Overview

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Collective proceedings claimants' entry bar lowered (but cases put on hold)

The past year has seen important developments for the UK's new Collective Proceedings (CPO) regime. Following the Competition Appeal Tribunal's (CAT) 2017 decision to dismiss the CPO application in *Walter Hugh Merricks CBE v MasterCard Incorporated and Others*, the Court of Appeal (CoA) permitted Mr Merricks to appeal the CAT's decision and on 16 April 2019 the CoA handed down a decision to uphold Mr Merricks' appeal. In doing so, the CoA lowered the hurdle for claimants seeking a CPO and revitalised the prospects of the wider collective proceedings regime.

With respect to assessing the evidence and the strength of the case on pass-on, the CoA held that at the certification stage 'the CAT demanded too much of the proposed representative' and, in effect, carried out a mini-trial. The CoA considered that the proposed representative must at least be able to demonstrate that the claim has a 'real prospect' of success.

In relation to distribution, the CoA considered that 'the approach taken by the CAT was too narrow' and that it was 'premature and wrong' for the CAT to have refused certification on the basis that the proposed method for assessing damages. The proposed method did not show how an aggregate award would be distributed in a manner that reflected individuals' actual losses, but the CoA found it did not matter since the CAT Rules (CAT Rule 79(2)(f)) did not require that.

Although the CoA's decision has lowered the bar for claimants at the initial stage, the proposed class representative and its funder may find it less helpful that the CoA highlighted that the making of a CPO does not 'prevent the CAT from terminating the collective proceedings if it subsequently transpires, for example, that the proposed representative is unable to access sufficient data to enable the experts' method [to be performed].'

In addition to *Merricks*, there are four other pending CPO applications. Two are the European truck manufacturer cartel follow-on damages cases, namely *Road Haulage Association Limited v Man SE and Others*, and *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others*. The CAT held its preliminary issues hearing in relation to funding for these two competing CPO applications in June 2019. A third CPO, *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others* (registered on July 2019), is a follow-on damages case combining the claims relating to two cartel infringement decisions in the spot foreign exchange market adopted by the European Commission. The fourth CPO, *Justin Gutmann v London & South Eastern Railway Limited*, is the first stand-alone application for a CPO issued under the new regime and concerns alleged abuses committed by train companies regarding boundary fares.

Now that the Supreme Court has agreed to hear MasterCard's appeal in *Merricks*, there is likely to be a pause of 12 to 18 months until there is more certainty on the new CPO regime.

Competition and Markets Authority prevents a supermarket merger and shines spotlight on killer acquisitions

The Asda/Sainsbury's merger

On 25 April 2019, after a Phase II investigation, the Competition and Markets Authority (CMA) prohibited the anticipated merger between Sainsbury's and Asda. The merger would have created the largest grocery retailer in the UK, with a market share of 29 per cent (surpassing Tesco's 27 per cent). The CMA assessed local- and national-level competition for in-store groceries, online delivered groceries, general merchandise and fuel sales. In addition, the CMA assessed the impact of the merger on the merged entity's buyer power.

A significant point of contention during the merger evaluation assessment was the CMA's decision rule for identifying local areas where the merger should be expected to result in a substantial lessening of competition (SLC). For in-store groceries, the CMA calculated a well-known indicator of whether a merger would provide merging parties with an incentive to raise prices. Specifically, it calculated gross upward pricing pressure indices (GUPPI) for each of the more than 1,000 'local areas' where the parties operated stores. The CMA found that the merger was more likely than not to give rise to an SLC in 537 areas where the GUPPI exceeded a 2.75 per cent threshold, which was markedly lower than a more familiar 5 per cent threshold. Moreover, the CMA's 2.75 per cent threshold included an efficiency 'credit' of 1.25 per cent, which meant that the CMA allowed only a net price pressure of 1.5 per cent, which, according to the CMA, 'takes into account the need for any lessening of competition to be substantial, and allows for uncertainty'. The parties argued that not only was it inappropriate for the CMA to use a GUPPI threshold as a decision rule rather than a screen, but that the 2.75 per cent threshold itself was unjustifiably low and a departure from convention. While there is clearly precedent for evaluating price effects of less than 5 per cent in groceries, it is nonetheless striking that a GUPPI threshold of 1.5 per cent (ie, net of the 1.25 per cent efficiency credit) would not allow a 14 to 13 merger in a market with symmetric firms each with 20 per cent variable margins. Alternatively, if margins are around 20 per cent – and we believe that relative prices at Asda and Sainsbury's are not dissimilar – then a 1.25 per cent GUPPI threshold would correspond to a diversion ratio of around 7 per cent (ie, around half that adopted by the Competition Commission in the *Somerfield/Morrison* merger).

The CMA did not accept the parties' claims in this respect and so, when it considered their proposed remedies package, it also rejected their proposed divestiture of 125–150 supermarkets as inadequate.

The CMA's merger review procedure was also the subject of a CAT ruling, which found that the CMA's requirements that the parties, while also preparing for a hearing, respond to 15 working papers published between 9–28 November 2018 by 7 December 2018 was unreasonable.

Focus on nascent (killer?) acquisitions

In October 2018, the CMA announced the launch of its merger inquiry into the completed acquisition of iZettle by PayPal. Both companies provide payment services to businesses through mobile point of sale (mPOS) devices. The CMA's concern was that, 'while iZettle is a relatively recent entrant to payment services, [it] was well-placed to compete against PayPal in other emerging markets [raising concerns] that PayPal's takeover could lead to higher prices or reduce the quality of the services available to customers.' The CMA's decision to investigate the transaction was consistent with its recently released 'Digital Markets Strategy', in which it notes that it is likely to pay closer attention 'to the risks of "killer acquisitions" – big companies buying smaller innovative ones with a view to extinguishing them as potential rivals'. Demonstrating clearly that a case-by-case analysis is always required to decide the impact of any given transaction, the CMA cleared the *iZettle/PayPal* merger after a Phase II investigation. The CMA found that while the merging parties were two of the largest suppliers of mPOS devices, their customers were willing to switch to 'traditional' point of sale devices so that the merged entity would continue to be constrained by major competitors such as Worldpay and Barclaycard among others.

CAT rejects restrictive agreements in two notable cases: Ping and Achilles

In *Ping*, the CAT considered online sales restrictions in selective distribution agreements between Ping Europe, a manufacturer of golf clubs and accessories, and a number of its UK authorised retailers. The agreements prohibited those retailers from selling Ping golf clubs online. The CAT concluded that Ping's online sales ban amounted to an object restriction under article 101(1) and did not benefit from any individual exclusion or exemption under article 101(3).

In particular, the CAT applied the criteria developed in the Court of Justice of the European Union's (CJEU) judgment in *Metro* (Case 26/76 *Metro SB-Großmärkte v Commission* EU:C:1977:167), which asked 'whether the [online sales] ban is necessary for non-price competition to exist' (CAT Judgment in *Ping*, paragraph 200). The CAT concluded that the restriction was not objectively justified (noting in particular that neither competitors in the UK nor the parent company in the US, Ping Inc, operated online sales bans). Moreover, while the CAT considered that the online sales ban did pursue the legitimate aim of promoting custom fitting, it did not do so in a proportionate manner. The CAT found that less restrictive measures proposed by the CMA were viable alternatives to Ping, which would have been 'comparably effective at achieving the benefits of the ban' (CAT Judgment in *Ping*, paragraph 211). While Ping contended that the alternative measures would give rise to a 'free-rider' problem, the CAT notably found that there 'was no sound basis' for that contention. Overall, the CAT concluded the online sales ban could not be considered 'indispensable' to attaining the efficiency to which Ping claimed entitled it to an individual exemption under article 101(3).

In *Achilles*, the CAT considered the restrictions that Network Rail (the owner and operator of most of the mainline rail infrastructure in Great Britain) imposes on supplier assurance schemes in the railway industry. Network Rail required its and other buyers' suppliers who need access to that infrastructure (such as contractors who subcontract tasks requiring trackside access) to use a particular supply assurance scheme known as the Railway Industry Supplier Qualification Scheme (RISQS). The CAT found that this 'RISQS-only' rule breached the Chapter 1 and Chapter 2 prohibitions.

The case arose after Network Rail ran a procurement process to operate RISQS in which Achilles, the sole operator of the precursor to RISQS between 2014 and 2018, was replaced. Achilles argued that RISQS meant that it was prevented from continuing to supply a rail assurance scheme to the rail industry and had lost 101 buyers and 4,414 suppliers as customers of its own rail assurance scheme.

In evaluating whether the RISQS-only restriction was an object restriction, the CAT applied the logic of the European Court of Justice (ECJ) decision in *Cartes Bancaires* (Case C-67/13P *Groupement des cartes bancaires (CB) v Commission* EU:C:2014:2204), focusing on the question of whether the RISQS-only rule 'by its very nature reveal[s] a sufficient degree of harm to competition' (CAT Judgment in *Achilles*, paragraph 108) to amount to an object restriction. Looking 'at the content of its provisions, its objectives and its economic and legal context' (CAT Judgment in *Achilles*, paragraph 108), the CAT concluded that it was not an object restriction and therefore proceeded with an 'effects' analysis. This required the following.

- An evaluation of market definition (the market for supplier assurance services in the UK rail industry) and an understanding that the market for supplier assurance services was two-sided (CAT Judgment in *Achilles*, paragraph 125).
- A consideration of the counterfactual since if the two-sided market 'tipped' to the point where only RISQS survived in the situation absent the RISQS-only rule, then there could be no exclusionary effect. Whereas, if competition between Achilles and RISQS occurred for at least a limited period of time before one of the schemes exited, then there could be. The CAT considered that the correct counterfactual was one in which Achilles would compete with RISQS for at least a period of time and that its competition would lead to some benefits in terms of lower prices and product differentiation. In doing so, the CAT attached significant weight to the fact that Achilles, with its experienced and detailed knowledge of the market, wished to compete with RISQS and believed that it could do so (CAT Judgment in *Achilles*, paragraphs 150–151).
- A consideration of whether the RISQS-only rule had actual appreciable effects – a question the CAT evaluated by reference to the state of the market as it would have been had the rule never existed rather than by the reference to the state of the market at the time of the litigation.

The CAT concluded that the RISQS-only rule does cause significant foreclosure of demand in a significant segment of the market for supplier assurance schemes in the UK railway sector and that the RISQS-only rule has an appreciable effect on competition in that market (CAT Judgment in *Achilles*, paragraph 154). In doing so, it noted that: 'It is fundamentally not for Network Rail to make the decision for other buyers and suppliers that they would prefer RISQS to other supplier assurance services' (CAT Judgment in *Achilles*, paragraph 152).

Another important issue in the case was whether there was an objective justification for the RISQS-only restriction, namely safety. Network Rail, which had the burden to establish any objective justification, argued that the RISQS-only rule gave rise to eight specific safety benefits and the CAT considered each in turn. In doing so, the CAT emphasised its belief that Achilles would likely be the only other supplier assurance provider and highlighted that there was limited evidence that safety was historically the motivation for the rule (CAT Judgment in *Achilles*, paragraph 230). In summary, the Tribunal found that Network Rail had not established that the safety purposes would be impossible to achieve without the RISQS-only rule.

Finally, we turn to whether the RISQS-only rule benefited from an exemption under Section 9 of the 1998 Act. The CAT's assessment was that the incremental cost savings would be small (£65,000 to £85,000) and 'insufficient to outweigh the benefits of competition, either in terms of price or other benefits'. (CAT Judgment in *Achilles*, paragraph 275). As such, the RISQS-only rule was not exempt from the Chapter 1 prohibition.

Consideration of as-efficient competitor test in article 102 cases

In *Royal Mail*, Ofcom ruled that Royal Mail's decision to introduce a price differential between its bulk delivery schemes under the Contract Change Notice (CCN) in January 2014 was an abuse of a dominant position in violation of article 102, resulting in a fine of £50 million. The regulator contended that Royal Mail attempted to leverage an 'overwhelmingly dominant' position to reduce competition in the relevant market for bulk mail deliveries by significantly deterring expansion from Whistl, its first and only competitor in the market.

Whistl, an access operator, planned to enter the market for end-to-end deliveries of bulk mail with an aim to cover 40 per cent of all UK addresses by 2017. In January 2014, Royal Mail introduced a price differential by increasing the price of two schemes under which access operators like Whistl could use Royal Mail's bulk mail delivery services. Ofcom found that, although the third national level scheme did not see a price increase, its contractual requirements would effectively preclude access operators from using it if they planned to compete with Royal Mail by gradually expanding in the market for bulk deliveries. Consequently, Ofcom's claim that the introduction of the price differential was motivated by a desire to either incentivise competitors like Whistl to switch to one of the two schemes that had seen price increases leading to higher costs, or limit or altogether curtail their expansions in the bulk delivery market.

Notably, Ofcom also rejected the need to carry out an as-efficient competitor (AEC) test for two reasons. First, Ofcom claimed that the AEC is appropriate in cases where a dominant undertaking employed either low pricing strategies or 'margin squeezes', while Royal Mail had raised its scheme prices. Second, Ofcom argued that Royal Mail held a dominant position in a market with high barriers to entry. It was an 'unavoidable trading partner' for any firms seeking to compete in the market for end-to-end deliveries and the AEC was not relevant in identifying the foreclosure effects that would potentially harm consumers by reducing a source of competition.

Another article 102 case where the AEC test could have been considered is *Unlockd et al v Google et al*. In that case, Unlockd alleged that Google's threat to both remove apps developed by third parties that contained Unlockd's software product from the Google Play Store, as well as to exclude Unlockd from Google's AdMob network, amounted to a violation of article 102. Unlockd ultimately withdrew its damages claim, citing a lack of litigation funding. This resulted in a CAT ruling requiring Unlockd to pay Google's costs associated the withdrawn litigation claim.

While the case was prematurely terminated, prior to a full consideration of the merits of the competition claims, this case raises some interesting issues with respect to applying the AEC test. Specifically, the CAT may have considered Google an 'unavoidable trading partner' for Unlockd. It would have been interesting to see where the CAT may have landed with respect to the appropriateness of the AEC test and whether they would have considered a more dynamic perspective on the competitive constraints offered by less efficient competitors.

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In addition to his consulting work, Dr Davis is a former deputy chairman of the Competition Commission (now integrated into the UKs Competition and Markets Authority) and has served as a faculty member at the London School of Economics and MIT's Sloan School of Management. His academic work is published widely and he is a co-author of two books: *Quantitative Techniques for Competition and Antitrust Analysis* (Princeton University Press) and *Damages Claims for the Infringement of EU Competition Law* (Oxford University Press).

Dr Davis is listed in *AC Black's Who's Who* as well as *Who's Who Legal: Competition Economics* as 'highly recommended for his impressive knowledge of antitrust investigations and litigation proceedings' and in *Who's Who Legal: Thought Leaders – Competition*, where *WWL* says: 'The "excellent" Peter Davis secures extensive recommendations from peers for his excellent work on mergers analysis, follow-on damages actions and market investigations.'

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