CAT Collective Proceedings

February 2023 update

A new era of consumer-focussed competition class actions is now well underway. It kicked off with the first collective proceedings order (CPO) granted by the Competition Appeal Tribunal (CAT) in *Merricks* in the summer of 2021, opening the gates for further collective claims to be certified.

The UK's fledgling competition class action regime, brought in under the Consumer Rights Act 2015, has now taken flight.

As at February 2023, 29 collective proceedings applications have been registered with the CAT under the new regime. Ten are now certified and have moved to the substantive stage of proceedings. Many more are currently awaiting certification and affect multiple sectors, ranging from musical instruments and PlayStation consoles through to cryptocurrency and social media. There are further class actions in the wings with recent collective proceedings publicised including claims against Google, Amazon and water companies.

Now eighteen months after the CAT's first certification ruling in *Merricks*, early 2023 has already got off to a flying start.

Chris Ross and Leonia Chesterfield take a look at recent developments and what to watch out for in the competition collective proceedings space, both this year and beyond.

The certification story so far

This table shows the status of CPO cases to date:

CLAIM STATUS AS AT 10 FEBRUARY 2023	CERTIFIED AND MOVING TO SUBSTANTIVE TRIAL	AWAITING CERTIFICATION	DISCONTINUED/ ON APPEAL	PUBLICISED BUT NOT YET FILED/ON CAT WEBSITE
CPO claims	Interchange fees: Merricks Trucks: RHA* Train ticketing: Gutmann (First MTR) Train ticketing: Gutmann (LSER) Maritime car carriers: McLaren Landline services: Le Patourel Smartphone chipsets: Consumers' Association App Store: Dr Kent Train ticketing: Boyle Google Play Store: Coll *Stayed pending the outcome of the Court of Appeal	Train ticketing: Gutmann (Govia) Social media: Dr Gormsen Musical instruments: Sciallis (Fender) Power cables: Spottiswoode Interchange fees: CICC I (Mastercard) Interchange fees: CICC II (Mastercard) Interchange fees: CICC I (Visa) Interchange fees: CICC II (Visa) Phone batteries: Gutmann (Apple) Cryptocurrency: BSV Gaming consoles: Neill Musical instruments: Sciallis (Roland) Musical instruments: Sciallis (Korg) Musical instruments: Sciallis (Yamaha)	Mobility scooters: Gibson Trucks: UKTC FX: O'Higgins FX: Evans Insurance comparison site: Home Insurance Consumer Action	Further CPO applications are in the pipeline. Those recently publicised include: Amazon 'Buy-box': Hunter v Amazon Ad tech: Pollack v Google Sewage and wastewater: Professor Roberts' proposed claim against water companies
Total no.	**10**	**14**	**5**	

As a recap, the CAT's certification assessment for collective proceedings comprises two limbs:

- the authorisation of the proposed class representative (**PCR**) (the **authorisation criteria**, Rule 78 of the CAT Rules); and
- the certification of the claims as eligible for inclusion in collective proceedings (the **eligibility criteria**, Rule 79 of the CAT Rules).

With 10 claims now certified, many aspects of the CAT's application of the certification criteria have been clarified. At appellate level, Court of Appeal rulings last year in *Le Patourel* (our previous update is here), *Gutmann* and *McLaren* all provided further welcome clarity as to the nature and breadth of the CAT's discretion. This combined decisional practice has firmed the ground since the landmark Supreme Court ruling in *Merricks* in 2020, and the greater certainty has paved the way for many more claims to be brought.

A number of high-level themes have emerged so far:

- **Standalone trend:** whereas previously the litigation landscape for competition damages mainly featured follow-on damages claims (following an existing infringement decision), increasingly the trend is for collective proceedings to be 'standalone'. In standalone claims, the underlying infringement of competition law must be proved in addition to proving causation and loss. Given high evidential hurdles, this reflects increasing levels of confidence on the part of PCRs, their advisors and funders, as well as a recognition that the market is increasingly crowded and that PCRs run the risk of competing claims and carriage disputes if they wait to bring follow-on claims.
- **Novel claims:** increasingly creative claims are being shoehorned into the current competition damages collective proceedings regime (and many are based on novel and untested theories of harm). These include claims based on misuse of data and environmental losses. Many of the current CPO cases are testing the boundaries of traditional competition law, including where it intersects with other areas of law such as data privacy and consumer protection.
- **Opt-out consumer classes preferred:** while there are examples where businesses fall within the relevant class definition, most CPO applications have been framed on behalf of consumer classes and have been brought on an opt-out basis. Although there are exceptions. For example, there are claims brought primarily on behalf of businesses, such as in *FX*. And while opt-out is the favoured model, the RHA's claim in *Trucks* is opt-in. In the newly launched Commercial and Interregional Card Claims (**CICC**), the proposed classes comprise eligible merchants that have accepted Visa or Mastercard payment cards during the relevant claim periods. Two of the CICC CPO applications are on an opt-in basis and two are opt-out. In terms of whether a proposed class member would fall within an opt-in or an opt-out CICC CPO, the size of the merchant is relevant: eligible merchants with an average annual turnover of less than £100m per annum in the relevant period would be included in the opt-out proceedings.
- **Rewriting the procedural rule book:** as suggested by the Court of Appeal in *Le Patourel*, the CAT Guide to Proceedings may need to be amended as the CAT's experience of collective proceedings develops. It has now been clarified that there is no 'general preference' for opt-in 'where practicable', as had been suggested in the CAT Guide. The position is one of neutrality. The CAT's procedural rules remain under review and we have already seen a new Practice Direction clarifying that the trial panel will likely remain the same as the certification panel. We expect to see further revisions as the CAT's experience of the new regime beds down and the volume of cases continues to increase. The CAT is clearly willing to take novel case management approaches where needed. This includes its new Umbrella Proceedings Practice Direction, enabling an Umbrella Proceedings Order to be put in place where proceedings raise so-called 'ubiquitous' matters.
- **Pro-Sys battleground:** the CAT has continued to place significant importance on meeting the *Pro-Sys* or *Microsoft* test (which derives from Canadian caselaw[1]). The Pro-Sys test is now firmly embedded as the relevant threshold test which applies to expert methodology in fulfilling the relevant certification criteria. This is proving to be a key battleground in the certification hearings with the CAT taking an active role in raising detailed questions regarding the methodology put forward by the PCR. While various challenges relating to the authorisation criteria have been raised, particularly as to the funding arrangements in place, the key focus at many of the CPO hearings has been on assessing the eligibility criteria.

The early certified cases suggest there is presently a low bar to the CAT's certification assessment. In two cases, the CAT has even certified the claim on the spot at the certification hearing. The relatively low bar also reflects the fact the CAT does not consider the merits of the claim as part of the certification assessment. Further, all attempts to date by a proposed defendant to bring a parallel application for strike-out/reverse summary judgment (heard at the same time as the CPO application) have failed.

Notes

1. The Canadian ruling was cited in the very first CPO cases heard in the CAT: *Pro-Sys Consultants Ltd v Microsoft Corp [2013].*

What lies ahead in 2023

Whether the CAT's current relatively low certification bar may be raised in 2023 is being watched with interest. A number of procedural skirmishes have affected the smooth early running of the first certified cases. For example, recently the CAT gave permission for Mr Merricks to further amend his re-amended reply following a hearing in January 2023 in relation to limitation and exemptibility. There have already been various satellite issues arising in the first certified case, including an appeal on domicile date.

As the substantive stage of the early certified cases is now running alongside the further CPO applications being brought, we may see the CAT take an increasingly robust approach to ensure the necessary 'blueprint' to trial is addressed in sufficient detail before the newer claims are certified. As the regime matures, the CAT's early learning with the initial cases will no doubt feed back into the level of rigour it takes at the certification assessment to ensure the certified cases are able to run efficiently to trial from a case management perspective.

From imminent new certification rulings to various appeals, there is certainly plenty of activity fixed for 2023. The CAT will also likely hear the first substantive trial of a certified case this year.

We take a look at key developments expected in 2023:

In the CAT: further CPOs, a trial on the substance and a new avenue for data claims?

Kicking off 2023 with the first certification hearing of the year, the CAT heard the *Meta* application in January. This is a novel claim brought by Dr Liza Lovdahl Gormsen on behalf of Facebook users against Meta.

In summary, the PCR has alleged various abuses of what she says is Facebook's dominant position, with allegations of the imposition of unfair terms, prices and/or other trading conditions on its users. The PCR alleges that the so-called 'Unfair Price' relates to the charging of an unfairly high 'price' or 'payment in kind' in the form of extensive personal data for the provision of social networking services.

At the CPO hearing, the CAT panel raised several detailed questions, in particular to ascertain whether the PCR's economic evidence relating to the proposed quantum methodology would be sufficient to meet the requirements of the *Pro-Sys* test. The CAT did not certify at the hearing and its certification decision is awaited.

If certified, the claim could lead to further collective proceedings based on these novel allegations of anti-competitive data practices – and the CPO route could become a potential new procedural vehicle for mass privacy claims following the unsuccessful claim in *Lloyd v Google* (see our case update here).

Among other key dates in the CAT's spring diary are the certification hearings in *Gutmann v Govia* (22 March 2023); *Gutmann v Apple* (2 May 2023); and *Neill v Sony* (7 June 2023) and many more hearings are also being listed.

We are also likely to see the first substantive trial of a CPO application this year. In *Boyle v Govia*, the CAT ordered a split trial and indicated in its ruling that the Stage 1

hearing concerning liability and other issues is to be listed between October to December 2023. Questions of quantum have been hived off to Stage 2. The next substantive trials are not likely to be until 2024 (when claims such as *Le Patourel* and *Kent v Apple* are due to be heard). These cases are likely fast overtaking the pace of *Merricks* which is to be heard across three trials (with only the first and second trials taking place during 2024[2]).

In the Court of Appeal: clarifying carriage disputes and opt-in vs opt-out

The Court of Appeal will also be busy in 2023. It will hear two different appeals both of which concern competing CPO applications (*FX* and *Trucks*).

If there are competing PCRs[3] in respect of the same claims, this is often termed a 'carriage dispute'. Under the authorisation criteria, the rules provide that the CAT shall consider which PCR would be 'the most suitable' (Rule 78(2)(c) of the CAT Rules).

FX – competing opt-out applications

In *FX*, there were two competing applications for an opt-out CPO. One application was brought by Michael O'Higgins FX Class Representative Ltd and the other by Phillip Evans. Both claims sought damages on a class-wide basis following the European Commission's infringement decisions regarding foreign exchange spot trading.

As both applications were brought on an opt-out basis, the proposed classes overlapped and therefore the issue of carriage arose (as only one opt-out claim could have been certified). Were the claims certified on an opt-in basis, however, the issue of carriage would not arise. However, both PCRs were unsuccessful. The CAT considered both the PCRs should refile their claims on an opt-in basis instead. See our previous update here for further details.

Trucks – overlapping applications

There were also two competing class actions in Trucks. The Road Haulage Association (**RHA**) had applied for a CPO on an opt-in basis and UK Trucks Limited (**UKTC**) had applied on an opt-out basis (with opt-in in the alternative).

Although the proposed classes in the RHA (opt-in) and UKTC (opt-out) applications were not identical, they substantially overlapped. This raised the jurisdictional question whether the CAT was able to certify two overlapping sets of collective proceedings. The CAT did not determine the jurisdictional position, as in any event it considered it would be wholly inappropriate to approve both applications.

The CAT then considered which of the two applications was preferable. In determining this, the CAT compared the differences between the UKTC and RHA applications, including regarding the class definition, funding aspects, the run-off period and the impact of the availability of data on the respective experts' methodology. Overall, in comparing the differences, the CAT considered that the RHA opt-in claim was preferable to the UKTC's claim (even if the UKTC's claim had been opt-in).

Permission to appeal has been granted in both the *FX* and the *Trucks* cases. The certified RHA claim is currently stayed pending the outcome of the Court of Appeal. The *FX* appeal is due to be heard on 25 April 2023 and the *Trucks* appeal has been recently listed for 10 May 2023. Therefore, there will likely be further guidance provided soon as to the CAT's approach to certification in the context of competing CPO applications. The relevant grounds of appeal also raise important points of principle as to the CAT's opt-in versus opt-out assessment.

In the Supreme Court: can LFAs be DBAs?

A further appeal in the context of the *Trucks* litigation will be heard in the Supreme Court in February 2023. This relates to a specific issue relating to whether litigation funding agreements (LFAs) may constitute damages based agreements (DBAs), which are unenforceable if they relate to opt-out collective proceedings. The hearing is listed for 16 February 2023[4].

Given that LFAs and third-party funding have become a recognised feature enabling the collective proceedings regime in the UK, funders, lawyers and PCRs are watching the outcome with interest.

With pressures to regulate the funding sector growing, in the UK and elsewhere including in the EU, the spotlight remains firmly on how best to regulate third-party funding of class actions.

Notes

2. A hearing in relation to evidential issues concerning pass-on is to be held in May 2023 (as set out in the Tribunal's Order drawn 13 January 2023).
3. PCRs do not always compete: in one case, Mr Boyle and Mr Vermeer applied jointly for a CPO. The CAT considered it did have jurisdiction to appoint two PCRs but declined to do so. In its ruling it noted that joint class representatives is not a cost-free option and was not justified in that case. Only Mr Boyle was appointed.
4. *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* UKSC 2021/0078.

Looking beyond 2023

While looking beyond 2023 involves many unknowns, here are a few developments we predict:

Continued tech sector focus

The Digital Markets Unit (**DMU**) is due to receive its formal statutory powers later this year (see our December update here). The CMA has not wasted any time gearing up for the forthcoming new digital regime as the DMU has been operating in shadow form for a while. It has significantly bolstered its internal capabilities in terms of tech expertise and continues to deploy its existing competition and consumer law enforcement tools in the meantime.

Digital markets have long been a strategic objective for the CMA but we are seeing renewed vigour in the number of cases it is choosing to bring in the tech sector. With the continued regulatory activity and focus on the tech sector, we are likely to see an increasing number of collective proceedings relating to issues arising in digital markets.

Further ESG based claims emerging

Towards the end of 2022, we saw publicity of the first environmental collective action against water companies for alleged unlawful discharges of untreated sewage and wastewater into waterways. While this is the first 'environmental' CPO application, we expect to see further activity relating to ESG claims, particularly given the CMA's increased activity in relation to sustainability issues. The CMA's proposed 2023-2024 Annual Plan recently under consultation[5] refers to promoting environmental sustainability and its creation of a Sustainability Taskforce which is now operational. Again, the increased regulatory focus in this area is, in turn, likely to generate related collective proceedings activity.

Interplay with public enforcement

While many of the current claims are 'standalone' in name, a significant portion are running in parallel with ongoing regulatory investigations or seeking to rely on prior regulatory findings.

This is creating a host of complexities for all parties as some class actions are running concurrently with ongoing public enforcement, which raises wider public interest issues. It also risks having a chilling effect on established regulatory tools such as the UK's markets regime, as there are examples of regulatory findings being used to underpin potential competition law infringement claims, such as Ofcom's findings concerning BT relied on by the PCR in *Le Patourel*.

We are also seeing frequent CMA interventions in collective proceedings given the flurry of competition law based class actions. The CMA has recently set up a new register of cases in which it has intervened. These include: *Kent v Apple*; *Coll v Google*; *Lovdahl Gormsen v Meta*; and *Le Patourel v BT*. The Secretary of State for Transport has also intervened in the CPO cases regarding train ticketing issues: the CAT recently described it as an 'aggressive' role of intervention in those cases.

Given the new wave of collective proceedings marking a significant increase in overall private enforcement of competition law, intervention is a trend we expect to continue. How the recent rise of collective proceedings can co-exist efficiently alongside parallel and often overlapping public enforcement remains to be seen.

Notes

5. The consultation closed on 30 January 2023 and the final version will be published by the end of March 2023

CONTACTS

Chris Ross
Partner
T +44 20 3060 6258
M +44 7545 100436
chris.ross@rpc.co.uk

Leonia Chesterfield
Senior Associate
T +44 20 3060 6246
M +44 7732 401765
leonia.chesterfield@rpc.co.uk

rpc.co.uk