ANTITRUST CLASS ACTIONS: UK TRIBUNAL'S JUDGMENT IN FIRST OPT-OUT CLASS CARRIAGE DISPUTE

On 31 March 2022, the Competition Appeal Tribunal ("**CAT**") handed down an important judgment (**here**) regarding antitrust collective proceedings in the UK. The Tribunal considered three issues: (1) whether the Tribunal should permit the collective proceedings to proceed (the "Certification Issue"); (2) if so, whether they should proceed on an opt-in or an opt-out basis (the "Opt-in vs Opt-out Issue"); and (3) which proposed class representative ("PCR") should be permitted to take the collective proceedings forward (the "Carriage Issue"). The CAT panel was split by 2-1. The majority was willing to permit the collective proceedings to proceed. However, because the claims were so weak that they were liable to be struck ought and because there was no practical reason why members of the class could not have opted-in, the CAT refused to allow the claims to proceed on an opt-out basis. While it did not have to decide which PCR had carriage of the claims, it found marginally in favour of the Evans PCR. The applications have both been stayed and they have been given permission to submit a revised application for certification on an opt-in basis within three months of the date of the Tribunal's judgment.

Background

Under section 47B of the Competition Act 1998 ("**CA98**"), antitrust claims may be brought before the CAT combining two or more claims on an opt-in or an opt-out basis (i.e. brought on behalf of each class member except those who opt-out or who are not domiciled in the UK, unless they opt in). In order for a collective action to proceed, it must be certified by the CAT by making a collective proceedings order ("**CPO**"). There are 16 ongoing collective proceedings before the CAT at present including *Merricks v Mastercard, Kent v Apple Inc., Gutman v South Eastern Railway, Consumers' Association v Qualcomm, and Gormsen v Meta*.

In *O'Higgins v Barclays and ors and Evans v Barclays and ors* [2022] CAT 16, separate applications were brought by two rival proposed class representatives Phillip Evans (the "**Evans PCR**") and Michael O'Higgins FX Class Representative Limited (the "**O'Higgins PCR**") under section 47B of the Act to combine, on an opt-out basis, follow-on claims for damages arising from separate infringement decisions of the European Commission. The Commission found that various banking groups had

infringed Article 101 TFEU by participating in a single and continuous infringement covering the whole EEA in the foreign exchange spot trading of G10 currencies (the European Commission's summary of those decisions can be found **here**).

The Certification Issue

The CAT may authorise an applicant to act as the class representative, only if the Tribunal considers that it is just and reasonable for the applicant to act as the class representative by considering a range of factors, including whether the proposed class representative would act fairly and adequately in the interests of the class members (CAT Rule 78(1) to (3)) (the "**Authorisation Condition**"). In determining whether the PCRs met this 'Authorisation Condition', the CAT found that both the O'Higgins PCR and the Evans PCR were appropriately qualified. While it did not consider that the incorporation of the O'Higgins PCR constituted a material difference between the two PCRs, it noted that the directors behind corporate PCRs should be under no illusions that if the corporate PCR is not good for the money, a third party costs order will likely follow, so that incorporation as a liability shield does not work *[261(1)(iii)]*. The fact that neither PCR was a pre-existing body also pointed in favour of certification. Neither PCR gave rise to a conflict of interest. In considering their plans for the collective proceedings, while the Tribunal considered that both PCRs had "impressive" funding arrangements, it was concerned that neither had a sufficient fighting fund to bring the collective proceedings successfully to trial and beyond and this was a factor against certification *[359(5)(i)]*. In considering the extent to which the PCR would be able to pay the Respondents' costs, if ordered to do so, the Tribunal said it would be surprised if even the extensive After the Event insurance cover of the O'Higgins PCR would permit the Respondents to recover all of their costs *[359(6)(iii)]*. This was not a factor that precluded certification, but was an indicator against certification. Overall, the Tribunal considered that it was clear that the Authorisation Condition was met because the contra-indicators (specifically, funding levels and level of ATE insurance) did not come close to outweighing the factors pointing the other way *[360]*.

The CAT may certify claims as eligible for inclusion in collective proceedings where they are brought on behalf of an identifiable class of persons, raise common issues, and are suitable to be brought in collective proceedings (the "**Eligibility Condition**"). In considering whether the claims were suitable to be brought as collective proceedings, following the Supreme Court's judgment in Merricks, the CAT found that these claims could not be vindicated on an individual basis because a market-wide effect is alleged. Therefore an aggregate award of damages was not merely suitable, but inevitable. In considering the costs and benefits of continuing the proceedings, 'costs' did not refer to the financial costs incurred by the funders and their contingently instructed lawyers, rather to disbenefits in a broader framework, and the CAT did not identify any in these claims *[288(2)*]. When considering the nature and size of the class, it found that the enormous complexity of the claims and the degree of resistance those claims are going to meet from the Respondents, was strongly in favour of them being suitable for collective proceedings. However, the existence of group litigation in the High Court (insert reference) brought on behalf of *Allianz* and a number of other claimants which may seek to recover some of the same losses as the present Applications, was an indicator that the Eligibility Condition was not met *[288(3)]*. Overall the CAT concluded that the Eligibility Condition had been met.

The Opt-in vs Opt-out Issue

The CAT found that both the construction of its rules and approaching the question from first principles made clear that it had a discretion in determining the outcome of the Opt-in vs. Opt-out issue, and could not simply "rubber stamp" the Applicants' choice in framing them as only Opt-out applications *[367]*. In assessing this question, the CAT considered the same factors it had considered in the Authorisation and Eligibility Conditions. However, in resolving this issue, it was not concerned with whether these conditions were met, but whether there are points in those conditions which indicate the proper outcome of the Opt-in vs. Opt-out issue.

In considering the factors in the Authorisation Condition, it found that the fact that neither the O'Higgins PCR nor the Evans PCR is a 'pre-existing' body was a factor pointing away from certifying on an opt-out basis. If the CAT had before it a trade association, whose established purpose was to represent a specific class that had suffered alleged harm, but found it difficult to corral members of the class into opting-in, that would be a factor in favour of certifying on an opt-out basis. However, the CAT found that both PCRs in this case had come forward, not at the behest of the class, but at the behest of the lawyers they now instruct (who have themselves failed to "build a book") was an indicator against certifying on an opt-out basis *[370(3)]*. The Tribunal was also concerned that there was a risk that the PCRs would effectively be forced into an early settlement because of a lack of a sufficiently large fighting fund. The level of funding therefore did, slightly incline the Tribunal against opt-out collective proceedings, but it was one of relatively little weight *[370(5)]*. The Tribunal considered that the extent to which the PCR was able to pay the Respondents' costs was irrelevant to whether the claim should proceed on an opt-in or an opt-out basis.

When considering the Eligibility Condition and, in particular, the costs and benefits of continuing the proceedings the CAT stated that its decision could not be influenced by the enormous outlay in terms of time and money by the funders and legal teams *[372(1)]*. The CAT found that the benefit that it must look for is access to justice. This did not mean that every case that can only be brought on an opt-out basis must be permitted to proceed on that basis, but it was a factor that, in this case, weighed strongly in favour of certification on an opt-out basis *[372(2)(ii)]*. The fact that the opt-out class action would be able to recover irrecoverable costs from the undistributed damages of those who are nominally in the class but who do not claim damages, was a factor in favour of opt-out certification *[372(2)(ii)]*. In considering whether there were any separate proceedings, the existence of the Allianz claim indicated that there was an appetite to bring this sort of claim and supported the sense that the putative class members were choosing not to involve themselves in the proceedings the Applicants wish to bring on their behalf *[372(3)]*. When considering the nature and the size of the class in terms of identifiability, commercial sophistication and ability to look after themselves, it suggested that, in light of the efforts of the claimant firms involved, there is simply no enthusiasm or desire to take this matter forward, even if it costs a class member nothing *[372(4)]*.

The CAT also considered that the strength of the claims and whether it is practicable for the proceedings to be brought as opt-in proceedings, were additional factors that

apply specifically in relation to the Opt-in vs. Opt-out Issue. Consideration of strength should not involve a mini trial and should be gauged principally by reference to the plausibility of the case made in the pleadings. The Tribunal should approach this issue with a degree of trepidation and caution, particularly where the determination of this issue may cause collective proceedings not to be brought at all *[374]*. As a general rule, the weaker a case, the less justification there is for certifying on an opt-out basis. In this case, the CAT found that the claims pleaded were so weak that they are liable to be struck out, although it did not do so. Their lack of particularity made it effectively impossible to gauge the strength of any case that might be made by the Applicants if they were to plead matters more fully. This was a powerful reason against certification *[375]*.

In terms of practicability, this needs to be considered from the standpoint of the members of the class concerned, it is a legal standard assessed by the reasonable class member. It required consideration of why the more obvious route of opt-in proceedings was not being taken. The CAT noted that considerable efforts had been made by one of the claimant firms having contacted some 321 firms and invested more than 6,000 hours over 4 years in trying to build a book of claimants, resulting in only 14 advisory retainers. Although some of these institutions had theoretical claims exceeding a million pounds, it was not possible to assemble a large enough group to make a group action economically feasible on an opt-in basis. When assessing the composition of the class, it was clear that these were not *Merricks*-type claims, where the individual claims of the whole class, or substantially the whole class, are so small that one can see why members of the class would simply not be interested to sign up a claim that ought to be brought to rectify a market-wide wrong. The putative class members will, on the whole, be sophisticated potential litigants capable of looking after themselves. Nor could it be said that the putative class members will be ignorant of these potential claims, to the contrary the efforts of the claimant law firms evidence that there appears to be a deliberate decision not to participate. The CAT could see no reason why it was not practicable for the putative class to join on an opt-in basis, given the sophistication, the class knowledge and the potential size of claim. The inference (and the CAT considered it a strong one) is that the potential class members are not opting in because they do not want to, and not because opt-in proceedings are not practicable. These weighed strongly against opt-out certification *[378-382]*.

Overall, the CAT considered that the factors pointing towards certifying on an opt-out basis, were substantially outweighed by the strength and practicability factors. It accepted that not certifying on an opt-out basis means that the claims will not proceed. Ordinarily that would be a significant factor, but in this case the claims, as presently framed, are so weak that they are deserving of a strikeout. While access to justice factors were important, there is no practical reason why members of the putative class are not opting in. Access to justice should not be forced upon an apparently unwilling class *[385]*.

The Carriage Issue

The CAT acknowledged that the issue of carriage, i.e. which PCR should proceed, does not arise but the CAT decided the point in case the matter goes further. It considered that if the CAT had been minded to certify on an opt-out basis it would

have granted carriage to the Evans PCR. The applications were very similar and the question of carriage was a very marginal decision. Being the first to file its application was not a point in favour of the O'Higgins PCR. While O'Higgins had an advantage in terms of the extent of ATE insurance, which is a material point, it was given limited weight given the costs the Respondents were likely to incur. The Evans PCR was "better thought through", but the CAT emphasised that it was drawing a distinction between two cases that only just survived strikeout. It had very serious concerns about the manner in which the claims had been articulated. After the close of proceedings, the Evans PCR provided improved ATE insurance cover. Ultimately, the CAT concluded that even without the improved offering, that carriage should be given to the Evans PCR.

The applications have both been stayed and they have been given permission to submit a revised application for certification on an opt-in basis within three months of the date of the Tribunal's judgment.

Conclusion

The CAT's judgment is a significant blow to opt-out collective actions. While the proposed class representatives in these claims have been given permission to apply to certify the claims on an opt-in basis, the evidence before the Tribunal made clear that the claims were unlikely to be viable on an opt-in basis. Where claims are weak and poorly particularised, even if they can survive a strikeout, there is a real risk that they may only be permitted to proceed on an opt-in basis. That risk may be heightened where there has been a deliberate decision by class members not to participate in an opt-in claim, particularly where they are sophisticated litigants and the potential size of each claim is significant.

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