

Gutmann v First MTR: Landmark victory for class action defendants

The Competition Appeal Tribunal (CAT) has dismissed a long-running class action against our client, First MTR, and other train operators in only its second judgment under the decade-old competition class action regime. The judgment is good news for consumer-facing businesses as it clearly confirms that “*competition law is not a general law of consumer protection*”.

Background

The claim was launched by class representative, Justin Gutmann, in 2019. It concerned ‘boundary fare’ train tickets, which can be used by a London travelcard-holder to travel beyond the zone of validity of their travelcard. Mr Gutmann argued that competition law required the defendant train operators to increase the ‘availability’ of boundary fares for sale and ensure general awareness of their existence among consumers. He claimed that the failure by the train operators to organise their sales and marketing activities to secure this outcome amounted to an abuse of their alleged dominance.

The CAT certified the claim as a class action in 2022. Following an unsuccessful appeal, the CAT ordered that the issues in the case should be heard in three separate trials. The first of these took place in June 2024 and considered whether - on the assumption that each train operator was dominant - their conduct in relation to boundary fares amounted to an “abuse” for the purposes of competition law.

Shortly before this trial, one defendant, Stagecoach, settled with Mr Gutmann, offering a settlement pot of £25m to class members (of which only c. £200,000 was claimed).

On 17 October 2025, the CAT handed down its judgment for the remaining train operators, dismissing the claim and determining that there was no abuse.

Clarifying the limits of competition law class actions

Competition damages claims are a uniquely privileged field of litigation which benefits from a specialist class action regime: class representatives can pursue claims on behalf of huge classes of claimants, including on an “opt-out” basis, under the supervision of the CAT.

Due to the attractiveness of the CAT regime, there is an obvious temptation for class representatives to try to shoehorn claims into a competition law cause of action. The boundary fares claim, which concerned the treatment of a sub-set of consumers, was at the vanguard of what has now become a wider trend. Such claims test the conventional boundaries of competition law and risk it being applied in unexpected and intrusive ways. However, the CAT has clearly signalled in its judgment that the class action regime has its limits, emphasising that “*competition law is not a general law of consumer protection*”.

In considering the meaning of “abuse” of dominance, the CAT held that the concept is broad but not unlimited. The CAT observed that a finding of abuse can lead to significant fines and is classified as “*quasi-criminal*”, and emphasised that it will require strong and compelling evidence to support a finding of abuse. The CAT made it clear that examples of difficulties faced by some consumers will not be enough to establish abuse of dominance and helpfully clarified that there is no “*obligation on the dominant company to organise or conduct its business so as to achieve the best outcome for its customers, or a fortiori for a sub-group of its customers*”.

The CAT’s role in scrutinising businesses

If Mr Gutmann had succeeded in establishing that the train operators had a competition law obligation to ensure that relevant customers purchased boundary fares, this could have had profound implications for how companies (who could be argued to be dominant) run their businesses - for example, how they sell their products, communicate with customers

and design their marketing strategies. The way the claim was framed suggested that the CAT should engage in detailed scrutiny of core aspects of the train operators' businesses; their defences covered many varied and complex commercial decisions, ranging from the screen layout on their ticket vending machines to the terms of sales contracts with third parties.

Ultimately, however, the CAT's judgment made a holistic assessment of the train operators' sales practices and acknowledged the competing commercial priorities the train operators faced, particularly in a highly-regulated industry. For example, when considering whether boundary fares were sufficiently available for sale, the CAT examined the evidence on each sales channel but decided that the overall picture was not abusive as boundary fares could be bought through certain key sales channels (e.g. at ticket offices). Whilst observing that the *"selling systems of each of the Defendants could have been improved"*, the CAT did not consider that any issues highlighted by Mr Gutmann could be considered abusive.

The CAT also found that Mr Gutmann had failed to prove that there was a lack of customer awareness of boundary fares. It further held that, so long as a dominant company makes a product sufficiently available to customers and does not conceal its existence, it is not additionally required to *"promote or advertise a product that will benefit some of its customers so as to increase their awareness"*. This finding will be particularly welcome for businesses which offer a wide range of products or services to consumers.

Wider implications for the regime - greater scrutiny at certification?

This judgment should dampen the enthusiasm of claimant law firms and funders to pursue consumer protection claims under the guise of "novel" abuse of dominance claims in future. However, at the certification stage, the CAT and the Court of Appeal considered that Mr Gutmann's claim was an arguable form of abuse, while recognising its novelty. In particular, the CAT observed that the *"categories of abuse are not closed"* and was prepared to accept that an *"unfair selling system"* could constitute an abuse. The Court of Appeal further agreed that the class representative's broad formulation of abuse was arguable based on an analysis of the case law. However, upon a fuller consideration at trial, the CAT decided that the alleged conduct did not constitute abuse, albeit after nearly seven years of costly litigation. Such an outcome might suggest a regime that requires more intensive scrutiny of the merits at the certification stage.

It is also notable that the CAT initially certified the action despite concluding at that stage that the cost-benefit analysis pointed against doing so, including because of the risk of low take-up of any damages by class members, and the anticipated costs of the proceedings. In the event, just c. £200,000 of the £25m settlement agreed by one of the train operators shortly before trial was ultimately claimed by class members. (Such was the CAT's disappointment at this "very low" take-up and concern about the optics of the lawyers and funders being seen to be the primary beneficiaries of the regime, that it encouraged the parties to agree to donate £4m of the undistributed pot to charity.) The CAT revisited the cost-benefit analysis in the closing paragraph of its judgment: it cautioned that, even if Mr Gutmann successfully appeals the judgment in respect of some aspects of the train operators' conduct, the class would narrow, and the *"cost-benefit of the proceedings going forward would clearly be markedly changed"* such that *"[w]e would then wish to consider whether, in those circumstances, the [collective proceedings order] should be revoked"*. The outcomes in this case (both in the settlement and subsequent CAT judgment) could therefore also suggest the cost-benefit analysis should play a greater role in the CAT's analysis at the certification stage.

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