TL4 Competition MAGAZINE

ISSUE 1

COVERING EVERY MOVE: COMPETITION LAW, LITIGATION AND EVERYTHING IN-BETWEEN

INTRODUCTION

"The way to get started is to quit talking and begin doing."

- Walt Disney

We are delighted to present the inaugural edition of ThoughtLeaders4 Competition Law & Litigation Magazine. The Competition Law & Litigation Community brings together key practitioners working in both the contentious and non-contentious Competition space, delivering thought provoking industry-led content and events to the full spectrum of practitioners.

In this issue, our authors discuss a variety of topics facing competition practitioners, including ESG, trends in expert witness evidence, big tech, digital design, and more. This issue also features a series of 60 seconds with interviews with some of our new community partners, and speakers at the upcoming Competition Collective Actions Forum, taking place on 6 June 2023.

Thank you to all our contributors, members and community partners for their support in the launch of the Competition Community, we look forward to welcoming even more of you over the course of 2023 and beyond.

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Competition

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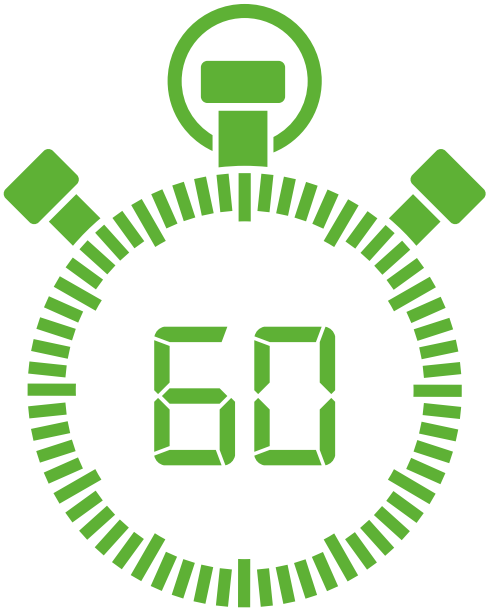

Q Imagine you no longer have to work. How would you spend your weekdays?

A I love hiking and I've always wanted to go to the north pole – so training for that!

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

A Attention to detail. In my view, getting to grips with the finest details of the case in order to be properly prepared for the counterarguments that could be raised is essential.

Q What motivates you most about your work?

A I love the fact that no two cases are the same, and love learning about the different industries and business models that the clients work within. I am also very competitive and want to win, and that is very motivating!

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

A I was an economist before coming to the Bar and advised on competition economics as a consultant. Part of the reason I came to the Bar, and have a particular interest in competition law, is because of that background. My goal is to cross-examine an expert economist.

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

A Preparation preparation preparation!

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

A There has been a huge growth in the number of class action enquiries, and disputes. I expect to see this area continue to grow as the funding market continues to develop.

Q Who has been your biggest role model in the industry?

A Lady Rose JSC. I first came across Lady Rose when I was an economist considering making the move to become a barrister. She was then sitting in the Court of Appeal. I asked to marshal with her because of my interest in competition law and her former role as a judge of the Competition Appeal Tribunal. It was a fantastic experience that fueled my desire to become a barrister. She is very inspiring.

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

A Empathy. I think the ability to understand and empathise with the people you work and engage with is essential to a happy life!

Q What cause are you passionate about?

A Global warming. I'm not sure this needs much explaining. In my view it is the most urgent issue facing my generation.

Q Where has been your favourite holiday destination and why?

A Madagascar – because of the lemurs!

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

A David Attenborough. He has inspired many generations to care more about the planet, and to act on that; must also have the most incredible stories; and undoubtedly has fascinating insights into wildlife.

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IMPARTIALITY AND TRANSPARENCY IMPORTANT TO MORE WIDESPREAD ACCEPTANCE OF SURVEY USAGE IN COURT CASES

Authored by: Dante Quaglione (Managing Director) - BRG

Surveys have been gaining prominence across a range of civil litigation actions and are being used increasingly in class certification, antitrust cases and intellectual property matters (e.g., trademark infringement proceedings), as well as in employment-related class actions.

They also have become common in false-advertising cases, as they can provide two types of key evidence: in cases in which the advertising is literally false, surveys often provide evidence on the materiality of the claim; in cases in which the claim is not literally false but potentially misleading surveys can provide evidence as to consumers' perceptions of the claims.

The Competition Appeal Tribunal (CAT), a specialist tribunal with the jurisdiction to hear competition damages actions, is becoming more comfortable using survey evidence and accepts that surveys can be useful to plug gaps in the body of facts for a given case.

When properly executed, survey evidence can be a crucial component of a wider litigation strategy—especially in situations where other sources of data are unavailable. However, a survey's usefulness and significance are dependent on how robustly it is designed and undertaken.

Establishing impartiality

Despite the growing acceptance of surveys, some legal pundits remain sceptical of the "probative significance" of survey evidence in litigation. This concern can be combatted by ensuring that a survey framework and methodology are designed by experts in the field.

One significant characteristic of a credible survey is that it be seen as impartial and without bias. Surveys must not "lead the responder". Experts must also demonstrate that the appropriate questions are asked clearly and that respondents understand the survey questions as intended and can complete the survey without fatigue.

Ideally, surveys should be grounded in academically rigorous and unbiased methodologies. Once key questions are identified, the expert should determine the most appropriate approach.

A survey will have greater probative value if the expert can document and support the choice of sample, question and method, while minimising any appearance of biases.

Avoiding common biases

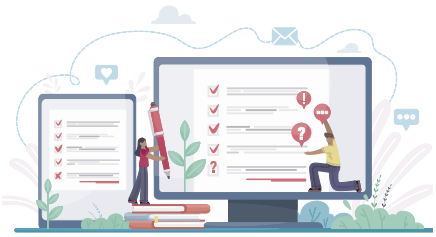
A survey can be deemed as biased in different ways.

The first is selection bias. A credible survey will identify an appropriate group of respondents based on the particular issue in question. If the sample of respondents is too broad, the survey runs the risk of including results that are not relevant to the question at hand. Conversely, if the sample is too narrow, it may not give the trier of fact the full picture of the issues and concerns to be addressed. A survey may be excluded from evidence if the sample of respondents is adjudged to be incorrect or incomplete.

Surveys also should avoid information-related bias, meaning that the right questions must be asked in the right manner. How questions are phrased, the methodology used, the survey design and its implementation all will be examined closely in court. Transparency on these points is important for the survey to stand up to scrutiny.

Finally, the survey should be free of analytical bias: survey results must not favour the researcher's own point of view or preconceived ideas of what the outcome should be. It is therefore helpful if the researcher can corroborate the survey's findings using alternative evidence and supplementary information.

The researcher may decide to pre-test the survey before a full launch to demonstrate the relevance of particular design decisions in how the survey is compiled, increase the likelihood that questions are clear and minimise the possibility of unintended implications, such as a respondent's ability to guess the sponsor or purpose of a study. Additionally, it may be helpful to demonstrate that potential biases have been minimised by conducting surveys and experiments in a manner that is "double-blind", thus eliminating the chance that the interviewer could influence the results.



Transparency can help ensure survey acceptance

Recent court opinions have indicated that transparency regarding the design process can be critical to admissibility. The more open experts are about their methodologies and how they have been tested, the more likely their surveys will be allowed to be considered on their merits as evidence.

It is also important to acknowledge that while surveys are gaining more acceptance by courts, not all judges and lawyers are convinced with regard to their reliability as bona fide evidence. This variability in acceptance means that surveys will continue to be rigorously challenged in court.

That said, survey evidence is likely to remain a crucial component of many litigation strategies. Being open and transparent about survey design and methodology and following best practices to eliminate bias can go a long way towards increasing the likelihood that surveys will be admitted and accepted as evidence in future court cases.

WATCH YOUR LANGUAGE

COMMUNICATING WITH AN OPT-OUT CLASS

Authored by: Cian Mansfield (Partner) and Douglas Campbell[1] - Scott + Scott

Introduction

The Consumer Rights Act ("CRA") collective action regime continues to throw up novel issues for judicial determination, which were seemingly unforeseen when the Competition Appeal Tribunal Rules 2015 (the "Rules") were drafted. In some instances, binding law with wide implications for the entire regime results from the specifics of individual cases.

One recently considered issue is whether defendants in a collective action can freely communicate with members of an opt-out class (the "Communications Judgment").[2] While that issue stemmed from certain defendants sending letters that were so clearly inappropriate that the Tribunal described them as "not proper conduct" by the respective defendants' legal representatives, the Tribunal has subsequently provided robust clarification of the principle's wider general application. This article discusses the Communications Judgment and the subsequent clarification of its impact.

Background

In February 2022, the Tribunal certified the opt-out Car Delivery Charges claim, authorising Mark McLaren[3] (the "Class Representative") to represent (in summary) a class of persons who purchased or financed new vehicles of certain brands during the period from 18 October 2006 to 6 September 2015. The class includes both consumers and businesses.

At the certification hearing, the defendants argued that large businesses should have to opt-in, rather than be automatically included in the opt-out class. The defendants did not deny that their primary motive was to reduce the total claim value, but they argued that a key benefit was obtaining disclosure from those larger class members.

The Tribunal refused to bifurcate the class, holding that disclosure was "not a good reason" to accede to the defendants' proposal. In its judgment, it noted that "disclosure would not ordinarily be ordered from members of an opt-out class", but that if it was deemed to be reasonably necessary and proportionate, "a way could be found to achieve that".

It raised possibilities such as "some form of costs protection so that the burden is not shouldered unfairly" on class members providing disclosure, and "potentially giving the relevant class members the option of being excluded from the claim by removing them under rule 85(3) (if not rule 82(2)), if the opportunity to opt-out would otherwise have expired".

The collective proceedings order was made on 20 May 2022. The Tribunal

1 Partner and senior associate respectively at Scott+Scott UK LLP. Thanks to Belinda Hollway for her comments. All views are the authors' own

2 Case 1339/7/7/20: Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others ("McLaren") [2022] CAT 53.

3 Through a special purpose vehicle, Mark McLaren Class Representative Limited

ordered the Class Representative to publicise the claim to class members in accordance with the litigation plan, which included a notice of certification, approved by the Tribunal, giving class members information on next steps. Class members had until 12 August (12 weeks) to opt out.

The Letters and Subsequent Application

What they failed to do by the front door, some of the defendants then sought to do by the back.

Two weeks before the opt-out date, two firms of solicitors wrote letters on behalf of the defendants (excluding K-Line) (the "Respondents") to various large business purchasers within the class. Examples of the Letters are appended to the Communications Judgment.

The Letters were marked "urgent" and stated:

(i) if the recipient did not opt out, they "will automatically become claimants in the litigation" (which, as the Tribunal noted, was inaccurate as the claimant was the Class Representative, and the regime is specifically designed so that class members do not have the responsibilities of claimants in ordinary litigation);

(ii) if the recipient did not opt out, the Respondents were likely to apply for onerous disclosure which "could involve a commitment of time, effort and cost" by the recipient and "extend to finding and disclosing documents which are confidential"; and

(iii) any recipient that did not opt out should "take legal advice as to [their] duties to preserve relevant documents" and about the "content of this letter generally".

The Letters did not:

(i) refer to or enclose the Tribunal-approved notice of certification;

(ii) explain that any disclosure would be subject to an order from the Tribunal;

(iii) draw recipients' specific attention to the Tribunal's scepticism about the utility of the proposed disclosure or protections that the Tribunal said could be put in place, including in relation to costs and a further opportunity to opt out; or

(iv) explain how class members stand to benefit from the proceedings.

The Class Representative made an urgent application for directions that the Respondents (i) cannot communicate directly with actual or potential class members going forward and (ii) provide copies of previous communications with class members.

Defending the application, the Respondents argued that such communications are not expressly prohibited by the Rules, and that any such prohibition would infringe their human rights of freedom of expression under Article 10 European Convention on Human Rights ("ECHR"). They acknowledged their obligation to conduct themselves fairly under Rule 4(2)(d) of the Rules but maintained that the letters were "conspicuously fair" and their conduct was "unimpeachable".

The Tribunal disagreed and found that the behaviour in sending the letters was "not proper conduct".

The Communications Judgment

There is no explicit prohibition in the Rules or the Tribunal's Guide to Proceedings against defendants sending letters to attempt to persuade class members to opt out.

However, the Tribunal carefully analysed the Rules and held that they include an inherent restriction preventing any communication between a defendant (or their legal representative) and a member of a class identifiable under a collective proceedings order. The restriction "arises inevitably out of the wording of the Rules and is consistent with, even necessary to, the essential purposes and structure of the collective proceedings regime". It extends to proposed defendants and proposed class members, from the time a collective proceedings application is filed and served.

The Tribunal's reasoning was that:

(i) The regime is designed so class members are represented by a class representative and are not themselves parties to proceedings. Communications regarding the proceedings should only be between parties, via their legal representatives.

(ii) Class members should not have to incur costs, including the costs of independent legal advice, and communications directed at class members "are liable to result in costs being incurred not merely to no purpose but to the disbenefit of the regime as a whole".

(iii) The Rules oblige class representatives to engage with class members in a certain way since, while they are not parties to the litigation, it is their claims that the class representative is progressing.

(iv) Court rules to ensure due process cannot sensibly be said to infringe Article 10 EHCR.

Importantly, the judgment qualifies that the restriction applies only "where that communication concerns those collective proceedings". Further, defendants can seek permission to communicate with class members, or the parties can agree (subject always to the Tribunal's supervisory jurisdiction).

In short, defendants' communications with class members must be subject to the Tribunal's oversight, in the same way the class representative's overall plan for communications and specific formal notices must all be scrutinised, after the class representative themself have been confirmed as free of conflict and able fairly and adequately to act in the interests of the class members.

Some of the relevant defendants have sought permission to judicially review the Tribunal's decision. As at the date of writing, permission has been refused on the papers but the application for permission is to be reconsidered at an oral hearing.

Clarifications of the Law

The Communications Judgment led to various concerns about its wider impact in collective claims generally, and in individual claims by claimants who might otherwise be part of a pending collective action.

These concerns include that:

(v) Defendants' ability to prepare their cases properly is compromised.

(vi) Defendants are unable to settle potential individual claims, where those prospective claimants happen to be members of a prospective class of which they cannot opt out until the claim is certified

(vii) Those acting for defendants in collective proceedings will have to censor or police their interactions with "friends or colleagues".

However, each of these concerns appear hypothetical, overstated, or both. We address the Tribunal's clarification of them in turn below.

Preparing cases

At a subsequent CMC in McLaren, the Defendants raised the concern that potential witnesses and experts may be members of the class and therefore sought permission to contact such class members for the purposes of preparing their case.

The Tribunal gave the Defendants permission to communicate with Class Members to obtain evidence or information in relation to the factual and/or expert issues without seeking permission from the Tribunal or notifying the Class Representative. However, it qualified that any communication adverting to the possibility of any formal application being made, or order sought against such Class Member shall require prior permission from the Tribunal.[4]

Settling claims

Beyond the McLaren case, in the long-running interchange fee litigation, collective actions were filed against Visa and Mastercard in June 2022, by which time thousands of merchants had either already brought or were actively considering bringing individuals actions. Visa raised concerns that responding to pre-action correspondence and settlement offers from merchants would infringe the prohibition on communications with class members which concern the relevant collective proceedings and sought guidance from the Tribunal.

The Tribunal acknowledged that communications regarding settlement of claims which could form part of collective proceedings would require the Tribunal's approval.

It clarified:[5]

(i) Communications with class members regarding existing claims outside the scope of collective proceedings – do not require permission as they do not concern the proceedings themselves;

(ii) Communications with class members regarding existing claims within the scope of the collective proceedings – do not require permission where such class members have instructed legal advisors and are aware of the collective proceedings, therefore are making an informed choice, but do require permission if the class member is unrepresented.

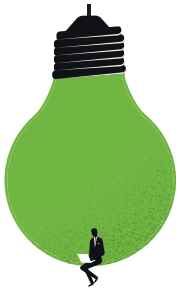
(iii) Communications with class members regarding settlement of potential claims within the scope of the collective proceedings – do require permission, which the Tribunal thought was unlikely to be granted before certification, when the class definition and basis of the collective action becomes clear. The defendants could apply for further directions if particular circumstances warrant a different approach.

Being "friends or colleagues" with those acting in collective proceedings

In collective proceedings regarding iPhones, a barrister applied to opt out after the opt-out deadline as he considered himself materially prejudiced as an owner of an iPhone and a member of the class, since his "friends and colleagues" representing the Defendants will need to "engage in policing their interactions" with him to comply with the rule on communications with class members.[6]

The Tribunal granted the application but noted how it is "difficult to see how the prohibition in McLaren will affect the Applicant in the way he suggests, given that it extends only to communications with a class member concerning his interest in the collective proceedings" and it is unlikely that his "friends or colleagues would inadvertently find themselves making such a communication".

Despite this clear indication that it thought the applicant's concern to be misguided, the Tribunal nonetheless granted the opt-out application as (i) it is a matter for the applicant himself and (ii) as it would not cause prejudice to any party.



Conclusion

To some, the Communications Judgment's prima facie blanket ban on Defendants communicating with class members about collective proceedings may seem surprising, inconvenient, or even unjust. An argument could be made that the Tribunal reached such a stringent prohibition because it considered the issue in the context of letters which were clearly inappropriate; had the letters been more balanced, the Tribunal might have articulated a more nuanced prohibition. However the Tribunal was clear in its elaboration of the wider principle that communications by defendants to class members about the collective action "cut across and undermined the potential benefits of collective proceedings" and therefore can only be undertaken with the Tribunal's oversight.

It now appears that the sole benefit of the letters was to enable the Tribunal to state, and subsequently clarify, an important principle of the CRA regime – that defendants' communications with opt-out class members must be carefully monitored to ensure fairness to class members. This should be unsurprising, given the entire regime is designed around Tribunal oversight to ensure fairness to class members. The Communications Judgment is a sensible recognition of the principle and sets out clear parameters regarding communications with class members for all parties to collective proceedings going forward.

4 Order of the Tribunal dated 6 April 2023, paragraph 5

5 See paragraphs 7 to 31 of the judgment dated 13 January 2023 in joined cases 1441/7/7/22, 1442/7/7/22, 1443/7/7/22, and 1444/7/7/22 [2023] CAT 1.

6 Reasoned order dated 11 January 2023 in Case 1403/7/7/21 Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd.

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

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

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

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

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

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

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BIG TECH, COLLECTIVE DATA CLAIMS AND THE CAT

ROUND TWO FOR GORMSEN V META

Authored by: Kees Jan Kuilwijk (Consultant), Alex Thompson (Legal Director), and Liam Smith (Associate) - Gateley Legal

Big Tech companies such as Facebook, Google, Amazon, and Apple collect an enormous amount of our personal data every day. These data are then used by them to enhance their other services, such as advertising.

Such companies also hold dominant positions in the markets within which they operate and have, as a result, been subject to scrutiny by competition regulators around the world. This has led to several Big Tech companies receiving fines for established breaches of competition law, and various other investigations are ongoing.

Despite this, consumers and businesses still face challenges in bringing collective data claims against Big Tech.

UK data claims against Big Tech

In the UK, attempts to raise collective data claims that seek to recover "losses" have been largely unsuccessful, with Lloyd v Google [2021] UKSC 50 being a prime example.

Nevertheless, in February 2022 competition law expert Dr Liza Lodahl Gormsen commenced a new (and innovative) fight in the Competition Appeal Tribunal (CAT) against Meta, the owner of Facebook and Instagram.

Announcing her claim, Dr Gormsen said Meta "are exploiting users by taking their personal data without properly compensating them for that data". Specifically, she alleged that Meta breached competition law by abusing its dominant position in the market, primarily by exploiting user data for advertising, which reportedly accounts for 98 per cent of its income.

Meta denied these claims, stating that "[people] choose to use our services because we deliver value for them and they have meaningful control of what information they share on Meta's platform and who with".

An unfair use of data?

Dr Gormsen applied to the CAT, as a proposed class representative in terms of s47B of the Competition Act 1998, for a collective proceedings order (CPO) for permission to bring opt out collective proceedings on behalf of an estimated 45 million Facebook users in the UK. The application alleged that Meta abused its dominant position in breach of Article 102 of the Treaty on the Functioning of the European Union and the domestic Chapter II Prohibition.

It specified three alleged abuses:

(i) access to Facebook was conditional on users accepting terms and conditions that provided Meta with access to the user's personal data (the Unfair Data Requirement);

(ii) this was an unfairly high "price" for the provision of social networking services (the Unfair Price), and;

(iii) Meta imposed other trading conditions that were unfair and anti-competitive (the Unfair Trading Conditions).

According to the application, Meta "unfairly required users to hand over their personal data as a condition of access to [Facebook]", while failing to "share with its users the profits it makes from such data".

Round One

The CAT's CPO judgement, issued in February 2023, did not grant Dr Gormsen's application. It identified issues with the "vague" case pleaded by Gormsen, the nature of the harm allegedly caused by the alleged abuses, and the accompanying expert methodology.

In terms of the Pro-Sys test, prior to granting certification, the CAT stated that it must be satisfied "as to the steps that need to be undertaken in the future so as to ensure that the claim […] can be heard in an efficient manner, consistent with the Tribunal's governing principles".

It also stressed that, while the CAT should not engage in a merits assessment at certification stage unless the claim warrants striking out, it still bears a "heavy responsibility as the gatekeeper in collective proceedings", primarily to "ensure that there is in place a blueprint for the parties and for the Tribunal of the way ahead to trial".

The CAT also commented on the three alleged abuses put forward by Dr Gormsen. Regarding both the alleged Unfair Data Requirement and Unfair Trading Conditions abuses, it held that "there can be no doubt that the Pro-Sys test has not even been addressed – let alone any king of 'blueprint' to trial provided". As such, the CAT agreed with Meta's arguments that no expert methodology "at all" had been framed by Dr Gormsen for these elements.

In its thorough analysis of the alleged Unfair Price abuse, the CAT noted difficulties with the pleaded case and its accompanying methodology. There were, it said, "significant methodological difficulties" in the claim's approach and "far more is required than a mere clarification".

For example, the methodology assumed, rather than demonstrated, that the price Meta charged was excessive and an abuse of its dominant position. For the CAT, the expert needed to calculate the price users would pay if the alleged abuse (i.e. the requirement to provide personal data in exchange for access to Facebook) was removed. It must then provide a mechanism to correlate and quantify the loss to class members. The CAT did, however, acknowledge the difficulties in articulating a methodology linking Meta's (alleged) excessive profits to the class's (alleged) loss.

"Without significantly more articulation," the CAT concluded, "there is no blueprint to trial, and […] [Dr Gormsen] has unequivocally failed the Pro-Sys test".

Round two

Despite Meta's request to put the application "out of its misery", the CAT stated its "preference – consistent with the importance of access to justice articulated by the Supreme Court in Merricks – is that the Proposed Class Representative have another go."

"But we wish there to be no misunderstanding," it added. "The methodology so far advanced by the PCR will need a root-and-branch re-evaluation, and mere tinkering with the methodology will not do".

The CAT therefore stayed the application for six months and invited Dr Gormsen to "file additional evidence setting out a new and better blueprint leading to an effective trial of these proceedings".

Conclusion

Meta may have won round one, but the outcome of round two remains to be seen.

The task ahead for Dr Gormsen is a large one. It may be a fresh fight, but the difficulties in framing and quantifying Big Tech's data exploitation remain. It is promising, however, that the CAT has given Dr Gormsen a second chance, together with detailed guidance on the claim's deficiencies. Whether these can be rectified is not yet clear.

For the wider competition collective proceedings landscape, this development demonstrates the CAT's willingness to support proposed class representatives in progressing novel claims and improving access to justice.

In terms of certification, the CAT stressed the importance of its gatekeeper role and the need for proposed class representatives to provide an effective blueprint to trial. Practitioners would, however, benefit from further elaboration on the exact requirements for such a blueprint. Perhaps this will come in round two.

TRENDS IN EXPERT WITNESS EVIDENCE

TWO EXPERTS BETTER THAN ONE?

Authored by: Aaron Bradley (Director) - Kroll

Introduction

Competition law has for many years been in its own separate club. A number of law firms have had their own departments that focus on competition law disputes, competition economists have been charged with producing expert reports and econometric models and the UK has its own specialised court - the Competition Appeal Tribunal ("CAT"). However, as the field goes through a period of rapid growth, the club has been expanding with a growing number of legal professionals and expert witnesses entering the field.

This article focusses on trends in expert witness evidence in competition law disputes. In particular, the growing interplay between economic and forensic accounting experts in cartel follow-on cases.

Why?

At no point in the nine years that I have worked as a forensic accountant has the demand for combining economic and forensic accounting evidence on cartel follow-on cases been higher. But why are more and more legal practitioners opting to instruct both economic and accounting experts on their cases?

In reality there are probably a number of factors including:

(i) competition damages litigation in the UK is still at a development stage;

(ii) the entrance of commercial litigators, who are used to working with forensic accountants, into competition law disputes

(iii) references to legal and economic pass-on in CAT judgments; and

(iv) the importance of compound interest claims in long running disputes.

That being said, it is most likely because economists and accountants bring different, but complimentary, skill sets that can be applied to cartel cases that are often inherently complex.

How?

There are several areas that are common to the assessment of damages across a wide range of cartel cases. In particular the assessment of any overcharge, pass-on, volume effect and interest losses. For each area, it is important to consider carefully which expert evidence is most appropriate.

Overcharge is the amount extra the claimant made paid for the cartelised product/service. This is an area where legal practitioners are continuing to favour economic expert evidence and in particular the use of market and econometric modelling and literature review.

Pass-on is where the claimant passes on some or all of the overcharge through higher prices to its customers. Economists typically estimate pass-on through an econometric model or through a review of the available literature. This is often complimented by an understanding of how the business and market operated. Accountants typically address pass-on from a slightly different perspective to economists. If the data allows, one possible approach is to review the underlying financial records of the claimant to better understand its financial performance. Another approach is to review the claimant's contemporaneous documents to review the business characteristics and processes (for example through analysis of its pricing processes). These approaches, which focus on the facts of the case, can act as a bridge between economic and legal pass-on. They are also important approaches as they help to evidentially prove whether or not there is a connection between the overcharge and the downstream price setting of the claimant.

To the extent that there was any pass-on, it is possible that this also had a volume effect on the claimant. This is because any change in price may have resulted in customers deciding not to purchase the products, substitute to an alternative product or procure the product from a competitor. Where there has been a volume effect this head of claim can offset at least some of the credit given for passing-on a proportion of the overcharge.

The volume effect is a key area where there is a growing interplay between economic and forensic accounting experts in cartel cases.

Economic evidence on the price elasticity of demand is a common method for assessing the volume effect. Where there is available information, forensic accounting experts can also be instructed to consider the contemporaneous documents within the business that may provide further insight into the claimant's sales performance. Once the volume effect is quantified, forensic accountants can then assess the financial records of the claimant to quantify the lost profits associated with the volume effect.

There appears to have been a growing trend of legal practitioners placing a greater importance on the assessment of interest losses in cartel cases. In long running cartels, such as the truck cartel, interest losses can be a significant proportion of any loss suffered by a claimant. This is evident from the recent award Royal Mail received in relation to the truck cartel where the compound interest award exceeded the overcharge award. Typically, forensic accountants are well placed to address this head of claim as a common approach to assessing both (i) the applicable interest rates and (ii) whether the loss was suffered on a simple or compound basis is to look at the claimant's underlying financial records. For example, by reviewing the claimant's underlying borrowing and deposit records. Further, similar to the models produced by economists, the financial modelling required to calculate interest losses is the same as that historically adopted by accounting experts in general commercial disputes. Anecdotally, this appears to have resulted in a growing number of accountants being instructed to provide expert reports in this area.

What next?

Given the rapid growth in competition law cases it is challenging to predict the future direction of travel for expert witness evidence in cartel cases. Legal practitioners' approaches to expert evidence, and in particular the types of experts that they appoint, is likely to be conditioned by future judgments handed down by the CAT. The recent judgment on the truck cartel cases brought by Royal Mail and BT continued to draw the distinction between economic and legal pass-on and placed emphasis on the importance of assessing the facts of the case. Therefore, economists and accountants are likely to be spending even more time together going forward – expect to see them together in the evidential hot tub soon.

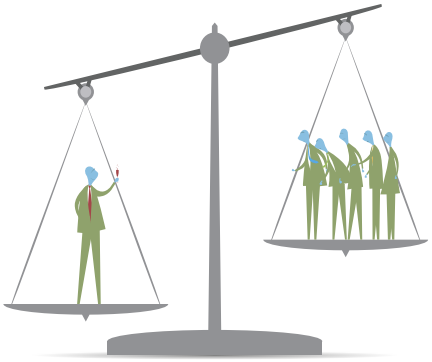
Sometimes two experts may be better than one!

UK CAT CASES IN AN ESG CONTEXT

Authored by: Jordan Howells (Senior Investment Officer) and Hugh Tait (Senior Investment Officer) - Woodsford

Defining ESG litigation

ESG is an acronym for the wide range of Environmental, Social, and Governance standards that companies now increasingly say that they comply with, or which they are legally required to comply with. Companies make ESG promises, and otherwise have ESG obligations to a variety of stakeholders, including their investors, their customers, their regulators and the wider community in which they operate. Litigation – including through collective actions in the Competition Appeal Tribunal (CAT) – is a key mechanism by which corporate entities may be held to account and consumers can assert their rights in respect of ESG failures.



CAT litigation is ESG litigation

It is trite that to be certified in the CAT, the claim must be brought as a competition law claim; but competition and ESG claims are by no means mutually exclusive. Simon Holmes, a judge at the CAT, and a Visiting Professor at Oxford University, and academic Michelle Meagher, have written an influential article that looks at monopoly power as a barrier to a sustainable future, and examines how competition law and policy can be used in the light of climate change and growing market concentration. It looks, in particular, at how competition law and policy can be used as a "sword" to attack market power and unsustainable practices. This line of thinking is likely to lead to more ESG breaches being litigated in the competition courts. Furthermore, while the 'E' in 'ESG' often gets most of the attention, the importance of the social and governance elements as driving forces in litigation should not be underestimated, particular in the context of competition matters. ESG claimants will almost always be in large, often disparate, groups that lack any pre-existing organisation. They may not be aware that they have been wronged, for example they might be customers who don't know that they have been unfairly overcharged for goods or services. Even if they are aware that they have been wronged, they won't necessarily know how to get in contact with others in a similar position or may not have the resources to do so.

As the only opt-out litigation regime in the UK, collective action in the CAT offers a solution to these problems.

Anti-competitive behaviour is contrary to ESG principles in multiple ways, as reflected in the CAT cases Woodsford has led the way in funding. Maintaining and promoting an affordable public transport network is fundamental to the economy, the environment and wider society, particularly in major cities like London. Woodsford is therefore proud of our significant financial and other support for collective actions against train operating companies who operate railway lines in and out of London and who, it is alleged, have been overcharging customers.

By the same token, anti-competitive conduct by big corporates distorts markets and ultimately causes harm to consumers. In particular, governance failures which enable people within corporate entities to engage in behaviour which results in cartels often leads to consumers being overcharged. From October 2006 to September 2012, a number of shipping companies engaged in unlawful cartel behaviour whereby they exchanged commercially sensitive information, coordinated prices and divided customers amongst themselves, to avoid competing with each other. The governance failures which enabled the cartel to operate are likely to have made the cost of shipping new cars and vans into the UK and Europe higher than it should have been. Woodsford is providing significant financial and other support for a class action through which consumers and businesses affected by the cartel seek compensation and accountability; it is a case which we see as sitting squarely within the objective of championing ESG causes.

For millions of people in society, gaming has become an integral form of social interaction and engagement in the modern world. It is alleged that Sony is breaching UK and EU competition law by abusing its dominant position resulting in consumers paying inflated prices for digital PlayStation games and add-on content. Woodsford is supporting a standalone collective action brought on behalf of an estimated 9 million potential class members. An application has been made to the CAT for a Collective Proceedings Order which, if ordered, will result in a single class representative representing all potential class members on an opt-out basis.

Leading the way in collective redress

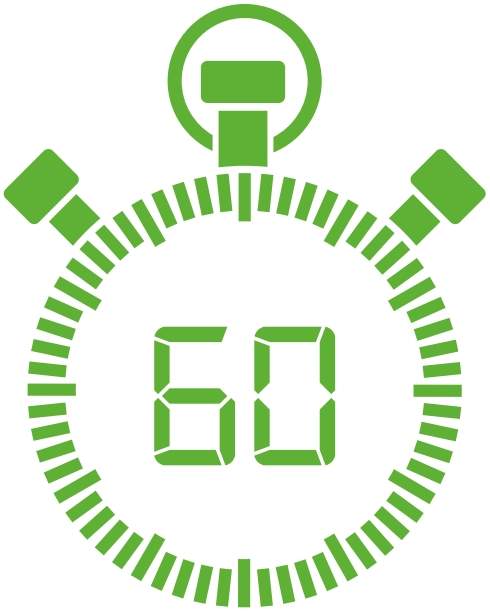
Woodsford is a pioneer in the relatively new opt-out regime for collective actions and consumer redress in the CAT, with litigation funding forming a key component to empower those affected to redress the balance of power and assert their rights. It is not uncommon for large corporate entities to wield a disproportionate amount of power within society relative to the millions of individuals who make it up and they have significant fiscal and environmental impacts:

collective action facilitates good governance through accountability, corrective action to promote efficient functioning of markets and by giving a voice to those in society who might otherwise be left without a voice or remedy.

The boundaries of what might be brought as a claim within the jurisdiction of the CAT continues to be tested and defined, and further developments in this area this year are likely to follow. But what is clear, is that the view expressed by some – that ESG matters can only be litigated through opt-in Group Litigation Orders in the High Court – is to underestimate and fail to grasp the scope and importance of what ESG redress and litigation really means.

60-SECONDS WITH:

HELEN KEAN
ASSOCIATE DIRECTOR
BRG



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

A I'd definitely travel a bit more without concern of time clashes. Then hopefully learn about new things that I am interested in. But I expect that I would still work in some capacity. I love my work.

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

A Work is of broad intellectual interest to me. The most important part of my job though is adding value. Some days that means pushing hard, other days it means standing back to get perspective.

Q What motivates you most about your work?

A I love that I am always learning. No day is the same and tackling any case involves some degree of being open to learn. I am also motivated by the professionalism and standards of others.

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

A I don't always think of my work goals as entirely separate to other goals since I arrive at work as a whole person. But I am currently enjoying growing my expertise; building my network; reading, writing, and speaking more; and managing my energy well.

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

A I don't have one piece. I generally learn more from how people are, how they conduct themselves and how they work, rather than what they say.

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

A I work across a few jurisdictions and the main trend differs by area. But the overarching one is that of more artificial intelligence woven into every sphere of business. And this innovation has implications for competition and antitrust. We are working on some great matters in this space.

Q Who has been your biggest role model in the industry?

A I consider myself lucky to be surrounded by role models weekly. Some older, some younger, some in parallel fields. But I would have to acknowledge that I am also inspired by a lot of well-known female economists (not necessarily in my exact field) that have cut great paths. Seeing people that look like you and the person you want to be on a frequent basis makes a big difference, even if subconsciously.

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

A Two – critical thinking and communication skills. They go together.

Q What cause are you passionate about?

A Family and (overall) health – because this is where most things tend to start. Beyond that, generally setting a decent example for the next generations and leaving things at least not worse off for them.

Q Where has been your favourite holiday destination and why?

A There have been many but one memorable one is Reunion Island – not far from South Africa. It has incredible mountains, largely formed by volcanoes. It is great for a holiday of hiking in the mountains and forests, and then relaxing on the beach and eating good food.

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

A Not famous to most, but to me – I would enjoy having dinner with all the great-grandparents and grandparents in our family. They would have many good stories to tell.

From Strength to Strength in Antitrust & Competition

INTELLIGENCE THAT WORKS

With an outstanding reputation for economic and financial consulting around the world, BRG is rapidly expanding its antitrust and competition practice in Europe and the US.

BRG appoints **David Sunding** as vice chairman to spearhead growth in antitrust and competition practice.

Dr. David S. Evans appointed to lead firmwide growth in work related to the digital economy and platform markets.

Dr. Rosa Abrantes-Metz joins antitrust and competition policy group.

"With the talent and track record that exist across the firm, and our desire to grow and invest in key practice areas and locations—particularly in competition policy and antitrust in Europe and the US—I look forward to what we are going to achieve."

– David Sunding, Vice Chairman

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SELF-PREFERENCING IN DIGITAL MARKETS

Authored by: Matt Hunt (Managing Director), Burak Darbaz (Senior Vice President), Robert Scherf (Senior Vice President) - AlixPartners

Self-preferencing is at the forefront of competition enforcement in digital markets. The European Commission's (EC) milestone Google Shopping decision and the subsequent judgment by the General Court (GC) have confirmed that self-preferencing by a dominant firm can be a standalone abuse. This has opened the door for competition authorities to develop several investigations against 'big tech' firms related to self-preferencing theories of harm.

In December 2022, the EC held its first technical workshop on the implementation of the new Digital Markets Act (DMA) which prohibits various forms of self-preferencing by designated digital gatekeepers. The per se approach adopted in the DMA contrasts with the effects-based approach endorsed by EU competition law and has further placed self-preferencing in the limelight, with potentially high stakes implications for the business models of dominant digital platforms as well as their competitors.

Competition enforcement of 'big tech' firms increasingly focuses on self-preferencing

The EC's 2017 Google Shopping decision placed self-preferencing firmly on the radar of European competition enforcement as a potential standalone abuse. Following a seven-year investigation, the EC levied a €2.4 billion fine Google for abusing its dominant position in general search by displaying its own comparison-shopping service on its general search engine results page more favourably than rival comparison-shopping services.

The EC's decision was almost entirely upheld by the GC in its 2021 judgment, which dismissed Google's appeal and confirmed that self-preferencing by a dominant firm could be considered, in certain circumstances, as a standalone abuse of dominance.

The GC's judgment highlights two conditions for self-preferencing to constitute an abuse of dominance: (1) the conduct must have actual or potential anticompetitive effects; and (2) the conduct must depart from what would be expected under normal competition.

The GC clarified that regarding anticompetitive effects, a causal link can be established by showing a correlation between the conduct and market outcomes as well as by additional corroborating information, such as assessing the impact on specific market participants. Further, the GC noted that a 'product improvement' defence should be considered only at the stage where objective justification and potential efficiencies of the conduct are examined.

Since the EC's Google Shopping decision, there has been an increasing number of investigations of 'big tech' firms and enforcement decisions on the basis of theories of self-preferencing or closely related conduct. These include the following:

In March 2019, the Italian Competition Authority opened an investigation into allegations that Amazon favoured those merchants selling on the Amazon Marketplace that also purchased its logistics services through giving them preferential access to the Buy Box and its Prime programme. In November 2021, the authority imposed a fine of €1.1 billion as well as behavioural remedies intended to restore competitive conditions in the relevant markets. In November 2020, the European Commission opened a similar investigation, which was ultimately closed in December 2022 following legal commitments by Amazon.

In June 2021, the French Competition Authority concluded an investigation into Google's practice of allocating display ads, arguing that Google self-preferenced its own 'Ad Exchange' and 'Double Click for Publishers' services at the expense of rivals, levying a fine of €220 million. Also in June 2021 the EC began investigating whether Google abused its dominant position by favouring its own ad tech services. In February 2022, the UK Competition and Markets Authority concluded an investigation into Google's 'Privacy Sandbox' proposals following behavioural commitments from Google. The investigation relates to concerns that Google removing cross-site tracking of users on its Chrome web browser via third-party cookies would limit the information collection and targeting abilities of rival publishers and ad tech providers, while Google's own abilities would be unaffected.

Apple was fined by the Dutch Competition Authority in 2021 for prohibiting dating app developers from using third-party payment systems and is facing an EC investigation for the same conduct vis-à-vis music streaming app developers. It is also facing several other investigations including regarding its App Tracking Transparency Framework, which obliges third-party apps to ask for their users' content but does not affect Apple's ability to use and combine user data from its own ecosystem.

Overall, competition authorities are increasingly eager to challenge the core strategies of the 'big tech' companies, including those that may have helped them build their ecosystems in the first place, with overarching concerns about potentially abusive leveraging, distorting competition in adjacent markets as well as strengthening of existing dominant positions.

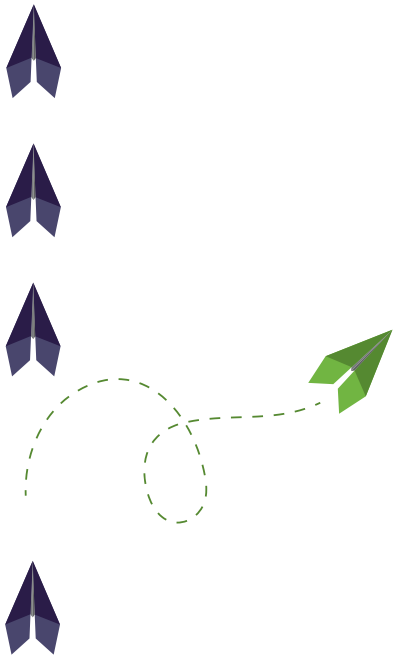
Self-preferencing theories of harm

Theories of harm in cases concerning self-preferencing have two central elements: foreclosure and consumer harm. Foreclosure concerns typically relate to a firm that is active at upstream and downstream levels of a supply chain which implements a discriminatory mechanism that inhibits or excludes its rivals' access to critical inputs or customers, which harms the rivals via reduced scale, increased costs or diminished incentives to innovate.

In the context of digital markets, the underlying concern is that a vertically integrated digital platform leverages its dominance at one level of the supply chain to distort competition at another level.

A necessary condition for such conduct to harm consumers is that it forecloses a substantial part of the market. This requires the platform to be an important supplier or buyer, as well as on the lack of sufficiently available alternative routes to market that would allow foreclosed rivals to mitigate the loss of access to inputs and/or customers. Another necessary condition is the absence of offsetting efficiencies from the conduct – in the face of sufficient efficiencies, consumers could benefit from the self-preferencing behaviour if it improves the functioning of the market overall leading to better market outcomes.

In the recent cases referred to above, competition authorities have offered varying degrees of detail when analysing the mechanisms through which consumer harm arises and tended to focus on establishing the existence and significance of foreclosure rather than actual consumer harm. This may be because consumer harm is indirect and/or dynamic and harder to show in the context of digital platforms, where services are often free (i.e., without a measurable price).



Prohibition of self-preferencing conduct in the Digital Markets Act

The DMA has shifted the focus of enforcement by competition authorities towards an ex-ante regulation of dominant vertically integrated digital platforms. Articles (5)-(7) of the DMA list specific behavioural obligations that digital platforms designated as 'gatekeepers' must comply with. These obligations include per se prohibitions of various types of self-preferencing and leveraging conduct. For example, Articles (5)-(7) prohibit gatekeepers from: ranking their own products and services more favourably than those of third parties, requiring business users to use the gatekeeper's payment service, or using non-public data that are provided or generated by business users in competition with those business users.

The DMA's per se prohibition of self-preferencing by gatekeepers goes beyond the recommendations of some experts, who believe that self-preferencing should be subject to an effects test (with the burden of proof falling on the dominant platform) as self-preferencing may have pro-competitive rationales and they may lead to efficiencies and better consumer outcomes. Similarly, the Google Shopping judgment endorsed an effects-based approach, finding that self-preferencing by a dominant undertaking is not abusive per se.

Proponents of the DMA's per se approach have argued that it offers speedy and effective enforcement, which is especially important in digital markets since restorative remedies for abusive self-preferencing are particularly difficult to design and enforcement decisions might come too late to provide any effective remedy or to restore competition.

However, there is a risk that a blanket ban on widely defined categories of self-preferencing may have a negative impact on innovation and prevent outcomes that are in the interests of consumers, such as the development of new products.

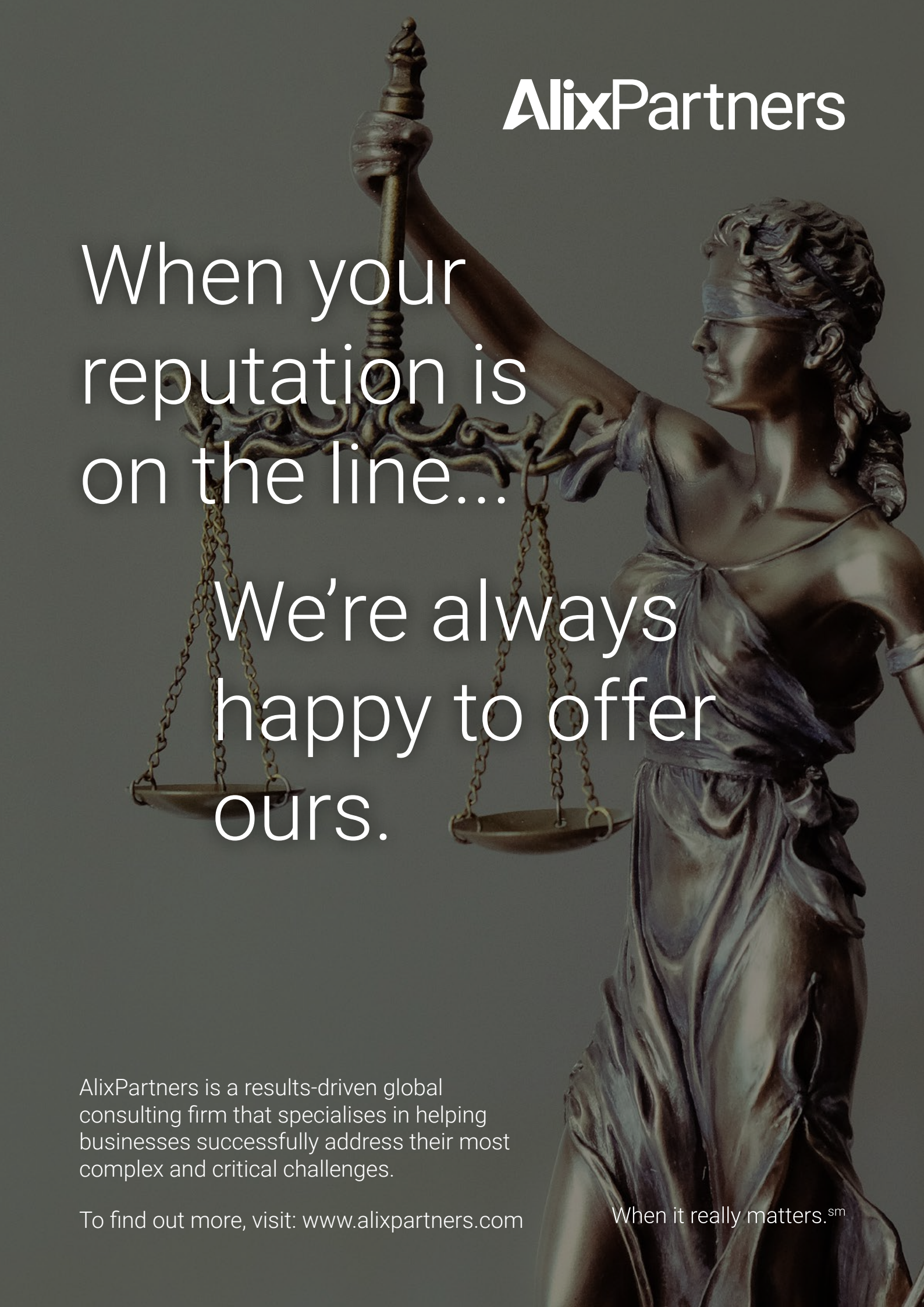
This risk should be considered in light of the limited flexibility provided by the DMA, where the obligations defined under Article (6) (but not in (5) and (7)) are "susceptible of being further specified", and where Article (12) allows EC to update gatekeepers' obligations.

Whether the DMA risks over-enforcement by potentially ignoring efficiency rationales in defence of gatekeepers' self-preferencing activities, and the impact that the DMA will have on competition and innovation in digital markets more generally, will be clearer in the years to come.

Conclusion

While self-preferencing has been a prominent concern in relation to digital markets for some time, we expect that it will remain a hotly debated topic as the implementation of the DMA moves forward. There are evidently risks that a blanket ban on widely defined categories of self-preferencing will have a negative impact on innovation and prevent outcomes that are in the interests of consumers, such as the development of new products.

Although the DMA does not contain a clear mechanism by which a gatekeeper can justify its behaviour on objective justification or efficiency grounds, it seems inevitable that in practice authorities will need to have these issues in mind as they specify how gatekeepers should interpret the legislation.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GOING GREEN

STAYING ON THE RIGHT SIDE OF COMPETITION LAW

Authored by: Melanie Musgrave (Of Counsel) and Leonia Chesterfield (Senior Associate) - RPC

Sustainability increasingly top of the agenda

Environmental issues are high on the agenda for many consumers and businesses alike. They are also increasingly an area of focus for competition authorities around the world, including the Competition and Markets Authority (CMA), who are keen to ensure that competition law concerns do not unnecessarily prevent businesses from collaborating legitimately on environmental sustainability initiatives.

The intersection of competition law and environmental sustainability is a current hot topic. We consider a few key developments in this area.

CMA's annual plan 2023/24

In its recent annual plan, the CMA has confirmed that one of its ambitions is for the UK economy to "grow productively and sustainably" and a medium-term priority is to help accelerate the UK's transition to a net zero economy and to promote environmental sustainability.

As detailed below, one of the key ways in which the CMA is seeking to achieve this is through competition law guidance to help to ensure that competition law is not "an unnecessary barrier" for businesses contemplating green initiatives. In addition to its competition law focus, the CMA is using its consumer protection powers to help consumers make informed choices about the green credentials of goods and services, including taking action to tackle 'greenwashing' (i.e.,misleading claims about the environmental characteristics of products and services). For example, it recently opened a consumer law investigation following concerns about the eco-friendly and sustainability claims relating to certain fashion products and is following up on its call for information about sales practices in the green heating and insulation sector. In addition, the CMA has confirmed that its Sustainability Taskforce, set up to lead its work on sustainability, is now operational.

CMA's guidance on environmental sustainability agreements

As part of its sustainability focus, and to help businesses take action on climate change and sustainability without fear of breaching competition rules, the CMA recently published new guidance for consultation (which ended 11 April 2023). The CMA's draft guidance on the application of competition law to environmental sustainability agreements (ESAs) should provide some much-needed comfort to businesses that wish to participate in green initiatives but may be reluctant to do so given the risks of infringing UK competition law. ESAs are agreements or concerted practices between actual or potential competitors aimed at preventing, reducing, or mitigating the adverse impact their economic activities have on environmental sustainability or assessing the impact of their activities on environmental sustainability.

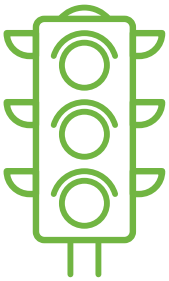
The guidance goes further than CMA guidance generally. It sets out the principles and provides examples of arrangements which are unlikely to infringe the Chapter I prohibition (s 2(1) of the Competition Act 1998 (the Act)), those which could infringe it and those which might benefit from exemption (under s9(1) of the Act). The guidance highlights the importance of the context of the ESA for the purposes of a competition law assessment and the need to quantify the benefits, which could be future ones.

The CMA is adopting a more permissive approach to climate change agreements with wider consumer benefits to be taken into account when applying the exemption criteria. The CMA is mindful of the evolving landscape and will consider updating/supporting its guidance as its own experience develops.

In an important further step, the CMA is offering an open-door policy, whereby businesses can seek informal guidance. This does not negate the need for businesses (and their legal advisers) to conduct a preliminary competition law self-assessment in relation to a proposed ESA but does demonstrate the CMA's willingness to work with businesses where their proposed initiatives are not covered by the guidance or where there are uncertainties remaining. Subject to confidentiality considerations and following consultation with the parties, the CMA is looking to publish summaries of the initiatives on which informal guidance has been sought, along with an assessment of the risks identified and proposed solutions. In order to encourage such engagement, the CMA has said that it will not issue fines against parties to an ESA where they have sought informal guidance in advance (and have addressed any concerns if raised by the CMA) and, at a later stage, the ESA is considered to raise competition law concerns. The CMA will also not take enforcement action against ESAs which "clearly correspond" to the examples and are consistent with the principles set out in the guidance.

The European Commission's approach

The European Commission has also acknowledged the importance of sustainability agreements and the need for guidance. In its draft, revised Horizontal Guidelines, it has included a chapter on sustainability agreements, although they should be assessed primarily based on the type of agreement rather than as a special category. Sustainability agreements are broader in nature for these purposes than the CMA's definition of ESAs as they include not only environmental initiatives, but also social objectives, such as employment and human rights, animal welfare and healthy food. The European Commission has recently been consulting on draft Guidelines on designing sustainability agreements in the agriculture sector so as to benefit from the exclusion from EU competition law introduced in the recent reform of the Common Agricultural Policy.



A reminder of environmental initiatives given a red light

Although competition authorities are seeking to support legitimate collaboration, the message is clear that they will be alert to cartel activity undertaken in the guise of environmental sustainability.

There have already been examples of legitimate technical collaboration which have veered into anti-competitive collusion:

(i) In 2021, the European Commission found that the Daimler, BMW and Volkswagen (VW, Audi and Porsche) groups had been involved in a cartel relating to restrictions on technical development rather than agreeing to fixing prices, sharing markets or allocating customers[1]. Despite the relevant technology being available, they had colluded so as not to compete beyond the legal requirements. In light of the novel nature of the cartel, the European Commission gave guidance in the form of a published letter[2] to the car manufacturers as to the aspects of the co-operation which did not raise competition concerns. It also reduced the fines by 20%.

(ii) This contrasts with the cartel decision a decade earlier when European producers of washing powder were fined for infringing competition law[3]. Initially the companies had implemented an initiative through their trade association to improve the environmental performance of laundry detergent products. However, the environmental initiative did not require collusion/co-ordination in respect of their pricing nor other anti-competitive practices to maintain their respective market shares.

1 https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022289_3048_5.pdf
2 https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022302_3050_5.
3 https://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf

Environmental based collective proceedings

Whilst the approach by many competition authorities to environmental initiatives is to be welcomed, there are also interesting recent class action developments in relation to the intersection of competition and environmental issues.

Professor Roberts, a water resource management specialist, is the proposed class representative looking to bring opt-out collective proceedings in the Competition Appeal Tribunal for competition law damages against water and sewerage companies in England on behalf of a significant class of UK bill-paying households. It is understood that the proposed class representative will allege that each of these companies is a monopolist in its locality and, in breach of their dominant position (under s18 of the Act), the proposed defendant companies had increased customer charges due to their alleged unlawful discharges of untreated sewage and wastewater into waterways.

If certified, Professor Roberts' class action will be the first collective proceedings claim in the UK with an environmental focus.

Promoting sustainability on the right side of the line

Given the importance of sustainability, companies - both large and small – may well wish to co-operate with one another to transition to more sustainable business models to help tackle climate change. In publishing further guidance, competition authorities increasingly recognise that greater clarity is needed to help ensure that businesses are not unduly impeded from moving towards more sustainable business practices. Whilst the CMA's focus is on environmental sustainability rather than wider social objectives (unlike some competition authorities), its proposed guidance and open-door policy mark a welcome approach to helping businesses navigate this tricky area.

However, when seeking to pursue their environmental goals through collaboration, businesses will still need to ensure that they stay on the right side of the line from a competition law perspective.

DIGITAL DESIGN AND THE CHANGING REGULATORY LANDSCAPE

Authored by: Adam Rivers (Director) and Henry Smith (Associate Director) - KPMG

Regulators around the world continue to raise concerns over how businesses design their online environment and frame information to end consumers.

After publishing an open letter warning online retailers against the use of pressure selling tactics in March 2023, the UK's Competition and Markets Authority ('CMA') announced a formal investigation into these practices. Enforcement action is also taking place across the Atlantic, with the Federal Trade Commission requiring Epic Games to pay $245 million to consumers to settle charges that the company used dark patterns to trick players into making unwanted purchases.

The EU and UK government are also introducing legislative changes to strengthen regulators' powers in both consumer protection and digital markets. The EU's Digital Services Act ('DSA') contains a ban against so-called "dark patterns" and the UK government has committed to increasing the CMA's consumer protection powers to strengthen its ability to clamp down on harmful online practices.

How can digital design harm consumers and competition?

In online settings, businesses design the environment in which customers interact with the website and/or app and make consumer choices. The way in which these options are presented is often known as the 'online choice architecture' (OCA).

In this environment, regulators are concerned that businesses may also use various OCA practices to impair or distort consumers' ability to make informed decisions and encourage users to engage in behaviours that might have negative consequences for them. For example, using misleading scarcity claims (e.g. 'only one left'), making it difficult to cancel a contract or choose a cheaper product, or revealing the full price of a product only at the last stage of a purchase.

Competition and consumer protection authorities are concerned that these practices, designed either deliberately or unintentionally, might negatively affect consumer choice, leading to consumers spending more, receiving poor value services, or searching less for alternatives.

"Harmful OCA practices may persist even in competitive markets due to low OCA awareness (and their effectiveness in influencing consumers even when recognised), potential profitability of OCA practices and/or certain features of a market."

The future of regulating digital design

With consumers and businesses shifting their interactions to digital settings, OCA practices will face increased scrutiny and interventions. The CMA has pledged to investigate harmful OCA practices 'more actively', using a full range of powers and tools available. The stronger enforcement powers in consumer protection mean that the CMA could take on more consumer protection work and will be able to impose fines on companies breaching the fair use of digital tools if these are deemed to break the law. The introduction of the DSA will also formalise the European Commission's powers in this space. Given the EU's keen focus on regulating digital markets and past investigations into 'misleading' online selling tactics, enforcement action would not be surprising.

Some OCA practices, such as using false time pressure to evoke an immediate action, are more clearly harmful. However, other practices are not intrinsically harmful and can deliver benefits for consumers, such as removing friction from the customer journey or providing relevant feedback or insights into the product's features or availability. Online businesses will need to consider the context in which they engage in particular OCA practices and will need to strike the right balance between smoothing the consumer journey and ensuring users are not being "nudged" in ways that might harm their interests. Regulators will also need to consider the context in which firms engage in particular practices.

What does this mean for online businesses?

The latest regulatory developments should encourage businesses to consider whether their use of OCA practices complies with competition and consumer protection law. The above can be achieved through a series of activities, from self-assessment through to independent review and will likely require engagement across Legal, Risk and Compliance and Internal Audit teams, as well as the business's data and commercial teams.

Behavioural economics and data science can also help to identify and contextualise OCA practices, and businesses may choose to consider:

(i) Getting a clear picture of what OCA practices are currently being used in their organisation and how these are being implemented.

(ii) Detecting and remedying any issues where (i) practices are implemented which are known to be harmful (from research and policy work such as the CMA's); (ii) more generally, where practices have been found to result (or be likely to result) in negative outcomes.

At the same time, businesses should ensure that they gather evidence of positive outcomes arising from OCA practices chosen by the organisation, providing internal assurance and supporting their ability to communicate this to the regulator(s) as required.

WHO'S WATCHING THE WATCHMEN?

Authored by: Edward Bowie (Senior Associate) - DRD Partnership

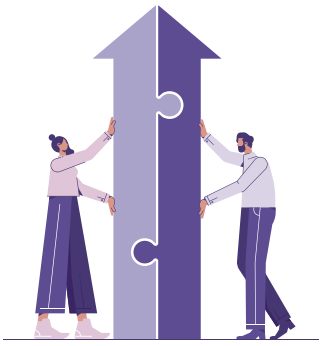
Edward Bowie asks whether, in the midst of a cost-of-living crisis, competition regulators have a clear enough focus on the public interest.

One notable feature of the UK's post-Brexit regulatory settlement has been the approach taken by the Competition and Markets Authority (CMA) to its role. The general sense is that it has exhibited an increasingly expansionist and interventionist style, although new CEO Sarah Cardell has worked hard to assure markets on the importance of certainty and predictability. Nevertheless, actions speak louder than words and it is clear there is a new direction and momentum at play.

One important illustration of that new thinking was released in February of its draft guidance on the application of competition law to environmental sustainability agreements. The material presents a practical toolkit for how competing businesses can collaborate without infringing competition prohibitions.

Importantly, it helps to align the UK's legal framework with its vital policy goals around reaching net zero.

The arrival of the draft guidance hardly arrived too soon and is welcome. However, a broader question must be considered: that is, whether the UK's competition and wider regulatory framework is truly working in the interests of consumers. Its publication represents a positive development, no doubt – but the focus and priorities of competition regulators more generally is in desperate need of scrutiny.



Conscious cooperation

The draft guidance is intended to apply to agreements or practices between competitors that are designed to prevent, reduce or mitigate the adverse impacts on the environment from their economic activities. It brings the CMA into league with the EU Commission, plus its Austrian, Greek and Dutch counterparts,

in recognizing that bringing emissions down may require sectoral collaboration – an activity than can ordinarily fall foul of competition law.

Practical examples are helpfully provided, such as where several housebuilding companies participate in a pilot to develop zero-energy housing using innovative technology. The CMA notes that some companies may be unable to individually advance this sort of project, making collaboration a necessity if progress is to be made. In those circumstances, the CMA has clarified that cooperation is unlikely to raise competition issues.

Big focus on Big Tech

The draft guidance's real value, however, is in the fresh and bold thinking it represents on a tangible issue facing the globe. And that thinking is well overdue, given the near-obsessive focus from competition regulators in tackling Big Tech in recent years.

Their collective failure to spot the emergence of these giants has resulted in serious overcompensation. Competition regulators appear so singularly determined to make up for their lax oversight of what were nascent innovators in the 2000s that they are now stretching theories of harm and clamping down. This is to the detriment of preserving bandwidth to undertake work that would be more demonstrably valuable for the consumer.

The inquiry into Facebook/Giphy (a GIF is a video or sticker digital file showing a short looping, soundless video) is a case in point, having sucked up valuable resource since attracting an initial enforcement order in June 2020 and a final order being issued in January 2023. The CMA found a loss of potential competition in display advertising where Facebook already had significant market power.

It is unsurprising that the competition regulator would like to avoid this sort of outcome – but the person on the street could be forgiven for wondering how this work helps make their weekly grocery shop any easier.

A stream of other tech mergers have been examined, including Facebook/WhatsApp, Facebook/Instagram, Facebook/Kustomer, Google/Fitbit and Google/Looker, each drawing on – and diverting – regulators' valuable resources.

Meantime in the real world

While competition authorities busy themselves on the antitrust implications of various tech-driven developments, inflation remains rampant, and families struggle to get ahead.

At Keystone's Brussels conference in March, the absence of any analysis on how competition law could be used to bolster the purchasing power of struggling consumers was striking. Dominance in the provision of the energy, food, transport infrastructure and petrol sectors – to name just a few – did not receive even a passing mention.

Margrethe Vestager, the European Commissioner for Competition, delivered a laudable speech on the powers contained in the new Digital Services Act. Later that day in the same room, the US Department of Justice's Assistant Attorney-General, Jonathan Kanter, discussed the work of his team in bringing enforcement action in relation to – you guessed it – digital advertising.

Competition issues that may stem from the metaverse were the theme of a whole panel discussion.

In each case, consideration of life for the average family was missing from the frame: enforcers putting their digital smarts on display was the name of the day. Reinforcing perceptions of competition law as being a narrow and somewhat esoteric area of the law, the absence of any meaningful grounding of its application in the real world was notable.

Giphys v bread and butter

Giphys may matter – but in the midst of a cost of living crisis, it is surprising the degree to which regulators allow themselves not to focus on bread and butter issues. With the Labour Party quietly musing about providing greater strategic direction to the CMA, a change in tone may not be far off.

A scattering of work impacting the real-world is, to be fair, underway. The recent launch of the CMA's Market Study into housebuilding being a welcome example, as is its work on green claims in household essentials.

The very clear direction of travel, however, is pulling in the opposite direction. The forthcoming Digital Markets, Competition and Consumer Bill, which will give the Digital Markets Unit a statutory footing, is just what the competition community has been asking for – a shiny and new toy for the lawyers, economists, academics and consultants to play with.

But whether it will do anything to bring down the price of everyday items on which we all rely is another question entirely – and not one the CMA can confidently answer right now.

THIS IS YOUR (ANTITRUST) CAPTAIN SPEAKING

FASTEN YOUR SEATBELTS AND COMPLY WITH COMPETITION LAW

Authored by: Jennifer Marsh, Mélanie Bruneau, Dr. Jens Steger, Michal Kocon, Antoine De Rohan Chabot, Nikolaos Peristerakis, Aurelija Grubytė, Natalie Ferdinand - K&L Gates

An open letter was issued in January 2023 by the United Kingdom's Competition and Markets Authority (CMA) and Civil Aviation Authority (CAA) in which the two watchdogs have reminded airport operators of their responsibilities and obligations under competition law and warned them that, if there is any suspicion of competition law breaches in the sector, the CMA/CAA may well take formal enforcement action.

The open letter sends a clear warning message to all businesses active in the aviation industry that they are very much in the spotlight, with competition law enforcers being prepared and willing to step in to address any anti-competitive conduct.

What does the open letter say?

The joint letter from the CMA and the CAA contains a number of very interesting insights and statements.

In particular:

(i) Both authorities already hold intelligence and are in agreement that certain airport operators may be in breach of competition law.

(ii) While sympathetic to the difficulties caused to the aviation industry by externalities such as the COVID-19 pandemic or the conflict in Ukraine, the CMA/CAA remind operators that they need to conduct themselves in compliance with competition law.

(iii) The key type of anticompetitive conduct the authorities are warning against is the exchange of competitively sensitive information, particularly on pricing or market strategies.

(iv) In light of the considerable staff changes that many operators will have undergone recently, the CMA/CAA are stressing the importance of having up-to-date competition compliance policies and of ensuring that personnel receive regular training.

The regulators conclude the letter by summarizing the serious consequences that a business may be exposed to for breaches of competition law, recommending that players active in the industry seek legal advice, and encouraging whistle blowers to come forward if they hold any relevant information.

Interestingly, this is the second open letter issued jointly by the CMA and CAA in the aviation industry. In July 2022, the authorities used this format in reaching market players to remind airlines of their consumer law compliance (with respect to flight cancellations and reimbursements), possibly indicating a new trend/preference in terms of the method of communicating preliminary concerns in this sector.

What does the open letter actually mean?

A number of important messages can be distilled, and conclusions drawn, from the three-page open letter:

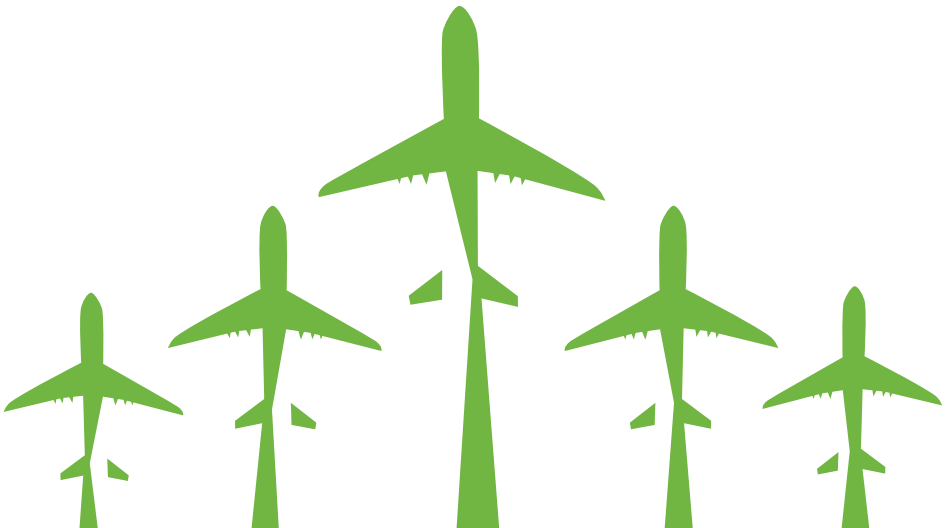
(i) The letter is a clear warning shot for airport operators. Competition regulators who hold information in relation to anti-competitive conduct have the authority to launch investigations, issue formal requests for information, and conduct dawn raids that can be enforced through very heavy fines for noncompliance. The CMA/CAA have instead opted for a warning shot, addressed to all airport operators, that they are being watched very closely and that any conduct that is outside the competition law boundaries may be sufficient to trigger official enforcement action. In this respect, the joint letter seems to effectively be saying that the antitrust enforcement cannons are basically loaded, and that the two regulators will not hesitate to use them.

(ii) If businesses active in the aviation industry who have engaged in anti-competitive conduct hope to be able to explain or justify their actions by reference to mitigating factors such as the global pandemic, staff changes or the Ukraine conflict, the letter brings bad news: these defenses are likely to be rejected by the CMA/CAA, who are more focused on protecting the interests of consumers.

(iii) It seems the intention behind the letter was for it to act as a warning to all types of airport operators and businesses active in the aviation industry. As such, it should not be interpreted narrowly as only addressing specific market players or specific airports.

(iv) The responsibility to prevent breaches of competition law sits with every independent operator. Every business must itself ensure that it does not engage in anti-competitive conduct (including through the mere exchange of sensitive information), that its employees understand the "dos and don'ts" of competition law and that they regularly assess whether their agreements and market practices are compliant.

(v) Given the international nature of the aviation industry, and the cross-border character of the airport operators' businesses, the issues highlighted in the open letter are not limited to the United Kingdom. On the contrary, it would be impossible to exclude the prospect of other national or supranational antitrust regulators also turning their attention to this sector and taking a tougher stance vis-à-vis airport operators.



Concluding remarks

While the CMA and CAA have clearly sought to alert and warn airport operators that they are not immune to antitrust enforcement, the open letter could be treated by businesses as a "near miss." Instead of facing formal information requests or dawn raids, companies active in the aviation industry have been given the opportunity to look into their market practices, revisit their competition law compliance policies, train their staff, and fix any issues they discover.

The open letter is also a good reminder that, in order to be effective, compliance programs must actually be tailored to each business and, together with compliance training sessions, must be implemented in a way that meets the minimum standards internationally.

This is particularly relevant in the context of exchanges of competitively sensitive information (the key type of conduct the CMA and CAA are concerned about), where it will not always be clear whether a particular email, communication, or discussion ventures into the danger zone and where a better grasp of the applicable legal rules can prevent a single communication (inadvertently) disclosing certain business information from being likened to a cartel-type infringement.

How can we help?

We recommend that companies active in the aviation sector in the United Kingdom and European Union take a closer look at their agreements and interactions with other operators in the industry, including with competitors, and consider whether there are any competition compliance issues that could expose their businesses to antitrust risks.

This article was originally published on the K&L Gates Hub.

UK COMPETITION LAW AND THE QUEST FOR NET ZERO

Authored by: Richard Pepper (Partner), Andrew Morrison (Senior Associate), Matthew Jones (Associate), Rachel Richardson (Head of ESG) - Macfarlanes

The UK Competition and Markets Authority has published draft guidance on environmental sustainability agreements, which promises a more flexible approach to enforcing competition law, especially in relation to "climate change agreements".

This may be the most significant departure from EU competition law principles since Brexit.

Businesses commonly cite competition law as a reason for dialling back on joint initiatives that might help to address climate change. This has led to growing pressure on competition authorities to consider if, and how, competition law enforcement should adapt to facilitate collaboration between competing firms for these purposes.

Some authorities, including the European Commission, have been wary of condoning co-operation for sustainability purposes, based on the concern that companies will seek to "greenwash" illegitimate conduct. Conversely, the Dutch Authority for Consumers & Markets has been a leading proponent of a more flexible approach, and there have been calls for the CMA to follow-suit.

The CMA published draft guidance on 28 February 2023 on the application of UK competition law to environmental sustainability agreements (the Draft Guidance). The Draft Guidance represents potentially the most significant departure from EU competition law principles since Brexit, in particular as regards a more flexible approach in relation to "climate change agreements", which would become easier to exempt from UK competition law. The CMA cites the UK's international obligations in relation to climate change, as the UK Government policy objective justifying the special status of "climate change agreements".

The CMA guidance also makes helpful progress in several other areas, including acknowledging that co-operation between rivals to achieve climate change goals may legitimately overcome first mover disadvantages that can otherwise disincentivise companies from taking unilateral action to change their business models to combat climate change.

The "sustainability exemption"

For businesses and practitioners, the main area of interest in the guidance is the CMA's approach to the application of the Section 9 exemption on efficiencies, and most notably, Condition 3 and accounting for consumer benefit. This has been the most hotly debated area in interpreting competition law to facilitate sustainability objectives and there remains a disconnect between many European Authorities in how to approach this and will be the focus of this article.

The CMA's Draft Guidance explains its approach to each of the "efficiency" criteria, namely:

(i) the agreement must give rise to benefits to production, distribution or technical or economic progress (Condition 1);

(ii) the restriction to competition arising from the agreement must be indispensable to achieve those benefits (Condition 2);

(iii) consumers must receive a fair share of the benefit (Condition 3); and

(iv) there must be no elimination of competition (Condition 4).

Condition 3 – Consumer benefit

There are two main schools of thought in how to approach the "fair share" test. The conservative approach has been restricted to "in-market" efficiencies, i.e. only customers that purchase a given product can be considered when assessing whether a fair share of the benefits have been passed on.

This is often sufficient when considering supply chain efficiencies – if money is being saved, some of these savings must be shared with customers.

However, this approach fails when considering sustainability agreements because the true environmental cost of a product is not borne by the purchasing consumer but is spread across society (so-called negative externalities).

The second, more adventurous. school of thought, promoted by the Dutch Authority for Consumers & Markets, is that "in-market" and "out-of-market" benefits should be taken into account. (Though arguably if negative externalities were properly factored into prices in the first place this point would become moot.)

The CMA's general approach remains that only in-market benefits should be taken into account, except with respect to climate change agreements. This can create challenges where the environmental benefits of a given agreement are enjoyed far beyond its consumers, or where those consumers are insensitive to a given sustainability benefit that nevertheless has significant value. That said, consistent with the position of the European Commission, consumers in "related" markets can be taken into account, provided the consumers concerned are "substantially the same or substantially overlap".

Once the relevant consumers have been identified, the parties must quantify the benefits of the agreement and demonstrate that they are sufficiently substantial to offset the harm arising from the restriction of competition. The CMA suggests that in many cases it will not be necessary to quantify the benefits precisely, for example because the agreement will give rise to only a limited restriction of competition but a significant sustainability benefit. However, it remains to be seen in practice how often the CMA is willing to consider that the benefits are sufficiently clear not to require at least a degree of quantification.

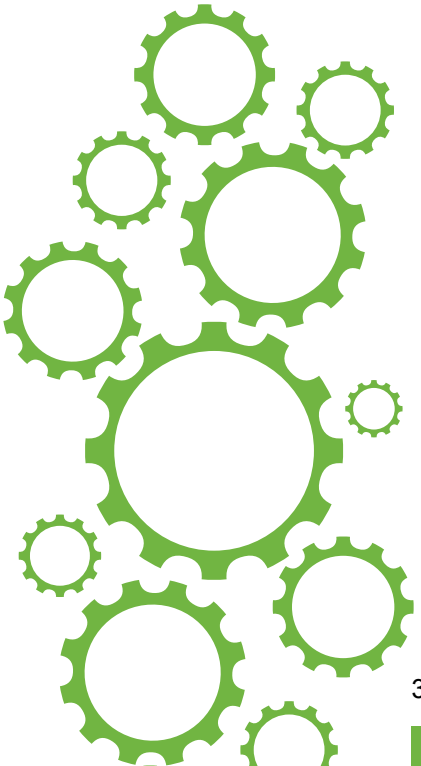
In less straightforward cases, the CMA provides examples of 'established techniques' that can be used, for example, the carbon pricing under the UK Emissions Trading Scheme to put a price on the greenhouse gas emissions. Many businesses are already using internal carbon pricing mechanisms in order to manage their carbon footprints and reporting on this is anticipated by the draft climate disclosures of the International Sustainability Standards Board (the ISSB) but the robustness and appropriateness of these metrics remains generally controversial.

It is likely that in many cases, businesses will require significant assistance in relation to the quantification exercise from external advisers, such as environmental economists. These risks pose a significant challenge to smaller organisations that may not have the resources to undertake such complex work.

Climate change agreements

The CMA plans to exempt these agreements if the "fair share to consumers" condition can be satisfied, taking into account the totality of the benefits to all UK consumers arising from the agreement. The CMA explains this on the basis that climate change "represents a special category of threat that sets it apart and requires a different approach".

To qualify, the agreement must be consistent with meeting the UK's legally binding requirements in relation to climate change or well-established national or international targets, that UK consumers as a whole benefit from the agreement, and that the benefits offset the harm.

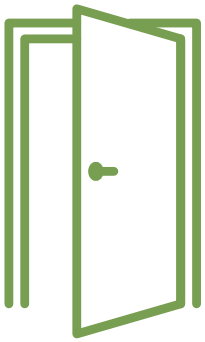


What are "climate change agreements"?

"Climate change agreements" are a subset of environmental sustainability agreements, and the term covers agreements that contribute towards the UK's binding climate change targets under domestic or international law:

"such agreements will typically reduce the negative externalities from greenhouse gases, such as carbon dioxide and methane, emitted from the production and consumption of goods and services."

The question of exactly where the line is drawn will not always be straightforward. For example, an agreement to reduce or eliminate certain types of plastic packaging may have as an effect a reduction in carbon emissions during the production process, thereby "reducing] the negative externalities from greenhouse gases" such that it could in principle be classified as a climate change agreement. Much will depend on how flexibly the CMA interprets this test and we anticipate it will realistically depend on the extent of such reductions in greenhouse gas emissions as a result of the agreement in question.



An "open-door" policy

The CMA intends to operate an open-door policy providing informal guidance on proposed environmental sustainability agreements, something CMA does not typically offer for other categories of horizontal agreements. This is another indication that the CMA is keen to work constructively on environmental and sustainability agreements. It may also be an implicit acknowledgement that assessing such agreements may not be straightforward.

The CMA expects businesses to make contact at an early stage in the development of an environmental sustainability initiative, having first conducted an initial self-assessment of their agreement, including a quantification of the relevant environmental benefits.

Businesses that do seek guidance from the CMA will be able to obtain comfort that they will not be fined for entering into the agreement provided the parties implement the arrangements as advised to the CMA (subject to addressing concerns identified by the CMA).

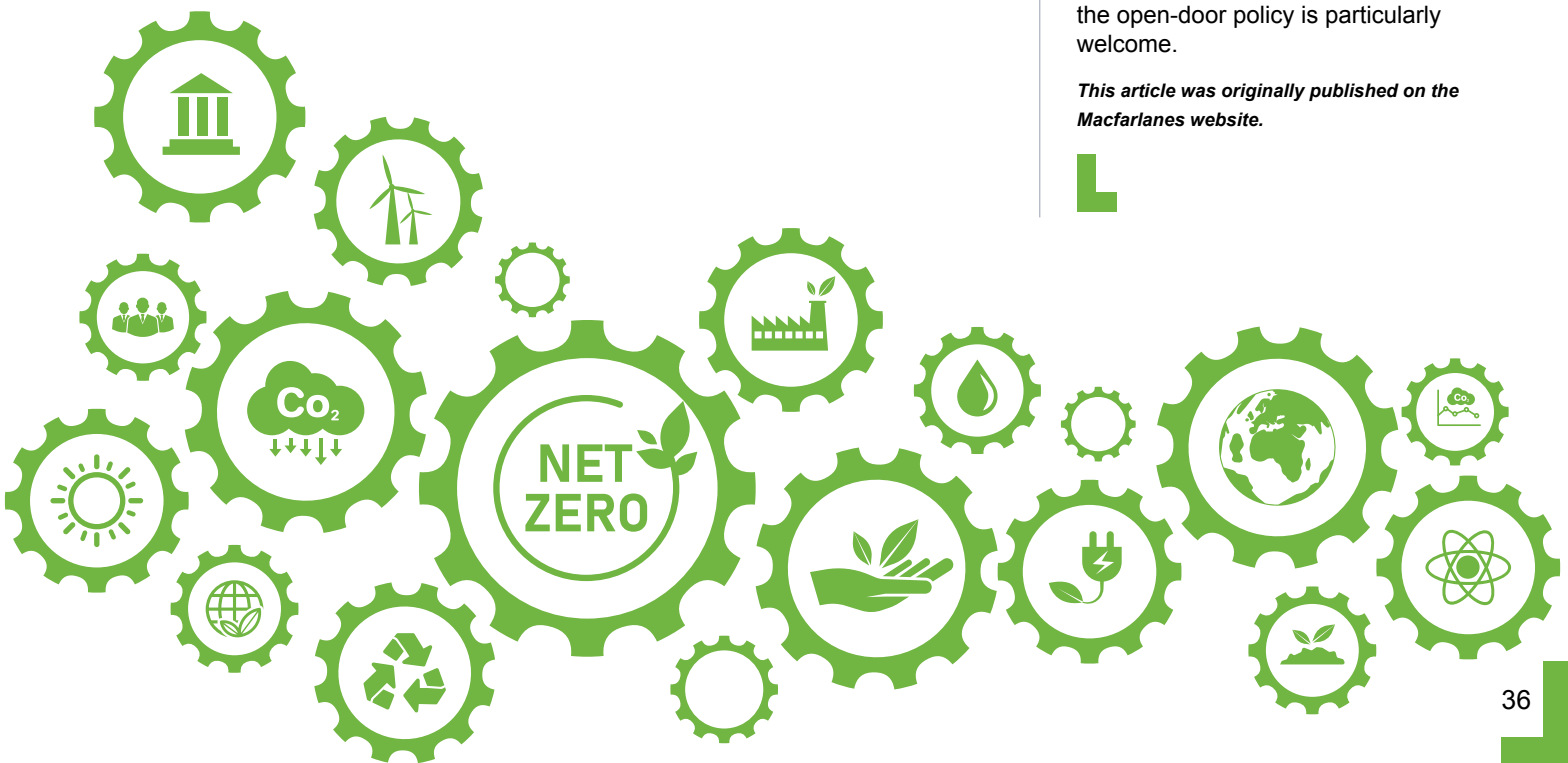
Finally, the CMA intends to publish anonymised summaries of sustainability agreements that have been shared with it for consultation to enable a body of positive decisional practice to evolve, demonstrating to businesses the types of agreements to which the CMA has given its informal approval.

Conclusion and next steps

The CMA's approach is encouraging for those who believe that competition law should be doing more to facilitate businesses' desire to address climate change. There appears to be a genuine move towards a more flexible approach for 'climate change agreements', which goes significantly beyond the approach adopted by the European Commission. However, there is no clear legal basis for the creation of two tiers of sustainability agreements, and it is unclear how the CMA will distinguish between the two in practice.

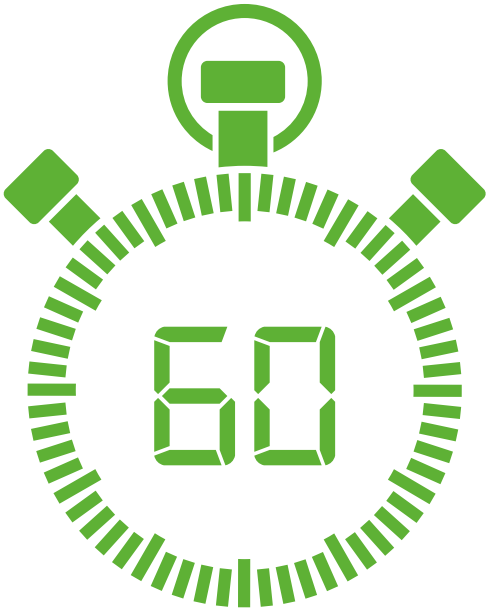
More broadly, it remains to be seen how the CMA applies its new principles in practice; as such the CMA's intention to publish a summary of some of the different environmental sustainability agreements or initiatives that it has been approached about as part of the open-door policy is particularly welcome.

This article was originally published on the Macfarlanes website.



60-SECONDS WITH:

SAM WILLIAMS CO-FOUNDER AND DIRECTOR ECONOMIC INSIGHT



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

A Writing music; and sitting by the fire in my local.

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

A Leading a fantastic team of people to help them develop and achieve their own goals (making myself redundant!)

Q What motivates you most about your work?

A Striving to be the best, building lasting relationships with clients.

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

A See the senior team at EI being (rightly) recognised as amongst the best in their field.

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

A Always have the sausage.

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

A Increased appetite to pursue class action litigation cases, paired with an increased entry bar to get said cases off the ground.

Q Who has been your biggest role model in the industry?

A Rachel Webster at Frontier Economics; she was my first ever boss and remains a great friend.

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

A A dry sense of humour.

Q What cause are you passionate about?

A Macmillan cancer support and Marie Curie.

Q Where has been your favourite holiday destination and why?

A Norway, for the Fjords

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

A Dylan Thomas, to hear his voice.

Q As a speaker at our upcoming Collective Actions Forum, what are you most looking forward to at the event?

A I'm looking forward to hearing a range of perspectives on the future direction for class action cases, given how rapidly that area is developing – but especially keen to hear from Marcus Smith to get a CAT take on things.

Competition

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