



**INTERNATIONAL LEAGUE
OF COMPETITION LAW**



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

LIDC Conference 8 November 2024

Competition Litigation Masterclass

10 years on from the Damages Directive – how effective is private enforcement across the EU & UK?

Panel: Ben Tidswell (UK Competition Appeal Tribunal)
Mieke Dudok van Heel (District Court of Amsterdam)
Scott Campbell (Hausfeld), David Parker (Berkeley Research Group)
Chaired by Kim Dietzel (Herbert Smith Freehills)

1. Different procedural approaches to competition litigation across Europe

- Kim spoke about the enormous rate of growth in competition litigation across Europe, particularly in the last 10 years (after the bringing to force of the Damages Directive (“**DD**”). Kim also noted the differing approaches between different jurisdictions, with jurisdictions such as the UK being a “front runner”.
- Mieke focused on claims brought in the Dutch courts and how competition litigation in the Netherlands “plods along” noting:
 - the procedure for collective action only applies to actions relating to events on or after November 2016.
 - the Netherlands use an “assignment model” for competition litigation, where a special purpose vehicle (“**SPV**”) bundles claims together (often funded by litigation funders). Mieke commented that the bundling of claims in this model can be efficient for damages allocation, but that larger cartel damages proceedings tend to “plod along” in this system.
 - Mieke focussed on the *AirCargo* cartel – a case involving an extended timeline and 10 interim judgments on various preliminary issues (since the claim was first filed in 2010). In particular, in the Dutch civil procedure, there is no appeal right against an interim judgement and hence usually proceedings in lower courts are stayed on account of issues being resolved.
- In terms of the UK system, Ben noted that the combination of the mechanism for “opt-out proceedings” and the aggregation of damages has been highly influential in the nascent collective action regime, with around 60 collective action cases in the CAT at the time of the panel:
 - In terms of non-collective action cases (including *Trucks* and *Merchant Interchange Fees*), these involved large groups of claimants and that the Competition Appeal Tribunal (“**CAT**”) has gained useful experience about case management, and especially disclosure, from these cases.
 - On the unique features of the collective action regime, early on, there has been a focus on expert evidence (as part of the certification) and establishing key principles.

- Overall, the UK's collective action regime is at an early stage, with only some minor settlements and as yet no judgments given.
- Kim and Ben also noted the role of “carriage disputes” (where 2 individuals propose to represent a class and the CAT needs to decide which individual to certify) and how this was an interesting area to keep track of, including the possibility of potential class representatives joining together.
- Vis-à-vis Mieke's comments on competition litigation “plodding along” in the Netherlands, Ben agreed that in the UK some cases were bearing the burden of a new regime, but on the whole the UK regime was benefiting from a set of core decisions which have set guardrails, particularly on certification. The expectation was that cases would proceed more quickly now.
- Scott noted that the early era of competition litigation in England and Wales focussed on follow-on damages and that these cases helped put together a “toolkit” to conduct claims –currently the collective action regime (and its actors) were similarly in the process of putting together a “toolkit”, looking to other European jurisdictions such as the Netherlands (where collective action is applicable for all types of cases), Sweden and Portugal for guidance.
- In terms of factors influencing where claimants decide to launch a case, Scott cited 3 key factors: (1) the availability of collective redress mechanisms (e.g., opt-out collective proceedings), (2) the availability of disclosure, particularly for overcharge analyses (which is well developed in England and Wales), and (3) a court's attitude to case management.

2. The litigation funding landscape

- Kim noted that the growth in litigation, in the jurisdictions such as the UK and the Netherlands, would not be possible without the existence of litigation funders due to the expensive nature of litigation; noting a shift where previously defendants were well-funded, whereas in recent years claimants are now equally well-funded due to the role of litigation funders. Scott agreed that funding was “essential” to the collective action regime, where unless class members could pay, the only other body that could fund litigation would be wealthy industry associations.
- In the UK, Kim said there was a question as to whether litigation funders are acting as pseudo-gatekeepers to competition litigation (rather than the CAT) but queried whether funders (with a portfolio strategy) may be willing to take greater risks for greater reward, even if the risk of winning a case is low (David agreed with line of argument).
- Scott noted that there are instances of meritorious claims, not receiving redress, due to a lack of funding.
- David agreed that for consumer class actions, litigation funding is required to put together a vehicle for the purposes of bringing claimants together. He agreed that the collective action regime is “critically driven” by the rules of litigation funding (including expected returns and timing of returns).
 - He suspects that there is a currently a “gold rush” on launching new cases (due to the potential for high returns) but expects that, as cases go through the CAT, there will be new standards of evidence and standards of proof, which will reset expectations for funders on the type of return that may be acceptable.
 - Kim built on this discussion noting the *Riefa / Apple* case where a key element of questioning the class representative was whether the class representative understood that the litigation funder would be paid before any class member received damages.

- Scott commented that litigation funding remains largely unregulated and that there may be possible regulation in the future. Ben mentioned that to counter the problems with expensive competition litigation, a shift to the CAT fast-track process may be more efficient, and he also mentioned that the CAT is considering a pro bono scheme supported by the bar.

3. The impact of the CJEU and the Damages Directive on harmonising competition litigation

- Kim noted that, since 2021, there have been 15 cases from across the EU referring questions on the Damages Directive to the CJEU, noting that sometimes from a practitioner's perspective their assistance is limited where the judgments provided merely specific answers to specific issues.
- The term "estimation" within the Damages Directive and how this has led to ambiguity of interpretation (generally influencing the CJEU's comments that it can be excessively difficult to quantify damages), but possibly the CJEU's judgment in *TMF* helps to clarify the position.
- Mieke noted that some decisions of the CJEU were helpful, but that largely, in the Dutch courts, answers to some questions posed to the CJEU were already clear (for example, in relation to the limitation periods for bringing proceedings) and that the Dutch courts have interpreted national law in line with the Damages Directive.
- Ben commented on a wider issue of consistency in terms of legal principles, vis-à-vis consistency of outputs (i.e. the actual decisions of courts who had heard the facts): for example, in references like that in the *Volvo* case Ben noted that the CJEU was establishing a degree of conformance of procedural principles.

4. "Pass-on"

- Kim mentioned that pass-on is a key topic that has not yet been settled by the court.
- David noted that, from an economics perspective, for measurement of quantum based on specific issues and facts, pass-on is important to ensure consistency in definition and measurements. He also mentioned the need for coherence of approach in relation to pass-on cases, in particular – he highlighted that it would be important to decide on what type of data is allowed to manage assessment of pass-on.
- In the UK, there was a lot of unhelpful debate that pass-on can only be looked at in one particular way; whereas he viewed that the approach to measuring pass-on may involve differing approaches.