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Opting out of opting in: what is the future of opt-in CPOs in the CAT following Ennis?

by Barney Stannard, Adam Bradley and Emily Wilcock, Travers Smith

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An article considering the approach taken by the Competition Appeal Tribunal (CAT) to the choice between opt-in and opt-out collective proceedings orders (CPOs) and, given the scarcity of the opt-in approach, what the future of opt-in CPOs might be.

The judgment in Le Patourel was handed down on 19 December 2024, after the original date of publication of this article. As the class representative's claims failed in that case, it will not provide insights into the level of take-up by class members of damages awards in opt-out claims.

On 18 October 2024, the Competition Appeal Tribunal (CAT) handed down its collective proceedings order (CPO) certification judgment in Ennis v Apple Inc and others ([2024] CAT 58). In doing so, it certified its 22nd set of collective proceedings, ordering that they should proceed on an "opt-out" (rather than "opt-in") basis.

Opt-in collective proceedings are those which are brought on behalf of each class member who opts in by notifying the class representative that their claim should be included in the collective proceedings.

Opt-out collective proceedings are those which are brought on behalf of each class member, except:

- Any class member who opts out by notifying the class representative that their claim should not be included in the collective proceedings.
- Any class member who is not domiciled in the UK at a specified time and who does not opt in to the claim.

Only three of the CPOs made since the commencement of the regime have been made on a purely opt-in basis. Whilst the CAT's decision to grant a further opt-out CPO in *Ennis* is therefore not surprising, nor does the judgment demonstrate a radically different approach to certification, it does provide an opportunity to reflect on the approach taken by the CAT to the choice between opt-in and opt-out CPOs and, given the scarcity of the opt-in approach, to consider what the future of opt-in CPOs might be.

A brief summary of *Ennis*

Dr Ennis is the proposed class representative who has brought proceedings against Apple alleging abuse of its dominant position through charging unlawful levels of commission to iOS app developers on purchases of their apps through Apple's App Store (or purchases of additional content or subscriptions within those apps). The claim is brought on behalf of all UK-domiciled iOS developers that have paid the allegedly unlawful commission since 25 July 2017. Dr Ennis estimates there to have been at least 13,206 app developers in the class, collectively suffering damage in the region of £630 million to £785 million.

Apple challenged certification on four bases. One of those bases was that the proceedings, if certified at all, should be certified on an opt-in (rather than opt-out) basis. In summary the other three grounds of challenge were:

- Alleged conflicts of interest between the proposed class members. While detailed analysis of this issue is beyond the scope of this article, the judgment reiterates that differing interests in the outcome of a case amongst class members do not necessarily constitute conflicting interests (*paragraphs 26 to 39*).
- That the proceedings were not suitable for an aggregate award of damages because of radical differences in the value of the claims of individual class members. Apple highlighted evidence suggesting that the majority of the class (11,800)

had claims in aggregate of between only 0% and 5% of the overall claim value, whereas a few hundred class members would account for the great majority of the claim value. The CAT did not consider this divergence in individual claim values to be an obstacle to an aggregate award; on the contrary, the number of very small individual claims supported that approach (*paragraphs 40 to 45*).

- That the funding arrangements were unsatisfactory because they risked incentivising the litigation funders to delay settlement until after the start of the trial. The CAT considered Apple's concerns in this regard to be overstated on the facts; its approach demonstrates the courts' continued reluctance to interfere with a funder's assessment of the commercial risks associated with funding a claim (*paragraphs 57 to 61*).

The decision between the opt-in and opt-out approaches in *Ennis*

Although the Competition Appeal Tribunal Rules (CAT Rules) provide for a range of factors that the Tribunal can take into account in deciding whether to certify proceedings on an opt-in or opt-out basis, the primary focus is generally (and was in *Ennis*) on whether an opt-in approach is "practicable" (*CAT Rule 79(3)(b)*).

Apple's position was that an opt-in claim was perfectly viable. As noted above, a very small minority of the proposed class members accounted for a very significant proportion of the claim value. Those class members were substantial businesses who could take an informed decision as to whether to opt in to the proceedings or not; if they did opt in, the proceedings may well be financially viable for the purposes of attracting litigation funding. The "long tail" of class members with much smaller claims could then participate if they so wished, once the certified opt-in proceedings were advertised in the usual way. Unlike some other cases, the proposed class representative did not appear to have even attempted to contact class members to assess whether it would be practicable to proceed on an opt-in basis.

In response, Dr Ennis argued that whilst an opt-in CPO comprised of the largest claims could potentially be brought (and funded), that would not resolve the difficulties of identifying, contacting and persuading the long tail of claimants with smaller claims to opt in; Dr Ennis thought those difficulties could be significant, in view of the incomplete information available to him to contact class members and the very significant number of them. Experience from other CPO applications suggested that contacting class members can be a very time-consuming exercise. Dr Ennis's solicitors also considered that claimants might be too intimidated to join an opt-in claim against Apple (given that their businesses may have depended on continued access to Apple's App Store).

The CAT sided with Dr Ennis in deciding that the CPO should be opt-out. Even though, for the reasons given by Apple, opt-in proceedings could potentially be brought in a way that was financially viable, the fact that an opt-in approach would be impracticable in respect of the majority of claimants with smaller claims was considered crucial. Given the small sums at stake for those claimants, take-up was likely to be limited. An opt-in approach would therefore not be in the interests of the claimants "as a whole".

How does the approach in *Ennis* fit with other authorities on the opt-in / opt-out question?

The CAT's judgment in *Ennis* is noteworthy for its express acknowledgement that an opt-in approach might well be practicable (in the sense that a financially viable claim could be brought), but as it would unlikely serve the interests of class members as a whole, an opt-out approach should be preferred.

Since the introduction of the regime, the judiciary has been searching for the appropriate balance between the use of opt-in and opt-out proceedings. The CAT's 2015 Guide to Proceedings (the CAT Guide) specifically provides that "*There is a general preference for proceedings to be opt-in where practicable*". This might have been informed by what some might consider (at least from an English perspective) to be the unconventional nature of conducting litigation on an opt-out basis, whereby a person's claims can be resolved and compromised without their active involvement.

However, any such preference does not appear to be reflected in the number of opt-in CPOs in fact made, and indeed the Court of Appeal in *BT Group PLC and another v Le Patourel* (*[2022] EWCA Civ 593*) specifically dismissed the idea that the CAT Guide could (as a matter of law) provide for any predisposition towards opt-in proceedings, which it considered not to be borne out by the statutory provisions and instruments which govern the CPO regime (*paragraph 61*).

The only circumstances in which CPOs have been made on an opt-in basis are where the class representative has requested it (or where there is a statutory requirement for an element of the proceedings to be opt-in, namely in respect of any class members not domiciled in the UK (who must specifically opt in to an otherwise opt-out CPO)). The former scenario was the case, for example, for the CPO obtained by the Road Haulage Association (RHA) in the *Trucks* proceedings. There, the RHA had engaged in considerable book building pre-certification, having signed up more than 15,000 class members (including those with very small truck fleets).

A nuanced approach was taken in respect of the four CPOs sought earlier in 2024 in the *Interchange Fees* litigation ([2024] CAT 39) (addressing collective proceedings brought on behalf of merchants, rather than the collective proceedings brought on behalf of consumers in *Merricks v Mastercard Incorporated and others*). There, two CPOs were sought against each of Mastercard and Visa, in both instances one on an opt-in basis and one on an opt-out basis. The opt-in CPOs were sought (and successfully obtained) on behalf of larger merchants with an annual turnover in excess of £100 million, with other eligible (and smaller) merchants forming part of the opt-out proceedings.

The Tribunal did not take issue with this bifurcated approach in *Interchange Fees*, which was proposed by the class representative. But it is clear from the authorities that respondents will have a harder time persuading the CAT that bifurcation is appropriate. For example, in *Maritime Car Carriers*, the respondents argued that class members with larger claims (those who had purchased or financed at least 20,000 relevant vehicles) should be required to opt in to a CPO, whereas it would remain practicable for opt-out proceedings to be brought on behalf of those with smaller claims (taking account of the class representative's estimate of class size and loss) (*McLaren v MOL (Europe Africa) Ltd and others [2022] CAT 10*). The CAT did not agree, citing in particular (at *paragraphs 161 to 170*):

- The potential inefficiencies with proceeding on a bifurcated basis.
- The respondents' acceptance that an opt-out approach would be appropriate for the majority of the class.
- That the threshold for smaller/larger claims was somewhat arbitrary (and that it may not be clear to class members on which side of the line they fall).

It is therefore unsurprising that the Tribunal reached similar conclusions in *Ennis* with regards to the distinction between larger and smaller claimants. Indeed, it might be said that the respondents' position in *Ennis* was even more extreme, because it proceeded on the basis that all claimants would need to opt-in; there would be no opt-out element that could serve as a "catch-all" for smaller claims.

Conclusion: what is the future of opt-in CPOs?

The CAT's approach raises questions about the scenarios in which it would push back on a purely opt-out approach. Whilst the CAT's concerns surrounding opt-in CPOs are largely grounded in the risk of it being impractical for some claimants to obtain redress, opt-in CPOs will inevitably entail at least some eligible claimants not joining the proceedings (including because they are unaware of them). However, in *Ennis*, it was perhaps the sheer number of claimants with smaller claims (and the potential obstacles to contacting all of them) that favoured an opt-out approach.

Clearly, where class representatives have engaged in significant book building (such as in *Trucks*), thereby demonstrating the viability of opt-in proceedings for much of the class, an opt-in approach may still be more appropriate. Book building may also be more practical where there is a single industry body who can readily reach out to class members, and/or where the class is relatively small (*McLaren v MOL (Europe Africa) Ltd and others [2022] CAT 10, paragraph 166*). Consumer claims are inherently unlikely to be suitable for book building.

But it remains to be seen, in view of the CAT's approach, whether class representatives will become progressively less inclined to even attempt to book build and will simply proceed on an opt-out basis. Indeed, no attempts to book build appear to have been made in *Ennis* notwithstanding the presence of class members with large claims (who could themselves have made opt-in proceedings viable) and that it is not a claim brought on behalf of consumers. (A consumer claim against Apple has already been brought in respect of overlapping conduct to that complained of in *Ennis*, and has been certified on an opt-out basis *(see Dr Rachael Kent v Apple Inc and another [2022] CAT 28)*).

A class representative might consider an opt-in approach if they consider that this will provide an easier route to obtaining useful disclosure from

class members. However, the Tribunal was not persuaded by such an argument (albeit made by the respondents) in *Maritime Car Carriers*; indeed, it specifically contemplated that disclosure could be obtained from members of an opt-out class (*McLaren v MOL (Europe Africa) Ltd and others [2022] CAT 10, paragraphs 168 to 170*).

The CAT's reluctance to overrule class representatives on the opt-in versus opt-out question perhaps also flows from an equivalent reluctance to materially alter the commercial viability of collective proceedings for the litigation funder (for fear of stifling claims altogether which would otherwise never be brought). Funding dynamics may, in certain circumstances, cause class representatives to pursue an opt-in approach.

For now, particularly given the difficulties of bringing opt-out proceedings in the High Court using the representative action procedure, class representatives are likely to continue to push the envelope in seeking CPOs on an opt-out basis. But we remain in the foothills of the CPO regime. The eagerly anticipated judgment in *Le Patourel* (the first CPO to go to trial) and the outcome of distribution following the *South Western Trains* settlement (*Gutmann v First MTR South Western Trains Limited and another [2024] CAT 32*) are likely to shine a light on the effectiveness of the CPO regime. Where awards are made, there is likely to be close scrutiny of the level of uptake by members of the (opt-out) class. That may in turn inform the CAT's approach on whether opt-out CPOs are generally to be preferred; if opt-out CPOs prove to have low take-up then attention may turn again to the opt-in approach, if the book-building process is considered to lead to an ultimately greater return to the class.