

**Insights**

## **CERTIFICATION OF COLLECTIVE ACTIONS IN THE CAT**

A TURNING OF THE TIDE

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### **SUMMARY**

To bring a collective competition action in the Competition Appeal Tribunal (“**CAT**”), a proposed class representative first has to have their claim certified by the CAT.

The CAT’s approach to certification is therefore an important issue and has been heavily scrutinised.

In this Insight, we look at three recent judgments of the Competition Appeal Tribunal where the CAT has stalled the progression of the claims: *Gormsen v Meta Platforms, Inc.*, *Justin Gutmann v Apple Inc.*, and *Commercial and Interregional Card Claims*.

We consider the factors that led to these decisions, which buck the trend over the last two years of class representatives achieving certification of their claims with relative ease, and set out our thoughts on the key learnings from the judgments.

This year the Competition Appeal Tribunal (“**CAT**”) has so far handed down four judgments in cases where the proposed class representative (“**PCR**”) was asking the CAT to make a collective proceedings order (“**CPO**”) certifying their proposed claims. The CAT granted a CPO in one of those cases (*Justin Gutmann v Govia Thameslink Railway Limited*, where certification was not actually contested by the defendants) but has declined to certify in all three claims where the defendants opposed certification: *Liza Lovdahl Gormsen v Meta Platforms, Inc.*, *Justin Gutmann v Apple Inc.*, and *Commercial and Interregional Card Claims* (the latter being four separate proposed claims – the judgment dealt with certification of all of them).

### **BACKGROUND**

Prior to these judgments, the CAT had approved 11 CPOs (with some of those CPOs determined in the same judgments) and declined to certify only two (those being rival claims in respect of the

European Commission's FOREX decisions) since the Supreme Court's seminal decision in *Walter Merricks v Mastercard Incorporated* in December 2020. In determining that appeal, the Supreme Court set what was perceived by many as a 'low bar' to certification.

However in a judgment handed down in July 2022 upholding certification in *Justin Gutmann v First MTR South Western Trains Limited*, the Court of Appeal stressed the importance of the "vigilant gatekeeper role" of the CAT and emphasised the importance of the PCR's 'methodology' as a "blueprint" for how the issues raised by their proposed claims will be determined at trial.

The methodology requirement, which emerged from a decision of the Canadian Supreme Court in *Pro-Sys Consultants Ltd v Microsoft* (which was endorsed by the Supreme Court in this jurisdiction in *Merricks*) falls to be considered in addition to the 'authorisation requirement' (whether it is just and reasonable for the PCR to act as a representative of the class) and is linked with the 'eligibility requirement' (whether the claims raise the same, similar or related issues of fact or law such that they are suitable to be brought as collective proceedings). It is significant that - in this still young collective action regime - the methodology or "blueprint" requirement is a creation of the early UK case law (drawing on Canadian case law) and not something found in legislation or the Competition Appeal Tribunal's collective action rules themselves. This demonstrates the speed at which the regime has evolved and no doubt will continue to do so.

The *Pro-Sys* test requires the CAT to ask whether the PCR has put forward a methodology that offers a realistic prospect of establishing loss on a class-wide basis if the matter proceeds to trial. It must be grounded in the facts of the particular case and cannot be purely theoretical or hypothetical.

When evaluating a methodology, the CAT must "*strike an appropriate balance between the right of the class to seek vindication and the right of defendants not to be subject to a top down claim unless it is a proper one to proceed*", the Court of Appeal held.

The decisions in *Gormsen, Gutmann v Apple* and *CICC* followed the Court's judgment.

## THE THREE JUDGMENTS

### LOVDAHL GORMSEN V META

The PCR, Dr Liza Lovdahl Gormsen, was seeking certification of three distinct claims which the PCR alleged individually and/or together amounted to an abuse of dominance:

- first, that Meta exploited its dominant position by imposing terms and conditions on its users which permitted it to collect, share and process their data as a condition of access, all amounting to an unfair requirement;

- secondly, that the bargain between Meta and its users, whereby users permit the collection, etc., of their data in exchange for free access to Facebook, entailed users paying an unfair price; and
- thirdly, that Meta's other terms and conditions were unfair by virtue of them, for example, being (allegedly) excessively complex, misleading, and mandatory.

The Tribunal raised a number of concerns at the certification hearing regarding the PCR's methodology. Fundamentally, as the Tribunal went on to hold in the judgment, they considered the methodology to be directed to the quantification of loss for the unfair price abuse case but not directed at all to the two other alleged abuses.

With respect to the unfair pricing abuse case, the Tribunal criticised the PCR's proposals for assuming the status quo was abusive (thereby adopting the wrong counterfactual) and for failing to articulate a positive case for how to assess whether the price charged by Meta (zero) was unfair.

The Tribunal also held that the PCR had failed to be upfront about apparent changes in their expert's approach between their first and second expert report (the second report had responded to a number of issues raised by Meta's expert) which left the Tribunal in the dark as to what the PCR's positive case and methodology actually were.

The Tribunal ultimately concluded that the PCR had "unequivocally failed the Pro-Sys test" but instead of dismissing the case (which Meta had argued for), the Tribunal invited the PCR to "have another go". However they stressed that the PCR would first need to carry out a "root-and-branch re-evaluation" of its methodology. Pursuant to the Tribunal's invitation, the PCR requested and the Tribunal duly ordered a six-month stay of the proceedings.

## GUTMANN V APPLE

This proposed CPO brought by Justin Gutmann, who separately acts as class representative in a number of certified collective proceedings regarding train fares, alleges that Apple committed an abuse of dominance by its conduct in relation to unexpected power offs that affected certain historic iPhone models, and in particular, its introduction in 2017 (by a software update) of a performance management feature limiting power demands. Apple had two grounds for resisting certification: first, that the PCR's methodology was defective because of a fundamental disconnect between the alleged abuse and the alleged loss their methodology sought to measure; and secondly, that Mr Gutmann was not suitable to act as the PCR.

At the start of the certification hearing the Tribunal raised (of its own initiative pursuant to its gatekeeper role) a number of concerns regarding the absence of a factual basis for the abuse claim. They were particularly concerned about what was underpinning the PCR's allegation that the performance management feature resulted in the affected iPhone models becoming sub-standard from the perspective of the consumer and inferior to advertised expectations.

Unconvinced by the responses it received from the PCR to its questions on the factual basis for those allegations, the Tribunal floated the idea of adjourning the CPO application and the PCR making an application for limited disclosure from Apple with a view to refining its case.

The PCR agreed to the proposed adjournment so the Tribunal did not go on to determine Apple's challenges, including with respect to the sufficiency of the methodology. However the methodology requirement looms large for the PCR if and when they are back before the Tribunal seeking certification

## COMMERCIAL AND INTERREGIONAL CARD CLAIMS

The PCR had started four separate collective actions (two against Visa and two against Mastercard) because they sought to bring both opt-in and opt-out claims and on behalf of different classes of merchants. The claims concerned the multilateral interchange fees ("**MIFs**") charged under Visa and Mastercards' card schemes for card transactions made by merchants since 2016.

The class in each proposed claim was confined to those merchants that entered into transactions which incurred certain types of MIFs, specifically interregional and commercial card MIFs. The claims were made on a 'standalone' basis (under Chapter I of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union) as while there have been prior UK court judgments and European Commission addressing the legality of MIFs, none of them established an infringement in respect of interregional or commercial card MIFs.

In their judgment, the Tribunal criticised the PCR's methodologies, for both the opt-in and opt-out claims, for being directed exclusively on quantum such that there was no blueprint towards establishing whether the interregional and commercial card MIFs had actually infringed competition law. The Tribunal saw "*no sensible reason*" for this omission and strongly rebuked the PCR for exhibiting a "*casualness*" about the methodology requirement, which they considered amounted to a "*material and substantive defect*" that precluded the grant of a CPO in any of the four proceedings.

The Tribunal identified a number of further serious issues with the PCR's proposals.

With respect to the opt-out proceedings specifically, the Tribunal held that, contrary to the Tribunal's rules in relation to eligibility, it is not possible in many cases for individual merchants to be able to determine whether they are a member of the proposed class. They judged this to be a fundamental defect with the design of the class definition. They also raised concerns with the practicality and proportionality of the methodology for resolving pass-on issues.

As regards the opt-in proceedings, the Tribunal identified a further failure by the PCR to provide a sufficient methodology in respect of issues relating to identification of class membership.

In light of these issues (and others), the Tribunal stayed all the proceedings and ordered that the PCR had 8 weeks to notify them as to whether they intend to submit revised proposals. Like in *Lovdahl Gormsen v Meta*, the Tribunal rejected the proposed defendants' call for them to dismiss the proposed claims outright. However the Tribunal stressed that some of the defects they had identified, such as the class identification issues in the opt-out proceedings, could not easily be fixed.

## ANALYSIS

The Tribunal disposed of the three cases in different ways but in each has allowed the PCR a second bite of the cherry.

As will be clear from the above, the Tribunal was vocal with its criticisms. On the one hand, this will mean the PCRs and their teams have a good sense of the points they will need to try to address if they are to renew their CPO applications.

However the funders backing them have now incurred the sunk costs of the PCRs' first attempts, which are likely considerable. There is also the issue of the proposed defendants' costs. Indeed, a costs order has already been made in *Lovdahl Gormsen v Meta* requiring the PCR to pay 33% of the proposed defendants' costs of the certification hearing (£650,000) and reserving the issue of the PCR's liability for the remaining costs.

Those involved will no doubt be wanting to understand quickly whether and if so how the issues that surfaced at these hearings can be rectified and, more broadly, what the strength of the claims are once revised proposals are drawn up, and whether they are capable of meeting the heightened certification standard. If the claims are ultimately refined in a way that negatively impacts on probable quantum then this may materially affect their viability from the perspective of the funders.

*Gutmann v Apple* is in a different position as it appears that the future of that case now depends first on whether further documents to be provided by Apple, for which the PCR obtained a disclosure order on 28 June 2023 in the face of opposition from Apple, can be used to stand up the claims made.

Standing back, it is clear that the bar for certification has been raised in a way that is likely to be significant not just for the PCRs in these claims but for all pre-certification and future claims.

PCRs and their experts must put forward a holistic methodology and this may necessitate delays in proposed claims being brought and potentially a rise in pre-certification (and possibly pre-action) correspondence as PCRs seek to draw out challenges at an earlier stage with a view to improving upon their initial methodologies. PCRs will likely be considering bringing forward work and – if their funding permits it – committing greater resources in the early stages of a case.

While understandable given the appellate endorsement of the *Pro-Sys* test and the CAT's role as vigilant gatekeeper, the strong interventionist approach taken by the Tribunal in all three cases nevertheless demonstrates a renewed vigour to critically assess claims at the outset. This is not a merits analysis but an assessment of whether a claim can proceed sensibly to trial. For example, is the Tribunal satisfied that the proposed form of evidence in the case is capable in principle of proving the allegation that is being made? The goal is to weed out untriable claims at the beginning. *Gutmann v Apple* in particular demonstrates the propensity of the CAT to look under the bonnet of a proposed claim and stress test the allegations and assumptions underpinning the PCR's methodology by reference to available factual evidence (or indications as to the availability of factual evidence).

The development of the certification standard we have discussed can be understood as a form of natural rebalancing as the collective actions regime matures. The perception of the low bar set by *Merricks* no doubt encouraged novel and inherently challenging claims (e.g. *Lovdahl Gormsen v Meta* and *Gutmann v Apple*) and potentially gave PCRs the impression that a degree of casualness with their methodologies would be forgiven by the CAT (and this perhaps explains *CICC*).

Claims already certified are not insulated from all of this though. As the Tribunal has noted in *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd*, the PCR's methodology is not "cast in stone" once a CPO is made and "the CAT has the power at any point to revisit the methodology" and, if appropriate, to "stay, vary or revoke a CPO". We may not have long to wait before we see the first post-certification CPO challenges.

Read the CAT's judgments:

- [Lovdahl Gormsen v Meta](#)
- [Gutmann v Apple](#)
- [CICC](#)

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If you would like to discuss any aspect of these judgments, or collective actions generally, please contact Ed Coulson or Sam Brown.

## RELATED PRACTICE AREAS

- Class Actions
- Antitrust
- Antitrust Class Actions

## MEET THE TEAM



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