ALERT MEMORANDUM

CAT Refuses to Certify Collective Proceedings Against Apple and Amazon

15 January 2025

The Competition Appeal Tribunal has refused an application for a collective proceedings order ("CPO") in a claim against Apple and Amazon regarding alleged breaches of competition law in connection with the sale of Apple products on Amazon's UK website.

In a judgment handed down on 14 January 2025 (the "Judgment"),[1] the Tribunal, chaired by Mrs Justice Kelyn Bacon, concluded that it could not make a CPO in this case because the Proposed Class Representative, Christine Riefa Class Representative Limited (the "PCR"), had failed to satisfy the authorization condition.

Following two certification hearings, including – for the first time at the certification stage – the cross-examination of Professor Christine Riefa as sole representative of the PCR, the Tribunal concluded that the PCR had "*not demonstrated sufficient independence or robustness so as to act fairly and adequately in the interest of the class*".[2]

The issues arising at the hearings focused primarily on the PCR's funding arrangements and their implications for the question of the PCR's suitability to act as a representative in these proceedings. In particular, the funding terms included (i) a success fee calculation that Amazon and Apple argued gave rise to excessive and unfair returns to the funder, (ii) a requirement for the PCR to seek payment to the funder in priority over distribution to the class, and (iii) confidentiality provisions that prevented disclosure of the funding terms to class members.

Although the Tribunal concluded that the funding terms (as amended following the first hearing) were not in themselves "*sufficiently extreme to warrant calling out*", the evidence as to (i) the circumstances in which those terms had been agreed, and (ii) the limited extent to which the PCR had scrutinized and understood them, led the Tribunal to conclude that the claim should not be certified. In particular, the PCR had not demonstrated that it was suitably qualified to act as class representative and the manner in which it had approached the funding arrangements did not reflect sufficient regard to the interests of the class.[3]

Cleary Gottlieb acted for Amazon in successfully resisting the CPO Application.

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[1] *Christine Riefa Class Representative Limited v Apple Inc. & Others* [2025] CAT 5.
[2] Judgment, §115.
[3] Judgment, §118.

The Proposed Claim

The PCR sought aggregate damages on behalf of a proposed class comprising all those who had purchased Apple (and Beats-branded) products at retail level in the UK from late 2018 onwards.

The core allegation in the proposed collective proceedings was that certain agreements between Apple and Amazon in relation to the sale of Apple products on Amazon's UK website amounted to a breach of competition law. The result of the alleged breach was said to be that purchasers of Apple products via *any* retail channel in the UK had paid higher prices than they otherwise would have.

The claim was brought on a 'standalone' basis, in the absence of any decision by the Competition and Markets Authority or the European Commission on which the PCR could rely to establish liability.

As recorded in the Judgment, the "*genesis*" of the case appears to have been an approach by economist Dr Chris Pike of Fideres Partners LLP to law firm Hausfeld & Co. ("Hausfeld"), further to which Hausfeld arranged funding for the claim and subsequently identified the PCR.[4]

Issues Arising on the CPO Application

By an application filed in July 2023, the PCR applied for a CPO on an opt-out basis (the "CPO Application").

In their Responses to the CPO Application, Amazon and Apple raised substantive objections to the claim, which they opposed in its entirety. However, the focus of argument at the certification stage was on issues relating to the PCR's funding arrangements and, correspondingly, the PCR's suitability.[5]

These matters were relevant to the authorization condition, which requires the Tribunal to determine whether it is "*just and reasonable*" for the PCR to act as a class representative in the proceedings.[6] As summarized in the Tribunal's Guide to Proceedings 2015 (the "CAT Guide"), the "*central purpose of this assessment is to ensure that class members are adequately and appropriately represented*".[7] It requires consideration of (*inter alia*):

— whether the PCR "*would fairly and adequately act in the interests of the class members*";[8]

— the PCR's ability to manage proceedings and instruct its lawyers;[9] and

— the PCR's financial resources, including third party funding, insurance and fee arrangements with its lawyers.[10]

In the present case, further to the points raised by Amazon and Apple in their Responses, at the first certification hearing in July 2024 the Tribunal expressed clear concerns regarding: (a) the PCR's funding terms; (b) the means by which they had been obtained; (c) the PCR's ability to make independent decisions on funding matters; and (d) the PCR's acceptance of confidentiality provisions that prevented disclosure of the funding terms to class members.[11]

As a result of those concerns, the Tribunal gave the PCR an opportunity to file further evidence and to make any necessary adjustments to the Claim Form and/or funding arrangements, and directed the listing of a further certification hearing in advance of which the Proposed Defendants could apply for permission to cross-examine the PCR.

That hearing took place in September 2024 and Professor Riefa (as the sole representative of the PCR) was cross-examined by counsel for both Amazon and Apple. This was the first time a PCR had been cross-examined at the certification stage.

[4] Judgment, §5.
[5] The Proposed Defendants also raised a concern with the PCR's proposed class definition and its attempt to claim for future damages up to the point of judgment (or settlement), but the point was effectively conceded by the PCR following the first certification hearing.
[6] Competition Act 1998, Section 47B(8)(b); Competition Appeal Tribunal Rules 2015 ("CAT Rules"), Rule 78(1)(b).
[7] CAT Guide, §6.29.
[8] CAT Rules, Rule 78(2).
[9] Judgment, §24; CAT Guide, §6.30.
[10] CAT Rules, Rule 78(2)(d); CAT Guide, §6.33.
[11] These concerns are summarized at paragraphs 89-91 of the Judgment.

The Funding Issues

The key funding issues live at the two certification hearings can be summarized as follows:[12]

The requirement to seek an order for payment to the funder in priority to the class.

— In the event of a successful outcome and an award of damages to the class, the PCR's litigation funding agreement (the "LFA") imposed an obligation on the PCR to apply to the Tribunal for an order permitting all or part of the award to be paid to the PCR in respect of costs, fees and disbursements. If the Tribunal made such an order, payments of such amounts to the PCR's funder, solicitors and counsel would take priority over and above any distribution to the class members.

— Following the first certification hearing and in light of the issues raised at that hearing, the LFA was amended.[13] The amended LFA retained the requirement for the PCR to make such an application, but only "*where it is appropriate in all the circumstances*". The revised clause provided for a dispute resolution mechanism in the event of a disagreement about whether it was appropriate to make such an application.

— The possibility of such an application gave rise to a concern that payment of the funder's return (and amounts due to lawyers and insurers) could substantially diminish or even exhaust the pot of damages available to the class in the event of a successful outcome. Moreover, the amended wording requiring an application to be made "*where* [ ] *appropriate*" introduced considerable uncertainty, given the lack of clarity as to how 'appropriateness' should be judged.

The amount of the success fee.

— After an initial amendment to reflect the outcome of the decision in *PACCAR*,[14] prior to the first certification hearing, the LFA provided that the funder's success fee be comprised of:

- the drawn funds; plus
- a 'priority multiplier' of up to 1.75 times the drawn funds, depending on when the claim was resolved; plus
- the greater of: (i) a 'balancing multiplier' of up to 2.75 times the drawn funds, depending on when the claim was resolved; or (ii) an amount giving the funder an internal rate of return (IRR) on its drawn funds of 45%.

— The Proposed Defendants raised concerns at the first hearing that: (i) the potential sums recoverable by the funder were very high and potentially excessive; and (ii) the IRR-based clause gave the funder an incentive to ensure the proceedings lasted as long as possible and to allow maximum draw down of funds, which may in turn incentivize the funder to resist an otherwise reasonable settlement.

— Again, amendments were made following the first certification hearing. A new definition of the success fee was introduced, which replaced the IRR with a revised set of increased multipliers, which varied over time and reached a maximum of 5.75x after seven years.

— The Proposed Defendants' continued to argue that the potential returns to the funder were too high. In particular, evidence filed on behalf of the PCR between the two hearings indicated that the maximum return in this case was almost double what was available elsewhere on the market. Moreover, there was no evidence before the Tribunal that the rates now provided for in the LFA were fair or market-tested on the basis of the risks inherent in this particular claim.

The Suitability Issues

The issues regarding the PCR's suitability to act as class representative arose in two primary ways.

[12] The Proposed Defendants also identified a number of issues in relation to the PCR's ATE insurance, though these were effectively rectified by the PCR in advance of the first certification hearing.

[13] For a third time, certain amendments having already been made over the preceding months (including to rectify apparent errors in the drafting).

[14] *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* [2023] UKSC 28.

First, the issues with the terms of the LFA described above themselves gave rise to a concern as to the PCR's suitability, as they appeared to run counter to the PCR's overarching responsibility to protect the interests of the class.

Second, the evidence advanced on behalf of the PCR in support of the CPO Application generated concerns regarding the extent to which the PCR had in fact scrutinized and understood the terms of the LFA, which in turn gave rise to a broader question as to the PCR's ability to manage the proceedings generally.

Professor Riefa's first witness statement in support of the CPO Application ("Riefa 1") contained very little detail on the funding arrangements or the extent of any independent detailed consideration of the terms of the LFA by the PCR. The limited detail that *was* provided contained an important error.

Specifically, Riefa 1 explained that, in the event of a successful outcome, the PCR would make an application for payment of costs and expenses (including those due to the funder) from any unclaimed damages (*i.e.* after distribution to the class). This description did not accurately reflect the terms of the LFA and, as Amazon's counsel submitted at the first certification hearing, this indicated that Professor Riefa may have concluded that the terms of the LFA were reasonable on the basis of a misunderstanding of those terms and the obligations they imposed on the PCR.

The Tribunal also raised its own concerns regarding the PCR's approach to the confidentiality provisions in the LFA. In response to questioning on those points at the first hearing, the position advanced by counsel for the PCR was that the funder "*felt strongly*" about them and the PCR "*would not want to take a position contrary to that of her funder*".[15] Although certain assertions of confidentiality were subsequently waived by the funder, the PCR's position that she would not want to take an adverse position vis-à-vis her funder nevertheless indicated that she may not have been acting with the interests of the class front of mind (particularly since the class's interest was likely to be in understanding the nature of the commitments taken on by the PCR pursuant to the LFA, which it could not do if the relevant provisions of the LFA could not be disclosed to class members).[16]

Unexplained errors in the terms of the LFA and the ATE policy also gave rise to concerns regarding the PCR's attention to detail, and the lack of any consultative panel raised the question of whether the PCR had sufficient independent support.

The Tribunal's Decision

Despite having expressed its concerns at the first hearing and given the PCR an opportunity to rectify the issues arising, by the conclusion of the second hearing the Tribunal concluded that the PCR had failed to satisfy the authorization condition, and thus declined to make a CPO.

The Tribunal reached this decision "*on the basis of a cumulative assessment*" of the relevant matters, which included each of the funding and suitability issues set out above.[17]

As to the funding issues, the Tribunal noted that it "*should be reluctant to venture into an assessment of the commercial terms of the LFA unless they are sufficiently extreme to warrant calling out*".[18] Having regard to evidence provided on behalf of the PCR about the "*uncertainty of the litigation funding market in the aftermath of the Supreme Court's judgment in PACCAR*", the Tribunal declined to conclude that the terms of the LFA in this case met that threshold.[19] Nevertheless, the Tribunal concluded that it was appropriate to consider the circumstances in which the LFA was agreed.

The Tribunal's refusal to certify thus focused on the suitability issues, as to which the evidence filed on behalf of the PCR after the first hearing and Professor Riefa's evidence on cross-examination at the second hearing were particularly relevant.

[15] Judgment, §89(6).
[16] Judgment, §89(6).
[17] Judgment, §115.
[18] Judgment, §110.
[19] Judgment, §110.

The PCR's Further Evidence and Professor Riefa's Cross-Examination

Although the evidence submitted following the first hearing contained further detail about the negotiation of the LFA and the PCR's engagement in that process, the Tribunal held that it "*did little to mitigate the overall impression that the PCR was and remains over-reliant on her advisers*".[20]

The Tribunal recognized that collective proceedings inevitably require third party funding and that PCRs are entitled to take the advice of their solicitors (who may themselves be acting on conditional fee arrangements) in relation to the funding terms on offer.[21]

However, the Tribunal concluded that there was "*insufficient evidence of robust and independent scrutiny of the arrangements by Prof Riefa*".[22] In particular:

— Professor Riefa "*appears to have accepted the amendments which incorporated the IRR return into the LFA without inquiry as to whether further efforts might identify better terms or alternative sources of funding*" (§93).

— Professor Riefa's further witness statement "*was vague as to* [her] *understanding of how the revised success fee terms compared to the previous terms*" (§94).

The Tribunal further held that Professor Riefa's answers during cross-examination did not improve matters:

— "*Throughout her cross-examination, we found Prof Riefa to be hesitant and uncertain in her answers. Overall, she did not demonstrate that she had a strong understanding of the arrangements she had entered into on behalf of the PCR*" (§95).

— Professor Riefa had no clear answer in response to questioning from Amazon's counsel as to the basis on which she had made the erroneous statement in Riefa 1 in relation to the payment of the success fee from unclaimed damages (§§96-97).

— By her responses to questions from Apple's counsel regarding when it would be "*appropriate*" for the application envisaged in the LFA for priority payment to the funder to be made, Professor Riefa "*failed to persuade* [the Tribunal] *that she had properly understood this provision*" and would be capable of carrying out the necessary exercise of balancing the competing interests of the class and the funder (§§100-101).

— Further, Professor Riefa "*did not appear to have given thought to the point that making an application for the funder to be paid in priority would also benefit Hausfeld* […] *such that a conflict of interest might then arise (and indeed already arose) in taking advice from Hausfeld on this clause*" (§103).

The Tribunal's concerns were "*exacerbated*" by the confidentiality issues. Specifically, the Tribunal could see "*no justification in withholding any of the terms of the LFA from the scrutiny of the public and in particular the potential class members*".[23] The Tribunal was concerned that Professor Riefa had only engaged with the question of confidentiality insofar as required to respond to the concerns it had raised at the first hearing, and noted that Professor Riefa was "*clearly alive to the interests of the funder*" but did not "*however, appear to have considered sufficiently where the interests of the class members lie*".[24]

As a result, the Tribunal concluded that "*the written and oral evidence of Prof Riefa has not convinced us that she has a strong understanding of the nature and extent of her responsibilities to protect the interests of the class she seeks to represent*".[25] Consequently, the PCR had "*not demonstrated sufficient independence or robustness so as to act fairly and adequately in the interests of the class*",[26] and the Tribunal thus refused the CPO Application.

[20] Judgment, §92.
[21] Judgment, §105.
[22] Judgment, §92.
[23] Judgment, §113.
[24] Judgment, §113.
[25] Judgment, §104.
[26] Judgment, §115.

Practical Implications

First and foremost, the Judgment has important implications for current and future PCRs, who can expect to be held "*to a high standard*" by the Tribunal in relation to all aspects of proposed collective proceedings.[27]

Recognizing that individual cases are likely to give rise to different circumstances, the Tribunal has made clear that it does not seek by this Judgment to impose specific conditions on the types of PCRs that may be put forward, nor specific obligations on PCRs in relation to the negotiation of funding arrangements.

Nevertheless, the Judgment emphasizes the "*central and crucial role*" played by the PCR,[28] who cannot be "*merely a figurehead for a set of proceedings being conducted by their legal representatives*".[29] Rather, the PCR "*carries a heavy responsibility to ensure that the proceedings are conducted, in all respects, in the bests interests of the class*".[30]

In this regard, the Judgment is a reflection of the Tribunal's broader focus on its role in ensuring that the collective proceedings regime operates for the benefit and in the interests of class members. Similar attention to this central tenet of the regime was recently demonstrated, for example, in the Tribunal's consideration of two collective settlement applications in *Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd and others*, where the Settlement Tribunal expressed particular concern about the possibility of payments to the funders and other stakeholders before it was apparent whether such payments might operate to the detriment of the class.

The Judgment will of course also be of interest for those advising PCRs, and for funders and insurers involved in collective proceedings, all of whom will be alive to the possibility of greater scrutiny from both the Tribunal and those opposing CPO applications in relation to the terms of the relevant funding arrangements and the means by which they have been negotiated and agreed.

Although the Judgment reiterates that there is no requirement for a PCR to be supported by a consultative or advisory panel, the Tribunal's concerns in this case about the PCR's lack of experience and independent support (in particular, the absence of a consultative panel) may increase the likelihood of PCRs seeking to appoint consultative panels comprised of independent advisors with a range of expertise in future.

Finally, the Judgment represents a departure from the Tribunal's approach in previous cases such as *CICC v Mastercard*[31] and *Gormsen v Meta*,[32] where the Tribunal's refusal to certify collective proceedings was expressly accompanied by a further period for the PCRs to address fundamental flaws in their cases before coming back for a second attempt at certification.[33] The Tribunal has, for the first time, simply refused certification with no invitation for the PCR to come back with a revised application.

The case is notable for its focus on funding and suitability issues (as opposed to the methodological flaws) and serves as an important reminder that CPOs may be resisted and refused on various grounds, and the Tribunal will look to ensure that the proposed proceedings will best protect the interests of the proposed class in all respects..

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[27] Judgment, §116.
[28] Judgment, §104.
[29] Judgment, §116.
[30] Judgment, §116.
[31] [2023] CAT 38.
[32] [2023] CAT 10.
[33] In those cases, the Tribunal's refusal to certify was based on the PCRs' failure to set out an adequate methodology by which the proceedings could be tried on a collective basis.