
**OPT-OUT COLLECTIVE ACTIONS REGIME REVIEW
DEPARTMENT FOR BUSINESS AND TRADE
CALL FOR EVIDENCE
RESPONSE HAUSFELD & CO. LLP**

ABOUT HAUSFELD

Hausfeld is a specialist litigation practice, with considerable expertise in complex, high value disputes.

Hausfeld is widely recognised as the market-leading claimant practice for competition claims with extensive experience in the Competition Appeal Tribunal (“Tribunal” or “CAT”) and in the High Court for group claims and collective proceedings, which are almost exclusively funded, possessing notable expertise in resolving complex technology disputes. Our teams have experience of bringing both CPR 19.8 claims and Group Litigation Order (GLO) claims on a funded basis.

Hausfeld is therefore uniquely well-positioned to respond to this call for evidence on the opt-out collective actions regime.

For further questions and/or information about the response, please contact:

Nicola Boyle
London Managing Partner
Hausfeld & Co LLP
12 Gough Square
London EC4A 3DW
020 7665 5000
nboyle@hausfeld.com

PART I - EXECUTIVE SUMMARY

The competition opt-out regime of collective redress plays a key role in access to justice for SMEs, public organisations and consumers, fair markets and the wider economy.

Civil justice and our competition regime are an essential part of the UK's legal system and a foundation of fair markets, open competition and a dynamic, growing economy. The opt-out collective actions regime is the only realistic means by which consumers, SMEs and public organisations can enforce their rights against companies that have adopted unlawful practices in breach of competition law. It is now a core safeguard for consumers and SMEs that ensures rights are meaningful and enforceable and that there is a fair playing field for SMEs to operate, innovate, and contribute to the growth of the wider economy.

Though still relatively new, the regime has already engaged serious anti-competitive practices across sectors such as Big Tech, financial services and transport, and is securing compensation for UK SMEs and consumers. The system is set out in legislation, tightly controlled by the courts, underpinned by loser-pays costs rules and subject to strict judge-supervised certification standards.

Since 2022, we have seen an increase in lobbying from organisations presenting themselves as 'consumer advocates' such as Fair Civil Justice, EPICE, European Justice Forum and IEA - organisations mostly backed by US and/or British 'Big Business' interests. Weakening collective redress and the enforcement of competition rights in response to such lobbying would prevent UK enterprises and consumers from obtaining redress and hand power back to the very companies it was designed to hold to account, thereby weakening innovation and growth for UK PLC. After all, businesses that don't breach the law have nothing to be afraid of.

The system complements the, necessarily, limited work of regulators but, unlike regulatory fines - which are absorbed on balance sheets, often accepted by wealthy corporates as a necessary cost of doing business, and which never reach those harmed - collective actions can deliver accountability, direct compensation to those harmed and lead to better practices and fairer markets in which new businesses can innovate and thrive.

The regime and meaningful enforcement of competition law strengthen fair competition, builds consumer confidence and makes the UK a more attractive destination for responsible, long-term investment and growth. It levels the playing field for compliant businesses, fosters innovation, promotes growth and effective competition and strengthens the UK's appeal to responsible investors by signaling that Britain is not a playground for exploitation.

Competition enforcement's foundational role as a driver of innovation, productivity, growth and economic resilience has been recognised by not only the CMA,¹ but also by the USA,² EU,³

¹ CMA, [Wider Benefits of Competition Policy and Enforcement](#), CMA Microeconomics Unit literature review (January 2025).

² US Department of Justice, [Antitrust Division Contributes to Historic Efforts to Unleash Prosperity Through Deregulation](#) (September 2025).

³ EC, [Modelling the macroeconomic impact of competition policy, 2023 update and further development](#) (2024).

Canada,⁴ and Australia.⁵ Restricting access to opt-out collective redress and the ability to enforce competition rights would be a backward step, leaving the UK failing to provide the same degree of access to justice available in other jurisdictions often for the same infringing behaviour,

The Civil Justice Council (“CJC”) has only recently concluded a detailed, judge-led review of litigation funding. As part of that exercise, the CJC recognised that collective actions are considered and court-led by design, and that litigation funding is an essential component of access to justice. It recommended proportionate, light-touch improvements to provide transparency, ensure capital adequacy and reinforce judicial oversight, which we support.

Weakening the regime to make the UK a more jurisdictionally attractive or desirable forum for Big Business to act with impunity, would most certainly strangle growth and innovation for others. Before 2015, small businesses generally could not enforce their competition rights due to the cost and resources needed to bring a claim. The regime now benefits businesses that play by the rules - not just consumers - particularly SMEs.

The DBT has a real opportunity to reinforce, improve and enhance the present arrangements. That means preserving the core architecture of opt-out collective actions, especially where they are the only practical route to redress; maintaining active judicial gatekeeping; providing clear funding rules consistent with the CJC’s recommendations and bringing procedural improvements where warranted. In doing this it can help - rather than hinder - the powering of growth in UK PLC.

Useful statistics

The number of active cases is quite small

Those opposed to the regime have alleged an “explosion” in claims filed. However, the statistics do not bear this out.

There are officially **62** s47B claims filed in the Tribunal over a 10 year period since the regime was introduced in late 2015.

- In reality, this translates into **42** claims when grouping together claims brought by the *same* claimant in relation to the *same* infringement but against multiple defendants. For example, a claim in respect of inflated musical instrument prices as a result of anticompetitive agreements or concerted practices was brought by a class representative against 5 defendant groups, but in practice these 5 cases concern the same types of anticompetitive conduct.⁶

⁴ Competition Bureau Canada, [Canada’s evolving economy: the need for more competition](#), Remarks by Matthew Boswell, Commissioner of Competition (October 2025).

⁵ Australian Competition and Consumer Commission, [ACCC response to Treasurer and Minister for Finance - Regulatory Reform Opportunities](#) (August 2025).

⁶ See cases: *Elisabetta Sciallis v Casio Electronics Co. Limited and Casio Computer Co., Limited*; *Elisabetta Sciallis v Yamaha Music Europe GmbH and Yamaha Corporation*; *Elisabetta Sciallis v Roland Europe Group Limited and Roland Corporation*; *Elisabetta Sciallis v Korg (UK) Limited and Korg Inc*; *Elisabetta Sciallis v Fender Musical Instruments Europe Limited and Another*.

- Of those 42 claims, a further **5** could not progress as the CAT preferred an equivalent claim brought by a different class representative, the regime being set up to prevent duplication of claims (the carriage dispute principle).
- Of the **37** remaining claims, two claims have been withdrawn and another dismissed, leaving **34** claims. **34 claims over ten years is not an “explosion” in claims.**

“Follow-on” -v- “Standalone Cases”

It has been suggested that the regime was intended only for follow-on cases and not the so called “explosion” of standalone cases that has transpired.

There was no intention to restrict the regime to follow-on cases. When reforming the regime, the government agreed with the great majority of respondents to its consultation that there should be no distinction between follow-on and standalone cases, in particular because the difficulty in drawing a bright-line distinction between the two forms of cases had led to the unsatisfactory situation in the CAT which it was trying to remedy through reforms.⁷

Post-Brexit the only fully “follow-on” cases would be based on infringement decisions of the CMA and concurrent sectoral regulators in the UK (which are necessarily limited to the extent of their resources, and many of the decisions are too small to be pursued cost effectively under the current operation of the regime).

In practice **8 of the 34** claims “follow-on” from a prior regulatory finding of an infringement of competition law by the European Commission (prior to the Brexit withdrawal) or the UK CMA where the regulatory finding can be relied on in court. The remaining cases – typically termed as “standalone” – are cases in which an infringement still needs to be proven. However, the majority of these “standalone” cases are in practice based on some form of prior regulatory findings, either here, in Europe or other jurisdictions, and in some cases by multiple regulators. Contrary to the suggestion by those opposing the regime, there are in practice a real minority of fully standalone claims.

Cases brought on behalf of businesses represent a large proportion of claims overall

Lastly, of the:

- **34** cases, **15** (44%) are claims on behalf of a business class or a mixed business/consumer class and,
- **28** claims which the CAT has certified to proceed to trial, **15** (54%) are on behalf of a business class or a mixed business/consumer class.

This is clear evidence that the regime functions also for the benefit of UK businesses and the regime cannot be dismissed - as is suggested by some - as being contrary to business interests and growth.

⁷ BIS, [Private Actions in Competition Law: A Consultation on Options for Reform](#) (January 2013), para. 5.17.

PART II - HAUSFELD'S DETAILED RESPONSE

ACCESS AND FUNDING

Q1. Is the regime currently affordable to a diverse range of classes? If not, how do you think the current cost of bringing a claim impacts on how claims are funded? Where third party litigation funders are used, are you aware of the cost of a claim having an impact on competition between litigation funders able to finance such a claim? If so, how? Where third party litigation funders are used, do you consider that the cost of a claim under the regime influences funders' decision-making in relation to what cases to support? If so, how?

The regime is currently only affordable for consumers and UK businesses with the availability of third party litigation funding, as recognised when the regime was set up and more recently by the CJC in its recent report on litigation funding. The necessary use of third party funding and the cost of opt-out proceedings has a bearing on the availability of and, consequently, competition between litigation funders.

- Litigating in the UK to enforce legal rights is costly, in particular for opt-out collective actions, which raise complex matters of fact, economics, and law. Even where solicitors are willing to work on discounted rates under an alternative fee structure, those solicitor fees account for only a fraction of the overall cost of a dispute, which also include the cost of counsel, experts, disclosure providers, and the high cost of After-the-Event (ATE) insurance cover. ATE insurance is necessary to provide cover for a class representative, so that the insurer pays the defendant's costs if the claim is unsuccessful. Altogether, the costs typically run into the millions of pounds under the current regime.
- Defendants with deep pockets often further exacerbate these costs, with defendants typically outspending claimants by a significant factor. For example, in the *Trucks* collective proceedings, the Competition Appeal Tribunal noted that defendants' estimated costs were significantly in excess of £20 million in respect of at least two of the defendants, with suggestions that adverse costs cover of £60-65 million might be needed.⁸ Even at the certification stage (the initial stage of a collective proceeding), the legal spend of well-resourced defendants can be very significant. In *Merricks v Mastercard*, the defendant claimed costs of just under £2 million for resisting certification in a hearing that took only 2.5 days and involved no evidence, which the Tribunal described as "*wholly unreasonable and disproportionate*."⁹ This willingness of defendants to weaponise costs is evident throughout proceedings, with well-resourced corporate defendants routinely employing strategic cost-escalation tactics: prolonged procedural battles, technical challenges to funding arrangements, and appeals on minor points. Litigation funding helps level the playing field in these instances, although the increasing cost of proceedings is putting pressure on availability of funding due to funder concentration limits and means that lower value claims are often not viable
- With large legal budgets to fund, the process for putting funding and insurance in place is time consuming, involving detailed review of the case prospects and valuation. This

⁸ *Road Haulage Association Limited v Man SE and Others* [2019] CAT 26.

⁹ *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2022] CAT 27, para. 12.

may leave many strong claims unfunded, particularly those of lower value which will not meet the commercial threshold for funding the costs involved.

- At the same time, competition between litigation funders can be limited by the fact that funders may require exclusivity during the due diligence exercise, which can take months. A claimant can therefore only present the case to another funder after it has received a decision not to proceed further from the previous funder. This can hamper the claimants' ability to "*shop around*" for competing funding offers.
- Given the high levels of costs involved in funding claims, some funders that have already invested in funding ongoing proceedings may have concentration limits. Those funders will want to see those proceedings resolved before investing in new proceedings. This dynamic naturally reduces competition but will be addressed by more cases resulting in settlements or damages awards by the CAT, which should also give funders clarity as to how costs will be assessed.
- Resolving remaining uncertainties in respect of *PACCAR*¹⁰ would also assist in unlocking funding. The upshot of the Supreme Court's judgment in that case is that funders are now calculating funding returns typically based only on multiples of their investment, and without use of returns based on damages awarded. The latter allowed the funders' returns to track and be proportionate to the final damages awarded, enabling a clearer calculation and enabling investment in lower value claims.
- One mooted alternative to litigation funding is public civil legal aid. However, as was noted by the CJC, that suggestion is not realistic, as the cost of litigation would require a recapitalisation of the civil legal aid fund "*to a level it never previously reached*".¹¹
- It follows that for opt-out collective proceedings, at present, as was recognised by the CJC, litigation funding "*is and is likely to continue to be the only viable funding mechanism*" and is "*an essential means to promote and secure access to justice*."¹²

Q2. Do you consider the way litigation funders' share of settlement sums or damages awards is approached currently to be fair and/or proportionate? Please provide reasoning to support your answer. How could it be improved?

The current approach to the payment of funders' fees, whether as part of a settlement sum or damages awarded following a successful outcome for the claimant, is one of close judicial oversight by the Tribunal in each case. This means that the Tribunal will ultimately determine on the facts and context of each proceeding what payment to stakeholders is appropriate following distribution to the class. It is currently unclear to what extent the Tribunal will follow pre-agreed arrangements between stakeholders or impose its own view of how costs should be allocated.

¹⁰ *R (on the application of PACCAR Inc and Others) v Competition Appeal Tribunal and others* [2023] UKSC 28.

¹¹ CJC, Review of Litigation Funding Final Report (June 2025), para. 6.48.

¹² CJC, Review of Litigation Funding Final Report (June 2025), para. 6.49. While we note that one collective proceeding is being funded by the Home Office (Case 1698/7/7/24 *Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc*), such cases are likely to be few in number.

In its supervisory capacity, the Tribunal will bear in mind the need of funders to make a return, but will ultimately focus on the interests of class members above all. Given the early stages of the regime, we have only seen the Tribunal consider awards to funders in two proceedings, both times in cases where settlements were relatively limited compared to the costs entitlement. The lack of predictability as to how costs awards will be dealt with is currently creating uncertainty for funders and other stakeholders in making decision on financial commitments which are very significant.

- The Court of Appeal has noted that the ability of third party litigation funders to generate a profit is integral to the viability of the opt-out collective regime.¹³ As explained in our answer to Question 1, without such funding, the commercial reality is that those proceedings could not be brought and pursued.
- However, the Tribunal is very mindful of ensuring that what is recovered by the funder is not excessive, and that the regime should operate first and foremost for the benefit of the class members in order to ensure it meets its objectives. This was set out in the Tribunal's settlement judgment in *Merricks*: "*We regard it as fundamental that the collective proceedings regime should operate for the benefit of [Class Members] and not primarily for the benefit of lawyers and funders. At the same time, the regime could not function effectively without the [Class Representative] having good legal representation and commercial litigation funding to pay for it.*"¹⁴
- In *Merricks*, the Tribunal was ultimately guided by case law in Australia and Canada to assess the reasonableness of the funder's return. In those mature jurisdictions, the Tribunal noted, courts have much greater experience of class actions, in neither case limited to competition law. In *Merricks*, that resulted in the Tribunal unilaterally adjusting the funder's return downwards, to reflect the ultimately low settlement sum in the case, compared to the initial claim value.
- Given the relatively recent start of the regime, there have to date been only four judgments or settlements in collective opt-out proceedings, even fewer have dealt with the details of distribution, and only one case has determined the payment of funders' fees. No opt-out collective proceedings so far have resulted in an award of damages. As the first cases are starting to reach their conclusion, we will begin to see how the CAT will exercise its supervisory role in practice. Much like the mature regimes in Canada and Australia, the Tribunal will need to develop the necessary decisional practice to try and walk the line to ensure that funders' returns are fair and proportionate such that funding continues to be available whilst protecting the interests of the class, and those rulings will in turn generate commercial certainty for the regime.

At this early stage of the regime, adopting for example a fixed cap on the funder's return could prevent the pursuit of viable claims that require higher returns due to their risk or complexity and cases which take a significantly longer period to resolve. The latter is particularly an issue in the early stages of a regime where appeals on procedural points are more likely, and the Tribunal is still grappling with appropriate case management of similar claims, which can result in proceedings taking longer. Further, cases can evolve during the life of a case – costs may

¹³ *Mr Justin Gutmann v Apple Inc and Others* [2025] EWCA Civ 459, para. 81.

¹⁴ *Walter Hugh Merricks CBE v Mastercard Incorporated and Others (CSAO Application)* [2025] CAT 28, para. 121.

increase, and damages estimates may decrease during proceedings. With fixed caps, cases that were initially viable could become uneconomic, forcing them to be abandoned if there is no flexibility to reprice the funding.

Q3. We are aware that recommendation 57 made by the CJC in its report on litigation funding proposes the introduction of an Access to Justice Fund. However, we would like to explore options for funding cases in the context of the CAT specifically. Are there lessons to be drawn from other models of funding that could support access to the regime? For example, Contingent Legal Aid Funds provide financial support for cases where funding would otherwise be unavailable, with the fund being replenished by a portion of settlement sums or damages where a case is successful. An example of this is the Ontario Class Proceedings Fund in Canada.

As the CJC concluded, for opt-out collective proceedings, litigation funding is currently the only viable funding mechanism, and on that basis the CJC recommended only light-touch regulation to avoid the risk of inadvertently stifling access to justice.¹⁵ We assess below the main alternatives to third party funding based on our direct experience. While each alternative has its place, none offers a complete solution:

- ***Conditional Fee Agreements (CFAs):*** Whilst CFAs are frequently used to assist the claimant in bringing a claim by allowing the claimant to defer some or all of their legal fees until the conclusion of the case (and will often be a requirement of funding), they are only one component of the claimant's funding needs. There is still a need for funding to meet upfront disbursements, including expert fees, and ATE cover. In a typical competition collective action, disbursement costs alone are likely to be in the region of £15-20 million. These costs must typically be funded upfront, creating a significant gap that CFAs alone cannot bridge.
- ***Damages-Based Agreements (DBAs):*** DBAs are currently unenforceable in the context of opt-out collective proceedings. However, extending the use of DBAs to opt-out collective proceedings could potentially enable law firms to take on more of the financing role currently filled by third party funders, and may also assist in allowing some lower value claims to be brought and/or alternative forms of finance to be used for disbursements.
- ***ATE insurance:*** ATE insurance is essential for managing adverse costs risks but is itself expensive and difficult to obtain for complex claims and will not cover disbursements or other costs.
- ***Other funding options,*** such as crowdfunding and trade union funding, may serve important roles in suitable cases (for example in employment claims or public interest litigation), but lack the scale and flexibility required to fund large collective actions.
- ***Access to Justice Fund:*** The constitution of a fund similar to the Ontario Class Proceedings Fund, using damages which go undistributed in collective claims, is a model which should be considered, in particular as it could help support access to the regime for claims where it is typically not possible to use commercial funding. Cases

¹⁵ CJC, Review of Litigation Funding Final Report, para. 6.49.

may be follow-on cases e.g. from CMA Decisions and strong on their merits but, due to the costs of bringing a claim, are not viable on commercial funding and ATE costs.

Q4. How has the secondary market in litigation funding developed? Do you consider that there have been any subsequent impacts on transparency and client confidentiality?

We believe that funders are best placed to answer this question. In practice, given the level of funding required to bring a claim, a secondary market is likely necessary in order to expand funding options and make the market more competitive. Funders can be expected to want to diversify exposure to the high costs on one case and a number of funders will have a concentration limit per case which is not sufficient to meet the cost of a collective claim under the current regime.

Q5. The CJC made recommendations in its report on litigation funding in relation to terms and approval of litigation funding agreements (for example, recommendations 19 and 20). However, we would like to understand more about litigation funding agreements used in cases before the CAT specifically. Are funding agreements fair and transparent for class members and clear for the court to understand? If not, why? How could they be improved?

Funding agreements in opt-out collective proceedings are routinely disclosed to the Court and, subject to necessary safeguards to prevent giving defendants a tactical advantage, can be disclosed to class members:

- In opt-out collective proceedings, claimants seeking certification are already required to disclose their funding arrangements to the Tribunal, which is under a duty to examine them as part of its assessment of whether to grant the claimant's application for a Collective Proceedings Order.
- In respect of disclosure of the funding terms to class members, the CAT in *Bulk Mail Claim* held that class members should be able to inspect the litigation funding agreement with minimum redactions upon giving appropriate confidentiality undertakings.¹⁶ In that case, class members were able to request a copy of the funding agreement with some terms redacted for confidentiality, such as deferred fees for solicitors and the total cost of insurance premiums incurred. Similarly, in *Coll v Google*, the CAT held that there is a presumption of transparency in respect of funding agreements in collective proceedings, but that the Tribunal may make an order refusing disclosure of a funding document where disclosure would give the defendant an unfair tactical advantage.¹⁷
- Funding agreements are, however, typically long and complex documents which take significant time to negotiate and agree. Given the relatively limited competition in the

¹⁶ *Bulk Mail Claim Limited v International Distribution Services* [2025] CAT 19, para. 31.

¹⁷ *Elizabeth Helen Coll v Alphabet Inc and Others* [2022] CAT 39, para. 22(2).

funding market, class representatives are often limited in their ability to negotiate clearer, simpler, terms.

- The Tribunal has used its broad case management powers to require terms to be clarified or amended at the certification stage. The Tribunal has focussed in early stages in particular on provisions to satisfy itself that the class representative can exercise its case management decisions independently and in relation to the operation of the funding arrangements to ensure the interests of the class are protected. In the recent *Hammond v Amazon* certification ruling, the Tribunal queried a term in the funding agreement which enabled the proposed class representative to seek an order for payment of the Funder's Fee in priority to distribution to class members. Following the CAT's intervention, the claimant amended the LFA to clarify that such an application would only be made where it was "*appropriate in all the circumstances*".¹⁸
- The Tribunal has typically not at the certification stage amended the financial terms of the funder return. In *Gormsen v Meta*, the Tribunal noted that, in certain circumstances, it may refuse to certify collective proceedings where the funding provisions are "*sufficiently extreme*".¹⁹ However, it also noted that there are good reasons for the Tribunal to refrain from passing judgment on the fairness of the funding terms at the certification stage, given that those terms will have been agreed as a result of commercial negotiations concerning the merits of the case, the associated risks, and internal expectations of likely damages.²⁰ For the Tribunal to peer behind the curtain of those negotiations would involve it seeing highly privileged material.
- Those concerns, however, do not apply on settlement or after an award of damages, which is why the Tribunal will generally defer assessment of the reasonableness of the funding terms to the conclusion of the proceedings.²¹
- The financial terms may also be significantly impacted by: a) the availability of funding options; and b) the length of time which proceedings take. Returns are obviously much more modest the quicker a case is resolved whereas, for longer cases, a funder will be expecting a return which reflects the period of time the money has been invested.

Q6. Is funding provision for the full potential cost of a claim sufficiently considered on the commencement of claims under the regime?

- In our experience, budgets for funded claims are subject to careful consideration and funder scrutiny at the outset of the case, underpinned by detailed and sophisticated negotiations. This is particularly important in the opt-out collective actions context, where claimant budgets are subject to scrutiny by the CAT on certification. It is also important to try and accurately estimate the costs to conclusion and avoid the complication of having to seek variations to the funding budget during the course of the proceedings.
- Funders will often seek to impose caps per phase in the proceedings to ensure the budget extends to conclusion of the matter. In addition, there is ongoing funder

¹⁸ *Robert Hammond v Amazon.com Inc and Others* [2025] CAT 42, para. 68.

¹⁹ *Dr Liza Lovdahl Gormsen v Meta Platforms Inc and Others* [2024] CAT 11, para. 36.

²⁰ *Dr Liza Lovdahl Gormsen v Meta Platforms Inc and Others* [2024] CAT 11, para. 35.

²¹ *Robert Hammond v Amazon.com Inc and Others* [2025] CAT 42, para. 66.

pressure throughout the course of the proceedings to keep costs down. Where unexpected events arise during the course of the litigation causing costs to increase, this can leave budgets very tight. The law firm must submit a comparison of spend to budget usually on a monthly basis and any overspend will be scrutinised. It has obviously been challenging in the early days of the regime to anticipate how claims will be managed and to provide reliable costs estimates, however learning is obviously developing on this from the early cases.

- Aware of this pressure on funded claimants, well-resourced defendants frequently apply tactics designed to drive up the costs of the litigation and/or to delay its resolution in an attempt to exhaust the available funding (or continued willingness of the funder to provide additional funds) before trial. A known example of this, outside the competition context, is the Post Office litigation, where the Post Office responded with scorched earth tactics, spending tens of millions of pounds in an attempt to exhaust the claimants' resources.
- To assist in providing more certainty in relation to costs budgets, it would be sensible for cost budgeting processes to be considered as we see in the High Court. Budgeting of defendant's costs would also assist in providing certainty as to required insurance levels. This will also assist the Tribunal in considering proportionality at different stages of the proceedings and the impact of any procedural decisions on costs. For example, the Tribunal recently required that both parties to proceedings would need to provide the Tribunal with updated costs budgets in future case management hearings.²²

Q7. Recommendation 15 of the CJC report on litigation funding proposes a binding dispute resolution process for funders and funded parties. However, we would like to explore further how conflict between litigation funders and class representatives could be approached. To what extent should extra-curial dispute resolution be used or required to be used to resolve conflict between the funder and class representative or class?

In the event of a dispute, most funding agreements will contain agreed dispute resolution mechanisms, for example to enable a third party counsel view to be given in the event of a dispute in relation to settlement offers.

- The Tribunal, as part of its supervisory jurisdiction in opt-out collective proceedings, has reviewed such dispute resolution clauses and, where necessary, has required amendments to be made to funding agreements to incorporate references to dispute resolution mechanisms. This occurred, for example, on certification in a recent collective action against Google.²³
- It is in the interest of the regime that any disputes between funders and class representatives are resolved quickly without requiring the involvement of the courts or the Tribunal. To reinforce this, the CAT Rules of Procedure ("CAT Rules") and/or Guide to Proceedings ("CAT Guide") could be amended to require the Tribunal to consider as

²² *Bulk Mail Claim Limited v International Distribution Services Plc* [2025] CAT 56, paras. 70-72.

²³ *Professor Barry Rodger v Alphabet Inc and Others* [2025] CAT 45, paras. 58-60.

a matter of course, as part of its broader review of the class representative's funding arrangements, whether the dispute resolution mechanisms are satisfactory.

- As the Tribunal noted in *Merricks*, one other way of aligning the funder's interests with those of the class (and the class representative) – and consequently further reducing the scope for conflicts – is by allowing the funder's return to be a percentage of the damages recovered.²⁴ This can involve stepped caps based on the level of damages recovered. That would require a reversal of *PACCAR*, as also recommended by the CJC report in its Recommendation 1. Certainty on this area would significantly assist trying to negotiate terms that are appropriate to the individual case.
- The most likely time at which conflict might arise will be on settlement and in considering how stakeholder costs will factor into any settlement. In practice, the Tribunal is exercising its jurisdiction to review and approve costs. As explained above, increased certainty as to the approach to be taken will help minimise risk of any dispute between class representative and funders and provide clearer expectations at the outset.

SCOPE AND CERTIFICATION OF CASES

Q8. Is the current scope of the regime appropriate?

The current scope of the regime to competition claims has proven to be an effective method of private enforcement, enabling UK consumers and SMEs to seek redress from otherwise unassailable deep-pocketed defendants to the benefit of the broader UK economy. The current restriction of the regime to competition law alone is, however, difficult to justify given similar patterns of mass harms in other areas.

Expanding the opt-out collective action regime would, in the absence of the reintroduction of taxpayer-funded civil legal aid, address gaps in access to justice and provide more efficient models in other areas such as consumer claims. The efficiency and court control over the opt-out competition model can be contrasted to e.g. consumer claims, where individual consumers still need to individually each be named in a claim form and provide individual details for every claim. In a regime where claims are then subsequently determined by test cases, the costs associated with requiring every consumer to be identified is not an efficient or good use of money and often leads to the difficulties currently under scrutiny of explaining engagement and funding terms to individual consumers. The opt-out mechanism led by a suitably approved class representative is a much more efficient regime.

Extending the opt-out regime to other sectors would also align UK practice with leading international models – collective mechanisms in the EU, Australia, Canada not being restricted by sector as they are in the UK. The absence of a broader regime results in scenarios in which, for example, SMEs are having to bring claims in the Netherlands or other jurisdictions as equivalent mechanisms are not available in the UK.²⁵ It also results in situations where

²⁴ *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* (CSAO Application [2025] CAT 28, para. 185.

²⁵ For example, in the Netherlands, REACT - The Anti-Counterfeiting Network was able to bring collective proceedings on behalf of its trademark-holder members against an online marketplace

consumers and SMEs are being compensated in other jurisdictions in relation to conduct which is global but cannot obtain compensation in the UK in the absence of the pressure of an effective means to bring a claim.

Stand-alone and follow-on claims

The current scope of the regime is an effective mechanism for the private enforcement of competition law.

- The growth of ‘standalone’ actions is one measure of the regime’s success. At the time of the government’s original consultation on the regime, the possibility of standalone cases was seen as an essential aspect of the regime which would help drive redress and deterrence.²⁶ It is also a reflection of the Government’s observation at the time that the victims of an antitrust abuse will frequently be better placed than a government regulator to identify where and how anticompetitive behaviour is causing them harm.²⁷
- At the same time, it must be borne in mind that the term ‘standalone’ is a misnomer, as in almost all cases the action will be based on some prior finding of competition harm and/or market failure. These ‘quasi follow-on’ claims will be based on decisions or findings by UK regulators – such as CMA settlement decisions or market studies – or on competition infringements decisions by foreign regulators (and frequently a combination of both). For example, while the call for evidence defines follow-on cases as those brought on the basis of an adverse finding by the CMA or EC, EC decisions based on investigations initiated post-Brexit will *not* be binding on UK courts. Accordingly, proceedings brought on the basis of EC infringement decisions will soon change from follow-on cases into ‘standalone’ (quasi follow-on) cases. The ability to bring a collective action acts as an important complement to the resource of domestic regulators, as the CMA itself has acknowledged.

Redress for individuals as well as businesses and public organisations

In addition to enabling redress to victims, the current regime’s complementary enforcement of competition law is demonstrably beneficial to UK economic growth. By enabling claims against large defendant companies that suppress or foreclose potential UK competition, drive up consumer prices, and ultimately harm UK growth and contribute to inflation, the regime ensures that anti-competitive practices are curtailed, redressed, and deterred. We note the following points in respect of this:

- While the opt-out collective action regime is frequently described as a mechanism to enable *consumer* redress, it is also a mechanism that is available to UK businesses together with public entities, NGOs, and charities. As noted in the statistics set out at the beginning of this Response, nearly half of all collective claims are brought on behalf

platform trading in counterfeit products. See [REACT Counterfeiting Foundation v Sara Mart Limited and Others](#) (27/05/2024).

²⁶ BIS, [Private Actions in Competition Law: A Consultation on Options for Reform](#) (April 2012), at para. 5.46.

²⁷ BIS, [Private Actions in Competition Law: A Consultation on Options for Reform](#) (April 2012), at para. 5.52.

of businesses or include businesses as class members,²⁸ and over half of all certified collective proceedings include a class of business claimants.²⁹

- Competition enforcement is essential in giving startups the opportunity to reach their market, otherwise a dominant company or a cartel of companies would be able to foreclose a market and shield themselves from the competitive pressures that an enterprising startup might bring. This is particularly important for the UK economy, where 99.8% of the business population are SMEs, and nearly 60% of employees are employed by SMEs.³⁰ Ensuring that these SMEs and their employees have a fighting chance on the market and are not hamstrung or forced out of the market by large businesses flouting the law is of critical importance to ensuring UK competitiveness, innovation, and economic growth.³¹
- Recent macroeconomic modelling has indicated that competition enforcement and its deterrent effects increase GDP in the long run, with the European Commission modelling that competition enforcement translated to an increase of real GDP relative to the baseline in the range of 0.6% to 1.1% in the medium to long term, and an estimate increase of GDP in the range of 3.5% to 5% after ten years.³² In Australia, the Productivity Commission estimated that the introduction of a national competition policy added 2.5% to Australian GDP.³³ In concrete terms, the amount of value stolen from the UK economy by large businesses breaking competition law could be equivalent to the UK's yearly expenditure on defence.³⁴
- A recently certified claim this month has also illustrated the value which the opt-out regime can play in providing access to justice not only for businesses but also for public organisations, including local authorities, charities, and NGOs.³⁵

Beyond competition

The regime should now be widened to allow for collective redress outside of competition harms.

- Many mass harms, such as environmental damage or systemic consumer rights violations, are not actionable under the current regime, which is limited to competition law. There is no principled reason why collective redress should be confined to competition law, when similar patterns of dispersed harms exist across other areas, which are left without an efficient mechanism for group restitution. Further, extending

²⁸ Of the 34 claims that have been brought, 15 are claims on behalf of a business class or a mixed business/consumer class (44%).

²⁹ Of the 28 claims which the CAT has certified to proceed to trial, 15 are on behalf of a business class or a mixed business/consumer class (54%).

³⁰ DBT, [Business population estimates for the UK and regions 2024: statistical release](#) (October 2024), see Figure 4.

³¹ CMA, [Wider Benefits of Competition Policy and Enforcement, CMA Microeconomics Unit literature review](#) (January 2025).

³² EC, [Modelling the macroeconomic impact of competition policy, 2023 update and further development](#) (2024).

³³ CMA, [Productivity and competition: a summary of evidence](#) (July 2015).

³⁴ The latest NATO estimates show that the [UK spent 2.3% of GDP on defence in 2024](#) (Table 4).

³⁵ *Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc* [2025] CAT 60.

the regime would enable private litigation to hold bad corporate actors to account, increasing the effectiveness of UK laws and regulations.

- In the absence of an equivalent regime, consumers, employees, and businesses that are the victims of wrongdoings have had to individually register to bring individual claims, for example in respect of the mis-selling of financial products, data breaches, and diesel emissions.
- A recent thematic review by the Solicitors Regulation Authority (SRA), has highlighted concerns in respect of advertising to consumers in relation to individual consumer claims which require them to sign up to join legal action, including acceptance of engagement and funding terms. Extending the opt-out regime would remove the need for individual consumers to have to sign up individually to claims up front, thereby introducing judicial oversight and procedural safeguards, whilst still resolving claims on a test basis in a more efficient process.
- A further benefit of widening the scope of the regime is that it would result in a more rapid development of legal precedents in the collective regime. Jurisdictions that have a broader collective regime, like the Netherlands, Australia and Canada, have demonstrated that such regimes foster rapid legal development through a greater volume and diversity of cases, including less complex claims compared to competition litigation. This in turn leads to clearer judicial guidance, predictability and market certainty.

Q9. How are cases which cut across multiple areas (for example, environmental protection or data) dealt with? Is this appropriate? Are certification decisions sufficiently predictable and transparent for parties?

- Opt-out collective proceedings must be based on an infringement of competition law. The broad application of competition law, particularly in relation to dominant undertakings, extends its application. Competition law has therefore been applied in multiple areas, including by public regulators, to addresses abuses or infringements even in non-traditional or “novel” fields of enforcement, such as in respect of data privacy, environmental protection, and labour markets.³⁶ This is appropriate: a cartel that results in environmental damage, and accompanying health risks, is no less harmful than one that results in a loss of profit. Similarly, a company leveraging its dominant position to extract more data from users than necessary may be imposing an unfair price; that the price isn’t expressed in pounds sterling shouldn’t make a difference. Ultimately, these are all harms or losses inflicted on individuals, and what matters for the purpose of the regime is not whether the market or harm inflicted is of a novel sort, but whether an infringement of competition law is involved and whether the test for certification is met.
- Accordingly, in *Gormsen v Meta*, the Tribunal certified a collective proceeding involving a claim that Meta unfairly extracted high value data from users for no (or no sufficient) compensation.³⁷ On appeal, the Court of Appeal confirmed that the use of data as a

³⁶ See: Hausfeld, [The Substantive Scope of the UK Collective Action Regime](#) (June 2025).

³⁷ *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc and Others* [2024] CAT 11.

proxy for monetary payment is an increasingly common phenomenon of modern digital life, and that the law is sufficiently flexible to determine if there has been an anticompetitive abuse: *“although the factual scenario might be relatively new, the framework for analysis is not.”*³⁸ Conversely, the Tribunal has also shown itself willing to refuse to certify cases that fall outside the scope of competition law, such as where it found that the relevant legislation precluded a private action in damages against water and sewerage undertakers,³⁹ and where it refused to certify a claim against a collective management organisation because there was no clearly pleaded competition infringement.⁴⁰

- We do not therefore agree that the scope of competition claims has been inappropriately extended. Any tension on this question can, however, be removed if the opt-out regime were extended to other areas. For example, a claim brought here under competition law may in other jurisdictions additionally be brought under consumer legislation, which may in some cases be much more straightforward.
- As further discussed in our response to Question 15, we believe that the rules on certification of competition opt-out collective proceedings are now sufficiently clear to both claimants and defendants following the established case law from the Tribunal, Court of Appeal, and Supreme Court.

Q10. What approach should be taken if the same issues are concurrently being investigated by the CMA and brought before the CAT?

- The question of the interaction between public and private enforcement was considered by the Government in its 2012/2013 consultation on the reforms that paved the way for the present opt-out collective actions regime. That consultation recognised the importance of empowering UK businesses and consumers to take direct action against anticompetitive behaviour not only as a pathway to redress but as *“essential to establishing a private actions regime that complements public enforcement.”*⁴¹ Private enforcement accordingly complements public enforcement, creating a more comprehensive system of market oversight. This reduces the burden on public resources, leaving the UK competition regulator to prioritise its resources, whilst increasing detection and deterrence of anticompetitive conduct.
- At the same time, the government was also keenly aware of the need to ensure that private enforcement did not cut across public enforcement. To guard against that, it sought to ensure that consistency would be maintained between the CAT and the CMA through the following amendments to the CAT Rules:⁴²
 - The proposed class representative must send a copy of the collective proceedings Claim Form to the CMA at the same time as it is served on the

³⁸ *Meta Platforms Inc and Others v Dr Liza Lovdahl Gormsen* [2024] EWCA Civ 1322, at para. 30.

³⁹ *Professor Carolyn Roberts v Severn Trent Water & Others* [2025] CAT 17, currently on appeal to the Court of Appeal.

⁴⁰ *Mr David Alexander de Horne Rowntree v Performing Right Society and Another* [2025] CAT 49.

⁴¹ BIS, [Private Actions in Competition Law: A Consultation on Options for Reform](#) (April 2012), at para. 3.10.

⁴² BIS, [Private Actions in Competition Law: A Consultation on Options for Reform - Government response](#) (January 2013), para. 7.19.

- other parties to the claim,⁴³ which must also be provided with a copy of the Defence and the Reply to the Defence at the time of service.⁴⁴
 - The CMA may elect to intervene by submitting written observations to the Tribunal and, with the permission of the Tribunal, to submit oral representations.⁴⁵ The CMA has actively used this power of intervention and has notified its intention to intervene in at least eight opt-out collective proceedings.⁴⁶
 - The CAT has the power to stay collective proceedings, at any time and of its own initiative.⁴⁷
- The current system is therefore one in which private enforcement is able to operate as an effective complement to public enforcement, both by providing redress to UK businesses and consumers who have suffered loss or harm and by adding to the deterrent effect of UK competition law, while ensuring that the public regulator has an important voice in all collective proceedings from the very moment of filing.

Q11. Do you consider that there is currently sufficient certainty for businesses in relation to the level of liability they face under the opt-out collective actions regime? If not, why? What additional measures do you consider could be introduced to provide increased certainty?

- It must be noted at the outset that, in respect of Chapter I infringements, such as cartels, the participants to the infringement have chosen the higher profits provided by anticompetitive behaviour over the risk of regulatory fines and private damages claims. Where such blatantly illegal conduct has taken place, the cartelists will have made their own calculation on possible liability exposure.
- Likewise, in respect of Chapter II infringements, a business in a dominant position will know that by law it has a “special responsibility” not to allow its conduct to impair competition. Where they choose to shirk that responsibility in the pursuit of higher profits, they will have made a conscious calculation to prioritise the opportunity for profit over the level of any liability exposure.
- Such defendant calculations aside, it is also a requirement for the claimant as a condition for certification to present an expert methodology that has “a realistic prospect of establishing loss on a class-wide basis”.⁴⁸ The claimant is of course operating without the benefit of disclosure, which would refine such a methodology,

⁴³ CAT Rule 76(6).

⁴⁴ CAT Rules 35(6) and 36(4), which apply to collective proceedings pursuant to Cat Rule 74.

⁴⁵ CAT Rule 50(2), which applies to collective proceedings pursuant to Cat Rule 74.

⁴⁶ See: CMA, [Service of documents on the CMA in court proceedings relating to competition law](#) (June 2025). The register of cases in which the CMA has intervened lists the following opt-out collective proceedings: *Justin Le Patourel v BT Group PLC*; *Dr Liza Lovdahl Gormsen v Meta Platforms Inc and Others*; *Elizabeth Helen Coll v Alphabet Inc and Others*; *Dr. Rachael Kent v Apple Inc and Apple Distribution International Ltd*; *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited & Others*; *Ad Tech Collective Action LLP v Alphabet Inc & Others*; *Nikki Stopford v Alphabet Inc & Others*; and *Professor Barry Rodger v Alphabet Inc & Others*.

⁴⁷ CAT Rule 85.

⁴⁸ *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2020] UKSC 51, para.135. This is known as the *Microsoft* test.

but must identify a plausible approach as to how it might estimate the damages to the class, and therefore the extent of the defendant's liability. A great amount of time and effort is accordingly spent prior to filing on producing such a methodology and calculating a preliminary estimate of the amount of damages involved.

- Following service of the Claim Form, along with the expert methodology and provisional damages calculation, defendants can apply that methodology to their own internal data and accounts to assess the claimant's calculations and form their own internal view on the level of their liability. It should not be any more difficult for a defendant to estimate its liability than in relation to an individual claim. Indeed, as the Tribunal has noted in a recent judgment, it may be more straightforward in some cases to assess the loss at an aggregate level than for individual claims.⁴⁹
- A defendant will also have a clear idea what the costs of the action involve, particularly where they choose to run the case to conclusion and not to engage in any settlement discussions, and especially where liability has already been established (as is the case in follow-on cases or where regulatory findings have been found already in other jurisdictions).
- In conclusion, our view (informed by our extensive experience of developing methodologies for establishing liability in competition actions) is that there are no significant differences between the well-established individual action regime and the opt-out collective action regime with respect to the possibility for an infringing business to estimate its potential liability for a competition infringement.

Q12. Are there circumstances where it would be appropriate to provide protection to businesses from liability? For example, might this be a consideration in certain circumstances in which businesses have cooperated with the CMA in a prior investigation?

- The current rules already provide protection for leniency applicants, by limiting the liability of businesses that have received immunity to paying compensation only to their own direct and indirect purchasers; this is an important limitation on the usual rules of joint and several liability between defendants.⁵⁰ Further, there can be no disclosure in respect of a cartel leniency statement (whether or not it has been withdrawn).⁵¹
- Any limitation on the liability in damages of immunity applicants will mean *less* compensation for victims. Given that the CMA's fining powers operate under a cap, this means that businesses would be able to profit from their wrongdoing and could create a perverse incentive to infringe, knowing that immunity from all consequences is available. This would be a windfall for a business intending to act illegally at the expense of UK businesses and consumers.
- The counterargument, that shielding immunity applicants from liability encourages self-reporting to the regulator and therefore enhances the CMA's ability to detect secret cartels, is also overstated. As was noted by the CMA's Executive Director for Competition Enforcement, for many years – and despite the rise of private actions and

⁴⁹ *Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc* [2025] CAT 60, para. 82.

⁵⁰ Competition Act 1998, Schedule 8A, paras. 15-16.

⁵¹ Competition Act 1998, Schedule 8A, para. 28.

follow-on damages – around half of the CMA’s cartel cases have originated from leniency applicants. The other half has originated from the CMA’s own intelligence work, including its whistle-blower reward programme.⁵²

- Lastly, businesses subject to a CMA investigation could deter potential follow-on claims, as well as make a clean break from their past misconduct, by agreeing a voluntary redress scheme with the CMA. This mechanism has never been used. We discuss voluntary redress schemes in our response to Question 17.

Q13. Should there be specific requirements in order to be eligible to act as a class representative?

- Eligibility to act as a class representative is not automatic, and a proposed class representative must satisfy the Tribunal that it is “just and reasonable” for them to act as the class representative in the proceedings.⁵³ As noted by the Tribunal, the central purpose of this assessment is to ensure that class members are adequately and appropriately represented which, in the context of an opt-out collective proceeding, “*is not a responsibility to be taken on lightly*.”⁵⁴ Accordingly, the Tribunal will consider a variety of factors in determining whether it would be just and reasonable for a person to act as the class representative, including:
 - Whether they would fairly and adequately act in the interests of the class members.⁵⁵ Relevant to that determination will be the proposed class representative’s competence to manage a large and complex piece of litigation and ability to exert sufficient control over the legal work conducted and costs incurred.⁵⁶
 - Whether they have a material conflict of interest with the interests of class members.⁵⁷
 - Whether they will be able to pay the defendant’s costs if ordered to do so.⁵⁸ As part of this, the Tribunal will consider the proposed class representative’s financial arrangements for bringing the claim, including any relevant fee arrangements with its lawyers, third party funding agreements, and insurance cover.⁵⁹ The Tribunal will need to be satisfied that the funding arrangements reasonably serve and protect the interests of class members.⁶⁰
- In addition, the proposed class representative must also prepare a plan for the proceedings that satisfactorily includes a procedure for governance and consultation.
- Lastly, the Tribunal has increasingly imposed additional requirements for certification on proposed class representatives, to ensure that they are well advised and capable

⁵² Speech by Juliette Enser, Executive Director for Competition Enforcement, [UK competition law enforcement: a look ahead](#) (5 December 2024).

⁵³ CAT Rule 78(1)(b).

⁵⁴ CAT Guide, para. 6.29.

⁵⁵ CAT Rule 78(2)(a).

⁵⁶ CAT Guide, para. 6.30.

⁵⁷ CAT Rule 78(2)(b).

⁵⁸ CAT Rule 78(2)(d).

⁵⁹ CAT Guide, para. 6.33.

⁶⁰ *Bulk Mail Claim Limited v International Distribution Services* [2025] CAT 19, para. 21.

of discharging their duties. For example, the Tribunal has noted that measures may need to be put in place to ensure that the proposed class representative receives specialist and independent advice on any litigation funding agreement and has required the class representative to retain an independent costs specialist to assist them in reviewing and approving any bills.⁶¹ It is now common for a class representative to be supported by a consultative panel to provide support in decision making and additional areas of expertise and experience.

- It follows that the current system provides for specific requirements in order to be eligible to act as a class representative, and the continued satisfaction of those requirements is kept under review during the proceedings, with the Tribunal having the power to substitute the class representative.⁶²
- To impose additional eligibility requirements on class representatives risks creating a professional class of such representatives, who might then be less connected with the class of businesses or consumers that they would purport to represent, and whose unique professional expertise would require commensurate compensation, thereby driving up litigation costs. So far, we have seen representatives from a wide range of backgrounds from consumer advocates, consumer groups, trade bodies and sector specialists all dedicated to bringing the claim in respect of the class. There does not seem to be any obvious basis for restricting those who are eligible.

Q14. Do you feel the current rules for class representatives are clear enough regarding the relationship between the class, class representative and funder and how to manage potential conflicts of interest?

Whilst we are aware that conflicts of interest between funders and funded parties are covered in recommendation 14 of the final report in the CJC's review of litigation funding, we are interested in exploring this topic in the unique landscape of the opt-out regime.

- As noted in our response to Question 7, the interests of clients and third party funders are aligned most of the time in funded cases. However, in the event that a conflict arises between a class representative and their funder, most funding agreements will contain agreed dispute resolution mechanisms, and the Tribunal will closely review the wording of dispute resolution clauses and require amendments where necessary.
- The most likely stage for conflict is on settlement, where there may be differing interests. One scenario where the argument of a 'conflict' has been raised by defendants is where (i) the Tribunal has ordered the defendant to make a payment in settlement or damages to the claimant, and (ii) the Litigation Funding Agreement provides that a class representative is obliged to apply to the Tribunal for an order that part of that sum be used to pay the funder, i.e. before any distribution to the class members. However, this argument is without merit, as has been recognised by the Tribunal:

⁶¹ *Bulk Mail Claim Limited v International Distribution Services* [2025] CAT 19, paras. 22 and 40.

⁶² CAT Rule 85(3)(b).

- Firstly, payment to the funder prior to distribution has been held to be permissible, as it is necessary to allow for the funder to be rewarded for the risk they have taken.⁶³
- Secondly, it is not the case that paying the funder first is necessarily to the disadvantage of the class. For example, it may be in the best interests of the class to agree to at least some payment to the funder first in order to lower the funder's risk and thereby reduce the cost of litigation funding.⁶⁴ This is no different to other cases pursued with funding where the claimant has to account for a proportion of costs from the settlement.
- Finally, there are procedural protections safeguarding the interests of the class prior to any payment to the funder in the form of legal advice from solicitors, advice from the consultative panel, contractual protection in the form of the dispute resolution clause and – most importantly – the protection of the Tribunal's supervisory power, which must ultimately review and approve any application.⁶⁵
- Increased certainty will be achieved in this area as more cases reach a conclusion and case law starts to develop, which will assist all parties in approaching these questions. This is also ultimately not a new issue, as it is no different from the scenario in a funded case where a claimant has to seek to reach agreement with a funder and insurer in order to agree settlement terms.

Q15. Should there be more defined rules on what cases can be certified as opt-out proceedings?

- We consider that the rules on certification of competition opt-out collective proceedings are now sufficiently clear and well-understood by the courts, claimants and defendants. Over twenty cases have now been certified by the CAT, which has resulted in a body of case law providing clarity on the standard that claimants need to meet for certification, including from the Court of Appeal and the Supreme Court. This is starting to reap benefits as defendants also now have the certainty as to the certification test, and we are seeing a more refined approach to points being taken to opposed certification.
- Indeed, in some cases defendants have chosen not to oppose certification,⁶⁶ in light of the clarity provided by previous certification judgments and Court of Appeal guidance on the applicable standard.⁶⁷ Even in those unopposed cases, the Tribunal has nevertheless proceeded to hold an oral hearing in order to provide transparency on the certification process and to ask its own questions of the claimants.⁶⁸

⁶³ *Mr Justin Gutmann v Apple Inc and Others* [2024] CAT 18, para. 35, which was upheld by the Court of Appeal in *Justin Gutmann v Apple Inc and Others* [2025] EWCA Civ 459, paras. 78-98.

⁶⁴ *Mr Justin Gutmann v Apple Inc and Others* [2024] CAT 18, para. 35 and *Professor Barry Rodger v Alphabet Inc and Others* [2025] CAT 45, para. 44.

⁶⁵ *Professor Barry Rodger v Alphabet Inc and Others* [2025] CAT 45, para. 45.

⁶⁶ See *Elizabeth Helen Coll v Alphabet Inc and Others* [2022] CAT 39 and *Dr. Rachael Kent v Apple Inc and Apple Distribution International Ltd* [2022] CAT 28.

⁶⁷ See *Elizabeth Helen Coll v Alphabet Inc and Others* [2022] CAT 39, para. 6.

⁶⁸ See *Elizabeth Helen Coll v Alphabet Inc and Others* [2022] CAT 39, paras. 8-9.

- Given the level of clarity that has now been achieved in respect of the certification stage, care would need to be taken not to introduce fresh uncertainty into the process through the introduction of new or additional rules, as such uncertainty would need to be resolved through additional litigation and appeals and increasing costs and funding costs.
- One residual area of some uncertainty concerns the extent to which, if at all, assessment of a claim's strength plays a role in determining whether proceedings should be opt-out rather than opt-in and how this aligns with the certification test and criteria such as practicability. The Supreme Court recently heard argument on this question, with judgment awaited.⁶⁹ Introducing prescriptive statutory rules now, whilst key questions are being resolved judicially, and before the CAT has the opportunity to apply whatever principles emerge from that process, would seem premature. The better approach is to let the case law develop and preserve the CAT's flexibility to apply principles to the facts of each case.
- By way of example:
 - Opt-in proceedings may work well where class characteristics make them viable and advantageous. For example: where representative bodies have strong industry connections facilitating opt-in take-up; where the class is small and homogeneous with substantial individual losses; where those class members are considered to have the time and resources to participate directly in proceedings and/or where opt-in participation provides evidential advantages (such as direct access to claimants' transactional data).
 - Understanding when opt-out is appropriate requires recognising what practical barriers it addresses. For businesses in particular, non-participation may reflect legitimate commercial considerations, such as relational concerns (avoiding any frictions in relationships with defendants, particularly in sectors where ongoing relationships are critical and defendants may be dominant/options limited), balancing resource constraints gathering historic transaction data that may no longer be readily accessible, the complexity of entering into individual engagements and litigation funding arrangements which may bring costs risk. Similar considerations may apply for public bodies, charities and other not-for-profit organisations in appropriate cases.⁷⁰
 - These concerns are not merely theoretical. The Government's 2012 consultation recognised that businesses "*face the additional complication of still having ongoing business links with the infringers*", addressing relational concerns.⁷¹ Research by the Federation of Small Businesses documents resource constraints, finding that smaller businesses "*do not have the resources (time, knowledge, labour, finance and bargaining power) to dedicate to dealing with a dispute*", with 40% reporting they "*put up with unfair contract terms because they felt that the supplier was too important to their business or*

⁶⁹ Case UKSC/2023/0172, *Michael O'Higgins FX Class Representative Ltd and another v J.P. Morgan Europe Ltd and Others*.

⁷⁰ See *Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc* [2025] CAT 60, para. 76.

⁷¹ BIS, [Private Actions in Competition Law: A consultation on options for reform - government response](#) (January 2013), para. 5.22.

too powerful to challenge".⁷² The World Bank has estimated that litigation costs in the UK may amount to approximately 46% of the claim value, illustrating the economic barriers to participation.⁷³ Most jurisdictions with opt-out collective action regimes do not operate parallel opt-in regimes, recognising these practical difficulties.

- Classes are often heterogeneous, comprising claimants of varying sizes and claim values. They can be "pyramid-shaped" with a small number of larger claims and a long tail of smaller claims. Rules which automatically exclude more sophisticated or larger class members from opt-out proceedings could create intractable problems: any threshold would be arbitrary and could generate litigation about categorisation, and excluding larger claims may render remaining claims economically unviable, thereby harming the smaller claimants the regime is designed to protect.
- The above points are most aptly illustrated by the most recent certification judgment by the President of the Tribunal this week in *Spottiswoode v Airwave Solutions Limited*, in which the Tribunal considered an argument by the defendants that the claim should be pursued on an opt-in rather than an opt-out basis. The Tribunal considered evidence provided by the class representative of the practical difficulties faced by organisations with limited resources in participating directly in an opt-in case, particularly where the sums involved may be relatively modest. Practicability was therefore a key consideration for the Tribunal in ruling that it was appropriate for the proceedings to be pursued on an opt-out basis, noting that there would otherwise be a significant impediment to access to justice for many class members.⁷⁴ It also noted that judicial efficiency may be a relevant factor in favour of a claim proceeding on an opt-out basis.⁷⁵

ADR, SETTLEMENT AND DAMAGES

Q16. Do you have any experience of involvement in ADR to resolve a loss suffered by consumers as a result of anti-competitive behaviour? If so, what kind of ADR have you engaged in and how common is this in your experience? If not, why not? What would make it more likely for you to consider this option in the future? To what extent does the prospect of engaging in ADR deter businesses from wrongdoing? How far do you believe that appropriate redress for class members can be achieved by ADR?

- ADR can achieve redress for consumers and businesses harmed by anti-competitive conduct and has in some cases been effective. The opt-out collective action regime

⁷² Federation of Small Businesses, [Tied up: Unravelling the dispute resolution process for small firms](#) (November 2016), pages 12-13.

⁷³ World Bank Group, [Doing Business - United Kingdom](#) (2020), page 53.

⁷⁴ *Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc* [2025] CAT 60, para. 79.

⁷⁵ *Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc* [2025] CAT 60, para. 78.

has seen settlements in the Boundary Fares proceedings⁷⁶ and the Maritime Carriers proceedings,⁷⁷ in addition to the recent *Merricks* proceedings.

- In our experience, however, the greatest hurdle to ADR has been a lack of defendant willingness to engage, which in turn undermines trust and confidence in the effectiveness of ADR. Defendants will typically show no willingness to consider settlement until the risk of an adverse judgment obtained through litigation becomes real. Engaging in litigation is therefore a necessary prior step to ensure the effectiveness of ADR. This has been observed even in circumstances where a defendant has entered into settlements for the same infringement in other jurisdictions, or has been found liable for the infringement by one or more regulators, but refuses to engage in ADR proceedings in the UK.
- In addition, the Tribunal's effective case management of litigation should also result in the necessary disclosure being ordered from defendants, which will enable sufficient clarity on both sides to engage in effective ADR. It may therefore be helpful for the Tribunal to direct the parties to engage in or consider ADR when proceedings are sufficiently advanced and building this into the case timetable, while ensuring that the ADR process does not become another tool for defendants to drive up costs. Such a mechanism would bear resemblance to the position in Australia, where, at an early stage in the class action proceeding, parties are required to take steps to establish the methods for disclosure that would assist with informed settlement discussions, and the court will make appropriate directions in relation to such disclosure.⁷⁸ The Australian system further provides that, after the close of pleadings in litigation, the relevant court will hold a case management hearing to investigate the possibility of an ADR process.⁷⁹
- The developing nature of the regime also means that there are still areas of complexity that are in need of clarification, such as how damages are quantified, and pass-on issues are resolved. It is expected that a maturing regime will grapple with these issues and, in due course, provide the clarity necessary to allow parties to apply the relevant rules and principles in ADR and achieve a fair negotiated settlement.
- The mere availability or prospect of ADR does not deter businesses from engaging in anti-competitive behaviour. Experience shows that defendants typically consider ADR or settlement only after litigation has advanced to a stage where the threat of an adverse court decision is credible.

Q17. Voluntary redress schemes were introduced by way of amendments to the Competition Act 1998 through the Consumer Rights Act 2015. They offer an avenue for redress by way of schemes voluntarily set up by businesses and approved by the CMA. Are you aware of the option of voluntary redress schemes and under what circumstances a voluntary redress scheme could be used? If yes, for what reasons would you or would you not be inclined to either use or advise the use of a voluntary redress scheme

⁷⁶ *Mr Justin Gutmann v First MTR South Western Trains Limited and Another*.

⁷⁷ *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others*.

⁷⁸ Federal Court of Australia, [Class Actions Practice Note](#), para.10.3.

⁷⁹ Federal Court of Australia, [Class Actions Practice Note](#), para.10.4.

following an adverse finding by the CMA? Noting that they have not yet been utilised, what reforms could be made to voluntary redress schemes to increase their use?

- We are aware that a business that has infringed competition law may apply to the CMA for approval of a voluntary redress scheme either during the course of an ongoing investigation or where an infringement decision has already been made.⁸⁰
- The business will need to appoint an independent chairperson who will in turn appoint an independent board which will devise the terms of the scheme, including the scope and level of compensation.
- Importantly, the business will need to determine the scope of compensation to be offered under the scheme and the chairperson and board are expected to devise a scheme with regard to those parameters. The business may in certain circumstances receive a discount on any penalty imposed by the CMA in respect of the infringement.
- To date, the voluntary redress scheme has not to our knowledge been utilised by any defendant. This is in spite of the benefits defendants would obtain through its use: avoiding or reducing the scope of costly litigation, a potential discount on any penalty imposed by the CMA in respect of the infringement, and reputational benefits.
- A central problem with the voluntary redress mechanism, beyond defendant unwillingness to admit to wrongdoing, is the complexity of devising a scheme, and the complicated position in which it places the regulator in approving the scheme. As noted by the CMA, the defendant applicant will need to decide on key parameters of the scheme, including:
 - whether the scheme will cover both direct and indirect purchasers, and how to address issues related to double recovery and pass-on (where the person or entity that suffered the direct harm passed all or some of the harm on to an indirect purchaser, such as though a higher resale price);⁸¹
 - whether compensation will cover only direct loss (such as higher prices) or also other losses, such as a reduction in sales because the victim was forced to increase its own sale prices as a result of having to pay higher prices to the defendant;⁸² and
 - whether redress will compensate only for purchases made from the parties to the infringement or also 'umbrella damages', which are losses caused by other participants on the market increasing their prices as a result of adapting their prices to the higher price set by the infringers.⁸³
- The chairperson and the board will then have the extremely complex task of determining the amount of compensation they consider appropriate, based on the factual and economic evidence provided and using an appropriate methodology. They will need to somehow produce a report determining the exact level of redress to be provided for each beneficiary. The CMA guidance states optimistically that it expects

⁸⁰ CMA, [Guidance on the approval of voluntary redress schemes for infringements of competition law](#) (CMA40), paras. 1.8-1.21.

⁸¹ CMA, [Guidance on the approval of voluntary redress schemes for infringements of competition law](#) (CMA40), para. 2.13.

⁸² CMA, [Guidance on the approval of voluntary redress schemes for infringements of competition law](#) (CMA40), para. 2.14.

⁸³ CMA, [Guidance on the approval of voluntary redress schemes for infringements of competition law](#) (CMA40), para. 2.14.

that the use of independent (economic and other) experts will be kept to a minimum necessary to assess compensation.⁸⁴ In practice, however, the Tribunal and courts have struggled with these complex calculations even with the benefit of extensive expert evidence and, in cases involving direct and indirect purchasers, submissions by the various affected victims. It is likely that the board and the CMA will require representation by the various victim groups and other expert input. There is a risk that the creation of a scheme would likely involve time and costs – including on the part of the CMA – and result in a voluntary scheme that undercompensates some, or indeed all, classes of victims.

- The approval of such a scheme also places the CMA in the invidious position of having to determine whether to approve a scheme that may not result in compensation for all classes of victim, such as where the defendant has determined that the scope of compensation should not include indirect purchasers (which are typically end-consumers). In other words, the CMA would need to decide whether to approve a scheme which only provides for compensation to businesses, and not consumers, or *vice versa*, and face the potential political repercussions of such a decision.
- These difficulties would become all the more pronounced if defendants were somehow immunised from all follow-on damages as a result of having a scheme approved. For example, where an approved scheme provides compensation for only the defendant's direct purchasers, immunity would prevent indirect customers (such as smaller downstream business or consumers) from bringing claims against the defendant, leaving them with no route for redress. In addition to shielding the defendant from having to provide redress for the harm it caused, this would also undermine deterrence.

Q18. Do you consider that additional alternative routes for redress could reduce the need for litigation? For example, could empowering the CMA to issue directions for redress reduce the need for private action?

For the reasons set out in our responses to Questions 16 and 17, we believe that ADR and voluntary redress schemes are additional redress options, alongside individual and collective private actions.

- Absent private actions, parties may not obtain the necessary clarity, in the form of disclosure and expert evidence, to enable effective ADR, and defendants are unlikely to feel obliged to engage in ADR without the real threat of litigation.
- Further, absent private actions, voluntary schemes may result in the CMA being forced into approving schemes that undercompensate victims or leave entire classes of victims in the cold without any means of redress for the harms suffered.
- In both scenarios, the deterrent effect of private competition enforcement would be lost.
- We do, however, very much welcome defendants being required to engage in ADR, which may help narrow issues in dispute and provides an opportunity to assess whether the costs of pursuing a collective action can be reduced or avoided. We are

⁸⁴ CMA, [Guidance on the approval of voluntary redress schemes for infringements of competition law](#) (CMA40), para. 2.63.

not aware of any defendant yet having agreed to engage with the claimant to seek to agree a collective settlement before an opt-out collective claim is pursued. It would be helpful if a mechanism existed under which the granting of such application stayed limitation in respect of the initiation of a claim as at present there is no way to do so.

Q19. What barriers do you consider there are to pursuing alternative routes to redress, such as ADR, voluntary redress schemes, or similar potential options outside of, or prior to, litigation? How could greater use of these alternative routes be facilitated?

- See our response to Question 16. There may be scope for the Tribunal to direct the parties to engage in or consider ADR when proceedings are sufficiently advanced, while ensuring that this ADR process does not interfere with the timetable to trial.
- It is important to note that the Tribunal has broad powers to review whether ADR has been undertaken in the course of (proposed) collective proceedings. In particular, the CAT Rules provide that:
 - the collective proceedings Claim Form must state whether the parties have used an ADR procedure;⁸⁵
 - at the first case management conference, the Tribunal may give directions as to a stay of proceedings while the parties attempt to compromise through ADR;⁸⁶
 - in considering whether to certify proceedings, in determining whether the claims are suitable to be brought, the Tribunal must take into account the availability of ADR, including the availability of redress through approved voluntary schemes.⁸⁷

Q20. Do direct financial, rather than cy-pres, damages deliver justice effectively? If not, what might alternatives look like?

- The two benefits of private enforcement are, firstly, the ability to provide redress to businesses and consumers that have been harmed by anti-competitive conduct, and, secondly, its contribution to the deterrent effect of the antitrust regime. Accordingly, permitting a defendant the windfall of retaining, in whole or in part, the benefits of its infringement would substantially undermine the deterrent purpose of private enforcement, at the expense of UK customers and to the detriment of the broader UK economy.
- It follows that direct financial compensation to those harmed by the infringement should be the primary objective of private enforcement. However, where direct compensation is not feasible or is impracticable, alternative measures, such as *cy-pres* distributions, that ensure the defendant is deprived of any benefits obtained through unlawful conduct, can also serve the regime's objectives by providing indirect compensation to

⁸⁵ CAT Rule 75(1)(g).

⁸⁶ CAT Rules 76(9)(e).

⁸⁷ CAT Rules 79(2)(g).

victims and preserving the law's deterrent effect. This is also likely to be increasingly important when considering appropriate methods for distribution.

Q21. What degree of influence, if any, do you consider litigation funders currently have over the resolution of a case? For example, whether/when to settle or pursue an award of damages. We are aware that the CJC has made recommendations in relation to the level of influence funders should have over settlement in particular in its report on litigation funding (for example, recommendation 12) but would like to explore perspectives on to what extent this is currently an issue in cases before the CAT.

- Funders in the UK are not able to exercise control over litigation and, as a matter of principle, should not seek to influence its resolution. Rather, there are robust reporting mechanisms in the funding agreement. It is not appropriate for a funder to exercise control over litigation or influence its resolution. Such control would interfere with the relationship between solicitor and client. The solicitor must act in the best interests of the client and the client must be free to make decisions with respect to the litigation as it sees fit.
- In our experience as a firm, funders are very well aware of this requirement and we have not encountered issues in which funders have sought to involve themselves in any way in the conduct of the litigation.
- As noted in our responses to Questions 7 and 14, in the event that a conflict arises between a class representative and their funder, most funding agreements will contain agreed dispute resolution mechanisms, and the Tribunal will review the wording of dispute resolution clauses and require amendments where necessary to clarify their operation.

Q22. What safeguards do you consider could be implemented to mitigate the risk of litigation funders inappropriately influencing a case, or to help identify where such influence has been exerted?

- We refer to our responses to Questions 7, 14, and 21. In our experience, the risk of litigation funders seeking to inappropriately influence a case has simply not materialised and the solicitor is under a duty to act in the best interests and to only act on instructions from the client.
- We do not believe any safeguards are required against a risk that has not materialised in practice. We would caution that any safeguards proposed by firms representing defendants should be carefully scrutinised. Such firms typically lack direct experience with litigation funders in the context of opt-out collective proceedings, and their suggested measures may inadvertently introduce inefficiencies or ultimately impede business and consumer victims of unlawful conduct from pursuing funded claims.

Q23. Should remedies other than compensatory damages be available? If so: Why? What types of remedies? Should the availability of restitutionary damages be considered?

- Restitutionary damages aim to strip a defendant of the gains made through the commission of the wrong. This may be appropriate where the benefit or profit obtained by the defendant exceeds the loss or harm caused to the claimant, such that compensation for harm alone would still allow the defendant a windfall. Given that the purpose of the regime is to enhance deterrence, there is no reason in principle why restitutionary damages should not be available.
- The law already allows for restitutionary damages. In *Merricks*, the Supreme Court held that the ordinary compensatory principles in civil damages claims “*is expressly, and radically, modified*” under the collective opt-out regime.⁸⁸ That restitutionary damages are a possible remedy in opt-out collective proceedings was expressly recognised by the Court of Appeal, which has noted that it may be possible for the Court to apply less standard remedies, for example by ordering a disgorgement of the defendant’s profits, as the profit made by the wrongdoer may amount to a proxy of the loss suffered by the class.⁸⁹
- Following the same reasoning, there is no reason in principle why exemplary damages should continue to be prohibited in collective proceedings. Exemplary damages may be appropriate where a defendant has calculated, with cynical disregard for another’s rights, that it will be worthwhile to commit a wrong because the gain will be greater than an award of compensatory damages.⁹⁰ Claims for exemplary damages in respect of competition claims were available under UK law,⁹¹ but were subsequently prohibited by the EU Damages Directive and UK law was accordingly amended on implementation of the EU Directive. Most recently, the Digital Markets, Competition and Consumers Act 2024 re-introduced the ability of the UK courts and Tribunal to award exemplary damages in private competition claims,⁹² but not in respect of collective proceedings.⁹³ There is no logical reason to maintain this distinction and we propose that the remedies available under private enforcement should be made uniform and that exemplary damages should become available in collective proceedings.

Q24. What factors might incentivise you to settle or advise settlement rather than continuing to judgment before the CAT?

- In our experience of bringing competition claims since 2009, both prior to and since the introduction of the opt-out collective action regime, we would always advise a claimant to accept a fair and reasonable settlement offer at an early stage rather than face the delays, costs and uncertainties of litigation.
- In non-collective cases we have good experience of achieving settlements voluntarily between the parties, and have reached trial in only a very limited number of cases.

⁸⁸ *Mastercard Incorporated and Others v Walter Hugh Merricks CBE* [2020] UKSC 51, para.58.

⁸⁹ *Mr Philip Evans v Barclays Bank PLC and Others* [2023] EWCA Civ 876, para.105.

⁹⁰ *Rookes v Barnard and Others* [1964] AC 1129.

⁹¹ *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19.

⁹² Digital Markets, Competition and Consumers Act 2024, section 126.

⁹³ Competition Act 1998, section 47(C)(1).

- However, in collective cases, in our experience, the greatest hurdle to achieving a solution through settlement has been the lack of defendant willingness to engage in alternative dispute resolution. It may be that this improves as we start to see more judgments from the Tribunal which give more certainty to all parties around the regime.
- We do believe that it would be helpful for the Tribunal to direct the parties to consider or engage in ADR when proceedings are sufficiently advanced and to actively consider what that crucial points in dispute are and what information is needed to improve the prospect of settlement. Even if such ADR does not ultimately result in a settlement, the process may result in a narrowing of the issues in dispute between the parties and an accordingly shorter and less costly trial. Conversely, care would need to be taken to ensure that such an ADR process does not interfere with the timetable to trial or otherwise provide a tool for defendants to drive up litigation costs. Allowing a short, focussed period in the timetable at an appropriate stage would be sensible, although timing of this is likely to vary from case to case.

Q25. To what extent do you think it would be beneficial for the CAT to have increased oversight of settlement/a stronger role in approving settlement agreements between parties?

- Under the regime, the CAT already has a pivotal role in overseeing and approving settlement agreements. This oversight function stems from the twofold purpose of the collective settlement regime, which is to encourage settlement while also protecting the interests of the class.⁹⁴ We accordingly believe that the CAT already has a significant role and that there is no obvious basis to further extend it.
- An application for approval of a proposed collective settlement must be made to the Tribunal by the settling parties, and the Tribunal may make an order approving the settlement only if it is satisfied that the settlement terms are just and reasonable.⁹⁵ In determining whether the terms are just and reasonable, the Tribunal must take account of all the relevant circumstances, including the amount and terms of the settlement, the (estimated) number of persons likely to be entitled to a share of the settlement, any opinion by an independent expert and any legal representative of the applicants and the views of any class member.⁹⁶
- The Court of Appeal and the Tribunal have emphasised that the Tribunal has a broad discretion to determine how any settlement should be dealt with in terms of distribution to class members and payment of any return to the funder.⁹⁷ The Tribunal has accordingly stated that not only the terms of the settlement but also the distribution arrangements require approval of the Tribunal, which may require amendments to the return to the funder provided by the litigation funding agreement.⁹⁸ In other words, the

⁹⁴ *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd (WWL/Eukor and K Line Collective Settlement)* [2025] CAT 4, para. 20.

⁹⁵ Competition Act 1998, Section 49A.

⁹⁶ CAT Rule 94(9).

⁹⁷ *Mr Justin Gutmann v Apple Inc and Others* [2025] EWCA Civ 459, paras. 93-97; *Walter Hugh Merricks CBE v Mastercard Incorporated and Others (CSAO Application)* [2025] CAT 28, para. 167.

⁹⁸ *Walter Hugh Merricks CBE v Mastercard Incorporated and Others (CSAO Application)* [2025] CAT 28, paras. 116-119.

Tribunal's supervisory role on settlement is such that it can rewrite a commercial agreement. This is what occurred in *Merricks*, where the funder was unsuccessful in persuading the Tribunal in its attempt to obtain a larger share on distribution, and the Tribunal awarded the funder a return on investment which it thought just and reasonable in the circumstances of that case.⁹⁹

- Given this very broad oversight by the CAT, it is difficult to envisage how the CAT's role in this respect could be enhanced any further and our view is that this is not necessary.
- However, it may be worth reviewing the settlement process to consider whether it could be foreshortened in appropriate cases, particularly where proceedings are close to trial, in order to preserve the possibility of settlements at a late stage.

Q26. What should happen to unclaimed funds from a settlement agreement?

- Currently only one charity has been prescribed by legislation to receive unclaimed damages in the event of a judgment, the Access to Justice Foundation. It is our understanding that the foundation can, however, act as a conduit to other charities.
- It may be appropriate to consider the ability to allow the parties to identify a charity, which may be more closely aligned with the interests of the class or the nature of the specific proceedings, such that undistributed damages could be donated to a related cause. In addition, if defendants are able to identify a specific charity as part of a settlement agreement, that may further encourage defendants to come to the negotiating table.
- Similarly, keeping the possibility that some amount of the unclaimed funds revert to the defendant could motivate defendants to consider settlement in appropriate cases.
- In light of the way that commercial funding terms and costs currently restrict the bringing of lower value claims (however meritorious) we would very much support the establishment of a fund such as that used in Canada for which applications for funding could be made on lower value claims where commercial funding costs are too expensive or not available.

DISTRIBUTION OF FUNDS

Q27. How are funds distributed among consumers? How could this be improved?

- Where the Tribunal makes an award of damages, it will also give direction as to how each class member's share is to be calculated, and the CAT Rules give examples of the types of directions the Tribunal can make, such as a formula or the appointment of an independent third party to determine the claims or any disputes in respect of the share of the damages received.¹⁰⁰ The Tribunal's primary concern will be to ensure that the distribution method proposed by the class representative is fair to the interests of all class members.¹⁰¹

⁹⁹ *Walter Hugh Merricks CBE v Mastercard Incorporated and Others (CSAO Application)* [2025] CAT 28, paras. 188-190.

¹⁰⁰ CAT Rule 92.

¹⁰¹ CAT Guide, para. 6.83.

- On settlement, as noted in response to Question 25, the collective settlement application must specify how any damages received under the settlement are to be distributed, and the Tribunal will need to approve the proposed distribution arrangements. The Tribunal has clarified that the settling parties must provide the Tribunal with “full and frank disclosure”: the Tribunal must be able to understand with clarity the mechanics of the settlement, the likely amounts that will be apportioned to stakeholders relative to class members, the relative prioritisation between class members and stakeholders and where class members’ interests are subordinated to the interests of stakeholders.¹⁰² Further, the Tribunal has emphasised that it is of critical importance that it be provided with empirical or survey evidence of the likely take-up by class members.¹⁰³ Again, any class member may apply to make submissions at the collective settlement hearing.
- Beyond the legal standard, the practicalities of distribution are yet still to be fully explored. This is because, to date, the young regime has only resulted in four settlement rulings across three collective proceedings, only one of which has reached the distribution stage. Accordingly, claimants, class representatives, and their third party class action distribution managers are still learning how to best communicate collective awards to class members. Given the infancy of the regime, there are a number of challenges to distribution at this early stage:
 - The noticing requirements require a large amount of legal information to be communicated to a non-legal audience of class members which has the risk of preventing the use of plain language.
 - A lack of general awareness among the public of their rights under the collective regime. If people are unaware of their right to compensation, they are less likely to seek out updates on ongoing proceedings and may view an unsolicited offer of compensation as suspicious. This can be remedied by the regime bedding in and future awards being effectively communicated. However, a government-sponsored central portal providing information on certified collective proceedings and their distribution schemes would be a definite asset – as this would significantly assist in class members being able to verify the legitimacy of a settlement fund.
 - Confusion between ‘group claims’ in which a claimant is being invited to join a claim directly and which has yet to progress and the opt-out collective regime in which awards are available for distribution. As above, this may be assisted by use of a government website for validation purposes and a growing awareness as the regime fully develops.
 - As cases reach distribution, we believe there will be increasingly innovative methods for distributing damages. These approaches should not simply attempt to copy what has historically been done in other jurisdictions, but should also embrace innovative solutions, such as through new technologies for example through credit amounts which can be used for certain products or

¹⁰² *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd (WWL/Eukor and K Line Collective Settlement)* [2025] CAT 4, para. 65.

¹⁰³ *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd (WWL/Eukor and K Line Collective Settlement)* [2025] CAT 4, para. 65.

services. Where appropriate, new ways of distribution, such as through *cy-pres* application, should likewise be considered.

Q28. Are consumers made sufficiently aware of proceedings/their right to claim their share of damages by current notice requirements? If not, how could awareness be improved?

See our response to Question 27. A maturing regime will result in more damages awards and settlements, and that will in turn result in a virtuous circle of increased awareness and increased willingness by consumers and businesses to come forward to take up their share of the damages awarded. However, it may be worth (i) considering a government-sponsored central portal to provide notice and alert class members of relevant distributions schemes, and (ii) reviewing the information which needs to be provided to class members, to ensure that notices are comprehensible to a non-legal audience.

Q29. The quantum of damages can vary from case to case. For example, out of the recent Merricks settlement of £200 million, £100 million was set aside for class members. Of this, individual class members can expect to receive approximately £45 each and no more than £70. To what extent do you consider that this return is meaningful for individual class members?

- We believe that an award of this level should be a meaningful return for individual class members - subject to distribution being sufficiently straightforward - especially when viewed in the context of, for example, the minimum hourly wage.
- Whether an individual return of up to £70 is meaningful will ultimately depend on the individual class members and the wider economic situation. This was recognised by the Tribunal, which held that it did not consider an average claim value of £16-17 per consumer to be such a small sum to conclude that take-up was likely to be limited. This was the case given *“the current economic climate, and given the cost of living challenges faced by many consumers”*.¹⁰⁴
- In addition, while some claims may result in a lower return to individual class members, individuals may be class members of multiple collective proceedings, and the cumulative effect to an individual of receiving compensation across a range of infringements (particularly infringements affecting large proportions of the population) may result in a significant overall sum.
- Even where a claim results in a low return to individual class members, there is still a benefit to consumers and businesses in the form of having their rights vindicated, ensuring that the unlawful conduct is brought to an end where it is ongoing (as may be the case in standalone claims), and reinforcing the deterrent effect of UK competition law. Recent polling has shown that 87% of respondents considered it important that

¹⁰⁴ *Consumers’ Association v Qualcomm Incorporated (Application for a Collective Proceedings Order)* [2022] CAT 20, para. 106.

consumers have access to legal actions in the Tribunal, and that this very high level of support applied regardless of party voting intention.¹⁰⁵

Q30. What should happen to unclaimed or residual damages? Should different expectations be applied to settlements?

- As explained in our response to Question 26, in the context of settlement discussions, defendants may be persuaded to consider settlement if they are able to identify a charity that would be the beneficiary of any unclaimed damages or to agree to some degree of reversion to the defendant.
- However, those considerations do not apply where the Tribunal has awarded damages in favour of the class members. In that context the current rules prohibiting reversion of undistributed damages to defendants, and that such damages will be paid to the designated charity – currently the Access to Justice Foundation – are appropriate.¹⁰⁶

CLOSING QUESTION

Q31. Is there anything else that you would like to share regarding the operation of the opt-out collective actions regime?

- As explained in a number of questions above, the Tribunal has actively engaged in its supervisory role on certification and has begun to build up a body of case law to guide parties through at least the initial phases of an opt-out collective proceeding. To provide clarity, it may be worth updating the CAT Rules and Guide to codify this guidance. In particular, this could cover the nature, scope, and detail of the proposed methodology the claimant must present on certification (also known alternatively as the *Microsoft* or *Pro-sys* test), and whether there is in all cases a need for a consultative panel and the criteria the claimant should consider in deciding whether to appoint a panel and the support they need.
- The Tribunal should also be encouraged to assist in controlling costs, such as by introducing costs capping and budgeting for defendants. For example, in a recent case management ruling, the Tribunal required that going forward both parties would need to provide the Tribunal with updated costs budgets.¹⁰⁷ In addition to ensuring that costs are kept at a proportionate level, this also helps to ensure equality of arms in a case where the deep-pocketed defendant is able to outspend the class representative, and safeguard the litigation from being turned into a war of attrition.
- The Tribunal should also bear in mind the costs impacts of its case management decisions. For example, where separate proceedings are brought by different claimants against the same defendant(s), raising similar issues, it may appear logical for the Tribunal to jointly manage these separate proceedings together. However, in practice, this can cause costs to spiral. That is because trial dates that had already

¹⁰⁵ Stack Data Strategy Polling for ILFA, polling of June 2025: [June 2025 - Third-party litigation \(BPC\).xlsx](#).

¹⁰⁶ CAT Guide, paras. 6.88-6.89.

¹⁰⁷ *Bulk Mail Claim Limited v International Distribution Services Plc* [2025] CAT 56, paras. 70-72.

been set in one proceeding would need to be rescheduled and pushed back, and because – going forward in the proceedings – different parties would now need to expend time and costs weighing in on what would otherwise have been unrelated applications and hearings.

- Additional lowering of costs can be achieved by the Tribunal enforcing discipline on defendants in cases involving multiple co-defendants, for example by requiring those defendants to save costs by working together/sharing experts and/or counsel where possible. Currently, separate defendants may each instruct their own legal team, and may try to instruct their own expert economists, resulting in a duplication of work and costs, including on behalf of the class representative, who will need to respond to each defendant separately, and the Tribunal, which will need to spend more time on the different sets of arguments. The Court of Appeal has vindicated the use of joint expert evidence in competition claims, finding that even the existence of a material conflict of interest between the defendants is “*no trump card*” to instructing a joint expert.¹⁰⁸
- Finally, and as proposed in our response to Questions 8, we suggest that a review of the regime should also examine the merits of extending the opt-out collective actions regime to allow for collective redress outside of competition harms, for example in respect of consumer claims, as was under consideration when the Consumer Right Act 2015 was originally considered. At present, the only route for such claims are actions under CPR Rule 19.8. Although the UK Supreme Court appeared to endorse the principle of such claims in *Lloyd v Google LLC*,¹⁰⁹ an effective regime has not ensued. That, we believe, is prejudicial both to consumers, who do not benefit from redress, and businesses, which do not benefit from effective deterrents as to market-wide abuses. Experience seems to be showing two of the main alternatives to opt-out collective claims, namely mass opt-in group claims and redress schemes, can be slow, expensive and difficult to navigate. We believe that many of the features of the competition collective opt-out regime would beneficially inform a broader collective claims regime, including having a PCR to represent the class and mechanism for the allocation and distribution of recoveries.

¹⁰⁸ *PSA Automobiles SA & Others v Autoliv AB & Others* [2024] EWCA Civ 609, para. 49.

¹⁰⁹ *Lloyd v Google LLC* [2021] UKSC 50, para. 80.

PART III - CONCLUSION: WHY THE OPT-OUT COLLECTIVE REGIME MATTERS

In the context of litigation, we are still at an early stage in the regime and only beginning to see the first few cases reach trial and/or settlement. The initial years have inevitably seen a number of appeals as interpretation of the rules and scope of the regime has been established. The Tribunal is making good progress in starting to establish procedures and creating more certainty for all those involved. We do not think it would be helpful at this stage to further change the rules, which would inevitably result in further uncertainty, scope for further appeals and detract from the development of the regime to date which would at this point be a backward step. Rather, any review should allow the regime to fully develop so a meaningful analysis can be carried out.

The opt-out collective regime is the only realistic pathway to redress for dispersed, low-value but systemically significant harms. By aggregating claims at scale it puts parties on a level playing field when individuals or small businesses cannot litigate alone, it ensures that unlawful gains are stripped, and provides a credible deterrent that complements public enforcement.

Whilst the focus is often on the benefits for consumers; it is often overlooked that a large proportion of the claims are also on behalf of businesses. Out of the 28 claims certified by the CAT to proceed to trial, 15 (54%) are on behalf of a business class or a mixed business/consumer class. Furthermore, competition law which is being enforced encourages everybody to play by the rules and ultimately this fosters an environment where there can be innovation and growth by businesses.

Regulators can only do so much to foster pro-competition policy as they have limited funding and their own priorities. So, there is an important role for private enforcement to play for access to justice. Anti-competitive behaviour, whether in the form of price fixing or abuse of dominance, is a tax on the economy. That money, unduly paid by consumers or business, is not going into the economy nor innovation. Collective actions can put some of the unlawful profits made by infringers back into the economy.

Preserving a viable funding ecosystem, subject to robust, existing court oversight, is critical to maintaining the viability of the regime. Hard legislative caps on funder returns would not protect consumers but would risk funders deciding that claims are not viable. Rather, parties should be given flexibility to make terms aligned to the circumstances of the case, including via a reversal of *PACCAR* to remove the uncertainties it created and to remove the constraints under which funding can be agreed. As also recommended by the CJC, such a reversal would result in increased certainty on funding returns, to the ultimate benefit of class members.

The better course is light-touch refinement: maintain and codify the CAT's case-by-case scrutiny of funding and settlements, permit DBAs in opt-out claims, and explore an Access to Justice fund to provide an alternative means to bring claims where commercial funding is unavailable.

Alongside measured expansion of scope beyond competition cases, these steps will increase access to justice, reinforce market integrity, and keep the UK competitive as a venue for fair, efficient resolution of mass harms.