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UK CAT Collective Proceedings

| Spring 2024 Update

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Last year, we reported on what was then a fledgling collective proceedings regime in the UK's Competition Appeal Tribunal (**CAT**). Our 2023 update is [here](#). Since then, the competition collective proceedings regime has continued to grow at pace, notwithstanding the seismic Supreme Court decision in *PACCAR* affecting the underlying funding arrangements which underpin the entire collective proceedings landscape.

In a short spring 2024 stock-take, we summarise some recent developments in the regime:

Funding

- The *PACCAR* [judgment](#) of the Supreme Court last summer held that litigation funding agreements (**LFAs**) are damages based agreements (**DBAs**) for the purposes of the DBA Regulations 2013. This left many funding arrangements unenforceable.
- As all CAT collective proceedings are backed by third party funding, class representatives were left scrambling to revise their funding arrangements in the wake of the unexpected ruling.
- A number of funding hearings were held in the CAT to consider revised LFAs put forward by class representatives. This has led to greater certainty as to which funding terms are now considered appropriate by the CAT. In a recent funding [ruling](#) in Mr Gutmann's claim against Apple, the CAT confirmed it has the power to order a funder's fees to be paid out of damages awarded to the class (not just out of unclaimed damages).
- In further news, new legislation has been proposed in the form of the Litigation Funding Agreements (Enforceability) Bill, which at the time of publication was at report stage in the House of Lords. If enacted, the Bill would reverse the *PACCAR* decision such that LFAs are no longer treated as DBAs.

First substantive trial

- Running from January through to March 2024, the CAT has now heard the first substantive trial in the case of *Le Patourel v BT*. The case concerns excessive pricing allegations regarding BT landline services, relying in part on Ofcom's prior regulatory findings. Many of the represented class members are pensioners and the case has been heard quickly, including an expedited hearing by the Court of Appeal.
- Judgment from this trial will likely provide clarity on various aspects of the competition collective proceedings regime, and will be a significant factor in whether the number of collective proceedings continues to grow. For further details, see our article considering the implications of the case for the wider regime [here](#).

First collective settlements

- In a regime first, a settlement was agreed in the *McLaren* case with one of the defendant cartelists. In December 2023, the CAT approved the settlement, finding the collective settlement terms were "just and reasonable". In recent developments, the Class Representative has applied to the CAT for payment of funders, insurers and lawyers' costs out of the agreed settlement funds.
- A settlement has also been agreed by Stagecoach South Western Trains Limited in the [boundary fares litigation](#) and the settlement was recently approved by the CAT in its hearing held on 29 and 30 April 2024.

- In the boundary fares settlement, the settlement terms involve three different 'pots' for claims with varying evidence requirements for class members to make a damages claim. The parties were also required to provide a detailed distribution plan for the CAT's approval. The CAT suggested that empirical evidence, such as by way of a survey, as to likely take-up rates would have been of assistance and might become expected in future settlement approval applications to the CAT.
- In making its determinations approving the settlement terms as just and reasonable, the CAT also noted the wider public interest in encouraging settlements. In summing up, the Tribunal warned of the pitfalls of continuing the litigation, referring to the fictional case from Charles Dickens' *Bleak House* (*Jarndyce v Jarndyce*). The CAT's written ruling is to follow.
- For further details, our article on the CAT's collective settlement approval procedure is [here](#).

Carriage disputes resolved

- The CAT issued an [order](#) consolidating the competing claims against Google by Mr Pollack and Mr Arthur. The PCR is now known as *Ad Tech Collective Action LLP* (of which both Mr Pollack and Mr Arthur are members, together with Ms Kate Wellington formerly of Which?). The certification hearing is listed for 8 - 10 May 2024.
- In the two competing cases brought against Amazon both concerning the Amazon 'buy-box', the CAT determined in favour of Mr Hammond's claim. Julie Hunter's claim is no longer being pursued. Permission to appeal the CAT's determination was recently refused. The CAT's ruling is [here](#) and our article on the carriage ruling is [here](#).
- Our previous article considering the background to the CAT's new approach to carriage disputes (now normally considered as a preliminary issue) is [here](#).

Appellate decisions

- A recent Court of Appeal [decision](#) in *McLaren* has overruled the CAT's finding that there is a restriction on defendants communicating with class members unless the parties agree or the CAT orders otherwise. The Court of Appeal determined that there is no such general rule prohibiting communications with class members. While the practical effect of the ruling is unclear, the CAT is likely still to want to exercise some supervision over defendants communicating directly with represented class members.
- Further appellate decisions have been handed down, clarifying aspects of the regime as well as making clear permission to appeal will not be granted readily in light of the breadth of the CAT's discretion. In the recent Court of Appeal [decision](#) in the *Commercial and Interregional Card Claims*, permission to appeal on certification was refused and the CAT's refusal upheld. Underlining the observations made previously in *Le Patourel*, the Court of Appeal reiterated that it will accord the CAT a broad margin of discretion over its case management decisions and it will be rare for permission to appeal to be granted in such cases.
- In recent news, on 29 April 2024 permission to appeal was refused in *Gormsen v Meta*. The CAT held none of the appeal grounds had a real prospect of success and there were no compelling reasons for granting permission. Query if *Meta* will now seek permission to appeal directly from the Court of Appeal.

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In our snapshot table on the next page, you will see how many collective proceedings are now certified and which collective proceedings order (**CPO**) claims are still awaiting certification.

Here are a few key takeaways:

- By our calculations, the **16** CPO cases now certified involve claims where the alleged quantum amounts collectively to as much as **£21 billion** (based on the available upper bounds of the class representatives' quantum estimates).
- The allegations across the CPO cases span multiple sectors of the UK economy. However, there is a clear cluster of CPOs brought in the tech sector with around **a dozen** or so collective proceedings brought in relation to digital markets.
- Of the live cases underway, there are more than twice as many standalone actions (with limited follow-on elements) than follow-on/hybrid claims (where the allegations rely primarily on prior infringement decisions).
- The split in the CPO cases between allegations involving the Chapter I prohibition under the Competition Act 1998 (**CA98**)/Article 101 TFEU claims (anti-competitive agreements) and Chapter II CA98 /Article 102 TFEU (abuse of a dominant position) is fairly even. However, the clear majority of the current CPO claims are based on allegations of abuse of dominance.
- One novel claim of note is the new environmental based claim brought by Professor Roberts against a number of UK water companies. It concerns allegations of abuse of dominance in relation to sewage spills. A CMC was recently held. The proceedings are moving fast with a certification hearing week listed for September 2024 (and a further week listed for January 2025). The cases raise interesting issues as to the interaction between competition law and the regulatory regime for the water and sewerage sector, particularly given ongoing and related investigations by Ofwat or the Environment Agency. The case is certainly one to watch and could be the first in a wave of environmental based collective proceedings in the CAT.

CPOs at a glance

To view the current CPO claims and their status at a glance, please see our snapshot table below. Our table shows how many CPO claims are now certified and those waiting in the wings.

Competition and consumer law - landscape reforms

The new Digital Markets, Competition and Consumers (**DMCC**) Bill continues through the parliamentary processes. At the time of publication it had been through the Commons and Lords and is in the final stages (with consideration of the Lords amendments sitting on 30 April 2024). The DMCC Bill is expected to hit the statute books soon and by the first half of 2024.

The DMCC will bring in a raft of substantial changes to the competition and consumer law regimes. It also ushers in a new pro-competition regime for digital markets.

There have been a number of controversies concerning the DMCC Bill. Issues hotly debated in Parliament include the requisite appeal standard for decisions taken by the new Digital Markets Unit (**DMU**) in regulating big tech (whether it should be judicial review - as with mergers, for example - or the more rigorous full merits review). As it stands, only limited penalty decisions are appealable on the full merits review standard with the majority of DMU decisions to be appealable by way of judicial review.

Also recently debated during the DMCC Bill's readings in the House of Lords was the proposed amendment to include consumer law based claims within the collective proceedings regime (which is currently limited to competition based claims).

The final text of the DMCC Bill is yet to be fixed. However, one thing is clear. It is only once the competition collective proceedings regime matures and its first cases are resolved that the success (or otherwise) of the regime can be duly assessed. Whether it is deemed a success or not will be determinative of whether the regime might be then extended to other areas of law.

We continue to watch this space.

CPO CLAIM STATUS AS AT 30 APRIL 2024	CERTIFIED BY THE CAT	AWAITING CERTIFICATION	DISCONTINUED/ON HOLD	PUBLICISED BUT NOT ON CAT WEBSITE
	<p>Interchange fees (umbrella proceedings order in place): Merricks</p> <p>Trucks: RHA</p> <p>Train ticketing: Gutmann (First MTR)*; Gutmann (LSER); Gutmann (Govia)</p> <p>Maritime car carriers: McLaren*</p> <p>Landline services: Le Patourel</p> <p>Smartphone chipsets: Consumers' Association</p> <p>App Store: Dr Kent</p> <p>Train ticketing: Boyle</p> <p>Google Play Store: Coll</p> <p>Train ticketing: FX: Evans</p> <p>Phone batteries: Gutmann (Apple)</p> <p>Gaming consoles: Neill</p> <p>Social media: Dr Gormsen</p> <p>Power cables: Spottiswoode</p> <p>*Partial or full settlement terms approved by CAT</p>	<p>Interchange fees: CICC I (Mastercard); CICC II (Mastercard); CICC I (Visa); CICC II (Visa)**</p> <p>Cryptocurrency: BSV</p> <p>Musical instruments: Sciallis (Fender); Sciallis (Korg); Sciallis (Roland); Sciallis (Yamaha); Sciallis (Casio)</p> <p>Amazon: Hammond</p> <p>Ad Tech: Ad Tech Collective Action (consolidation of claims by Pollack and Arthur)</p> <p>Car purchase finance: Doug Taylor (Santander); Doug Taylor (Black Horse); Doug Taylor (MotoNovo Finance)</p> <p>App Store: Dr Ennis</p> <p>Amazon and Apple: Riefa</p> <p>Android: Stopford</p> <p>Mobile Networks: Gutmann (Telefonica); Gutmann (Hutchinson); Gutmann (EE); Gutmann (Vodafone)</p> <p>Sewage and Wastewater: Roberts (Severn Trent); Roberts (Anglian Water); Roberts (Northumbrian Water); Roberts (Yorkshire Water); Roberts (United Utilities)</p> <p>**Certification hearing taken place, outcome awaited</p>	<p>Mobility scooters: Gibson (withdrawn)</p> <p>Trucks: UKTC (carriage dispute unsuccessful)</p> <p>FX: O'Higgins (carriage dispute; appeal unsuccessful)</p> <p>Insurance comparison site: Home Insurance Consumer Action (CMA infringement decision successfully challenged)</p> <p>Amazon: Hunter (carriage dispute unsuccessful)</p> <p>Replica football kits: Consumers' Association (settled) - claim under a previous version of section 47B Competition Act 1998</p>	<p>Further CPO applications are in the pipeline. Those recently publicised include:</p> <p>Credit and debit cards: Four CPO claims proposed against Mastercard and Visa</p> <p>Gaming platform: Vicki Shotbolt's proposed claim against Valve Corporation regarding Steam</p> <p>Google Play Store: Professor Rodger proposed claim against Google (UK developers)</p>
Total no: 49	16	28	5	6+ CPOs in pipeline

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