



## Competition Law Association

British Group of the  
Ligue Internationale du Droit de la Concurrence  
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### An Update on Collective Actions in the Competition Appeal Tribunal

**Date:** 15 November 2022

**Speakers:** David Bailey, Belinda Hollway, Rachael Mulheron KC<sup>1</sup>

Kim Dietzel introduced David Bailey, Belinda Hollway and Rachael Mulheron KC and provided an overview of recent CPO applications. She then asked the provocative question: "**Is certification becoming a rubber stamping exercise for the CAT?**"

The discussion began with the consideration of the Supreme Court's (**SC**) judgment in *Merricks*,<sup>2</sup> which was described as the "most eye-catching collective action", particularly due to the extent of its class. The speakers noted the following key takeaways from Lord Briggs' judgment in the case:

- The "door has been pushed wide open" following *Merricks*, with a number of collective actions and certifications since then.
- Canadian case law is having an impact on the UK regime, as there are many instances where the CAT and the Court of Appeal (**CA**) are guided by standards and principles set up by Canadian courts (especially the *Microsoft* test for the analysis of the proposed expert methodology).

It was noted that there are three themes in the CPO regime:

- The conditions for authorisation of Proposed Class Representatives (**PCRs**) are relatively clear, with most PCRs being qualified individuals, former regulators, academics or similar. The CAT is not worried provided the PCRs have sound management (and most PCRs have an advisory panel).
- The role of merits and expert evidence is still a work in progress. The SC made clear that merits only feature through strike-out and summary judgment, but it has proved difficult to dismiss a case at the summary stage. Concerning expert evidence, the CAT applies the *Microsoft* test, but there is uncertainty about its specific application (as shown in the *UKTC* case<sup>3</sup> where a simulation methodology was approved, despite the CAT being sceptical about whether it would be able to assess damages).
- The issue of who should have "carriage" of the collective proceedings arises whenever there is more than one applicant for a CPO. This is a vexed and vexing issue, as can be seen from the two cases to date: *FX* and *Trucks*.

#### The role of cost/benefit criterion in CPO cases

The speakers then considered the role of cost/benefit in CPO cases (set out in rule 79(2)(b)<sup>4</sup>):

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<sup>1</sup> All speakers were speaking in a purely personal capacity and whilst their views may be influenced by the cases they work on, no-one was representing the views of their clients.

<sup>2</sup> *Walter Hugh Merricks CBE v Mastercard Inc*, Case 1266/7/7/16, filed on 8 September 2016 [2020] UKSC 51 (*Merricks*).

<sup>3</sup> *UK Trucks Claim v Stellantis NV (formerly Fiat Chrysler Automobiles NV)*, Case 1282/7/7/18, filed on 18 May 2018 [2022] CAT 25 (*UKTC*).

<sup>4</sup> All references to rules in this article refer to rules in the Competition Appeal Tribunal Rules 2015 unless stated otherwise.

- The certification stage was not strictly necessary (as Australia's regimes don't have it), but the legislative intention was to have a gateway for CPO cases to pass through to protect CAT's resources.
- The cost/benefit criterion is unique to the UK regime as it does not exist in any other regime around the world. It is a "truly experimental type of criterion", which has a long way to go re its potential interpretation and impact.
- There is room for parties to make further submissions as to the meaning of the cost/benefit criterion, and it is perhaps surprising how little the idea of cost-benefit application has featured in cases to date. Considering CAT's reference to the criterion in the Gutmann case,<sup>5</sup> there is room for argument that the CAT may take into account the number of class members, the value per claim, the cost to the court, the number of people coming forward, or the likely take-up rate.

### The CPO claimants' perspective

The panellists noted that there may be a feeling that the CAT should stop bad cases going forward, but the fact that most cases have been certified may suggest the CAT is not properly considering certification. Offering the CPO claimants' perspective, it was said that the reason CAT had let the majority of cases through is not surprising. Instead, it is a natural outcome of the complex process in place before an application is filed, notably:

- It is "incredibly difficult to get the case up and running" as all cases must be backed by highly sophisticated litigation funders who will only back cases, they are persuaded are winnable. By the time the claim is filed, barristers, solicitors, experts, ATE insurers, and funders have all considered the prospects of the case and decided that it is worth taking forward.
- For CPO applications, you cannot log the claim form and settle the case behind the scenes (this can be contrasted with High Court claims), and a lot of documentation must be prepared ahead of the claim being filed (for example the supporting experts' reports, litigation plan, budget, and a witness statement from the PCR).

The speakers then considered whether the CAT is resistant to stopping CPO applications in light of this difficult process and the fact that the SC considered that the CAT had applied too stringent a test. The speakers considered SC's decision in Merricks, where the majority of the judges allowed the PCR the opportunity to obtain the necessary data and that a stricter test should not be applied for a class action than individual claim, while the minority did not think that the evidence would be found. It was said that the majority were prepared to interpret the regime in a way which will have a profound effect – following Merricks, the CAT may now be reluctant not to permit certification.

### Opt-in vs Opt-out basis

When deciding whether the case should be brought on an opt-in or opt-out basis, rule 79(3) directs the CAT to consider the strength of the claim, the practicability of proceedings, and any other matter as the CAT sees fit. However, it was noted that most claims are brought on an opt-out basis.

- Strength of the claim – This was at the forefront of CAT's mind in the FX case (i.e. in O'Higgins<sup>6</sup> and Evans<sup>7</sup>). While CAT typically delivers unanimous decisions, there was a split of opinion in these cases, as the dissenting judge disagreed with the majority's reasoning that weaker claims should be brought on an opt-in basis.

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<sup>5</sup> *Justin Gutmann v First MTR South Western Trains Limited and Another*, Case 1304/7/7/19, filed on 27 February 2019 [2021] CAT 31 (*Gutmann*).

<sup>6</sup> *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc*, Case 1329/7/7/19, filed on 29 July 2019 [2022] CAT 16 (*O'Higgins*).

<sup>7</sup> *Mr Phillip Evans v Barclays Bank Plc*, Case 1336/7/7/19, filed on 11 December 2019 [2022] CAT 16 (*Evans*).

- Practicability of proceedings – In *Le Patourel*,<sup>8</sup> BT argued that the case was the ideal candidate for opt-in proceedings as all class members are customers of BT and so easily contactable, which is also the general preference stated in the CAT guide. On appeal, the CA held that there was no general preference for opt-in; instead, this should be determined on a case-by-case basis. In the FX case, the CAT based its decision on the practicability of the proceedings and especially the take-up rate. The speakers noted that there is a human tendency that, when given a chance to do something positive (such as opt into proceedings), people are unlikely to do it.

The panellists considered the possibility of a combination of opt-in and opt-out proceedings, and it was noted that the CAT is resistant to this idea. In *RoRo*,<sup>9</sup> some of the proposed defendants proposed an opt-in class for large business purchasers and an opt-out class for everyone else, but CAT was concerned that such a split would be artificial and unworkable. However, it was noted that the latest interchange fee cases have been filed on both an opt-in and opt-out basis, with a revenue threshold determining whether a class member is part of the opt-in or opt-out class.<sup>10</sup> It was noted that it will be interesting to see how these cases progress, especially given the large number of individual proceedings that have been issued.

Additionally, non-residents are required to opt-in in the UK by virtue of the legislation, which can be contrasted with the position in Australia, where it has recently been held, in the Brazilian dams case, that non-residents (about which the statute is silent) are not required to opt-in, effectively creating a global class.

### Carriage disputes

Three issues arise out of the *FX* and *Trucks* cases (i.e. *UKTC* and *RHA*<sup>11</sup>):

- The two decisions are not consistent. The CAT chose not to apply the Canadian Court's 17-factor test to assess who should win the carriage dispute and created a new law on carriage disputes instead. The *FX* and *Trucks* cases are currently being appealed and it will be interesting to see whether the CA will articulate a general test, or decide that each case turns on its facts.
- It is unclear whether carriage decisions can be appealed or rather subject to judicial review. The CAT guide originally envisioned that certification decisions would not be appealable, but that has not been the case. Under the legislation, the CA can only review decisions that relate to an award of damages. It was suggested that members of the O'Higgins PCR class were denied the right to seek compensation for a particular type of trading, so the carriage decision in favour of Evans denies damages to O'Higgins' victims. This would make it an appealable decision, but we have to wait to see what CA says about its jurisdiction to hear the carriage dispute.
- The position on costs. In *Trucks*, the CAT held that as both *RHA* and *UKTC* were good enough to be certified, they were both entitled to their costs as against the respondents who had argued neither should be certified, even though only the *RHA* claim was certified. While the respondents may argue that they are entitled to their costs for wasted time from *UKTC*, the current position is to hear carriage disputes as part of certification and so if both cases meet the threshold for certification, the respondents can be liable for both PCRs' costs. It was noted that it would be better if the carriage dispute could be resolved as a preliminary issue without the defendants' involvement, as then the respondents will only have to respond to one PCR.

The CAT is therefore faced with the dilemma of deciding which PCR is the more suitable person to act as class representative. As a practical matter, the prospect of a carriage dispute can encourage PCRs to

<sup>8</sup> *Justin Le Patourel v BT Group Plc*, Case 1381/7/7/21, filed on 15 January 2021 [2021] CAT 30, [2022] EWCA Civ 593 (*Le Patourel*).

<sup>9</sup> *Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd*, Case 1339/7/7/20, filed on 20 February 2020 [2022] CAT 10 (*RoRo*).

<sup>10</sup> *Commercial and Interregional Card Claims I Ltd v Mastercard Incorporated & Others*, Case 1441/7/7/22, filed on 6 June 2022; *Commercial and Interregional Card Claims II Ltd v Mastercard Incorporated & Others*, Case 1442/7/7/22, filed on 6 June 2022; *Commercial and Interregional Card Claims I Ltd v Visa Inc. & Others*, Case 1443/7/7/22, filed on 6 June 2022; *Commercial and Interregional Card Claims II Ltd v Visa Inc. & Others*, Case 1444/7/7/22, filed on 6 June 2022.

<sup>11</sup> *Road Haulage Association v MAN SE*, Case 1289/7/7/18, filed on 17 July 2019 [2022] CAT 25 (*RHA*).

"race to the front door of the tribunal" (especially if the earlier PCR is favoured in any subsequent dispute). Considering the role of merits in the carriage dispute in *FX* litigation, it was noted that while one PCR (*O'Higgins*) argued that merits were irrelevant (in line with the Supreme Court's judgment in *Merricks*), the other PCR (*Evans*) argued that merits are relevant because the class will be best served by the stronger claim. The CAT tried to distance itself from the merits when deciding carriage, but CA will consider this important issue next year.

### **Treatment of CPO claims post-certification**

CPO claims differ from standard civil claims in that there is a class represented by the class representative, which raises issues for disclosure obligations – for example, is a defendant able to request disclosure from a class member (or a selection of class members)? It was noted that there will be a hearing the following day in *RoRo* where such issues will be considered, following the defendants writing to large class members informing them that they would be seeking disclosure from those class members if they did not opt-out of the litigation, and so they should take legal advice on document retention. It will be considered whether the defendants can write to class members or whether communication should go through the lawyers/PCR, as would happen in other litigation. It was also noted that most disclosure will come from the defendants. It is unclear whether the PCR should sit back and see what is disclosed, involve experts, or whether the approach is more nuanced than that.

Adverse costs were described as "another brake in the gateway of certification" under rule 78(2)(d). When considering whether it is just and reasonable to certify the CPO claim, one criterion is whether the PCR would be able to pay the defendant's costs if ordered to do so. It was noted that the situation is different in the UK than in other regimes. In *Trucks*, the CAT said that this criterion is met provided the claimants are able to pay a substantial level of costs at least for part of the proceedings. However, this is not what rule 78(2)(d) says, and issues may arise if the money runs out. In *Coll*,<sup>12</sup> the CAT held that the claimant should not be stifled for want of funds. Both the cost/benefit and the ability to pay adverse costs are part of the framework of certification criteria, but they are being interpreted differently than perhaps intended (albeit that it is early days).

### **The issue of parallel investigations**

Lastly, the panellists considered what happens if CPO cases are brought in parallel with CMA investigations. The CMA has sought to intervene in a number of CPOs, which was said to be a positive development; for example, in *Le Patourel*, the CMA intervened to provide its experience and expertise on excessive pricing to help the CAT. In some cases, there are also overlapping investigations, for example, in relation to Apple and Google. It was noted that there is some degree of coordination through CMA intervention, as CMA assists the CAT and ensures that the CAT is aware of CMA's thinking. It will be interesting to see how this develops in the UK and how the CAT will react.

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<sup>12</sup> *Elizabeth Helen Coll v Alphabet Inc*, Case 1408/7/7/21, filed on 29 July 2021 [2022] CAT 39 (*Coll*).

## TABLE OF CPOs

Case and date of CPO application	Alleged infringement	Follow-on or standalone?	Opt-in or opt-out?	Certified?
<i>Dorothy Gibson v Pride Mobility Products Ltd</i> , Case 1257/7/7/16, filed on 25 May 2016 ( <i>Gibson</i> )	Anti-competitive concerted practices aimed at prohibiting the online advertising of prices for certain models of Pride mobility scooters below Pride's recommended retail price	Follow-on	Opt-out	Certification effectively refused by CAT on 31 March 2017 and claim subsequently withdrawn
<i>Walter Hugh Merricks CBE v Mastercard Inc</i> , Case 1266/7/7/16, filed on 8 September 2016 ( <i>Merricks</i> )	Anti-competitive concerted practices related to setting a minimum "interchange fee" which merchants had to pay to their acquiring bank for accepting payment cards	Follow-on	Opt-out	Certification granted by CAT on 18 August 2021 <sup>13</sup>
<i>UK Trucks Claim v Stellantis NV (formerly Fiat Chrysler Automobiles NV)</i> , Case 1282/7/7/18, filed on 18 May 2018 ( <i>UKTC</i> )	Anti-competitive concerted practices between truck manufacturers relating to gross list prices for medium and heavy trucks	Follow-on	Opt-out (or opt-in in the alternative)	Certification refused by CAT on 8 June 2022
<i>Road Haulage Association v MAN SE</i> , Case 1289/7/7/18, filed on 17 July 2019 ( <i>RHA</i> )	Anti-competitive concerted practices between truck manufacturers relating to gross list prices for medium and heavy trucks	Follow-on	Opt-in	Certification granted by CAT on 8 June 2022
<i>Gutmann v First MTR South Western Trains Ltd</i> , Case 1304/7/7/19, filed on 27 February 2019 (together with Case 1305/7/7/19 below, <i>Gutmann 1</i> )	Abuse of dominance by train operating companies related to not making Boundary Fares sufficiently available to customers	Standalone	Opt-out	Certification granted by CAT on 19 October 2021
<i>Justin Gutmann v London &amp; South Eastern Railway Ltd</i> , Case 1305/7/7/19, filed on 27 February 2019 (together with Case 1304/7/7/19 above, <i>Gutmann 1</i> )	Abuse of dominance by train operating companies related to not making Boundary Fares sufficiently available to customers	Standalone	Opt-out	Certification granted by CAT on 19 October 2021
<i>Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc</i> , Case 1329/7/7/19, filed on 29 July 2019 ( <i>O'Higgins</i> )	Anti-competitive concerted practices between banks trading in the spot foreign exchange market	Follow-on	Opt-out	CAT refused certification on the opt-out basis sought, in a ruling of 31 March 2022. Application stayed and applicant given permission to submit a revised application for certification on an opt-in basis

<sup>13</sup> The CAT had previously denied certification on 21 July 2017. However, this ruling was appealed and the application for a CPO remitted back to the CAT after the Supreme Court's judgment on 11 December 2020.

Case and date of CPO application	Alleged infringement	Follow-on or standalone?	Opt-in or opt-out?	Certified?
<i>Mr Phillip Evans v Barclays Bank Plc</i> , Case 1336/7/7/19, filed on 11 December 2019 ( <i>Evans</i> )	Anti-competitive concerted practices between banks trading in the spot foreign exchange market	Follow-on	Opt-out	CAT refused certification on the opt-out basis sought, in a ruling of 31 March 2022. Application stayed and applicant given permission to submit a revised application for certification on an opt-in basis
<i>Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd</i> , Case 1339/7/7/20, filed on 20 February 2020 ( <i>McLaren</i> )	Anti-competitive concerted practices between maritime car carriers in relation to the provision of "deep sea" carriage of new motor vehicles	Follow-on	Opt-out	Certification granted by CAT on 18 February 2022
<i>Justin Le Patourel v BT Group Plc</i> , Case 1381/7/7/21, filed on 15 January 2021 ( <i>Le Patourel</i> )	Abuse of dominance by BT charging excessive prices to customers supplied with certain residential landline services	Standalone	Opt-out	Certification granted by CAT on 27 September 2021
<i>Consumers' Association v Qualcomm Inc</i> , Case 1382/7/7/21, filed on 18 February 2021 ( <i>Consumers' Association</i> )	Abuse of dominance by Qualcomm in the markets of smartphone chipsets and standard essential patents, resulting in an overcharge to purchasers of smartphones	Standalone	Opt-out	Certification granted by CAT on 17 May 2022
<i>Dr. Rachael Kent v Apple Inc and Apple Distribution International Ltd</i> , Case 1403/7/7/21, filed on 11 May 2021 ( <i>Kent</i> )	Abuse of dominance by Apple in imposing restrictive terms and charging excessive prices in relation to its App store	Standalone	Opt-out	Certification granted by CAT on 29 June 2022
<i>David Courtney Boyle &amp; Edward John Vermeer v Govia Thameslink Railway Ltd</i> , Case 1404/7/7/21, filed on 10 June 2021 ( <i>Boyle &amp; Vermeer</i> )	Abuse of dominance by rail operator in inflating passenger fair prices on London-Brighton mainline	Standalone	Opt-out	Certification granted by CAT on 25 July 2022
<i>Elizabeth Helen Coll v Alphabet Inc</i> , Case 1408/7/7/21, filed on 29 July 2021 ( <i>Coll</i> )	Abuse of dominance by Google related to bundling Play Store with other Google products	Standalone	Opt-out	Certification granted by CAT on 18 July 2022
<i>Home Insurance Consumer Action Ltd v BGL (Holdings) Ltd</i> , Case 1423/7/7/21, filed on 1 November 2021 ( <i>Consumer Action</i> )	Anti-competitive concerted practices entered into by ComparetheMarket related to its use of "most favoured nation" clauses in its contracts with 32 home insurers	Unconfirmed at this stage	Unconfirmed at this stage	CPO application not yet served on respondents (time for service extended pending outcome of appeal against related CMA decision)

Case and date of CPO application	Alleged infringement	Follow-on or standalone?	Opt-in or opt-out?	Certified?
<i>Justin Gutmann v Govia Thameslink Railway Ltd</i> , Case 1425/7/7/21, filed on 24 November 2021 ( <i>Gutmann 2</i> )	Abuse of dominance by train operating companies related to not making Boundary Fares sufficiently available to customers	Standalone	Opt-out	Certification pending (certification hearing has not yet taken place)
<i>Dr Liza Lovdahl Gormsen v Meta Platforms, Inc</i> , Case 1433/7/7/22, filed on 14 February 2022 ( <i>Lovdahl Gormsen</i> )	Abuse of dominance by Facebook on the personal social network/social media market in relation to price charged to/terms and conditions required of Facebook users	Standalone	Opt-out	Certification pending (certification hearing has not yet taken place)
<i>Elisabetta Sciallis v Fender Musical Instruments Europe Ltd &amp; Another</i> , Case 1437/7/7/22, filed on 21 March 2022 ( <i>Sciallis</i> )	Anti-competitive concerted practices in the guitar sector (resale price maintenance)	Follow-on and standalone	Opt-out	Certification pending (certification hearing has not yet taken place)
<i>Clare Mary Joan Spottiswoode CBE v Nexans France S.A.S &amp; Others</i> , Case 1440/7/7/22 filed on 10 May 2022 ( <i>Spottiswoode</i> )	Anti-competitive concerted practices by producers and supplies of high-voltage submarine and underground power cables	Follow-on	Opt-out	Certification pending (certification hearing has not yet taken place)
<i>Commercial and Interregional Card Claims I Ltd v Mastercard Incorporated &amp; Others</i> , Case 1441/7/7/22, filed on 6 June 2022 ( <i>CICC I Mastercard</i> )	Anti-competitive concerted practices related to setting a minimum "interchange fee" which merchants had to pay to their acquiring bank for accepting payment cards	Standalone	Opt-in	Certification pending (certification hearing has not yet taken place)
<i>Commercial and Interregional Card Claims II Ltd v Mastercard Incorporated &amp; Others</i> , Case 1442/7/7/22, filed on 6 June 2022 ( <i>CICC II Mastercard</i> )	Anti-competitive concerted practices related to setting a minimum "interchange fee" which merchants had to pay to their acquiring bank for accepting payment cards	Standalone	Opt-out	Certification pending (certification hearing has not yet taken place)
<i>Commercial and Interregional Card Claims I Ltd v Visa Inc. &amp; Others</i> , Case 1443/7/7/22, filed on 6 June 2022 ( <i>CICC I Visa</i> )	Anti-competitive concerted practices related to setting a minimum "interchange fee" which merchants had to pay to their acquiring bank for accepting payment cards	Standalone	Opt-in	Certification pending (certification hearing has not yet taken place)
<i>Commercial and Interregional Card Claims II Ltd v Visa Inc. &amp; Others</i> , Case 1444/7/7/22, filed on 6 June 2022 ( <i>CICC II Visa</i> )	Anti-competitive concerted practices related to setting a minimum "interchange fee" which merchants had to pay to their acquiring bank for accepting payment cards	Standalone	Opt-out	Certification pending (certification hearing has not yet taken place)

<b>Case and date of CPO application</b>	<b>Alleged infringement</b>	<b>Follow-on or standalone?</b>	<b>Opt-in or opt-out?</b>	<b>Certified?</b>
<i>Mr Justin Gutmann v Apple Inc. &amp; Others</i> , Case 1468/7/7/22, filed on 17 June 2022 ( <i>Gutmann 3</i> )	Abuse of dominance relating to batteries in iPhones	Standalone	Opt-out	Certification pending (certification hearing has not yet taken place)
<i>BSV Claims Limited v Bittylicious Limited &amp; Others</i> , Case 1523/7/7/22, filed on 29 July 2022 ( <i>BSV</i> )	Anti-competitive concerted practices related to the delisting of BSV in 2019.	Standalone	Opt-out	Certification pending (certification hearing has not yet taken place)
<i>Alex Neil Class Representative Limited v Sony Interactive Entertainment Europe Limited &amp; Others</i> , Case 1527/7/7/22, filed on 22 August 2022 ( <i>Sony</i> )	Abuse of dominance by Sony by imposing exclusive dealing obligations, tying Sony's electronic store to PlayStation and imposing excessive and unfair prices for digital games and in-game content	Standalone	Opt-out	Certification pending (certification hearing has not yet taken place)
<i>Julie Hunter v Amazon</i> , filed on 14 November 2022 ( <i>Amazon</i> )	Abuse of dominance by Amazon by favouring its own retail products, or those sold by third-party sellers who use Amazon's order fulfilment and delivery services, in the so-called "Buy Box".	Standalone	Opt-out	Certification pending (certification hearing has not yet taken place)