HAUSFELD
FOR THE CHALLENGE

2022 YEAR IN REVIEW
COMPETITION DISPUTES

In 2022 the UK retained its crown as a first-class litigation centre for international corporate claimants and consumers alike, notwithstanding the turbulent years post-Brexit and post-Pandemic. The year has seen the continued resilience of the UK as a leading jurisdiction for both standalone and follow-on competition claims, with a noticeable uptick in the number of collective actions filed over the past year. In this newsletter, we embark on a whistle-stop-tour of the key judgments and developments of 2022 and feature the cases to watch in 2023.

SHIFTS IN THE COMPETITION LAW UNIVERSE IN 2022

Collective opt-out proceedings

2022 saw a record number of new actions being launched with 12 filed and a further claim announced at the time of writing. All are being brought as opt-out claims, and all but two allege standalone abuses.

One claim is brought on a hybrid basis. For an in-depth analysis and an extensive look at the collectives landscape, our team has prepared an in-depth overview.

The mitigation defence meets reality (or the Court of Appeal)

In a seminal judgment relating to cartel damages actions, the Court of Appeal in January ruled that, to successfully plead a cost mitigation defence, defendants need to show a sufficient causal nexus or connection between the alleged mitigation and the overcharge. The issue arising on this appeal was whether an over-charging supplier can defend the claim by pleading off-setting. This involves an attempt by the supplier to assert that the purchaser has mitigated the overcharge by getting reduced prices on supplies from other suppliers. The Court also needed to decide whether it was permissible to plead a defence of this kind without any actual evidence that the claimant did mitigate its loss in this way. Keeping this in mind, the Court confirmed that a defendant must demonstrate that: (a) there is a legal and proximate causal connection between the overcharge and the act of mitigation being pleaded; (b) this connection is “realistic” or “plausible” and carries some “degree of conviction”; and (c) the evidence is more than merely “arguable”. This decision is a welcome confirmation that the English courts will not tolerate attempts by defendants to advance bare assertions of a mitigation defence in cartel damages actions. Our Perspectives sets out a full summary.

Court of Appeal strikes out pass-on defence in Forex manipulation claim

In further good news for claimants, in March the Court of Appeal struck out arguments put forward by the defendant banks that investment funds such as Allianz had passed on their losses from the global Forex cartel by cashing out of investments. If successful, the defendants' arguments would have had wide-ranging consequences regarding entities able to claim for losses arising from competition law infringements, and potentially made damages claims unduly complex and burdensome. Although defendants will continue to raise a variety of different pass-on arguments as a shield to competition damages claims, in this context at least the door has been firmly shut to the pass-on defence. For more info.

Far-reaching CJEU ruling on the statute of limitation in cartel damages cases

The latest CJEU decision regarding the Trucks cartel published in June is undoubtedly the most significant judgment the EU courts have handed down on limitation rules applicable under the domestic laws of Member States and, in particular, in confirming that the Damages Directive can already be relied on in this area. The judgment has a far wider application than the Trucks cartel and will have a profound, positive impact for international corporate claimants both on the starting point and length of limitation periods for cartel damages actions brought in the UK under the laws of many Member States that have historically had very restrictive rules on limitation. Take a deep dive into our Competition Cast podcast on the issue of limitation rules.

Power Cables Cartel

Greater Gabbard Offshore Winds Limited and SSE plc continued making progress in their multi-million damages claim against cable manufacturer Prysmian in respect of the Greater Gabbard Offshore Windfarm. The claim was resolved and withdrawn shortly before trial was due to start in June 2022. Hausfeld represented the claimants in this matter and has been instructed on two other follow-on damages claims arising from the Power Cables cartel, which are currently at the pleadings stage.

Trucks Cartel in the UK and abroad

This year saw further significant progress being made to bring the UK proceedings to a head, especially in respect of disclosure and case management considerations.

A further case management conference took place in March, during which the Tribunal:

i. Listed a 28-week trial commencing in April 2024
ii. Confirmed the identity of eight "test claimants" whose claims in relation to the UK, French and German markets will be resolved at that trial
iii. Set down a timetable to trial, with disclosure completing in November 2023 and factual and expert evidence to be exchanged in the course of next year and
iv. Compelled the Defendants to assist in populating the Claimants' "Revised composite dataset" of truck data.

The parties also agreed on the scope of additional disclosure to be provided by the Claimants on the issue of pass-on and agreed on the number and identity of the experts who will testify at trial. Hausfeld represents 14 corporates (involving over 500 claimants) in their claim before the UK's Competition Appeal Tribunal for damages resulting from the Trucks cartel.

In the Netherlands, most claimants assigned their claims to two Dutch SPVs, represented by Hausfeld. These SPVs channel the claims of more claimants and more trucks than any other similar stakeholder in the Netherlands.

Hausfeld progressed the Trucks mass litigation before the Amsterdam District Court after multiple procedural victories. Notably, on 12 May 2021, Hausfeld's clients secured a major victory as the Amsterdam Court rejected the truck manufacturers' arguments that the claimants did not suffer any damages and the claims should be struck out. Even though this judgment was rendered in the proceedings for the "first wave" of claimants, it will be of significance for all our clients.

On 27 July 2022, Hausfeld and other claimants secured another major victory.

Following a hearing on 29 March 2022, the Court issued an interim judgement finding that Dutch law was to apply to all claims in the first sets of submissions, the claim vehicles bringing and bundling claims had standing and needed not complying with provisions introduced on 1 January 2020 in a similar, yet unapplicable, Dutch procedural regime. Following these important steps, further hearings are scheduled in April 2023.

There also are other claims in the Trucks mass litigation before the Amsterdam District Court, brought later and therefore case managed in separate stages by the Amsterdam District Court. The second and third such 'waves' of proceedings have also progressed positively in 2022, following the trail blazed by the abovementioned first set of proceedings. Further developments are expected in 2023 as these proceedings gather pace and attract momentum. Hausfeld represents in total more than 4,500 companies from 37 countries before the Dutch courts.

Auto Parts Cartels

The last year saw new and ongoing claims brought by the Stellantis Group (formed in 2021 after a merger between the Italian American conglomerate Fiat Chrysler Automobiles and the French PSA Group) against many global suppliers, who allegedly overcharged the claimant on automotive parts. Whilst the European Commission's long series of cartel decisions in the automotive sector – 13 in total – have now come to a halt, many damages claims arising from those decisions are only now seeing the light of day, often on a standalone basis, as opposed to follow-on, whilst many more have been settled behind the scenes.

Occupant Safety Systems

The Stellantis Group continues to pursue a standalone claim relating to the occupant safety systems cartel. This claim was filed in the High Court against ZF/TRW, Autoliv, Toyoda Gosei and Tokai Rika in December 2020 and transferred to the specialist Competition Appeal Tribunal in March 2022. The litigation has since made good progress: the claim against Toyoda Gosei was resolved in May 2022 and a first case management conference was heard in June 2022, ordering the disclosure and access to the European Commission's investigation file by September 2022. A second case management conference is listed for March 2023, likely to cover the next steps to trial which has already been listed for October 2024.

Thermal Systems

Similarly, the Stellantis Group is now pursuing a standalone claim relating to the thermal systems cartel. The claim was filed in the High Court against Denso, Valeo, MAHLE Behr, Sanden, Marelli (formerly Calsonic) and Panasonic in March 2022. The claim against Panasonic was resolved shortly afterwards.

Foundem v Google

Infederation Ltd (Foundem) is a UK based company which operated a comparison-shopping service (CSS) allowing consumers to compare prices for goods and services offered on retailer websites. Starting in 2004, Foundem became aware that Google was making changes to its flagship Google Search infrastructure and algorithms in a way that favoured Google's own CSS (Google Shopping) and adversely affected competing CSS. Foundem was the first company to bring Google's anti-competitive self-preferencing conduct to the attention of the European Commission and the US Federal Trade Commission.

In June 2017 the European Commission found that Google had abused its dominant position as a search engine by favouring its own CSS over competing CSS. The Commission imposed a €2.4 billion fine, which was appealed by Google to the General Court. The Hausfeld team intervened in the appeal on behalf of Foundem, in support of the Commission. This is the first time that the EU courts have considered whether Google's conduct in respect of its CSS complies with European competition laws. Foundem's intervention was key to the General Court's judgment, which was delivered on 10 November 2021, and largely upheld the Commission's Decision.

Google has appealed the General Court judgment to the Court of Justice of the European Union and Foundem is preparing submissions in the lead up to its intervention in the final appeal in the European proceedings in 2023/4. In parallel, since 2008, Foundem has been pursuing a private action for damages against

Google in respect of the same conduct in the High Court of England and Wales. Over the summer of 2022, Google provided preliminary disclosure of material that they submitted to the Commission prior to its Decision. Pleading amendments are due to be concluded before the end of this year and a timetable to trial in 2025 has been ordered by the Court. Hausfeld represents Foundem in this matter.

Further infringement findings against pharmaceutical companies

Prochlorperazine rose/anti-nausea drug

In February 2022, the CMA found that Alliance Pharma, Lexon, Medreich and Focus had infringed competition law by concluding a "pay-for-delay" agreement, under which a competitor was paid not to launch an anti-nausea drug. The CMA found that the arrangements had resulted in prices rising by 700% over a four-year period. The CMA imposed a fines of over £35 million in total. The decision has been appealed to the CAT. For more info.

Aspen commitments – cancer drugs

In April 2022, the CMA announced that it had secured commitments from Aspen in relation to Aspen's pricing of certain cancer drugs. In an earlier, parallel investigation, the European Commission investigated Aspen's pricing of the same drugs which led to the EC accepting commitments from Aspen. Pursuant to the commitments, Aspen reduced its prices across Europe, committed to paying rebates to purchasers for a limited period and guaranteed the supply of the cancer drugs for a period of five years, and, for an additional five-year period, will either continue to supply or make its marketing authorization available to other suppliers. This means that over a ten-year period, Aspen is not allowed to charge more than the price set out in the commitments in the EC decision. Since the EC's decision dated after the UK exited the European Union and the pricing-related commitments relate to future, post-Brexit conduct (i.e. after 31 December 2020), the commitments related to the pricing and guaranteed supply of the affected cancer drugs were not enforceable in the UK. Therefore, the CMA secured binding undertakings from Aspen with regard to the UK market of the same pricing- and supply related commitments Aspen made in the EC decision. For more info.

Phenytoin sodium capsules/epilepsy medication

Following its original infringement decision in 2016 and after reassessing part of its investigation in July 2022, the CMA has found that Pfizer and Flynn abused their dominant positions resulting in overcharge for the NHS in relation to phenytoin sodium capsules (an epilepsy drug previously known as Epanutin). After Pfizer and Flynn's appeal of the 2016 infringement decision, it was partially annulled, and the Court of Appeal dismissed Flynn's related appeal in its entirety. The CMA decided to re-investigate the matters that were remitted to it by the CAT (which related to the CMA's conclusion that the companies' prices were an unlawful "abuse" of dominance). Following additional evidence gathering and analysis, the CMA has concluded that Pfizer and Flynn's conduct was an abuse of their dominant positions in their respective markets and that both Pfizer and Flynn charged unfair prices for phenytoin sodium capsules. For more info.

Key judgment on merger control following Meta challenge

Also in June, the UK Competition Appeal Tribunal ruled on the application brought by Meta for review of the UK Competition and Markets Authority's decision that it should divest itself of GIPHY. The judgment endorses the Authority's approach to reviewing mergers that may harm innovation and provides useful guidance on the assessment of the concept of 'dynamic competition'. Global NGO Privacy International, represented by Hausfeld, had intervened in the proceedings in support of the Competition and Markets Authority. For more info.

Brand-new UK competition regulatory regime for digital markets

In 2021, a new regulator, the Digital Markets Unit, was launched to boost competition in online markets, safeguard consumer choice and their control over their data, and tackle unfair business practices. Following this launch, in May 2022, the UK Government announced its intention to create new competition rules for digital markets and the largest digital firms as

part of the Digital Markets, Competition and Consumer Bill. The draft Bill, which will notably provide the Digital Markets Unit with statutory status and the power to levy higher fines from abusive tech giants, will be published in draft form in the 2022/2023 Parliamentary session but is not expected to come into force until at least after 2023.

The UK Government's plan to reform competition and consumer law

Following a consultation on wide-ranging reforms to the UK's competition and consumer law regimes, the UK Government published in May its response to feedback received from over 180 stakeholders. While the draft legislation has yet to be published, the Government's stated intention to legislate to promote competition and strengthen consumer rights is welcome, if – in relation to some of the reforms which appear likely to be adopted – a long time coming. For instance, the aligning of the UK Competition and Markets Authority's fining powers for breaches of consumer law with those available to it pursuant to the competition law regime, have been mooted for some time but now appear likely to be implemented. While the opportunity to enhance access to justice which would have come with the expansion of the opt-out collective redress regime to consumer law breaches appears to have been put on ice for now, the Government does not appear to have closed the door to reforms in this area in the medium or longer term. For more info.

LOOKING AHEAD

2023 appears set to be a busy year in relation to the enforcement of competition law. From the point of view of public enforcement, it will be interesting to observe how the draft Digital Markets, Competition and Consumer Bill evolves in Parliament in the coming year, as abusive tech giants are among the biggest challenges facing the Competition and Markets Authority in 2023.

We also anticipate that the Competition and Markets Authority intervening in competition law proceedings relating to big tech, a feature of 2022, for example in Epic Games' lawsuit against Google, is likely to continue in 2023.

It should also be noted that January 2023 will see a new UK subsidy control regime come into effect. This will require public bodies to adapt and update their approaches to meet the new rules, and 2023 may well see the development of related competition law litigation.

Like 2022, it is likely that private enforcement will see a growing volume of standalone damages actions progressing through the English courts in 2023. The collectives actions sphere will continue to be active, as our 2023 outlook predicts. For summary.

If you would like to discuss anything in this newsletter, please contact Scott Campbell, Head of Competition Disputes, on scampbell@hausfeld.com or your usual Hausfeld contact.

With special thanks to Scott Campbell, Lucy Rigby and Charles Laporte-Bisquit for their contributions.

They have the largest competition litigation team in the UK, with the ability to seamlessly operate across jurisdictions through their sister offices in the UK and EU. The competition litigation landscape in the UK has never been busier, and Hausfeld's entrepreneurialism, bravery and ability to work collaboratively with key players in the field (counsel, experts, funders, other firms, and opponents) has been a key factor.'
Legal 500 UK, 2023