



Bar Council response to DBT call for evidence on the Opt-out Collective Proceedings Regime

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business and Trade's call for Evidence on the Opt-out Collective Proceedings Regime.¹ The response has been prepared by members of the Bar Council European Committee, among them barristers who are specialists in competition law, and who have acted for both Claimants and Defendants in competition cases, including class actions.

Introductory observations/ Question 31

2. The Consultation Document rightly notes that the opt-out collective proceedings regime ('the CPO Regime') was introduced to remedy a failure in the UK's civil justice system to offer effective redress for infringements of competition law. It is important to note that the CPO Regime has not yet reached full maturity. While there have been a handful of settled cases (*McLaren*, *Gutmann*, *Merricks*) and one substantive decision (*Le Patourel*), many substantial claims have been certified but not yet resolved. There is accordingly not yet a sufficient evidential basis on which to reach a definitive view on the merits and demerits of the regime.

3. The CPO Regime has undoubtedly allowed a greater number of claims to be brought on a more cost-efficient aggregated basis, with the benefit of funding and insurance cover from the private market, which 'de-risks' the claims process. It is also being used, backed with Government funding, for public sector entities to recover allegedly excessive payments paid under PFI or other procurement contracts (*Airwave*). This serves potentially to reduce the burden on UK regulators to enforce competition law, which would come at greater cost to the taxpayer, and funnels recovery directly into the pockets of those that have suffered loss. The aggregated basis for opt-out collective claims also makes it easier (and less costly) to prove harm and loss to the class as a whole, without the need for lawyers to incur higher costs on book-building, or to prove the loss caused to each individual claimant. As such, if used properly, it is a cost-effective vehicle to bring claims on an aggregated basis for significant harm caused by anti-competitive conduct.

¹ <https://www.gov.uk/government/calls-for-evidence/opt-out-collective-actions-regime-review-call-for-evidence/opt-out-collective-actions-regime-review-call-for-evidence>

4. It is important to recall that the CPO Regime was introduced to bridge a gap in private law enforcement of competition law infringements, which was a feature not simply of the UK but of the wider Member States of the European Union at the time. The introduction of Council Regulation (EC) No. 1/2003,² the Modernisation Regulation, was intended to decentralise the enforcement of EU competition law, in part to address ‘the mystery of the reluctant plaintiff’³ and relieve some of the burden which the centralised regime of enforcement imposed on the EU Commission. But while the number of private cases has increased, there was still an absence of successful claims (particularly for abuse of dominance and standalone infringements). The direct effect of the competition law provisions was recognised by the Court of Justice of the European Union (‘CJEU’) many years ago.⁴ The House of Lords recognised the availability of damages in principle in the 1980s in Garden Cottage Foods Ltd v. Milk Marketing Board.⁵ But it took a further 20 years before an award of damages was in fact made. In Crehan v. Inntrepreneur Pub Company⁶ the Court of Appeal awarded Mr. Crehan £131,336 in damages for infringement of Article 101 TFEU, but that was overturned on appeal to the House of Lords in Inntrepreneur Pub Company v. Crehan.⁷

5. The decision of Etherton J. in Attheraces Ltd v. The British Horse Racing Board⁸ briefly became the first example of an English court making a finding of anti-competitive behaviour under Article 102 TFEU. Etherton J was prepared to grant relief in principle. But that decision was overturned by the Court of Appeal in February 2007.⁹ The outcome confirmed a pre-existing trend that enforcing putative rights under the EU competition provisions was an uphill struggle. As the Court of Appeal said in Attheraces at [7]:

“The nature of these difficult questions suggests that the problems of gaining access to essential facilities and of legal curbs on excessive and discriminatory pricing might, when negotiations between the parties fail, be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers. The adversarial procedures of an ordinary private law action, the limited scope of expertise in the ordinary courts and the restricted scope of legal remedies available are not best suited to helping the parties out of a deadlocked negotiating position or to achieving a business-like result reflecting both their respective interests and the public interest. These are not, however, matters for decision by the court, which must do the best that it can with a complex piece of private law litigation.”

² OJ [2003] L No. 1, p. 1, 4.1.03; [2003] 4 CMLR 551; as amended by Regulation (EC) No. 411/2004 (OJ [2004] L No. 68, p. 1, 6.3.2004).

³ The “mystery of the reluctant plaintiff” was a reference by J. Maitland-Walker at a conference in London, 1982, cited in Enric Picañol, *Remedies in national law for breach of Articles 85 and 86 of the EEC Treaty - a Review*, Legal Issues of European Integration, Deventer No. 2 (1983) 1 at page 2. Comprehensive reasons why there were not more claims under the old regime were provided by John Temple Lang in *EEC Competition Actions in Member States' Courts - Claims for damages, declarations and injunctions for breach of Community Antitrust Law* (1983-4) vol. 7 Fordham Intl L.J. 389 at page 407.

⁴ Case 127/73 BRT v SABAM (1974) ECR 51, CJEU.

⁵ [1984] A.C. 130, HL.

⁶ [2004] EWCA Civ 637, CA

⁷ [2006] UKHL 38, HL; [2006] 3 W.L.R. 148.

⁸ [2005] EWHC 3015, Ch.

⁹ [2007] EWCA Civ 38, CA.

6. Similar difficulties were experienced in The Consumers' Association v JJB Sports. This was a claim brought by Which? under the former provisions of section 47B of the Competition Act 1998. Which? brought the case as a specified body on behalf of consumers. But despite widespread advertising to affected consumers, very few proved willing to sign up to the opt-in proceedings. The low level of engagement and low resulting settlement was recognised to reflect an issue with providing effective redress for consumers in response to anti-competitive conduct.

7. The 'mystery of the reluctant plaintiff' was not simply a UK phenomenon. Back in 2008, an EU Commission staff working paper accompanying its White Paper on Damages¹⁰ concluded that consumers in the EU were not securing – and were not able to secure – adequate redress for the harm done to them by competition infringements. The Commission described this as “*a clear deficit in terms of corrective justice.*” The working paper identified the size of the harm done in relation to hardcore cartels with a pan EU impact as ranging from €13 billion to €37 billion. This deficit was addressed in a large number of high-profile decisions made by the Commission in the period from 2005 to 2016, tackling a large number of cartels in core economic sectors. In the period from 2000 to 2004, for example, the EU Commission imposed €3.4 billion of fines on undertakings infringing the competition provisions.¹¹ In the four-year periods from 2005 to 2009 and from 2009 to 2013, the respective figures were €9.4 billion and €7.9 billion. Of the ten highest fines ever imposed by the EU Commission for competition infringements, 9 were in the period from 2008 to 2017.

8. Over the same period, while regulatory intervention remained a feature of the UK commercial landscape, there was no perceptible increase in private enforcement action, either in the spaces between those interventions or in consequence of them. The result was an apparently widening 'enforcement gap'. This threatened a sub-optimal allocation of the UK's economic resources. The same enforcement gap was even wider in most Member States of the European Communities (as they then were).

9. These gaps were initially targeted at EU level through a series of initiatives. First, by means of the Modernisation Regulation 1/2003. This sought to encourage a greater degree of participation in competition enforcement by national courts, supported by a Cooperation Notice to enable national courts to seek opinions from the EU Commission and/or order disclosure of infringement decisions and the investigation file. Secondly, the EU Commission, in collaboration with National Competition Associations, introduced immunity and leniency regimes.¹² These encouraged a series of cartelists to bring forward evidence of participation in

¹⁰ http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf. The paper's reference is COM (2008) 165 Final dated 2 April 2008.

¹¹ <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>. The figures have not been adjusted for subsequent reductions by CJEU or GCEU judgments.

¹² See at EU level the Notice on immunity from fines and reduction of fines in cartel cases, OJ [2006] C No. 298 p. 17.

long-running cartels.¹³ Thirdly, the Damages Directive¹⁴ has, more recently, harmonised a number of substantive and procedural elements in private competition law enforcement. While the Damages Directive produced relatively few changes for the competition law regime in the UK,¹⁵ it did settle the question of how ‘pass on’ should be approached¹⁶; and conferred privilege against disclosure for leniency statements.¹⁷ Lastly, the recent Collective Redress Directive¹⁸, implemented in the EU27 States from June 2024, enables qualified entities (such as consumer organisations) to bring opt-in/opt-out representative actions (supported with litigation funding) on behalf of consumers across the EU. Although this regime does not apply in the UK and does not benefit UK consumers, it means that UK companies can be pursued before national courts in the EU27 for conduct that has direct or indirect negative effects on competition and prices in the EU.

10. Courts in England and Wales began to see an increase in the number of follow-on and standalone claims for breach of Article 101 TFEU (and to a lesser extent Article 102 TFEU), as these measures became embedded. While anecdotal reports of substantial settlements in actions prior to 2015 abound, it was not until 14 July 2016 that the Competition Appeal Tribunal (‘CAT’) awarded Sainsbury’s £68.5 million in its claim against MasterCard: Sainsbury’s v. MasterCard [2016] CAT 11, CAT.¹⁹ This represented the first Court-endorsed award of damages in a competition case in the UK. While it was then appealed to the Supreme Court and ultimately remitted to the CAT, the action was thereafter settled.

11. It is against this background that the CPO Regime was introduced by the Consumer Rights Act 2015 (‘CRA 2015’). It was a key part of the UK Government’s response to the enforcement gap. Its primary goal was to increase access to justice and provide a cost-effective way for consumers and businesses to seek compensation for losses caused by anti-competitive conduct, as individual claims were often not economically viable (and remain so). The critical role performed by the private sector in funding and facilitating civil litigation was recognised by the Supreme Court in Coventry v. Lawrence (No 2) [2015] UKSC 50, in particular per Lord Neuberger at [64]-[69].

¹³ See, for example, the cathode ray tube (‘CRT’) and liquid crystal display (‘LCD’) cartels, which were drawn to the attention of the Commission by immunity and leniency applicants. Both cartels are considered in the Court of Appeal decision in Iiyama v. Samsung [2018] EWCA Civ 220, CA.

¹⁴ Directive 2014/104/EC on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ [2014] L No 349, 5.12.2014, p. 1–19.

¹⁵ See the amendments made to the Competition Act 1998 and the Consumer Rights Act 2015 by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385).

¹⁶ See also the subsequent Commission Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, [2019] OJ C No 267, 9.8.2019, p. 4.

¹⁷ The English Court had hitherto been reluctant to grant complete immunity against disclosure for such materials, taking a more nuanced approach. See the judgment of Roth J in National Grid Electricity Transmission plc v. ABB Ltd [2012] EWHC 869 (Ch).

¹⁸ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L No 409, 4.12.2020, pp. 1–27.

¹⁹ Conflicting decisions with the CAT’s reasoning were then nonetheless reached in Asda Stores v. MasterCard [2017] EWHC 93 (Comm) per Popplewell J; and in Sainsbury’s v. Visa [2017] EWHC 3047 (Comm) per Phillips J.

12. The Consultation Document suggests that the CPO regime has been in effect for 10 years, which is formally correct. But it has not truly been in play over that period. The efficacy of the regime has been particularly susceptible to vagaries in the case law.

- a) First, initial applications for CPOs were not successful, and it was not until the Supreme Court's decision in Merricks v Mastercard [2020] UKSC 51 that the criteria for certifying collective proceedings in the UK were settled with the degree of certainty that funders typically require before committing to invest very substantial sums at considerable market risk.
- b) Secondly, the legality of what emerged as standard funding agreements was thrown into confusion by the decision of the Supreme Court in R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal [2023] UKSC 28. This ruling precludes funders from taking a percentage recovery of any damages award as their fee. Funders have been required to amend their funding agreements so as to provide for returns based on a multiple of the capital sums invested or committed to the funding of the case. A greater degree of commercial certainty has thereafter been brought to the funding market by the decision of the Court of Appeal in Sony Interactive Entertainment Europe Ltd v Alex Neill Class Representative Ltd [2025] EWCA Civ 841. But that is on appeal to the Supreme Court.
- c) Thirdly, the interactions between the new collective regime and (i) the CAT rules on limitation periods, as well as (ii) the transitional regime for the application of the new evidential and substantive provisions transposed from the Damages Directive,²⁰ have created uncertainty with a deterrent effect on new claims.
- d) Fourthly, the transitional provisions ensured that a sufficient volume of commerce to support any viable claim for damages could not be established for a period of time. In other words, enough time had to pass to cover a sufficient period of overcharge to make the economics of a claim work for funders.

13. Specific decisions also have a chilling impact on the willingness of funders to invest in further litigation. So a loss in a particular case has a knock-on impact. For example, since the recent decision of the CAT in Le Patourel v BT Group plc [2024] CAT 76, funders have been more reluctant to fund claims based on an allegation of excessive pricing, without any corroborative claim based on exclusionary conduct.

14. The nature and number of significant claims in the pipeline do give an indication that the efficacy of the regime will be capable of evaluation in the light of a much wider range of evidence in three to four years' time. By then, the Government is likely to have a richer dataset of results by which to calibrate any cost-benefit analysis.

Q1. Is the regime currently affordable to a diverse range of classes?

15. Yes. Litigation funding effectively "de-risks" the claims for claimants so that companies can bring claims to recover excessive prices paid to cartelists without the litigation

²⁰ In particular, the Damages Directive provides for certain evidential presumptions of harm and pass-on or extension/suspension to limitation periods which are more generous for claimants but they only apply where both the facts of the infringement and the harm takes place after 9 March 2017.

costs being taken out of their own balance sheet or having to make specific provision in their accounts. Consumers and small businesses can bring claims that would individually cost in excess of £1m where their damages might be significantly less than that; instead the costs are spread over a large class facilitating recovery.

16. The claims which have proved most attractive to funders are those in which small and medium sized businesses claim against either: (i) a group of companies engaged in a cartel or similar conduct; or (ii) a dominant incumbent undertaking engaged in abusive conduct that excludes rivals. Consumer claims must typically establish that other entities in the supply chain have “passed on” their loss to the consumer class. It is legally and evidentially more difficult to establish a claim arising indirectly in this way. But recent cases such as Coll/Epic/Rodger v Google and Hammond/Stephan v Amazon have seen CPO claims brought on behalf of both businesses and consumers, such that issues of pass-on may conveniently be determined in one forum with no risk of double recovery or under-recovery from the Defendants. In other cases, the CAT has case managed different claims involving businesses and consumers together as part of so-called “Umbrella Proceedings” (the *Umbrella Multilateral Interchange Fee litigation* and the *Trucks claims*).

17. While the co-existence of claims by businesses and consumers result in case management challenges for the CAT, they do serve to ensure that the ‘enforcement gap’ is closed. Thus, if the proceedings do not fare well at the business level, by reason of pass-on, the underlying consumer claim should serve to remove the ‘infringement premium’ that might otherwise be retained in the form of economic gain by the Defendants. Individual claims by UK supermarkets are currently on foot against salmon processors established in Norway and Scotland, for instance, which are underpinned by a consumer claim on behalf of buyers of salmon products from those supermarkets.

18. The claims which are less likely to receive litigation funding are those where the value of the claim does not justify the cost (a point made by the CAT when refusing certification in the recent Rowntree v. Performing Rights Society Ltd [2025] CAT 49) or where the nature of the claim is unduly speculative. Litigation funders typically deploy highly experienced former Judges and Counsel to provide an independent check on the merits of a proposed claim before they commit to funding. The due diligence of litigation funders is typically conducted to an exacting standard as they do not want to tie up funds for in excess of five years on a speculative basis. Litigation funders have also been known to strip the proposed scope of a claim back in order to maximise the likely recovery while minimising complexity, legal uncertainty/risk and ultimately cost exposure.

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.

19. The present method of funding based on multiples of committed or invested capital does not fully align the funders’ interests with the class whose litigation they are funding. The former percentage recovery approach established a more direct alignment with those interests. That is because the former approach meant that funders received more if the amount of damages recovered was higher. There was a direct link between the extent of the recovery

on behalf of the class and the amount of the funder's return. Under the revised approach, that link is indirect. The recovery is essentially based, loosely, on the cost of the capital committed by the fund over time. That can mean that in a long-running case, the level of capital committed has become high, so that the level of return required to finance that capital investment increases, even though the overall assessment of the risk remains unchanged. The *Merricks* case shows that perceptions of the merits of a settlement in long-running litigation can vary between funders and the legal team. This is addressed, in the first instance, through the dispute resolution procedures found in the Litigation Funding Agreement ('LFA'). It is the CAT which has the ultimate say on the level of recovery for funders and lawyers alike.

20. The former Government had proposed to legislate to reverse the PACCAR decision. We consider that doing so would serve to narrow or remove the risk of conflict that now exists between the interests of funders (who seek a return on investment, above all) and those whose claims the funders underwrite (who seek redress, above all).

21. The proposed costs of a claim, as well as the anticipated benefit, are both very carefully scrutinised by funders before they will support an application for a Collective Proceedings Order ('CPO'). This is an important part of the test applied by the CAT in certifying a collective claim (and deciding whether it should proceed on a opt-in or opt-out basis). But the cost/benefit is an important consideration for all litigation, whether individual or group or collective. Typically, a firm of solicitors with a proposed claim will approach a number of funders to discuss the possible funding of the action and will present an overview of known and unknown risks and uncertainties. We are aware of a number of potential (and otherwise meritorious) claims which have not received funding because the funding market did not think the anticipated cost and gain would justify the heavy risk incurred by funders when financing litigation.

22. Ultimately the scrutiny applied by the CAT in certifying class actions and overseeing opt-out settlements is an important safeguard for ensuring that an appropriate balance is struck between the interests of funders, lawyers and claimants.²¹ In many cases, the CAT has ordered amendments to the LFAs and has insisted on anti-avoidance clauses for insurance policies.²² The CAT's judicial oversight is renewed at regular intervals throughout the trial process. The CAT has ongoing powers of case management and s a "gatekeeper role" in ensuring that the claim is properly scoped, with an effective "blueprint to trial."²³ It also seeks to ensure that costs are appropriately budgeted and kept to a minimum. In recent CPO hearings, it has directed that separate costs' lawyers are retained to scrutinise the payment of the solicitors' and counsel costs during the litigation. It has powers to revisit certification and can even de-certify claims where the cost-benefit no longer holds true.²⁴ It also ensures that distribution of damages in any collective settlement is fair and appropriate. Whilst some funders have sought to challenge the CAT's assessment of distribution, the CAT's process has

²¹ There is no equivalent judicial scrutiny for settlements for opt-in collective proceedings which is an oversight: see recent CAT CPO Hearing in *Airwave*.

²² See, for example, *The Consumers' Association v Qualcomm* [2022] CAT 20.

²³ *Mark McLaren Class Representative v MOL (Europe Africa) Ltd* [2022] EWCA Civ 1701, CA.

²⁴ Rule 53 – see regular re-assessments in the *Boyle v Govia Thameslink* case.

been robust in imposing limits on funders' returns and structuring the requirements of proof and settlement categories to maximise recovery for claimants.²⁵

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?

23. As the Court of Appeal made clear in *Attheraces*, private law claims for breach of competition law are complex. They invariably involve expert economic and econometric evidence, covering matters such as market definition, the anti-competitive effect of agreements or conduct, the likely competitive conditions which would obtain in a counterfactual world without the infringements in play and complex questions of causation and calculation of the loss caused by those infringements. That legal and factual complexity also means that competition claims are expensive. In circumstances where the individual loss to consumers might be measured in the tens or hundreds of pounds, they are simply not viable cases without substantial litigation funding. The experience of the Which? football shirts case (*Consumers' Association v JJB Sports*) also shows that consumers are reluctant to come forward and join a book of claims even where there is no cost involved in them doing so.

24. The suggestion of State-sponsored or supported funding merits consideration, but risks adding an additional layer of bureaucracy and will represent a capital cost on the public balance sheet. That may be appropriate for public-sector claims, like *Airwave*, where state entities and/or the taxpayers potentially derive some tangible benefit from the damages recovery. We respectfully consider that, for claims brought by private entities, the litigation funding market is sufficiently developed in the UK that state intervention is not necessary at this stage. Any form of public support to the private sector would need to be scrutinised under the Subsidy Control Act 2022.

25. To the extent that it is harder to obtain funding for consumer-led competition claims, this could well reflect the additional evidential burdens which consumers typically face in showing that businesses which have suffered the overcharge from anti-competitive conduct have passed on their loss to the final consumer and the quantification of that harm. Indeed, in the United States, indirect purchaser claims are prohibited at federal level on public policy grounds and pass-on is not a defence to a damages' claim (see the *Hanover Shoe* and *Illinois Brick* decisions of the US Supreme Court). There have been (comparatively) fewer examples of cartels or other conduct directly targeting the consumer found in the case law.

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?

26. Litigation funders are better placed than the English Bar to answer this question. We are aware that funders often enter into subrogation arrangements where they either share or

²⁵ See Applications by Innsworth in *Merricks* and the recent decision in the *Stagecoach Boundary Rail Fares* Settlement.

spread the litigation risk between one or more other litigation funders. We are not aware of any impact on transparency or client confidentiality. While the public disagreement between Mr Merricks and his litigation funder has garnered headlines, almost all LFAs require the Class Representative to act in the best interests of the class, with no control over the litigation ceded to the funder. Moreover, LFAs that comply with the requirements set by the Association of Litigation Funders must have a dispute settlement clause, allowing disputes between funders and the class representative to be determined by an independent King's Counsel or at arbitration. The CAT has also scrutinised, and ordered amendments to, the litigation funding arrangements and has insisted on anti-avoidance clauses in after the event insurance policies ('ATE insurance').²⁶

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?

27. LFAs are, in principle, confidential to the parties, namely the funder and the Class Representative. However, most contain clauses that require their publication if required by the CAT. In addition, most LFAs require the terms of the LFA (with certain confidentiality protections) to be made available to the class members. Those class members are able to communicate with the Class Representative to voice any concerns. Before issuing a CPO authorising a collective claim to proceed, the CAT will seek to satisfy itself as to the fair operation of the funding arrangements entered into by the proposed class representative. In practice, proposed defendants at CPO hearings often focus their fire on the terms of the proposed litigation funding agreement, with the result that those agreements are anxiously scrutinised by the CAT before any CPO is made. In many cases, the CAT has ordered amendments to the litigation funding arrangements.²⁷ The CAT is especially concerned to ensure that conflicts of interest between funders, insurers, legal representatives and proposed class members are reduced to the greatest possible degree.

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

28. In our experience, the funding for the claim is considered in very great detail by funders prior to the approval of any litigation funding arrangements and a detailed costs budget is drawn up as part of the application for a CPO. The Cost Budget is modelled on the Precedent H model in the Commercial Court. The CPO application is required to show how the claim will be funded and how adverse costs will be addressed. The risk of adverse costs is covered by an appropriate ATE insurance policy. It is routine for the CAT to scrutinise the litigation costs budget, a detailed funding plan and a notice and administration plan which sets out how the claim will be managed and how communications with the class members will be conducted. These documents are reviewed by the CAT as part of the cost/benefit

²⁶ See, for example, *Qualcomm* (*supra*).

²⁷ See, for example, *Qualcomm* (*supra*) and the certification in *Stephan v Amazon* [2025] CAT 42.

assessment when deciding whether or not to certify any claim and will be reviewed at regular intervals as part of the “blueprint to trial” as part of its ongoing case management powers. In the recent Rowntree v PRS decision,²⁸ the CAT expressly took into account the likely cost of the claim weighed against its estimated recovery when deciding not to grant certification. In Boyle v Govia, the CAT has criticised the costs incurred by the class representative on disclosure and threatened to de-certify the claim.

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?

29. The topic of compulsory mediation has recently been considered by the Court of Appeal in Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416, which ruled that the Court has power to order unwilling parties to engage in mediation or other alternative dispute resolution (‘ADR’). The Civil Procedure Rule 1.4 was thereafter amended to allow the Court to order ADR as part of the overriding objective. The Competition Appeal Tribunal Rules 2015 (‘CAT Rules’) have similar principles as part of the overriding objective of managing cases before the CAT fairly. By Rule 4(6)(a), the CAT may encourage or facilitate ADR between the parties. A case could be made for a rule change to the CAT Rules to confer an equivalent power on the CAT to compel mediation in appropriate cases. We think it would be better for the compulsion to mediate to be subject to a filter of judicial approval, since otherwise compulsory ADR, in particular at an early stage of the dispute, risks becoming a costly box-ticking exercise rather than a meaningful encouragement of settlement of claims. If such a power is conferred, there would seem to be no reason in principle why it could not be drafted so as to extend to any disputes between the funder and the class representative in the course of CAT proceedings. We note that the current version of the LFA approved by the Association of Litigation Funders does have a dispute settlement claused within it.

Q8. Is the current scope of the regime appropriate?

30. Despite some high-profile examples of settlement which have attracted critical comments, we believe the current regime is reaching a stage of maturity. Its merit should be judged over the next five years when a number of claims will be determined which are of considerable value to small businesses and consumers.

31. It is certainly true that the number of opt-out claims has increased and a number of large businesses face substantial claims. But it is also important to note that very few claims are advanced without the support of regulatory decisions or judicial precedent in the UK or in other jurisdictions. In our experience, many claims have been brought on the back of decisions or investigations undertaken by the EU Commission or the CMA, claims brought by the Department of Justice or States Attorneys in the United States or by regulators in the UK or other Member States. These precedents are frequently relied upon to support the pleaded case in any application for a CPO. The number of entirely unheralded claims is very

²⁸ [2025] CAT 49.

small (the Gutmann v Govia boundary fares case being one of the rare exceptions), with the United States having a considerable lead in the inception of class claims in almost all areas. The CAT certification process is a rigorous one. While the Pro-sys/Microsoft test applied to the merits is not a high standard to meet, in practice Defendants can and do challenge unmeritorious claims by applying for summary judgment and/or strike out at the certification stage. Some of these applications have succeeded, but most have not. There have also been some high profile examples of the CAT refusing certification to proposed class representatives, for example in Riefa v Apple [2025] CAT 5.

32. There have now been a sufficient number of decisions on certification for practitioners and parties to know what the key issues will be. This has streamlined the process and, increasingly, claims are certified after a short one to two day hearing. The CAT is also developing additional requirements as part of its ongoing case management. For example, in the light of the *Merricks* case, it has been encouraging parties to appoint specialist costs lawyers to monitor the expenditure under the litigation budget plan as a specific help to the class representative and to keep costs under control. It has also sought to ensure that class representatives have an outline plan for distribution at the certification stage.

33. In our experience, the Defendants to CPO claims are provided with an estimate of the aggregate damages at the inception of the claim and also with a detailed methodology as to how loss will be ascertained. They will frequently have been under investigation for many years in multiple jurisdictions. Their legal teams will typically be familiar with the issues. It is not uncommon for CPOs to be conducted in circumstances where substantial settlements have already been made by the Defendants in other jurisdictions.

34. Any suggestions by large businesses that the UK should revoke the CPO regime needs to be seen in this context. It would put the UK, uniquely among most developed economies, back in the position of seeing substantial competition infringements going unchecked, with small businesses and consumers going uncompensated for their loss. It would drastically reduce the deterrent effect of competition law on large multi-national businesses operating in the UK. The reason that large multi-national companies have been subjected to claims is typically because they have been found by courts and regulatory authorities to have acted in breach of competition laws, which are regarded as a form of economic fraud and mandatory *ordre public*. Regulatory decisions finding infringements have been adopted in jurisdictions as diverse as Brazil, South Korea, Turkey, Israel and the United States as well as a number of EU States.

35. Any roll-back of the CPO Regime would also put the UK out of step with EU States who are implementing the new collective redress regime for mass torts (including not just competition law but also data, environmental and consumer law breaches). Indeed, the concept of collective proceedings in the UK is not presently confined to competition law alone. The FSMA regime contains a mechanism allowing for extra-judicial collective redress, as is currently being widely reported in the context of motor financing claims. More pertinently, Part 19 of the Civil Procedure Rules has since 2000 (specifically the Civil Procedure (Amendment) Rules 2000, SI 2000/221) provided for Group Litigation, designed to achieve the objectives stated in the Final Access to Justice Report (July 1996). Representative Actions are

of even older provenance (see the old Order 15 r. 4, now CPR r.19.8). The CPO Regime introduced in 2015 was not, therefore, entirely novel.

36. The Final Report which inspired the CPO Regime recommended that multi-party claims should be introduced with the objectives of:

- a) Providing access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;
- b) Providing expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure; and
- c) Achieving a balance between the normal rights of claims and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner.

37. While these objectives have all been met through the implementation of the CPO Regime for competition claims, they are equally applicable to other mass tort litigation. Examples of circumstances in which the handling of claims involving multiple parties giving rise to common or related issues of fact or law were given in the Final Report, including personal injury claims arising from, for example, a sudden disaster or the use of defective products; financial loss arising from mishandling of investments; and damage to property arising from a landlord's failure to repair properties with multiple tenants.²⁹ Indeed, the costs' budgets typically produced in applications for CPOs indicate that the CPO Regime is more efficient than standard group litigation before the High Court in pursuing very substantial claims for damages.³⁰

38. While we think a good case could be made for introducing an equivalent regime to the CPO Regime for other areas of law, we do not suggest simply extending the scope of the current regime to include these cases. First, in the face of (sometimes misguided) criticism of the current regime, it would be prudent to see how the current claims pan out, so that the Government has a broader evidential basis upon which to form a view. Secondly, we doubt that the existing CAT would have the resources to entertain an expanded caseload.

Q9. How are cases which cut across multiple areas (for example, environmental protection or data) dealt with?

39. These claims are not within the scope of the current UK CPO Regime although they are covered by the EU collective redress regime. The CAT refused certification in a claim brought against a number of water companies in the Carolyn Roberts v Severn Trent case

²⁹ See now, in particular, the definition of a GLO in rule 19.21, referring to "claims which give rise to common or related issues of fact or law (the 'GLO issues')". Perhaps most famously, the claims in Bates v Post Office were Group Litigation proceedings.

³⁰ In the *Dieselpgate* litigation (a claim for £6 billion), Constable J in the High Court recently ruled that the costs' budget for the claimants should be reduced from £650m to £388m. The reduced costs budget is well over 10 times more than the highest budgets typically seen in CPO applications (many of which have claims ranging from £5bn to £10bn).

([2025] CAT 17). Claims for breach of the GDPR are not within the scope of the regime, and their frequency has diminished substantially in the light of the Supreme Court ruling in Lloyd v Google [2021] UKSC 50.

40. We think a case could be made for broadening the scope of the CPO regime so as to encompass claims for breach of the GDPR, consumer, product liability/safety and/or environmental regulations, but a more pressing case could be made for the proposed inclusion of claims under the Digital Markets, Competition and Consumers Act 2024 first. That would be on the basis of conduct found to be infringing either ‘competition’ law requirements in Chapter 3 of Part 1 of the Act or the consumer law requirements found in Part 4 of the Act. The resource implications for the CAT would need to be addressed.

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

41. It is more usual for the CMA or other regulatory investigation to have concluded (or at least reached an advanced stage) before applications for CPOs are brought in relation to the same infringing behaviour. There are safeguards to protect disclosure of the CMA investigation file while the investigation is still ongoing to preserve the companies’ rights of defence and the sanctity of the public administration process. The CAT also has extensive case management powers, which it has used extensively on a case-by-case basis and sometimes in novel ways.

42. But in any event, the CAT has granted permission for regulatory bodies (such as the CMA or the Department for Transport) to make written and/or oral submissions as an intervener in those cases where they have an interest in doing so. The CMA has recently intervened in this way in the Epic/Coll/Rodger v Google and the Gutmann v Apple case; the Department for Transport has intervened in the Gutmann Trains (Boundary Fares) and Boyle v Govia (Differential Fares) litigation and the Environment Agency and Ofwat were invited to participate in the Roberts v Severn Trent (Water Discharge) case. It is open to the regulator to invite the CAT to factor in their own investigation into the case management of any litigation. The parties to the case might also apply for the litigation to be stayed or the procedural steps managed so that the risk of inconsistent decisions is addressed. A class representative might well wish to await the CMA’s decision if it knows that the subject matter of its claim is under active investigation. We do not think this is an area that calls for a legislative response.

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?

43. Yes. As we set out above, the Defendants to CPO claims are provided with an estimate of the aggregate damages at the inception of the claim and also with a detailed methodology as to how loss will be ascertained. Most Defendants have substantial resources at their disposal and access to sophisticated legal advice and economic expertise. In practice, most of the data about the sales they have made to their customers and prices charged is retained on their management databases so they can calculate the likely range of overcharge and damages over the claim period. Legal advisers can predict with reasonable accuracy the range of

damages that are likely to be awarded, just as they do in other areas of commercial litigation. There may be more uncertainty about their share of liability for umbrella damages (where there is an alleged overflow effect on prices charged by other suppliers in the affected market) but, in practice, this tends to be estimated through proxies and allocated on the basis of the Defendants' respective market share. Traditionally, the issue of "pass on" has been relatively undeveloped in the case law of the CAT. However, recent decisions have examined this issue and established the appropriate parameters for its determination. Moreover, a ruling from the CAT in the Interchange Umbrella Proceedings dealing with the question of "pass on" is expected in the near future.

Q12. Are there circumstances where it would be appropriate to provide protection to businesses from liability?

44. The UK, in common with all EEA States, already has an immunity and leniency regime in place which gives businesses the ultimate protection, in the form of 100% immunity against administrative penalties for the first participant to report anti-competitive conduct and/or other reductions in the level of the fine to reflect cooperation with the competition authorities. They can also secure a reduction in their fine if they participate in early regulatory settlement with the regulator. The value of that benefit can be very substantial, given the level of penalties of up to 10% of global turnover which are imposed by the EU Commission (and, albeit at a lower scale, by the CMA and/or sectoral regulators). This regime does not exempt businesses from private "follow on" actions being brought on the back of the regulatory decisions that are taken, but there are important safeguards for companies that engage with the immunity programme or early regulatory settlement process. They will, save in exceptional cases, only be liable for losses caused to their own direct customers and will not share joint and several liability with other cartelists for total losses and/or umbrella losses. They also secure procedural benefits in terms of evidence and limitation.

45. Reforming the regime to give immunity against private claims would be problematic. In the context of unilateral conduct captured by the Chapter II prohibition in the Competition Act 1998, it would enable a dominant undertaking to carry out abusive behaviour for a period of time before seeking immunity at the last minute, allowing it to infringe competition law without any consequences. In a cartel situation, it could create inequality, as a ringleader could orchestrate the cartel for several years (and punish other cartel members for breach) yet be able to secure immunity by then being the first to reveal the participation of its competitors. The ringleader's rivals would face heavy fines and potentially protracted, private litigation culminating in damages, but the ringleader would not. It would potentially secure an unfair competitive advantage and further distortion to competition in the relevant market in the process. That would create perverse incentives and substantially reduce the effectiveness and deterrence effect of competition law. We consider that immunity or leniency from very substantial UK (and EU)³¹ penalties should serve as a sufficient incentive to engage with the immunity/leniency regime.

³¹ Since most cartels are not simply confined to the UK, the actions of any Defendant at a regulatory level will likely be co-ordinated so that any immunity/leniency application is made both to the CMA and the EU Commission at the same time.

46. It would also leave certain businesses and consumers with no redress at all for the loss they suffer as a result of competition law infringements, just because of arbitrary factors. While a more modest extension of immunity from claims conferred on the first whistleblower in relation to cartel activity would still enable claims to be brought against other cartelists, we still think it sends a strange message to would-be cartelists to have a regime which visits no consequences at all on a business that engages in naked anti-competitive conduct, such as price-fixing, bid-rigging or market sharing. Indeed, in an extreme case, it might prompt Machiavellian businesses to initiate cartel activity with a less sophisticated rival with a view to then blowing the whistle and landing their competitive rivals with an unmatched liability to fines and damages claims.

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

47. The CAT Rules already impose a set of exacting requirements on class representatives. (We note, in passing, that so do the CPR rules in the context of Group Litigation Orders). They must not be at risk of having a conflict with the class, and they must be suitable to act as a class representative. Successive CAT rulings have fleshed out the criteria that class representatives are expected to meet. In practice, most class representatives have been special purpose vehicles set up as limited companies with an identifiable figurehead in charge of their management. They have often been managed by competition law academics or those with a strong interest in consumer affairs, supported by an experienced Advisory Board, comprised of former judges, consumer champions and representatives of different categories of class member. We do not consider legislation is needed in this area.

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?

48. Yes. The criteria set by the Competition Act 1998 and fleshed out in the CAT Rules have also been supplemented by the judicial observations of the CAT and the appellate Courts in a number of cases. The specific relationship between the class representative and the funder has to be set out in the LFA. The LFA is actively scrutinised by the CAT before the claim is certified. It is true that the Merricks case provides an example of a significant dispute arising between the funder and a class representative. The CAT and practitioners are cognisant of the issues thrown up by that dispute, so that even greater attention is now paid to the specific level of control a funder exercises over the conduct of litigation and settlement. In the recent Airwave case, the proposed Class Representative emphasised the importance of having judicial scrutiny over her role in managing the claim and overseeing distribution of any damages award, which she argued should be a factor taken into consideration in favouring opt-out over opt-in proceedings.

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

49. There is already a detailed framework set out in the CAT Rules. The CAT in a series of decisions has fleshed out what it expects in practice and further clarification on the line

between opt-out and opt-in proceedings is to be expected in the forthcoming Airwave ruling, as well as the Supreme Court ruling in the FX case. We consider that the level of control exercised by the CAT is appropriate and proportionate.

Q16. Do you have any experience of involvement in ADR to resolve a loss suffered by consumers as a result of anti-competitive behaviour?

50. One of the authors of this Consultation Response was indirectly involved in the ADR resolution of the football shirts claim in Consumers' Association v JJB Sports. Another has used a form of mediation and/or early negotiation to settle proceedings brought on behalf of small businesses in the GRS Footwear, Belle Lingerie and Ping Golf Club cases. In two cases, the CAT was asked to give directions for limited disclosure and for the economists to agree a common methodology and submit preliminary "position papers" on quantum ahead of the mediation, with directions for expedited trial if the ADR proved unsuccessful. In our experience, ADR can be a useful means of resolving claims, especially as it can result in novel forms of resolution (such as vouchers or discounts to be used against future purchases) but generally a particularised claim is needed in order to encourage ADR. We have suggested above a rule change to the CAT Rules to confer a power on the CAT to mandate ADR in appropriate cases. ADR should be capable of providing appropriate redress in principle.

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?

51. Yes, although most instances in practice have been in financial services and supervised by the FCA, rather than the CMA. To our knowledge, the voluntary redress scheme under the CRA 2015 has never been used. Offering a discount from a penalty or other sanction in return for the proposal of a voluntary redress scheme might encourage its greater use.

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?

52. A CMA direction for redress could work in certain, clear-cut situations where, for example, the infringing party had a direct, ongoing relationship with overcharged customers, so that redress could be easily given through a form of roll-back relief. For example, the overcharge could be repaid as a credit against a yearly or monthly subscription or other regular payment made by every customer. The more diverse and disparate the class of affected persons, the harder a redress scheme would be to frame. Another suggestion would be for any regulatory penalty to be reduced in circumstances where the infringer offers to put in place a redress scheme for the harmed class.

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?

53. The main barriers stem from the desire on the part of the Defendants to seek full clarification of the nature and extent of the case against them, and to explore available means of minimising their liability. That stance is perfectly lawful, but precludes early and effective ADR of any claim.

Q20. Do direct financial, rather than *cy-près*, damages deliver justice effectively?

54. Direct claims for financial loss are the traditional means of providing redress in England and Wales and support the effectiveness of the competition regime as it returns excessive or unfair payments to the pockets of those that have suffered loss. The distribution of aggregate damages awards *cy-près* are an exception to this process. The adoption of the broad axe estimation of loss allows an assessment of damages to be conducted effectively. In certain cases, what Professor Mulheron has described as organisational roll-back relief could stand in place of a pure *cy-près* distribution.³² The infringing firm could be required to reduce its prices for all customers for a period of time until the equivalent sum of damages had been returned to customers. Another mechanism for claims involving direct and indirect purchasers would be for the CAT to approve a consensual offer from the direct purchaser (e.g. a retailer) to give a proxy voucher or credit to its customers which reflects the latter's share of the loss that has been passed-on. This might help to neutralise the protracted pass-on issues, which consume a lot of litigation expense in terms of economic evidence and legal fees, and ensure that end-consumers secure some form of redress in a way that is meaningful to them. This would not necessarily provide precise redress for those who had actually suffered the harm, but it might stand a better chance of doing so than distribution to a charity of the undistributed pot of damages.

Q21. What degree of influence, if any, do you consider litigation funders currently have over the resolution of a case?

55. The current drafting of LFAs as approved by the CAT seeks to ensure that the Class Representative has full control over the litigation. The standard terms in LFAs now confirm that it is the Class Representative who is tasked with making decisions on starting, maintaining, withdrawing or settling a claim. The right of the funder is usually restricted to the right to be consulted before these decisions are taken. LFAs also typically provide for a dispute resolution procedure (a KC referral and/or arbitration) if disputes about a proposed settlement arise. The CAT is already reviewing LFAs closely to ensure that appropriate safeguards are in place to maintain the independence of the Class Representative. The recent interventions by funders in the Merricks and Stagecoach settlements show that the system is working well and Class Representatives are able to take decisions independently of funders' preferences (where appropriate to do so).

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?

³² Rachael Mulheron, 'The conundrum of undistributed residues under the United Kingdom's collective proceedings regime' (2024) 23(2) Competition Law Journal 79.

56. We do not consider that further safeguards are needed at this stage, since the CAT will not certify a CPO without appropriate safeguards being in place. At the Airwave CPO hearing, the CAT heard evidence about information barriers, separate teams and other conflict management measures that had been put in place to manage any apparent conflicts within the Home Office, which was funding the litigation. However, that was an unusual case where the Home Office is both a class member and the funder and checks were needed to ensure that its interests did not take precedence over other class members. The safeguards there would not be appropriate for ordinary commercial litigation funding.

Q23. Should remedies other than compensatory damages be available?

57. There are cases where it may be difficult to quantify harm on a compensatory basis or where the harm is continuing, where it may be appropriate to order other forms of damages. In Belle Lingerie, the Claimant sought damages in lieu of an injunction, reflecting the harm to the Claimant's business capital growth if the Defendant's refusal to supply were allowed to continue on a permanent basis, notwithstanding its illegality. The CAT granted permission for that amendment but ultimately the case settled. In Gormsen v Meta³³, the CAT has recently allowed amendments for user damages, along One Step lines, to allow class members to be compensated on an aggregated basis for the loss of the value of the exercise of the right to control the collection and/or use of their Off-Facebook Data.

58. We consider that a case could be made for giving the CAT powers to order restitutionary and other relief in appropriate cases. An award for the disgorgement of profits attributable to the infringement, for example, might be administratively more straightforward than calculating loss to consumers. Distribution to consumers and businesses might then take place using a broad axe evaluative judgment, placing less emphasis on time-consuming and costly estimates of pass-on. Conferral of specific remedial powers to the CAT might extend to a recognition of the power to make orders for roll-back relief or the application of the *cy-près* doctrine. While an early decision of the CAT in the Cardiff Bus case ([2012] CAT 19) found that exemplary damages could be awarded, Parliament has subsequently legislated for exemplary damages not to be available before the CAT in competition collective proceedings: see section 47C(1) of the Competition Act 1998 (as amended). We do not consider there is presently a need to revise that approach.

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

59. Many of the CPO applications before the CAT have had a "follow on" element. In these cases, an element of liability will be established, so the obstacles to early settlement are usually a combination of litigation tactics, differing views on the value of the claim or defences (such as jurisdiction/limitation/pass-on) and any residual uncertainty as to the scope of the additional liability. Defendants that face parallel regulatory action or litigation in other jurisdictions may be reluctant to settle in the UK, for fear of compromising their position in other proceedings. If there were a way to introduce no-fault settlement that did not set any precedent for other proceedings (notwithstanding the CAT's role in approval of the settlement process), that might provide greater incentive to engage at an early stage.

³³ [2025] CAT 55.

60. As part of a CAT mandated ADR we describe above, an option might be the appointment of a CAT appointed economic expert or forensic accountant, to offer an independent or neutral expert evaluation on matters in dispute as part of the mediation process. This view would be non-binding on the parties, but might help break the deadlock and give an early indication of what position the CAT might, in due course, adopt, since the CAT panel normally features a highly experienced economist who is (self-evidently) completely independent of the parties. While this would add to the costs of the mediation process, it would be worthwhile if it substantially increased the likelihood of high value claims achieving an early settlement.

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?

61. The CAT already has a strong supervisory role in approving opt-out class settlements. Its experience of doing so is relatively limited to date, and reflects some settlements which are unlikely to be typical given the cohort of cases before the CAT. There is no similar provision for judicial supervision of settlements in opt-in class actions which is an oversight. We respectfully consider that the parties to the litigation are best placed to take the lead on the merits of any settlement. The fiduciary nature of class representation means that independent judicial oversight is appropriate, but the current CAT rules already allow for this.

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

62. The current trend is for awards to be made *cy-près* to a charity such as the Access to Justice Foundation (who were the recipient of the undistributed damages in Gutmann). Given the consumer inertia demonstrated by the limited take-up in the *Football Shirts* case and in the recent *Boundary Fares* claim, serious thought should be given to Professor Mulheron's proposals for roll-back relief in appropriate cases. While the identity of the recipients might not tally exactly with the affected class (due to historical shifts in the composition of affected consumers), the ongoing customer class would benefit from reduced prices and, as explored in paragraph 54 above, the proxy is probably a better one than distribution to a charity. Roll-back relief could also be combined with *cy-près* distribution to consumer and access to justice charities in appropriate cases.

Q27. How are funds distributed among consumers?

63. The CAT has wide powers over the distribution of any award in both opt-out and opt-in class actions and can direct distribution to be made to particular sub-classes or even third parties. There have been very few examples of approved settlements under the CPO regime to date. The settlement in Mark McLaren Class Representative Ltd v MOL (Europe) Africa Ltd [2025] CAT 4, led to a collective settlement order of roughly £38 million, but we are not aware of the final terms of distribution. The settlement in the *Boundary Fares* case led to a disappointingly low take-up from consumers, so that a substantial distribution was made to charity. CPO litigation management plans typically include provision for a website to allow class members to sign up for information about the claim and which can then be used to

establish lists of claimants for distribution purposes. These management plans usually have targeted advertising campaigns to bring the fact of settlement to the attention of the affected class. Cases where the affected class is known to the Defendant, such as through lists of known customers, will likely make distribution an easier process.

Q28. Are consumers made sufficiently aware of proceedings/their right to claim their share of damages by current notice requirements?

64. We do not have an evidential basis upon which to answer this question. Some claims seem to be very well known, such as the “*Dieseldgate*” litigation, in part through extensive advertising by claimant firms in the press. Other settlements appear to have been advertised less widely. This is an area where the experience of the CAT and practitioners is evolving, given the limited number of approved settlements to date.

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?

65. We prefer not to comment on the outcome of individual cases. We note simply that a £100 million pay-out to individual consumers who have suffered an overcharge on their credit and debit card purchases is a better result than would have been obtained without the CPO regime in place. Such a claim would simply not have been viable but for the CPO regime. While a very substantial number of claims brought by businesses against Mastercard and Visa have achieved settlements, those claims have not been brought as opt-out proceedings. There are currently before the CAT two opt-out proceedings concerning multi-lateral interchange fees on commercial cards. Those proceedings are brought on behalf of businesses, not consumers. While concerns have been expressed about the level of the settlement achieved in Merricks (upon which we pass no comment), there can be little doubt that the litigation itself was ground-breaking and, at least to some extent, achieved a result which was consistent with the Government’s objective of improving consumer redress in competition cases.

Q30. What should happen to unclaimed or residual damages?

66. We have addressed this question in the course of the comments above.

67. We are happy to provide further information or evidence to the Department if it would be considered useful to do so. Our members would be available to meet the Department in person or by video link if that would assist.

Bar Council
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