# LESS HASTE MORE SPEED?

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In many ways, the UK's CPO regime has been a highly promising experiment in the privatisation of the enforcement of competition law. Funders and lawyers have been incentivised by the significant financial rewards available to successful claimants and have, since the Merricks judgment, invested significant funds, impetus and innovative thinking into breathing life into this private enforcement regime.

However, there has been one (very visible) type of market failure – the costs incurred in carriage disputes. In the context of Trucks and FX very substantial amounts of time, money and effort have been invested in competing CPO applications - one of which will not succeed. This represents (substantial) inefficiency in the form of wasted cost and a duplication of effort. Further, it is clear that the scale of these wasted costs is a matter of concern to the judiciary. Accordingly, the task facing the CAT is a tricky one – how do they minimise the inefficiency associated with carriage disputes whilst creating the institutional framework to ensure that this (expensive) competition between competing PCRs generates real value (in terms of the efficient and effective private enforcement of competition law)?

***For instance, can the CAT harness the competitive energies of the competing PCR's to develop better "blue-prints" to trial, that can be delivered at lower cost and that will lead to a more effective distribution of any settlement amount or award of aggregate damages?***

In his judgment in Pollack v Google and again in the context of his case management of the claims filed by Ms Julie Hunter and Mr Robert Hammond, concerning allegations of abuse of dominance by Amazon in respect of its "Buy Box" feature, Marcus Smith J has set out his proposed solution to this - perhaps intractable - problem – a preliminary issue hearing to determine the issue of carriage, at which costs are minimised by limiting the role played by the Defendant(s).

In taking this approach, Marcus Smith J has made clear the CAT's continued desire to avoid resorting to a "first to file" regime. Although such a rule would, no doubt, be effective in reducing the cost and frequency of carriage disputes, this approach would do little to assist the efficient and effective private enforcement of competition law – in fact it may do the opposite. It seems likely that a "first to file" approach would incentivise a "race" to file and, as potential PCR (and their lawyers and funders) sacrifice quality for speed, a "race to the bottom" in terms of the investment carried out by the PCRs and their lawyers in preparing their case. Rather, whilst Marcus Smith J acknowledges in Pollack that some credit ought to

be given to the party that files first, particularly if the proposed PCR has spent time and money in framing a carefully considered standalone claim, it appears that the relative strengths of each PCR's application will be key to the determination of these carriage disputes.

However, Marcus Smith J did not provide any guidance in Pollack as to how this assessment will take place in practice.

***In particular, it is not clear how this assessment of each application's relative strengths will differ from the approach taken in FX (where emphasis was placed on an assessment of "which Applicant will better serve the interests of the victims that comprise the class(es) for whom the PCRs wish to act") and in Trucks (where, in addition to case specific issues, factors such as the class definition, the proposed expert methodology and the nature of the competing PCR's funding arrangements all played a role).***

Accordingly, it remains unclear whether and how the CAT intends to balance the dual challenges of minimising the costs incurred as part of carriage disputes whilst creating institutions that incentivise competition between PCRs in such a way that supports the effective and efficient determination of the claims they are seeking to bring.

Whilst the approach taken in FX and Trucks to the determination of carriage disputes would serve to support the development of such incentives, it is difficult to see how an assessment of the relative strengths of the competing CPO applications could take place without trespassing into the territory that would be relevant in the context of the certification – where the Defendant is (necessarily) afforded a bigger role. Smith J's judgment in Pollack suggests

that he is confident that the CAT can navigate this issue – dismissing Google's submissions in this regard and explaining that

***"The questions that arise at each stage are different and Google can be assured that there will be no 'following wind' at the certification hearing emanating from the carriage hearing".***

However, it remains to be seen how the CAT does this in practice, given the nature of the issues that seem likely to be considered in assessing the relative merits of the competing CPO applications. Notably in Canada, the jurisdiction that is so often looked to for guidance as to how to operate our own CPO regime, carriage disputes have been determined by reference to a similar touch stone to that identified in FX, and for example in the case of MacBrayne v Lifelabs Inc 202 ONSC 2674, the court conducted a reverse auction, selecting the legal team who estimated that it would be able to conduct the litigation at the lowest cost to the class.

Further, it remains to be seen whether Smith J's procedural innovation of dealing with the carriage dispute as a preliminary issue will lead to a material reduction in costs incurred prior to certification. It seems inevitable that the preliminary issue hearing on carriage will be fiercely contested (not least given the financial stakes involved for funders of each PCR and their solicitors), with both competing PCR's determined to explain the relative merits of their own application through detailed submissions resting on complex fact and expert evidence.

Needless to say, the preliminary issue hearing listed in the Autumn to determine the carriage dispute in Pollack will be watched closely by all involved in the private enforcement of competition disputes, including funders and claimant and defendant side lawyers.