

## Collective proceedings regime: first damages awarded for abuse of a dominant position

In a historical first, the Competition Appeal Tribunal (CAT) has found a defendant liable in a collective action and handed down a monumental damages award (*Dr Rachael Kent v Apple Inc and others* [2025] CAT 67). Dr Rachael Kent represents a class of approximately 36 million UK iPhone and iPad users, which include consumers and UK businesses. The CAT upheld all of Dr Kent's allegations that Apple Inc and Apple Distribution International Ltd (together, Apple) had abused their dominant position in the markets for the distribution of iOS apps and in-app payment services.

### The claim

Dr Kent alleged that Apple abused its dominant position in two separate markets by:

- Foreclosing all competition on iPhones and iPads from rival app stores and in-app payment services providers, and tying Apple's payment system to its App Store.
- Charging excessively high and unfair commission rates of up to 30% on the price of paid-for apps, subscriptions and in-app purchases of digital content.

Class members suffered losses as a result of this conduct for a period of at least ten years.

### Market definition and dominance

The CAT commenced its analysis from the standard starting point of identifying the focal product that corresponds with the product which is the subject of the abuse allegation and then testing whether the market is broader than that focal product. Applying a traditional hypothetical monopolist test, the CAT accepted Dr Kent's market definition of the two relevant markets; that is:

- iOS app distribution services.
- An aftermarket for iOS in-app payment services.

It rejected Apple's submission that the relevant market was a broader systems market that encompassed all channels where developers and consumers can conduct transactions for digital goods and services, including Android, PCs and gaming consoles. The CAT also found that the contractual

and technical restrictions imposed by Apple effectively required all distribution of iOS apps to take place through the App Store, which made it difficult to accept Apple's argument that those arrangements did not amount to the creation of a separate market.

Similarly, the CAT considered that there was a clear factual basis to distinguish between distribution services for paid-for apps and the services that facilitate payments for apps, subscriptions and in-app purchases, and it found that these constituted a separate market.

The CAT held that Apple was dominant in both markets, given its 100% market share, the absolute barriers to entry that it had created through the restrictions imposed on developers and the absence of evidence of any sufficient external competitive pressure.

### Foreclosure

Dr Kent alleged that Apple had foreclosed competition through:

- Exclusive dealing, by requiring that iOS apps could only be distributed through the App Store and that App Store users could only use Apple's payment solution when making purchases of paid-for apps, subscriptions and in-app purchases of digital content.
- Tying the use of its payment system to its App Store.

Apple argued that these restrictions served to protect its intellectual property rights (IPR) rights and that it was not anti-competitive to impose limits on the use of those rights. Relying on EU jurisprudence, specifically the case commonly known as *Magill*, Apple argued that competition law only requires the compulsory licensing of IPR in exceptional circumstances, reflecting the principles of freedom of contract and property ownership, and that those exceptional circumstances had not been met (*Radio Telefis Eireann v Commission C-241-242/91P*).

The CAT rejected this argument. In line with the approach adopted by the European Court of Justice (ECJ) in the case commonly referred to as *Google Shopping*, the CAT noted that the *Magill* line of cases, and therefore the

exceptional circumstances that would justify the imposition of an obligation to provide access to a competitor's infrastructure, only apply where the dominant undertaking has developed infrastructure for its own business needs and reserved its use to itself (*Google LLC and Alphabet Inc v European Commission C-48/22*).

However, where, as in *Kent*, the dominant undertaking has developed the infrastructure for use by others and is allowing others to use that infrastructure but on terms that are less favourable than the terms on which it makes that infrastructure available to itself, *Magill* does not apply. The CAT held that the restrictions had "nothing to do with reserving Apple's property rights to itself. They instead prevent any effective competition in relation to iOS in-app payment services."

In respect of exclusive dealing, the CAT concluded that Apple had foreclosed both markets as, without the restrictions, there would have been competitive entry and Apple's market share would have reduced to an appreciable extent as a result. The CAT considered that a potential reduction of market share even by only 10%, as was conceded by Apple's expert when considering what might occur in the counterfactual (and there was credible evidence that it might fall as low as 50%), was "quite sufficient" to make out foreclosure. Importantly, the CAT did not consider the Android ecosystem to be a reliable comparator.

In addition, the CAT found that the tying abuse was clearly made out: the App Store and Apple's payment system were separate products, there was separate demand for the two products, Apple did not give developers a choice to obtain the tying product (the App Store) without the tied product (the payment services) and, consequently, Apple had eliminated all competition.

The CAT rejected Apple's argument that its abuses were justified by virtue either of efficiencies or objective necessity. It concluded that the efficiency defence was unavailable to Apple as a matter of principle as the conduct in question eliminated effective competition on the market. The CAT noted that, even had this not been the case, it was not satisfied that the value of the

efficiencies asserted by Apple outweighed the harm arising to users and Apple's evidence went "nowhere near the causal and quantitative specificity that is required in order to establish an efficiencies defence". While accepting that there is evidence that iOS is a superior offering to users who are concerned about safety, security and privacy, the restrictions were neither necessary nor proportionate to deliver the benefits that Apple had alleged. Indeed, the CAT found that those benefits were more likely to be delivered through the very competition that Apple had foreclosed.

### Excessive pricing

In assessing whether the commission charged by Apple was excessive and unfair, the CAT applied the accepted two-limb test set out in *United Brands v Commission* (C-27/76).

Under the first limb, the CAT accepted Dr Kent's profitability analysis, which showed that there was "a significant and persistent difference" over the claim period between the price and costs of App Store services, and found that the commission was excessive. The CAT rejected Apple's arguments that the integrated nature of the Apple products and services made it impossible to accurately ascertain the costs of the App Store and thereby assess its profitability. The CAT noted that it would be "very reluctant" to accept any argument to the effect that the complexity of analysing profitability should shield a business from legal scrutiny, finding that Dr Kent's expert's approach was reliable and plausible.

Under the second limb, the CAT accepted that the commission was both:

- Unfair in itself, as the commission was found to be considerably greater than that which would be set in conditions of workable competition, and that Apple's high profitability was not fully explained by the economic value of the App Store's services.
- Unfair by reference to comparators, as the most useful comparators were considered to be from the PC app distribution market, where commissions ranged from 12% to 20%.

### Overcharge

Having found Apple's conduct to be illegal, in respect of both abuses the CAT held that

## Relevance of regulatory findings and foreign determinations

In *Dr Rachael Kent v Apple Inc and others*, the Competition Appeal Tribunal (CAT) had before it a wealth of findings from investigations by regulatory authorities and courts around the world ([2025] CAT 67). These other findings included the Competition and Markets Authority's 2022 market study into mobile ecosystems and the European Commission's 2024 *Spotify* infringement decision ([www.gov.uk/government/publications/mobile-ecosystems-market-study-final-report](http://www.gov.uk/government/publications/mobile-ecosystems-market-study-final-report); *Apple/App Store Practices AT.40437*).

In *Kent*, although Apple argued that the conclusions from those other investigations were inadmissible, the CAT held that it would be wrong to simply discard the findings, given that they were produced by highly qualified and competent administrative bodies. The CAT accordingly adopted a cautious approach: while it focused on the evidence before it, it used the materials from those other investigations as a reference point for consistency and to fill evidential gaps. However, the CAT was clear that it did not rely on these materials in coming to its decision in *Kent*.

the relevant counterfactual required the removal of the restrictions and all of their effects. The CAT rejected Apple's argument that it required only the removal of the restrictions at the start of the claim period without also removing the effects, as this would have conferred on Apple a legacy benefit from its conduct because it would have taken time for the effects of Apple's abuses to erode away and for competition to establish in the affected markets. The CAT therefore found:

- In the market for iOS app distribution services, based on the comparator commission rates and adjusting for Apple's premium brand and market position, a counterfactual commission of 17.5%.
- In the market for iOS in-app payment services, based on the headline commission rate of established payment systems platforms, a counterfactual commission of 10%.

The overcharge was accordingly the difference between the commission that Apple actually charged and the two counterfactual rates.

### Pass-on from developers to users

The CAT then had to determine how much of that overcharge was passed on by developers to iOS users, as developers take the commission into account when setting their prices for paid-for apps, subscriptions and in-app purchases of digital content. Relying on a myriad of points, including economic theory and evidence from the European

Commission's 2024 infringement decision in *Spotify*, and applying a broad axe to account for the range of approaches adopted by app developers, the CAT determined that 50% of the overcharge was borne by developers, and 50% by iPhone and iPad users (*Apple/App Store Practices AT.40437*) (see box "Relevance of regulatory findings and foreign determinations").

### Interest

The general position is that successful claimants will be compensated for being kept out of their money at a borrowing rate, on the assumption that it will have been necessary to finance losses by way of borrowing. The CAT has discretion on what to award and accordingly awarded interest at 8%, as advocated by Dr Kent, as this represented the rate of borrowing for private individuals for unsecured loans of between £3,000 and £5,000, based on Bank of England data.

### Key takeaways

The CAT's landmark judgment provides valuable clarity across a range of issues, both for collective actions and for competition damages claims more generally.

**Magill distinguished.** The *Magill* line of cases applies to an extremely narrow set of factual circumstances and is not a broader shield against scrutiny for a potential abuse of dominance. This is entirely consistent with the ECJ's reasoning in *Google Shopping*. If Apple had been correct in its submission that it was necessary to establish the existence of exceptional circumstances before it could be required to change the scope of its licences to

open its App Store and tied payment system to competition, it would have created an extreme position. On that interpretation of the law, any undertaking that has created a powerful ecosystem and holds some relevant IPR could prevent the application of competition law to the manner and terms on which it operated that ecosystem. The CAT recognised that this clearly cannot be the law. It has always been the case that there are circumstances where the protection of an IPR can be overridden by the requirement for fair competition.

**Excessive pricing is abusive.** Excessive pricing is not a form of abuse that is limited to pharmaceutical markets. Indeed, *Kent* is a paradigm example of this type of abuse in a digital market. Even the world's best-known brands cannot explain away unlawfully high

charges on the basis of brand value alone, or unevicenced or unquantified user benefits. For large multi-product businesses, it is not a defence to a claim of excessive pricing to allege that it is simply too difficult, or not done in the normal course of business, to allocate costs and assess profitability. Businesses must use their best endeavours to perform a meaningful allocation of costs and revenues, using whatever information is available.

**Collective enforcement.** Ex post private competition law claims and the collective proceedings regime are essential tools for holding big technology companies to account. While legislation such as the Digital Markets, Competition and Consumers Act 2024 may provide a guide for their future conduct, private enforcement remains a critical pathway to

hold them responsible for losses caused by their actions. As the CAT astutely noted: "anti-competitive conduct may never be effectively restrained in the future if wrongdoers cannot be brought to book by the masses of individual consumers who may bear the ultimate loss from misconduct which has already occurred" and Dr Kent's claim "reflects the underlying philosophy of the collective proceedings regime, which allows consumers to aggregate claims which would not otherwise be economically viable, so they can be pursued, in the interests of redress and as a deterrence for anti-competitive behaviour".

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