

# CERTIFICATION DENIED FOR £14BN COMPETITION CLASS ACTION: WHAT NEXT FOR THE UK REGIME?

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Legal Briefings

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The UK's Competition Appeal Tribunal (**CAT**) has recently refused to certify a proposed opt-out class action against MasterCard, following hot on the heels of the abandonment of the first such action due to costs concerns. Stephen Wisking, Kim Dietzel and Molly Herron consider where these developments leave the nascent UK competition collective redress regime.

## **COMPETITION LAW COLLECTIVE REDRESS IN THE UK**

The new regime came into force on 1 October 2015, allowing competition law opt-out class actions to be brought on behalf of consumers and/or businesses, subject to the CAT granting a Collective Proceedings Order (**CPO**). Despite an expectation that claimant lawyers would rush to use the new process to bring opt-out damages claims (in particular based on European Commission cartel decisions), to date only two CPO applications have been made, and neither has proceeded past the certification stage.

## **MOBILITY SCOOTERS**

The first application involved a small claim against a manufacturer of mobility scooters on behalf of a narrow class of consumers on an opt-out basis (relying on a competition law infringement finding by the UK competition authority in relation to resale price maintenance).

In March 2017 the CAT declined to grant a CPO as the proposed class representative had not sufficiently demonstrated the existence of common issues. The CAT did, however, allow the class action to survive - giving the proposed class representative the opportunity to rethink her approach to quantification and reformulate her claim (see our briefing [here](#)). Ultimately the application was abandoned in light of concerns that the costs of pursuing the reformulated claim would outweigh any damages (with the applicant agreeing to pay the defendant's costs of £308,997).

## **MASTERCARD**

The second application was made by proposed class representative Walter Merricks CBE on behalf of a sprawling class of some 46.2 million UK consumers, seeking a record £14 billion in damages against MasterCard on an opt-out basis (relying on a competition law infringement finding by the European Commission in relation to MasterCard's multilateral interchange fees). The application was funded by litigation funder Gerchen Keller Capital LLC (now owned by Burford Capital).

The CPO application was rejected by the CAT on 21 July 2017 (see our e-bulletin [here](#)), on the ground that the claims were not suitable for collective proceedings. This was in light of the difficulties in assessing aggregate damages (which raised complex passing-on issues), and of distributing these between class members in any manner which sufficiently reflected the compensatory nature of damages, neither of which issues were resolved by the applicant's experts' proposed quantification model.

The CAT did, however, find that Mr Merricks would have been a suitable class representative. In doing so the CAT provided important clarifications as to the use of litigation funding in opt-out actions, including that the CAT has the power to order a payment out of unclaimed funds (which would otherwise be paid to a specified charity) to cover a funder's fee, and as to the drafting of funding arrangements.

The CAT also provided further guidance on its approach to certification. It reiterated its position in *Mobility Scooters* that the CPO hearing and decision is not a US-style "mini-trial", but made it clear that the applicant has to do more than simply show that it has an arguable case and that the CAT will scrutinise a CPO application with care to ensure that only appropriate cases go forward.

The CAT in both cases drew assistance from the position in Canada, citing the Canadian position that "*...the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement [and] offer a realistic prospect of establishing loss on a class-wide basis*".

It is not yet clear whether Mr Merricks intends to challenge the CAT's decision: there is no right of appeal from certification decisions, and so any challenge would be limited to a judicial review.

## **FUTURE OF THE COMPETITION COLLECTIVE REDRESS REGIME**

Although the CAT has yet to grant a CPO, this should not sound the death knell for the UK regime. The two judgments contain a number of important clarifications which will assist future applicants with properly framing their case in a way which is acceptable to the CAT, and in obtaining funding for their claims.

Therefore the threat of class actions – including in light of the CAT's apparent willingness in *Mobility Scooters* to allow such claims to proceed on an opt-out basis (at least in follow-on cases) – continues to represent a significant increase in the competition law risk profile for corporates, over and above the current combination of public enforcement by the regulators and individual private damages claims. However, the recent cases will provide comfort to potential defendants that the CAT will rigorously review CPO applications, and applicants' damages quantification models in particular.

Overall, the CAT's approach is likely to result in claimants seeking to identify less complex cases, narrower in scope than the over-ambitious MasterCard claim, and to very carefully assess the likely issues in calculating and distributing damages prior to bringing a claim (with the costs that this entails).

If and when further CPO applications are made to the CAT (and a number have been mooted, but not yet lodged), these will be watched very carefully. Their resolution is likely to be crucial to the appetite of claimant lawyers and funders to bring cases, and to the success (or otherwise) of the regime (and indeed any extension of collective redress to other legal areas).

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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