or detrimental.

Seafarers Sail Back to Europe: The Movement of Pursuing New Jurisdictions

Pedro Alvares Cabral departed from Lisbon and 'accidentally' reached Brazil. This voyage was part of Europe's broader objective of global exploration and conquering new lands. Besides the harmful effects of colonial empires, the Age of Discovery ignited the development of our current globalised world.

Today, we witness a figurative reversal. Plaintiffs from Brazil embark on judicial voyages to Europe, seeking more favorable jurisdictions for their cases.

For instance, in 2021, Professors Anthony Casey and Joshua Macey discussed this trend in their article 'Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars.' In 2022, forum non conveniens factors were debated in a lawsuit before the England and Wales courts concerning an environmental disaster in Brazil (Case No. CA-2021-000440, [2022] EWCA Civ 951, Municipio de Mariana v. BHP Group Plc). More recently, Dutch courts asserted jurisdiction and convicted Braskem for damages from earthquakes in the City of Maceio attributed to Braskem's Brazilian mining activities (Case Number C/10/618313 / HA ZA 21-415). In addition, two cases exemplify this new flow of legal navigation in the antitrust arena.

The Brazilian antitrust authority (CADE) convicted defendants for an alleged decade-long price-fixing conduct. On August 8, 2018, it concluded that the defendant manufacturers participated in a cathode ray tube cartel, harming Brazilian companies and end consumers[1]. Following these proceedings, in 2023, a Dutch court ordered two alleged cartel members to pay damages to three Brazilian clients. The lawsuit was filed in the Netherlands primarily because a suspected participant was a Dutch company. This case has sparked intense discussions on jurisdictional issues.

1 see Administrative Proceedings No. 08012.002414/2009-92 and 08012.010338/2009-99.

The second case was a lawsuit filed by orange growers in the courts of England, seeking billion-dollar damages caused by alleged cartel practices in Brazil. Claim CL-2019-000603 (the 'Viegas claim') and Claim CL-2019-000727 (the 'Sanches claim'). This lawsuit before British courts came in the wake of CADE's ruling on this matter in 2018, which had convicted the defendants for anticompetitive practices in the orange purchase market for frozen concentrated juice (Administrative Proceedings No. 08700.000729/2016-76, 08700.000738/2016-67, and 08700.000739/2016-10).

During the Brazilian investigations, one of the defendants moved to England, becoming the primary basis for the English jurisdiction claim. In 2021, a decision by the Honourable Mr. Justice Henshaw asserted jurisdiction against some defendants because they were domiciled in the UK. However, the Court concluded that the '[c]laimants do not have the better of the argument' that the company 'is domiciled in England and Wales' or 'has a place of business or place where it carries on its activities in England and Wales.' An interesting point in the decision is that if forum non conveniens had to be assessed, Brazil would be the adequate jurisdiction 'by a fine margin.' Weighed in favor of Brazil factors such as:

- The applicable law is Brazilian law,
- Most witnesses are based in Brazil,
- Relevant documents in Portuguese,
- Ongoing claims concerning the cartel before Brazilian courts.

The point that tipped the balance in favor of British courts was the length of time such cases take in Brazil. The courts noted that some private law cases under the Brazilian Antitrust Act have taken 18 years. The lawsuit is ongoing, and more legal issues are expected to arise. This forum non conveniens issue brings us to the next issue of the expedition: the challenges.

The Terrible Realities of Life at Sea: Issues Surrounding the Exploration of Foreign Jurisdictions

Just as Pedro Alvares Cabral's expedition was risky and uncertain, those setting off to explore foreign jurisdictions for Brazilian matters face a challenging reality. Diseases, attacks, and other obstacles dwindled Cabral's team to only a third of the venturers safely reaching home. Despite those risks, the expected prizes were high. Similarly, those exploring foreign jurisdictions for Brazilian matters face a challenging reality but might achieve incredible success.

Some foreign jurisdictions have robust antitrust laws that allow for substantial damages. These jurisdictions often provide more favorable conditions for plaintiffs by offering procedural advantages, such as more efficient case management, discovery processes, and class action mechanisms. These advantages can make it easier for plaintiffs to gather evidence and pursue their claims collectively.

However, this venue selection can undermine the principles of legal certainty and predictability. By choosing jurisdictions based on perceived advantages, plaintiffs may be seen as manipulating the legal system to their benefit, raising ethical concerns. It can also lead to increased litigation costs and complexity. Defendants may have to defend themselves in multiple jurisdictions, leading to higher legal expenses and lengthy legal battles. There is also concern about jurisdictional overreach, where foreign courts may assert jurisdiction over cases with limited connections to their territory. This can lead to conflicts of laws, potential clashes between legal systems, and the risk of contradictory decisions. Excessive competition for jurisdiction can create a 'race to the bottom' where jurisdictions lower their jurisdiction standards to attract cases.

Among the different obstacles to jurisdiction assertion is the forum non conveniens doctrine, which gives a court the power to decline jurisdiction in each litigation if there is a different, more appropriate, and available forum. Factors considered in such cases include, among others:

- The complexity of antitrust law,
- The location of evidence,
- The convenience of witnesses.

Brazil: A Land Still to be Explored

These attempts to pursue damages in foreign lands suggest that the Brazilian legal system needs revamping. Brazilian law authorised the redress for anticompetitive practices even before the 1994 Brazilian antitrust law was enacted, as the civil code broadly authorised any claim for illegal practices. However, most of the few cases in Brazil involve class actions filed by the Prosecutors for local gas station cartel practices.

Recently, Congress amended the Brazilian Antitrust Law (Law No. 12,529/2011) to foster more civil claims to obtain damages for anticompetitive practices. Law 14,470/2022:

- Defined that the limitation period starts when CADE issues its final administrative decision,
- Reversed the burden of proof to the defendants in the case of a passing-on defense,
- Established double damage compensation due to antitrust violations.

Nonetheless, this return of seafarers to Europe, now in the legal realm, highlights Brazilian plaintiffs' strategic navigation through complex jurisdictional waters. The implications of such practices, whether seen as strategic legal maneuvers or controversial forum shopping, continue to shape the landscape of international litigation.

CERTIFICATION OF COMPETITION COLLECTIVE PROCEEDINGS

A MORE SETTLED PATH?

Authored by: Mark Padley (Senior Associate) & Georgia Kinsella (Associate) – Milbank

The legal framework for the certification of competition class actions in the UK has developed at pace since the Supreme Court's decision in Merricks v Mastercard ("SC Merricks") lowered the threshold for certification in December 2020,[1] and there have been a considerable number of contested certification hearings before the Competition Appeal Tribunal ("CAT") and appeals from the CAT's decisions to the Court of Appeal ("CoA").

However, in July 2023, the CoA expressed the hope that "in light of the guidance given by this Court […] the issues of certification, carriage and other issues raised by applications for CPOs can be dealt with by the CAT at shorter hearings and in shorter judgments"[2].

As the President of the CAT, Sir Marcus Smith, remarked at a ThoughtLeaders4 conference in June of this year, to some extent the CoA's hope has been fulfilled "with a clear test for certification, and certification coming quickly and sometimes by agreement between the parties".

In this article we discuss the areas where the test for the certification of competition class actions has become more settled, and then briefly discuss areas that are likely to require further consideration by the courts.

The Test For Certification – More Settled?

As will be familiar to many readers of this publication, a competition class action will only be certified (and a Collective Proceedings Order ("CPO") made) if the CAT is satisfied that the following criteria are met:

(i) it is just and reasonable for the applicant to act as the class representative (commonly referred to as the 'authorisation' condition);

(ii) the application is brought on behalf of an identifiable class of persons;

(iii) the proposed claims raise common issues (that is, they raise the same, similar or related issues of fact and law); and

(iv) the claims are suitable to be brought in collective proceedings (suitability being assessed based on a range of factors and relative to individual proceedings)[3] ((ii)-(iv) are commonly referred to as the 'eligibility' condition). At the same time as addressing these issues, the CAT may also need to determine whether the claim is to proceed on an opt-in or opt-out basis and, where there are two competing proposed class

1 [2020] UKSC 51.

2 UK Trucks Claim Limited v Stellantis NV (formerly Fiat Chrylser Automobiles NV) & Others and Traton SE & Others v Road Haulage Association Limited [2023] EWCA Civ 875, §9. Sir Julian Flaux, Chancellor of the High Court, also noted in the same paragraph that: "Appeals to this Court should be limited to genuine issues of law as opposed to challenges to the exercise of the broad discretion and case management powers afforded to the CAT in this area dressed up as errors of law."

3 Section 47B of the Competition Act 1998.

representatives ("PCR"s), it will need to decide which is best placed to represent the class (i.e., the issue of 'carriage').

The CoA has provided important guidance on each of these aspects of certification and we discuss below three key areas where that guidance seems to have resulted in a more settled position.

Firstly, whilst the authorisation condition has rarely presented serious issues for the CAT, the eligibility condition (particularly the commonality and suitability elements) has required the courts to consider claims in detail at the certification stage. To facilitate this, the courts have adopted and refined what has become known and the "Pro-Sys" or "Microsoft" test from the Canadian case of Pro-Sys Consultants Ltd v Microsoft Corp.[4]

This test requires the PCR to put forward a "methodology" setting out how the issues in the case will be determined or answered at trial in order to assist the CAT in forming a judgment on commonality and suitability. As explained in SC Merricks and the CoA in Gutmann,[5] the methodology must be "sufficiently credible or plausible to establish some basis in fact for the commonality requirement", which "means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis"[6].

This methodology is usually prepared by an expert economist, but is not intended to result in a 'mini-trial' at the certification stage and it has been emphasised that the CAT's role is not to determine the best methodology available, or even to choose between the rival approaches of the parties' expert economists, but simply to assess the methodology advanced by the PCR to determine whether it provides a 'blueprint' for trial.

While several defendants have tried to persuade the CAT that the proposed methodology in their case falls short of this standard, the CAT has been reluctant to refuse to certify claims on this basis. Indeed, even where the CAT has found a proposed methodology wanting, PCRs have been provided with an opportunity to try again by the CAT (and CPOs have later been made). It is, therefore, perhaps not surprising that a recent certification decision dealt with the methodology relatively briefly, following a large measure of agreement between the parties.[7] It remains to be seen, however, whether that trend continues or new issues in relation to methodology emerge that require further guidance.

Secondly, when choosing whether to certify a claim on an opt-in or opt-out basis, the CAT will consider some of the same factors as it does in relation to certification, but also (a) the strength of the claims; and (b) whether it is practicable for the proceedings to be brought on an opt-in basis. In making this assessment there is no legislative presumption towards or against opt-in or opt-out proceedings, and the strength of a claim should not automatically point towards opt-in over opt-out.8 Instead, the CAT must decide which approach (opt-in or opt-out) is more appropriate taking into account all circumstances of the case.

The CoA has stated that most opt-in/ opt-out decisions will be an exercise of judgment within the CAT's discretion and that the CoA should not interfere simply on the basis that it might have drawn a different conclusion from weighing the evidence.9

Finally, whilst the CAT was initially reluctant to determine the issue of carriage as a preliminary issue – instead preferring to choose between PCRs as part of reaching a decision on certification – the CAT's practice is now to consider carriage as a preliminary issue before two PCRs have incurred the considerable costs of a certification hearing. The choice between competing PCRs has been held to be a quintessentially multi-factorial question and a matter of discretion and case management for the CAT.[10]

Areas Of Uncertainty Remain

Although these developments are welcome, it is likely that the law around certification will continue to develop and that further decisions will provide additional clarity. Indeed, the President of the CAT has noted that the Tribunal is still working out how best to determine carriage disputes at the preliminary issue stage. In addition, the legality of certain types of litigation funding remain in doubt following the Supreme Court's decision in PACCAR,[11] which held that litigation funding agreements are damages based agreements ("DBAs") for the purposes of the DBA Regulations 2013. DBAs are expressly prohibited in opt-out proceedings, and the re-formulated funding arrangements of a number of class representatives are subject to appeal. Those appeals were stayed pending proposed new legislation to reverse the effect of PACCAR, although it is currently unclear whether this legislation will be taken forward by the new UK government.

Finally, it is likely that new claims will give rise to novel certification issues and that the competition class action regime will continue to evolve and mature.

4 [2013] SCC 57.
5 London & South Eastern Railway Limited v Gutmann [2022] EWCA Civ 1077.
6 Ibid., §41.
7 Ad Tech Collective Action LLP v Google [2024] CAT 38.
8 BT Group plc v Le Patourel [2022] EWCA Civ 593, §§61-63 and 68; Philip Evans and Michael O-Higgins v Barclays Bank Plc & Ors [2023] EWCA Civ 876, §§92-93, 118-138.
9 BT Group plc v Le Patourel, §57.
10 Trucks, §100.
11 PACCAR and others v CAT and others [2023] UKSC 28.

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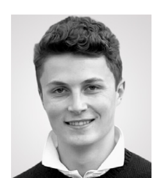

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