ThoughtLeaders4 Competition • September 2023

Competition MAGAZINE

ISSUE 2

SOLVING THE PUZZLE: YOUR QUARTERLY UPDATE ON COMPETITION LAW AND LITIGATION

INTRODUCTION

"Competition is good for consumers for the simple reason that it compels producers to offer better deals – lower prices, better quality, new products, and more choice."

Sir John Vickers, former Chairman of the Office of Fair Trading, UK

We are delighted to present Issue 2 of ThoughtLeaders4 Competition Law & Litigation Magazine. In this abounding issue, we discuss a variety of topical issues facing competition practitioners, including the Trucks Litigation, private enforcement, class actions in the CAT, artificial intelligence and more. This issue also features a series of 60 seconds with interviews with community partners, and speakers at our events.

We also look forward to seeing many of you join us at our UK Digital Markets Competition Regulation Forum, taking place on Wednesday 20 September in London.

Thank you to all our contributors, members and community partners for your ongoing support with this new and exciting Competition Community, we look forward to your continued involvement.

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COLLECTIVE ACTION
ADMINISTRATION

EXPERIENCE IS INDISPENSABLE

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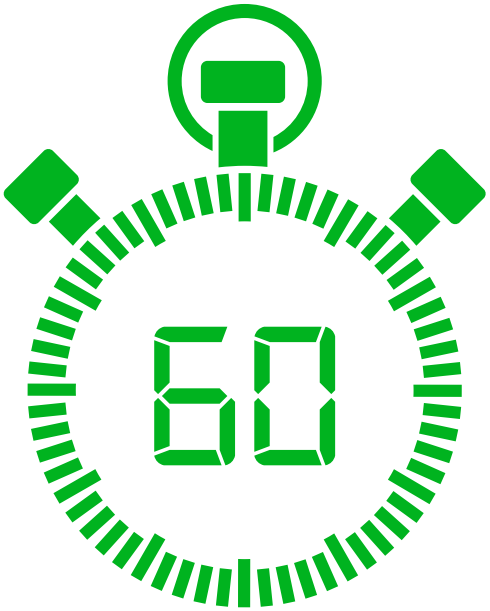
60-SECONDS WITH:

TOM MOORE MANAGING DIRECTOR ANGEION GROUP



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

A I love sports generally, but especially rugby and cricket, so the idea of following the international sporting calendar around the world appeals. However, as I don't really want a divorce or creating a carbon bomb all of my own, I suspect long walks with the dog, and attempting to get through the hundred-odd cookbooks I've accumulated over the years, is more likely. I'd also like to exercise my literary pretensions and write a crime noir novel.

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

A We are all in the access-to-justice business and the distribution of compensation into the hands of those that have been harmed is the end game.

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

A I'll have to give you a more historical example to avoid any awkwardness. In my first ever office job (terrifyingly a quarter of a century ago), I was a legal headhunter. An excited client called me immediately after an interview to offer a candidate the role. Ten minutes later, she called to retract the offer. The candidate had hit 3 cars on his way out of the car park and scarpered.

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

A I'd like to continue our growth and exceed 100m in annual revenue.

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

A Never put off to tomorrow what you can put off until the day after tomorrow. No, more seriously, probably to listen more and talk less.

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

A There are many that are interwoven. The proliferation of collective actions across multiple jurisdictions has been remarkable. How we go about funding these actions will no doubt evolve as will how technology impacts on our ability to distribute compensation.

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

A Emotional intelligence.

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

A The Maltese Falcon by Dashiell Hammett. It's totemic in the crime noir genre and utterly absorbing. The most famous MacGuffin of all time.

Q What cause are you passionate about?

A It feels to name just one, does a disservice to the others. I have always been an advocate for animal welfare and the eradication of homelessness. Obviously, the over-arching issue of our times is the climate crisis, which is exacerbating the other major issue of our times which to my mind is inequality.

Q Where has been your favourite holiday destination and why?

A San Sebastien in Pays Basque. It is the gastronomic hub of Spain. While it has more Michelin stars per capita than any other city, I prefer to walk around the old town (which the British navy kindly didn't bomb into the stone age, in return for some shore leave) and sample the many pintxos on offer. It also has three beautiful beaches (conchas) and the opera house sits right on the beachfront.

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

A Mark Twain. I ripped off his quote in an earlier question. An incredible wit who lived in some very difficult times. He died in Redding, CT where my aunt and uncle live. In fact my uncle was chair of the Mark Twain Library for a few years and is a bit of an authority, so much of my interest in Twain's work comes from him.

Q If you had to sing karaoke right now, which song would you pick?

A The world's got enough problems right now, without me adding to them.

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

Authored by: Iona McCall and Felix Hammeke - AlixPartners

Introduction

In February this year the UK's Competition Appeal Tribunal ("CAT" or "Tribunal") handed down its first judgment[1] in a damages claim relating to the European Commission's 2016 Trucks cartel decision[2] ("the Decision"). The economic experts' evidence in relation to the articulation of a Theory of Harm ("ToH"), the estimation of the overcharge and the assessment of pass-on played an important role in determining the CAT's judgement. While the judgment has led to a flurry of debate and articles in the UK on these issues, it is a relatively late addition to a number of related judgments across Europe.

In this article we focus on one of the most critical issues that the CAT dealt with – the estimation of the overcharge – and contrast it with the approaches taken by other courts across the European Union ("EU"). We will cover another important area where economic expert evidence played a key role in a forthcoming article: the assessment of pass-on.[3]

Estimation of the overcharge by the CAT

The overall objective of private competition damages claims, as set out in the EU damages directive[4] as well as UK case law, is compensation: "claimants are entitled to be placed in the position they would have been had the [infringement] not been committed".[5] While the Decision established the infringement, the Claimants still needed to prove that damage to them was caused by the infringement on a "but for" basis.[6]

The estimation of the overcharge – the average increase in transaction prices caused by the cartel – is a critical aspect of any cartel damages

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

2 European Commission Decision of 27 September 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39824 – Trucks).

3 The articulation of the theory of harm was also an issue addressed by the economic experts. The Decision mainly refers to "information exchange" about "gross" or "list" prices rather than any coordination of "net" or "transaction" prices (Decision, para 46). The Claimants thus had to explain how the information exchange could have affected the transaction prices that they paid for trucks. The CAT concluded that a cartel effect was plausible but did not "rule out" the possibility that the cartelists failed to successfully raise transaction prices (Royal Mail v DAF, para 306 – 309, 319, 325).

4 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (EU Damages Directive), Article 3.

5 Royal Mail v DAF, para 167.

6 Royal Mail v DAF, para 168.

case. The exercise is essentially an empirical test of the ToH and thus does not only allow the experts to estimate overall damages, but also to determine whether the cartel had any effect at all. Accordingly, the Tribunal dedicated a large part of the judgment to this issue. Key points of debate included the appropriate dataset for estimating the claimants' damages,[7] the most appropriate modelling approach and the treatment of exchange rate fluctuations and the Global Financial Crisis ("GFC").[8]

The economic evidence was examined in detail by the Tribunal and discussed at great length. However, on the most significant issues the Tribunal was unable to determine in favour of one expert or the other, considering the answer to be more nuanced than suggested by either expert.[9] The Tribunal eventually concluded that it was impossible to find the ""ideal" regression equation" because there were "too many imperfections in the evidence, and insoluble practical problems, to allow any such approach".[10] Instead, the Tribunal weighed up the evidence in general – including its ""a priori" reasons expecting that [the cartelists]… would to some extent have succeeded in materially affecting transaction prices" – to conclude that the cartel had an effect and then deployed a "broad axe" to estimate the overcharge at 5% (approximately half-way between the two experts).[11]

Overview of EU jurisdictions

Similar overcharge awards have been made in other European jurisdictions, though the use of economic analysis and the approach to estimation has varied.

In Germany, the Regional Court of Berlin recently issued the first judgment on overcharge in relation to the Trucks cartel.[12] The Court concluded a similar overcharge of 5% (the lower end of the range estimated by the claimants' expert), again following a careful review of the expert reports from both sides.[13] This judgment follows the April 2021 judgment by the Federal Court of Justice on trucks ("Trucks II"), which determined that the Regional Court of Kiel wrongfully did not consider the regression analysis of several economic party opinions in a case brought by a haulage company and confirmed that economic expert evidence must be considered in detail by first instance judges when assessing whether the cartel likely led to harm.[14]

In Spain too, a number of the provincial courts and courts of appeal have also awarded damages based on an overcharge of 5%. There are numerous judgments by provincial courts (more than 3,000 judgments spread across 69 courts) and courts of appeal (more than 1,000 judgments spread across 40 courts).[15] Damages were awarded in 92% of these cases, most often based on an overcharge of 5% though higher overcharges are not uncommon.[16] However, in contrast to the UK and Germany, these awards have often been made in the absence of case-specific economic analysis and based on judicial estimates made by the courts by reference to meta-studies and a high-level assessment of the nature of the cartel.[17]

The Supreme Court recently confirmed some of these judgments and decided that an overcharge of 5% should be assumed in the absence of any economic evidence.[18, 19]

This willingness to award damages in the absence of substantive evidence – as the claimants' unwillingness to invest in expert reports – may be influenced by the lack of collectivisation tools that would allow for the bundling of cases. As a result, many of the claims brought in Spain relate to a small number of trucks, some even to the purchase

7 A preliminary issue that had to be settled was whether the Claimants should prove their claim by reference to their purchases alone, or whether market-wide data could be used to estimate the overcharge (Royal Mail v DAF, para 328 et seq.). While the experts agreed that an estimate based on data from all cartel affected sales was more reliable because of the larger amount of data that could be used, DAF argued that this market-wide effect cannot simply be applied to the Claimants as they may differ from average purchasers inter alia due to their superior buyer power (Royal Mail v DAF, para 339 & 340). The Tribunal dismissed this "second bite of the cherry" approach and concluded that DAF had failed to provide any convincing evidence that would suggest that the UK market-wide effect did not apply to purchases by the Claimants (Royal Mail v DAF, para 345). The fact that both Claimants were sophisticated purchasers was found to be irrelevant because the same would have been true in the absence of the infringement (Royal Mail v DAF, para 67).

8 In particular, the experts debated from the use appropriateness of a before-during-after approach versus during-after model given data limitations in the "before" period, compared to a during-after model, which coincided with the GFC and carries the risk of overhang in the "after" period. The experts also disagreed onto the right way of dealing with exchange rate fluctuations, a particularly critical issue given the sharp appreciation of the Pound at the start of the Cartel period, and whether the demand shock resulting from the GFC was of a sufficient scale that it necessitated an adjustment to the model to account for broader effects on DAF's business and decision-making compared to other fluctuations in demand.

9 On the exchange rate question, the Tribunal concluded that "…we do not say that one approach is right and the other wrong. Instead, we are left with the feeling that the answer is more nuanced than that and that the Infringement effect lies somewhere between the two positions…" (para 410), but considered Professor Neven's approach with regards to exchange rates to have more merit (para 484). Meanwhile, the Tribunal considered the arguments for the respective approaches to dealing with the global financial crisis to be more evenly split, as stated in the judgement "…like with the exchange rate debate, there are legitimate arguments on both sides … Again, the actual answer may be found somewhere between the opposing positions which is more likely to reflect the true impact of the GFC on DAF's pricing" (para 440).

10 Royal Mail v DAF, para 475.

11 Royal Mail v DAF, para 477, 479 & 484.

12 While there have been a number of judgements in relation to the truck cartel in Germany, these have not addressed the question of overcharge. The focus of previous judgements (so called "Grundurteile" or judgments on the substance of the claim) has been on whether there is evidence that there was an overcharge, not its size.

13 See https://www.juve.de/verfahren/lg-berlin-wagt-als-erstes-gericht-schadensschaetzung-im-lkw-kartell/.

14 BGH KZR 19/20 – LKW Kartell II (13/04/2021).

15 Marcos, Francisco, Trucks Cartel Damages Claims: Thousand and Odd Judgments issued by Spanish Appeal Courts (October 07, 2022). Zeitschrift für Europäisches Privatrecht 1/2023, Available at SSRN: https://ssrn.com/abstract=4255889, page 3.

16 Ibid., Figure 9.

17 Ibid., page 15.

18 See https://almacendederecho.org/sobre-la-necesidad-de-precision-en-la-estimacion-judicial-del-dano-indemnizable

19 See https://content.mlex.com/#/content/1478775/truck-cartelists-must-compensate-victims-with-metadata-reports-spanish-supreme-court-rules.

of a single truck.[20] Engaging expert economists to undertake detailed analysis is unlikely to be proportionate given the low value of such claims.

In Italy the only overcharge award to date is three times that of the UK, Germany and most of Spain, but was not based on economic analysis. In 2021 the Court of Naples awarded damages based on a 15% overcharge, which it estimated on an "equitable basis" as the court appointed expert was unable to reach a conclusion supported by economic evidence.[21] However, in a more recent judgment from June 2023, the Court of Naples dismissed two claims because the claimants had relied on the meta-analysis in the EC guidelines as evidence for their claim of an overcharge of 20%. Following an intervention by the European Commission, the court determined that it was insufficient for the claimants to rely on meta-studies to substantiate their damage claims.[22]

In October 2022 the Commercial Court of Lyon, the first French court to hand down a judgment in the trucks case, concluded that the claimants failed to prove that the information exchange with regards to list prices had an effect on the transaction prices paid by the claimants.[23] The court questioned the credibility of the claimants' economic expert evidence and expressed concerns about the selection of the sample used for the damage estimation, the choice of the non-cartelised period in the "during-after" model, and the lack of sufficient control variables in the econometric model.[24] The unreliability of the claimants' econometric model appears to have played a significant role in the court's decision making.[25]

Conclusion

Overall, we observe some divergence in the overcharge awards across the UK and the EU in the trucks claims, as well as some variation in the reliance on expert economic evidence. However, there is also a clear trend emerging in terms of the role of the economic evidence in influencing the outcomes of these cases. Whilst inevitably imperfect, courts in the UK, Germany, Italy and France have recognised the importance of the economic evidence in helping them determine the overcharge award. As stated in the CAT judgement, "… the process did yield useful insights on the reasons for the experts' different conclusions and enabled us to reach a better-informed view on the critical question of the Overcharge". This echoes the position of the German courts in the Trucks II decision, and the recent judgment by the court of Naples on the importance of proper economic analysis. The only jurisdiction that appears to have accepted a less evidenced-based approach to the assessment of the overcharge is Spain, where the absence of collectivisation tools has required them to revert to a pragmatic judicial estimation of the overcharge in order to uphold the principle of effectiveness.

The reliance on more limited economic evidence in Spain speaks to the issue of proportionality. In the UK case, the CAT commented:

> ***"We do however wish to sound a note of caution in relation to the expert evidence. We received thousands of pages of detailed experts' reports on all of the issues before us. There were central, important issues on the Overcharge and Supply Pass On where the size of the reports could be justified. But there were other subsidiary issues, such as Complements and Loss of Volume, where we considered that there was disproportionate time and money spent on complicated analyses that were less justified. Not only does this increase the overall costs of these proceedings but also it is highly burdensome on the Tribunal, and we would urge parties in other similar cases to exercise some restraint and sense of proportion in the preparation of their expert evidence."***

Clearly there is a balance to be struck between robustness and proportionality. While expert economic evidence is needed to determine overcharge awards, the extent of such analysis that is required must be carefully considered.

20 Marcos (2022), Figure 2.

21 Court of Naples, Judgment of July 6, 2021, No. 6319. See https://www.clearygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--august-2021-pdf, page 2. We note that the claim was small in size, resulting in a damage award of only €12,000.

22 The court had asked the European Commission to opine on the claimants' approach, which appears to have cast doubt on the claimants' reliance on its guidelines without any attempt to quantify damages based on evidence relating to the infringement in question. See https://content.mlex.com/#/content/1481719/iveco-defeats-italian-trucks-cartel-claims-after-eu-commission-opinion-on-quantifying-harm.

23 Tribunal de Commerce de Lyon, 27/10/2022, n° 2018J191, Colas e.a. c/ DAF Trucks e.a., pages 34-35.

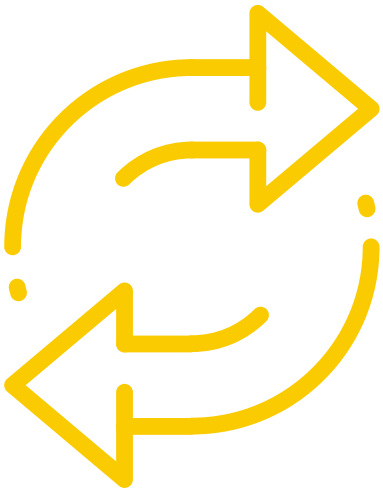
24 Ibid, pages 33-34.

25 Ibid, page 37.

REGULATED UTILITY COMPANIES FACE A BARRAGE OF CLASS ACTION CLAIMS IN THE UK

Authored by: Colm Gibson (Managing Director) and Mark Bosley (Director) – BRG

This year has seen a variety of new claims focussed on utility companies. While a perception had been emerging that the bar for bringing such claims can be very low, recent decisions have confirmed that a robust early defence can be effective in preventing or reducing the size of a claim.



What's changed?

Mass opt-out class actions have long been a major feature of the US litigation landscape. Following changes to legislation, they can now be brought in various ways in the UK, particularly in relation to competition law infringements. Walter Merricks, the former financial ombudsman, brought the groundbreaking UK case representing a class of over 45 million people in a claim against Mastercard for an amount comfortably over £10 billion. This case was challenged all the way up to the Supreme Court, which gave the green light in 2021, and has set the ball rolling for many more claims. New cases frequently attract media attention, but these are only the tip of the proverbial iceberg, as litigation funders have little interest in tipping off potential defendants before the claim is filed.

What is the risk for utility companies?

No industry is immune from class actions, but some sectors are particularly vulnerable, not least the regulated utility sector.

Salient features include that:

- (1) Plentiful information is in the public domain thanks to investigations undertaken by regulatory bodies such as Ofgem, Ofcom, Ofwat, ORR, the NAO, Parliamentary Select Committees, the Environment Agency, the CMA and various government departments. Claimants can use reports, or even simply the announcement of an investigation by these bodies, to support a prima facie case.
- (2) Utilities are required to publish financial and operating information, reducing, or dispensing with the need for legal disclosure (hence avoiding the need to alert the companies before the case is filed).
- (3) Claimants have the benefit of hindsight; for example, to see if the cost of capital assumed for their price cap was too high or if companies

have failed to deliver the services for which customers have paid.

- (4) Having customers physically connected to wires or pipes makes it easier for claimants to pass the legal tests necessary to define a class.
- (5) The high degree of standardisation (standard pricing structures, standard methodologies for setting prices and so forth) reinforces the commonality of any alleged wrongdoing, again making it easier to pass the legal tests necessary to define a class.
- (6) From an economic perspective, it is relatively easy to argue that the incumbent utility network companies are dominant as a matter of competition law.
- (7) The large number of utility customers means that, if a class can be defined sufficiently broadly, the headline value of claim can be very large, even if the individual claims are small.

Rightly or wrongly, utility companies are assumed to have access to significant resources to pay any damages award. Obvious avenues for claims against utilities arise where companies have failed to meet their regulatory targets; or where outturn costs have been lower than assumed by the regulator, but prices have remained at the price cap. (After all, if costs are lower in a competitive market, you would expect prices would be competed downwards to reflect this.) However, given the propensity of litigation funders and law firms to become increasingly innovative, there is a significant risk that claims will come from unexpected angles, and companies are often surprised by the claims that emerge.

Whilst a claim might ultimately be defeated, that process can take several years. Having a large class action claim - and hence an uncertain contingent liability - hanging over a company can create significant financial uncertainty over an extended period.

Impacts may include:

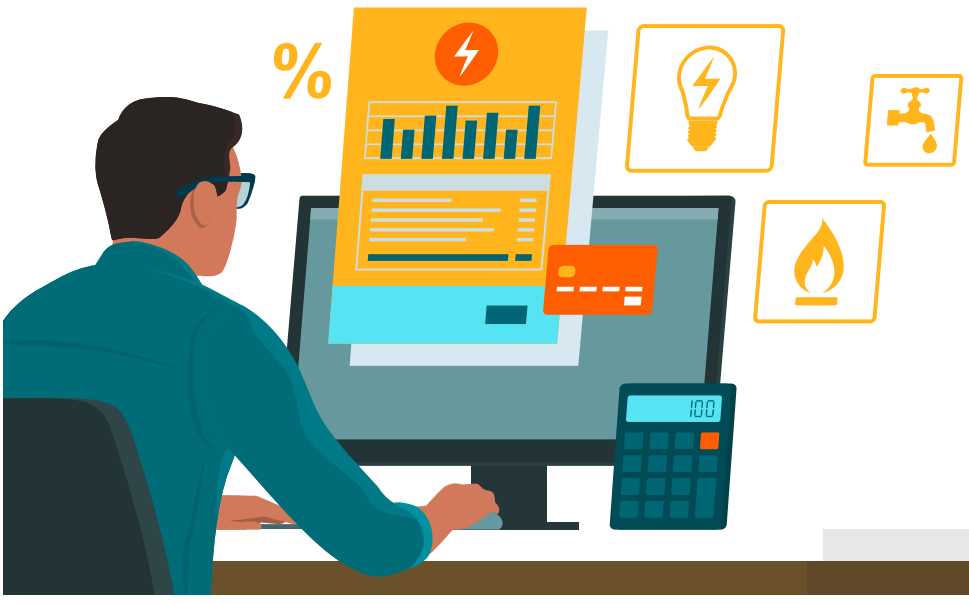
- (1) adverse publicity: where a class is certified based on a claim of "unfair pricing", this can create a perception that defendant companies have overcharged their customers by many millions of pounds, even if the claim is not well founded.
- (2) regulatory concerns: any claim where the sector regulator has not already investigated is bound to draw that regulator's attention.
- (3) financial concerns: a certified claim can impact credit ratings and deter equity and debt investors.
- (4) political attention: as the UK water industry is experiencing.

What should utility companies do?

Potential claimants will be working on preparing a thorough case, and litigation funding means they are well resourced. While claimants have unlimited time to prepare, defendants face tight timeframes to respond to certification applications, making it hard to prepare compelling expert and other evidence to challenge certification if work begins only when the application is filed.

To counterbalance the claimants' inherent advantage, defendants need to be equally well prepared. As a minimum, therefore, they will need to have engaged advisors familiar with class actions to prepare a "response pack" to have on the shelf in anticipation of a filing.

In addition to normal legal defences, companies must also be prepared to challenge all aspects of the application at the certification stage, such as the suitability of proposed claim to be brought as collective proceedings, commonality of the alleged effect on class members, class definition and proposed expert damages methodology. The CAT has declined to certify some recent applications, suggesting that the bar is not as low as some have assumed and that a robust response from proposed defendants, supported by the right expert evidence, can pay dividends.



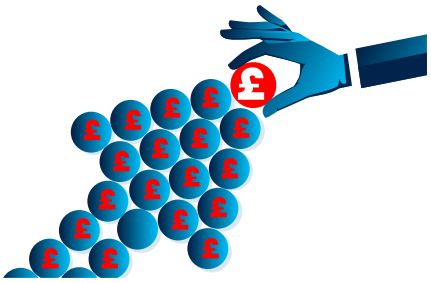
YOU SHALL NOT PASS!

ONE (CONFIDENTIALITY) RING TO RULE THEM ALL?

Authored by: Jeremy Humm (Investment Manager) – Balance Legal Capital

Times have moved on since maintenance and champerty were both crimes and torts (abolished as they were in the Criminal Law Act 1967 along with the lesser-known, but somewhat more dramatic offences of "challenging to fight" or "being a common barrator"), but there remains no scope for "wanton or officious intermeddling"[1] by funders in funded claims. Whilst funders will inevitably exercise some control over litigation (not least by holding the purse strings), if that control becomes excessive there is a real risk that the funding agreement becomes contrary to public policy, and therefore unenforceable.

The go-to authority in this area has for some time been the Commercial Court's decision in Excalibur Ventures LLC v Texas Keystone Inc,[2] in which the funder was found liable to pay the defendants' costs of the action on an indemnity basis. In his costs judgment, Clarke LJ rightly observed that the aim of the litigation funding industry is "not to finance hopeless cases but those with strong merits".[3] He went on to highlight the importance of funders and their advisors taking "rigorous steps short of champerty, i.e. behaviour likely to interfere with the due administration of justice - particularly in the form of rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals".[4]



Whilst the boundaries are therefore understood by litigation funders, there is a potential fly in the ointment when it comes to collective actions in the Competition Appeal Tribunal (CAT), brought about by the application of Rule 101 of the CAT Rules 2015, which provides a mechanism for confidential documents to be disclosed into a confidentiality ring. In practice, this often means an "outer" and an "inner" ring is established by order of the Tribunal to protect different categories of commercially sensitive documents (which usually include the litigation funding agreement (LFA) and after-the-event insurance policy). Membership of the "outer" ring often comprises the class representative, respective legal teams, certain representatives of the defendant and any experts instructed in the claim. The "inner" ring, reserved for the most sensitive documents, can be even more restrictive (sometimes even the class representative is excluded from the inner ring – this point arose recently in Coll v Google,[5] although ultimately no inner ring was established). The funder is not usually a member of either.

1 British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 KB 1006
2 [2013] EWHC 2767 (Comm)
3 [2014] EWHC 3436 (Comm) at paragraph 129
4 Ibid.
5 1408/7/7/21

The obvious question that arises is whether it is reasonable for the party financing the proceedings to be excluded from the confidentiality ring (the outer ring, if more than one is in place).

It might be argued that the funder does not need to have sight of all (or perhaps any!) documents disclosed in order to understand how a claim is progressing, and that the legal team is well equipped to provide ongoing, overarching strategic and merits advice as the case evolves without breaching confidentiality obligations. But is that sufficient for the funder to comply with its duties to its investors (and the court, cf. Excalibur) by monitoring its funded cases? What would happen in the (admittedly, relatively unlikely) event that a document disclosed into a confidentiality ring was so probative as to shift the class representative's strategy to the extent that further funding was required? How can a funder address a request for additional funding without the ability to carry out full due diligence? More importantly, shouldn't the funder have the ability to review all available material in the context of any settlement discussions that might arise (subject of course to the terms of the LFA)?

From a confidentiality perspective, there does not seem to be a strong argument in favour of excluding the funder. In addition to the stringent obligations imposed by the confidentiality ring order itself, members of the Association of Litigation Funders (ALF) are otherwise obliged to observe the confidentiality of all information and documentation relating to a dispute to the extent that the law permits, subject to the terms of any confidentiality or non-disclosure agreement agreed between the funder and the funded party.[6] It is simply not in the funder's interests to breach these obligations.

To date, this does not appear to be an issue that the Tribunal has had to grapple with. There may be something to be said for a funder keeping its powder dry until a competition claim gets the green light following a Collective Proceedings Order hearing.

Perhaps the answer is simply that this is an ever-evolving regime, and there is no bar to the funder being added to a confidentiality ring as the case progresses, if the facts require it.

As Roth J commented in his 2020 Foundem judgment, "In my view, the important points to emerge from the authorities are that: (i) such arrangements are exceptional; (ii) they must be limited to the narrowest extent possible; and (iii) they require careful scrutiny by the court to ensure that there is no resulting unfairness".[7] Any confidentiality regime should enable responsible funders to adequately assess the risks of the cases they are funding on an ongoing basis. This is not only in the interests of investors; if there is evidence within a confidentiality ring that could be capable of disposing of a case early, it should also be welcomed by defendants and the courts.

The hope (of this funder!) is that a reasonable balance will be struck, and the interests of the funder will not be unnecessarily marginalised.

6 ALF Code of Conduct, paragraph 7.

7 Infederation Limited v Google [2020] EWHC 657 (Ch), at paragraph 42.

ARE CLASS ACTIONS THE MOST EFFECTIVE WAY TO NET-ZERO?

Authored by: Tom Davey (Co-Founder and Director) - Factor Risk Management

Many companies are harnessing technological innovation to help mitigate climate change and achieve net-zero, primarily through clean energy production. Although industry has been responsible for most historic greenhouse gas pollution, it is also delivering the mechanisms to minimise its future impact. The rapid evolution of green energy and transport may surprise cynics, who are rightly suspicious of false promises but now see tangible evidence of positive change.

Climate change disproportionately impacts many of the world's poorest people, whose plight is often under reported. Meanwhile headlines are dominated by events affecting Western countries, such as the recent smog that engulfed the US East Coast, posing a major health risk to 100 million Americans as smoke from myriad Canadian wildfires blanketed the region, or indeed the ongoing heatwave in the Mediterranean with record breaking temperatures expected of over 45 °C in some parts for unprecedented period.

It remains to be seen whether national governments will voluntarily reform at sufficient speed to save vulnerable countries from the worst effects of climate change.

Accordingly, litigation may help the process: bypassing political power structures, forcing polluters to pay compensation for their actions and altering their behaviour to avoid further financial penalties.

Environmental actions have a long track record of success including a 2007 class action against Trafigura on behalf of 30,000 victims following the unloading of a toxic waste shipment at the Ivory Coast port of Abidjan. Trafigura paid out $45m in compensation: a powerful deterrent against illegal pollution, both for Trafigura and other operators.

Another successful class action was brought against Union Carbide, following the 1984 Bhopal disaster which affected more than 500,000 residents in central India. The lawsuit resulted in Union Carbide being ordered to pay $470m in compensation to the victims, who were exposed to highly toxic gas following a chemical accident at a pesticide plant.

While Trafigura and Bhopal were after the event actions, brought once damages could be demonstrated to flow from the event and liability could be established, they proved highly significant as litigation milestones against big multinationals, albeit at a local level.

Given the common absence of political will, class actions against offending companies can be a powerful tool in the drive towards net-zero emissions and a comprehensive environmental clear-up thanks to the 'polluter pays' concept.

Last year, the Grantham Research Institute's annual report examined global trends in climate litigation and found that 2,000 climate related lawsuits have been started since 2015.[1]

Such actions deliver twin benefits, allowing affected communities to receive compensation and deterring polluters from future environmental breaches through significant financial penalties that dent the share price of listed companies. This year's Grantham report revealed the deleterious impact of climate litigation on publicly-quoted polluters, whose market capitalisation dropped in the wake of suits being filed, or following adverse trial verdicts.

Competition claims are also being brought against UK water and sewerage companies, arising from their alleged unlawful discharges of untreated sewage and wastewater into British waterways. Such collective action competition claims enable groups of affected individuals to bring claims against companies that break competition rules.

Despite their apologies for dumping billions of litres of sewage into UK rivers, and their pledges to invest £10bn to reduce waste outflows, progress is slow. The government's storm overflows taskforce – set up in the wake of revelations about the scale of sewage dumping – has met only once in the past year.

Water companies operate in a febrile atmosphere. Notwithstanding the sewage dumping scandal, firms such as Pennon have caused outrage by making sizeable dividend payments to shareholders and paying large bonuses to executives.

Although localised campaigns and targeted lawsuits still play a key role in bringing polluters to book, the wider ambition of climate litigation is increasingly global: taking on the biggest multinational climate culprits who operate in multiple jurisdictions.

Such actions carry a steep cost. These international litigations face multiple challenges including proving causation and liability, which can be more challenging on a global scale. Many of the world's largest polluters operate in Asia: another hurdle for claimants, since bringing claims is invariably difficult in the region's more challenging jurisdictions.

Rather than a showstopping global win, perhaps litigators are better served chipping away at a local level to effect change by the sheer volume of actions brought against offending firms.

For example, a class action was launched in May against Delta Airlines claiming that the company misled consumers by marketing itself as carbon-neutral, despite allegedly not living up to its promises. This came shortly after the Dutch carrier KLM was sued in April for alleged "green-washing" in its advertising campaigns.

Whilst the scientific facts of manmade climate change are accepted by most people, they are nevertheless challengeable by defendants in litigation, posing an obstacle to claims brought by litigants.

Another issue facing claimants is whether the effects of climate change have yet been severe enough to warrant compensation, and – if so – whether direct causation by a defendant can be sufficiently established.

Sometimes, top-down approaches can be heavy-handed and ineffective, particularly with cross-jurisdictional action running up against domestic political and economic considerations. Counterintuitively, focus on local action can effect change on a bigger scale. For example, the smog crisis of 1950s London led to enduring change through legislation.

Likewise, China's experience of urban smog has led to the mass adoption of electric cars on a scale not yet replicated in the UK, with more than one in five new vehicles sold in China being fully electric. Yet as these vehicles solve one problem, the manufacturing and recycling of their batteries - made from environmentally toxic materials - creates another. As electric vehicle sales surge across Europe, a potential battleground awaits for environmental actions. The mining sector, no stranger to charges of environmental damage, may come under the spotlight for the environmentally damaging extraction of metal ores used by green manufacturers.

As commercial interests drive corporate decisions to meet consumer demand for greener products and solutions, strong localised climate and environmental litigation can play its part in forcing more recalcitrant firms to change for the better. Such actions could also ensure that new technologies, burnishing their green credentials, stand up to scrutiny and are truly environmentally-friendly rather than swapping one pollutant for another.

1 [Global trends in climate change litigation: 2022 snapshot - Grantham Research Institute on climate change and the environment (lse.ac.uk)]

EVOLVING LANDSCAPE OF CLASS ACTIONS IN THE UK AND EUROPE

Authored by: Clare Ducksbury (Founder & CEO) and Natasha Day (PR and Comms Executive) - Case Pilots

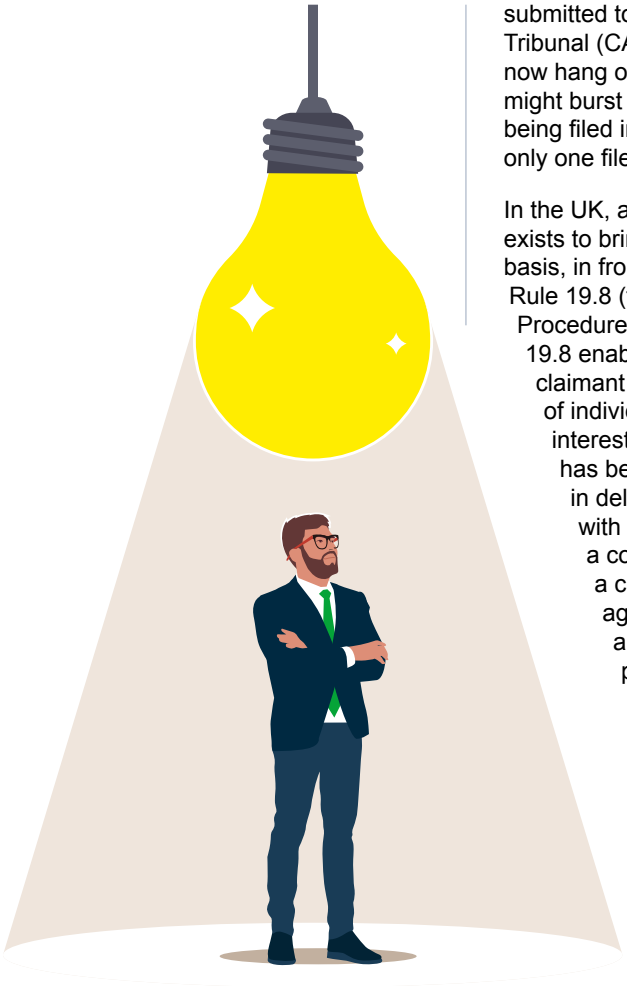
Class actions in the UK and Europe continue to evolve at pace, as they benefit from unprecedented levels of support. Within this dynamic landscape of litigation, claimants are being put at the forefront of the legal teams' strategies and processes – significantly strengthening their position in the mass claims and class actions space. Furthermore, an increasing number of litigation funders are backing mass claims in jurisdictions across Europe, providing much-needed momentum for these cases, at a time when consumers and businesses are demonstrating an increased interest in participation. Against this backdrop, the role for litigation support and robust LegalTech solutions becomes ever more valuable in a burgeoning market.

Introduction of the EU Directive

Class actions are gaining traction across Europe, following expiry of the 25 June 2023 deadline prescribed by the EU Representative Actions Directive, for Member States to transpose a mechanism for collective actions into national law. This significant development in the redress landscape allows private or public organisations / bodies across Europe to bring action for the protection of the collective interests of consumers, to which the consumers concerned are not parties. This is a game-changer. Consumers who have been wronged by unlawful practices are now armed with a system that enables large-scale redress.

Member States can choose an opt-in system, an opt-out system, or a hybrid approach that enables both. Hitherto, many European jurisdictions have supported an opt-in regime, whereby affected consumers make an active choice to join the group claim. In contrast, with opt-out mechanisms now on the agenda for many countries across Europe, affected consumers will automatically form part of the class unless they actively exclude themselves, via an opt-out process.

The combined approach (allowing a hybrid of both opt-in and opt-out claims) has become a feature of domestic law across European jurisdictions, including the UK, Belgium, Denmark, Poland, Portugal, and the Netherlands. It remains to be seen if consumers in jurisdictions where the opt-out regime does not exist, are tempted to participate in claims across borders – for example, non-Dutch citizens are permitted to opt-in to a class action in the Netherlands, if the court agrees, upon the request of a party to the class action. The court may also order that the opt out approach in particular cases applies to a precisely specified group of non-Dutch residents,



In addition, the EU Directive clearly outlines some rules in relation to third-party funding of collective actions – prescribing that Member States must take measures to prevent conflicts of interest and at all times the collective interests of consumers must take priority over a third party economic interest. The Directive also mandates that each Member State must communicate their list of qualified entities to the European Commission for any cross-border representative actions. These lists will all be publicly available and subject to regular updates.

Putting the Spotlight on some European jurisdictions

The UK continues to navigate its way through a relatively new class action framework, adopting a hybrid approach whereby an opt-out mechanism is available for breaches of competition law and opt-in group claims exist in other practice areas. Since the introduction of the UK's class action regime under the Consumer Rights Act 2015, we have seen an upward trend of opt-out mass competition claims being submitted to the Competition Appeal Tribunal (CAT). However, questions now hang over whether that bubble might burst with a total of 15 claims being filed in 2022, in comparison to only one filed so far this year.

In the UK, an additional opportunity exists to bring claims on an opt-out basis, in front of the High Court, via Rule 19.8 (formerly 19.6) of the Civil Procedure Rules 1998 (CPR). Rule 19.8 enables a representative claimant to bring a claim on behalf of individuals who have the 'same interest'. However, this mechanism has been unsuccessful to date in delivering collective redress, with the court deciding just a couple of months ago in a claim by Andrew Prismall against Google on behalf of approximately 1.6 million patients at the Royal free London NHS Foundation Trust, that proving the damage caused to all affected parties was too much of a hurdle.

To date, we have seen 88% of 19.8 cases filed in the High Court get stopped in their tracks, with all eyes currently on the Commission Recovery Limited claim related to undisclosed commission payments made to a number of IP firms, such as Marks & Clerks.

Earlier this year, in February 2023, the High Court agreed that the claim should proceed on an opt-out basis, delivering a significant judgment for practitioners looking at the UK representative action regime.

Ireland has recently introduced class actions for the first time, with the creation of the 'Representative Actions for the Protection of the Collective Interests of Consumers Act 2022' being signed into law on 11 July 2023 - signaling Ireland as an early adopter of an opt out regime under the EU Directive. However, with third party funding continuing to be prohibited in Ireland, it remains to be seen whether Irish class actions can indeed gain any traction.

In France, class actions have seen little success since their introduction in 2014, where they were first applied to consumer and competition matters (subsequently extended to include healthcare, discrimination, data protection, environmental and housing rental disputes). In March 2023, the French National Assembly unanimously adopted a Bill to simplify the legal regime for class actions in France. So, what does the new structure look like? The Bill introduces a number of key changes to the pre-existing regime, including the creation of a generic mechanism enabling a class action to be brought regardless of legal practice area. Other measures attempt to streamline the litigation process, reduce the duration of class action cases and secure enhanced compensation to all affected parties.

The Netherlands have truly embraced their 'Collective Damages Act' (or 'WAMCA') which came into force in January 2020. Whilst still in its infancy stage, the regime is perceived to resemble the American system more closely. In 2023, we have already seen nine collective actions filed at the Dutch courts, with the majority being brought on behalf of consumers. Since the introduction of the WAMCA, we have witnessed global interest in class actions in the Netherlands, with litigation funders becoming increasingly active in this jurisdiction.

Notably, the introduction of monetary damages under the Collective Damages Act, replacing the previous bifurcated regime, now makes these claims commercially attractive for litigation financers.

The combination of these factors has led to duplicative claims being filed by different representative bodies, so we are seeing the Dutch courts now paving the way for many other jurisdictions in respect of the handling of carriage disputes.

Up until this year, Germany's key mechanism for mass claims has relied on the Model Declaratory Action (MDA), which allows qualified consumer organisations to seek a declaratory judgment on behalf of affected consumers. The regime has lacked

engagement due to the requirement for consumers to bring stand-alone claims before the German courts in order to secure any damages. Implementation of the EU Directive, therefore, represents a novel mechanism for Germany whereby consumers and businesses can take collective action to recover damages.

Whilst a class action mechanism has existed in Sweden since he Swedish Group Proceedings Act came into force in January 2003, they have yet to gain any real momentum, with only approx. 30 cases filed during the past 10 years. With third party funding having only recently been permitted, we can surely expect to see class action activity increase in Sweden.

What value does class actions bring?

A class action mechanism offers consumers and businesses a realistic opportunity to seek redress for unlawful conduct that has an impact on large numbers of affected parties. Class actions do provoke a lot of discussion and in the past, consumers and businesses have shown scepticism about making a claim. There is, however, a change afoot with trusted sources emerging to help give consumers and businesses confidence in the class action legal regime.

Class actions are truly demonstrating the ability to protect and compensate consumers. Redress comes in the form of compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid - with a foreseeable landscape in Europe whereby consumers are able to benefit from collective settlements reached by qualifying entities. The need remains to continue to inform consumers of their rights and promote the positive impact of class actions, highlighting the importance and value they bring. Recently, consumers and businesses are more willing to join class actions against companies and organisations that they were directly impacted by due to their alleged wrongdoing. Having the option to be included in mass claims enables them to make an informed decision on taking action and fighting for justice.

What next?

Speedier access to justice in collective actions would certainly be well received, and optimism mounts that we will see class action settlements on the horizon across the UK and Europe.

With an enhanced focus on putting consumer protection and access to justice at the forefront of dispute resolution, we hope to see significant change in the class action arena ahead of an evaluation of the Directive in June 2028.

GERMAN FEDERAL COURT OF JUSTICE CONFIRMS FACTUAL ASSUMPTION OF HARM IN CASE OF ANTICOMPETITIVE INFORMATION EXCHANGES AND CLARIFIES SCOPE OF LIABILITY IN MULTI-PRODUCT CARTELS

Authored by: Dr Till Schreiber (Managing Director) – CDC Cartel Damage Claims

On 5 January 2023, the German Federal Court of Justice (BGH) published an important judgment in relation to follow-on damage actions relating to the so-called German drugstore products cartel (Case KZR 42/20). In its ruling, Germany's highest civil court also confirmed a factual presumption of harm in the case of anticompetitive information exchanges. This is an important clarification as the BGH had thus far only acknowledged such factual presumption in cases of price-fixing and market-sharing practices. In addition, the BGH clarified that cartel participants are jointly and severally liable for damages caused in relation to products they do not manufacture themselves if they were aware that the anticompetitive practices extended to the other products.

German Federal Court of Justice confirms factual assumption of harm in case of anticompetitive information exchanges and clarifies scope of liability in multi-product cartels

On 5 January 2023, the German Federal Court of Justice (Bundesgerichtshof, BGH) published an important judgment in relation to follow-on damage actions relating to the so-called German drugstore products cartel (Case KZR 42/20). In its ruling, Germany's highest civil court also confirmed a factual presumption of harm in the case of anticompetitive information exchanges. This is an important clarification as the BGH had thus far only acknowledged such factual presumption in cases of price fixing and market-sharing practices. In addition, the BGH clarified that cartel participants are jointly and severally liable for damages caused in relation to products they do not manufacture themselves if they were aware that the anticompetitive practices extended to the other products.

Background

The case concerns a damage action by the insolvency administrator of the drugstore chain Schlecker against the members of the German drugstore products cartel. This cartel involved a total of 15 manufacturers of branded drugstore products, including Colgate-Palmolive, Beiersdorf, Johnson & Johnson, L'Oréal, Procter & Gamble, Sara Lee, Gillette, and Reckitt Benckiser, that – from at least 2004 to 2006 – regularly exchanged information on gross price increases and the status of negotiations with mutual retail customers within the framework of the 'Body Care, Detergents and Cleaning Agents Working Group' of the German Brand Association (Markenverband). In 2013, the German Federal Cartel Office (FCO) fined the manufacturers as well as the Brand Association a total of EUR 63 million for their anticompetitive information exchange (Case No. B11-17-06).

In a follow-on damage action, the insolvency administrator claimed that, depending on the affected product group, net prices paid by Schlecker were raised between 4.13% and 18.38% due to the cartel, resulting in a total damage claim of EUR 212.2 million plus interest.

Factual presumption of harm in case of anticompetitive information exchange

One of the most disputed questions in the civil proceedings was whether the plaintiff could rely on a factual presumption that the anticompetitive information exchange resulted in a damage. The first and the second instance courts in Frankfurt denied such factual presumption. They argued that there was no sufficient probability of damage in the case at hand, particularly as the information exchanged was highly aggregated and concerned a broad range of products. According to the Frankfurt Court of Appeal, due to the ambiguity of the information exchanged, it was not inevitable that the practice had a negative effect on price competition.

The BGH did not follow this argumentation. In an obiter dictum, it held that "an exchange between competitors of secret information on current or planned price-setting behaviour […] gives rise to the empirical principle [….] that the subsequent prices are on average higher than those that would have been formed without in the absence of the restriction of competition."

The BGH based its conclusions in particular on the findings of the FCO, which under German and EU law are binding in civil proceedings. According to the fining decision of the FCO, the subjects of the information exchange were the intended gross price increases across customers and the implementation of the announced gross price increases. In line with case law of the CJEU in Anic Partecipazioni and T-Mobile Netherlands, the BGH concluded that, as it is presumed that the undertakings participating in an anticompetitive coordination take into account the information exchanged with their competitors when determining their market conduct, an influence on the market mechanisms is also highly probable in the case of a pure exchange of information. At least in the case of disclosure of secret information, the BGH argued, it is also highly likely that the market behavior of the cartel participants does not correspond to the hypothetical market behavior that would have resulted in the absence of the restraint of competition. If such secret information concerns the current or planned price-setting behavior, the BGH argued that there is also a high probability that the competitors involved achieve a common higher price level as a result of this behavior.

The BGH therefore concluded that, "in the case of an exchange of secret information between competitors in breach of competition law, which concerns the current or planned price-setting behaviour vis-à-vis a common customer, the high probability of such an event also gives rise to the factual presumption – in the sense of a rule of experience – that the prices achieved vis-à-vis this customer […] are on average higher than those which would have been achieved in the absence of the restriction of competition."

Scope of joint and several liability

Another important part of the judgment concerns the scope of the liability of the individual cartel member for the damage caused by the anticompetitive practice. This is particularly relevant where the practice concerns multiple markets and / or products, such as toothpaste, shower gel, and dishwasher detergents in the case at hand.

The BGH reiterated that, because a cartel is a jointly committed tortious act, all cartel participants are in principle liable as joint and several debtors for the damage caused. According to the case law of the Bundesgerichtshof, individual agreements that merely substantiate a basic anticompetitive agreement do not regularly constitute independent acts. Therefore, they do not constitute multiple violations, but are rather combined into a single statutory infringement. The consequence of the existence of such a basic agreement is that the participating cartel members are jointly and severally liable for all damages caused by the entire infringement. According to the BGH, which relied in its argumentation on the findings of the FCO, the separate restrictive agreements and practices, although concerning different products and customers, constituted the realisation of a single perpetrator's will. Thus, the BGH concluded that all meetings and agreements listed in the fining decision of the FCO served to implement the basic agreement made for the regular exchange of sensitive information. It was also foreseeable for the defendant that the other cartel members would take the information exchanged into consideration when acting on the respective product markets and when entering into negotiations with Schlecker, even in relation to products the defendant did not manufacture. Therefore, the BGH held that, insofar as joint and several liability exists, the defendant's liability is not limited to the respective competitive relationships and the product areas belonging to them. Rather, the liability relates to all products affected by the respective anticompetitive practices.

Conclusion

The judgment is consistent with the overall rather claimant-friendly approach of the Bundesgerichtshof in the field of private enforcement. Germany's Supreme Court aims to provide guidance on fundamental questions of liability and substance, paving the way for a more effective compensation of victims of competition law infringements. In doing so, the BGH takes due account of the jurisprudence and legislation at the EU level, ensuring that German case law is in line with EU law. This approach makes this judgment relevant beyond Germany, particularly as questions of the presumption of harm as well as the scope of joint and several liability of cartel members for their anticompetitive practices are frequently at the heart of competition damage cases across the EU.

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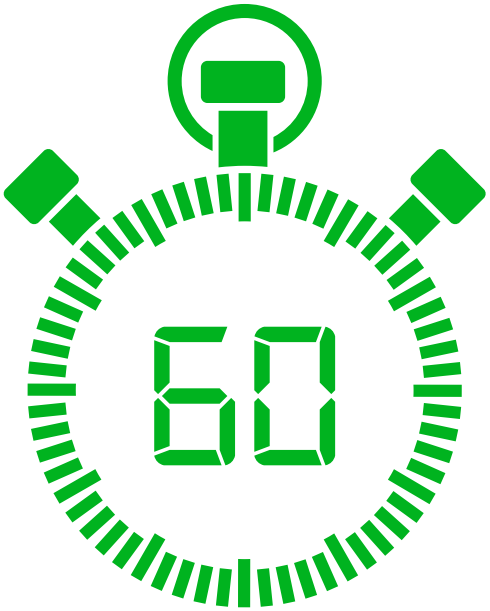


Q Imagine you no longer have to work. How would you spend your weekdays?

A What a nightmare that prospect is! If I didn't work, I would like to return to university and study Victorian and Edwardian history and literature.

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

A Understanding that competition law is both law and applied industrial economics; it is not just one or the other.

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

A Litigating and then settling a case in Kinshasa Zaire involving a massive resource development which was completely dependent on the political situation surrounding President Mobutu, in one of the most repressive states in Africa at the time.

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

A Run a collective action through to its conclusion, including the distribution of a damages award to the class.

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

A When making submissions think like the judge.

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

A Using collective proceedings to prove the primary antitrust liability, rather than just relying on a competition law agency's determination of unlawful conduct.

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

A The ability to think logically and to act rationally.

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

A David S Landes "The Wealth and Poverty of Nations". People need to understand both why wealth creation is central to a state's success (and independence) and the economic and social conditions that maximise wealth creation. This is the best single book I have read on that topic.

Q What cause are you passionate about?

A Free speech. To be human is to be able to think freely. Unless every person can speak freely it is not possible for any person to think freely.

Q Where has been your favourite holiday destination and why?

A Italy. Need anything more be said?

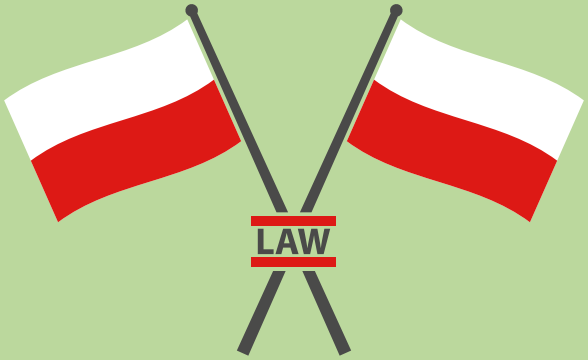
Q Dead or alive, which famous person would you most like to have dinner with, and why?

A Winston Churchill. In addition to being one of the most consequential political figures in history – and a renowned journalist and historian – he lived one of the most interesting lives of anyone, and did so during a period of dramatic political, social, economic, and technological change: The Victorian through the Second Elizabethan eras, and two global wars.

Q If you had to sing karaoke right now, which song would you pick?

A "I Will Wait" by Mumford & Sons. I am useless at singing the song, but the lyrics are quite meaningful to me.

LIMITATION OF PRIVATE ENFORCEMENT CLAIMS



POLISH SECOND INSTANCE COURT TAKES A POSITION REINFORCING PLAINTIFFS

Authored by: Marcin Trepka (Partner) and Elżbieta Buczkowska (Counsel) – Baker McKenzie

After ten years since publication of the Directive 2014/104/EU on damages for competition law infringements (the "Directive"), the Directive is indeed widely perceived in the EU as a genuine mechanism designed for compensation claims addressing damages incurred by persons affected by infringement of competition law. It is clear from the significant number of articles reporting about subsequent cases and judgments of the Court of Justice of the European Union (the "CJEU").

However, as the Directive provides for a framework for the mechanism and leaves the details to be addressed by national legislators, some of proposed measures raise doubts, frequently requiring guidance from the CJEU. This includes an issue of such a fundamental nature, which is a proper identification of the moment when the time-limit to file a claim starts to run. An issue crucial for all plaintiffs.

The Directive does not list events which trigger the running of the limitation period. In its Article 10, the Directive leaves the adoption of rules applicable to limitation periods for bringing actions for damages (including those determining when the limitation period begins to run), to Member States.

National rules must, however, meet the following condition: the limitation period shall not begin to run before the infringement of competition law has ceased and the plaintiff knows, or can reasonably be expected to know:

(1) of the behavior and the fact that it constitutes an infringement of competition law,

(2) of the fact that the infringement of competition law caused harm to it and

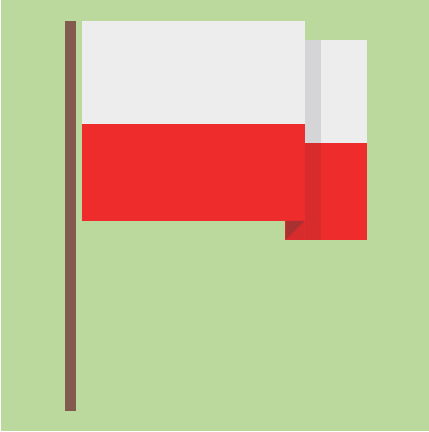
(c) the identity of the infringer.

Statute of limitation in the EU case law

The knowledge on the event causing liability which makes the limitation period to begin to run, must be determined by the court on a case by case basis. In the Volvo i DAF Trucks case (C-267/20) the parties to the domestic litigation were in dispute as to when exactly the plaintiff gained knowledge of the information necessary for bringing an action for damages - since the publication of the press release concerning the Commission decision stating the infringement of competition law or the publication in the Official Journal of the European Union of the summary of that decision. No other moment in time was proposed to the domestic court. In this context CJEU noted that it was also possible (in casu or in other cases) that the elements necessary for bringing an action for damages may have been known to the injured party well before those two publications. By this observation CJEU confirmed that the private enforcement mechanism is not dependent on the public enforcement of competition law, and the activity of the competition authority (whether European or domestic) is not determinative for the

start-off of the limitation period and the assessment of the claim.

In the Cogeco case (C-637/17), the CJEU pointed out that in the course of adjudication, national courts should consider the fact that bringing of actions for damages on account of infringements of competition law requires, in principle, a comprehensive factual and economic analysis. In this particular case, following that judgment, the Court of Appeal in Lisbon (i.e., the referring court) determined that the plaintiff's claim had expired before the issuance of the decision by the national competition authority. As reported, the said court established that the plaintiff, prior to the issuance of that decision, approached the authority regarding the infringement of competition law (the plaintiff reported a suspicion of such infringement). On this basis it was found that the injured party had sufficient knowledge to trigger the limitation period before the issuance of the decision.[1]



Statute of limitation in the Polish case law

Similar issues are currently under the debate before the Polish courts. Recently the Polish Court of Appeal decided on the issue of statute of limitations in private enforcement litigation case. Having analysed both the case law of the CJEU and the provisions of Polish law, the court found that due to characteristics and complexity of private enforcement litigation the first source of knowledge of the information necessary for bringing an action for damages is the decision of the national competition authority finding an infringement of competition law. In the court's view such conclusion stands regardless of the fact that such decision is not final and may be appealed with the courts.

Background of the case

The plaintiff sought to recover for an alleged overcharge allegedly resulting from an anti-competitive conduct of defendants. The claim is based on the allegation that defendants participated in the cartel and were sharing the market, rigging the bids and fixing prices of products sold to the plaintiff on the basis of regular, long-terms contracts. The compensation claimed is for the amount of overcharge, i.e., the difference between the prices offered to plaintiff in the period of cartel and the prices which the plaintiff claim should have been offered if the prices had not been affected by anti-competitive behaviour between the defendants.

The case was decided on the basis of statute of limitation provisions included in the Polish Civil Code (Article 4421) which echoes the conditions laid down in Article 10 of the Directive. The defendants argued that the claims were time-barred as: (i) the products affected by the change in price were tailor-made under specific instructions provided by the plaintiff and were purchased following detailed procurement procedures, (ii) thus a sudden and significant increase in the prices offered by the defendants, after which the prices returned to their previous level, was visible for the plaintiff, (iii) after the reduction in prices, the authority required the plaintiff several times to provide financial data relating to the price changes of products offered by defendants for the purpose of its investigation into potential price-fixing and the plaintiff provided data required. The defendants also indicated that the cartel decision was set aside before the judgement in question was delivered and formally does not exist – from the point of view of the private enforcement litigation.

Responding to RFI might be a source of knowledge starting the limitations period to run

The plaintiff stated that it learned about the damage and the entity obliged to redress it from the non-binding Authority's infringement decision. Before the issuance of the decision, it was not aware that the price change was unlawful or that it was an effect of an anticompetitive agreement of the defendants. The court of first instance rejected this argument and agreed with the defendants that the plaintiffs as professionals should have been monitoring the prices of products on an on-going basis and should have recognised that the price increase constituted damage once they received (and answered) the requests for information from the Authority during the investigation including detailed inquiries regarding the prices change in particular years, procurement procedures, information on the allegations against defendants and many more. In the court's view, although the plaintiffs were not parties to the investigation, they had enough information to learn about the damage and the entity obliged to redress it within the meaning of the limitation rules. Two different court of first instance decided that statute of limitations started to run from the date the plaintiffs answered the requests for information.

1 Cogeco Communications Inc v Sport TV Portugal, SA and ors, Court of Appeal final judgment, Proc no 5754/15.7T8LSB.L1; OCL 304 (PT 2020), 5 November 2020

Infringement decision is the first moment of learning on the damage

Recently, the Court of Appeal when reviewing the plaintiff's appeal disagreed with the lower tier court's view. In oral statement of reasons for granting the appeal, the court noted that due to the complexity of the private enforcement claims, a special caution must be exercised when assessing whether given knowledge might be qualified as sufficient to bring a private enforcement action. Thus, although the plaintiff obviously had knowledge about the change in prices before the issuance of the decision, and that knowledge was gained as a result of the plaintiff's analysis undertaken at the request of the authority during the investigation. Nevertheless, as the Court of Appeal observed, the Authority could discontinue the investigation and not issue a decision or issue a decision against not all parties to investigation. Therefore, it is the non-binding decision ending the investigation that allowed the plaintiff to suspect that it suffered a damage, and therefore constituted the first knowledge source under the statute of limitations requirements.

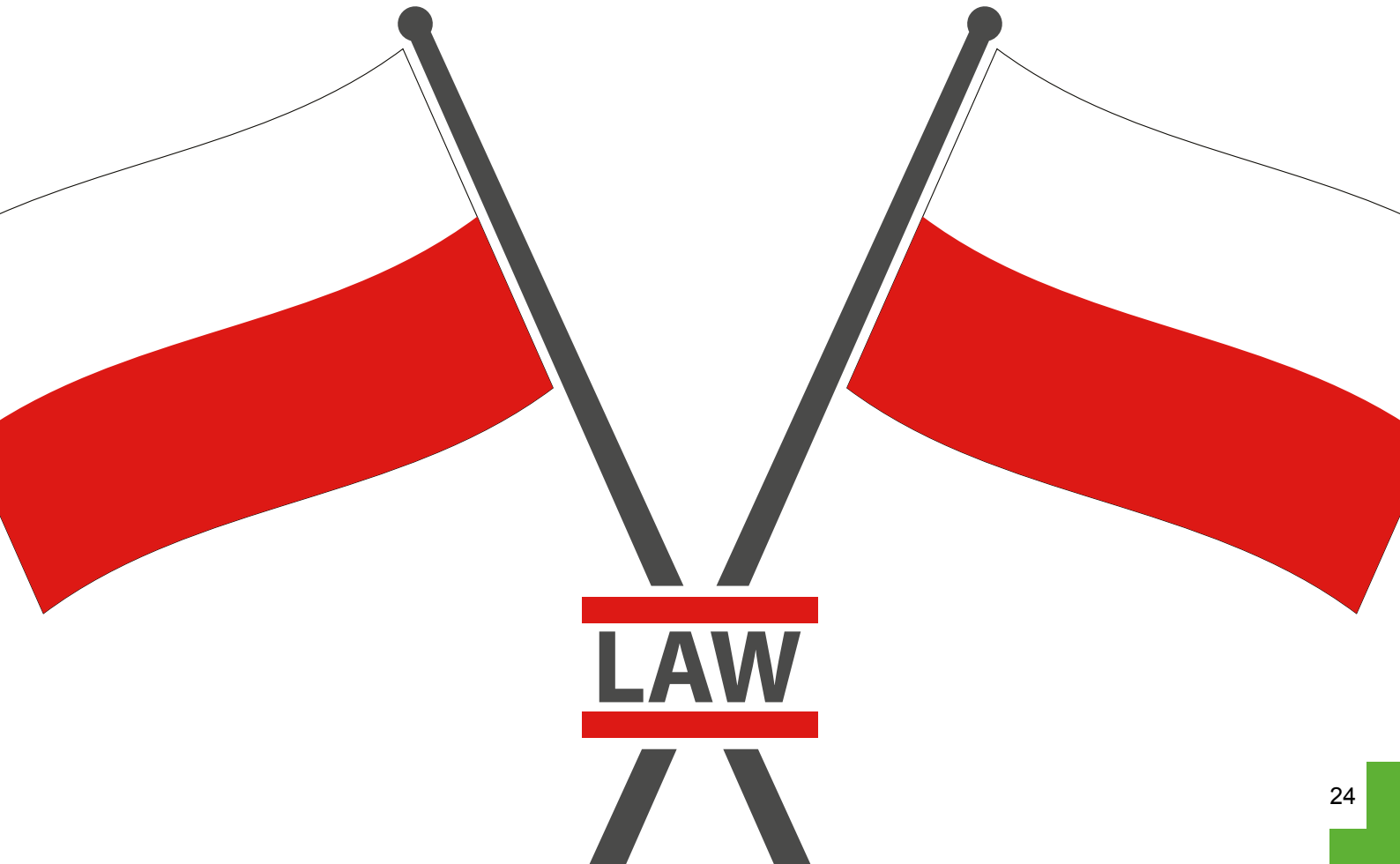
Poland as forum shopping for plaintiffs?

Both approaches to the limitation period presented by the first and the second-tier courts seems to have their foundations and arguments, and each of them can become the leading one. The existing first-instance case-law is in line with both the Directive and the directions of the CJEU, de-linking private enforcement from any activity of competition authorities allows scrutiny in conduct of the business and the plaintiff's own analysis to be taken into account in establishing the moment when the plaintiff learned about the anticompetitive behaviour causing damage and the infringer.

The recent ruling departs from the existing case law of the first-instance courts and creates a stronger, direct link between non-binding assessment of the competition authority and the scope of knowledge of the injured person sufficient for the start-off of the limitation period for the compensation claim.

This link does not appear as seamlessly fitting to the concept of stand-alone claim but undoubtedly reinforces the chances of those plaintiffs whose situation might lead to different, irreconcilable conclusions under statutory limitation rules.

The ruling is not final, however if sustained would be a first favorable for plaintiffs award granted by Polish courts. It would not mean that Poland is a generous venue for all antitrust litigation cases, however, it would be a clear signal that receiving an award is not just a theoretical concept but works in practice.



LESS HASTE MORE SPEED?

Authored by: Joseph Moore (Partner) and Emma Gittings (Associate) – Travers Smith

In many ways, the UK's CPO regime has been a highly promising experiment in the privatisation of the enforcement of competition law. Funders and lawyers have been incentivised by the significant financial rewards available to successful claimants and have, since the Merricks judgment, invested significant funds, impetus and innovative thinking into breathing life into this private enforcement regime.

However, there has been one (very visible) type of market failure – the costs incurred in carriage disputes. In the context of Trucks and FX very substantial amounts of time, money and effort have been invested in competing CPO applications - one of which will not succeed. This represents (substantial) inefficiency in the form of wasted cost and a duplication of effort. Further, it is clear that the scale of these wasted costs is a matter of concern to the judiciary. Accordingly, the task facing the CAT is a tricky one – how do they minimise the inefficiency associated with carriage disputes whilst creating the institutional framework to ensure that this (expensive) competition between competing PCRs generates real value (in terms of the efficient and effective private enforcement of competition law)?

For instance, can the CAT harness the competitive energies of the competing PCR's to develop better "blue-prints" to trial, that can be delivered at lower cost and that will lead to a more effective distribution of any settlement amount or award of aggregate damages?

In his judgment in Pollack v Google and again in the context of his case management of the claims filed by Ms Julie Hunter and Mr Robert Hammond, concerning allegations of abuse of dominance by Amazon in respect of its "Buy Box" feature, Marcus Smith J has set out his proposed solution to this - perhaps intractable - problem – a preliminary issue hearing to determine the issue of carriage, at which costs are minimised by limiting the role played by the Defendant(s).

In taking this approach, Marcus Smith J has made clear the CAT's continued desire to avoid resorting to a "first to file" regime. Although such a rule would, no doubt, be effective in reducing the cost and frequency of carriage disputes, this approach would do little to assist the efficient and effective private enforcement of competition law – in fact it may do the opposite. It seems likely that a "first to file" approach would incentivise a "race" to file and, as potential PCR (and their lawyers and funders) sacrifice quality for speed, a "race to the bottom" in terms of the investment carried out by the PCRs and their lawyers in preparing their case. Rather, whilst Marcus Smith J acknowledges in Pollack that some credit ought to

be given to the party that files first, particularly if the proposed PCR has spent time and money in framing a carefully considered standalone claim, it appears that the relative strengths of each PCR's application will be key to the determination of these carriage disputes.

However, Marcus Smith J did not provide any guidance in Pollack as to how this assessment will take place in practice.

In particular, it is not clear how this assessment of each application's relative strengths will differ from the approach taken in FX (where emphasis was placed on an assessment of "which Applicant will better serve the interests of the victims that comprise the class(es) for whom the PCRs wish to act") and in Trucks (where, in addition to case specific issues, factors such as the class definition, the proposed expert methodology and the nature of the competing PCR's funding arrangements all played a role).

Accordingly, it remains unclear whether and how the CAT intends to balance the dual challenges of minimising the costs incurred as part of carriage disputes whilst creating institutions that incentivise competition between PCRs in such a way that supports the effective and efficient determination of the claims they are seeking to bring.

Whilst the approach taken in FX and Trucks to the determination of carriage disputes would serve to support the development of such incentives, it is difficult to see how an assessment of the relative strengths of the competing CPO applications could take place without trespassing into the territory that would be relevant in the context of the certification – where the Defendant is (necessarily) afforded a bigger role. Smith J's judgment in Pollack suggests

that he is confident that the CAT can navigate this issue – dismissing Google's submissions in this regard and explaining that

"The questions that arise at each stage are different and Google can be assured that there will be no 'following wind' at the certification hearing emanating from the carriage hearing".

However, it remains to be seen how the CAT does this in practice, given the nature of the issues that seem likely to be considered in assessing the relative merits of the competing CPO applications. Notably in Canada, the jurisdiction that is so often looked to for guidance as to how to operate our own CPO regime, carriage disputes have been determined by reference to a similar touch stone to that identified in FX, and for example in the case of MacBrayne v Lifelabs Inc 202 ONSC 2674, the court conducted a reverse auction, selecting the legal team who estimated that it would be able to conduct the litigation at the lowest cost to the class.

Further, it remains to be seen whether Smith J's procedural innovation of dealing with the carriage dispute as a preliminary issue will lead to a material reduction in costs incurred prior to certification. It seems inevitable that the preliminary issue hearing on carriage will be fiercely contested (not least given the financial stakes involved for funders of each PCR and their solicitors), with both competing PCR's determined to explain the relative merits of their own application through detailed submissions resting on complex fact and expert evidence.

Needless to say, the preliminary issue hearing listed in the Autumn to determine the carriage dispute in Pollack will be watched closely by all involved in the private enforcement of competition disputes, including funders and claimant and defendant side lawyers.

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PRIVATE ENFORCEMENT IN EUROPE: A FUNDER'S PERSPECTIVE ON AN EXCITING AND EVOLVING AREA OF THE LAW

Authored by: Alexandre Lercher (Doctor of Law) – IVO Capital Partners

Private enforcement actions are undergoing significant development in Europe,[1] attracting interest from the third-party financing industry. This progress is largely attributed to the adoption of Directive 2014/104/EC on November 26, 2014 (referred to as the Damages Directive) and its implementation in various European countries. While it is evident that this directive has facilitated the implementation of private enforcement actions in Europe by reducing the evidentiary burden on plaintiffs, certain challenges persist, making the financing of these disputes difficult.

The primary objective of this directive is to ensure better compensation for private damages resulting from anti-competitive practices. To achieve this goal, the directive introduces several significant provisions.

Firstly, concerning the characterisation and proof of fault, the directive establishes an irrebuttable presumption stating that any infringement of competition law found by a national authority constitutes civil fault, thus enabling the liability of the perpetrators of the infringement to be established.

Secondly, the directive addresses the characterization of damages. It encompasses, among other things, losses incurred due to additional costs or a reduction in the price paid by the infringer, lost profits resulting from decreased sales volumes, loss of opportunity, and non-pecuniary damages.

Consequently, the directive establishes a presumption of harm in the case of a cartel, whereby the plaintiff only needs to demonstrate the extent of their damages. Specifically, concerning pass-on effects, it becomes the defendant's responsibility to demonstrate its existence and amount. Thus, there is a presumption that the additional cost is not passed on. Additionally, the directive introduces joint and several liability among co-perpetrators of the infringement and sets a limitation period of 5 years.

Despite these substantial contributions, difficulties remain, sometimes hindering the compensation of complainants and the financing of their actions. In follow-on actions, a crucial point of debate between the parties revolves around the extent of the damage suffered by the plaintiff. In the case of a cartel, the effects of the cartel lead to price increases borne by direct and indirect purchasers. To facilitate effective compensation for buyers' damages, the European legislator has placed the burden of proof regarding pass-on effects on the defendant. As mentioned earlier, the plaintiff, as the victim of a cartel, is presumed not to have transferred the additional cost generated by the cartel to the indirect purchaser. While this presumption is rebuttable, it is the defendant's responsibility to prove that the transfer occurred. However, it falls upon the plaintiff to determine the impact of the cartel on the market. According to the European Commission, this analysis is far from straightforward, and it suggests that European courts adopt an average price increase of 20%. While this

1 EU Comm., press release, Antitrust: Commission publishes report on implementation of the Damages Directive, 14 Dec. 2020.

solution may provide legal certainty, it may not be fully satisfactory in terms of compensating the plaintiff for the damages suffered.

In order to demonstrate the effects of the cartel, the plaintiff is required to provide detailed economic studies. These studies should attempt to establish counterfactual scenarios, which, in the majority of cases, would help determine the effects of the cartel on the target market. Unfortunately, we have seen cases where judicial experts were not able to establish those counterfactual scenarios.[2]

In order to minimise this risk, a funder conducts its own economic studies challenging the work provided by the claimant's expert, that we complete with economic studies done by economic experts. After the analysis, we will assess if the risk is worth taking considering the overall costs of pursuing the claim to completion.

Another recurring challenge in such cases concerns the limitation period. Here again, in order to decide if we will fund the case or not, we conduct an internal analysis of the merits of the case and especially regarding on the question of limitation period.

Our internal analysis is completed with an analysis by specialised lawyers in the relevant field.

Although the directive has introduced a 5-year limitation period, determining its starting point poses difficulties. For instance, consider a scenario where members of a cartel are convicted by a national competition authority, but all except one member of the cartel decide to challenge the decision before the national courts. As the authority's decision is not yet final, the starting point of the limitation period must be postponed until the national court issues its decision. However, does this suspension of the limitation period also apply to the cartel member who did not appeal the decision?

Since cartel members are jointly and severally liable for the damage caused by the cartel, does the member against whom the action might be time-barred remain jointly and severally liable for the convictions pronounced against the other cartel members?

We can only hope that national courts will soon rule on these issues, keeping in mind the spirit of the directive, which aims to promote compensation for market damages through the principle of effectiveness.

2 See CA Paris, pôle 5, ch. 4, 23 juin 2021, n° 17/04101, SARL Doux aliments vs SA Cie financière et de participations Roullier, SAS Timab industries.

CLASS ACTIONS IN THE CAT: WHERE ARE WE NOW AND WHAT NEXT?

Authored by: Matthew Lo (Director) – Exton Advisors

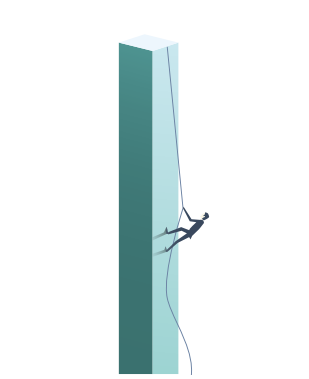
Introduction

The consumer redress landscape in England and Wales underwent a seismic change in 2015 with the enactment of the Consumer Rights Act 2015 and the introduction of a new and innovative group action regime for competition matters in the Competition Appeal Tribunal ("CAT"). Driven by a desire for increased access to justice, particularly for consumers who may have suffered relatively limited harm individually, this regime allowed collective proceedings to be brought by a certified class representative on either an "opt-in" or "opt-out" basis.

While initial uptake was slow, a sea-change came with the Supreme Court's decision in Mastercard v Merricks [2020] UKSC 51, which set the bar for class certification at a lower level than had previously been applied by the CAT. Since then, fuelled by the growing availability of litigation funding, there has been a rapid rise in the number of class actions being brought (and certified) in the CAT, with record numbers of filings in both 2021 (seven) and 2022 (fifteen).

However, due to a range of converging market forces including macro-economic conditions impacting the litigation funders on whose capital group claims invariably rely, there are now signs that the pace may be beginning to slow. At the time of writing, just one new class action has been filed in the CAT in 2023.

In this article, we consider the challenges that might be leading to this slow-down and look forward to what might be coming next.



Challenges in the market

It is an unfortunate reality that group claims in the CAT are extremely expensive to run. Expert costs are often very high due to the complex economic analysis which is generally required in order to quantify the harm to the class by reference to a counterfactual scenario. In addition, the CAT remains a developing jurisdiction and a whole host of its decisions have been subject to appeals, leading to further cost and delay.

Proposed class representatives ("PCRs") are also required to overcome a number of particular hurdles in order to obtain a Collective Proceedings Order ("CPO"). In particular, the CAT has (rightly) scrutinised the adequacy of the PCR's funding and ATE insurance arrangements, which has tended to further inflate the level of cover (and therefore funding) being sought by PCRs looking to optimise prospects of success at the CPO stage.

Rising costs is a trend that appears to be continuing unabated – it is now commonplace to see capital requirements in excess of £20 million for a group claim in the CAT. Moreover, the same factors which tend

to inflate cost also tend to drive delay.

As such, from a funder's perspective, as ever larger capital sums are being committed in the CAT, they are also being tied up for longer periods of time relative to other investment opportunities.

What is more, as we continue to await the first successful resolution of a group claim following a full trial on liability in the CAT, there continues to be a lack of clarity as to precisely how and when a funder can be paid its return in the event of a success. On one view, pursuant to s.47C(6) of the Competition Act 1998, funders can only be paid their success fee out of any damages remaining once distribution to class members has been completed.

Relatedly, after the initial surge of funded claims following the Supreme Court's decision in Merricks, funders who have been active in this market are increasingly concerned about concentration risk (i.e. the risk of over-committing capital to cases of a certain sort). Certain funders may now have more limited freedom under their own financing arrangements to commit further capital into the CAT. Others have simply begun to approach these cases with even greater caution.

Against this backdrop, funders continue to be mindful of the ever-looming possibility of a carriage dispute, where two law firms effectively compete to represent the class and the CAT is required to choose between them. This is a real concern for funders because "backing the losing horse" in a carriage dispute results in a total loss of the potentially significant capital invested up to that stage.

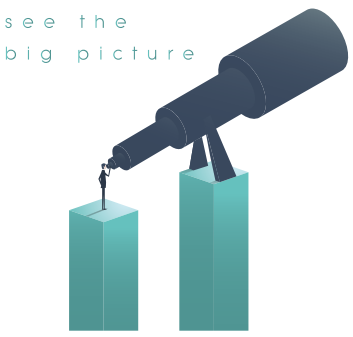
The CAT's latest decision in Pollack v Google [2023] CAT 34 is helpful in this regard because (in a departure from its previous carriage decisions in the FX and Trucks cases), it suggests that, in future, carriage disputes should normally be determined prior to (rather than at) the CPO hearing. Funders will nevertheless continue to be wary of carriage risk and indeed the possibility of further disruption caused by an appeal of a carriage decision which is based on the novel approach taken in Pollack.

More broadly, in recent decisions the CAT has reminded the market that it is prepared to refuse to grant a CPO where an appropriate "blueprint to trial" has not be laid out. The application in a £2.3 billion case against Meta Platforms Inc. to bring an opt-out collective action was rejected in February 2023 because of inadequacies in the pleading of the abuses alleged and the proposed methodology for quantification of loss. Similarly, in June 2023 the CAT declined to grant CPOs in applications brought against Mastercard and Visa because of issues regarding the identification of potential class members and a failure to advance an appropriate methodology.

Uncertainty in the funding market has only been deepened by the recent Supreme Court hearing in PACCAR, following which a potentially game changing decision on whether litigation funding agreements constitute unenforceable Damages-Based Agreements under the relevant legislation is eagerly anticipated. Although this decision will be of huge significance to the market generally, in the CAT context it is likely only relevant so far as opt-in actions are concerned because Damages-Based Agreements in relation to opt-out proceedings are already unenforceable under s.47C(8) of the Competition Act 1998.

Stepping back, most funders are yet to see any return on the very significant capital that has been deployed in the CAT in recent years. In a wider economic environment where persistent high inflation is leading to rising interest rates, which in turn make it more difficult for litigation funders to raise the significant capital required to fund CAT cases, the funding that is the lifeblood of these claims is facing unprecedented levels of perceived risk.

Should this lead to a freezing up of the funding market for CAT claims, the legislator's original intention of facilitating access to justice for aggrieved consumers and holding large corporations to account for their wrongdoing could be undermined.



What next?

Notwithstanding these rising headwinds, the prospect of spectacular returns continues to make group claims in the CAT an enticing investment opportunity for funders. This much is clear from the fact that so many have been funded to-date. Jurisprudence in the CAT demonstrates a real judicial will to make the collective redress regime work effectively for consumers and necessarily also those funding their claims. As the recent carriage decision in Pollack shows, procedural issues should improve as the jurisdiction continues to mature.

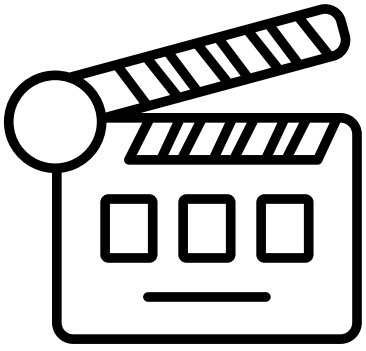
However, with the funding market seemingly tightening, we are now at a delicate point in the CAT's development. There is a sense that, with so much having been invested already, the market is waiting to see how these cases will be resolved over the coming years.

It will be interesting to see whether, rather than standing still, the market looks to innovate to better suit its changing needs. After all, the factors we identify above all place additional strain on a funder's capital, its projected IRR and, ultimately, its appetite to take a significant binary risk on a case. In those circumstances, demand for more effective risk sharing solutions is high and, as the funding market collectively pauses to draw breath, the key players now need to work together to facilitate the evolution that is required.

QUANTIFYING ANTITRUST DAMAGES BEFORE GERMAN COURTS – CURRENT STATE OF PLAY

Authored by: Dr. Henner Schläfke (Partner) and Sebastian Wrobel, LL.M (Senior Associate) - Noerr

Antitrust damages proceedings continue to be on the rise in Germany. After an initial slow start in the 2010s, most legal questions around the appropriate form of claims, standing to sue and damages per se have been resolved through judgments by the Federal Court of Justice (Bun-desgerichtshof – "FCJ"). In recent years, attention has therefore focussed more on the quantification of damages. The FCJ has set certain boundaries on the issue, but the lower instance courts are currently filling the blank space in between in different ways.



Setting the procedural scene

The legal framework for determining antitrust damages is provided by Section 287 (1) of the German Civil Code of Procedure (Zivilprozessordnung) which lowers the evidentiary threshold for quantifying damages. This provision allows for an estimate of damages by the court which must hold that there is (only) an overwhelming probability, but not full certainty, of the size of damages estimated after taking into account all the relevant facts put forward by the parties.

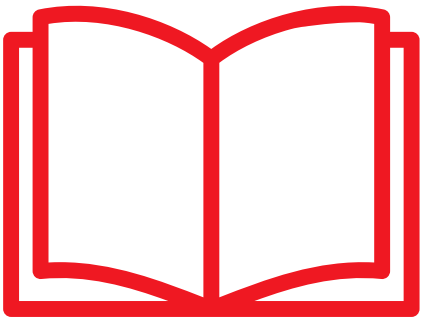
The FCJ has filled this provision, which is by design merely procedural, with life for antitrust damages proceedings in a series of landmark judgments over the last few years. Although the FCJ assumes a rule of experience that cartels lead to higher prices, it leaves it to the lower courts to determine the counterfactual price. The FCJ recognises that estimating antitrust damages is always a question of hypotheticals. There is no way to determine the exact counterfactual price which would have been set without the antitrust infringement. Even economic expert reports can only come close to the counterfactual reality but in no way define it precisely.

Given that even reports by economic experts are only an approximation of the counterfactual scenario, the FCJ gives a lot of leeway to the individual judge(s) to determine the eventual overcharge themselves.

The FCJ essentially holds that economic experts can help judges in their decision making process, but the final decision must be based on the judge(s) finding an overwhelming probability.

Before setting out the courts' response to the FCJ's case law, we will briefly explain the role of experts and expert reports under German procedural law. The admissible means of evidence in German civil proceedings are enumerated in the Code of Civil Procedure. One of the means of evidence is an expert report or testimony commissioned by the court (Sections 402 et seq. of the Code of

Civil Procedure). These court appointed experts are distinct from party experts. The court does not take a party expert report and designate it a court appointed expert report. The latter must come from an expert not previously involved in the proceedings.



A Tale of Two Approaches

The German courts have responded differently to the leeway given to them by the FCJ. Two different approaches have emerged among the lower instance courts. Note that the FCJ as the court of highest instance has not ruled on either of these approaches; the first cases are pending. Therefore, the solutions currently found by the courts have been neither approved nor re-jected by the FCJ yet.

First approach: Appoint an expert

Most courts follow the first approach and appoint economic experts regardless of the FCJ's invitation to estimate damages themselves. The process may be long and strenuous, but with a qualified expert, not much can be held against the process itself.

The reasons for appointing an expert were summarised in a judgment by Munich Regional Court I in the Trucks case.[1]

According to Munich Regional Court I, estimating antitrust damages requires an assessment of complex economic relationships and developments for which an ex-pert report is indispensable.

In particular, Munich Regional Court I refers to regression analyses, which – in its opinion – are a widely recognised tool for estimating antitrust damages and which require a court appointed expert. Consequently, Munich Regional Court, Stuttgart Regional Court and others have appointed experts in several Trucks proceedings and these expert processes are still ongoing. The same is true for other cases as well.

In addition, two courts have already finished a court appointed expert process. Cologne Regional Court and Mannheim Regional Court issued judgments in the sugar cartel case based on reports by court-appointed experts, albeit with different outcomes. Cologne Regional Court rejected the claim ruling that there were no damages per se based on the court appointed ex-pert report.[2] In contrast, Mannheim Regional Court awarded damages to claimants in multiple proceedings based on an overcharge estimate of approx. 2 % based on a court appointed expert report. According to reporting on the case, Mannheim Regional Court held two multi-day sessions of oral hearings with the court-appointed expert and the parties from multiple proceedings.[3] In the course of these oral hearings, the court appointed experts adjusted their initial overcharge es-timate of up to 10% down to the eventual value.

Second approach: Estimate damages

Fewer courts utilise the second approach and take up the FCJ's invitation by to estimate damages themselves without appointing economic experts. In recent years, however, there have been some instances of courts estimating damages.

The first such judgment was issued by Dortmund Regional Court in a case concerning the rail cartel. The court estimated an overcharge of 15 % based on a provision in claimant's terms and conditions for one of the purchases concerned. The provision stipulated that in the case of infringements of competition law, flat rate damages of 15 % applied.

Dortmund Regional Court considered this provision to be a suitable basis for estimating damages because a party infringing competition law would only do so if the overcharge accrued from such an infringement at least compensated for the potential contractual damages.

Celle Higher Regional Court based its estimate in a case regarding wood based panels on a simple during / after analysis of prices in an industry publication (EUWID). The simple comparison of prices during and after the infringement led the court to

1 Munich Regional Court I, judgment of 19/2/2021 – 37 O 10526/17, NZKart 2021, 245.

2 Cologne Regional Court, judgments of 9/10/2020 – 33 O 69/15 and 33 O 33/17.

3 https://www.juve.de/verfahren/zuckerkartell-muss-schadensersatz-an-nestle-und-mu eller-zahlen/.
The judgment has now been published: https://www.landesrecht-bw.de/bsbw/document/KORE203072023.

estimate an overcharge of 12 %.[4]

Berlin Regional Court estimated damages in proceedings concerning merchant fees in the German debit card payment system electronic cash.[5] In this case, Berlin Regional Court estimated an overcharge of up to approx. 25 % based on a claimant specific during/after analysis of the applicable merchant fees. In making this estimate, Berlin Regional Court also considered the duration of the "after" period and possible necessary adjustments to the fees observed "after" to ensure comparability to the "during" period. Notably, in some judgments in this set of cases Berlin Regional Court concluded that claimants suffered no damages because the claimant specific during/after analysis based on the same methodology did not yield an overcharge.[6] This shows that an estimate of damages does not necessarily have to result in an overcharge.

In a case concerning the rail cartel, another chamber of Berlin Regional Court estimated overcharges ranging from 6.74 % to 24.38 % depending on the product concerned.[7] This estimate was based on regression analyses in the expert report submitted by the claimant. However, Berlin Regional Court held that the overcharges estimated in the claimant's expert report were too high and not in line with meta studies dealing with antitrust damages. Berlin Regional Court therefore reduced the overcharges from the claimant report by a uniform percentage to derive its damages estimate.

Recently, Berlin Regional Court also issued a judgment in the Trucks case estimating damages. The judgment has not yet been published but according to reports the court found an overcharge of 5%.[8]

Notably, the few judgments estimating damages without a court-appointed expert have been issued by an even smaller number of "activist" courts. It remains to be seen whether the path taken by Dortmund Regional Court, Celle Higher Regional Court and Berlin Regional Court will become more frequently used or whether the courts of appeal and the FCJ will set clearer boundaries and request that courts more regularly attain the help of a court appointed expert to assess the intricate economic and econometric issues of the case at hand.

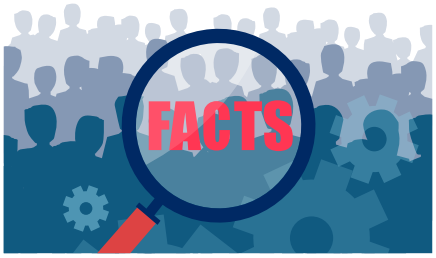
4 Celle Higher Regional Court, judgment of 12/8/2021 – 12 U120/16 (Kart), NZKart 2021, 581.
5 Berlin Regional Court, judgment of 2/3/2023 – 16 O 21/19 Kart, NZKart 2023, 235.
6 https://www.juve.de/verfahren/pyrrhussieg-fuer-klaeger-aber-am-ende-gewinnt-die-bank/.
7 Berlin Regional Court, judgment of 7/2/2023 – 61 O 2/23 Kart, NZKart 2023, 178.
8 https://www.juve.de/verfahren/lg-berlin-wagt-als-erstes-gericht-schadensschaetzung-im-lkw-kartell/.

WHAT IS THE REQUIREMENT FOR 'METHODOLOGY' IN UK COMPETITION COLLECTIVE PROCEEDINGS?

Authored by: Jeremy Robinson (Partner) and Temidayo Alade (Associate) – Harcus Parker

In Merricks,[1] the Supreme Court ("SC") clarified the law on certification of competition collective proceedings before the Competition Appeal Tribunal (the "CAT" or "Tribunal"). This allowed several collective proceedings to be certified, beginning with Merricks itself.[2] The SC did, however, uphold the CAT's gatekeeper role in assessing proposed collective actions.

The CAT considers that collective actions must have a credible, plausible, and sufficient methodology - a blueprint to trial, without which it will refuse certification: Gormsen v Meta[3] and Commercial and Interregional Cards Limited I & II v Mastercard & Visa.[4] The CAT has indicated, but not finitely defined, what a methodology must include. This article outlines the current approach.



Methodology must be grounded in facts of the particular case

The CAT's approach begins with the decision of the Canadian Supreme Court in Pro Sys or Microsoft[5] where that court emphasised that a methodology cannot be purely theoretical or hypothetical but must be grounded in the particular facts of the case. The SC in Merricks adopted this approach for UK competition collective proceedings, setting the threshold of adequacy as a "realistic prospect," for calculating loss on a class-wide and individual basis. So that, if an anticompetitive infringement is later established at the trial of the common issues, there is a means by which to demonstrate that infringement is common to a class.[6] The CAT's more recent approach[7] expands the requirement of methodology to questions of infringement and exemption, even pre-certification and before the defendants' case has been pleaded, which raises the question whether this maintains a fair balance between the rights of claimants and defendants?

The CAT considers that a proper methodology minimises the related risks of the (i) parties throwing away unnecessary costs; (ii) the Tribunal's time being wasted; and (iii) a matter coming to trial in an unmanageable form.[8] Merricks also established that there must be some evidence that data is available to support the application of

1 Mastercard Incorporated and others v Walter Hugh Merricks CBE [2020] UKSC 51
2 Walter Hugh Merricks CBE v Mastercard Incorporated & Ors [2021] CAT 28
3 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others [2023] CAT 10
4 Commercial and Interregional Card Claims I Limited v Mastercard Incorporated & Others [2023] CAT 38
5 Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57
6 Mastercard v Merricks CBE [2020] pg 52
7 Meta and CICC v Mastercard/ Visa
8 Gormsen v Meta [2023] CAT 10

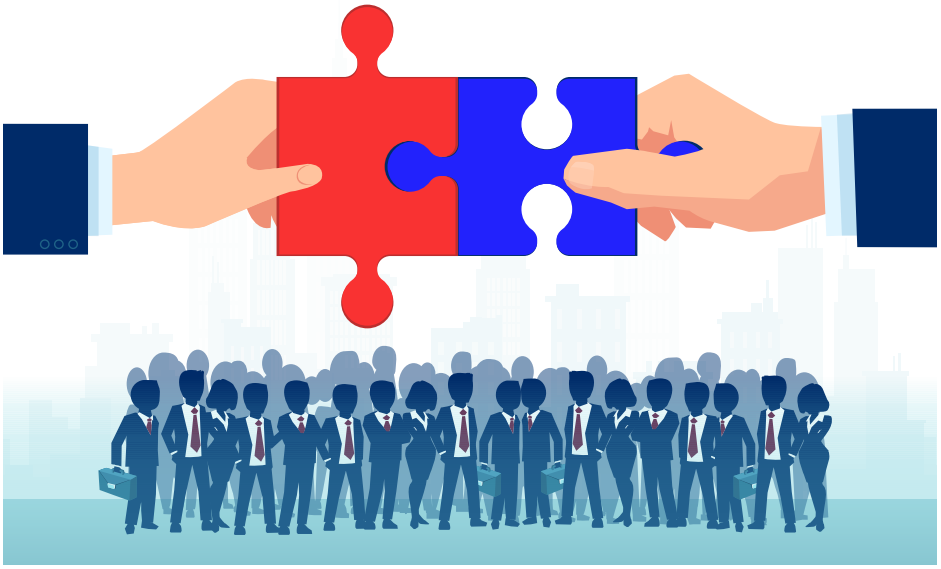
the methodology: a methodology may not be created outside of the facts of the case.[9]

Regarding the legal test for methodologies, Merricks noted that the "some basis in fact test"[10] set out in Microsoft was too strict for UK competition collective proceedings, favouring instead a "minimum evidentiary basis" – a concept which itself is evolving.

What is an adequate methodology?

If the law requires a methodology, when is that methodology adequate? There must be a level below which a prospective class action cannot be certified, and above which it ought to be certified. According to the CAT in Road Haulage Association,[11] methodologies must be designed to address actual and possible issues that may come up during the hearing of the claim. A methodology must be clear and detailed, even if there is still debate about its applicability to facts. Perfection is not required; nor must every permutation be accounted for. That would be contrary to the principle of effectiveness for damages claims and instead, the court will make use of the "broad axe" or "broad brush" approach that will allow the court to come to determine conclusions based on the evidence made available.[12] It is fundamental to competition damages cases that a precise quantification of the claimants' losses is not required and, in such cases, as in others, damages can be estimated using the "broad axe". Usually, English courts take a pragmatic view of the degree of certainty with which damages must be pleaded and proved and this is a point the CAT has emphasised.[13]

A methodology need not answer all questions, it just needs to answer sufficient questions to show a blueprint for the identified issues. The Tribunal may ask experts questions to clarify and explore the sensitivity of a methodology; however, a CPO application is not the place for a full evaluation of the merit and robustness of an expert methodology.[14] Notwithstanding, a methodology canvassed by experts must be consistent or in any event, if a methodology is reversed, it must be unequivocally stated before the tribunal.



Methodology need establish only primary case at individual or group of claimants level

Road Haulage Association shows that a methodology must be able to demonstrate how the primary case of the claim applies to each person or group of persons within a claim. The methodology need not establish that every class member suffered the anticompetitive infringement or its effect; it simply needs to be credible or plausible enough to show how the primary case of the claim at each claimant or group of claimants level will be established. Impliedly, if a different methodology will be required to establish the primary case of the claim amongst a different group of claimants within the same claim, such different methodology must be presented to the Tribunal.

Presentation of counterfactuals

It appears that PCRs must also identify counterfactuals.[15] Counterfactuals are used to explain what the market would have been like absent the anticompetitive infringement. From Meta,[16] it appears that a counterfactual may be based on an assumption of what the market would be like absent the anticompetitive conduct and even an informed guess may suffice.[17] Typically, defendants will argue against this counterfactual based on causation[18] i.e., the alleged harmful conduct of the defendant is not the basis of loss (if any) suffered by the claimants. The defendants will often challenge a counterfactual: see Sainsbury,[19] and Dune[20] but that does not absolve the claimants from advancing it. This raises the question: how robust must a

9 Mastercard v Merricks pg 52 - 53
10 Mastercard v Merricks pg 22
11 Road Haulage Association Limited v Man SE and Others [2022] CAT 25
12 Ibid pg. 52
13 Gutmann v London & Southeastern Railway Limited [2021] CAT 31
14 Ibid pg. 64
15 Dune Group Limited and others v Mastercard and others [2021] CAT 35
16 Meta pg. 43
17 Gutmann pg. 65
18 Guttmann pg. 59
19 Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others [2020] UKSC 24
20 Dune Group Limited and others v Mastercard and others [2021] CAT 35.

counterfactual be? This question arose in Meta however, it has not yet been definitively answered.

Building a counterfactual will usually combine legal and expert (e.g., economic or accounting) work. According to the Tribunal, a methodology must set out and reference in their report the legal basis for contending that a particular loss is caused by the infringement that has been pleaded in the claimant's pleadings.

In short, the expert report must demonstrate that there is a nexus between

(1) the exact breach of duty alleged.

(2) (ii) the framing of the counterfactual needed to put the claimant class in the position they would have been in had the tort i.e., anticompetitive infringement not been committed, and

(3) the method of quantifying the damage sustained as a result. The Tribunal expects these considerations to be set out.[21]

Claimant responsibility in its pleadings

In many applications for the certification of collective proceedings, PCRs rely heavily on disclosure by the defendant to establish their case. This is a controversial but valid method of presenting a case at the Tribunal however, the Tribunal considers that experts need to explain how such disclosure will be needed, conducted, and made relevant to the PCRs' case. Merely mentioning the need for disclosure will not suffice, and the Tribunal described Meta's reliance on disclosure as the "St Augustine Fallacy". Yet, the strength of the methodology plays a lesser part: even weak methodologies and, in terms of outcome, uncertain methodologies will not be killed off[22] but, the parties and the Tribunal need a well demonstrated blueprint. Absent a very good reason, collective proceedings may not proceed unless and until that blueprint has been provided.

From the discussions above, it is pertinent to mention that in certification proceedings, the burden of proof does not lie exclusively on the PCRs: the proposed defendants will on some points bear the burden of proof. But, where at the certification stage a proposed defendant makes clear that a certain point will be taken and argued, then, the PCR must show its methodology for addressing the point, in advance of having a fully worked-out answer.[23] The Tribunal in Meta calls this the "not my problem fallacy"[24] and it is worth pointing out that this involves a certain degree of "cards on the table" from the proposed defendants. If the defendants claim there are methodological problems, they need to articulate these at certification, and not after, where they will be unwelcome surprises. This imposes a duty of candour on the part of the proposed defendants to clearly articulate their reservations on the claimant's case, to enable the claimants to respond. This, of course, is a sensitive point given the need to strike a balance between defendants and claimants.

The Tribunal will need to provide more guidance on this point but in any event, both claimants and defendants must fulfil this responsibility in consideration of the overriding objective of access to justice for small claimants which the collective proceedings process is designed to protect.

Conclusion

The CAT collective proceedings regime will continue to develop. Of particular importance will be how the Tribunal balances access to justice for claimants and protecting the rights of defence of defendants. The CAT's focus on methodology and counterfactuals lies at the heart of its developing gatekeeper function in collective proceedings.

Whilst a regime in evolution inevitably creates some uncertainty or unpredictability for all parties, one may look forward to a more settled future where collective proceedings become adequately predictable, fulfilling the statutory purpose of facilitating access to justice, whilst protecting the rights of the defence.

21 Meta pg. 43
22 Meta pg. 29
23 Meta pg. 29
24 Meta pg. 29

TRUCKS LITIGATION A ROADMAP FOR CHANGE?

Authored by: Emma Birch (Director) – Fieldfisher

The Consumer Rights Act 2015[1] implanted a new regime which permitted consumers to bring individual actions to enforce private law rights in competition matters. The CRA also provided a new mechanism for collective redress by establishing the collective proceedings regime and allowing both opt-in and opt-out actions to be brought by an approved class representative.

Despite the opportunities created by the broadening of consumer redress actions, the Regime as a whole got off to a sluggish start. However, less than a year into the new Regime, the European Commission issued its Decision[2] against a number of truck manufacturers for various breaches of competition law. Cue the commencement of the Trucks litigation[3] and the largest scale litigation ever bought in the UK.

The operation of the CPO Regime was subject to much scrutiny and discussion as the profession grappled with new procedural requirements. However, alongside these new issues, the sheer scale of the Trucks Litigation gave rise to an old and familiar procedural problem – how to effectively manage volume litigation?

Necessity being the mother of creation, the CAT recognised that a step-change was needed and adopted a robust and innovative approach to case management in order to resolve as many of the Trucks claims as possible, in the most efficient way possible. After all, it cannot be right for the CAT to hear the same arguments on the same issues 10, 20 or 40 times over; it would be a gross misuse of resources to do so.

A new direction

That being said, the Trucks Litigation has played a large part in establishing and developing case management in the CAT.

First came the bulk transfer-in of claims from the High Court with the CAT assuming jurisdiction over all Trucks claims.

Next came the selection of the First Wave Claims in which certain cases were grouped together to be tried in what constituted 3 test cases. Other claims, known as the Second Wave Claims were stayed pending resolution of the First Wave. The CAT also permitted an intervention in one of the First Wave Claims by a third claimant group, in order to give evidence from a different level of the supply-chain.

Across the Trucks Litigation the CAT has deployed traditional case management tools effectively; it has encouraged the use of confidentiality rings in order to allow the sharing of information and/or evidence and has

1 Entry into force on 1 October 2015
2 EC Settlement Decision Case 39824 - Trucks
3 Cases brought for follow-on damages arising from the settlement decision of the European Commission against the manufacturers of trucks for

permitted joint experts on single issues.

Of course such a collaborative approach to case management is not solely down to the innovation of the CAT. The reality is that parties on all sides and at every level of the Trucks Litigation have played their part in developing effective and pragmatic case management strategies. It would also be misleading to suggest that the CAT has preoccupied itself with the Trucks Litigation to the exclusion of all else. Mastercard and Interchange continue on and the Interchange Litigation has seen the first use of the new Umbrella Proceedings Order (UPO).[4] The key point is that the CAT has embraced a new way of working and been ready to flex the Regime to suit the needs of the litigation.

No doubt such flexibility and close inter-party collaboration will be expected as the Second Wave Claims progress. The hope, presumably, is that a large proportion of the claims will settle once the CAT has determined some headline points.

Traffic merges ahead

Given the ever-present drive towards a more cost-friendly system of justice in the civil courts, combined with a packed diary of cases in the CAT, reducing the time that proceedings are taking to resolve must be fast climbing up the priority list.

Trucks 1[5] highlighted the significant amount of work (and cost) required to litigate such complex claims to trial. In its judgment in that claim, the CAT criticised various aspects of the way the case was litigated; no doubt the CAT will be looking to the parties to make efficiencies across the Second Wave Claims. A UPO is one tool in its armoury, selective grouping of claims to be tried together on an "all-issues basis" is another. Perhaps we will yet see further procedural developments. Compulsory mediation is an idea often flirted with in the civil courts, even if it has to date been rejected. Could it function better in follow-on damages actions where test cases may have determined key legal principles?

The future of the Trucks Litigation will unfold over the next year but one thing is for certain, the operation of the Regime and case management more generally have progressed significantly since 2015. Looking beyond Trucks, how can the CAT capitalise on the advancements in case management made through and alongside the Trucks Litigation?

Destination unknown?

Recent years have seen a swathe of CPO applications being issued in the CAT, some more imaginatively framed than others, in order to bring them with the CAT's jurisdiction.

The current trend towards mass claims and the particular laser-sighted focus on claims against Big Tech, have led to what many in the profession have termed "the commercialisation of consumer rights". The scale and number of claims currently stacked up in the CAT's diary is so great as to make proactive and robust case management inevitable.

Marcus Smith J has also recently indicated a willingness to expand the jurisdiction of the CAT should there be any extension of the collective redress regime in the UK.

In the event that the UK Government does broaden the CPO Regime, then the CAT may certainly be the best-positioned of all courts to assume jurisdiction.

The CAT has the advantage over the High Court that it is comparatively much smaller with a much narrower jurisdiction (even accounting for an expansion). Consumer claims are by their nature volume claims. A centralised court with specialist judges and a narrower jurisdiction is far more likely to have the enhanced oversight required to implement the proactive and robust case management required in volume litigation.

Moreover, the CAT's experience in implementing the CPO Regime and collectively managing the Trucks Litigation has built it an impressive CV.

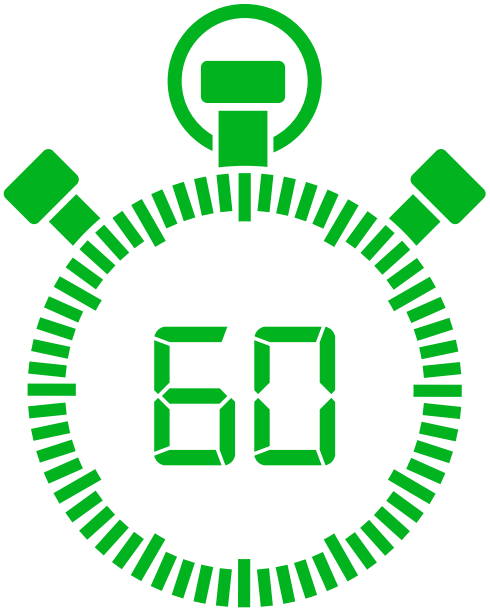
After a slow and spluttering start, the Regime seems now to be racing ahead towards an expansive future.

4 Practice Direction 2/2022 Umbrella Proceedings

5 Case nos: 1284/5/7/18 (T) and 1290/5/7/18 (T) Royal Mail v DAF and BT v DAF

60-SECONDS WITH:

MICHELLE CLARK
PARTNER
WILLKIE FARR & GALLAGHER



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

A I love horse riding, so would spend all day doing that!

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

A Being able to deploy a range of skills to get the best result for our clients – balancing big picture goals with attention to detail and the precision which is required in litigation, negotiation, advocacy, deep understanding of economics and how they traverse with legal issues, judgment, ability to work in a team – you need to be good at all of these to get a result.

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

A I was part of a team instructed by the Ministry of Labour of Qatar to review their laws ahead of the World Cup (including employment laws and human rights) and to produce an independent report setting out recommendations on how the laws should be updated to meet global standards (i.e. abolition of the kafala system which binds migrants workers to employers). It was a privilege and a real test to our integrity.

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

A To take an appeal to the Supreme Court – been close a couple of times, it will happen one day!

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

A I am fortunate to have some fantastically supportive mentors around me at Willkie. I think the best piece of advice I have had is nothing ventured, nothing gained - it is very true.

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

A We are seeing a significant increase in work from the collective actions regime – both defence side and claimant side. It is fascinating that post-Brexit the UK is probably going to forge ahead with developing the outer boundaries of some types of categories of abuse of dominance. We are also seeing an increase in competition issues which intersect with data protection, and I expect that trend will continue for some time.

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

A Attention to detail in litigation is extremely important – it's often that one comment in one document out of thousands that can flip the stakes of a case. Being the person to find that and understand its importance should not be underestimated.

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

A I read Verity by Colleen Hoover recently and would thoroughly recommend it if you like books like Gone Girl and Rebecca.

Q What cause are you passionate about?

A Global warming and the lack of prioritisation this is getting.

Q Where has been your favourite holiday destination and why?

A South Africa - I went there a few years ago and spent a while in Kruger on safari then travelled east to west ending up in Cape Town, where we jumped into a cage that was thrown over a boat to see great white sharks (on reflection, I have no idea what I was thinking in doing that!). It's an incredibly beautiful country and I will be going back for sure.

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

A Kevin Bridges – so much of what he says reminds me of Glasgow in the 1990's and I love his humour.

Q If you had to sing karaoke right now, which song would you pick?

A I don't have a repertoire, but do recall singing New York, New York the last time I did this…

GEN AI AND THE MEDIA SECTOR: A LEGAL AND POLICY AGENDA

Authored by: Dr. Konstantina Bania (Partner and Senior Lecturer) - Geradin Partners and Brunel Law School

Generative AI (or "GenAI") is undoubtedly becoming the buzz term of the year. GenAI is expected to create opportunities for most sectors of the economy, leading to faster and perhaps more accurate decision-making.

However, amid the excitement about new tools that have emerged, the Italian data protection authority announced in March[1] that it was temporarily blocking ChatGPT. In May, the US Senate held a hearing[2] on the oversight of AI where the need for regulation was extensively discussed whereas the EU institutions have started the so-called trilogue negotiations that will lead to the adoption of the AI Act[3].

In the media sector, GenAI can be used to improve the production and management of content. Yet, it is also expected to pose significant challenges, including infringements of copyright protected works, and the spread of illegal, harmful and manipulative content, such as disinformation and deepfakes.

Policymakers and regulators have a unique opportunity to influence how GenAI will evolve, for there are many lessons we have learnt in recent years. For starters, we know that we should not wait for decades before regulating a technology (or application thereof) that is being adopted at a fast pace. In that regard, the EU AI Act, which will introduce rules to increase transparency and ensure accountability in this area, is a first step in the right direction. Moreover, because most of the problems that arise from GenAI are neither new nor specific to GenAI, the solution may not necessarily consist in adopting new rules, but in sensibly revising and extending the scope of existing rules.

This article discusses the concerns that GenAI may raise and what the existing (or soon-to-be adopted) rules can do to address them, focusing on the challenges facing the media sector.

Competition and fairness concerns

A key factor determining the economic impact of GenAI is who owns data and models. A recent report[4] on the opportunities and risks of foundation models notes that "pushing the frontier of foundation models has thus far primarily been the purview of large corporate entities. As a result,

> ***"the ownership of data and models are often highly centralised, leading to market concentration"***

1 https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9870847
2 https://www.youtube.com/watch?v=TO0J2Yw7usM
3 https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-regulation-on-artificial-intelligence
4 https://crfm.stanford.edu/assets/report.pdf

Statements that were made at the recent US Senate hearing on the oversight of AI[5] also identify market concentration as a key issue.

In fact, OpenAI's CEO Sam Altman stated: "I think there will be many people that develop models. What's happening in the open source community is amazing, but there will be a relatively small number of providers that can make models at the cutting edge"

The question that may arise in the not-so-distant future is whether anticompetitive practices, such as bundling search or social networks with GenAI tools, would (or should) be addressed through the enforcement of competition law or the Digital Markets Act ("DMA").

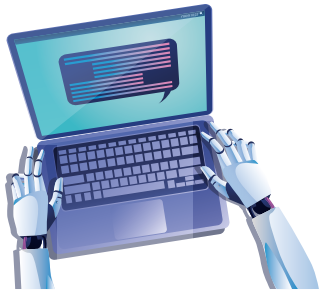
Competition law may be capable of remedying the anti-competitive conduct of dominant GenAI providers. However, competition law applies ex post and any remedies imposed would only apply to the GenAI provider concerned. In other words, a competition decision does not set an industry-wide standard.

The DMA (and its equivalents) could also address practices in which GenAI providers may engage, ranging from self-preferencing to tying.

But, could GenAI services qualify as one of the "core platform services" that are regulated by the DMA? For instance, there may be GenAI services that could meet the criteria defining search engines. This definition relies on a search engine's function to index words and phrases, crawling websites; however, GenAI tools work differently. For example, ChatGPT is a natural processing model that is limited to the information it was trained on and does not have access to the internet. Similarly, GenAI services do not seem to fit squarely within the definition of "virtual assistants", for they do not (always) provide access to other services, which is a requirement for virtual assistants to fall under the DMA.

However, the fact that GenAI services may not qualify as core platform services (for now) does not bring them outside the scope of the DMA.

This is because certain DMA obligations apply to "other services" offered by a gatekeeper, including core platform services for which an entity has not been designated as a gatekeeper and services that do not qualify as core platform services. For example, the prohibition whereby gatekeepers should not combine data unless users grant their (GDPR-compliant) consent applies to all services provided by the gatekeeper. This is expected to raise many questions in terms of (a) the datasets on which a foundation model can be trained, and (b) whether, even if users consent to data combination, compliance with the GDPR is even possible in such cases.



Protection of intellectual property rights ("IPRs")

It is widely accepted that inadequate IPR protection chills content creativity and innovation. Moreover, considering how digital technologies (including AI) have been used to spread disinformation, it is ever more important to protect the right of (trusted) media service providers to authorise the use of (and be fairly remunerated for) their works.

In the EU, the DSM Copyright Directive[6] establishes rules for text and data mining (TDM). TDM is defined as "any automated analysis technique aimed at analysing text and data in digital format having the purpose of generating information including, but not limited to, patterns, trends and correlations". Article 4 of the Directive establishes the so-called TDM exception, which allows GenAI tools to access large amounts of data to train the model concerned and generate "new" content subject to two conditions.

First, the copyright-protected work must be lawfully accessible (e.g., when it has been made available to the public online). Second, the copyright holder must not have expressly reserved the extraction of text and data. This essentially establishes an opt-out mechanism whereby the copyright owner expressly reserves TDM for itself. Accordingly, media organisations should unequivocally opt out of the TDM exception to protect their content against unauthorised use by GenAI providers. However, this imposes a regulatory burden on the copyright holder. As GenAI providers will hold significant bargaining power, one may wonder whether the regulatory burden should be carried by e.g., a local newspaper publisher (and not a tech giant).

When it comes to detecting copyright infringements, the European Parliament's ("EP") report on the AI Act proposal[7] recommends, for example, that foundation models document and make publicly available a sufficiently detailed summary of the use of training data protected under copyright law (Article 28b(4)(c)). This provision would essentially enable copyright holders, including newspaper publishers, to identify instances where their content has been used without prior authorisation and to claim damages. However, the final text should clarify the meaning and scope of this obligation, as it is unclear whether the GenAI providers should list all (or most) of the copyrighted material they use, or whether they would only be required to provide a high-level description thereof. In the latter case, it is doubted whether the AI Act will protect copyright holders in a meaningful manner.

Brand attribution

Media organisations are also concerned (see, for instance, here and here) about the fact that GenAI tools extract more proprietary content from the original sources, often providing little or no attribution. Lack of attribution prevents creating brand awareness and establishing a direct relationship with audiences, which may exacerbate

5 https://www.youtube.com/watch?v=fP5YdyjTfG0

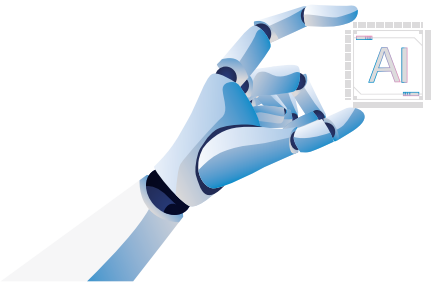
6 https://eur-lex.europa.eu/eli/dir/2019/790/oj

7 https://88fe0205-a2ac-4895-ba2e-a260b7a7b33d.usrfiles.com/ugd/88fe02_d1ead08db89d4b259552ec545415b1d4.pdf

the trend toward zero-click. What is more, it fails to address the spread of disinformation.

The EU Platform-to-Business Regulation[8] ("P2B") addresses lack of attribution, requiring providers of online intermediation services to "ensure that the identity of the business user providing the goods or services on the online intermediation services is clearly visible".

"Online intermediation services" are services that meet the following requirements: (a) they constitute "information society services" within the meaning of EU law (i.e., services normally (but not necessarily) provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services); (b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; and (c) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers. Though GenAI services could qualify as "information society services", it is entirely unclear whether they fulfil the other two criteria set by the P2B Regulation. Concretely, they do not seem to perform an intermediation function similar to app stores and e-commerce marketplaces (which the P2B Regulation currently covers) nor is there always a contractual relationship between businesses and the providers of GenAI services.



Transparency and accountability

In the EU, the main instruments that (will) establish rules seeking to promote transparency and accountability in the digital economy are the Digital Services Act ("DSA")[9] and the AI Act.

The DSA establishes obligations to mitigate the spread of illegal content. For example, platforms falling under the scope of the DSA[10] must establish a notice and action mechanism under which users may flag potentially illegal content, and offer out-of-court dispute settlement to facilitate disputes over content. Additionally, very large online platforms must establish a compliance system, consisting, inter alia, of proactive risk management strategies and independent audits, including identifying and reporting on systemic risks, such as risks to democracy and media pluralism.

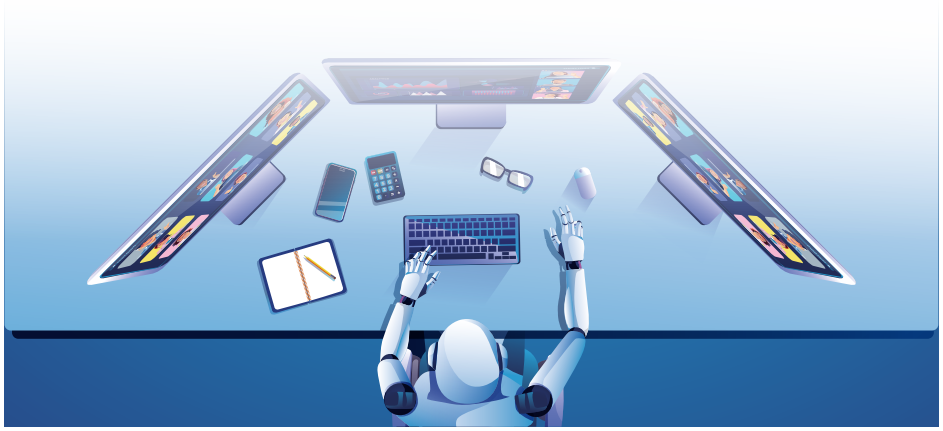
Clearly, all the above provisions are relevant to GenAI tools. But, it is doubted whether GenAI providers largely fall under the DSA. In particular, GenAI tools do not seem to qualify as "hosting services"[11] because the information those tools store is not provided by the recipient of the service (it is provided by the GenAI tool itself). This definitional issue means that the content GenAI providers offer is left up to Member States to regulate. However, national rules vary considerably across the EU and (more importantly) do not establish the same obligations as the DSA to ensure the expeditious removal of illegal, including manipulative, content.

The main change proposed by the EP's report on the AI Act[12] in this area is the establishment of rules specific to foundation models. For example, under Article 28b(4), providers of foundation models used in GenAI systems should, inter alia, "train, and where applicable, design and develop the foundation model in such a way as to ensure adequate safeguards against the generation of content in breach of Union law in line with the generally-acknowledged state of the art, and without prejudice to fundamental rights, including the freedom of expression" (emphasis added).

This provision seems to establish a content moderation requirement, although it is currently unclear what GenAI providers are expected to do to comply with this obligation. This is an important point that should be clarified in the final text of the AI Act because, as explained above, the content moderation obligations established in the DSA do not apply to GenAI providers. The AI Act should fill that gap.

Conclusions

GenAI creates many opportunities for the media sector that may reduce the costs of producing and distributing content and facilitate personalisation. However, GenAI also poses a threat to copyright protection, brand attribution, and accountability. The EU legal framework may address some of these challenges provided that the specificities of GenAI are taken into account in the design and implementation of these rules.



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DMCC: ACCELERATING PRO-COMPETITIVE INTERVENTIONS

Authored by: Schellion Horn (Partner), Edward Millinger (Assistant Manager) and Tom Middleton (Senior Manager) – Grant Thornton

The long-awaited Digital Markets, Competition and Consumers (DMCC) Bill has now been implemented, bringing wide-ranging reforms to competition and consumer protection laws for digital markets.[1] As nascent technologies and big tech companies continue to shape digital markets, this article will consider how key components of the DMCC impact interactions between publishers and digital platforms leading to changes in the nature of competition interventions and disputes resolution and the evolution of economists' and legal professionals' roles in digital market cases.

What is the Digital Markets Bill?

The DMCC bill has three areas of focus:

1. Consumer protection: the CMA can determine when consumer law has been broken, rather than taking individual cases to court. Presently, the enforcement of consumer protection law is a court-based regime based on the Enterprise Act 2002. Under the DMCC, the CMA can issue fines up to 10% of global turnover.

2. Digital markets: an enhanced, targeted direct enforcement regime monitored and deployed by the CMA's Digital Markets Unit (DMU) to set rules preventing firms it has designated as having Strategic Market Status (SMS) from using power to restrict digital innovation or market access. This legislation puts the DMU on statutory footing.

3. Competition: the CMA's investigative and enforcement powers are strengthened by new merger control thresholds in the updated competition framework, enabling faster and more flexible investigations into vertical and conglomerate mergers. This responds to so-called "killer acquisitions" in the digital market whereby incumbents acquire future competitive targets which currently generate limited competitive pressure, thereby eliminating potential threats.

The overarching aim is to empower faster and more wide-reaching action to safeguard the interests of consumers, whilst creating a level playing field, by limiting the market power of big tech firms. The bill is currently making its way through Parliament but is unlikely to come into force until late 2024. The DMU, initiated in 2021, will continue to operate in shadow form.

The DMCC comes amidst several ongoing competition investigations in digital markets. Google faces legal cases on behalf of publishers regarding digital advertising practices in both the UK[2] and Europe[3], whilst Amazon is being investigated by the CMA regarding handling of non-public third-party seller data amongst other issues[4] and Apple is being investigated for imposing "unfair or anti-competitive terms" on developers using the App

1 For clarity, a digital market involves the provision of a digital service or digital content via digital media such as the internet.
2 https://www.catribunal.org.uk/sites/cat/files/2023-05/2023.05.10_1582_Charles_Arthur_Order%20%28Service%20out%20the%20jurisdiction%29_Final.pdf
3 https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3207
4 Investigation into Amazon's Marketplace - GOV.UK (www.gov.uk)

Store, restricting user choice and raising prices.[5]

How is the bill likely to change the nature of competition interventions?

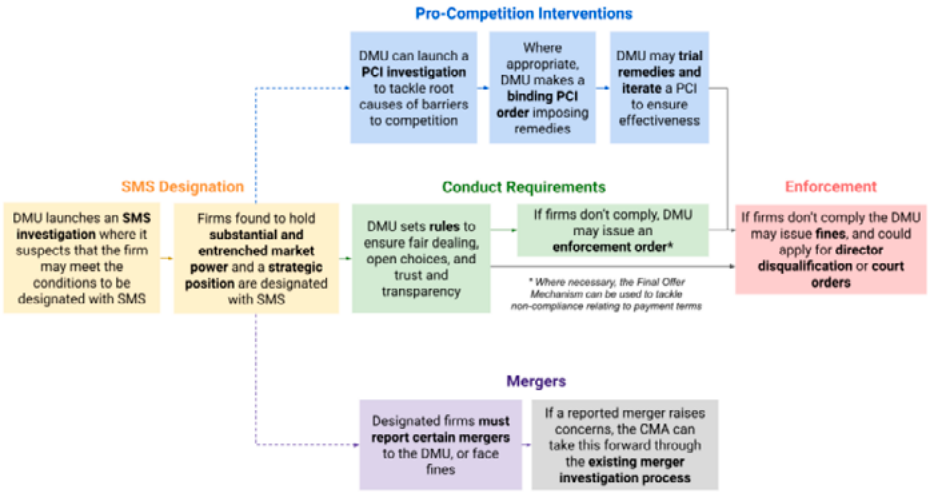
The DMCC focuses on firms designated as having SMS in respect of a digital activity linked to the UK. SMS is based on whether firms possess "substantial and entrenched market power", "a position of strategic significance", and have an annual turnover exceeding £25 billion globally, or £1 billion in the UK.[6]

The CMA has wide powers to impose firm-specific conduct requirements which regulate each SMS firm's behaviour in relation to designated activities. The DMCC sets out "permitted" conduct requirements based on principles of fair trading, open choices, trust and transparency.

SMS firms are obliged to notify of "qualifying acquisitions" prior to closing, in which acquired stakes exceed 15%, unless the transaction value is below £25 million.

Additionally, the DMU will have the ability to impose pro-competitive interventions (PCIs) that address the root causes of market power in the designated activity; more specifically, the DMU may issue pro-competition orders ranging from behavioural remedies to structural and operational separation of business units within a firm. How these instruments may be operationalised in practice is considered in Figure 1.

Figure 1: How the DMCC Bill regime could work in practice



Source: A new pro-competition regime for digital markets: policy summary briefing (publishing.service.gov.uk)

One element of the digital economy that may be impacted by the DMCC is the "multi-sided and complex"[7] online publishing sector which the CMA has previously observed to generate "material harms" to consumers.[8] Online publishers in the UK are reliant on firms such as Google and Facebook for traffic to their content. In February 2020, 96% and 87% of the total UK internet population accessed a Google or Facebook site respectively; in 2019, Facebook served 400-500 billion personalised ads- an average of 50-60 ads per user per hour- and Google served 400-500 billion search ads.[9] In its online platforms and digital advertising market study, the CMA finds that both exercise "significant market power": Google has more than a 90% share of the UK search advertising market, whilst Facebook has over 50% of the display advertising market.[10]

Publishers' reliance means many suffer from an imbalance of bargaining power when dealing with platforms who increasingly control the distribution of publishers' content online; consequently, platforms may be able to impose terms without consultation or negotiation.

Platforms can exercise their dominance due to network effects, given that they operate in a market exhibiting two-sided characteristics whereby platforms are involved in both the sale and purchase of advertising space on published content.

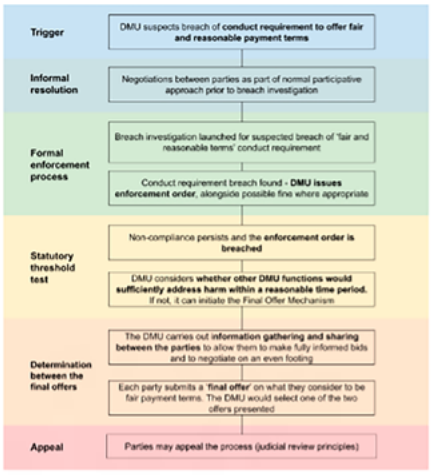
To maximise profits, publishers wish to have at their disposal the widest possible pool of advertisers (and vice versa), though this generates competition concerns such as anticompetitive pricing to maintain market share and profits.

This market structure may hinder online publishers from engaging in actions against such companies, for fear of biting the hand that feeds them. Therefore, it is important that firms can negotiate credibly for positive market outcomes.

To enable productive pricing negotiations, the DMCC proposes a toolkit, which first establishes conduct requirements on SMS firms, enforcement orders where these are not complied with and eventually a Final Offer Mechanism (FOM, shown in context in Figure 1 above, and in more detail in Figure 2 below). The FOM acts as a backstop whereupon an SMS firm in persistent breach of an enforcement order made relating to the conduct requirement to trade on fair and reasonable terms, compelling them to do so. The uncertainty associated with this backstop has the potential to impact both publisher and platform behaviour at all stages in the negotiating process.

5 CMA investigates Apple over suspected anti-competitive behaviour - GOV.UK (www.gov.uk)
6 Digital Markets, Competition and Consumers Bill (parliament.uk)
7 digital-markets-reforms-impact-assessment-annex-1.pdf (publishing.service.gov.uk)
8 digital-markets-reforms-impact-assessment-annex-1.pdf (publishing.service.gov.uk)
9 Final report (publishing.service.gov.uk)
10 Final report (publishing.service.gov.uk)

Figure 2: Overview of Final Offer Mechanism



Source: Final offer mechanism: policy summary briefing (publishing.service.gov.uk)

This is a novel application of last-resort arbitration to digital markets as the CMA chooses a winner rather than determining its own position based on both sides' inputs. Therefore, the threat of deploying the FOM will likely incentivise good-faith negotiations on digital advertising between platforms and publishers, addressing the information asymmetry the market currently faces.

The role of economists and legal professionals

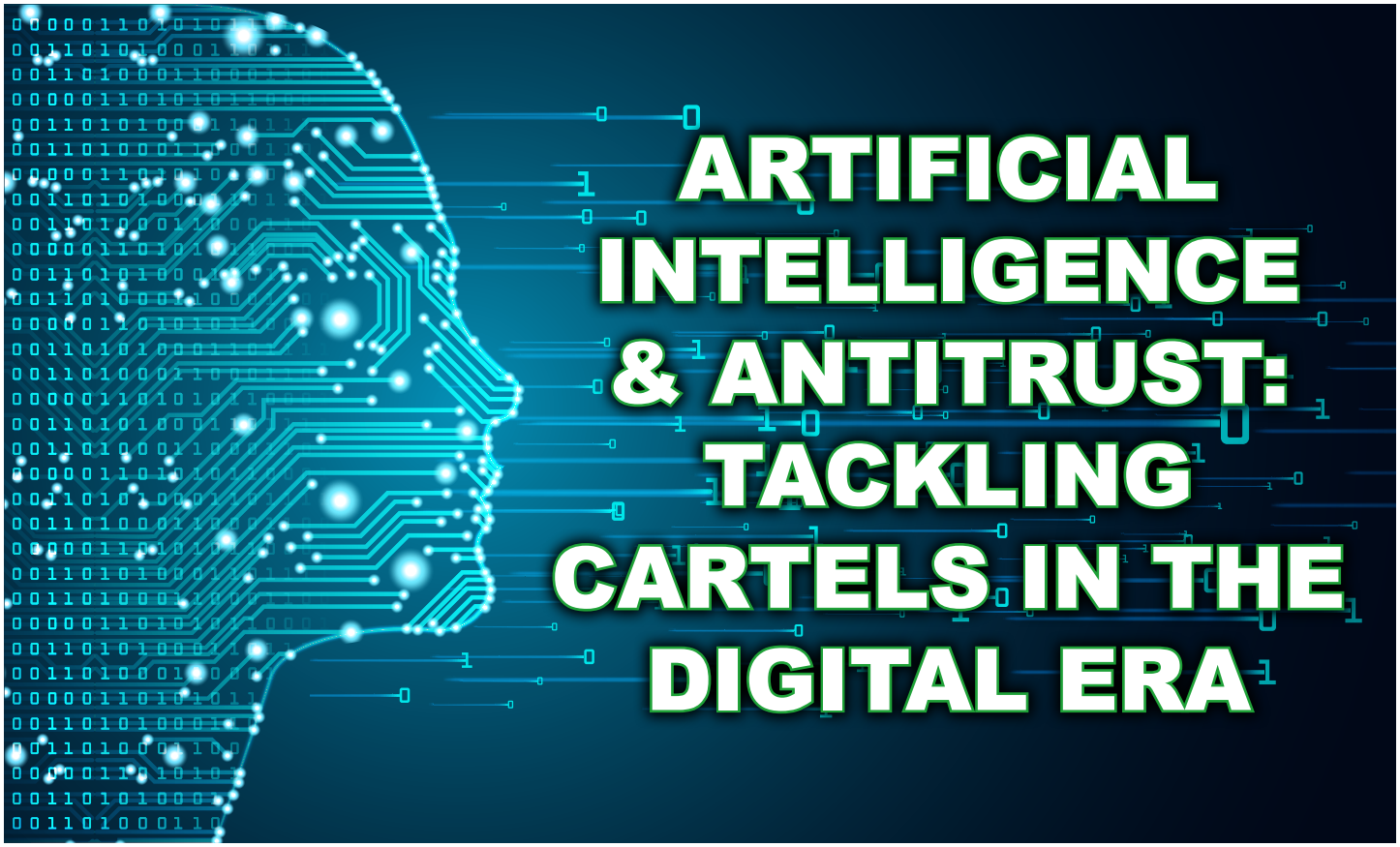
The DMCC creates an entirely new regulatory landscape, in effect forging an unprecedented new relationship between platforms and stakeholders. The specific operation of the FOM within the UK is yet to be tested, but a similar mechanism in Australia has seen over 30 commercial agreements established between digital platforms and a cross section of news businesses within the first year of operation alone. [11]

Emerging evidence would suggest an entirely new scope of work for both lawyers and economists, who will play a pivotal role in defining the roles and responsibilities of players within a market and the value they are likely to create.

From a legal perspective, parties are likely to require assistance either demonstrating breaches or compliance with either conduct requirements or enforcement orders. These negotiations between platforms and users warrant informed expertise.

From an economics perspective, the final offer mechanism places the burden on parties to quantify key inputs into value, whereas typically this is a role fulfilled by the regulator. This could entail econometric analysis or analysis of fair pricing principles used elsewhere in examples such as regulated monopolies. Equally the ambition to create an equal footing means parties would be expected to call upon analytical support when appraising data shared with them as part of the information gathering process.

11 https://treasury.gov.au/sites/default/files/2022-11/p2022-343549.pdf



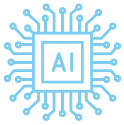
ARTIFICIAL INTELLIGENCE & ANTITRUST: TACKLING CARTELS IN THE DIGITAL ERA

Authored by: Diana Martínez Cobaleda (Senior Associate) – Linklaters

Introduction

As technology continues to evolve at an unprecedented pace, the revolutionary potential of artificial intelligence (AI) has invaded every aspect of our lives, reshaping industries, economies, and societies. Regulators around the world are facing complex challenges and antitrust authorities have been working since the disruption of AI in reassessing their strategies in this new digital landscape.

While these technological developments have the ability to promote innovation and economic growth, they also raise legitimate concerns about potential anticompetitive practices. Antitrust specialists have been actively researching and discussing these issues, focusing on two key elements: (i) AI has broaden the circumstances under which known forms of anti-competitive conduct can occur; and (ii) the use of AI can bring newer, more sophisticated forms of anti-competitive behaviour, such as novel methods of price discrimination.



Does AI facilitate collusion between competitors?

The use of algorithms, big data and machine learning has unquestionably empowered businesses to streamline production, improve product quality, and boost efficiency, all of which have positively impacted consumers.

However, the drawbacks of these developments lie in their potential to restrict competition in certain markets. For instance, algorithms can be used -and are used- to reduce the unpredictability nature of competitors' pricing strategies. Monitoring algorithms, as the name suggests, are designed to track and control competitors' actions, looking for behavioural patterns and trying to find potential deviations.

Although this increase in market transparency is not, per se, contrary to competition law, it unintentionally encourages collusive behaviour, since AI can be used to monitor cartel implementation, facilitate collusion and make retaliatory actions smoother.

Moreover, algorithms allow for coordination between companies in dynamic markets where it was previously difficult to do so because of ongoing fluctuations in supply and demand, and where it would have been necessary for the members of a cartel to frequently meet and renegotiate the terms of the agreement. By contrast, the emergence of AI has given rise to tools like parallel pricing algorithms that permit coordination between competitors without direct communication (sometimes, without any communication at all), leaving no traces and making antitrust authorities' task significantly more challenging. As a result, collusion has become more stable, durable, and versatile.

New forms of anticompetitive behaviours: price discrimination

Another potential behaviour that has garnered significant attention is the use of algorithms and machine learning for price discrimination. Although there are situations in which personalised pricing can reflect the specific features of a customised product and improve efficiency, in other cases, it can be used to take advantage of clients and cause them to enter into exploitative transactions.

Thanks to machine-learning algorithms, price discrimination without genuine justification becomes much easier to implement, leading to varying prices for the same product or service among different consumers, depending, for example, on their perceived willingness to pay. AI could be used, for instance, to identify vulnerable consumers or those with limited choices and set higher prices for them.

In any case, it appears that when it comes to the application of AI and machine-learning, we still don't fully understand the nature of harm resulting from tailored pricing.

Self-learning algorithms and liability

One intriguing question that has emerged among experts is the extent to which a company can be held liable for an antitrust infringement that has been committed by an automated tool. In particular, since recent developments in AI involve algorithms with automatic self-learning capabilities, which enable autonomous learning and have a huge predictive capacity, being able to learn from other competitors' past and present behaviour in the market. The foregoing may result in tacit and automatic collusion between competitors without direct programming from the companies themselves.

The European Commission seems to have taken a clear position on this matter, considering that, in such cases, companies should be held liable for antitrust infringements even when they are carried out by automated systems.

To mitigate this risk, businesses are recommended to take proactive measures, such as training their own staff to monitor the machine.

Consumers and antitrust authorities should also take advantage of AI

Like any revolutionary advancement, AI presents a double-edged sword in the antitrust world. On one hand, as it has been explained, some businesses may take advantage of it to engage in anticompetitive practices, thereby posing significant challenges for competition authorities.

On the other hand, it should not be disregarded that consumers can harness the power of AI to their advantage by, for instance, making use of it to compare offers, access valuable information, and make more informed purchasing decisions. By enabling greater transparency and access to diverse market options, AI empowers consumers to escape from exploitative practices.

Simultaneously, antitrust authorities have a unique opportunity to leverage AI as a powerful ally in their battle against cartels and other antitrust conducts. Equipped with AI-driven tools, regulators can strengthen cartel detection capabilities, uncover hidden patterns, and analyse immense volumes of data that would otherwise be impossible to handle without AI.

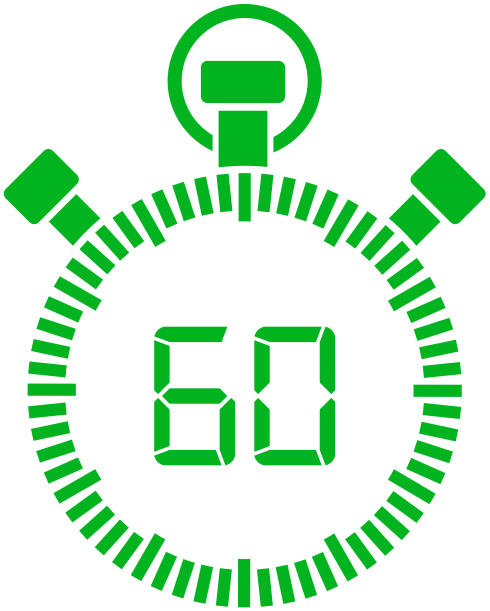
This potential has been impressively demonstrated in Spain, where the Catalan Competition Authority (the ACCO) developed an AI tool (ERICCA) to detect potentially collusive behaviour in public tenders. ERICCA operates by performing a behavioural screening, analysing companies' behaviours in various tenders based on a vast database compiled by the ACCO from publicly available information on tenders since 2010. With machine learning facilitating continuous improvement, ERICCA creates clusters of companies exhibiting potentially suspicious behaviour. The tool then applies additional layers to confirm or dismiss suspicions, considering factors like repeated participation of the same companies in different tenders, consistent winners or losers, and price discrepancies between offers. While it does not provide conclusive evidence, the results provided by ERICCA constitute well-founded indications of potential anticompetitive behaviour.

Hence, it is important for market stakeholders to embrace AI responsibly as it can foster a more equitable and competitive business landscape while affording regulators the means to enforce antitrust laws with greater efficacy and precision.

By recognising the multifaceted nature of AI's impact, we can turn towards a future where innovation thrives, consumers are empowered, and competition remains the lifeblood of a thriving marketplace.

60-SECONDS WITH:

TOM SMITH
PARTNER
GERADIN PARTNERS



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

A I recently watched The Great British Throw Down with my kids, and now really want to learn to make pottery, but definitely don't have time at the moment.

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

A Learning how your client's business and its industry operates as quickly as possible. Competition lawyers get a grace period of about a week before they're basically expected to know everything about an industry.

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

A Agreeing to go into business with someone I'd never met in person and set up a new law firm in less than a week. I left my safe and fulfilling civil service job to compete with dozens of well-established law firms with entrenched client relationships in the London legal market, and it was the best decision I ever made.

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

A We hope that Geradin Partners will be such a presence in competition law that people would expect to see us involved in many of the most complex cases in Europe.

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

A When talking to the senior management of clients, talk in bullet points and don't be afraid to tell them what they should do.

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

A The UK's Digital Markets, Competition and Consumers Bill, the EU's Digital Markets Act, and other countries' equivalent regimes, are ground-breaking attempts to regulate a fast-moving industry. They could improve digital markets to the benefit of society, and they represent a huge business opportunity for competition lawyers like me who have been closely involved in designing them.

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

A You can get a long way by being someone that everyone loves working with. Anyone can develop that skill, even if they aren't the world's best lawyer. It means being enthusiastic, completely reliable, clear in your oral and written communications, and pausing to consider the other person's point of view.

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

A I think a lot about Life and Fate, by Vasily Grossman. It is an epic tale that follows different members of an extended family as they negotiate their way through the horrors of the mid-20th century Soviet Union. It is not the most beautifully-written book I've ever read – I'm guessing it never had the benefit of a good editor considering it was confiscated by the authorities and then later smuggled out of the Soviet Union – but it reveals something really fundamental about human beings.

Q What cause are you passionate about?

A I am Vice-Chair and Treasurer of Citizens Advice Southwark, which is a charity that offers free and impartial advice to local residents on issues such as housing, debt and benefits. The Southwark branch has been around since 1939 and last year helped around 20,000 people to solve nearly 50,000 issues.

Q Where has been your favourite holiday destination and why?

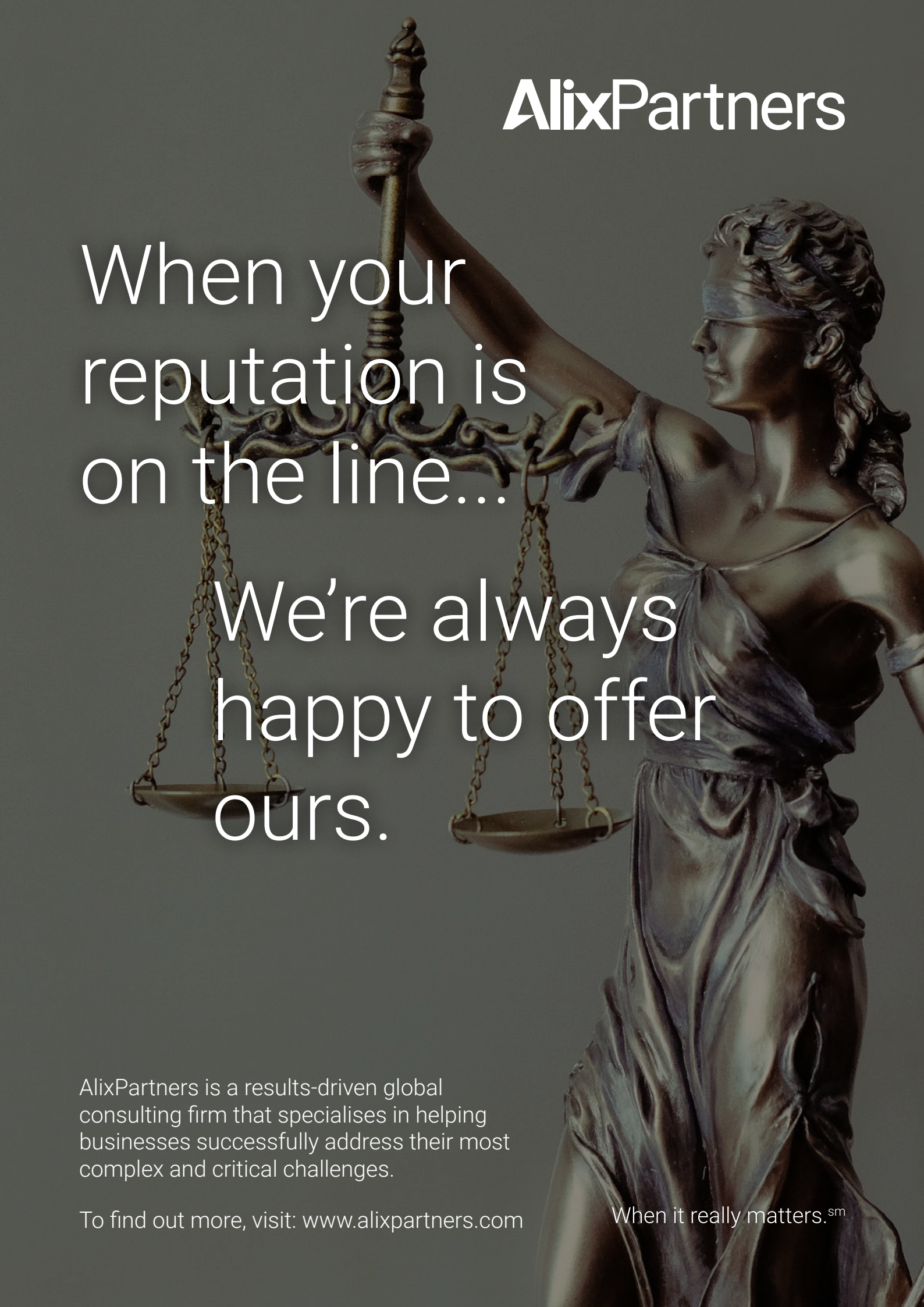
A I have done a lot of travelling and would highly recommend visiting Iran whenever the political situation allows it. The silk road cities of Isfahan, Yazd and Kashan are beautiful, and Iran's authoritarian leaders seem so ill-suited to the welcoming and lyrical Persian people.

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

A Dr Dre. We could talk about his journey from Compton to becoming one of the best music producers in the world to becoming a hugely successful businessman. I could also tell him how his song, Forgot about Dre, played an important role in getting me together with my wife!

Q If you had to sing karaoke right now, which song would you pick?

A Bohemian Rhapsody will always be the pinnacle of karaoke songs, but I'm partial to a bit of Rick Astley too.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INFLATION AND THE RISK OF ANTITRUST ENFORCEMENT

Inflation puts competition authorities under pressure to investigate

Authored by: Andrew Ward (Partner), Alessandra Ponzone and Alexandre Picón - Cuatrecasas

In evidence given to the EU Parliament's economic committee on Monday June 5, the President of the European Central Bank, Christine Lagarde, acknowledged the role of increased corporate profits in worsening inflation, and called, amongst other measures, for closer scrutiny from competition authorities. She noted that some sectors "have taken advantage to push costs through entirely without squeezing on margins, and for some of them to push prices higher than just the cost push," and added that "I think that it's important that competition authorities could actually look at those behaviours, and I would certainly regard that as perfectly called for".

Those concerns about inflation are by no means new. In its Report on the situation of the Spanish Economy[1] in 2022, the Spanish Government identified inflation, influenced by the geopolitical situation and its impact on energy prices, as the main challenge, with historically high rates not only in Spain but throughout the European Union and abroad, and while there is no indication that these levels of inflation are a result of antitrust infringements, there is no doubt that they result in pressure on competition authorities from all sides to identify and punish "profiteers" to protect consumers.

In another recent report[2] the OECD points out that high inflation can create incentives for companies to cooperate with competitors to coordinate prices and reduce competition, while the disruption of supply chains and shortages of essential products can also impact the behaviour of firms, incentivising them to set ever higher prices.

Competition authorities, on the other hand, have long been concerned that high levels of inflation also give rise to the perfect conditions for collusive conduct. Since prices change continuously, businesses and consumers expect price increases, and due to this frequent variation in prices, it is harder for consumers to obtain accurate market information required to make informed purchasing decisions. Since price perception is blurred by the high level of inflation, in theory at least firms may be able to capitalise and engage in collusion.

For firms the result is an environment where, in addition to a need to constantly reassess their own pricing and costs, there is an increased risk of investigation, making internal compliance ever more important, and for which specific lessons can be drawn from similar periods of high inflation in the past.

Heightened vigilance by Competition Authorities in Spain and around the world

While distinguishing legitimate from illegitimate pricing practices during inflation, where prices constantly

1 https://portal.mineco.gob.es/RecursosArticulo/mineco/economia/macro/Informe_Situacion/InformedeSituacion2022.pdf
2 https://www.oecd.org/daf/competition/competition-and-inflation-2022.pdf

change, represents a substantial challenge for competition authorities, enforcers worldwide have shared their determination to preserve fair competition.

In Spain there have been several manifestations of the pressure on the authorities and their resulting high level of vigilance. First, consumer organisations have complained to the National Commission on Markets and Competition (CNMC) alleging that food manufacturers have engaged in shrinkflation (reducing the size of a product while keeping the price constant) and that supermarkets and others have failed to pass on the benefit of tax reductions to consumers. Second, the Spanish Government has announced that it is cooperating with the CNMC to scrutinise the food retail markets. Third, the CNMC itself has announced that it is reinforcing its surveillance[3] of industries with high inflationary pressure, such as basic products and also energy.

But Spain is far from an isolated example, with the ECB President's comments only the latest in a growing list of similar declarations.

- In a recently published report[4] dealing with this topic, the Portuguese Competition Authority (AdC) noted that in times of inflation, firms must set their prices and strategies autonomously, avoiding public price announcements that involve invitations to collude, announcing an intention that the AdC would keep its vigorous enforcement activity in pursuing cartels vis-à-vis public entities and deter firms' behaviour that could otherwise worsen inflation.
- The French Competition Authority also recommended strengthening the control framework of the electricity market and preserving purchasing power as a priority area of action in its roadmap for 2022-2023, with a focus on sectors such as energy, food, and public procurement, which are particularly affected.
- The Italian Competition Authority has stated before the Italian Congress that it is actively monitoring the phenomenon of shrinkflation[5].
- Senior officials from the European Commission have publicly stated that battling the cost-of-living crisis generated by rampant inflation across the EU is a priority for EU antitrust enforcers.
- On 30 November 2022, the OECD Competition Committee held a roundtable to discuss competition and inflation. The topic was again explored during the 2023 OECD Competition Open Day[6].
- Further afield in the US, the Department of Justice (DOJ) announced that the Antitrust Division and the FBI had joined forces in fighting illegal conduct in times of supply chain disruption. For this purpose, they are prioritising existing investigations where competitors may be exploiting supply chain disruptions for profit, undertaking proactive measures to investigate collusion in industries affected by supply chain disruptions, and forming a working group focused on global supply chain cooperation with partner agencies around the globe, through which they are implementing international cooperation tools to develop and share intelligence to detect and combat collusion.

Lessons from history

Inflation at current levels have not been seen in Europe since the early 1980s and there are few comparable periods since the modernisation of Spanish antitrust enforcement. Nevertheless, the experience of the early 2000s in Spain provides a pointer to two risks in particular: the risk of price signalling - via industry associations and otherwise -, and that of collusion on "shrinkflation".

Public announcements

Pricing announcements, via press releases, emails to customer lists, or earnings calls, can help reduce uncertainty in the market and can be considered a form of anticompetitive information exchange between firms, with agencies worldwide imposing significant fines in past cases.

In Spain the antitrust risks of such announcements are particularly pronounced because of the aggressive application of Spanish antitrust rules in information sharing cases in general, and where announcements are made by trade associations or similar the risk is even clearer. This is because in addition to anticompetitive agreements by associations Spanish law also specifically prohibits "collective recommendations", a prohibition which has been found to cover even general announcements by associations commenting on increases in raw material costs or on general levels of industry profitability – infringements for which firms that are members of the associations can ultimately be found liable. Between 2008 and 2012 the National Competition Commission ("CNC") imposed fines on a wide range of associations and even individuals for public statements echoing the increases in the costs of raw materials and their implications for consumer prices, in sectors as diverse as beverages, building materials, bakeries, poultry products, hotel rooms and public transport.

As such, firms should take advice and analyse before making public statements in relation to prices, costs or price or cost forecasts and should exercise caution before participating in any such announcement by an industry association.

"Shrinkflation"

"Shrinkflation" consists of reducing the size or quantity of a product while keeping the same price and can be considered attractive as a means of passing on price increases since consumers are generally less aware of volume reductions than price reductions. Again, however, caution is necessary. While unilateral acts of "shrinkflation" have not previously been the object of antitrust enforcement, the CNC have historically imposed significant fines in cases of cartels in which companies agreed to reduce the size of their packaging while

3 C:\Users\APIF\AppData\Local\Microsoft\Windows\INetCache\Content.Outlook\I8380DFF\businessinsider.es\cnmc-vigila-subidas-precio-energia-productos-basicos-1086117
4 https://www.concorrencia.pt/sites/default/files/Competition%20and%20purchasing%20power%20in%20times%20of%20inflation.pdf
5 https://www.greatitalianfoodtrade.it/en/consum-actors/less-product-same-price-antitrust-oversees-shrinkflation/
6 https://www.oecd-events.org/competition-open-day-2023/

keeping their prices constant and the CNMC have accounted that this is a practice that they – with their Economic Intelligence Unit – will have under review.

But the risks to firms probably go beyond those inherent in cartel conduct. The Spanish Consumers and Users Organization (OCU) recently filed a complaint[7] before the National Commission on Markets and Competition (CNMC) against several brands alleging conduct of this kind. The complaint is based not on Article 1 of the Law for Defense of Competition (the prohibition of collusive agreements) but on Article 3 LDC, which prohibits acts of "unfair competition that affect the public interest by distorting free competition". It remains to be seen whether the CNMC would consider shrinkflation, in the absence of collusion, to be a breach of Article 3 LDC, but firms must keep that risk in mind.

Coordination between firms

More generally and beyond the specific risks cited above, the highly pressurised environment created by inflation, on the one hand, and consumer resistance to price increases, on the other, provide a significant temptation for coordination between firms (or between sales people). Again history shows that that coordination can take a wide range of forms – from casual conversations between sales people to detailed information exchanges or even production agreements in the context of trade associations. Whatever the form, firms should be aware of the heightened level of scrutiny, step up compliance efforts to try and minimise the risk of informal contacts and analyse in depth the risks derived from any formal collaboration with competitors.

Key Takeaways

While there is no evidence that antitrust infractions are fuelling the recent issues with inflation, there is significant pressure on competition authorities to be vigilant. That heightened vigilance by the competition authorities in Spain and around the world means increased risk of enforcement for firms. As a result, firms would be well advised to heighten their own internal compliance efforts, and in particular to exercise great caution when making public announcements, when taking part in sector associations and other industry wide coordination, and when engaging in practices that could be considered "shrinkflation".

7 https://www.ocu.org/organizacion/prensa/notas-de-prensa/2022/reduflacion

COUNTING THE COSTS OF CERTIFICATION:

THE ALLOCATION OF COSTS IN COLLECTIVE PROCEEDINGS

Authored by: Edward Coulson (Partner), Ben Bolderson (Associate) and Andrew Leitch (Senior Associate) – Bryan Cave Leighton Paisner

Costs matter - in collective proceedings, where costs can be staggeringly high at the certification stage alone, costs allocation can be an important factor influencing parties' litigation conduct.

However, costs allocation following contested certification applications has attracted limited commentary. The CAT has recognised that its "practice as regards [certification] costs is still developing"[1] and, as at the date of publication of this article, it has made 13 costs awards dealing with issues related to certification.

These costs awards give rise to novel and complex challenges. How should the CAT's heightened gatekeeper role be reflected in costs allocation? How should costs be awarded where there has been a carriage dispute? Which costs are attributable to the certification dispute?

The CAT has provided valuable guidance on costs awards at the certification stage. In this article, we analyse the CAT's approach to certification costs awards and suggest four refinements to the CAT's approach[2]

What is the CAT's approach to certification costs awards?

Starting point: costs follow the event

Unsurprisingly, the CAT has applied the general principle that the successful party at the certification stage is entitled to recover its relevant costs.

If a respondent does not oppose certification, it is not liable for costs at the certification stage.

Discounts

However, diffculties arise in isolating the costs which should be awarded at the certification stage. The CAT seeks to limit costs awards at the CPO stage to the costs of, and associated with, a respondent's unsuccessful opposition to certification through the application of three interrelated discounts:

1. **The In-Any-Event Discount:** Even in the absence of opposition to certification, the CAT will scrutinise whether a PCR's application meets the certification standard. Costs associated with satisfying the CAT are not occasioned by a respondent's opposition to certification. Therefore, they are not reflected in costs awards at the certification stage. For example, in Le Patourel v BT, the CAT reduced the costs awarded to the claimant by 20% to reflect the fact that "there were some costs…which would have been incurred in any event"[3]. We term this the 'In-Any-Event Discount'.
2. **The Start Date Discount:** Preparing a certification-worthy claim requires a large up-front investment of costs,

1 UK Trucks Claim Ltd v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.); Road Haulage Association Ltd v Man SE [2022] CAT 51 at [9].

2 These issues, along with further proposed refinements, are addressed in detail in our recently published article in Global Competition Litigation Review: E. Coulson, A. Leitch and B. Bolderson, 'A Certified Muddle: The Costs of Collective Proceedings' [2023] 16 G.C.L.R, Issue 2, 61-72.

3 Justin Le Patourel v BT Group Plc [2021] CAT 32 at [8].

even before issuing the claim. Again, these costs aren't occasioned by a respondent's opposition to certification, but drawing that distinction can be diffcult in practice. To distinguish between these up-front costs and the costs incurred as a result of a respondent's opposition to certification, the CAT has sought to draw a bright line: costs incurred by a PCR before a respondent has filed its CPO Response are not recoverable at the certification stage. We term this the 'Start Date Discount'.

3. **The Issues-Based Discount:** The CAT is willing to discount costs awards at the certification stage "to reflect significant or material issues on which the respondents succeeded"[4]. When doing so, the CAT has generally applied a single, 'broad-brush' percentage discount to the successful party's recoverable costs, rather than making cross orders dealing with success on specific issues.

Refinement

The CAT has emphasised that "it is desirable that there should be a level of consistency as regards the approach to costs on CPO applications"[5]. Against that background, we identify four proposals to refine the CAT's approach to certification costs.

What happens to costs that are subject to the issues-based discount?

Generally, when the CAT makes an Issues-Based Discount, it orders that the discounted costs become costs in the case, to be paid by the party that is unsuccessful at the conclusion of the overall proceedings. However, Issues Based Discounts reflect the fact that a party has lost on particular issues. Rather than deferring them for later consideration as costs in the case, we consider they should be rendered irrecoverable. This would be consistent with the usual position in non-collective claims. This approach was adopted in McLaren v MOL[6].

A different start date

We think that the Start Date Discount is unnecessary.

It is common for parties to engage in protracted correspondence prior to the making of the CPO application, and between the time of making the CPO application and the filing of the CPO Response. The CAT recognised this in McLaren v MOL where it elected not to apply the Start Date Discount, reasoning that "it would be wrong not to take account of the substantial costs incurred in dealing with correspondence before [CPO Responses were filed] that raised objections to the grant of the CPO, including objections that were not pursued"[7]. The CAT's approach in McLaren v MOL should be the general starting point, which would be consistent with standard costs principles.

"Double-discounting"?

The discounts applied by the CAT have overlapping rationales. The Issues Based Discount reflects a PCR's failure on certain issues. The In-Any-Event Discount reflects the fact that the PCR would have to have developed its case before the CAT in light of the CAT's own scrutiny.

What if a respondent is successful in disputing an issue[8] which the CAT would have raised of its own motion? Conceivably, these same costs would be subject to concurrent Issues-Based and In- Any-Event Discounts.

In practice, the CAT has guarded against this vigilantly. For example in McLaren v MOL, it expressly excluded any matters subject to the Issue-Based Discount from its calculation of the In-Any-Event Discount[9]. We think this approach should be extended and adopted generally. The In-Any-Event Discount should, by definition, exclude costs which could be subject to an Issues-Based Discount.

Carriage disputes

The allocation of costs as between competing applicants for certification presents novel and intractable challenges. There are a number of potential outcomes in a carriage dispute, each of which raises different costs issues. We propose the following general principles for dealing with the costs of carriage disputes:

Scenario

Both PCRs meet the certification standard. Only one PCR is certified[9].

Proposed costs allocation

Each PCR should bear its own costs of the carriage dispute.

Scenario

One PCR meets the certification standard, the other does not.

Proposed costs allocation

The successful PCR should be entitled to claim their costs of the carriage dispute from the unsuccessful PCR.

Scenario

Neither PCR meets the certification standard[10].

Proposed costs allocation

Each PCR should bear its own costs of the carriage dispute (regardless of whether the CAT expressed a preference as between the competing applications).

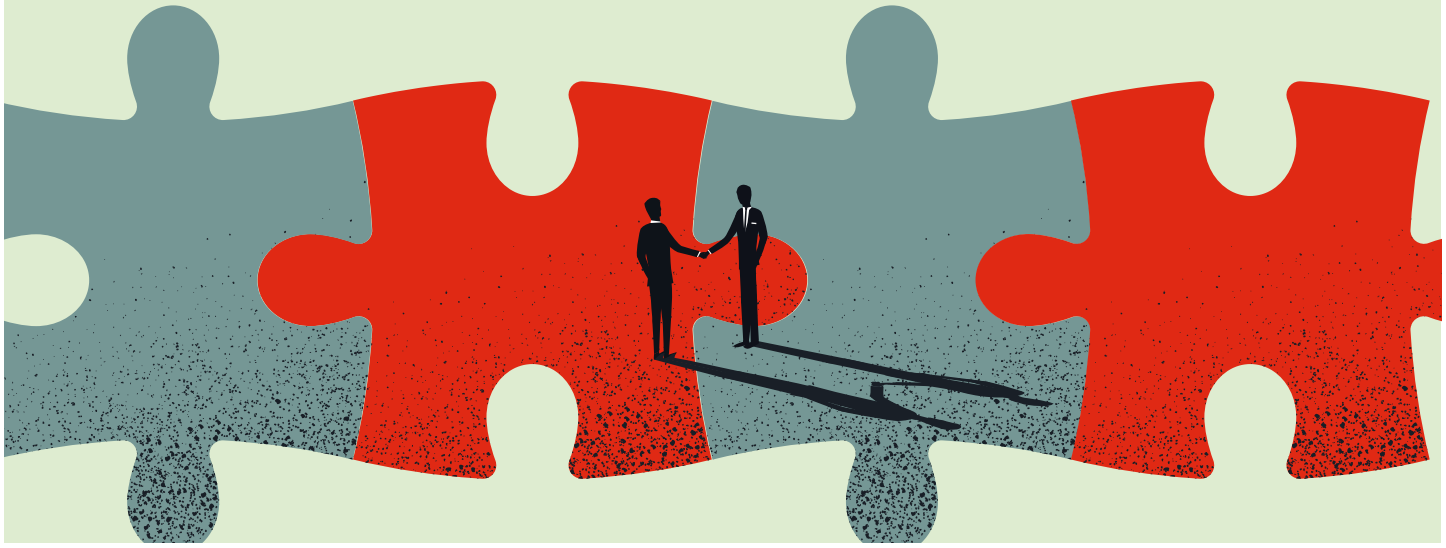
The PCRs should be jointly and severally liable for the respondent(s)' costs.

Conclusion

Costs awards at the certification stage present significant challenges. The CAT has provided valuable guidance on this issue, but there is scope for further development, including through the refinements that we propose above. The development of a sound and consistent costs award policy is important for the continuing development of the collective active regime more generally, given the large cost sums involved and the potential for those cost awards to incentivise desired conduct by the parties to these claims.

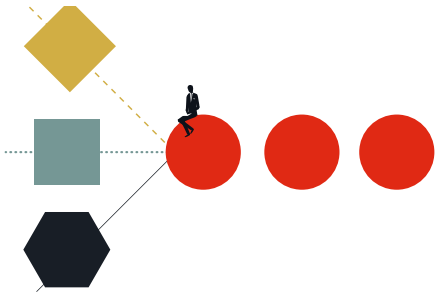
4 UK Trucks Claim Ltd v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.); Road Haulage Association Ltd v Man SE [2022] CAT 51 at [11].
5 Walter Hugh Merricks CBE v Mastercard Incorporated and Others [2017] CAT 27 at [16].
6 Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd and others [2022] CAT 18.
7 Ibid at [27].
8 But unsuccessful in bringing a broader certification challenge.
9 As in UK Trucks Claim Ltd v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.); Road Haulage Association Ltd v Man SE [2022] CAT 51
10 As in Mr Phillip Evans v Barclays Bank Plc; Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc [2022] CAT 42.

EU COMMISSION ADOPTS MERGER CONTROL SIMPLIFICATION PACKAGE



Authored by: Christophe Humpe (Partner), Richard Pepper (Partner) and Louis Delvaux (Associate) - Macfarlanes

On 20 April 2023, the European Commission ("Commission") adopted a merger control simplification package consisting of a revised Merger Implementing Regulation, a new Simplified Procedure Notice, and a Communication on the transmission of documents. These new rules will come into force on 1 September 2023 and aim to cut some of the current "red tape" in merger control procedures under the EU Merger Regulation ("EUMR") by bringing more transactions within the scope of the simplified merger procedure and introducing additional simplifications to the notification process.



Streamlining the simplified merger control procedure

Each year, many unproblematic mergers, acquisitions, and joint ventures ("JVs") are caught by the EUMR turnover thresholds and must be notified to the Commission. Whilst a simplified merger procedure expedites the review of such cases by reducing the amount of information that notifying parties must provide its scope remains limited. Notably, too many cases that raise no prima facie competition concerns are still not eligible for treatment under the simplified procedure.

The Commission has decided to revise and expand the scope of application of the simplified procedure to additional categories that feature limited horizontal or vertical relationships between the parties. As result, more cases should benefit from the procedure:

1. Acquisitions by one party of sole control over an undertaking over which it already has joint control.
2. Acquisitions of joint control of a JV, whose current and expected annual EEA turnover (including the turnover of any activities contributed to the JV) is less than EUR 100m (to the extent there are plans to transfer assets to JV in the EEA, the total value of those assets must also be less than EUR 100m).
3. Acquisitions that involve no horizontal overlaps or vertical relationships.
4. Acquisitions that, under all plausible market definitions, fulfil the following conditions:
    a. the combined market shares created by any horizontal overlap are lower than 20% or under 50% provided the increment of the Herfindahl-Hirschman Index (HHI) arising from the transaction is below 150; and
    b. the market shares of undertakings in a vertical relationship are lower than:
        i. 30% on the upstream and downstream markets;
        ii. 30% on the upstream market, provided the parties active in the downstream market hold a purchasing share of less than 30% of upstream inputs; or

iii. 50% on both the upstream and downstream markets, provided the HHI increment created by the transaction is below 150 on both markets and the undertaking with the smallest market share is the same in the upstream and downstream markets.

The Commission will also have discretion to apply the simplified procedure to transactions that do not fall within these categories if (i) any horizontal overlap results in a combined market share of below 25%, and (ii) insofar as there are vertical relationships, the upstream and downstream market shares of the parties remain below 35%. The Commission's discretion to apply the simplified procedure will also extend to JVs with turnover and assets below 150m in the EEA, and to cases that feature vertical relationships where the parties' market share does not exceed 50% in one market and 10% in the other vertically related market.

The Commission always retains the power to deprive a transaction of the benefits of the simplified procedure. Previous experience has shown that this can cause issues since it is not always possible to accurately predict when the Commission will revert to the normal procedure.

To reduce uncertainty in this area, the Simplified Procedure Notice now includes a more detailed list of the circumstances in which the Commission is likely to abandon the simplified procedure.

This includes situations where: (i) the relevant market(s) are difficult to define; (ii) one of the parties has a significant user base or holds commercially valuable data; (iii) one of the parties has significant non-controlling shareholdings in companies active in the market(s) where another party is active; and/or (iv) the parties are active in closely related neighbouring markets.

In addition, to reduce the cost and administrative burden associated with simplified procedure cases, the new rules introduce a simplified Short Form CO with tables and a "tick-the-box" format based on a series of multiple choice questions.

Finally, the new rules emphasise the ability of parties to make use of a "super simplified procedure" that enables notification without prior pre notification discussions for: (i) mergers with no horizontal overlaps or vertical relationships between the parties; and (ii) acquisitions of joint control over a JV with no activities or assets in the EEA. The basis for this treatment is that prenotification discussions are (rightly) deemed to be superfluous in such cases.

Streamlining the standard merger control procedure

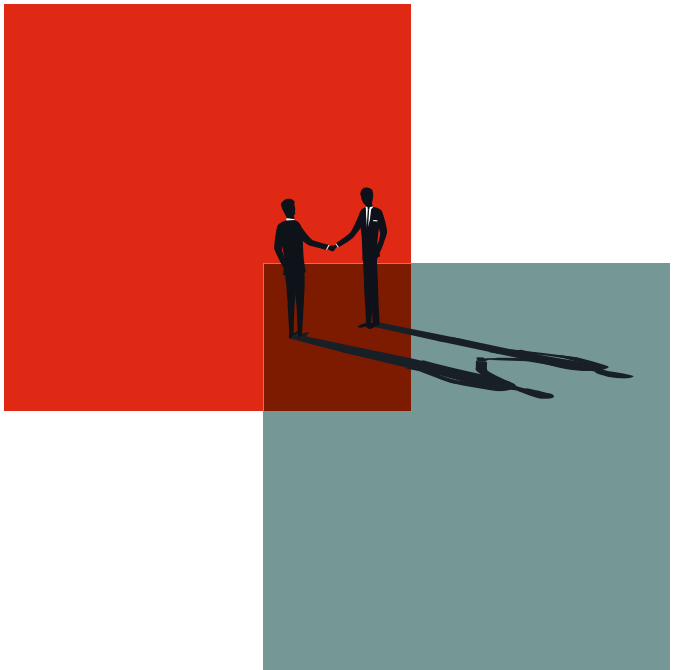
The Implementing Regulation has also been revised to streamline the standard merger control procedure by reducing and clarifying the information requirements imposed on notifying parties. For example, the standard Form CO template now includes tables for information on affected markets. The parties will also no longer have to systematically provide certain types of information (e.g., information relating to cooperative agreements, trade between Member States and/or ex EEA imports, and trade associations). The Commission will also be able to make greater use of waivers to dispense notifying parties from the need to provide certain types of information in their filings.

Comments

The new rules are a step in the right direction and should improve the EU's merger control procedures, allowing the Commission to better focus its resources on difficult cases whilst lessening the burdens and costs imposed on notifying parties. However, more types of transactions could have been brought within the scope of the simplified procedure and the Commission could also have committed itself to dispense with pre-notification discussions for the vast majority of transactions reviewed under the simplified procedure.

It remains to be seen how well the newly designed Short Form CO, with its "tick the box" and table format, will work in practice since information may not always be amenable to be presented in a way that neatly dovetails into the new template.

Regardless of whether the new rules succeed in simplifying and delivering tangible improvements to the Commission's merger control procedure, they will not alter the basic fact that the EUMR will continue to capture many unproblematic transactions, an underlying problem which can only be addressed through a more radical overhaul of the EUMR, something which is currently not on the agenda and would require buy in from EU Member States.



FUTURE LAWYERS:

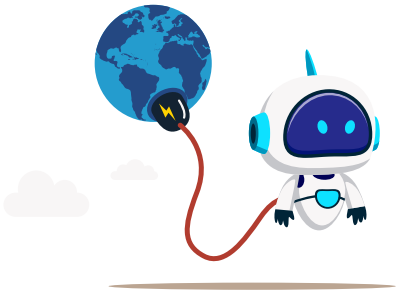
EDISCOVERY AND GENERATIVE AI TODAY

Authored by: Rachel McAdams (Senior Consultant) – Sky Discovery

In eDiscovery, we're used to working with technology to manage and interrogate large volumes of data efficiently, defensibly, and cost-effectively. When technology like Chat-GPT gains traction, our considerations are two-fold. We first need to understand how it might affect the types of data we collect and review for disclosure and, secondly, how it might change and hopefully improve the tools we currently use to carry out those tasks.

The public debate about Artificial Intelligence continues to swing between two extremes – either AI will replace everyone's jobs, or AI is overrated, and nothing will ever change. The reality will likely rest between these extremes and vary by industry. In particular, the legal sector — a regulated profession traditionally seen as resistant to change — may seem safe from AI disruption. However, with such a significant leap forward in AI capabilities, it's very likely that even the legal profession will need to adapt and work with the technology, not against it. In this series of posts, we'll explore why this new breed of AI differs from what has come before it, how it could be applied to the eDiscovery space, and what the roadblocks to wider adoption might be.

Let's start by defining some terms we'll need to understand in more detail before examining how AI technology can impact eDiscovery. Whilst there is much jargon associated with AI (something it has in common with eDiscovery!), it's important to understand how to talk about new types of AI and capabilities for these AI models.



Large Language Model (LLM)

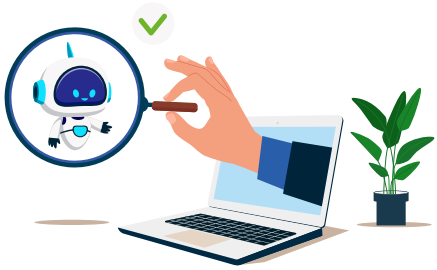
LLMs are the next generation in AI technology. Built on neural networks that mimic the layers of neurons in the human brain, LLMs are large and powerful computer models initially trained to manage general natural language processing tasks. The LLM can then be subject to additional training and fine-tuning to handle specific tasks more efficiently and accurately. This fine-tuning often takes the form of "prompt engineering": crafting the best context and instructions to the model to get the answer you need.

An LLM is trained on a large dataset with many parameters. You've probably already heard how many of these models have been trained on the data available for free on the internet.

The computing power, data, and resources needed to develop and maintain an LLM can be enormous.

Generative AI

Generative AI is often mentioned in the same breath as LLMs, and while they aren't the same, they can overlap. Generative AI refers to AI which can produce new content — whether this content is text, audio, video, or images. The technology predicts what words, phrases, pixels or sounds typically appear next in the sequence based on examples already learned. This "prediction" is the source of some (but not all) ethical concerns with generative AI, such as bias and accuracy levels. For example, generative AI trained on different data sets may give different answers and vary in accuracy depending on the training data. If a generative AI model has been trained on false data, then the model's responses will also be inaccurate because it doesn't know any better. If the data set that a generative AI model is trained on is prejudiced or biased in some way, then the responses the model gives will perpetuate that bias.



So, what's new?

We've had AI capabilities for many years in the guise of machine learning and natural language processing, and it's become a part of everyday life. However, as computing power increases and the amount of data generated and stored by humans increases, the capabilities of AI also increase. In particular, the ability for AI to learn from data in an unsupervised way (i.e., without explicit labelling of data from humans) has increased, allowing for more varied use cases for AI. In particular, the move from classifying data to generating new data.

Utilising AI, Netflix has already made a name for itself in successfully profiling its users and suggesting content to viewers. AI has also helped Netflix create engrossing highlights, recaps, and trailers to increase viewership. They are now experimenting with a new compositing technique for filmmaking that relies on machine learning while actors are sandwiched between garish magenta lighting and a green screen. The leap from predicting your next Netflix show to creating a brand-new show based on previous content you've watched is a conceptual leap that changes how AI can impact entire industries.

LLMs have created opportunities for everyone to interact with AI, not just data scientists. You don't need to have any experience in AI or machine learning to ask Chat-GPT a question, and whilst your ability to interact with AI can be improved with training and practice, you don't need to understand how the underlying LLM works to see benefits.

And since LLMs are general purpose, you don't need to build a new model every time you have a new task.

Chat-GPT, from OpenAI, is currently the most known LLM in the world. When it burst onto the scene in late 2022, it revolutionised how AI was perceived, inspired huge amounts of thought pieces, and demonstrated a potential to impact many industries. Chat-GPT is a specific implementation, designed for conversation, of a model called GPT-3; however, the model behind the scenes is evolving rapidly, and many of the errors which were being reported on the release of Chat-GPT (such as hallucinations or making up facts) have now been blocked, but not necessarily resolved.

Other tech companies have also invested in LLMs. Google has a family of models called LamDA, which are specialised for conversation, such as their chatbot BARD. Another example is PaLM, which can handle complex learning and reasoning tasks. Meta also invested in LLM development, and their LLaMA model hit the news in March 2023 when it was leaked online. It's now an open-source model where the source code is freely available to the public. But many other proprietary models exist, developed by companies and universities for commercial and research purposes.

With these advances in AI capabilities, it's inevitable that the legal industry, among others, will face some impact. The rest of this series will look at the possibilities of this technology when applied to eDiscovery; however, many other aspects of legal work may be transformed by AI. Legal research, drafting and templating memos and reports, admin tasks such as formatting and adherence to house styles, summarising regulations or legislation, and many more tasks spark possibilities for innovation.

Chat-GPT revolutionised the public's perception of AI by giving direct access to powerful and new technology — crucially without requiring any prior expertise in AI. The ability of LLMs to deal with language and take instruction from the user rather than delicate parameter-tuning in the background by an expert means that, theoretically, a lawyer can already experiment with using Chat-GPT for free online.

However, issues such as data privacy, data security and protection of privileged information mean that you shouldn't start uploading client data into ChatGPT for testing! It's also worth keeping in mind that ChatGPT's data set is not fully up to date, and you may get answers which are not valid today that may have been accurate in the past.

Online courses on legal prompt design (or how lawyers can interact more effectively with LLMs) are already popping up; however, there is no substitute for practice and experimentation.

In our next article, we'll look at how technology is used in eDiscovery today and where LLMs and generative AI could take us into the future.

See **HERE** for the link to the second part of this series.

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