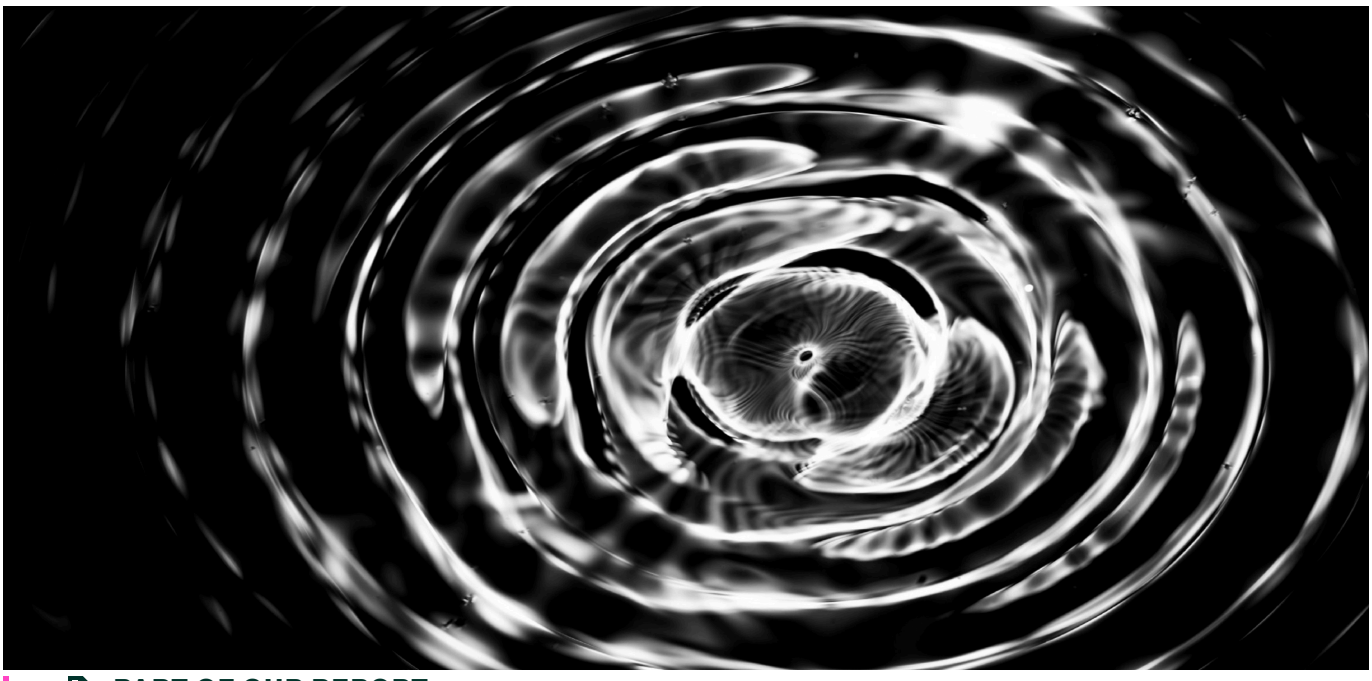
A&O SHEARMAN

ARTICLE

Private damages activity escalates across key jurisdictions



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Global antitrust enforcement report

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In the EU, the surge in private damages actions following the transposition of the Private Damages Directive (PDD) at member state level has brought to the fore several novel legal questions, prompting national courts to regularly seek guidance from the European Court of Justice (ECJ).

In seeking to strike a balance between facilitating claims and promoting legal certainty, the ECJ has tended to favor the former. However, there is a concern that, if the threshold for obtaining damages in the EU is set too low, partly in response to the frequent inequality of arms between individual plaintiffs and well-funded corporate defendants, it could undermine incentives to apply for leniency, to the detriment of public enforcement. It is hoped that, as more member states introduce collective redress mechanisms, this will support a robust approach by courts to burden and standard of proof, including in relation to evidence of quantum by plaintiffs.

In the U.K., the extraordinary rise of collective actions continues. Not only were many applications to bring new and high-value claims issued and (with one exception) granted in the last year, but several cases also reached trial, and one case produced the trial judgment (resulting in a dismissal of a claim against BT). The various procedural, interlocutory, and trial judgments associated with the dozens of ongoing collective actions (and several individual claims) in the Competition Appeal Tribunal (CAT) have developed the law and practice relating to several key issues, including experts and their evidence, settlements, the duties of and choice between class representatives, and litigation funding.

Antitrust damages also continue to be a hot topic in the U.S. In the last year, courts have given rigorous scrutiny to antitrust damages in both the litigation and settlement context. This has included reversing a multi-billion-dollar jury verdict that was premised on flawed expert analysis and rejecting a sizable

class action settlement because the class members were not fairly treated relative to one another. U.S. courts have also continued to refine the rules on when antitrust claims accrue in different contexts for purposes of applying the statute of limitations.

Navigating procedural issues—balancing facilitation of claims and legal certainty

The procedural landscape for antitrust damages claims is still evolving in the EU. National courts continue to call upon the ECJ to address a number of unprecedented legal questions, which all require balancing the interests of plaintiffs against those of defendants. Similar issues also remain the subject of important court decisions in the U.S.

Forum shopping

Regarding jurisdiction, despite the harmonization introduced by the PDD, significant differences in national rules persist. The expansive way in which the Brussels I *bis* Regulation on jurisdiction (the Regulation) has been interpreted by the ECJ in recent years has opened up new opportunities for plaintiffs in most European cross-border cases to choose the most advantageous forum.

Most recently, the ECJ interpreted Article 8(1) of the Regulation, which allows the bringing of a claim in the jurisdiction in which one dependant is domiciled (referred to as the "anchor defendant") in respect also of other defendants where the claims are so closely connected that there is a risk of "irreconcilable judgments" arising from separate adjudications. In *Greek Beer*, the ECJ ruled that that a parent company and its subsidiary can be sued in the jurisdiction where the former is domiciled. This is the case even where the claim relates to a national abuse of dominance committed solely by the subsidiary in another member state, provided a presumption of decisive influence by the parent over the subsidiary arises and is not otherwise rebutted by the defendant(s). Other pending preliminary rulings in *Power Cable* and *Cardboard* are also expected to shed light on the

interpretation of Article 8(1) of the Regulation in the context of follow-on damages actions. These upcoming rulings will be crucial in determining whether plaintiffs will have even more strategic options when choosing where to bring a claim.

Time limitation rules

Regarding time limitation rules, the ECJ has also offered guidance on resolving temporal conflicts between the (generally more generous) national rules transposing the PDD and the pre-existing national rules.

- In *Volvo* and *DAF*, the ECJ held that rules relating to time limitation periods are substantive in nature and, therefore, national provisions transposing them cannot be applied retroactively. However, the ECJ clarified that, where national limitation periods were still running on the day when the PDD transposition deadline expired, the national transposition rules would nonetheless apply. The ECJ considered that this would not infringe the principle of non-retroactivity.
- In *Heureka*, the ECJ considered that, even before the transposition deadline of the PDD, EU law required that, for the limitation period to commence, the infringement of competition law must have come to an end and the injured party must have known also of the fact that the behavior concerned constituted such an infringement.

While these rulings have provided further clarity on the application of time limitation rules in antitrust damages cases, further guidance is expected from the ECJ in relation to certain other aspects of the time limitation rules (e.g., in *Nissan Iberia*). We expect the ECJ to continue to play a key role in clarifying the legal framework.

Although relatively more developed compared to the EU, courts in the U.S. continue to issue important decisions regarding the statute of limitations applicable to antitrust cases.

- In *Sidibe v. Sutter Health*, the Ninth Circuit Court of Appeals reversed a jury verdict in favor of the defendant and ordered a new trial because the district court had excluded evidence pre-dating the limitations period

from being presented to the jury. While there was no dispute that the four-year statute of limitations period began in 2008, the Ninth Circuit held it was a reversible error to exclude pre-2008 evidence from the jury because it deprived the factfinder of context necessary to understand the defendant's market power and strategic intentions. The *Sutter* case does not support either blanket admission or exclusion of evidence pre-dating the limitations period during trials, and we expect that courts will continue to refine the circumstances in which pre-limitations period evidence is permissible in antitrust trials.

- In *CSX Transportation*, the Fourth Circuit affirmed the district court's grant of summary judgment on the ground that an overt act committed in or around 2009 or 2010 may not be the basis for an antitrust suit filed by a competitor in 2018. Plaintiff CSX accused defendant Norfolk Southern of conspiring to exclude it from competing in the international shipping market by imposing an effectively exclusionary "switch rate" for on-dock rail access needed to conduct its business at Norfolk International Terminal beginning in 2010. CSX argued that, under the continuing violation exception, the statute of limitations restarted each day that Norfolk Southern and alleged conspirator Belt Line imposed the exclusionary rate. The Fourth Circuit reasoned that CSX's claim accrued at the time the switch rate was put into place, and the defendants' decision to keep the switch rate in place did not inflict new harm causing new injury to CSX within the limitations period.

Quantification of harms

Quantifying the degree of damage a plaintiff allegedly incurred is a challenge in antitrust cases. In turn, an economically reliable quantification of damages has increased in importance in both the U.S. and the U.K. Indeed, in a landmark decision in the U.S., a district court reversed a jury verdict that had been in favor of the plaintiffs and granted judgment to defendants because it considered that the damages methodology proffered by the plaintiffs' experts was insufficiently reliable and was the only supposed proof of damages in the case.

In a U.S. class action lawsuit, a class of subscribers to the National Football League (NFL)'s "Sunday Ticket" alleged that the NFL's practices of licensing live broadcasts of local games to CBS and FOX while licensing all live broadcasts of out-of-market games to DirecTV, and requiring fans who want to watch out-of-market games to choose Sunday Ticket, violated the antitrust laws. In particular, the plaintiffs alleged that the NFL's Sunday Ticket product was an overpriced package of games that many plaintiffs did not want to purchase, and the NFL's refusal to sell games of only the teams that a customer may want to watch violated Section 1 of the Sherman Act. Following a three-week trial, the jury returned a USD4.7 billion verdict in favor of the plaintiffs. However, after a post-trial motion by the NFL challenging the verdict, the district court reversed the jury's decision and granted judgment to the NFL, ruling the testimony of two key expert witnesses for the subscribers, on which the jury's damages award was based, had flawed methodologies and should have been excluded. The judge found that plaintiffs had "failed to provide evidence from which a reasonable jury could make a finding of injury and an award of actual damages that would not be erroneous as a matter of law, be totally unfounded and/or be purely speculative." The court took issue with expert modeling of what would occur without the relevant competitive restraints at issue in the case. It reasoned excluded experts: (i) lacked a sound economic methodology to explain how, absent alleged restraints, relevant out-of-market telecasts would have been available on cable and satellite television without an additional subscription; and (ii) failed to offer evidence that a distributor other than DirecTV could have provided live streaming of Sunday Ticket. While the plaintiffs have appealed the judge's decision to reverse the jury verdict, the Sunday Ticket decision underscores the need for reliable expert methodologies to calculate damages and the potential consequences of not providing such methodologies.

In the U.K., the role played by experts was a key area of development in 2024 in the context not only of the assessment of causation and quantification of damages, but also in determining liability and driving procedural decision-making:

Application of the broad axe

In *Le Patourel v BT*—an abuse of dominance claim brought as opt-out collective proceedings on behalf of over 3.7 million BT customers—the CAT was required to assess whether BT's prices were "excessive" and "unfair" (and therefore abusive). Extensive expert evidence was deployed (principally economic modeling) to assess whether BT's prices were excessive compared with a competitive benchmark. BT's expert's evidence was that its prices were less than the benchmark; whereas the class representative's expert asserted that the prices were excessive by up to approximately 96%. Like the approach in *Royal Mail v DAF* and *Granville v Chunghwa*, the CAT decided that both experts' methodologies contained problems but adopted a "broad axe" approach, by giving different weight to each element of the experts' respective analysis, to arrive at what it considered the most appropriate assessment. On this basis, the CAT reached a near mid-point between the two positions, finding that BT's prices were up to approximately 50% above the benchmark. However, the claim ultimately failed, with the CAT finding that, while excessive, BT's prices were not unfair since they bore a reasonable relationship to the value of the services supplied.

One expert for all

The Court of Appeal affirmed in *Stellantis* that there is no presumption or "established practice" that defendants in multi-party antitrust litigation should be able to rely individually on different economic experts (despite such arrangements commonly arising). An important decision for new, prospective claims, the court confirmed it has a wide discretion to direct that a joint expert be appointed, to ensure proceedings are dealt with justly and at proportionate cost, having regard to the evidence reasonably required to resolve the issues and their complexity. While defendants may seek to rely on rights of defense or conflicts of interest to justify individual instructions, this will not necessarily be determinative.

An "expert-led approach"

In certain long-running multi-party proceedings such as the *Trucks* and *Interchange* litigation, experts have become increasingly pivotal to case management. The CAT has diverted from more traditional approaches to disclosure and evidence (typically grounded in the parties' pleaded claims) by adopting an "expert-led" approach. Experts have been given a wide berth to identify the material required to conduct and implement their proposed analyses. Regular, more informal "case management meetings" have also seen the CAT place heavy reliance on experts' views over legal submissions when making decisions about the scope of evidence.

In the EU, economists frequently serve as experts in antitrust litigation to help determine liability, causation, and quantum. However, the degree to which courts engage with expert evidence varies by member state. Recognizing that assessing harm involves complex factual and economic analysis, the PDD allows national courts to estimate quantum and, if relevant, passing on, where it is "practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available." National courts in some member states have arguably adopted an expansive interpretation of when judicial estimation is legitimate. We anticipate that the ECJ will be asked to provide guidance on the scope of this power in the future.

Collective actions—opportunities and challenges

Class or collective actions, by saving time, cost, and valuable resources, incentivize private enforcement. Courts in the U.S. and the U.K. are tasked with rigorously evaluating settlements to ensure the terms of each settlement are appropriate and fair to the class before they will approve them. U.S. courts have recently rejected antitrust settlements where they did not believe the settlement treated all class members fairly relative to one another.

Most prominently, a proposed antitrust class action settlement of an equitable relief class, which the plaintiffs class valued at approximately USD30bn in fee reductions and rule changes, was rejected primarily due to

concerns over the adequacy of release terms and equitable treatment of class members relative to one another. The settlement agreement between plaintiffs, a class of merchants bound by Visa and Mastercard rules, and defendants, Visa and Mastercard (and the member banks in Visa's and Mastercard's networks prior to their respective IPOs), provided for changes to Visa and Mastercard's rules governing merchant practices and dictated that Visa and Mastercard would abide by the modified rules for five years in exchange for a release of related claims arising in the same five-year period. The court rejected the proposed settlement because it did not treat the class members equitably relative to one another and would not lower interchange rates or "swipe fees" below what experts had previously described in the litigation as an "upper limit" to the level of the fees absent the challenged competitive restraints, among other reasons. This decision reflects the rigorous scrutiny courts apply to settlements seeking to resolve complex multiparty disputes even when defendants are willing to settle for a substantial amount of money.

In contrast, the U.K.'s collective action regime has continued to produce many high-value claims. Eleven distinct sets of collective proceedings were issued in 2024 (an increase on 2023), together claiming aggregate damages in excess of GBP13bn. Abuse of dominance cases continue to make up the vast majority of claims brought (see chart). Various claims have now reached trial, for example, the *BT Landlines* litigation (where judgment dismissing the case has been given), the Interchange litigation and *Kent v Apple*. Several further trials are listed in 2025.

Several claims were certified, providing further evidence of the low threshold test for certification which had been affirmed by decisions of the CAT and Court of Appeal in 2023. On top of traditional antitrust enforcement and ex ante regulation mentioned above, Big Tech continues to be a focus for claimant firms and prospective class representatives, with claims against Google, Apple, and Microsoft certified.

There were several other important developments in the U.K.'s regime in 2024, the key ones of which we highlight below:

- In *Christine Reifa v Apple*, exceptionally the CAT refused an application for certification outright; a divergence from prior decisions where class representatives who did not meet the threshold were given a chance to reformulate their application. The CAT held Reifa was not suitable to act as a class representative, in contrast to most prior certification decisions where the focus was on whether the claim itself was appropriate to be certified. The funding arrangements agreed by Reifa raised concerns for the CAT (including terms that presented potential conflicts of interest between herself, the funder, her instructing solicitors, and the class). Following cross-examination of Reifa, the CAT determined that it could not be satisfied that Reifa would execute her role fairly and adequately in the interests of the class. It serves as a reminder of the "high standard" expected of class representatives who are not "merely a figurehead" but must engage critically with their funders and advisors and make informed, independent decisions.

- *Le Patourel v BT* was the first collective proceeding to reach trial on issues of liability and quantum with a judgment issued in December 2024. The class representative failed to establish that BT's prices were both excessive and unfair (see above). Although brought on a standalone basis, the class relied on existing non-binding regulatory findings (of a regulator), an approach taken by other "quasi follow-on claims" in 2024 (such as *Spottiswoode v Airwave & Motorola*). The CAT placed little weight on these findings, not least because the CAT determined that the evidence before it was more extensive and robust than had been available to the regulator.

- Since the first collective proceedings settlement in *McLaren v MOL*, the CAT has considered (and approved) a further three collective settlement applications: one in *Gutmann v First MTR South West Trains* and two in *McLaren v MOL* (which the CAT considered together). Unlike the first *McLaren v MOL* application, these applications were made at a relatively late stage (after disclosure and factual and expert evidence) and represented the settlement of a large proportion of the claim. The decisions illustrate the CAT's reliance on evidence that the settlement is

"just and reasonable," including evidence from experts and independent lawyers.

- In December 2024, the parties in *Merricks v Mastercard* announced a provisional settlement of GBP200m (against an original claim value of around GBP10bn). The class representative's funder opposed the settlement, on the basis it was too low, and has brought arbitration proceedings against the class representative and applied for permission to intervene in the settlement application, which the CAT approved. It remains to be seen what, if any, standing and influence a funder has to challenge an agreed settlement. If approved, it will be the first all-party collective proceedings settlement.
- Funders have moved to alternative funding structures following the Supreme Court's ruling in *R (PACCAR) v CAT* (which rendered agreements that calculate a funder's return by reference to the amount of damages awarded unavailable in opt-out collective proceedings). These alternatives have so far withstood legal challenge, for instance, where the funder's fee is based on a multiple of the amount invested by the funder (*Neill v Sony*), and where that fee is capped by the proceeds of the claim, provided that the cap does not in substance create a success fee (*Commercial and Interregional Card Claims I Limited ('CICC I') v Mastercard Incorporated & Others* and *Kent v Apple (AppStore)*). These decisions are under appeal. Despite the previous U.K. government's commitment to introduce legislation to address the implications of *PACCAR*, the current U.K. government has indicated that it intends to wait for the conclusion of a wider review into the litigation funding market being undertaken by the Civil Justice Council before deciding what, if any, legislative response to adopt. That review is not expected to conclude before summer 2025.

Despite growing interest, collective actions in the EU remain relatively limited compared to the U.K. or the U.S. This is partly due to the lack of an EU-wide collective redress framework specifically designed for antitrust damages actions. Initially, the PDD was considered the appropriate legal framework to introduce collective redress mechanisms. However, this idea was eventually abandoned for political reasons. As for the Representative Actions Directive,

which sets a minimum standard legal framework for representative actions aimed at protecting consumers' collective interests, it does not expressly cover antitrust law. Only some member states have chosen to extend their implementing provisions to cover this area of law.

Although there is no mandatory common framework at EU level, a clear trend towards facilitating collective redress has recently emerged. Some member states have implemented collective dispute mechanisms, while others have provided for the possibility of aggregating or bundling individual antitrust damages claims through specialized claim vehicles. Nevertheless, the recent ECJ ruling in *ASG 2* clarified that the PDD does not require member states to introduce collective redress models for the enforcement of EU antitrust rules. It is hoped that, as more member states introduce collective redress mechanisms, this will serve to support a robust approach by courts to burden and standard of proof.

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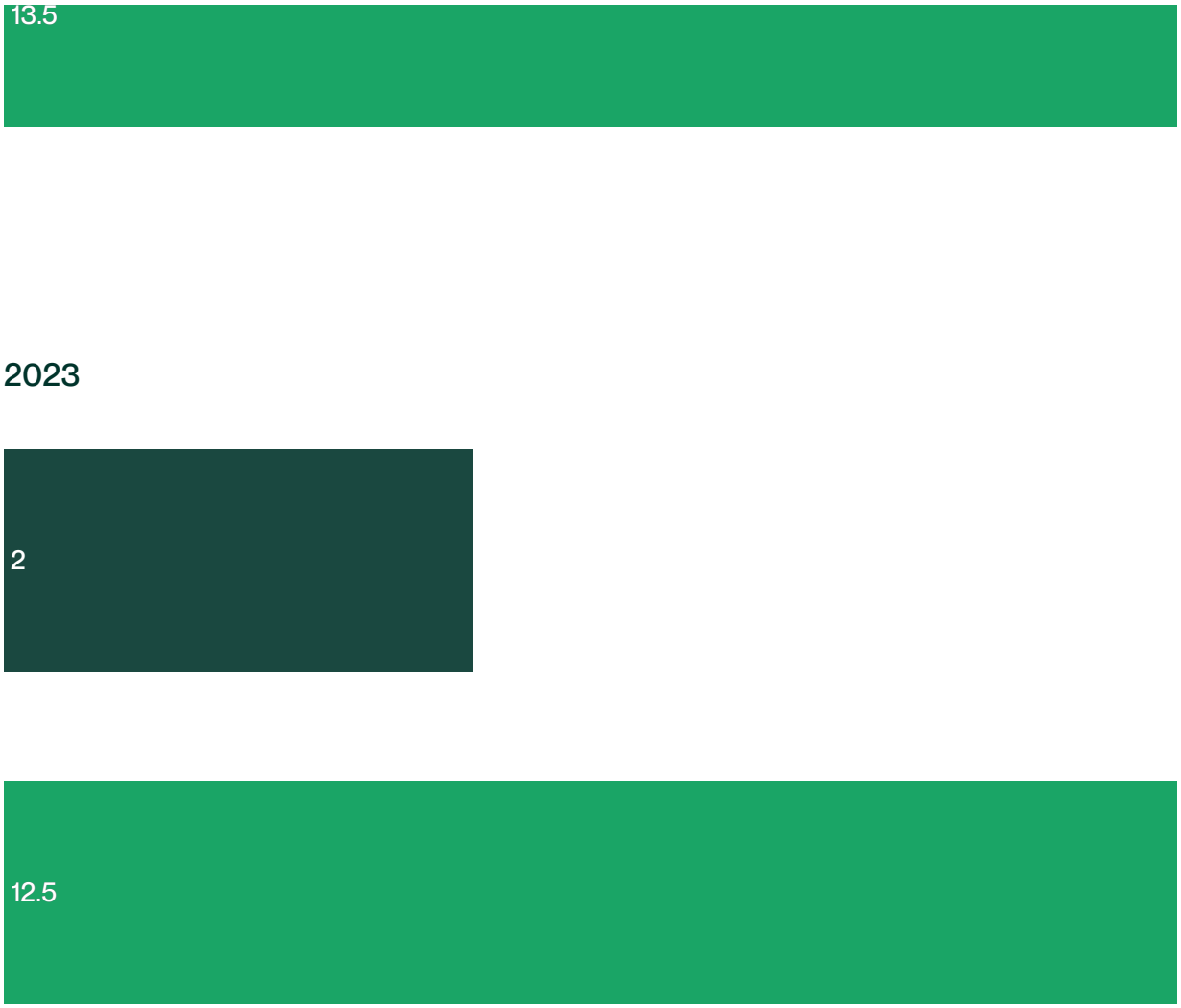
Applications for collective proceedings in the U.K.

2023-2024 (USDbn)

Chapter I - restrictive agreement Chapter II - Abuse of dominanace

2024



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