

21 June 2022

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As reported in previous Client Alerts, there has recently been a flurry of Collective Proceedings Orders (“CPOs”) in collective (class) actions for competition/antitrust claims (as introduced in the UK by an amendment to the Competition Act 1998 (the “Act”) in 2015), following the UK Supreme Court’s landmark 2020 decision in *Merricks v Mastercard*.¹

On 6 May 2022, the Court of Appeal (“CoA”) handed down judgment in *Patourel v BT Group* (the “CoA Judgment”).² This appeal considered a judgment of the Competition Appeal Tribunal (“CAT”) of 27 September 2021, the second CPO to be made in the UK (the “CAT Judgment”),³ that the proceedings should be *opt-out*, rather than *opt-in*, proceedings.

In this article, we look at the CoA’s decision, the first in which an appeal court has considered the approach to determining whether collective proceedings should proceed on an opt-out or opt-in basis as part of the UK’s nascent collective action regime.⁴

Background

Patourel’s claim is brought on behalf of around 2.3 million BT customers and concerns allegations that BT abused its dominant position in the telecommunications market by imposing unfair prices, contrary to section 18 of the Act. The claim is brought on a standalone basis (i.e., without the benefit of a regulatory finding against BT that it had infringed competition law), but relies on certain findings in Ofcom’s ‘Review of the Market for Standalone Landline Telephone Services’ dated 26 October 2017, which “concluded that BT possessed “significant market power” ... in the market for voice only telephony services and that it had

¹ *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51.

² *BT Group plc and British Telecommunications plc v Justin Le Patourel* [2022] EWCA Civ 593.

³ *Justin Le Patourel v BT Group plc and British Telecommunications plc* [2021] CAT 30.

⁴ The CAT has, since the hearing of this appeal, handed down further decisions in separate proceedings that consider this issue: please see below in relation to our [Client Alert of 17 June 2022](#), with a further Client Alert to follow in respect of the CAT’s decision of 8 June 2022 in *UK Trucks Claim Ltd v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others; Road Haulage Association Ltd v Man SE and Others* [2022] CAT 25.

charged customers materially above the competitive level".⁵ Damages of £589m (comprising between £238-£351 per customer) are sought.

The CAT Judgment made a CPO which certified a claim for damages as eligible for collective proceedings, and ordered that, if the claim succeeded, the remedy would be an award of "*aggregated damages*".⁶ The CAT also directed that the claim proceed on an opt-out basis (i.e., a claim that is brought on behalf of all of the members of a defined class, except those that choose to opt-out), rather than on an opt-in basis, and it was that direction which formed the basis of BT's appeal to the CoA.

Legal framework

Section 47B of the Act governs the certification of collective actions. Sub-paragraphs (10) and (11) define opt-in and opt-out proceedings, obliging the CAT to determine that a claim proceed on one or other basis,⁷ but without specifying the criteria to be applied in making that decision.

The Competition Appeal Tribunal Rules 2015 (the "**Rules**")⁸ expand on the framework contained in the Act, including the criteria to be applied in choosing between opt-in and opt-out proceedings.⁹ Rule 79(3) addresses the nature of the CAT's broad discretion in determining whether collective proceedings should proceed on an opt-in or opt-out basis, including that the CAT may take into account "*the strength of the claims*" and "*whether it is practicable for the proceedings to be brought as opt-in collective proceedings*". Those factors are addressed in greater detail in the CAT's Guide to Proceedings 2015 (the "**Guide**"), with the CAT noting its "*general preference for proceedings to be opt-in where practicable*".¹⁰

The CoA considered the following three topics relating to the legal framework:

1. The criteria that the CAT should apply in selecting as between opt-in or opt-out proceedings.
2. The power of the CAT to order that any damages payable be distributed by an account credit.
3. The role that an assessment of the merits plays in the choice of opt-in or opt-out proceedings.

1. The criteria for choosing between opt-in or opt-out proceedings

In this context, BT asserted that the CAT had made four main errors,¹¹ which the CoA considered in turn.

- First, the CAT had "*failed to take into account the general preference for opt-in proceedings as articulated in the Guide*".¹² The CoA found that "*the power to order opt-in or opt-out proceedings is one for the Tribunal to make upon the basis of all the circumstances in the case. There is no prior legislative predisposition one way or another*".¹³ Given the apparent preference for opt-in proceedings in the Guide, the CoA appears to have felt the need to explain this finding, including that: (i) the Act (section 47B) and the Rules (particularly Rule 79) "*intended to leave the choice of opt-in or opt-out to the CAT based upon the facts of each case*";¹⁴ (ii) Rule 79 gave the CAT an

⁵ CoA Judgment, paragraph 4.

⁶ Section 47C of the Act permits "*aggregated damages*", as a departure from the established common law principle that damages should compensate individual claimants for the losses that they have suffered.

⁷ The Act, section 47B(7)(c).

⁸ SI 2015 No 1648.

⁹ More generally, in determining whether the claims are suitable to be brought in collective proceedings, the CAT may take into account all matters it thinks fit, including those set out in Rule 79(2).

¹⁰ Guide, paragraph 6.39.

¹¹ CoA Judgment, paragraph 59.

¹² Section 6.38 of the Guide states that a class representative seeking opt-out proceedings "*will need to make submissions as to why that form of proceedings is more appropriate than opt-in proceedings*" and, as mentioned above, Section 6.39 states that there "*is a general preference for proceedings to be opt-in where practicable*".

¹³ CoA Judgment, paragraph 68.

¹⁴ CoA Judgment, paragraph 63.

unfettered discretion such that it “*may take into account all matters it thinks fit*”;¹⁵ (iii) the Guide did not impose predetermined limits upon the CAT’s discretion and the Preface to the Guide made clear that the collective action jurisdiction was “*novel*” and that the CAT might “*develop its approach on a case by case basis*”;¹⁶ and (iv) it would not, in any event, be open to the CAT, in issuing its Guide, to depart from legislative intent.¹⁷

- Second, BT argued that the only issues relevant to the question of the practicability of opt-in proceedings are the identifiability and contactability of potential claimants (which was straightforward in this case because the identity and contact details of all potential claimants were known to BT), whereas the CAT found that it had to consider the willingness of claimants (assumed to be identifiable and contactable) to sign up to litigation, which involved considering the position both at the outset and at the distribution stage. The CoA held that the ability of a claimant to convert identifiable contacts into litigants is an important factor, and that “*the CAT was entitled to conclude that if an opt-in was ordered the take-up could be very limited. Indeed, this seems to us to be a more or less obvious conclusion to arrive at on the facts ... the practicalities of collectively organised litigation might favour an opt-out solution where there are large numbers of potentially affected parties and relatively small sums at stake which might otherwise deter the take up of opt-in proceedings.... The ability of a claimant to convert identifiable contacts into litigants is hence an important factor which goes well beyond issues of identifiability and contactability*”.¹⁸ The CoA referred in this context to the recent decisions of the Supreme Court in *Mastercard v Merricks* and *Lloyd v Google Inc.*,¹⁹ including that “[i]n *Lloyd* the Supreme Court highlighted the important advantage of opt-out proceedings in overcoming the low-participation rates associated with opt-in proceedings”.²⁰
- Third, that the CAT had “*accepted the argument that the position and preference of third party funders was relevant and indeed dispositive*”.²¹ BT argued that nothing in the Rules or the Guide permits this and that, if the CAT were correct, no proceedings would ever be certified on an opt-in basis, since a funder would always express a preference for opt-out proceedings (and a claimant class representative would always maintain that no claim would get off the ground on an opt-in basis). The CoA, citing the relevance of a number of the Rules and the need for access to justice (“*a seminal principle lying at the epicentre of the jurisdiction*”),²² determined that the CAT should consider the financial position of the parties, including their ability to attract third party funding, concluding that “[i]t is self-evident that in many large-scale consumer based collective actions the availability or non-availability of third party funding might be dispositive of whether the claim ever gets off the ground”.²³ The CoA emphasised the importance of the CAT forming an independent view (including being “*alert to curb the risk that the leverage that opt-out proceedings provide is being deployed oppressively and unfairly*”) and found that, in this case, the CAT was “*entitled to conclude that it was “probably a truism” that it was easier to fund opt-out than opt-in proceedings*”.²⁴
- Fourth, the CAT “*applied generally a mistaken understanding of the concept of practicability*”.²⁵ Rule 79(3) provides that, in selecting between opt-in or opt-out proceedings, the CAT should consider whether it is “*practicable*” for proceedings to be brought on an opt-in basis. BT argued that the CAT had applied the wrong test for “*practicability*”, but the CoA held that “[t]he concept of

¹⁵ CoA Judgment, paragraph 62.

¹⁶ CoA Judgment, paragraph 65.

¹⁷ CoA Judgment, paragraph 67.

¹⁸ CoA Judgment, paragraphs 73 and 74.

¹⁹ *Lloyd v Google* [2021] UKSC 50.

²⁰ CoA Judgment, paragraph 71.

²¹ CoA Judgment, paragraph 59.

²² CoA Judgment, paragraph 78.

²³ CoA Judgment, paragraph 77.

²⁴ CoA Judgment, paragraph 79.

²⁵ CoA Judgment, paragraph 59.

*“practicability” is not defined in the [Act] or the Rules and it is not “the” test but simply “a” matter the [CAT] is entitled to take into account”.*²⁶ Once again, the CoA commented on the CAT’s margin of discretion: *“Practicability, in any case, will be highly fact and context sensitive and will include, as one facet of this broad analysis, the [CAT] using its expert judgment to envisage how the costs and benefits of litigation will play out upon an opt-out or opt-in basis. The view the [CAT] takes will be a conclusion reached by an expert body with a growing depth of experience in the conduct of collective proceedings”.*²⁷

2. Can damages be distributed by way of an account credit?

The CAT treated as a fact relevant to the benefits of opt-out over opt-in proceedings that, in opt-out proceedings, the distribution of damages could be achieved by means of an account credit without the active involvement of relevant customers. BT argued that the CAT had no power to enable damages to be paid out via an account credit, and that the CAT erred in taking this benefit into account. The CoA held that there is *“almost nothing in the [Act] or the Rules which addresses the actual process or modus operandi of distribution, a lacuna filled by the exercise of the CAT’s broad case management powers”.*²⁸

The CoA also went further, in order to consider the policy behind this: *“the aim of the legislation is to redress consumer wrongs and increase access to justice. In an appropriate case an account credit does that expeditiously, cost effectively and serves to maximise the benefit to the wronged consumer. A rule which eases the administrative costs and burdens of collective litigation and thereby makes it easier will also increase the incentive on companies holding customer accounts to comply with the law”.*²⁹

3. The role of the merits in choosing between opt-in and opt-out

As mentioned above, Rule 79(3) provides that the CAT may take into account the *“strength of the claims”* in determining whether proceedings should be opt-in or opt-out. BT argued that the CAT misdirected itself in law, effectively concluding that BT would have to show the claim to be *“very weak”* before opt-in proceedings could become appropriate. It argued that this creates a *“systemic slant against opt-in proceedings”*.³⁰

The CoA disagreed, noting that: (i) in many cases *“the CAT might be hard pressed at the certification stage to form a sufficiently clear view of the merits to enable it, with confidence, then to take merits any further in the overall balancing exercise”*;³¹ (ii) there might, however, be cases where the Tribunal, following a contested summary procedure in which it finds that a claim has a realistic prospect of success, concludes that it can go further (the CoA noted that it would have been surprising if the CAT had not found that the conclusions of Ofcom’s ‘Review of the Market for Standalone Landline Telephone Services’ dated 26 October 2017 (see above) were amply sufficient to defeat a summary challenge);³² (iii) it was not convinced that the suggestion in the Guide that the merits of opt-out proceedings should be *“more immediately perceptible”* was an accurate generalisation;³³ and (iv) the CAT would in any event *“act as the gatekeeper in deciding upon all aspects of certification, including opt-out and opt-in”* and *“[t]he legislation does not*

²⁶ CoA Judgment, paragraph 83.

²⁷ CoA Judgment, paragraph 83.

²⁸ CoA Judgment, paragraph 88. Sections 47C(3)-(4) of the Act provide that, where the CAT makes an award of damages in opt-out proceedings, it *“must”* impose an order that the damages are paid to the class representative or a third party, whereas it *“may”* do so in opt-in proceedings.

²⁹ CoA Judgment, paragraph 92.

³⁰ CoA Judgment, paragraph 103.

³¹ CoA Judgment, paragraph 105.

³² CoA Judgment, paragraph 106.

³³ CoA Judgment, paragraph 107.

however create additional hurdles relating to the merits which have to be satisfied before an opt-out can be ordered, as part of that safeguard".³⁴

Conclusions and outlook for class actions in the UK

- It is clear from the CoA's decision that the CAT has a broad discretion in choosing between opt-in and opt-out proceedings. The CoA summarised the position as follows: *"when it comes to the weighing up of the various factors relevant to the choice of opt-out or opt-in this is essentially an exercise of judgment over facts and evidence by an expert, specialist, body, that will over time accrue an increasing well of experience in how to handle these complex cases. The appellate courts recognise that the case management decisions of the CAT are exercises in pragmatism and that undue formalism and precision are not required ... These considerations broaden the [CAT's] margin of discretion or judgment. This Court should not interfere simply because it might, for the sake of argument, have drawn a different conclusion from the weighing exercise"*.³⁵
- The CAT's discretion extends to looking at novel and cost-efficient approaches to the potential distribution of any damages (in this case by way of an account credit) in order to facilitate access to justice.
- It is also clear that, in developing the collective action regime in the UK, the courts will be flexible, and parties should not necessarily place too much reliance on all aspects of the Guide (some of which, the CoA concluded were inaccurate). A postscript to the CoA Judgment states: *"reflecting the observation of the Registrar in the Preface to the Guide, we would respectfully suggest that there are a number of points made about collective proceedings which might, when the Tribunal considers that it has sufficient experience, warrant reconsideration in the light of that experience"*.³⁶
- It is worth noting that, since the hearing of this appeal, the CAT has proved itself willing to act as a "gatekeeper" in choosing between opt-in and opt-out. In a recent decision,³⁷ it rejected an application for opt-out proceedings, ordering instead that the class representatives should submit revised applications for certification of the proceedings on an opt-in basis within three months.³⁸ Opt-out proceedings were rejected by a decision of the majority on the basis of the weakness of the claims and the practicability of bringing opt-in proceedings, although the dissenting judgment considered that this decision did not achieve the broader objective of access to justice (since opt-in proceedings would either not get off the ground at all, or, if they did, an overwhelming number of proposed class members would not opt-in).

³⁴ CoA Judgment, paragraph 108.

³⁵ CoA Judgment, paragraph 57.

³⁶ CoA Judgment, paragraph 112.

³⁷ *Mr. Phillip Evans and Michael O'Higgins FX Class Representative Limited v Barclays Bank Plc and Others* [2022] CAT 16.

³⁸ See Milbank [Client Alert of 17 June 2022](#).

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