United Kingdom

ANTI-COMPETITIVE PRACTICES

Enforcement—judgments—follow-on actions for damages—collective proceedings order—certification—opt-in versus opt-out—permitted class representative—access to justice—assessment of competing claims—carriage dispute—powers of CAT

Anti-competitive practices; Certification; Collective proceedings; Competition Appeal Tribunal; Discretionary powers

Antitrust Class Actions: UK Tribunal clarifies approach to certifying opt-out collective proceedings

The Competition Appeal Tribunal (CAT) has recently clarified its approach to certifying collective actions for breaches of European Union (EU) and United Kingdom (UK) competition law in a recent judgment, resolving for the first time a carriage dispute between proposed class representatives.[1] In another judgment in the Court of Appeal, the CAT's discretion to certify collective proceedings on an opt-out basis was unsuccessfully challenged.[2]

Separate applications were brought by two rival proposed class representatives under s.47B of the Competition Act 1998 (CA98) to combine, on an opt-out basis, follow-on claims for damages arising from separate infringement decisions of the European Commission relating to foreign exchange spot trading of G10 currencies (the *Evans/O'Higgins* case).[3]

In *Evans/O'Higgins*, the CAT considered three issues: whether it should permit the collective proceedings to proceed (the Certification Issue), if so, whether it should proceed on an opt-in or an opt-out basis (the Opt-in vs Opt-out Issue), and which proposed class representative (PCR) should be permitted to take the collective proceedings forward (the Carriage 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[4] (the Authorisation Condition). In determining whether the PCRs met the Authorisation Condition, the CAT found that both the O'Higgins PCR and the Evans PCR were appropriately qualified. 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. The CAT was concerned that neither PCR had sufficient funds to bring the collective proceedings successfully to trial and beyond, which was a factor against certification, even taking into account "after the event" insurance.[5] However, these issues did not outweigh the factors supporting the PCRs' authorisation.[6]

In addition to a PCR meeting the Authorisation Condition, a claim must meet the "Eligibility Condition". There must be an identifiable class of persons, which raise common issues, and the claims must be suitable to be brought in collective proceedings. Following the Supreme Court's judgment in *Merricks*,[7] the CAT found that these claims could not be vindicated on an individual basis because a market-wide effect was alleged. In addition, the CAT found that the enormous complexity of the claims and the degree of resistance those claims were going to meet from the Respondents weighed in the favour of collective proceedings. However, the existence of separate litigation in the High Court[8] brought by a number of other claimants which might seek to recover some of the same losses weighed in the opposite direction.[9] Overall the CAT concluded that the Eligibility Condition had been met.

[1] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16.
[2] *BT Group Plc v Le Patourel* [2022] EWCA Civ 593.
[3] CAT Cases 1329/7/7/19 and 1336/7/7/19.
[4] CAT Rule 78(1)–(3).
[5] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [359(5)(i)] and [359(6)(iii)].
[6] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [360].
[7] *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] Bus. L.R. 25.
[8] *Allianz Global Investors GmbH v Barclays Bank Plc* [2021] EWHC 399 (Comm); [2021] 4 C.M.L.R. 18.
[9] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [288(3)].

The CAT was willing to permit the collective proceedings to proceed, but because the claims were so weak that they were liable to be struck out and because there was no practical reason why members of the class could not have opted-in, it was not permitted to proceed. The CAT reiterated that it had discretion to determine the opt-in/opt-out basis of collective proceedings.[10] Assessing this question, the CAT considered the same factors it had considered in the Authorisation and Eligibility Conditions.

The CAT found that the fact that neither PCR was a "pre-existing" body (unlike a trade association whose established purpose was to represent a specific class) counted against opt-out certification. Given that both PCRs in this case had come forward, not at the behest of the class, but at the behest of the lawyers instructed by them (who had themselves failed to "build a book") was considered by the CAT as an indicator against certifying on an opt-out basis.[11]

The CAT found that the benefit that it had to look for was 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 weighed strongly in favour of certification on an opt-out basis.[12] It was a factor in favour of opt-out certification that the PCR would be able to recover costs from the undistributed damages of those who are nominally in the class but who do not claim damages.[13]

The existence of the *Allianz* claim supported the sense that the putative class members had chosen not to involve themselves in the proposed collective proceedings,[14] even if it costs a class member nothing.[15]

The CAT considered that the claims' strengths, and practicality of bringing the claims on an opt-in basis, were additional factors. As a general rule, the weaker a case, the less justification there was for certifying on an opt-out basis. The CAT found that the claims pleaded were so weak that they were liable to be struck out, although it did not do so. This was a powerful reason against certification.[16] In terms of practicability, the CAT asked why the more obvious route of opt-in proceedings was not taken. Despite the considerable efforts of the claimant firms trying to build a book of claimants, it was not possible to assemble a large enough group to make an opt-in action economically feasible. In addition, the putative class members were, on the whole, sophisticated potential litigants capable of looking after themselves. The CAT saw 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 CAT inferred that the potential class members were not opting in because they did not want to, and not because opt-in proceedings were not practicable.[17]

Overall, the CAT considered that the factors in favour of opt-out certification were substantially outweighed by the strength and practicability issues faced by the claims. While access to justice factors were important, there was no practical reason why members of the putative class were not opting in. Access to justice should not be forced upon an apparently unwilling class.[18]

While it did not have to decide which PCR had carriage of the claims, the CAT found marginally in favour of the Evans PCR if it had authorised an opt-out collective action. The applications were stayed and were 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.

[10] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [367].
[11] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [370(3)].
[12] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [372(2)(ii)].
[13] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [372(2)(ii)].
[14] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [372(3)].
[15] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [372(4)].
[16] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [375].
[17] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [378]–[382].
[18] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 at [385].

In a separate CPO application, *Le Patourel v BT*,[19] the PCR sought a CPO on an opt-out basis for consumers of BT residential landline services, claiming that BT charged excessive prices to these customers on the basis of a review conducted by Ofcom in 2017 of the market for standalone landline telephone services. The application was brought as an opt-out basis, which was challenged by BT on the basis that: (i) because all the potential claimants are or have been in the recent past, customers of BT, they are easily identifiable;[20] (ii) the Tribunal may not have jurisdiction to enable damages to be paid out to each customer via a credit to their account or something similar, if customers could be identified;[21] (iii) that the class representative's own proposed plan for distribution of damages, if the claim succeeded, involved the filling out of a claim form by each customer who may be contacted;[22] and (iv) that, for the proportion of customers who used their residential landlines for business purposes, BT may have a "pass-on" defence, which could not properly be run on an opt-out basis as BT would not know at the outset which customers were in the potential "pass on" group.[23]

The CAT concluded that the opt-out basis is clearly more appropriate and suitable than an opt-in basis. Importantly, the CAT agreed with the PCR that there is a real difference between the option to join a legal action at the outset and claiming a damages entitlement later on once the case has been won. The CAT found that that it did have the power to order an account credit to the relevant customer, and that it would be for BT to try and work out which customers are using the landlines for business purposes for the identification of a "pass on" group. BT appealed the CAT's judgment to the Court of Appeal,[24] which upheld the CAT's decision to certify the CPO on an opt-out basis. Green LJ held that: (i) the balancing exercise of opt-in vs opt-out was well within the CAT's margin of discretion;[25] (ii) that the CAT was correct to conclude that it had the power to order an account credit, and it was open to the Tribunal, following an award, to seek proposals as to how best to achieve an informal, mediated, method of distributing the award which could include any creative solution;[26] and (iii) that if the CAT had sought to create a new test based on the merits of the claim, for certification on an opt-out basis, this would have been an error of law, but it did not do so.[27] Finally the Court of Appeal suggested that there are a number of points made in the CAT Guide to Proceedings about collective proceedings which might, when the Tribunal considers that it has sufficient experience, warrant reconsideration.[28]

The Tribunal's judgments in these claims provide further guidance for parties involved in proposed opt-out collective proceedings before the CAT. The *Evans/O'Higgins* judgment is a significant blow to certain types of opt-out collective actions. Where claims are weak and poorly particularised, even if they can survive a strikeout, there is a real risk that they may only be able to proceed on an opt-in basis. That risk may be heightened where there has

[19] *Le Patourel v BT Group Plc, British Telecommunications* [2021] CAT 30.
[20] *Le Patourel v BT Group Plc, British Telecommunications* [2021] CAT 30 at [111].
[21] *Le Patourel v BT Group Plc, British Telecommunications* [2021] CAT 30 at [117].
[22] *Le Patourel v BT Group Plc, British Telecommunications* [2021] CAT 30 at [119].
[23] *Le Patourel v BT Group Plc, British Telecommunications* [2021] CAT 30 at [121].
[24] *BT Group Plc v Le Patourel* [2022] EWCA Civ 593.
[25] *BT Group Plc v Le Patourel* [2022] EWCA Civ 593 at [84].
[26] *BT Group Plc v Le Patourel* [2022] EWCA Civ 593 at [100].
[27] *BT Group Plc v Le Patourel* [2022] EWCA Civ 593 at [109].
[28] *BT Group Plc v Le Patourel* [2022] EWCA Civ 593 at [112].

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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US

ANTI-COMPETITIVE PRACTICES

Enforcement—criminal prosecution—wage-fixing and no-poach agreements—per se violations—jury acquittals

Anti-competitive practices; Enforcement; Non-poaching covenants; United States; Wages

DOJ faces setbacks in crackdown on Wage-fixing and No-Poach Agreements

In April 2022, the United States (US) Department of Justice (DOJ) lost its first two jury trials arising from criminal prosecutions of alleged wage-fixing and no-poach agreements. Its criminal enforcement efforts in labour markets, which were buoyed by early victories in November 2021 and January 2022, now face an uncertain future.

The DOJ, the only agency that is empowered to bring criminal prosecutions for alleged violations of federal antitrust law, first announced in 2016 that it would begin criminally prosecuting wage-fixing and no-poach agreements. (For decades, the DOJ has criminally prosecuted price-fixing, bid-rigging, and market allocation arrangements, and it continues to do so.) This new focus on labour markets bore fruit in late 2019 and early 2020, when the DOJ secured indictments against individuals whose companies allegedly engaged in conspiracies to suppress competition by agreeing to fix wages or avoid competition for potential employees.

The DOJ obtained favorable results in the preliminary stages of both cases. The first case is *United States v Jindal*, Case No. 4:20-cr-00358 (E.D. Tex.). There, on 29 November 2021, the Texas federal district court denied a motion to dismiss the indictment and held that the criminal allegations—that the defendants (executives of a physical therapist staffing company) and their co-conspirators had engaged in a conspiracy to suppress competition by agreeing to fix prices by lowering the pay rates of physical therapists—described conduct that is per se illegal and could be pursued criminally.

The second case is *United States v DaVita Inc.*, Case No. 1:21-cr-00229 (D. Colo.). There, on 28 January 2022, the Colorado federal district court likewise denied a motion to dismiss and similarly concluded that the criminal allegations—that the defendants (a medical device company and its former CEO) had conspired with competitors not to poach each other's employees, thereby suppressing wages and job opportunities—also described per se violations of US antitrust law.

At trial, however, the defendants mostly prevailed. On 14 April 2022, in the *Jindal* case, the Texas jury acquitted both defendants on the charge that they had orchestrated a wage-fixing scheme, while convicting one defendant of obstruction of justice.

One day later, on 15 April 2022, in the *DaVita* case, the Colorado jury acquitted the defendants on the no-poach conspiracy charge. A question submitted to the court by the Colorado jury before it announced the verdict of acquittal suggests that the jurors may have believed that the former CEO's actions did not "meaningfully harm" competition.