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COLLECTIVE PROCEEDINGS: EMERGING TRENDS

CRISIS MANAGEMENT
Part of the Horizon Scanning series

The UK collective actions regime for competition damages actions has developed rapidly since the Supreme Court handed down its landmark decision in *Merricks v Mastercard* in December 2020. More companies can expect collective proceedings for abuse of dominance claims in 2024.

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LEGAL FRAMEWORK

Collective proceedings were introduced to allow large numbers of people affected by breaches of competition law – who, individually, might not have the resources to pursue litigation – to combine their claims under the leadership of a class representative. There are two kinds of collective proceedings: "opt-in", where the representative claims on behalf of all those who have expressly chosen to participate; and "opt-out", where the claim is made on behalf of all persons domiciled in the UK who match a particular description, except for those who have expressly chosen not to participate.

An action by a proposed class representative (a **PCR**) can only proceed if the Competition Appeal Tribunal certifies a collective proceedings order (a **CPO**). A CPO will only be granted if the CAT: (i) authorises the PCR on the basis that it is "just and reasonable" for them to act as a representative in the proceedings (the "authorisation condition"); and (ii) certifies that the claims are eligible for inclusion in collective proceedings (the "eligibility condition").

The Supreme Court's decision in Merricks significantly lowered the bar for CPO certification and incentivised claimant law firms and funders. This has resulted in a huge increase in the number of CPO applications (with more than 30 currently pending in the CAT). While the CAT has generally adopted a claimant-friendly approach at the certification stage, recent developments may suggest a slight shift of approach.

AUTHORISATION CONDITION

In order to be authorised, a PCR must (among other things) persuade the CAT that it has adequate funding arrangements in place. Collective proceedings are invariably financed by professional litigation funders; they have typically done so in return for a percentage of the damages recovered in the event the claim succeeds. In July 2023, the Supreme Court took the market by surprise by holding that litigation funding agreements of this kind are caught by the definition of damages-based agreements (DBAs).

DBAs are prohibited in opt-out collective proceedings and will only be enforceable in opt-in proceedings if they comply with certain conditions.

In a recent decision, the CAT held that a funding agreement revised in the light of the Supreme Court's decision – so that the funder would be paid a multiple of its investment, rather than a percentage of damages – was not a DBA and was, accordingly, valid. It remains to be seen whether that decision will be appealed. Meanwhile, the Government has proposed a change to the law which would remove the prohibition on DBAs in opt-out proceedings, but not address the underlying question of whether the definition of DBAs should be amended to take litigation funding agreements outside their scope more generally.

ELIGIBILITY CONDITION

In considering whether claims are eligible for inclusion in collective proceedings, the CAT will consider a number of factors including whether they: (i) raise common issues of fact or law; and (ii) are suitable to be brought as collective proceedings. The CAT and Court of Appeal have confirmed the low threshold (including by reiterating that suitability is a relative concept requiring the CAT to consider whether a claim is more suitable to be brought in collective proceedings rather than individual proceedings).

In **Trains**, the Court of Appeal explained that to enable the CAT to form a judgment on commonality and suitability, the PCR must put forward a methodology setting out how the relevant issues will be determined at trial. In **McLaren**, the Court of Appeal emphasised the CAT's gatekeeper function in ensuring that the PCR puts forward a clear "blueprint to trial" at the certification stage. Multiple respondents have therefore sought (mostly unsuccessfully) to persuade the CAT that the relevant PCR's expert methodology has fallen short of the required standard. However, in **Meta** and **CICC**, the CAT did take what appears to be a more stringent approach: it refused to certify the claims, although gave the respective PCRs time to improve them. It remains to be seen whether the concept of "blueprint to trial" will allow respondents to challenge certification.

OPT-IN VS OPT-OUT

The choice between opt-in and opt-out proceedings has been a key battleground in a number of CPO applications. In two recent decisions, the Court of Appeal noted that:

A. the CAT should exercise its discretion based on all circumstances of the case and that there is no legislative presumption either way;

B. it should not be that a weaker case necessarily becomes opt-in and a stronger case opt-out; and

C. where no proceedings will continue save on an opt-out basis, that is a powerful factor in favour of opt-out.

2024 TRENDS

There has been a significant increase in standalone abuse of dominance claims against tech companies, with CPO applications filed against Google, Meta, Qualcomm, Apple and Amazon.

A separate emerging trend is claimants seeking novel ways to use the collective proceedings regime by framing claims for alleged non-compliance with environmental law or regulation in other areas as competition law breaches. We are currently representing defendant companies in collective proceedings in multiple different sectors.

We expect that it will be difficult to persuade the CAT that opt-out proceedings are unsuitable (particularly for consumer claims) but, given the high stakes, we may see creative arguments on the issue of opt-in vs opt-out.

Given the developing state of the law around collective proceedings, we expect to see both PCRs and respondents continue to test the limits of certification arguments.

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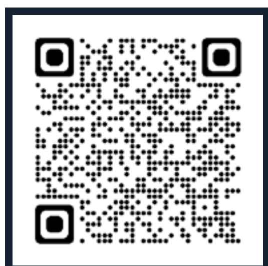

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