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United Kingdom: Maturing CAT collective proceedings process sees uptick in cases

Oliver Heinisch
Sheppard Mullin

Summary

IN SUMMARY

This article focuses on some of the issues at play in collective proceedings for competition damages in the United Kingdom, in particular the nature of the claim and thresholds for related pleadings by the proposed class representative when seeking to obtain certification to proceed to trial. The selected issues this article will discuss are the commonality, suitability and blueprint requirements and how case law has refined the legal standards the proposed class representative must meet at the stage of obtaining a collective proceedings order.

DISCUSSION POINTS

- Overview of CPO procedure
- Common issues
- Suitability
- Blueprint to trial

REFERENCED IN THIS ARTICLE

- Consumer Rights Act 2015
- Treaty on the Functioning of the European Union
- Competition Act 1998
- CAT Rules
- *Merricks*

INTRODUCTION

Following the adoption of the Consumer Rights Act 2015 in the United Kingdom and its profound and far-reaching changes to the system of private collective proceedings in competition cases, and notably a ground-breaking UK Supreme Court judgment in 2020-[1] (Merricks) lowering the threshold for claims to proceed to trial, an increasing number of collective proceedings are being filed with and certified by the UK Competition Appeals Tribunal (CAT). Often, these actions are grounded on novel theories of harm under articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and increasingly their UK equivalents.

The regime governing collective proceedings is complex, multifaceted and ever developing. This article focuses on some of the issues at play, in particular the nature of the claim and thresholds for related pleadings by the proposed class representative (PCR) when seeking to obtain certification to proceed to trial. The selected issues this article will discuss are the commonality, suitability and blueprint requirements and how case law has refined the legal standards the PCR must meet at the stage of obtaining a collective proceedings order (CPO).

Developments in relation to other requirements relevant to the collective proceedings regime (already pertinent at CPO stage) are not discussed in detail in this article: expert independence, funding, after the event insurance, carriage disputes, strike-out and summary judgments, authorisation of the class representative, opt-out versus opt-in proceedings, or collective settlements, to name just a few.

The article will first give a brief overview of the structure and special characteristics of collective proceedings in the United Kingdom, and then discuss the common issues, suitability and methodology tests each as developed by the ever-growing body of case law.

OVERVIEW OF CPO PROCEDURE

Section 47B of the Competition Act 1998 (CA 1998) provides for the possibility of combining two or more claims for damages or relief based on competition law infringements, commenced by a person proposing to act as representative. Section 47B(4) stipulates that these proceedings may only commence where the CAT makes a CPO requiring a two-pronged procedure: first certification (in the form of a CPO), and then trial on the merits of the case. Section 47B CA 1998, complemented in more detail by Rules 77 to 79 of the CAT Rules,[2] set out the requirements that must be met to obtain a CPO.

The legislators' intention when creating the collective proceedings regime was to enable access to justice for those having suffered loss from competition law infringements who otherwise would not initiate individual proceedings.[3] This overarching objective informs the CAT's construction of many statutory tests.

The UK Supreme Court has underlined in Merricks that collective proceedings must not face restrictions that an individual claimant would not face.[4] As soon as claimants can establish a triable issue and more than nominal loss, then the courts must not deprive them of their right to go to trial.[5] A striking feature of the collective proceedings regime is the inapplicability of the compensatory principle. Damages are awarded on an aggregate basis, and there is no need for a separate assessment of each claimant's loss.[6]

Merricks also established that the certification process does not involve a merits-based control.[7] The merits of the case are to be examined exclusively at trial stage (save for applications for summary judgment or strike-out). What is required to proceed to trial is that the conditions for certifications have 'some basis in fact' (ie, a minimum evidentiary basis),[8] even if disputed by the defendant.[9]

PCRs can bring claims on an opt-in or opt-out basis.[10] In the former case, class members must actively join the proceedings, while in the latter, they are by default included (unless they opt out), and the proceedings take place without any involvement (or possibly even knowledge) of the class members. There are generally no presumptions in favour of either form of proceedings and the CAT has to make an order upon the basis of all the circumstances of the case.[11]

Despite the somewhat eased burden for PCRs to bring collective proceedings, there remain significant hurdles. In particular, the claim must raise common issues[12] and be suitable for collective proceedings.[13] Additionally, the case law requires the PCR to present the CAT with a blueprint to trial, including a methodology to identify and resolve relevant issues. Each of these requirements will be discussed in the following sections.

COMMON ISSUES

The UK Supreme Court requires the CAT to approach the common issues test by first determining what are the main issues and, then, whether or not these issues are common issues.[14] Common issues are defined by CAT Rule 73(2) as 'the same, similar or related issues of fact or law'.[15] For an issue to be common, it needs not to arise equally with respect to all class members, or require the same answer for all class members.[16] While

common issues relevant for the outcome of the proceedings must be present, the CAT has ruled in some instances that they do not necessarily need to predominate over non-common issues.[17]

Issues that depend on the position of individual class members and differ for some or all are not suitable for determination as a common issue.[18] However, the Court of Appeal has indicated that the fact that it appears only at a later stage that an issue may depend on the position of individual class members does not necessarily prevent the issuing of a CPO as such. It stated that this problem could also be addressed by case management when it becomes apparent (if necessary by amending the CPO, or scheduling a trial of sub-issues).[19]

This means that, at CPO stage, the possibility that it may be ultimately established that some class members have suffered no loss may not necessarily be fatal for the purposes of the common issues test, as long as common issues between all class members exist.[20] That could be for instance the common question of whether pass-on of cartel overcharges occurred. This issue is relevant for all class members, but may yield a different answer depending on the position of the individual class members.[21] At CPO stage, the focus lies at establishing loss on a class-wide basis (ie, on an aggregate basis).[22] As a defining feature of opt-out proceedings, the PCR does not need to engage with individual class members until the distribution stage.[23]

Further, it was held in some cases that it may be sufficient for the PCR to only plead the 'gist' of the damages of the class as a whole, and individual quantification of loss is unnecessary.[24] This does not mean, however, that class members having suffered no loss at all should benefit from the award of damages. We will address the general requirements for the proposed methodology in more detail below, but in connection with individual loss, it should already be noted here that the PCR's methodology must, at some point, include a device for winnowing out no-loss members of the class.[25] As already touched upon above, the methodology is not necessarily flawed if it emerges at a later stage that there is no loss, if that is a matter of fact.[26]

SUITABILITY

The suitability requirement stipulated in CAT Rule 79(1)(c) boils down to the question of whether collective proceedings are more suitable than bringing individual claims.[27] CAT Rule 79(2) stipulates that the CAT shall 'take into account all matters it thinks fit' when deciding on suitability. It then lists a number of factors to be considered. These are:

- whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
- the costs and the benefits of continuing the collective proceedings;
- whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
- the size and the nature of the class;
- whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
- whether the claims are suitable for an aggregate award of damages; and
-

> the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise.

The UK Supreme Court held in Merricks that these grounds must not be understood as hurdles that each must be surmounted, including suitability for an aggregate award, which is just one of many factors.[28] Rather, they are all relevant for and guide the exercise of the CAT's discretion.[29] Still, the CAT may very well arrive at the conclusion that the non-fulfilment of one of the factors is enough to deny certification.[30]

Collective proceedings are more likely to be suitable if the CAT considers them to be the only practical or proportionate way of pursuing claims.[31] The CAT, following UK Supreme Court case law, needs to identify whether the same difficulties that might face a collective action apply in an individual claim as well.[32] If yes, then collective proceedings will usually be suitable. This is ultimately a case management decision that will be informed, inter alia, by the following matters:[33]

- the procedural benefits and disbenefits of different types of proceedings;
- the ease with which proposed class members, or subsets thereof, could commence individual proceedings;
- costs;
- the ease and ability of the CAT, in the future, to manage and administer the litigation.

The courts have underlined in that context that bringing claims on a collective basis can offer advantages in terms of judicial economy and efficiency.[34] As reflected by CAT Rule 79(2)(a), the question of common issues comes into play again here. Where all the main issues in the case are common, certification is more likely.[35] On the other hand, the CAT may also conclude that common issues could more fairly and economically be resolved by a procedure other than collective proceedings, such as an individual test case.[36] The CAT endorsed, in that connection, the Ontario Court of Appeal's formulation of the test as asking whether the need for individualised inquiry is more pervasive than the treatment of the case as one of systemic wrong.[37] Additionally, an unnecessarily broad class definition, bringing about disproportionate complexity, will not be accepted by the CAT.[38]

The significant costs of collective proceedings can be a strong argument against suitability. However, the courts have shown a tendency to accept those sizeable costs as long as the class is sufficiently large in comparison (there are many collective actions representing millions of class members).[39] In turn, this could mean where a class is not sufficiently large and a claim not sufficiently substantial, the case does not warrant the investment of vast resources necessary for conducting collective proceedings.

At the same time, the courts will be vigilant to consider whether the proposed collective proceedings are likely to benefit principally lawyers and funders as opposed to the members of the class. As ruled by the CAT, such cost–benefit analysis may weigh against certification and could be a factor questioning the suitability of the claims in itself.[40] Where that line needs to be drawn exactly will depend on the facts of each case. The CAT has for instance ruled that a budgeted cost ratio of 5 per cent of the expected claim value was not disproportionate.[41] Additionally, courts have to date been reluctant to reject a claim in cases where the individual payouts will be very low, and a high take-up rate of class

members in the event damages are awarded questionable. Individual estimated claims in the modest amounts of £33–£55,[42] £13.5–£38[43] or a mere £16–£17[44] were not considered an obstacle to suitability per se. Still, where it is foreseeable that very few class members will be incentivised to claim their awarded damages, collective proceedings are unsuitable, even when compared to the suitability of individual proceedings.[45] The CAT is at liberty to find creative solutions other than cash payouts to resolve this issue (such as offering discounts or credits to future transactions).[46] Where such a need arises, the PCR must address the distribution method already at CPO stage so that the CAT can perform a proper cost–benefit analysis.[47]

BLUEPRINT TO TRIAL

An important additional requirement developed in recent case law following the UK Supreme Court's Merricks judgment that often turns out to be pivotal for the success of a CPO application is the 'blueprint to trial' that the PCR must present – that is, a methodology identifying the issues for trial (breach of duty, causation, proof of loss and quantum) and how they are to be resolved.[48] It will form the basis upon which the CAT can form a judgment on commonality and suitability. The test to be applied is borrowed from the Supreme Court of Canada (Pro-Sys test)[49] and was endorsed by the UK Supreme Court.[50]

The methodology will usually be prepared by an expert economist instructed by the PCR. It must be counterfactual and therefore hypothetical in nature (ie, positing how the market would operate absent the alleged unlawful conduct). As such, it should provide a benchmark against which the CAT can measure the defendant's actual conduct and assess commonality and suitability.[51]

The purpose of the Pro-Sys test is to be distinguished from the purpose of a strike-out test. While a strike-out application will weed out substantively unarguable cases, the Pro-Sys test is meant to ensure that a case that is arguable will nonetheless not derail in a way unmanageable for the CAT (ie, must be triable 'with a minimum of procedural fuss and a maximum of focus on the substantive issues to be resolved' as the CAT put it).[52] This does not mean that difficult or controversial questions would be an obstacle if neither questions of arguability or case management arise.[53] Importantly, the CAT will not explore whether there might exist a better methodology in theory, but rather only assess whether the one put forward by the PCR holds up against the Pro-Sys test.[54]

The methodology to be presented must be a generic one (ie, establishing some or all of the issues in the case on a class-wide basis). This applies to liability, quantum and related defences.[55] Without setting out the legal basis for contending that a particular loss is caused by the infringement that has been pleaded, the methodology will be incomplete.[56] The methodology must thus explain a:

> nexus between (i) the exact breach of duty alleged, (ii) the framing of the counterfactual needed to put the claimant class in the position they would have been in had the tort not been committed, and (iii) the method of quantifying the damage sustained as a result.[57]

The CAT has held that it is not a condition for certification that the PCR can show that the data needed will actually likely be available.[58] An indication of the available sources of data to which the analysis be applied is, however, required and needs to be substantiated.[59] A

theoretically preferable methodology cannot be selected in practice if the data necessary for it would not be available, or only at disproportionate costs.[60]

Disclosure is a necessary part of the vast majority of actions for competition damages. But the CAT also clarified that generic references to a later disclosure application cannot be a blanket excuse for an incomplete methodology (the 'St Augustine fallacy' in the words of the CAT).[61] The PCR must articulate what disclosure will be required based on a sound methodology and thus demonstrate how a particular assertion will be made good at trial.-[62] A defective claim cannot be healed by subsequent disclosure, but problems should be resolved at the outset by pre-action disclosure.[63] Also, disclosure can work to the benefit of the defendant. If disclosure shows that a claim is non-viable, the CAT has a continuing power to strike it out.[64]

The CAT has a tool at its disposal to plug certain gaps in the methodology – the metaphorical broad axe, intended to facilitate the achievement of practical justice, which does not require absolute certainty.[65] This should not be seen to alleviate the PCR's obligations to establish a methodology that offers a realistic prospect of establishing loss on a class-wide basis. Supposing that the alleged facts are proven in trial, the need for later refinements to the methodology may not harm.[66] The CAT itself may, as part of its case management function, revisit the methodology at any point and stay, vary or revoke a CPO.[67]

Case management is also key where the proposed defendant challenges the soundness of the methodology. In that case, it is incumbent on the CAT already at CPO stage to give guidance, and make use of its case management powers, on how to address the identified battle lines.[68] Notwithstanding these principles, the PCR's blueprint must be able to address the defendant's articulated arguments.[69] While this duty may not, however, extend to every conceivable point the proposed defendant might raise,[70] the PCR must still satisfy the CAT that there is no insurmountable (in case management terms) barrier to an orderly trial.[71] It follows that if the PCR omits to address manifest weaknesses or gaps in the proposed methodology, the Pro-Sys test will likely not be satisfied.[72]

As a general rule, the CAT held that it makes no sense to certify proceedings whose triability is in doubt.[73] Yet, there have been a number of cases where the CAT chose to neither strike out nor certify a CPO application, but rather gave the PCR some time to present a reworked methodology addressing the flaws identified, supposedly to foster the overarching goal of 'access to justice'.[74] This is an unfortunate development unnecessarily punishing the defendant with prolonged uncertainty for launching successful attacks on the PCR's case. We expect this development to reverse given the substantial case law that has emerged since the inception of the collective proceedings system in the CAT.

In cases where it proceeded this way, the CAT held for instance that a mere detailed expansion of a theoretical position which does not contain enough material to support a proper plea of causation, loss and damage will not suffice.[75] In another case, it emphasised that the methodology cannot assume what needs to be established[76] and that it needs to be based on the correct counterfactual.[77]

CONCLUSION

The increasing number of newly initiated collective proceedings in recent years is testament to the generally favourable attitude of the UK Supreme Court (and of lower courts following its guidance) towards collective actions in competition damages cases. Rarely ever have CPO applications failed for good[78] – and if so, not because the CAT struck them out or

denied certification definitely. Rather, even where the CAT found the initial application to be deficient, it has granted a 'second try',[79] often much to the dismay of the proposed defendants who are faced with prolonged uncertainty.

While the UK Supreme Court lowered the threshold for PCRs, subsequent case law has clarified a number of open questions. PCRs are not confronted with a novel regime anymore like they were in 2020 when Merricks was handed down. There, the UK Supreme Court emphasised the important screening and gatekeeping role the CAT exercises when certifying collective proceedings.[80] The Court of Appeal later added in the same vein that lack of proper case management would risk 'the unleashing of litigation leviathans'.[81]

This might well already be happening as a consequence of a generous approach of the CAT to CPO applications if many of the certified claims later fail in full trial. The typology of cases certified by the CAT is certainly increasingly diverse: from claims where class members are all more or less large businesses with sizeable individual claims, to classes composed of consumers only with each individual claim only amounting to a few dozen pounds at most. More and more claims are standalone and entertain relatively novel theories of harm[82] – backed by litigation funders with an appetite for risk, but also for the prospect of potentially vast payouts.

The mass nature of the collective proceedings indeed means that in many cases, hundreds of millions or even billions of pounds are at stake. Companies should take the prospect of being dragged into year-long bet-the-company litigation very seriously, even where no competition authority has (yet) established any infringement. The relatively low bar to seek certification of collective proceedings means that even where the claims brought forward may appear speculative, defendants must at least calculate with protracted proceedings eventually going to trial. However, given that the collective proceedings system has now significantly matured, the CAT will attach more weight to the interests of defendants not to be plunged into several years of lingering uncertainty where PCRs do not do their homework properly in the first attempt.

** The author thanks Ana Alvarez and Anton Gerber for their contribution to this article.*

Endnotes

[1] [2020] UKSC 51.

[2] The Competition Appeal Tribunal Rules 2015 (SI 2015 No.1648).

[3] [2020] UKSC 51, paragraph 45; [2022] EWCA Civ 593, paragraph 29.

[4] [2020] UKSC 51, paragraph 45.

[5] [2020] UKSC 51, paragraphs 47 and 54.

[6] [2020] UKSC 51, paragraph 58.

[7] [2020] UKSC 51, paragraph 59.

[8] As borrowed from the Canadian Pro-Sys test (see below): [2020] UKSC 51, paragraphs 39 to 42.

[9] See [2023] CAT 10, paragraph 4(1)(i).

[10] See section 47B(11) and (12) CA 1998.

[11] [2022] EWCA Civ 593, paragraph 68.
[12] CAT Rule 79(1)(b).
[13] CAT Rule 79(1)(c) and (2).
[14] [2020] UKSC 51, paragraph 62.
[15] See also Section 47B(6) CA 1998.
[16] [2023] CAT 38, paragraph 63; [2021] CAT 31, paragraphs 125 and 136.
[17] [2023] CAT 38, paragraph 63.
[18] See [2023] EWCA Civ 875, paragraph 103.
[19] ibid.
[20] See [2022] CAT 10, paragraph 61.
[21] See ibid.; [2021] CAT 31, paragraph 125.
[22] [2022] CAT 10, paragraph 133.
[23] [2022] EWCA Civ 1077, paragraph 39.
[24] See [2023] CAT 10, paragraph 15; [2022] CAT 16, paragraphs 172 to 175.
[25] [2022] EWCA Civ 1077, paragraph 38.
[26] See [2023] CAT 67, paragraphs 58 and 62.
[27] [2020] UKSC 51, paragraphs 56 to 57.
[28] [2020] UKSC 51, paragraphs 61 and 68.
[29] Cf. [2024] EWCA Civ 218, paragraph 36.
[30] See [2020] UKSC 51, paragraph 68.
[31] See [2022] CAT 39, paragraph 58(4).
[32] [2023] CAT 38, paragraph 64.
[33] [2024] EWCA Civ 218, paragraph 36.
[34] [2024] EWCA Civ 218, paragraph 38.
[35] See [2020] UKSC 51, paragraph 66; [2021] CAT 31, paragraph 107(2); CAT Guide to Proceedings, paragraph 6.37.
[36] [2020] UKSC 51, paragraph 62.
[37] [2021] CAT 31, paragraphs 83 and 114.
[38] [2022] CAT 25, paragraphs 180 and 208.
[39] See [2022] CAT 28, paragraph 37(2).
[40] [2022] CAT 20, paragraph 105.
[41] [2022] CAT 20, paragraph 109.
[42] [2022] EWCA Civ 1077, paragraph 7.

[43] This results from the aggregate losses estimated at between £263 million and £752 million, compared to a class size of approximately £19.5 million individuals, see [2022] CAT 39, paragraphs 2, 57 and 58.
[44] [2022] CAT 20, paragraph 106.
[45] [2024] CAT 31, paragraphs 45 and 54.
[46] [2024] CAT 31, paragraph 48; [2022] EWCA Civ 1077, paragraph 87.
[47] [2024] CAT 31, paragraph 55.
[48] [2022] EWCA Civ 1077, paragraph 44.
[49] [2013] SCC 57.
[50] See [2020] UKSC 51, paragraphs 39 to 42.
[51] [2022] EWCA Civ 1077, paragraph 24.
[52] [2024] CAT 11, paragraph 7(1).
[53] See [2024] CAT 11, paragraphs 18, 19 and 31
[54] [2022] CAT 10, paragraph 97.
[55] [2022] CAT 35, paragraph 23.
[56] See [2023] CAT 10, paragraph 56(1).
[57] ibid.
[58] [2022] CAT 25, paragraph 153.
[59] See [2022] EWCA Civ 1077, paragraph 66.
[60] [2022] CAT 10, paragraph 74.
[61] [2023] CAT 10, paragraph 40(3)(i).
[62] ibid.
[63] [2022] CAT 16, paragraph 238(6), endorsed by [2023] EWCA Civ 876 paragraphs 73 and 78.
[64] [2023] EWCA Civ 876, paragraph 80.
[65] [2022] EWCA Civ 1077, paragraphs 58 and 59.
[66] See [2023] CAT 67, paragraph 63.
[67] [2022] EWCA Civ 1701, paragraph 47.
[68] [2022] EWCA Civ 1701, paragraphs 50 and 52.
[69] [2023] CAT 10, paragraph 40(3)(ii).
[70] [2023] EWCA Civ 875, paragraphs 101 and 102.
[71] [2024] CAT 11, fn 11.
[72] See [2021] CAT 30, paragraph 64.

[73] [2023] CAT 10, paragraph 40(5).

[74] See [2023] CAT 10, paragraph 58.

[75] [2022] CAT 16, paragraph 237.

[76] [2023] CAT 10, paragraph 51

[77] See [2023] CAT 10, paragraph 53.

[78] See for instance case 1423/7/7/21, where the underlying CMA Decision upon which the collective follow-on damages actions were based was subsequently annulled by the CAT; or various parallel proceedings which failed due to the CAT preferring another concurrent PCR to represent the same or similarly defined class.

[79] See for instance [2023] CAT 38; [2023] CAT 10; [2017] CAT 9.

[80] [2020] UKSC 51, paragraph 4.

[81] [2023] EWCA Civ 876, paragraph 5.

[82] See for instance case 1624/7/7/23 on alleged 'loyalty penalties' charged by telephone operators; or case 1603/7/7/23 on alleged misleading environmental information submitted to supervisory authorities by sewage companies.

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Oliver Heinisch oheinisch@sheppardmullin.com

2099 Pennsylvania Avenue, NW, Suite 100, Washington, DC 20006-6801, United States

Tel: +1 202 747 1900

https://www.sheppardmullin.com/