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**COLLECTIVE ACTIONS IN  
COMPETITION LAW: WHAT ARE  
THE KEY TRENDS AND  
DEVELOPMENTS FOLLOWING THE  
SPATE OF RECENT CASES?**

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# WHAT WILL WE COVER?

# What will we cover?

- What are collective actions?
- Mechanisms for the bringing of collective claims for breaches of competition law - focus on claims brought in the Competition Appeal Tribunal
- Procedure for bringing a collective claim under s47B Competition Act 1998 (as amended by the Consumer Rights Act 2015)
- Snapshot of the collective claims brought to date in the Competition Appeal Tribunal
- Standard opt-out claims will be required to meet in order to be certified and proceed to trial (*Merricks*)
- Key trends and development of the collective regime to date
- What does the future look like?

# WHAT ARE COLLECTIVE ACTIONS?

# What are collective actions?

**Collective actions allow individual claims to be brought together in a single set of proceedings:**

- Collective redress allows for the vindication of individual rights on a collective basis.
- Collective redress facilitates access to justice: often, absent collective mechanisms, individual claims would not be brought, due to the costs and effort involved with an individual claim not being proportionate to its value.
- Allowing claims to be brought and heard together allows for judicial efficiency, as well as efficiencies from the point of view of the claimants and defendant.
- If rights go unvindicated, the profits of unlawful conduct remain with the wrongdoer.
- The threat of collective actions assists in deterring unlawful conduct.

# Collective mechanisms



1. Collective claims in the Competition Appeal Tribunal pursuant to s47B Competition Act 1998
2. Group claims
3. Civil Procedure Rule 19.6
4. Group Litigation Orders (GLOs)

# Collective actions in the Competition Appeal Tribunal (1)



**Consumer Rights Act 2015:** the introduction of an opt-out regime.

Limited to competition claims.

## **Opt-out or an opt-in basis:**

- Opt-out – all those falling within the class definition are automatically part of the class, unless and until they expressly ‘opt-out’ of the claim.
- Non-UK based individuals need to expressly opt-in to a claim.
- Opt-in - consumers must pro-actively decide, within a set window, that they wish to form part of the class.

## **Follow-on and standalone (or hybrid):**

- A follow-on claim relies upon the findings of a competition regulator – such as the Competition and Markets Authority – to establish the liability of the parties who infringed competition law, meaning that the claimant does not need to establish liability but only causation and loss.
- A standalone claim requires the claimant to prove liability, i.e. the existence of anti-competitive conduct.

## Collective actions in the Competition Appeal Tribunal (2)



- Collective proceedings are initiated by the filing of an application for a **Collective Proceedings Order (CPO)** by the proposed class representative on behalf of the class.
- To grant a CPO (certification), the CAT must be satisfied that the class representative is suitable and that the proposed claims are eligible to be brought in collective proceedings.
- The proposed class representative must be able to demonstrate that it would act fairly and adequately in the interests of the class members, and furthermore that its interests do not conflict with the class. The class representative does not, however, have to be a class member and it can be either an individual or an incorporated entity.
- If the CAT grants a CPO then the claim may progress to trial.
- If the claim is successful, the CAT can make an **aggregate award of damages** - this provides compensation for the loss suffered by the class as a whole, without the need to quantify the loss of each class member precisely.
- Specific provisions for costs: any costs that have not been recovered from the defendant, or which are not recoverable from the defendant, the class representative can apply to recover such costs from the **undistributed damages** (i.e., once consumers have come forward to claim their share of the damages).
- **Litigation funding** is key in allowing collective claims to be brought.
- Specific **settlement** provisions governing the approval by the CAT of settlements in collective claims.

# Collective actions filed in the CAT to date



No	Cases filed to date	Standalone or Follow-on?	Progress
1	<b>Mobility Scooters</b> - <i>Gibson v Pride Mobility Products Limited</i>	Follow-on	Withdrawn
2	<b>Merricks</b> - <i>Merricks v Mastercard Incorporated &amp; Ors</i>	Follow-on	Certified
3,4	<b>Trucks</b> - <i>Road Haulage Association Ltd v Man SE &amp; Ors; UK Trucks Claim Limited v Stellantis N.V &amp; Ors</i>	Follow-on	Heard together; awaiting certification judgment
5,6	<b>Trains</b> - <i>Gutmann v London &amp; Southeastern Railway Limited; Gutmann v First MTR South Western Trains Limited &amp; Anor</i>	Standalone	Certified
7,8	<b>FX</b> - <i>O'Higgins v Barclays Bank Plc &amp; Ors; Evans v Barclays Bank Plc &amp; Ors</i>	Follow-on	Heard together; awaiting certification judgment
9	<b>RoRo</b> - <i>McClaren v MOL (Europe Africa) Ltd &amp; Ors</i>	Follow-on	CPO hearing 29 November 2021
10	<b>BT</b> - <i>Le Patourel v BT Group Plc</i>	Standalone	Certified
11	<b>Qualcomm</b> - <i>Consumers' Association v Qualcomm Incorporated</i>	Standalone	CPO hearing 30 March 2022
12	<b>Apple App Store</b> - <i>Kent v Apple Inc. &amp; Ors</i>	Standalone	Awaiting first CMC
13	<b>Govia</b> - <i>Boyle &amp; Vermeer v Govia Thameslink Railway Limited &amp; Others</i>	Standalone	Awaiting first CMC
14	<b>Google Play Store</b> - <i>Coll v Alphabet Inc. &amp; Ors</i>	Standalone	Awaiting first CMC
15	<b>Comparethemarket</b> - <i>Home Insurance Consumer Action Limited v BGL (Holdings) Limited &amp; Ors</i>	Hybrid	Awaiting first CMC
16	<b>Trains 2</b> - <i>Gutmann v Govia Thameslink Railway Limited &amp; Ors</i>	Standalone	Awaiting first CMC

## The certification test – *Merricks* (1)

### **What standard ought an opt-out collective proceedings claim be required to meet to proceed to trial?**

The Supreme Court provided its answer in *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51; [2020] All ER (D) 67 (Dec), which was handed down in December 2020.

First, importantly, certification is not a merits test: “*The certification process is not about, and does not involve, a merits test*”.

This is subject to two caveats:

- i. first, the CAT can hear, on application by the defendant or of its own volition, applications for strike out and/or summary judgment alongside an application for a CPO; and
- ii. second, “the strength of the claims” can be assessed pursuant to Rule 79(3)(a), but this arises only in the context of a choice between opt-out and opt-in proceedings.

## The certification test – *Merricks* (2)

The only hurdles for certification purposes are therefore those listed in s47B(5) and (6) of the Competition Act 1998 and at Rule 79(1). In order to grant a Collective Proceedings Order, the CAT must be satisfied that the following requirements are met:

- (i) It may authorise the representative; that is to say it is just and reasonable for the applicant to act as the class representative;
  - (ii) The underlying claims must be eligible for inclusion in collective proceedings;
  - (iii) Eligibility will be met only if the claims: raise the same, similar or related issues of fact or law, are brought on behalf of an identifiable class and are suitable to be brought in collective proceedings.
- The CAT is then expected to make a value judgment about “suitability” in which the factors listed in Rule 79(2) and other factors are weighed in the balance. The listed factors (including suitability for an aggregate award of damages) are not separate suitability hurdles. “Suitability” appears twice in the relevant provisions regarding certification: first, in s47B (“suitable to be brought in collective proceedings”) and second in Rule 79(2)(f) (“suitable for an aggregate award of damages”). In both, “suitability” is to be interpreted as vis-à-vis individual proceedings, as opposed to being “suitable” in an abstract sense.

## The certification test – *Merricks* (3)

- Level of evidence at the certification stage - claimants have a right to quantification and justice demands it, no matter the potential forensic difficulties. There is no reason why this principle, which would apply to an individual claim, ought to be abandoned for collective proceedings.
- Common issues: the CAT has to identify the main issues in a case and assess whether or not they are common issues.
- Aggregate awards of damages - an aggregate damages award need not bear relation, in its calculation nor distribution, to the compensatory principle. s47C expressly removes the ordinary requirement for the separate assessment of each claimant's loss.
- Consideration of distribution proposals at certification would generally be premature, save that there may be cases where the suitability of the claims for collective proceedings is best addressed by examining all of the class representative's proposals in the round, including those relating to distribution.
- Judgment provided a ringing endorsement of the principles underpinning the introduction of the Consumer Rights Act 2015.

# Key trends and development of the regime to date

**Pace of regime development** – despite regime coming into force over 6 years ago, only 4 claims certified.

## **Approach to funding and insurance**

- Own-side funding
- Adverse costs
- CAT has to date taken a pragmatic and flexible approach – e.g. *Trucks*

## **What happens when there are two competing claims in relation to the same conduct, i.e. a carriage dispute?**

- *FX* and *Trucks*
- Unclear how the CAT will deal with carriage disputes.

## **Strike-out applications at certification**

*Merricks* ruling has encouraged strike out applications, so as to incorporate merits test at certification. But, *BT* and *Trains* show difficulties defendants are likely to face.

## **Opt-out/opt-in**

- Consumer/business classes
- *FX* and *Trucks*.

# WHAT DOES THE FUTURE LOOK LIKE?

# What does the future of opt-out redress look like?



- More claims
- Carriage fights
- Testing aspects of the regime / appeals
- Settlements
- Industry growth
- Expansion of opt-out redress



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