

TRUCKS LITIGATION: CAT CERTIFIES THE RHA'S OPT-IN CLAIM AND REJECTS UKTC'S OPT-OUT

On 8 June 2022, the Competition Appeal Tribunal (the CAT) delivered its long-awaited certification judgment in connection with two applications for a Collective Proceedings Order (CPO) for follow-on damages in the *Trucks* litigation.

The first application, brought by UK Truck Claims Ltd (UKTC), a SPV formed specifically for the purpose of pursuing the claims, sought certification on an opt-out basis. The second application, brought by the Road Haulage Association (RHA), a representative body for the road haulage industry in the UK, sought certification on an opt-in basis.

The CAT's judgment is noteworthy because it assesses the suitability and eligibility of both opt-in and opt-out applications in parallel. While the CAT held that both applications met the threshold for certification, it ultimately preferred the RHA opt-in claim and certified it to proceed.

1. Legal framework

The UK's collective proceedings regime was introduced by the Consumer Rights Act 2015, which amended the Competition Act 1998. Applicants for a CPO must meet two conditions. First, the proposed class representative must be authorised by the CAT on the basis that it is "just and reasonable" for them to act as a representative in the proceedings (the authorisation condition). Second, the claims must be certified by the CAT as eligible for inclusion in collective proceedings (the 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 in collective proceedings.

2. Factual background

Both claims sought follow-on damages arising from the European Commission's *Trucks* decision in 2016 pursuant to which the Commission found that five European truck

manufacturing groups had infringed Article 101 of the Treaty on the Functioning of the European Union.

Iveco, MAN and DAF are named Respondents and Daimler and Volvo / Renault are objectors to the RHA action. Iveco and Daimler are Respondents and Volvo / Renault, MAN and DAF are objectors to the UKTC action.

Naturally, there was overlap between the UKTC and the RHA claims. However, there were a number of material distinctions as between them. In particular:

- The UKTC claim sought to bring proceedings on an opt-out basis (though it did present opt-in proceedings as a second-best alternative). The RHA sought certification on an opt-in basis.
- The UKTC claim covered new trucks only; whereas the RHA claim was for new and used trucks.
- The UKTC claim covered trucks acquired in the UK only; whereas the RHA sought to bring proceedings in respect of trucks acquired in the UK and the EEA (where the EEA trucks were acquired by an entity which belonged to a group of companies that acquired trucks in the UK during the claim period).

3. The CAT's judgment

The Common Issues

The CAT found that both applications were in principle eligible and suitable for inclusion in collective proceedings. More specifically, the CAT certified certain of the proposed issues to be taken by way of collective proceedings: for example, the alleged overcharge issue (which applies to both claims) and the alleged delay in introducing emissions standards-compliant technologies (in the RHA claim only). However, the CAT did not certify all of the proposed issues on a *carte blanche* basis. In particular, the CAT was not prepared to certify the issue

of compound interest in either claim in circumstances where it would make a substantial difference to the size of the claim and where neither applicant had put forward a plausible methodology for estimating the entitlement to compound interest on a common basis.

The CAT's refinement of the proposed class

The CAT also refined the proposed classes in important respects, including that claimants in other damages actions cannot be part of collective proceedings covering all or part of the same loss.

Suitability of the claims to be brought in collective proceedings

The CAT rejected the truck manufacturers' contention that the actions were not suitable for collective proceedings, including because the claims were more suitable to individual determination. The CAT held that the size and nature of the proposed classes in both applications, the costs and benefits of the collective proceedings, and the finding that expert evidence will enable a fair and efficient resolution of the common issues, all indicated that the claims were more suitable for collective rather than individual proceedings.

The CAT was not, however, willing to certify trucks acquired outside the UK for inclusion in the RHA's proposed class. In that regard, the CAT held that those claims would likely involve questions of foreign law and would significantly add to the complexity of the proceedings for the benefit of a very small number of class members and therefore to the detriment of the great majority of class members claiming for UK-acquired trucks only.

Choosing between the applications

Having decided that both claims were eligible and suitable for certification, the CAT was then faced with the question as to whether to certify both claims.

In the event, the CAT did not decide the question of whether, as a matter of law, it could certify opt-in and opt-out proceedings to proceed in parallel. Instead, the CAT held that, in the circumstances, it would substantially increase the costs and complexity of the proceedings if the RHA and UKTC claims were both certified and that it would therefore be inappropriate to do so. It follows that the CAT had to choose between the claims and, for the reasons set out below, it preferred the RHA claim.

Factors weighing in favour of the RHA claim

- (A) Expert methodology. While both methodologies passed the *Microsoft* test, in the sense that they provided a sufficiently plausible methodology for assessing the losses suffered by class members, the CAT was more confident in the robustness of the RHA's proposed model, in part because the use of regression analysis is well tested.
- (B) Opt-out versus opt-in proceedings. The CAT noted that there is no presumption in favour of opt-in over opt-out proceedings. However, it held that, for the present claims, opt-in proceedings had the notable advantage of providing the expert economists access to a very significant source of data from the class members which would assist in the quantification of damages. The CAT held that opt in proceedings were the more sensible way of proceeding in all the circumstances.
- (C) The run-off period. The RHA application, in effect, proposed a maximum run-off period up to 17 May 2019. The CAT held that a reasonable run-off for the RHA action was 31 January 2014 for new trucks and EURO emissions claim; and 31 January 2015 for used trucks to allow a modest extension for resale.
- (D) Damages for the EURO emission delay. The RHA put forward a method for claiming damages for increased costs resulting from the alleged delayed introduction of EURO emission compliant trucks. The UKTC did not offer any such methodology.
- (E) Funding arrangements. The CAT rejected UKTC's criticism of RHA's funding model which, in short, provided that RHA's litigation funder would be remunerated at a sliding rate between 6% and 30% depending on the total recovery. The CAT did not consider that there is a realistic concern that the RHA's funder's remuneration arrangements might operate unfairly as regards the class members and the CAT

noted that collective proceedings would be impossible without third-party funding.

- (F) The RHA claim extends to new and used trucks whereas the UKTC claim was in respect of new trucks only. The CAT held that the inclusion of used trucks would provide many operators with effective access to justice for their potential claims.

4. The RHA action for new and used trucks

The truck manufacturers' position at the hearing of the applications was that the RHA application was unsustainable because the inclusion of new and used trucks within the class led to an irreconcilable conflict of interest on the part of the RHA and its legal advisors. Put shortly, the contention was that it would be in the interests of new truck claimants to argue that there was no or little pass-on in the resale price of used trucks (as the respondents would say that any overcharge was recovered in an enhanced re-sale price of the truck); whereas used truck claimants would adopt the opposite position. The CAT rejected the criticism, taking the view that all class members shared a common interest in establishing that there was an overcharge on the sale of new trucks at as high a level as possible. While their interests may diverge on the quantification of pass-on by

resale of the truck, that was something which if fairly disclosed to the class members (upon opting-into the proceedings) would not prevent the RHA from fairly representing the class.

5. Implications for the future

The CAT's finding that both applications were, in principle eligible and suitable for certification, demonstrates that the certification hurdle continues to be lower following the Supreme Court's decision in *Merricks v Mastercard*.

In previous decisions, the CAT has made clear that certification is not the appropriate stage at which to fully evaluate the merits or robustness of an expert methodology. In this judgment, the CAT appears to go one step further and states that the hearing of a CPO application is not a battle of the experts and is not assisted by a large number of reports. The CAT indicated that in future, Respondents or objectors for a CPO should only deliver expert evidence with the permission of the CAT.

The CAT also appears ready to certify opt-in proceedings not least because of the added benefits which opt-in class members' data will provide in the quantification of damages.

Slaughter and May acts for MAN in these proceedings.

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