



BCLP'S RESPONSE TO DBT'S CONSULTATION ON SWIFTER AND SIMPLER COMPETITION REDRESS, REGULATORY APPEALS AND COMPETITION ENFORCEMENT

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The views expressed in this response cannot, under any circumstances, be attributed to any of the firm's clients.

BCLP.

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Chapter 1 – Opt-out collective actions

Bringing a claim

Class representatives

Q1. Do you agree that greater certainty is needed at this time in relation to the authorisation of class representatives? [Yes / No / Not sure] Please explain your views.

Yes. Presently, a disconnect exists between the Competition Appeal Tribunal (**CAT**) written guidance and the current state of the case law.¹ This is unsurprising – it was recognised in the CAT Guide that the Tribunal would develop its approach on a case-by-case basis and that the guidance would therefore likely need revision.²

In what remains a complex and evolving area, this growing gap creates unnecessary complexity and uncertainty, and absent clear codification, increases the scope for inconsistent judgments, with different judges placing differing weight on different factors.

Although greater clarity would benefit all stakeholders, the problem is particularly acute for proposed class representatives (**PCRs**), who are often laypersons without specialist legal expertise. Being a class representative (**CR**) involves “*significant and serious*” obligations and is not a responsibility to be taken on lightly.³ Notably, alongside the anticipated public scrutiny that derives from the spearheading role of a PCR comes legal, financial and reputational risks.⁴ Laying down clear and easily accessible rules will allow PCRs to form a clear-eyed view of their responsibilities, while providing their legal advisers and defendants’ advisers with the certainty

¹ See CAT, Guide to Proceedings 2015 (Guide to Proceedings); The Competition Appeal Tribunal Rules 2015 (CAT Rules), SI 2015/1648. Consultation, para. 145.

² Guide to Proceedings, p. 2: “*it is expected that the Tribunal will further develop its approach on a case-by-case basis, and the Guide is likely to need revision accordingly in the light of experience.*” See Explanatory Memorandum to the Competition Appeal Tribunal Rules 2015, 2015/1648, paras 12.1 and 12.2: “*the Rules will remain subject to regular reviews to ensure the CAT is operating efficiently*” and “*Government will also monitor the effectiveness of the private actions regime to assess whether it is operating efficiently and providing consumers and businesses with access to redress*”, see also para. 9.1: “[t]he CAT will revise its Guide to Proceedings to reflect the changes to the Rules.”

³ Guide to Proceedings, para. 6.30.

⁴ E.g., in the context of a collective settlement, a funder launched arbitration proceedings against a CR, Mr Merricks, in 2024. He did not have the personal financial means to defend himself, and the defendant, Mastercard, had to agree to make available up to £10 million to assist him. In August 2026, after the Divisional Court sided with the CR, the funder discontinued the arbitration. In another case, the CAT described the PCR’s evidence under cross-examination as “*hesitant and uncertain*” and failing to demonstrate “*a strong understanding*” of the LFA (Riefa v Apple and Amazon [2025] CAT 5, para. 95).

necessary to offer reliable advice. Stronger confidence in the workings of the regime may, in turn, encourage would-be PCRs with strong qualifications for the role to come forward.

For these reasons, greater clarity regarding the PCR's role and duties would be highly beneficial in providing further certainty on the Tribunal's decision making on whether it is just and reasonable for the PCR to act as a CR (please see **Q2** for further details on suggested amendments).

Q2. Which of the key areas identified do you agree would benefit from greater certainty? Tick all that apply.

- ☐ **Role in funding arrangements**
- ☐ **Use of costs lawyers**
- ☐ **Consultative panels**
- ☐ **Other (please specify)**

All and others (specified below). The Tribunal has recognised that it is a “*hallmark*” of collective proceedings that putative PCRs are frequently approached by lawyers and funders to act on claims rather than vice versa,⁵ and has raised concerns over the impact that this may have on a PCR's independence.⁶ Concerns have also been raised about the level of expertise PCRs may have on key issues such as costs and litigation strategy, given that they typically lack legal training. The CAT has adopted a range of measures to address those concerns on live cases, which should be consolidated and reflected in the CAT's practice directions and the applicable statutory instrument in the interests of clarity.

In particular, both the CAT Rules and Guide to Proceedings would benefit from detailing the following:

- **Role in funding arrangements.** The funding and insurance arrangements entered by PCRs and underpinning a proposed collective action have been a recurring theme, often the subject of close judicial inquiry. Whilst prescribing hard and fast rules is generally inappropriate, given that those complex arrangements ought to be considered contextually and in the round, some guiding principles and red lines have emerged:

⁵ In its Review of Litigation Funding Final Report, the Civil Justice Council (**CJC**) recommended legislating to prevent litigation funders or claimant law firms approaching PCRs to initiate collective actions. The Consultation neither addresses that recommendation nor expresses any view on its merits. See CJC, Review of Litigation Funding, Final Report, 2 June 2025, recommendation 21: “[t]he funder and the funded party's lawyer should certify to the court, as part of the without notice approval process, that they did not approach either directly or indirectly the funded party to seek their agreement to pursue proceedings.”

⁶ O'Higgins FX v Barclays [2022] CAT 16, paras 268-271, and para. 344, in which the question was raised whether the PCR is “*truly independent of the funders and the law firms*”. The Riefa CAT observed that a PCR cannot be “*merely a figurehead for a set of proceedings conducted by their legal representatives*” (Riefa v Apple and Amazon [2025] CAT 5, para. 115).

- In determining whether a PCR can act fairly and adequately in the interests of class members, the CAT will consider all relevant circumstances, including how the PCR has satisfied itself that the funding arrangements “*reasonably serve and protect*” those interests.⁷ To fulfil their role, PCRs must be “*sufficiently independent and robust*” to properly act in the best interests of the class, including when agreeing to any funding arrangements, and in managing the proceedings going forward, including ongoing interactions with funders.⁸
- Relatedly, the CR is under a duty to inform the CAT and other parties promptly of any material change to the funding arrangements.⁹ Yet a PCR may file without completed funding where limitation is imminent. In that case, however, the PCR must give a “*full and candid explanation*” of the status of funding discussions, why funding could not be finalised before filing, and how long finalisation is expected to take.¹⁰
- The CAT has repeatedly emphasised that divergence of interests between the funder and the class is most acute at settlement and termination of the funding agreement.¹¹ As regards unilateral termination of the LFA based on an assessment of the merits or commercial viability of the claim, it appears that independent expert legal advice must be relied upon,¹² that the terms providing for termination are not unreasonable, and that the commercial return of the CR and its counsel ought not to trigger termination rights.¹³

More generally, the CAT must not only be satisfied that the PCR understands the bargain it has struck, but also that it has made proper efforts to secure favourable funding terms.

⁷ *Shotbolt v Valve* [2026] CAT 4, para. 25.

⁸ *Shotbolt v Valve* [2026] CAT 4, para. 25. *Riefa v Apple and Amazon* [2025] CAT 5, para. 31.

⁹ *Sciallis v Fender* [2026] CAT 56, paras 87-92.

¹⁰ *Sciallis v Fender* [2026] CAT 56, para. 80. At the same time, the CAT will not wait indefinitely and the proposed defendants should not incur material costs while funding remains uncertain (*JLP v Scania* [2026] CAT 59, paras 65-67).

¹¹ *Merricks v Mastercard* [2021] CAT 28, para. 24.

¹² Reflecting, in large part, clause 13.2 of the Association of Litigation Funders Code of Conduct. *Ex multi, Road Haulage Association Limited* [2024] CAT 51, para. 80; *Rodger v Google* [2025] CAT 45, para. 58: “*in relation to clause 7.5(c) we questioned the reference to “material and irremediable breach” (emphasis added); and it did not seem to us clear that the Dispute Resolution Procedure (involving independent KC determination) applies in the event the PCR does not follow the advice of lawyers. In addition, we considered it appropriate for clause 7.5(c) to include a requirement that a breach would relate to the PCR “unreasonably” failing to follow advice.*”

¹³ See also, *UK Trucks Claim Limited v Fiat and others* [2019] CAT 26, para. 55; *Merricks v Mastercard* [2021] CAT 28, para. 27; *Shotbolt v Valve* [2026] CAT 4, para. 36(2); *Which? v Apple* [2026] CAT 29, paras 91-94; *Neill v Sony* [2025] EWCA Civ 841, para. 128: “*class representative and his solicitor have independent control over the conduct of the proceedings and any dispute between the class representative and the funder are referred to an independent KC.*”

To allay that concern, it should be “*standard practice*” for the PCR to explain in its evidence the steps it took to do so.¹⁴

- **Use of costs lawyers.** The use of costs lawyers is another recent development in the CAT’s jurisprudence.¹⁵ In one case, the Tribunal observed that measures may need to be put in place to ensure that the PCR gets costs specialist advice on legal fees to provide assistance in approving any costs arrangements and fees. In *Amazon*, the CAT described the involvement of a costs professional as the standard approach, with monthly oversight reports in that case being provided to the CR.¹⁶ In *Valve*, the CAT requested that (i) expenditure against the litigation budget be reported to the Tribunal on a quarterly basis, and (ii) the legal team only submit a request of funding/payment from the funder when that request had been reviewed and approved by an appropriate cost counsel or cost draughtsman.¹⁷ The potential for instruction of a cost draughtsman could be incorporated into the Guide to Proceedings when discussing the PCR’s ability to exert sufficient control over the “*costs incurred*.”¹⁸ Beyond that, however, it seems inappropriate for the CAT Rules or Guide to Proceedings to lay down overly prescriptive rules/guidance as to the use and precise role of cost draughtsmen and the frequency of cost reporting in proceedings. However desirable cost control and engagement by the CR with costs may be, there is a risk that rigid, one-size-fits-all costs rules will only add to the costs of proceedings. Further, the appropriate level of engagement with a cost draughtsman (if any) and the frequency of budget reporting are likely to vary from case to case, including in light of the PCR’s qualifications, the size of the budget, and the composition of the PCR’s wider advisory team. To that end, soft guidance on the circumstances in which the use of a cost draughtsman would be appropriate may also be helpful.
- **Consultative panels.** The CAT has indicated that, as a matter of principle, there is no requirement that a panel be put in place.¹⁹ Yet as recognised by the CAT, consultative panels may be valuable where a PCR has limited experience or access to support in discharging its responsibilities.²⁰ It would be useful to clarify the circumstances in which a consultative panel will be appropriate, as well as their membership (including the

¹⁴ *Hammond and Stephan v Amazon* [2025] CAT 42, para. 67(1).

¹⁵ In March 2026, Ms Justice Bacon opined that “[i]t’s now likely to become the standard practice of the class representative to be assisted by a cost specialist, independent of the funders and lawyers, and that should also help to ensure the costs stay within manageable bounds” (Janith Aranze, CAT president: delayed class action settlements are wasting tribunal resources (GCR, 16 March 2026)).

¹⁶ *Hammond and Stephan v Amazon* [2025] CAT 42, paras 45-46, 56.

¹⁷ *Shotbolt v Valve* [2026] CAT 4, para. 157.

¹⁸ Guide to Proceedings, para. 6.30.

¹⁹ *Rodger v Alphabet* [2025] CAT 45, para. 79.

²⁰ *Riefa v Apple and Amazon* [2025] CAT 5, para. 89(5).

members' "*relevant skills*" and "*how they inter-relate*"), terms of reference, and role.²¹ In particular, it would be helpful to provide guidance on their expected role at key milestones (e.g. the conclusion of the funding agreement/waterfall agreement and settlement proposals), requirements to keep proper records and justify each task (and its cost) throughout the proceedings, as well as expectations around frequency of consultative panel meetings.²²

- **Hourly rates.** Recently, the PCR's level of hourly rates has come under scrutiny. In *Waterside*, the CAT has criticised the PCR's proposal to charge £300 per hour for her services, notwithstanding a subsequent agreement to cap remuneration at £900 per day.²³ The Tribunal observed that, ordinarily, a CR's remuneration would be expected to align with levels of remuneration in the public sector. More recently, in *Or Brook*, an actual effective hourly rate lower than £250 was regarded as not undue or excessive in light of the PCR's input, qualifications and experience.²⁴ Against that backdrop, greater clarity as to the expectations regarding PCRs' remuneration would be welcome. Guidance on hourly rates for consultative panel may also be appropriate. In *BIRA v Amazon*, when discussing the role of panel members, the CAT appeared to regard substantial remuneration as consistent with, and perhaps indicative of, active and effective case management.²⁵ This stands in contrast to the CAT's position on the CR's remuneration in certain recent cases.
- **Transparency.** Recent caselaw stresses that the PCR ought to ensure an appropriate degree of transparency regarding the LFA underpinning the claim. The CAT has emphasised that the terms of any funding agreement should be open to scrutiny, not only by the court but also by the members of the class on whose behalf the claims are brought.²⁶ A funding agreement including wide confidentiality obligations that prevents the PCR from disclosing the terms to potential class members, including the funder's level of return could be problematic. The CAT has also suggested it should be "*standard*

²¹ *Waterside v Mowj* [2026] CAT 32, para. 60.

²² *Or Brook v Google* [2026] CAT 65, paras 77-78. Consultation, para. 19. For example, in *Rodger*, the CAT directed that the consultative panel should meet at least on a "*quarterly basis*" (*Rodger v Alphabet* [2025] CAT 45, para. 81).

²³ *Waterside v Mowj* [2026] CAT 32, paras 55 and 56.

²⁴ *Or Brook v Google* [2026] CAT 65, paras 74-76.

²⁵ *BIRA v Amazon* [2025] CAT 6, para. 48: "[w]e have seen the terms of reference of this panel and we note that Prof Stephan's litigation budget provides for substantial payments to the panel members for their assistance, so it is clearly envisaged that they will provide active assistance."

²⁶ *Gormsen v Meta* [2024] CAT 11, para. 37; *Riefa v Apple and Amazon* [2025] CAT 5, para. 31(7) and para. 112: "[o]ur concerns are exacerbated by the confidential nature of the LFA. Although Asertis has since waived the confidentiality requirement in relation to the calculation of the funders return and (it now appears) the provisions of clause 4.1.17, a PCR enters into an LFA so as to enable it to act in the interests of the members of the class. [...] we can see no justification in withholding any of the terms of the LFA from the scrutiny of the public and in particular the potential class members."

practice" for PCR to make available online the LFAs with minimal redactions.²⁷ To encourage certainty, the requirement for transparency and guidance as to how this may be achieved should be reflected in the Guide to Proceedings.

- **Cross-examination.** The CAT has authorised the cross-examination of the CR in *Riefa*, whereas it declined to do so in *Rowntree*.²⁸ In the latter case, the CAT opined that funding-agreement and distribution issues were matters for legal argument, on which cross-examination would not assist. Without imposing straitjacket rules on judges, who ought to retain sufficient procedural flexibility to accommodate the particular circumstances of each case, further guidance as to when cross-examination is appropriate would be welcome.

Q3. What mechanism do you consider would be most helpful in providing increased clarity?

Amending the CAT Rules and Guide to Proceedings is the most appropriate way to increase clarity.

Certification

Q4. Do you agree that specifying that 'suitability' should relate to absolute suitability and that this will ensure merits are considered as part of the certification threshold, providing a more meaningful filter? [Yes / No / Not sure] Please explain your views.

Yes and No. Specifying that "suitability" should relate to "absolute suitability" is a welcome development, but this alone is insufficient to ensure that the merits are considered as part of the certification threshold.

Guidance required on the meaning of "absolute suitability"

Specifying that suitability relates to absolute suitability may assist the CAT in adopting a more robust and predictable approach to certification. However, clear guidance is required on what "absolute suitability" means.

The Consultation positions absolute suitability in contrast to relative suitability (consistent with *Merricks*) and then goes on to say that the test should include "*it is proportionate for a claim to*

²⁷ *Hammond and Stephan v Amazon* [2025] CAT 42, para. 41. The CAT has also suggested that the PCR make the LFA available to class members for inspections, with minimum redactions upon obtaining appropriate confidentiality undertakings when considered necessary. According to the CAT, redacting ATE insurance premiums is acceptable, as they give an indication of the risk allocated to the case (*Rodger v Alphabet* [2025] CAT 45, para. 73; *Kent v Apple* [2021] CAT 37, paras 21, 28-32; transcript of the case management conference, *O'Higgins v Barclays*, 6 November 2019, p. 19, line 14).

²⁸ *Rowntree v The Performing Right Society Limited* [2025] CAT 8, paras 5-9.

be brought using the opt-out collective mechanism". However, we consider consideration of the merits and proportionality to be somewhat separate issues. The concept of absolute suitability and its relationship to both the merits and proportionality was well explained by Lord Sales and Lord Leggatt in their minority judgment in *Merricks*:

In our view, the word "suitable" in this context means suitable to be grouped together and determined collectively in accordance with the regime established by the Act and the CAT Rules. Applying this criterion requires the tribunal to focus on the special features of this regime and the objects [sic] which collective proceedings under the regime are intended to fulfil. This includes consideration of whether collective proceedings offer a reasonable prospect of achieving a just outcome. It also calls for an assessment of proportionality: is combining these claims and determining them collectively in accordance with the collective proceedings regime likely to achieve the fair determination of the claims at proportionate cost?²⁹

Further primary legislation amendments required to advance a broader merits test

In addition to Guidance on the meaning of absolute suitability, additional targeted primary legislation amendments, including advancing a broader merits test, will be necessary to ensure that the merits are adequately considered as part of the certification threshold.³⁰ As addressed further in response to **Q5**, we also see the benefit of introducing a statutory proportionality test. By placing those requirements on a statutory footing, Parliament would make clear that they constitute mandatory preconditions to certifying a claim.³¹

In order to meaningfully raise the threshold for certification, any merits test mandated by Section 47B would need to be set at a higher threshold than strike out or summary judgment. As the Supreme Court reasoned in *Evans*, a claim can survive strike out or summary judgment and yet still be regarded as "very weak", as surviving those applications is a "low bar".³²

²⁹ *Mastercard v Merricks* [2020] UKSC 51, para. 116.

³⁰ Moreover, if the strength of the claims were given a statutory footing, the question of "*whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover*" under Rule 79(3)(b) should remain a useful indicator in determining the appropriate opt-in or opt-out mechanism. There is a general preference for proceedings to be opt-in where practicable.

³¹ From a statutory construction perspective, and of direct relevance here, a factor that the Tribunal in exercising its own expert judgment "*shall take into account*", as currently drafted under Rule 79(2), differs conceptually from a clear precondition. See e.g., *Mastercard v Merricks* [2020] UKSC 51, para. 61: "[t]he hurdles (ie preconditions to eligibility under section 47B(5)(b) and (6)) are only that the claims are brought on behalf of an identifiable class, that they raise common issues and that they are suitable to be brought in collective proceedings: see also rule 79(1). In particular it is not a condition that the claims are suitable for an award of aggregate damages. That is only one of many relevant factors in the suitability assessment under rule 79(2)."

³² *Evans v Barclays* [2025] UKSC 48, paras 102. The relevant test is set out by Lewison J in *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 339 at para. 15.

In *Evans*, the Tribunal considered treating the weakness of the claim as pointing against opt-out proceedings, even if it is not so weak as to be struck out to be entirely logical.³³ The Supreme Court endorsed that sensible approach. This is why Rule 79(3)(a) includes the “*strength of the claims*” as a factor the Tribunal may consider when determining whether proceedings should proceed on an opt-out rather than opt-in basis.³⁴ By giving effect to Rule 79(3)(a), the Supreme Court has swung the pendulum back from the prevalent post-*Merricks* proposition that certification on an opt-out basis does “*not include a review of the merits*” whatsoever to a position that appears more compatible with the CAT Rules, as currently drafted.³⁵ This has led some defendants to seek – unsuccessfully so far – the decertification of opt-out claims.³⁶

However, as matters presently stand, putting strike out and summary judgment aside, the legal framework only provides for the merits to be considered when deciding whether the claim should proceed on an opt-in or an opt-out basis. Further, consideration of the merits is currently included in the CAT rules amongst discretionary judicial factors (“*may take into account*” under Rule 79(3)) rather than being elevated to the higher status of strict legal requirements (“*shall take into account*” under Rule 79(2)). That narrow avenue for incorporating merits-based considerations is ill-suited to striking a fair procedural balance between claimants and defendants.³⁷

The procedural benefits vested to CRs in both opt-in and opt-out scenarios militate in favour of a merits test that applies to both opt-in and opt-out claims.³⁸ The Court of Appeal indicated in *McLaren* that there are “*clearly established strong public interest benefits*” in the CAT performing an active elucidatory role which includes “*ensuring that defendants are not*

³³ *Evans v Barclays* [2025] UKSC 48, para. 102.

³⁴ The considerable interpretive significance of the CAT Rules for the new regime is confirmed by the express reference to them in the new sections 47A(1) and 47B(1), together with the fact that the draft rules were placed before Parliament and deposited in the libraries of both Houses to inform debate on the Bill.

³⁵ *Mastercard v Merricks* [2020] UKSC 51, paras 59, 60 and 169. See also *Consumers' Association v Qualcomm* [2022] CAT 20, para. 50 “[i]t is now well-established that, when considering the commonality and suitability requirements for certification, the Tribunal is not generally required to consider the merits of the proposed collective proceedings.” *Govia Thameslink Railway* [2022] CAT 35, para. 9(1): “[i]t is, we consider, clear law that the merits of a claim have no bearing on the question of certification.”

³⁶ *Ennis v Apple* [2026] CAT 55. *Rodger v Google* [2026] CAT 49; CAT, Transcript (opt-in hearing), 8 September 2026, *Hammond and Stephan v Amazon* (1644/7/7/24). A decertification application is also under consideration in *Spottiswoode v Nexans*, 1440/7/7/22 (see July 2026 [hearing transcript](#)). See also *Gutmann v Apple* [2026] CAT 20, which was a summary judgment and/or strike-out application, however.

³⁷ See dissenting opinion of Lord Sales and Lord Leggatt, *Mastercard v Merricks* [2020] UKSC 51, para. 172: “[w]hether an individual claimant has a claim that is sufficiently strong to go to trial is a different question, involving a different test, from whether a class of claims is eligible to be brought as a collective proceeding.”

³⁸ These include the availability of aggregate damages together with the broad axe principle, procedural efficiencies associated with the collective determination of common issues, enhanced bargaining leverage, greater access to funding and resources, and press coverage, among other things.

confronted with baseless claims".³⁹ To that end, given the "low bar" for strike out and summary judgment referenced above a tougher merits-based test should be incorporated into the certification threshold so that the CAT has the power to prevent "very weak" claims from progressing as collective actions at all. Poorly conceived or seriously inadequately formulated claims should not be certified on an opt-out or opt-in basis merely because the alternative is that they do not proceed at all.⁴⁰ As the CAT put it, it makes "*no sense to certify proceedings whose triability is in doubt*."⁴¹ For comparative-law purposes, the EU Representative Actions Directive likewise requires that courts can dismiss manifestly unfounded cases "*at the earliest possible stage*" of the proceedings.⁴²

Amendments to the Guide to Proceedings and CAT Rules required to specify the legal standard for any merits test

Updates to the Guide to Proceedings and amendments to the CAT Rules to specify and explain the legal standard to which a merits test would be helpful. At present the Guide to Proceedings states as follows regarding the standard of the merits test that may be conducted when determining whether a claim should be permitted to proceed on an opt-out or opt-in basis:

the reference to the "strength of the claims" does not require the Tribunal to conduct a full merits assessment, and the Tribunal does not expect the parties to make detailed submissions as if that were the case. Rather, the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form.⁴³

It is desirable to leave some flexibility to the Tribunal to adapt its approach to the assessment of the merits, which is a "*sliding scale*," as more cases proceed through certification and, ultimately, to trial.⁴⁴ However, more directive guidance and/or rules regarding the merits test

³⁹ *McLaren v MOL* [2022] EWCA Civ 1701, para. 46; see also *Gutmann v Apple* [2024] EWCA Civ 702. See also, Department for Business Innovations & Skills, Private Actions in Competition Law: A consultation on options for reform – government response, January 2013, paragraph 5.55: "[t]he Government has therefore decided that there should be a **strong process of judicial certification, including a preliminary merits test**" (emphasis added).

⁴⁰ Indirectly, but with no less significance, this would also reflect the principle that there is no entitlement to certification of an opt-out claim simply because no other means of proceeding is said to be viable.

⁴¹ *Gormsen v Meta* [2023] CAT 10, para. 40(5). Following a similar logic, albeit in a different legal context, the U.S. Supreme Court has held that "*certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied, [...] Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.*" (*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, emphasis added).

⁴² See Article 7(7) of 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 409.

⁴³ Guide to Proceedings, para. 6.39.

⁴⁴ *Evans v Barclays* [2025] UKSC 48, para. 95: "[t]he less the Tribunal has confidence about that, the harder it is to conclude that imposing those additional detriments on the defendant is fair and a price worth paying

are needed in order to encourage uniformity in the Tribunal's approach to the merits. Guidance on what types of case would fail this higher merits test (as opposed to the "very weak" cases that can still withstand a summary judgment application) would also be welcomed.

In performing its gatekeeper role, the CAT could consider, before or at certification,⁴⁵ purely legal issues raised by defendants, major deficiencies in the theory of harm or the economic expert methodology that may be dispositive of the proceedings against one or all of them,⁴⁶ particularly where they do not depend on the resolution of disputed facts or otherwise do not require the extensive evidential inquiry ordinarily associated with a trial.⁴⁷ In other words, there is "*no other compelling reason*" why the issue should await determination.⁴⁸

To give a few examples, this would address veiled consumer law or regulatory claims that are inadequately shoehorned into the competition regime (as in *Boundary Fares*),⁴⁹ the reliance on a pleaded legal test that is unsustainable as a matter of law, or claims that raise serious concerns regarding the methodology underpinning the PCR's proposed blueprint for trial (as in *Evans*, *Rowntree* and *Gibson* for example).⁵⁰ By analogy, as already implied in the Guide to Proceedings in relation to consideration of the merits when determining whether a claim should proceed on an opt-in or opt-out basis, follow-on cases are more likely to pass a merits test easily than, for example, standalone cases based on unprecedented theories of harm (though

in the overall interests of justice. [...] it is indeed appropriate, in our view, to view the strength of the claim in terms of a sliding scale."

⁴⁵ It would do so through the exercise of its case management power, for instance depending on how straightforward the issue is (see, by analogy, para. 7.8 of the Guide to Proceedings). See also, *Evans v Barclays* [2025] UKSC 48, para. 26.

⁴⁶ E.g. *Evans v Barclays* [2025] UKSC 48, paras 5-6, 55-58; *Consumers' Association v Qualcomm* [2022] CAT 20, paras 59-100.

⁴⁷ *Evans v Barclays* [2025] UKSC 48, para. 108: "[s]peculating that something may turn up if the defendants are compelled to incur the major inconvenience and expense of a huge disclosure exercise is not a sufficient reason for subjecting them to that inconvenience and expense. There is no reason to think that statements from witnesses of fact might cure the fundamental deficiency in the case on causation."

⁴⁸ Borrowing the wording from para. 5.104 on Summary judgment of the Guide to Proceedings.

⁴⁹ The relatively low certification threshold has, at times, enabled poorly cloaked claims to proceed. *Boundary Fares* lasted no less than six years, went through several CMCs, hearings, disclosure with confidentiality rings, and trial when, ultimately, the theory of harm did not withstand scrutiny for purely legal reasons. The result was significant wasted costs and time for all involved. See *Gutmann v First MTR South Western Trains* [2025] CAT 64, para. 79: "[c]ompetition law is not a general law of consumer protection. And where the allegations concern systemic conduct, the fact that the dominant company could have carried out a particular aspect of its business better, or in a different way that would have benefited consumers, does not mean that this conduct crosses the line to constitute abuse."

⁵⁰ *Gormsen v Meta* [2023] CAT 10, paras 49-56; *Rowntree* [2025] CAT 49, para. 77: "as yet the PCR has not, even in general terms, identified a plausible approach to how it might estimate the sums that should be paid to writer members on the counterfactual. It follows that the PCR has not identified a sufficiently credible or plausible method of how damages are to be assessed". For the avoidance of doubt, jurisdictional issues – as in the *Salmon* opt-in case – would, too, continue to be dealt with at that pre-certification stage. See *Asda and others v Bremnes* [2025] CAT 14; *Gibson v Pride* [2017] CAT 9, paras 112-119.

as recognised in *Evans* aspects of a follow-on case which go beyond the decision on which they are based, for example causation and quantum warrant careful scrutiny).⁵¹

Practically speaking, in performing its gatekeeper function, and contrary to the approach suggested in *Merricks*,⁵² it may be useful for the CAT – much as it did in *Evans* – to raise and ventilate such manifest issues at the first case management conference (**CMC**) or before certification, irrespective of whether a formal application has been made by the defendants.⁵³ Such a sifting exercise would promote cost efficiency in keeping with the overriding objective, provide greater certainty to the parties, and serve the interests of both claimants and defendants alike.⁵⁴

Care will of course need to be taken to ensure that consideration of the merits at the certification stage does not amount to a mini trial and we see no reason why the introduction of a merits test **should** considerably increase the volume of material that the parties produce at the certification stage. Significant material and preparation are already typically produced/carried out ahead of the CPO hearing; the main issue lies in the lens through which the CAT is required to consider this material when evaluating whether the action should proceed. That being said, clear procedural directions from the CAT in the context of live cases may be required to ensure that the volume of material produced for CPO hearings **does not** significantly increase following introduction of a new merits test.

Q5. Do you agree that making the cost benefit analysis part of the statutory certification threshold test will guard against the risk of claims being brought that carry disproportionate cost when compared to the benefit delivered to the underlying class? [Yes / No / Not sure] Please explain your views.

Yes. Elevating the cost-benefit analysis into the primary statutory certification threshold under Section 47B of the Competition Act 1998, in lieu of leaving it to the CAT Rules, would help clarify its pivotal importance in certifying collective proceedings. Alternatively (noting the

⁵¹ Guide to Proceedings, para. 6.39: “where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion.”

⁵² *Mastercard v Merricks* [2020] UKSC 51, para. 59: “[t]here is no requirement at the certification stage for the CAT to assess whether the collective claim form, or the underlying claims, would pass any other merits test, or survive a strike out or summary judgment application, save that the CAT may, as a matter of discretion, hear such an application at the same time as it hears the application for a CPO: see rule 89(4). This is the first exception, but inapplicable in the present case because no such application was made” (emphasis added).

⁵³ *Evans v Barclays* [2025] UKSC 48, para. 55: “[d]uring the hearing, the Tribunal made it clear to the parties that the question of causation “was a matter that was troubling the Tribunal”: [...] After the hearing ended, the Tribunal wrote to the applicants asking them to crystallise their current positions on the “theory of harm” they were asserting “in a pleading-style manner” but with the support of their experts.”

⁵⁴ See Rule 4 of the CAT Rules.

Government's comments that proportionality should form a part of the analysis of whether a collective action is suitable in absolute terms) an express proportionality requirement could be introduced in Section 47B.⁵⁵ If the latter approach were followed, the cost-benefit analysis should remain within the CAT Rules, as a concrete manifestation of the proportionality concept, rather than being elevated to statute given the overlap between the two concepts.

Regardless of the precise approach adopted, the importance of proportionality and the cost-benefit analysis should be clarified to reflect the current trajectory of the case law and to ensure that the cases brought forward are those that will deliver a meaningful benefit.

As the law currently stands, the costs and the benefits of continuing the collective proceedings are one of multiple factors relevant to suitability under Rule 79(2)(b). It is not a freestanding condition for certification. Illustratively, the CAT said in *Gutmann (CPO)* that "*the cost-benefit analysis comes out slightly against the grant of a CPO*" and yet granted certification.⁵⁶ Whilst this mandatory cost-benefit mini test occupies a higher position than the matters the CAT "*may take into account*" under Rule 79(3) when determining whether the proceedings should be opt-in or opt-out, a clarificatory amendment would ensure that the judiciary accords it preeminent weight and would in passing provide greater certainty to claimants and defendants alike.⁵⁷ In so doing, however, it would be helpful to clarify that this does not water down the importance of the other factors mentioned in Rule 79(2), which remain considerations the CAT ought to consider, albeit to a lesser directional degree.

There are, of course, inherent limits to any forward-looking cost-benefit analysis, particularly in complex, high-stakes litigation. There is also a risk that elevating the cost-benefit test to statute will result in substantial front-loaded costs.

Be that as it may, as the Consultation noted, the CAT has lately been much more attentive to the cost-benefit analysis, thereby giving it a new-found importance.⁵⁸ Most notably, in *Waterside*, the CAT refused certification on the basis that the PCR had not shown that the likely

⁵⁵ Consultation, para. 29.

⁵⁶ *Gutmann v First MTR South Western Trains* [2021] CAT 31, para. 178.

⁵⁷ This amendment would, to a certain degree, contradict the position of the majority in *Mastercard v Merricks* [2020] UKSC 51, para. 80: "*I agree that this will generally be true, not least because issues about distribution mainly engage the interests of the represented class inter se, rather than those of the proposed defendant. But there may be cases where the issues as to suitability of the claims for collective proceedings will be better addressed when the whole of the representative's proposed scheme, including distribution proposals, are looked at in the round. In the present case there was nothing in the proposals for distribution which militated against certification, and an inappropriate element in the distribution proposals would normally be better dealt with at a later stage.*" This was raised in *Waterside v Mowj* [2026] CAT 32, paras 24-26.

⁵⁸ *McLaren v MOL* [2026] CAT 6, para. 196: "[t]here is no doubt that there are lessons to be learned at the certification stage, particularly regarding the likely take-up by RPs. However, the CPO in these proceedings was granted six years ago and the Tribunal did not have the experience that it now has." See also *Consumers' Association v Qualcomm* [2022] CAT 20, paras 101-111.

benefits to the class justified the very substantial litigation costs.⁵⁹ Drawing heavily on its experience in *Gutmann*, the CAT stressed that collective proceedings ought not to proceed where the expected returns to class members are likely to be outweighed by the sums accruing to lawyers and funders.⁶⁰ In reaching its judgment, the CAT referred, among other things, to the fact that the PCR had not put forward an analysis of take-up by class members whilst at the same time putting forward a very significant litigation cost budget.⁶¹

Against that backdrop, further guidance regarding the evidential expectations placed on the PCR in conducting the cost-benefit balancing exercise would be helpful.⁶² In particular, greater clarity could usefully be provided regarding the evidence expected in relation to anticipated level of payment to class members,⁶³ realistic participation and take-up rates, proposed distribution arrangements, likely levels of undistributed damages, funding and administration costs. Guidance on the reasonableness of projected litigation expenditure would also be helpful.⁶⁴

Q6. Do you agree that the Tribunal should consider whether there is sufficient evidence for aggregate damages as one of the factors relevant to certification? [Yes / No / Not sure] Please explain your views.

Yes. It is, however, relevant to note that under Section 47C(2), damages may not only be assessed on an aggregate basis but also, where appropriate, on an individual basis (albeit this has not happened to date).⁶⁵

⁵⁹ *Waterside v Mowj* [2026] CAT 32, paras 16.

⁶⁰ *Waterside v Mowj* [2026] CAT 32, paras 18-20.

⁶¹ *Waterside v Mowj* [2026] CAT 32, paras 49: “[t]hat inevitably requires addressing the level of take up, of damages awarded, by individual class members. The failure of the PCR to address this while at the same time advancing a cost budget of over £20 million means this case is not currently suitable for a CPO.”

⁶² E.g., *Consumers' Association v Qualcomm* [2022] CAT 20, para. 109. “[t]he costs of the proceedings are, unsurprisingly, substantial. But they are not out of line with the costs of other collective proceedings, and overall the total budgeted costs represent only around 5% of the total estimated claim value of £482.5 million. We do not consider that to be disproportionate.”

⁶³ E.g., *Consumers' Association v Qualcomm* [2022] CAT 20, para. 106: “in the current economic climate, and given the cost of living challenges faced by many consumers, we do not consider that an average claim of £16–17 per consumer is such a small sum that take-up is inherently likely to be limited.” In *Waterside*, the estimated loss per household ranged from £3.10 to £16.91 (para. 29).

⁶⁴ Pertinently, the CAT will soon issue guidelines for reducing legal costs in collective actions, which may prove useful to lower costs.

⁶⁵ Section 47C(2) of the Competition Act 1998: “[t]he Tribunal **may** make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person” (emphasis added). See also *Mastercard v Merricks* [2020] UKSC 51, para. 3: “the remedy sought may, but need not always, be the award of what are called aggregate damages” and para. 61: “[t]he hurdles (ie preconditions to eligibility under section 47B(5)(b) and (6)) are only that the claims are brought on behalf of an identifiable class, that they raise common issues and that they are suitable to be brought in collective proceedings: see also rule 79(1). In particular it is not a condition that the claims are suitable for an award of aggregate damages. That is only one of many relevant factors in the

For collective claims assessed on an aggregate basis, the Tribunal currently applies the *Pro-Sys* test, as approved by the Supreme Court in *Merricks*. As shown in the quote below, that test includes a consideration by the Tribunal of whether there is at least some evidence of the availability of data to support the proposed approach to damages calculation. The methodology offered must provide a blueprint for the parties and the CAT, and as a consequence, sufficient evidence for aggregate damages.⁶⁶ As reiterated in *Waterside*,⁶⁷ Rothstein J stated in *Microsoft*:

the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. **There must be some evidence of the availability of the data to which the methodology is to be applied.**⁶⁸

In *McLaren*, the Court of Appeal likewise stressed that the methodology advanced by the CR at the certification stage will be an important feature of the process. The level of detail of a methodology required by the CAT will always be fact and context sensitive and will turn upon “such matters as the availability of evidence.”⁶⁹

suitability assessment under rule 79(2).” See Rule 75(3)(i)(i) of the CAT Rules. *Explanatory Notes*, Consumer Rights Act 2015, 2015 c. 15, para. 438: “*Subsection (2) enables the CAT to determine the damages due in collective proceedings without being required to consider each claim which forms part of the action.*” See, by analogy, in the context of the Civil Procedure Rules r. 19.8, Lord Leggatt’s opinion in *Lloyd v Google* [2021] UKSC 50, para. 82: “[t]here is no reason why damages or other monetary remedies cannot be claimed in a representative action if the entitlement can be calculated on a basis that is common to all the members of the class. [...] the example of a claim alleging that every member of the class was wrongly charged a fixed fee; another example might be a claim alleging that all the class members acquired the same product with the same defect which reduced its value by the same amount. In such cases the defendant’s monetary liability could be determined as a common issue and no individualised assessment would be needed.” See *UKTC/RHA* [2022] CAT 25, para. 215.

⁶⁶ *MOL v McLaren* [2022] EWCA Civ 1701, para. 47: “[t]he level of detail of a methodology required by the CAT will always be fact and context sensitive and will turn upon such matters as the availability of evidence. However, underlying the *Microsoft* test is the proposition that if a claim is certified then the methodology offered by the class representative will provide an initial blueprint for the parties and the CAT of the way ahead to trial.”

⁶⁷ *Waterside v Mowi* [2026] CAT 32, para. 11; *Rowntree* [2025] CAT 49, para. 77: “as yet the PCR has not, even in general terms, identified a plausible approach to how it might estimate the sums that should be paid to writer members on the counterfactual. It follows that the PCR has not identified a sufficiently credible or plausible method of how damages are to be assessed”.

⁶⁸ *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57, para. 118 (emphasis added); *Waterside v Mowi* [2026] CAT 32, para. 11.

⁶⁹ *McLaren v MOL* [2022] EWCA Civ 1701, para. 47.

Taking stock of these clarifications, it seems appropriate to revise slightly the wording of Rule 79(2)(f), which refers to "*whether the claims are suitable for an aggregate award of damages*" by adding the words "*taking into account, among other factors, whether there is sufficient evidence to support the proposed approach to damages.*"⁷⁰

Whilst the application of this test to a particular case will inevitably be fact specific, it would be helpful if some guidance could be provided in respect of what is likely to constitute "*sufficient*" evidence for aggregate damages and whether that is simply intended to mirror, or go further than, the *Pro-Sys* test that is currently used by the Tribunal for this purpose.

⁷⁰ For greater clarity, a similar reference to evidentiary considerations could also be incorporated into Rule 75(3)(i)(i) and the Guide to Proceedings.

Financing a claim

Q7. Will permitting DBAs increase options/competition for the financing of claims? [Yes / No / Not sure] Please explain your views.

Yes. Permitting DBAs would broaden the range of funding options available to PCR's, while fostering greater competition within the litigation funding market.⁷¹

As a primary point, it is worth noting that in the current environment, permitting DBAs would have a material impact on the available fee structures for funders as well as lawyers. As recognised in the Consultation, since *PACCAR*, the enforceability of LFAs in which the funder's return is calculated as a percentage of damages has been called into question.

Lifting the ban on DBAs would create an additional route to financing litigation and promote risk-sharing, fostering competition between different funding models and providers. It may also encourage more law firms to finance collective actions without the involvement of a funder. As outlined in the Consultation, this is likely to drive down costs and promote access to justice for lower value claims.⁷²

DBAs may also redirect competition among funders towards metrics that are more closely aligned with the interests of the class, such as the merits and prospects of the claim, rather than its anticipated costs (as noted in the Consultation, where funders returns are calculated on a capped multiple basis, funding the biggest and most costly claims is incentivised).⁷³

Q8. Are there sufficient safeguards to protect against speculative litigation? [Yes / No / Not sure] Please explain your views, including any additional protections the government should consider.

No, not at present – as noted above and below the certification threshold requires tightening.

There is some risk that permitting DBAs would provide further incentives to stakeholders to bring speculative claims, given the potential for material returns to stakeholders under a DBA structure. However, insofar as law firms are concerned, it is important to note that they are

⁷¹ This accords with the Civil Justice Council, *Review of Litigation Funding*, Final Report, 2 June 2025, recommendation 54: "DBAs should be permitted in opt-out collective proceedings in the CAT. Such DBAs should not be subject to any cap, but the return to the legal representative under them should be subject to approval by the CAT on the same basis as the return to a funder under LFAs is subject to approval. Entry into such agreements should be subject to the same notification requirements as apply to LFAs."

⁷² This is evidenced in the report cited in the Consultation, with group costs order rates being more advantageous to claimants than prevailing funding rates. See The McKell Institute, *A Model for the Nation*, May 2024, Part 5: The Victorian experience so far.

⁷³ This would align proceedings in the CAT with representative actions brought under CPR r.19.8, where DBAs are permitted.

subject to professional and ethical duties owed to their clients, including duties to act in their clients' best interests, avoid conflicts of interest, and comply with regulatory obligations. Illustrating this, the Solicitors Regulation Authority (**SRA**) recently issued guidance entitled *Using or Arranging Third-Party Litigation Funding*, which reiterates solicitors' duties when advising on or arranging litigation funding.⁷⁴ Those duties provide an additional safeguard for the PCR and help promote closer alignment between the interests of the PCR, the represented class, and those conducting the litigation.⁷⁵ Further, the CAT has significant supervisory powers which it already exercises to scrutinise LFAs and manage potential conflicts of interest between class and funder.

Nevertheless, on their own the safeguards that apply in relation to funding arrangements are not sufficient to protect against speculative claims. As outlined above, the certification stage of proceedings does not currently provide a sufficiently robust filter against speculative litigation. Thus, the Consultation's proposals to strengthen certification and permit greater scrutiny of claims at an earlier stage are welcome. As explained below, the Government should also consider introducing effective Rule 45 settlement offers in opt-out proceedings, coupled with meaningful costs consequences. Together, these measures would help deter speculative incentives from prospering in the long term.

Q9. Are there other risks of permitting the DBAs to the regime that the government should consider? [Yes / No / Not sure] Please explain your views.

Yes. There is a risk that the availability of DBAs may encourage less experienced law firms to fund collective proceedings under a DBA without the financial acumen and resources required to support highly capital-intensive claims, where funding commitments can extend to many millions, and in some cases tens of millions, of pounds over the life of the proceedings. In some cases, this may create incentives to settle prematurely, even where doing so is not in the class's best interests and/or could lead to the law firm seeking to terminate the agreement at a point in the litigation which risks causing prejudice to the class. That said, these concerns should not be overstated. Lawyers are subject to well-enforced, stringent professional and ethical duties. Similar issues already arise in proceedings funded through CFAs and have not prevented the effective operation of the regime.⁷⁶ Moreover, any residual risks could be substantially mitigated by subjecting DBAs to a level of judicial scrutiny broadly comparable to that proposed for LFAs, including oversight of the relevant funding arrangements and safeguards designed to

⁷⁴ SRA, [Using or arranging Third Party Litigation Funding](#), 9 July 2026.

⁷⁵ The SRA is paying increasing attention to the use of third-party litigation funding. Recently, the SRA launched a consultation proposing enhanced regulatory obligations for solicitors and law firms that use and/or arrange third-party litigation funding in consumer claims.

⁷⁶ DBAs do not necessarily create materially greater agency risks than CFAs, given that remuneration under both structures is contingent on a successful outcome.

protect the interests of the PCR and the class, as well as the defendants' ability to recover costs.⁷⁷

Preserving the use of litigation funding

Q10. Will an indication of reasonableness of funder returns and order of payment at the point of certification be likely to increase certainty for funders and reduce the risk of their withdrawal from the regime? [Yes / No / Not sure] Please explain your answer.

Yes. Thus far the CAT has generally intervened when the funding terms warrant amendment because they might cause the proceedings to be conducted in a way that is contrary to the interests of the class.⁷⁸ That initial scrutiny need not be altered.⁷⁹

By contrast, the judicial handling of the question of whether the level of the funder's return is reasonable might benefit from greater clarity and certainty.

The CAT's existing case law illustrates why caution is required. Even in cases where prospective returns were described as "*very large*", "*remarkably high*" and "*exceptionally high*", the Tribunal nevertheless deferred the question of whether to ultimately allow those returns on the premise that the reasonableness of a return often cannot be assessed properly at certification because the ultimate recovery, duration, risks assumed, distribution rates, and actual economics remain uncertain.⁸⁰ These known unknowns organically evolve throughout the litigation cycle. Beyond factors relevant to the specific case, the broader investment environment and prevailing rates of return to similarly situated funders may also be relevant.

⁷⁷ See Civil Justice Council, Review of Litigation Funding, Final Report, 2 June 2025, recommendation 54. See SRA, Protecting consumers when solicitors and law firms use and/or arrange third-party litigation funding for consumer claims, 9 July 2026. Of particular note is the following observation: "[w]e are excluding these [collective actions brought in the CAT] claim types because of the Tribunal's substantial supervisory powers, including in relation to third-party funding. We have not identified the same patterns of harm and risk in this sector as we have in relation to the third-party litigation funding of other HVCC" (p. 13). See also, The Law Society, Consultation response, Protecting consumers when solicitors and law firms use or arrange third-party litigation funding, 17 September 2026.

⁷⁸ E.g., Neill v Sony [2023] CAT 73, paras 166-171; Kent v Apple [2024] CAT 5, paras 25-26; Gormsen v Meta [2024] CAT 11, paras 34-41; Riefa v Apple [2025] CAT 5, para. 110; Rodger v Alphabet [2025] CAT 45, paras 47-48, 54; Rowntree [2025] CAT 49, para. 86.

⁷⁹ Noticeably, this is because PACCAR has further compounded the risks of misalignment between the class, the CPR, and the funder.

⁸⁰ Gutmann v Apple [2024] CAT 18, paras 9-10, 36; BIRA v Amazon [2025] CAT 6, paras 54-55; Hammond v Amazon [2025] CAT 42, paras 43, 67. In that sense, see UK Trucks Claim Limited v Fiat [2019] CAT 26, para. 52: "since competition damages claims generally involve many stages before a case reaches trial, and it is impossible to predict all that may happen in such litigation, the [LFA] arrangements may need to be reviewed and revised over time."

Against that background, there is still value in providing an early indication of the Tribunal's views. Such an exercise can promote transparency and provide funders with greater comfort that a return contemplated at the outset is unlikely to be radically revisited after judgment or settlement absent material changes in circumstances. This may benefit defendants too by making settlement economics clearer.

One way of achieving this would be to assess prospective return across a range of hypothetical recovery scenarios, taking into account anticipated expenditure and projected timetables based on the budgets and case-management information available at the certification stage. With the caveat that excessive court intervention by judges, who are necessarily not funding market specialists and are, through no fault of their own, operating with imperfect information, risks distorting reasonable market-based outcomes in what is becoming an increasingly competitive litigation funding market.⁸¹

Accordingly, any indication as to the reasonableness of the funder returns should be approached with caution, remain non-binding, and be given by reference to a range of hypothetical outcomes and litigation scenarios.⁸²

As suggested by the Consultation that indication could be revisited in the event of a notable change, including among other things, an unforeseen development. As to the specific example of a "*notable change*" cited in the Consultation – a change in quantum – it is worth noting that quantum frequently does change over the life of a case, in particular following disclosure and witness evidence. As noted above, it would increase certainty for funders if such changes in quantum could be provided for, to some extent, through judicial consideration of the funder's return under a range of different hypothetical recovery scenarios at the outset of the case.

Finally, there is merit in codifying that position in the CAT Rules in the interests of certainty and transparency.

Q11. Will a presumption that funders will receive their return at the point of a damages award being ordered or settlement sum being approved be likely to increase certainty

⁸¹ According to the *Riefa* tribunal, it should be "*reluctant to venture into an assessment of the commercial terms of the LFA*" unless they are sufficiently extreme to warrant calling out (*Riefa v Apple* [2025] CAT 5, para. 110).

⁸² By contrast, depending on its implementation, the CJC adopts a markedly more rigid approach in Recommendation 26 of its *Review of Litigation Funding*, proposing that: "*CPR Part 19 should be revised to make it consistent with the CAT Rules applicable to LFAs, not least in terms of approval of LFAs and settlements. Both CPR Pt 19 and the CAT Rules should be amended to include a requirement that upon certification of an opt-out collective proceeding or representative action that is funded a requirement that the opt-out notice specifies that: the class representative is in receipt of litigation funding; the name and details of the funder; and, the funder's approved return in the event of success*" (emphasis added).

**for funders and reduce the risk of their withdrawal from the regime? [Yes / No / Not sure]
Please explain your answer.**

Yes. Devising a rebuttable presumption that funders will receive their return at the point of a damages award being ordered or settlement sum being approved is likely to increase certainty for funders and reduce the perceived risk of their withdrawal from the regime.⁸³ The proposal would provide greater assurance that a successful funder will be able to recover both its investment and an appropriate return. As acknowledged in the Consultation, this proposal is consistent with the current trajectory of the caselaw. For example, in *Gutmann v Apple*, the Court of Appeal has observed that there is “*nothing surprising or unusual*” about the CAT ordering payment to funders or lawyers from the award in priority to the class.⁸⁴

Q12. Does the proposed approach retain sufficient discretion for the CAT to safeguard against unfair outcomes? [Yes / No / Not sure] Please explain your answer.

Yes. The adoption of a rebuttable presumption would not totally fetter the CAT's discretion, rather it would provide a starting point for the CAT in exercising that discretion. Subject to proper case-specific justification to rebut that presumption, the CAT could, for example, permit only part of the funder's return to be paid upon judgment or settlement approval, with the balance becoming payable following distribution to class members. The Courts have emphasised the importance of the CAT's discretion to consider such matters by reference to the facts of each case. As endorsed by the Court of Appeal, the CAT said in *McLaren*:

it is for the Tribunal to determine how any damages are to be dealt with in terms of distribution to class members, and payments of costs and expenses, including any return for funders. How that exercise is to be carried out is very much fact and case specific, and the Tribunal would endeavour to act fairly to all those concerned, mindful of the incentives and the need for a funding market for collective proceedings. Funding will dry up if funders are unable to recover their costs and disbursements and make a profit even on cases where there is a successful outcome overall.⁸⁵

Any reform should therefore seek to increase certainty for funders through a rebuttable presumption without displacing the CAT's ability to secure a fair outcome in the circumstances of the particular case. Guidance on the types of cases in which it may be appropriate for the

⁸³ In particular, the Consultation rightly notes that a funder's return diminishes with the passage of time due to the time-value of funds and cost of capital.

⁸⁴ *Gutmann v Apple* [2025] EWCA Civ 459, para. 81.

⁸⁵ *McLaren v MOL* [2024] CAT 47, para. 21; *Gutmann v Apple* [2025] EWCA Civ 459, para. 93.

presumption to be rebutted could also be useful, although the CAT should ultimately retain case-specific discretion to determine whether the presumption should be rebutted.

Costs

Q13. Do you consider changes to the CAT Rules to be necessary in addition to ongoing work by the CAT to develop guidance in relation to costs in collective proceedings? [Yes / No / Not sure] Please explain your answer.

Not yet. Governing principles, in particular Rule 4 together with Rules 53 and 104, already provide a flexible tool enabling the CAT to marshal the parties.⁸⁶ As the Supreme Court noted, this includes the well-known overriding objective that each case is dealt with justly and at proportionate cost.⁸⁷ Over time, this ordinary process of judicial development and refinement as regards costs should provide greater certainty and predictability, to the benefit of all stakeholders. Yet incorporating cost-related clarifications into the Guide to Proceedings, and to a lesser extent the CAT Rules, would be useful, but the Government should await the issuance of the CAT's practice direction in order to ensure a consistent and coherent approach overall.⁸⁸

Currently only the PCR needs to produce a budget as part of the certification process,⁸⁹ and there is no set approach for continued oversight of budgets as a claim proceeds. CJC's Recommendation 38 is that costs budgeting and costs management should be mandatory for all funded collective proceedings with legislation to empower the civil courts and the CAT to carry out pre-action costs budgeting and management.⁹⁰ In March 2026, the President of the CAT, Ms Justice Bacon, said in this respect that:

[g]oing forward, the tribunal is likely to want to scrutinise the cost budgets on both sides from earlier in proceedings, and we'll be considering how to use that information in ongoing case management to avoid situations where the costs spiral out of control.⁹¹

⁸⁶ The CAT has indicated that it will be issuing a new practice direction in the coming months. See Francesca McClimont, *CAT to issue guidelines for reducing legal costs in collective actions* (Global Competition review, 20 July 2026). By contrast, overly prescriptive rules may hinder the Tribunal's ability to tailor cost-management measures to the circumstances of individual cases.

⁸⁷ *Mastercard v Merricks* [2020] UKSC 51, para. 25: "*Rule 4(1)-(2) states that cases are to be decided justly and at proportionate cost. This is a modified version of the well-known overriding objective enshrined in the Civil Procedure Rules of England and Wales*".

⁸⁸ CJC's recommendation 39 suggests that better practice guidance on costs budgeting and management of funded claims should be developed jointly by the Civil Procedure Rule Committee and CAT Rule Committee.

⁸⁹ Rule 78 of the CAT Rules; Guide to Proceedings, para. 6.30.

⁹⁰ CJC, *Review of Litigation Funding*, Final Report, 2 June 2025, recommendation 38.

⁹¹ Janith Aranze, *CAT president: delayed class action settlements are wasting tribunal resources* (GCR, 16 March 2026).

This growing focus on costs had already found its way into recent CAT rulings. At a CPO hearing in 2025, citing its duty to actively manage cases, the CAT requested that the PCR “*submit updates*” on the budget at each CMC indicating the extent to which the budget has changed and confirming the amount that has been drawn from the funder. Were the budget to be exceeded, the CAT would be able to review whether the funder has agreed to that, and whether a realistic revised budget has been prepared. More recently in another case, the CAT has required parties to provide increasingly detailed costs information, including updated costs budgets and more granular breakdowns of expenditure across different litigation phases.

At the same time, any new rule on cost sanctions should make clear that parties will not ordinarily face indemnity costs consequences, or lose the ability to recover costs, for advancing legitimate arguments on unresolved or developing areas of law, given the regime remains young and still-developing through appellate determinations.⁹² With this in mind, the Consultation’s suggestion that cost sanctions be imposed upon parties that “*unreasonably drives up costs*”, including “*tactics to drain budgets*”, is difficult to support.⁹³ Those concepts, which assume a degree of ill intent, are inherently subjective, and risk conflating abusive conduct with the legitimate pursuit of legal arguments. Given the CAT’s “*wide discretion*” as regards costs, such a suggestion appears unnecessary and risks generating further satellite litigation concerning costs.⁹⁴

Lastly, regarding the post-*ChapelGate* approach to the *Arkin* Cap, it may be premature to codify definitive principles in formal guidance given the current state of judicial development. If the Government is nevertheless minded to provide guidance, a nuanced approach would be preferable.⁹⁵ In that, unless *ChapelGate* is deemed applicable, the funder’s non-party costs liability should ordinarily be capped at the adverse costs cover fixed approved by the CAT, whether at certification (£15 million in *Gutmann*) or as subsequently varied by agreement between the parties or order of the Tribunal.⁹⁶ That approach does, however, require the CAT to adopt a flexible and proactive approach to monitoring the adequacy of ATE cover throughout the proceedings so that the level of protection remains aligned with the evolving costs risks of

⁹² In particular, the collective action regime is an entirely new and complex regime which has been fully operational for only around five years. First, judicial guidance on the proper operation of the regime continues to develop, particularly through appellate decisions. Second, and relatedly, it is to be expected that both claimants and defendants will raise complex and novel legal and factual issues, many of which have yet to be tested before the courts. The resolution of those legitimate issues can generate additional and sometimes unforeseen costs in the short term.

⁹³ Consultation, para. 65.

⁹⁴ *Gutmann v Govia* [2026] CAT 21, para. 9.

⁹⁵ See CJC, *Review of Litigation Funding*, Final Report, 2 June 2025, recommendation 42. Moreover, where a litigation funder has failed to comply with the proposed capital adequacy or ATE insurance requirements, it is difficult to object in principle to the availability of security for costs against the funder, rather than the funded party, particularly where any non-compliance is through no fault of the claimant.

⁹⁶ *Gutmann v First MTR South Western Trains* [2026] CAT 21, paras 31-41.

the litigation. As outlined by the CAT, this principled approach should remain subject to the CAT's discretion.⁹⁷

Q14. Would increased oversight of budgets be likely to have a positive effect on their stability and transparency? [Yes / No / Not sure] Please explain your answer.

Not sure. Increased oversight of budgets is likely to improve transparency, but it is less clear that it would materially improve budget stability and it has the potential to generate additional costs.

In collective proceedings, costs often evolve in response to developments that cannot readily be anticipated at the outset, including disclosure exercises, expert evidence, interlocutory disputes and case-management directions. For instance, the sometimes-unexpected ways in which certain cases developed following certification, including through innovative case management procedures, have driven costs upwards. As a result, budget increases do not necessarily indicate inadequate oversight.

Boyle v Govia Thameslink illustrates the point. There, the CAT recognised that significant increases in the PCR's budget – £10.44 million originally, to £15.4 million in October 2023, to £20 million in February 2025 – were attributable to the unforeseen withdrawal of the PCR's expert and additional work resulting from the CAT's own directions.⁹⁸ At the same time, the CAT suggested that the PCR should "*proactively keep the other parties and the Tribunal informed*" of any significant changes to the budget.⁹⁹ This is a sensible and proportionate approach.

The principal concern is that any enhanced oversight itself risks generating substantial additional costs. An overly prescriptive costs-management regime risks encouraging satellite disputes over budgets and assumptions, thereby increasing costs rather than controlling them. The objective should be to improve transparency and accountability, not to introduce a rigid framework that inhibits parties from pursuing legitimate arguments or responding appropriately to developments in the litigation.

If the Government is minded to adopt the CJC's recommendations, a flexible approach to costs budgeting would therefore be preferable.¹⁰⁰ Requiring budget updates at defined stages of the proceedings, or following material changes in circumstances, may strike an appropriate balance between transparency and proportionality, however, the CAT should retain discretion to adapt its approach on a case-by-case basis.

⁹⁷ *Gutmann v First MTR South Western Trains* [2026] CAT 21, para. 35.

⁹⁸ *Boyle v Govia Thameslink* [2025] CAT 26, paras 107, 120 and 144.

⁹⁹ *Boyle v Govia Thameslink* [2025] CAT 26, para. 144.

¹⁰⁰ CJC, *Review of Litigation Funding*, Final Report, 2 June 2025, recommendations 38-40.

Alternative dispute resolution (ADR), settlement, and alternative routes to redress

Alternative dispute resolution

Q15. Should mediation be encouraged or mandated at set points of proceedings as a matter of course? [Yes / No / Not sure] Please explain your answer, including at which stages this would be appropriate if responding 'Yes'.

Yes to encouraged either following disclosure and/or following expert reports, no to mandated.

Mandating mediation at any stage in the proceedings risks adding significant further costs. Whilst some cases would benefit from being encouraged to mediate at set times in the proceedings, there will likely be other cases where it is apparent that the parties are simply too far apart for mediation to be successful, whether at a particular stage or at all.¹⁰¹ The parties should, therefore, retain the flexibility to rule out mediation at a particular stage (or at all) rather than having to incur the time and costs of attending a mediation which they know is bound to fail. In contrast, encouraging mediation at specific stages of proceedings, such as following disclosure and the service of expert reports, may prompt parties to engage in formal negotiations more quickly than is currently the case. As explained in **Q17** below, if it becomes apparent that one party was in favour of mediation at the post-disclosure or post-expert report stage but the other party was not, then the CAT could consider that when exercising its discretion on costs following trial.

Encouraging mediation at the post disclosure and/or post expert report stage may also result in collective actions settling at an earlier stage than they currently appear to and therefore saving costs and court time.¹⁰²

Within a relatively small sample of cases, a growing number have been settled, all within the last three years and most of them either in the build up to, or shortly after, trial (rather than following disclosure or expert evidence):¹⁰³

- *Three sets of settlements in RoRo (CSAV; WWL/EUKOR; and MOL/NYK settlements);*

¹⁰¹ Moreover, the CAT will not necessarily have the visibility on whether settlement discussions are ongoing, or of their content, given that they typically happen on a without prejudice basis.

¹⁰² *Consumers' Association v Qualcomm* [2026] CAT 50, para. 7: "[a] very substantial amount of costs, in excess of £60 million in total were incurred by the Settling Parties prior to reaching the Proposed Settlement."

¹⁰³ The only exception to date is the £1.5 million settlement with CSAV, which occurred just before the end of the disclosure exercise and involved a defendant whose alleged liability was dwarfed by the costs of defending the case (*McLaren v MOL* [2023] CAT 75; see joint application for a collective settlement approval order, 5 October 2023, para. 39).

- *Merricks v Mastercard*;
- *Gutmann v First MTR South Western Trains*;
- *Consumers' Association v Qualcomm*; and
- *Rodger v Google*.

From the claimant's perspective, the CAT's ruling in *Rowntree* already serves as an important reminder that pre-litigation consensual resolution mechanisms should, at the very least, be properly explored before collective proceedings are commenced.¹⁰⁴

Q16. Are these case management powers likely to have a meaningful impact on bringing parties together? [Yes / No / Not sure] Please explain your answer.

Yes. These powers are likely to have a positive impact by encouraging parties to consider settlement at defined stages of the proceedings. In particular, an express requirement to consider whether mediation should be explored at a particular stage or stages in a claim is unlikely to be ignored, especially following certification.

That said, the impact should not be overstated. Standalone cases brought before the CAT, which account for more than 70% of all proceedings are legally and evidentially complex.¹⁰⁵ Those complexities engender greater uncertainty as to outcome, perhaps explaining why some settlements occurred only post-trial.

Q17. Do you agree that, if a party unreasonably fails to engage in ADR when encouraged or ordered to do so by the CAT, this conduct should be taken into account when considering costs, with the potential for penalties? [Yes / No / Not sure] Please explain your answer.

Yes, provided such sanctions are reserved for truly unreasonable conduct. A party's unreasonable failure to engage in ADR when encouraged or directed to do so by the CAT may properly be taken into account when costs are considered.

The wording "*fails to engage*" is ambiguous, however. The key question should be whether the party's conduct was unreasonable.¹⁰⁶ In that respect, the factors identified in *Churchill v*

¹⁰⁴ *Rowntree v PRS* [2025] CAT 49, para. 107: "[t]he letter stated that 'we do not consider that any formal mediation or ADR is appropriate'. This approach was unfortunate and not in the interest of the class. It is in reasonable contemplation that there was scope for formulating alternative ways of distributing Black Box royalties which might benefit the class more than spending these eye-watering sums on lawyers and funders. If this claim were to have proceeded, we would have encouraged the parties to look at alternative ways of resolving this dispute."

¹⁰⁵ Consultation, para. 72.

¹⁰⁶ E.g., Transcript of Consequential Hearing in *Kent v Apple*, 13 November 2025, pp. 125-128.

Merthyr Tydfil County Borough Council, including by the Court of Appeal in *Halsey*,¹⁰⁷ provide a useful guide.¹⁰⁸ Costs sanctions should fundamentally be reserved for unreasonable conduct given the context, rather than used as a mechanism to pressure parties into settlement.

Settlement

Q18. Should there be differences in how settlement offers with automatic cost shifting consequences operate in collective proceedings, compared with Rule 45 offers in other kinds of claim? [Yes / No / Not sure] Please explain your answer.

Yes. At the inception of the collective regime, the legislator decided not to make the cost-shifting protections automatic in recognition that a claimant “*might not always be able to assess whether an offer is reasonable at the time that it was made.*”¹⁰⁹ Other reasons were also cited, including the risks of placing undue pressure on the CR and of conflicts between class members. Thus, Rule 45 offers with the costs consequences they trigger, are not currently permitted in the opt-out context.¹¹⁰ Today, however, that diagnosis appears less accurate for a number of reasons:

- **Maturing regime.** Judicial pronouncements, particularly final judgments, have slowly brought clarity on the working of the regime. These include, above all, settlement hearings and collective settlement judgments, with to date seven judgments (with some recently occurring after lengthy trials).¹¹¹ There have also been three fully-contested final judgments: *Le Patourel v BT*, *Justin Gutmann v First MTR South Western Trains*, and *Kent v Apple*. Most recently, *Google Play Store* has been settled approximately two years after filing for £260 million, representing 25% of the amount initially claimed and the largest settlement to date under the opt-out regime.

¹⁰⁷ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, paras 16-35, in short: “*factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.*”

¹⁰⁸ *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416.

¹⁰⁹ *Explanatory Memorandum to the Competition Appeal Tribunal Rules 2015*, 2015/1648, para. 8.22.

¹¹⁰ *Calderbank* offers are made privately, and the declining party can potentially face costs consequences if the CAT deems their conduct to be unreasonable. But, as noted in the Consultation, with the concrete example of *Kent v Apple*, this is not automatic, and the hurdle for costs consequences to be imposed is higher than under Rule 45 (*transcript* of consequential hearing in *Kent v Apple*, 13 November 2025, from page 125, line 24).

¹¹¹ Settlements that have occurred after trial include: *McLaren v MOL* [2026] CAT 6; *Consumers' Association v Qualcomm* [2026] CAT 50.

- **Blueprints.** The requirement that the PCR carefully consider and present a blueprint to trial in order to obtain certification will help CRs assess whether a settlement offer is more or less reasonable at different stages of the proceedings. Further, the proposed stricter merits test should give the parties an improved early understanding of broad settlement ranges by bringing focus to the merits at an early stage.
- **Evidence base.** Every year, PCRs have continued to file new claims, while many existing cases are approaching trial or resolution. As a consequence, the pool of available information, benchmarks, and comparators has grown considerably and will continue to expand over time.
- **Experienced litigants.** Law firms and a number of in-house teams within corporate institutions have now accumulated substantial experience in managing these claims and advising on settlement considerations. This, together with the increasing case law on collective action settlements and on cases which either succeed or fail, means that the parties involved in collective actions are now much better placed than they were at the outset of the collective actions regime to determine whether a settlement offer is at an appropriate level.
- **Stronger support.** Consultative panels comprising seasoned specialist advisors have become the norm. Their membership and structure have been scrutinised by the CAT, which seeks to ensure they offer meaningful added value to CRs. When asked, these panels can provide, and have provided, independent advice on settlement offers, allowing the CR to draw on a diversity of informed opinions.¹¹² In addition, CRs have also developed sophisticated external support networks. For instance, they have established the Class Representatives Network that brings CRs together to share experiences, practical lessons and insights.¹¹³ Similarly, The Collective Redress Lawyers Association provides a forum that facilitates knowledge-

¹¹² E.g., *McLaren v MOL* [2025] CAT 4, para. 75: “[a] number of steps were undertaken by the CR to satisfy itself that the terms of the settlement agreements were just and reasonable. The Tribunal has the views of Mr McLaren and his panel of experts of eminent people who are advising him, and he expresses the views set out in his witness statements. Prior to agreeing the settlements, Mr McLaren consulted two members of his advisory panel before executing the Settlement Agreement, Sir Richard Aikens and Kate Wellington.” See *Roger v Google*, joint application for a collective settlement approval order, 25 August 2026, para. 16: “[i]n reaching his conclusion that the Proposed Settlement is just and reasonable the CR took into account: [...] Further privileged independent advice from his Consultative Panel and Mr Nicholas Bacon KC”. On the utility of the panel, see *Riefa v Amazon* [2025] CAT 5, para. 89(5); transcript of the hearing, 24 September 2024, Prof. Riefa: “I certainly think that I would make sure the consultative panel is consulted and can give some views. I would also probably, if I felt it was going to be a bad settlement, refer to external advice”.

¹¹³ See website: [Class Representatives Network - Class Representatives Network](#).

sharing, the exchange of practical experience, and the development of best practices.¹¹⁴

Accordingly, there is no compelling reason in principle why opt-out collective proceedings should be treated differently from other forms of litigation. Allowing Rule 45 offers with automatic costs shifting consequences would create stronger incentives for both parties to engage constructively in settlement discussions and could reduce the costs and delays associated with protracted litigation. It may also help to discourage speculative litigation. Any Rule 45 regime for collective proceedings should, however, account for the important features characteristic of such proceedings, including:

- The CAT exercises a unique settlement approval function. In particular, if a party supports a proposed collective settlement, but the parties' application for settlement approval is refused by the CAT, it should not be treated as having rejected the offer for the purpose of Rule 45 costs consequences should the damages awarded fail to beat the offer.¹¹⁵
- That class actions are typically high value and long running. Rule 49(3), which applies only to claimants (and not to defendants), includes enhanced interest on damages of up to 10% above base rate post-offer, indemnity costs, and an additional monetary amount.¹¹⁶ We suggest consideration should be given to amending this rule in a collective actions context so that the amount of interest on damages which may be awarded is the lower of the 10% cap or a predetermined monetary sum. Without this adjustment, in the context of a long running, billion-pound claim, there is the potential for interest on damages to amount to hundreds of millions. This risks placing significant pressure on defendant businesses to settle even where the merits of a claim are in doubt. This rebalancing of these costs consequences, themselves modelled on Part 36, would be consistent with the legislative history and rationale of the enhanced interest rate. In his Access to Justice Final Report, Lord Woolf introduced the idea of this additional sanction, with an enhanced interest rate inversely proportional to the award value.¹¹⁷

¹¹⁴ See website: [The Collective Redress Lawyers Association - CORLA](#).

¹¹⁵ Although, thus far, the CAT has not rejected any settlement application.

¹¹⁶ It is worth noting, however, that the "*additional amount to be determined by the Tribunal in accordance with CPR Rule 36.17(4)(d)*", under Rule 49(3)(d), may have limited practical significance in collective proceedings. That additional amount is capped at £75,000, a figure that is unlikely to provide a material settlement incentive in proceedings often worth hundreds of millions, or even billions, of pounds.

¹¹⁷ Lord Woolf in *Petrotrade Inc v Texaco Ltd* [2000] EWCA Civ 512, para. 77: "*amount of the claim is also a relevant factor. If a claim is small, enhanced interest has to be at a higher rate than if the claim is large, otherwise the additional advantage for the claimant will not be achieved. In this case the sum involved was neither particularly large nor particularly modest.*" Put simply, the larger the award, the smaller the enhanced interest rate. Illustratively, the Woolf Report mentions 25% on awards up to £10,000 and 5% on awards above £50,000. This order of magnitude is far removed from the amounts at stake in billion-pound

Another potential option to level the playing field somewhat would be for defendants to be entitled to a stronger package of remedies if they have made a settlement offer which is rejected but which they ultimately achieve or beat a trial.

Finally, effective settlement incentives require not only cost consequences (e.g. proposed Rule 45-style offers) but also certainty that settling parties will achieve finality. To that end, we suggest that the CAT should expressly retain, on a newly-enacted statutory basis, a clear power to approve barring orders extinguishing contribution claims under the Civil Liability (Contribution) Act 1978, subject to suitable considerations for non-settling defendants, e.g., as regards contribution claims. At present, as illustrated in the CSAV settlement in *McLaren*, the legal position remains unclear.¹¹⁸

Q19. Are there additional safeguards that should be considered to avoid undue pressure on class representatives to settle? [Yes / No / Not sure] Please explain your answer.

No. The regime already contains substantial safeguards against undue pressure being exerted on a CR to settle and the proposals made in the Consultation to clarify the role and responsibilities of the CR will bolster this.

- *First*, the CAT scrutinises the suitability, independence and underpinning arrangements of PCRs at certification. As shown above in **Q2**, recent case law has demonstrated a growing focus on funding arrangements, consultative panels, costs advice and the ability of the CR to act independently of funders and legal advisers. In line with Rule 94(3)(c), save some particular circumstances, it has become standard practice to obtain independent advice in relation to the proposed settlement.¹¹⁹ In addition to the independent advice of the panel, the evidence provided to the CAT includes the “*comprehensive*” opinions of experienced solicitors and/or King’s Counsel on the settlement terms.¹²⁰ In addition, most litigation funders

aggregate damages claims, and strongly militates in favour of the inapplicability of the enhanced interest rule.

¹¹⁸ The position is clearer once the English transposition of the Damages Directive becomes applicable (Sections 10 and 41 of The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017).

¹¹⁹ See for the exception: *Consumers’ Association v Qualcomm* [2026] CAT 50, paras 158-160.

¹²⁰ *McLaren v MOL* [2026] CAT 6, para. 80; *Merricks v Mastercard* [2025] CAT 28, paras 210-212: “*expect the CR to provide a comprehensive opinion from its counsel (who we apprehend will usually be a KC) setting out the considerations on the basis of which counsel has advised that the proposed settlement is reasonable in the interests of the class*”.

financing opt-out proceedings either belong to, or have undertaken to comply with, the Association of Litigation Funders' Code of Conduct.¹²¹

- *Second*, collective settlements are subject to a level of judicial supervision that has no real equivalent in ordinary commercial litigation. Any settlement requires CAT approval, and the Tribunal must be satisfied that the proposed settlement is just and reasonable. In carrying out that assessment, the CAT considers the interests of the class, the terms of the settlement, the treatment of costs and funder returns, and any potential conflicts of interest. To date, the CAT has demonstrated a clear willingness to scrutinise settlement arrangements and ensure that they operate in the interests of the class.
- *Third*, the concern that CRs may be exposed to excessive settlement pressure should be viewed in context. Indeed, within a limited sample, anecdotal evidence suggests that collective proceedings can create substantial settlement pressure on defendants. In *Boundary Fares*, one defendant agreed to a settlement comprising a £25 million settlement fund together with £4.75 million in ringfenced legal costs and disbursements shortly before trial (this amounted to over half of the estimated quantum attributed to the settling defendant). Yet the CAT subsequently dismissed the claims against the remaining defendants and found no abuse of dominance.¹²²

Q20. Is it likely that introducing settlement offers with automatic cost shifting consequences, akin to Rule 45 offers, will have a meaningful impact upon the willingness of parties to engage in settlement discussions? [Yes / No / Not sure] Please explain your answer.

Yes. Much like Part 36, Rule 45 offers are an established mechanism for encouraging settlement in competition litigation. By attaching automatic costs consequences to the rejection of reasonable offers, they encourage parties to assess litigation risk realistically and engage constructively with settlement proposals. Those consequences are likely to result in parties making more formal settlement offers.

Given the significant legal, expert and funding costs typically incurred by both sides, the prospect of adverse costs consequences is likely to increase the use of formal settlement offers, encourage meaningful negotiations, and reduce the incidence of unnecessarily protracted, no-

¹²¹ *Robert Hammond v Amazon* [2025] CAT 42, para. 52: "[b]y letter from its solicitors dated 13 March 2025, FourWorld confirmed that it would act in accordance with the provisions of the Code". See also, *UK Trucks Claim Limited v Fiat and others* [2019] CAT 26, para. 54: "Mr Purslow states in his witness statement that they are indeed "Associated Entities" of TCML for the purpose of the Code" and para. 62: "after the hearing Calunius LLP by its directors on 21 June 2019 gave a written undertaking to the Tribunal that it will itself comply with the ALF Code and that it will use its best endeavours to ensure that Yarcombe will do so".

¹²² *Gutmann v Stagecoach South Western Trains Limited* [2024] CAT 32.

holds-barred litigation. Accordingly, a Rule 45-style regime should have a material positive impact on the willingness of parties to engage in settlement discussions.

As explained in the answer to **Q18** above, some of the benefits currently only available to claimants making Rule 45 Offers (indemnity costs, enhanced interest, and an additional monetary amount) may generate an imbalance between the parties and merit further consideration.

Q21. Do you consider it to be necessary to make changes to the settlement approval process at this time to increase efficiency? [Yes / No / Not sure]

- **If yes, what changes do you believe would be beneficial?**
- **If no, is this an area that would benefit from review in due course once the Tribunal and its users have more experience of settlement approval processes in collective proceedings?**

Not sure. In appropriate cases, shortening the process to a single-day hearing would be cost-efficient, with the CAT, if needs be, putting written questions to the parties before the hearing so that they come prepared for any specific issues the CAT wishes to raise and counsel are properly instructed to address any concerns at the hearing. Other measures aimed at increasing certainty rather than altering the substance of the approval process would be welcome. As noted above, subject to appropriate protections for non-settling defendants, there would be value in providing a clear statutory basis for the CAT to approve barring orders extinguishing contribution claims under the Civil Liability (Contribution) Act 1978. More certainty regarding the treatment of reversion provisions, such as an enforceability presumption, may also be beneficial, as these are often material commercial terms of settlement agreements and can create useful incentives to settle, particularly in multi-defendant proceedings through first-in, first-out structures.¹²³

That said, in the grand scheme of things, the existing approach seems to be functioning effectively.¹²⁴ Most collective proceedings that have reached a conclusion have settled, and the CAT has demonstrated a willingness to scrutinise settlements carefully. The safeguards contained in Rule 94, including the requirement that the CAT be satisfied that any settlement is just and reasonable, remain important protections against conflicts of interest and undue influence in the settlement process.¹²⁵ As explained above, the CAT's settlement approval

¹²³ McLaren v MOL [2026] CAT 6; McLaren v MOL [2025] CAT 4; McLaren v MOL [2023] CAT 75.

¹²⁴ As the Consultation itself recognises, a larger body of settlement decisions may provide a firmer basis on which to assess whether procedural changes are genuinely required.

¹²⁵ Indicating at certification whether and how the funder's returns can be deemed reasonable will, to some extent, help the settling parties structure the settlement and speed up the approval process.

judgments provide further clarity on the issues that the CAT will consider when approving a settlement and the evidence it will require.

Empowering the CMA to order redress

Q22. Do you agree that the simpler approach outlined in relation to assessing quantum is likely to make the use of redress schemes less burdensome? [Yes / No / Not sure] Please explain your answer.

Not sure. Introducing a presumed level of overcharge could in principle make the use of redress schemes less burdensome by reducing the need for complex and costly disputes regarding quantum. In this respect, the Supreme Court in *Merricks* observed that proof of “*causation and loss is likely to involve very difficult and expensive forensic work, both in terms of the assembly of evidence and the analysis of its economic effect.*”¹²⁶ However, the extent of simplification should not be overstated for the reasons noted below (including that any rebuttable presumption of overcharge would likely be robustly challenged, potentially on strong grounds and that complex issues of pass on may arise in all but the simplest of supply chains).

The possible impact of a simplified approach to assessing quantum in redress schemes on the shape of the regime as a whole and the number of claims pursued in the CAT must also not be overstated: most collective actions to date have been stand-alone claims where liability needs to be established and where a redress scheme would not, therefore, be appropriate.¹²⁷

As previewed above, the proposal raises a number of practical and legal questions that require further clarification and may have a bearing on the likely extent of simplification:

- **Level of overcharge.** Greater clarity is needed regarding how any presumed level of overcharge would be determined. It is not clear whether the presumption would apply uniformly across sectors and infringement types (price-fixing, excessive pricing, exclusivity, etc.), or whether different presumptions would apply depending on the circumstances of the case. A principled compensatory approach to estimating an overcharge is consistent with the prohibition of exemplary damages for mass redress.¹²⁸ More broadly, the academic and economic literature regarding typical overcharge levels show considerable variation across different industries and forms of infringement, and

¹²⁶ *Mastercard v Merricks* [2020] UKSC 51, para. 74.

¹²⁷ The Government appears to view redress schemes primarily as a way to “*potentially increase the number of cases in which redress would be available in respect of competition infringements*” rather than a way of reducing the number or type of claims currently being brought in the CAT (Consultation, para. 92).

¹²⁸ *Explanatory Notes*, Consumer Rights Act 2015, 26 March 2015, para. 438: “*Subsection (1) prohibits the CAT from awarding exemplary damages in collective proceedings, i.e. damages which are designed to be punitive rather than simply compensate for the actual loss suffered. This is to avoid very large damages being awarded which do not reflect the losses suffered*” (emphasis added).

at times even in relation to the same conduct. Judgments likewise reflect this heterogeneity. For instance, concerning the same bid rigging infringement, the CAT found an overcharge of 5% in *London Array*,¹²⁹ whereas in *BritNed*, the overcharge was confined to baked-in inefficiencies, quantified at 2.6% (without considering the regulatory-cap reduction of 10%).¹³⁰ By way of comparison, Connor's 454-page study found a median overcharge of 19% for bid-rigging.¹³¹ The proposal would therefore benefit from further explanation of the evidential and methodological basis on which any statutory presumption(s) would be fixed. An assumed level of overcharge that is not grounded in evidence and higher than that found in a material proportion of cases is unlikely to incentivise the use of voluntary redress, in particular given that the level of overcharge is typically heavily contested in litigation.

- **Whether the presumption is rebuttable:** It is unclear whether the proposed presumption would be rebuttable on the facts of an individual case. If it is not rebuttable, redress determined under the scheme could diverge materially from actual loss in either direction. A business could, therefore, be compelled to overcompensate on a basis it has no means of contesting. Doing so raises questions of compliance with fundamental rights.¹³² Human rights do require an effective opportunity to meaningfully challenge measures affecting civil rights and obligations and respect for the rights to property and to a fair trial.¹³³ Conversely, if it is rebuttable, this begs the question of what would be the legal threshold to rebut that presumption and how the determination process would practically work.¹³⁴ In this respect, businesses are more likely to propose or accept schemes if the quantum exercise is fair, predictable and not prohibitively expensive.

¹²⁹ *London Array v Nexans France* [2025] CAT 59, paras 290-291, 320.

¹³⁰ *BritNed v ABB* [2019] EWCA Civ 1840

¹³¹ John M. Connor, *Price-fixing Overcharge*, June 2024, revised 4th edition. See also, Oxera, *Quantifying antitrust damages Towards non-binding guidance for courts*, Study prepared for the European Commission, December 2009, p. 91. According to the Oxera report, international cartels have a larger mean overcharge (26%) than national cartels (16%) (*ibid.*, p. 91).

¹³² E.g., *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *R v Shayler* [2003] 1 AC 247; *Huang v Secretary of State for the Home Department* [2007] 2 AC 167.

¹³³ Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See European Court of Human Rights (ECtHR), *Golder v. The United Kingdom*, no. 4451/70. The effect of Article 13 ECHR is to require the provision of a domestic remedy to deal with the substance of an arguable complaint under the Convention and to grant appropriate relief (ECtHR, *Kaya v Turkey*, no. 158/1996/777/978). Further, depending on the facts of the case, a scheme requiring substantial payments untethered from proven loss could also be seen as a quasi-criminal sanction (*ex multis*, ECtHR, *Menarini Diagnostics S.R.L. v Italy*, no. 43509/08; EFTA Court, E-15/10, *Posten Norge v EFTA Surveillance Authority*). A blunt or irrebuttable presumption of overcharge that systematically over-compensates could also engage Article 1 of Protocol 1 to the ECHR, among other rights.

¹³⁴ For instance, further clarity would therefore be helpful regarding the continued role of the independent Chairperson and Board in circumstances where a presumed level of overcharge is adopted. Under the current regime, the Board must include a competition economist and consider evidence of loss when

- **Multifactorial analysis.** A presumed level of overcharge would address only one aspect of the assessment required to provide compensation. Even where an infringement decision has already been adopted, issues of causation, pass-on, volume effect, umbrella effect, class identification, and standing may remain highly contested. For example, where an infringement has been established by object, questions may still arise as to whether the conduct in fact had an effect on the market. Similarly, identifying the persons who have suffered loss may not be straightforward, particularly where supply chains are complex or indirect purchasers are potentially affected. At para. 92, the Consultation implicitly acknowledges those difficulties, stating that it is likely that the power to direct the establishment of a redress scheme “*would tend to be used in straightforward cases, such as where the range of those impacted by the infringement can be established relatively clearly.*”¹³⁵ Indirectly, but with no less significance, in complex cases, the resulting determinations could themselves become the focus of legal challenges, effectively shifting much of the litigation currently seen in private damages actions into proceedings funded by the taxpayer.
- **Pass-on.** Relying on a presumed overcharge is particularly problematic once the issue of pass-on is considered. An overcharge can be passed through multiple levels of a supply chain. The Consultation appears to contemplate assuming the level of overcharge by businesses to consumers (given it refers to “*an assumed level of overcharge by businesses to consumers*”). However, no mention is made of whether and if so, how pass on would be taken into account as a part of this analysis. Pass-on is a highly case-specific issue that hinges on industry specific factors, as well as each market player’s economic position, purchasing behaviour, and organisational structure, among other things. In practice there are few industry scenarios where all sales would be made only direct from suppliers to consumers (as opposed to passing through a diverse network of distribution channels involving third party resellers and intermediaries). Moreover, pass-on depends, in part, on the level of overcharge itself, with in theory a small overcharge upstream being more likely to lead to little or no overcharge to consumers downstream. Save, as acknowledged by the CMA, where there is a direct relationship between cartel and consumer, assuming an overcharge

determining compensation or the appropriate methodology for calculating it. It is unclear how that evidence-based assessment would interact with a prescribed presumption of overcharge, and whether the Board would retain any discretion to depart from the presumption where the facts of a particular case justify a different outcome.

¹³⁵ By way of comparison, under its new consumer protection enforcement powers under the Digital Markets, Competition and Consumers Act 2024, the CMA has already been active in ordering redress in drip pricing cases. However, in those cases the level of pernicious hidden fees/cost identified by the CMA provides a ready proxy for an overcharge and consumer harm arises by a more direct route. E.g. CMA, AA Driving School/BSM Driving School, 15 April 2026, no. 51667).

between businesses in the cartelised sector requires consideration of the level of pass on (if any) at each level of the supply chain.¹³⁶ The suggested approach to overcharge disregards this essential nuance. It wrongly equates the overall price effect in the cartelised market – focus of the OECD study cited by the Consultation – with the ultimate hypothetical overcharge to consumers (possible pass-on of the price effect). In so doing, it ignores well-known and accepted economic principles and creates a high risk of duplicative damages liability at different level of the supply chain.

- **Disclosure.** Depending on the factual and procedural context, undertakings may be reluctant to engage fully and proactively in designing a scheme if documents shared and positions adopted during that process could subsequently be disclosed and relied upon in civil damages proceedings.¹³⁷ Whilst such a proposal was not taken forward in 2022, further consideration should be given to placing strict disclosure restrictions on documents and information provided for the purpose of establishing or implementing a redress scheme.¹³⁸

Accordingly, while the proposal may reduce the burden associated with redress schemes, the proposal has significant downsides and its effectiveness would depend on how the legal and practical issues summarised above are addressed.

¹³⁶ CMA, Opt-out collective actions regime review: call for evidence Response from the CMA, October 2025, para. 21: “[t]he CMA acknowledges that, since the loss or damage arising from a competition law infringement may often involve some element of pass on, assessing the appropriate level and method of redress in the CA98 context and the infringing parties’ respective contributions may often involve a more complex range of considerations than in consumer enforcement cases and, therefore, the CMA would need to consider on a case by case basis whether it would be appropriate or proportionate for the CMA to order redress.”

¹³⁷ It would be useful to permit undertakings to communicate with customers about a redress scheme without those communications being treated as admissions capable of being relied upon in subsequent collective proceedings. Consideration could also be given to putting on a statutory footing the confidentiality and privilege protections applicable to documents and information created or disclosed for the purposes of establishing a redress scheme (see CMA, Guidance on the approval of voluntary redress schemes for infringements of competition law, 14 August 2015, CMA40, paras 2.72-2.74, 3.26).

¹³⁸ Department for Business, Energy & Industrial Strategy, Consultation outcome, Reforming competition and consumer policy: government response, 20 April 2022, Department for Business, Energy & Industrial Strategy, Reforming Competition and Consumer Policy Government Response to Consultation, April 2022, CP 656, para. 1.135: “it is still possible for a business operating such a scheme to face a civil claim for damages. In these circumstances, documents prepared for the purpose of obtaining the CMA’s approval of the scheme may fall to be disclosed in response to any civil claim. The consultation sought views on whether protecting such documents from disclosure in civil litigation may encourage the adoption of CMA-approved voluntary redress schemes” and para. 1.142.

Q23. What changes to the Competition Act 1998 (Redress Scheme) Regulations 2015 could be made to simplify requirements for redress schemes?

Not sure. Some procedural simplification may be possible. Many of the current requirements appear to reflect the inherent complexity of determining who has suffered loss, the extent of that loss, and the appropriate method of compensation. For relatively straightforward overcharge cases, one option would be to permit the CMA to approve a scheme based on the undertaking's proposed methodology, subject to a short independent review.

Q24. Do you consider that the protection from duplicative damages liability outlined is sufficient to incentivise use of redress schemes where an infringement of competition law has been found? [Yes / No / Not sure] Please explain your answer.

Not sure. The proposed protection against duplicative liability is likely to increase the attractiveness of voluntary redress schemes. In particular, reducing the risk that defendants face both redress payments and subsequent damages claims in respect of the same loss should increase the attractiveness of such schemes. That said, it is unclear that the proposed protection alone will lead to a substantial increase in the use of voluntary redress schemes, which, as pointed out by the Consultation, have never been used in practice to date:

- **Overcompensation.** By limiting the waiver of further actions “*for those that accept the redress offered to them*”, the compensating undertaking will still face the prospect of alleged victims benefiting from compensation arbitrage between the scheme process and civil damages claims.¹³⁹ In addition, as outlined above, in cartel cases, once the overcharge presumption applies at one level of the supply chain – e.g. consumer level, as suggested by the wording of the Consultation – it is very likely that another level closer to the cartelists – e.g. wholesalers – will contend that the overcharge has not been passed through to those consumers. On the basis of their right to full compensation, they may thus seek damages before the courts, leading to a risk of the cartelists paying twice. This cuts down the finality that redress schemes are intended to provide.
- **Interaction with private claims.** It remains that redress schemes ought to be considered in subsequent collective proceedings. For clarity, redress schemes should be expressly addressed in Part 9 of Schedule 8A of the Competition Act 1998 on contribution and consensual settlements. Further, as the Consultation outlines, the existence of a voluntary redress scheme is already a factor that may be taken into

¹³⁹ Consultation, para. 92.

account at certification and under the CAT's management powers,¹⁴⁰ and the Consultation suggests that sums offered via redress schemes (be it voluntary or mandatory) would be considered (i) when quantifying the value of a potential claim and (ii) at certification, notably in the cost-benefit test. Depending on how heavily courts take into account the existence of a redress scheme, this could give important finality to businesses participating in established redress schemes, thereby incentivising participation while avoiding duplicative costs. For instance, a statutory presumption against certification should be envisaged.

- **Costs consequences.** The practical operation of the regime will depend significantly on how courts and the CAT approach costs where a redress payment has been offered but declined. If parties who unreasonably reject redress offered through a scheme and instead choose to pursue a claim routinely face adverse costs consequences in subsequent proceedings, this is likely to encourage participation in redress schemes and further reduce the risk of duplicative recovery.¹⁴¹

Overall, the proposed protection is a positive incentive, but its effectiveness is likely to depend on the wider procedural framework, particularly the treatment of the overcharge presumption, costs, and the interaction between redress schemes and private litigation (see **Q22** and **Q27** for further detail).

Q25. Do you agree that a power for the CMA to direct the establishment of a redress scheme will encourage the use of redress schemes on a voluntary basis? [Yes / No / Not sure] Please explain your answer.

Not sure. Whether this proposal encourages greater use of voluntary redress schemes is likely to depend on how the CMA exercises the power in practice, including the circumstances in which mandatory schemes are imposed and the extent to which the process is perceived as workable and predictable. For instance, businesses are more likely to engage with voluntary redress schemes at an earlier stage if voluntary participation offers greater flexibility than a scheme directed by the CMA.

¹⁴⁰ Rule 79(2)(g) of the CAT Rules. CMA, Guidance on the approval of voluntary redress schemes for infringements of competition law, 14 August 2015, CMA40, para. 1.31.

¹⁴¹ The CMA soft-law guidance recognises that the CAT may take into account settlement offers derived from a voluntary redress scheme when determining costs but does not prescribe any automatic costs consequences. See CMA, Guidance on the approval of voluntary redress schemes for infringements of competition law, 14 August 2015, CMA40, para. 1.32.

Q26. Do you agree that this framework could increase the likelihood of redress being made available to consumers without the need for litigation? [Yes / No / Not sure] Please explain your answer.

Yes, but only in appropriate cases. The framework has the potential to increase the availability of redress without the need for litigation by providing a mechanism through which affected consumers can obtain compensation more quickly and at lower cost than through court proceedings.

However, its effectiveness is likely to depend heavily on how it is implemented and used in practice, including the types of cases for which redress schemes are pursued and the frequency with which they are employed. In particular, the framework may be better suited to cases where affected consumers can be readily identified and loss can be assessed on a relatively straightforward basis.

By contrast, its utility may be more limited in larger or more complex competition cases. Where the value of the claim is substantial, parties are likely to contest vigorously issues such as any presumed level of overcharge. Similarly, in cases involving complex supply chains, questions of pass-on and the identification of affected persons at different levels of the chain may make the operation of a redress scheme significantly more difficult (see **Q22** for further detail). Given this, while the framework may increase the availability of redress in some cases, it is unlikely to eliminate the need for litigation in many of the more complex competition disputes.

Q27. Are there other ways to incentivise the use of voluntary redress schemes? [Yes / No / Not sure] Please explain your answer.

Yes. As explained above, the Tribunal should be able to take participation in a voluntary redress scheme into account when making costs orders, particularly where a party has unreasonably refused an offer of redress and subsequently chosen to pursue a claim. Greater certainty regarding the treatment of information and documents shared in subsequent proceedings may encourage more open engagement with the process. Any penalty reduction where there is an approved scheme may also encourage greater uptake. The existing possibility of a discretionary penalty reduction of up to a 20% for an approved scheme has, to date, not been enough to incentivise use of the regime.¹⁴² A clearer, more predictable, and higher discount for early, genuinely voluntary schemes – also reflected in CMA settlement discussions and penalty guidance – would create stronger positive incentives.

¹⁴² CMA, Guidance on the approval of voluntary redress schemes for infringements of competition law, 14 August 2015, CMA40, para. 3.30.

Interaction with public enforcement

Ensuring harmony with regulatory action

Q28. Do you agree that it is necessary to intervene to support public enforcement work on cartels at this time? [Yes / No / Not sure] Please explain your answer.

See answer to **Q29**.

Q29. If introduced, are there additional protections you feel are necessary to ensure that the availability of immunity from civil litigation a) isn't exploited and b) doesn't frustrate avenues to seek redress? [Yes / No / Not sure] Please explain your answer.

The Consultation seeks views on whether Type A leniency applicants should be granted immunity from civil damages claims to encourage a greater number of leniency applications. It notes that, to preserve the ability of cartel victims to obtain compensation, the CAT would retain a discretion to set aside that protection where damages would otherwise be unrecoverable from the other undertakings involved in the infringement.

We support the Government's objective of encouraging Type A leniency applications, strengthening cartel detection and enforcement, and deterring participation in cartel activity. While it is worth acknowledging the CMA's effort to raise competition law awareness,¹⁴³ we also recognise that granting immunity from damages may, in principle, encourage undertakings to self-report cartel conduct.¹⁴⁴ This is because the potential exposure to damages claims is an important concern for businesses contemplating a leniency application, including in light of the increasing prevalence of collective actions.¹⁴⁵ As emphasised by the CMA, providing Type A

¹⁴³ For example, the CMA's Business Perceptions Survey of July 2026 found that 72% of businesses surveyed considered that they understood their responsibilities under UK competition law and, while there clearly remains scope for improvement, more than 50% understood that competitors should not agree prices in order to avoid losing money. This relatively high level of awareness may reflect the CMA's awareness-raising activities, as well as the deterrent effect of exposure to substantial financial penalties and follow-on damages claims (see DJS Research, Business Perceptions Survey 2026, prepared for the CMA, July 2026, JN 10699).

¹⁴⁴ The same CMA's Business Perceptions Survey, however, found that 75% of businesses surveyed were either unaware or uncertain that a company which had infringed competition law could report the infringement to the competition authority and receive immunity (although the survey is weighted heavily towards small businesses).

¹⁴⁵ That said, even if immunity is granted, an admission of participation in cartel conduct may have other serious reputational and commercial consequences, including regarding the undertaking's relationships with its customers, which we expect any potential immunity applicant to bear in mind.

immunity applicant with full immunity from liability for damages would create a strong “*incentive – at least for cartels with a UK focus – for undertakings to report cartel activity.*”¹⁴⁶

However, for the reasons set out below, we are not persuaded that the Consultation has articulated the proposal with sufficient clarity or granularity to enable its full implications to be assessed. We are particularly concerned that insufficient consideration has been given to its potential adverse consequences, and encourage the Government to undertake further assessment, including through a formal impact assessment, before implementing any measure to grant immunity from damages.

First, the Consultation recognises that the CMA amended its leniency guidance as recently as October 2025 with the objective of incentivising Type A leniency applications. While those reforms did not introduce significant new advantages for Type A applicants, they improved the relative attractiveness of Type A status by reducing the benefits available to subsequent applicants. In light of these recent changes, the Government should consider allowing sufficient time to assess whether they achieve their intended effect before proceeding with more substantial reforms.

Second, there is currently no other jurisdiction in which a successful leniency applicant is granted both complete immunity from public financial penalties and complete immunity from liability to compensate victims for the harm caused by its participation in the conduct. While immunity from damages claims before the UK courts may reduce an applicant's exposure, an applicant participating in an international cartel may, by admitting its conduct, expose itself to substantial damages claims in other jurisdictions. Given that, if the proposed immunity is to provide Type A applicants with meaningful protection from damages claims, it should operate as a matter of substantive English law. Otherwise, there is a risk that claimants may seek to circumvent the immunity by bringing English law proceedings against the Type A applicant in other jurisdictions.

Third, potential clarifications to the proposals and consideration of adverse consequences are required:

- The Consultation proposes that the CAT should retain a discretion to set aside immunity where damages would otherwise be unrecoverable from the other undertakings involved in the cartel (see **Q30** below for further details). In short, however, a would-be Type A applicant needs to assess the value of any proposed immunity when deciding whether to self-report. If immunity can later be set aside because, for example, other cartelists have become insolvent or are otherwise unable

¹⁴⁶ CMA, Opt-out collective actions regime review: call for evidence Response from the CMA, October 2025, para. 14.

to satisfy a damages award, its benefits would depend upon circumstances outside the applicant's control. This reduces the certainty that the proposed full immunity is intended to provide, and should the Government decide to proceed, would require clear and strict rules on where civil immunity can be lifted.

- The Consultation recognises that the proposal may create a risk that cooperation from other cartelists will be disincentivised, leading to an over-reliance on information provided by the leniency recipient. This, however, may understate the potentially significant implications for the CMA's ability properly and robustly to investigate cartel conduct. An applicant that stands to gain protection from both penalties and private damages claims may have an incentive to present the scope or nature of the cartel in a manner favourable to its own commercial interests. To address this, it is suggested that in its Guidance, the CMA expressly recognises that it ought to assess the leniency applicant's statements with a higher degree of caution, particularly where such statements are contested.¹⁴⁷
- The Consultation does not address how the share of liability of the immunity applicant ought to be shared by other co-cartelists in follow-in damages proceedings. From a practical perspective, clarity on this issue would be needed.
- Granting a Type A leniency applicant immunity from damages would not remove the need for victims to obtain evidence relating to that applicant. A claimant seeking compensation in respect of purchases made from an immunity recipient would, for example, still need to establish whether and to what extent it suffered loss on those purchases. This may require substantial documentary and witness evidence concerning the immunity recipient's sales and pricing data, the operation and implementation of the cartel, and whether and to what extent an overcharge was applied to the claimant's purchases. We suggest consideration be given to the Type A immunity recipient's obligations in this situation (including in relation to document preservation and disclosure), taking due account of claimants' rights to obtain effective redress.
- It would be helpful for the Government to make clear, for the avoidance of doubt, that any immunity recipient retains a right to intervene in civil damages proceedings concerning the alleged cartel. An immunity recipient has a legitimate interest in ensuring that its role in the cartel is characterised accurately and proportionately, and that its confidential information and commercially sensitive material are afforded appropriate protection. This is because an adverse judgment finding that an immunity

¹⁴⁷ For example, they may require corroboration by other evidence before constituting adequate proof of an infringement by other undertakings.

recipient imposed a particular overcharge carries significant legal, reputational and commercial consequences. For instance, such findings may be relied upon, or otherwise carry weight, in overseas proceedings.

Q30. Is it sufficiently clear when it would be appropriate and possible for the CAT to set aside immunity to enable recoverability of damages? [Yes / No / Not sure] Please explain your answer.

No. The circumstances in which the CAT would be able to set aside immunity are not yet sufficiently clear. The Consultation indicates that immunity could be disapplied where damages are “*otherwise unrecoverable*” from the remaining cartel participants, but further guidance would be helpful as to what this means in practice.¹⁴⁸ For example, are damages only unrecoverable? Does unrecoverability arise only where the remaining cartelists are insolvent, or also where recovery is impracticable because they are located outside the jurisdiction or enforcement is otherwise unlikely to succeed? Clarification would also be useful as to the relevant point in time at which recoverability is assessed.

Further detail would also be helpful regarding the scope of the proposed immunity. In particular, it is unclear whether the immunity extends only to liability for damages or whether it has wider procedural consequences. For instance, it should be clarified whether immunity recipients may still be joined to proceedings for procedural purposes, and whether they remain subject to third-party disclosure obligations where relevant evidence is in their possession.

Finally, clarification may be required as to how the immunity would operate in claims that contain both follow-on and stand-alone elements. The interaction between the proposed immunity and such mixed claims is not addressed, but could have important practical consequences.

¹⁴⁸ Consultation para. 108.

Interaction with wider regulatory action

Q31. Will it be sufficiently clear what other concurrent regulator(s) may be relevant to the claim? [Yes / No / Not sure] Please explain your answer.

Not sure. In practice, collective proceedings are usually handled by sophisticated legal teams that should be able to identify the relevant regulators. Nevertheless, the Guide to Proceedings could usefully include a short schedule of concurrent regulators and their remits.

Q32. Is this step necessary to ensure harmony between private and public enforcement action? [Yes / No / Not sure] Please explain your answer.

Not sure. A formal notification requirement does not appear necessary to ensure harmony between private and public enforcement, given the high-profile nature of many collective proceedings and the ability of regulators to engage with cases where appropriate. However, there may be value in ensuring that relevant regulators are made aware of proceedings at an early stage. If adopted, any notification requirement should be simple to administer and should not create scope for satellite disputes over which regulator is relevant.

Q33. Will this step be of benefit to claims brought that have clear sector-specific elements over and above the central competition issues? [Yes / No / Not sure] Please explain your answer.

Yes. Where a claim raises significant sector-specific issues in addition to competition law questions, observations from the regulator responsible for the sector may assist the Tribunal, the parties and the class. This can help ensure that relevant industry context and regulatory considerations are taken into account at an early stage. In a recent case, the CAT expressly noted that Ofwat's intervention had been helpful. The proposal may also encourage earlier engagement by regulators in appropriate cases, improving coordination between private and public enforcement.

Distribution

Consumer trust

Q34. Will the listing of claims on the CAT website increase trust and encourage take up? [Yes / No / Not sure] Please explain your answer.

Yes. Listing opt-out claims on the CAT website with link to live claim websites is likely to improve transparency and provide consumers with an authoritative source of information about proceedings and available redress.¹⁴⁹ This should form part of a broader notification strategy, as many UK consumers and businesses will be unfamiliar with the CAT and unlikely to visit its website proactively.

Q35. Are there other ways to increase trust among class members that the government should consider? [Yes / No / Not sure] Please explain your answer.

Yes. Trust is likely to increase where consumers receive compensation through a trusted intermediary, such as a regulator or a business with an existing relationship to the affected customers. In a number of ongoing proceedings, consideration is already being given to involving regulators or businesses within the relevant supply chain in the distribution process.

If such models are to be encouraged, it may be helpful to develop a clearer framework governing the role of those assisting with distribution, including how reasonable costs incurred in facilitating distribution should be treated. This could provide greater certainty and encourage participation by organisations that may be well placed to help deliver compensation efficiently to affected consumers.

Q36. Are there ways to incentivise a collaborative approach between parties to maximise distribution that should be considered? [Yes / No / Not sure] Please explain your answer.

Yes. Incentives should be built into settlement approval, the certification cost-benefit analysis and the treatment of undistributed sums, rather than through any obligation on defendants to undertake distribution.

- **Cost-benefit/settlement terms.** The Consultation notes that defendant-operated payment channels may be helpful, particularly where customers can be identified and compensated through existing billing, payment or communications systems. While there

¹⁴⁹ In that sense, see Consultation, para. 119. The CAT's website already publishes all judicially issued information relating to the cases before it.

is force in this point, in some cases the defendants do not have a direct relationship with class members (e.g., *Spottiswoode*, *Waterside*). In any event, as the defendants may be able to add value to the distribution process in appropriate cases, the CAT should view defendant-facilitated distribution positively when assessing settlements and cost-effectiveness. Defendants should also be encouraged to participate in distribution by ensuring that the costs of operating refund or credit mechanisms are reimbursed.

- **Reverter.** Incentives should also be aligned to maximise distribution. Under Rules 94(9)(g) and 97(7)(g), in a settlement context, unclaimed sums may revert to the defendant and reversion to will not “*of itself*” be considered unreasonable.¹⁵⁰ Without raising the bar for reversion in other settings, the Guide to Proceedings could identify as an example justifying reversion or a higher level of reversion, circumstances in which defendants can demonstrate that they have assisted in obtaining a reasonable percentage uptake of the settlement pot.¹⁵¹ Even following a final judgment awarding damages, the CAT Rules could, too, expressly empower the CAT to direct that a percentage of any undistributed sums reverts to a defendant if it is satisfied that it has reasonably contributed to the distribution process and/or has increased the percentage of take-up past a particular level.¹⁵²
- **Limits.** Collaboration should not require disclosure of customer databases beyond what is strictly necessary, use of defendant communications as a marketing tool for the CR, or any admission of liability in settlement scenario. Any data-sharing arrangements should be court-ordered, proportionate, purpose-limited and subject to appropriate safeguards.

¹⁵⁰ Rule 91(9)(g) of the CAT Rules; Guide to Proceedings, para. 6.125.

¹⁵¹ The CAT's practice direction vaguely mentions this theoretical possibility without elaborating on it. See Guide to Proceedings, para. 6.125: “[r]eversion to the defendant will not of itself be considered unreasonable, but where a settlement includes provision for reversion, the Tribunal may be concerned to see whether this is conditional upon a threshold of take-up of the settlement fund.”

¹⁵² This goal would be to cover both incorporation of such benefit into the settlement agreement, which would be judicially approved, or outside of a strict settlement context by agreement with the CR, equally approved by the court. The latter is more likely to arise following a final judgment against the defendant.

Undistributed sums

Q37. In light of the purpose of the regime and the likely interests of class members in claims brought under the regime, which organisation(s) do you consider would best benefit from undistributed damages:

- **Access to Justice Foundation**
- **Consumers' Association (Which?)**
- **A split between AtJF and Which?**
- **Other (please specify)**

A split between the Access to Justice Foundation and Which? would best reflect the objectives of the collective proceedings regime. The Access to Justice Foundation promotes access to justice, while Which? advances consumer interests.

As explained in the answer to **Q36** above, consideration should also be given to allowing a reversion of undistributed settlement sums and damages awards to defendants in circumstances where the CAT is satisfied that the defendants have reasonably assisted with distribution and have increased the rate of uptake beyond what may otherwise have occurred without their assistance.

CAT resourcing and efficiency

Fees

Q38. How significantly do you consider the introduction of CAT fees would impact access to justice? [Very / Quite / Neutral / Not at all] Please explain your answer.

Neutral. Provided CAT fees are modest and recoverable by successful parties, they are unlikely to materially inhibit access to justice. While they would form part of the overall cost analysis undertaken by claimants and funders, they are unlikely to be significant in the context of the overall costs of collective proceedings. However, as implied in the Consultation, care should be taken to ensure that fees do not disproportionately affect smaller or lower-value claims and, in any case, remain appropriately capped.¹⁵³

¹⁵³ Consultation, para. 137.

Q39. Do you consider it appropriate for fees to be restricted to private litigation? [Yes / No / Not at all] Please explain your answer, including if there are other application types before the CAT where charging a fee would be appropriate.

Yes. It is appropriate for fees to be confined to private monetary and damages claims. Private damages actions in the CAT, in particular collective actions, involve well-funded and sophisticated parties, claims often reaching into the billions backed by funders, and lengthy and resource-intensive proceedings. These features could justify appropriate fees to support the administration of justice. In other settings, however, the introduction of fees risks creating a chilling effect on the exercise of appeal rights and access to justice.

For the avoidance of doubt, it is inappropriate to include private enforcement of subsidies pursuant to Part 5 of the Subsidy Control Act 2022. None of the abovementioned features of competition actions that could justify the imposition of a reasonable fee are present. The UK subsidies regime relies heavily on private enforcement against public authorities' decisions under a judicial review standard.¹⁵⁴ Thus far, enforcement has been limited and fees could deter putative applicants even further.¹⁵⁵ Subsidy control claims generally target the quashing of a subsidy decision, interim and/or prohibitory relief (rather than damages) and fill a clear public enforcement gap.

Q40. Do you believe the introduction of CAT fees would be beneficial to its efficient operation? [Yes / No / Not sure] Please explain your answer.

Yes. This would provide the CAT with additional financial resources to better address the infrastructure and human resource challenges posed by a growing caseload of particularly complex cases.

¹⁵⁴ Department for Business, Innovation, Science and Trade, Policy paper, Response to the CMA review of the effectiveness of the UK Subsidy Control Act and its impact on competition and investment in the UK, 12 August 2026: "[t]he CMA reports that some stakeholders would support the creation of a more 'proactive' regulatory approach whereby an enforcement body would monitor subsidy-giving [...] [w]e consider that the private enforcement model remains the best approach for the regime." To date, the Secretary of State has played only a peripheral role in the enforcement of the regime (no direct challenge under 70(7)(b) of the Subsidy Control Act 2022).

¹⁵⁵ Durham [2023] EWCA Civ 729, para. 30: "[t]he judge's aim of seeking to ensure that the costs of subsidy control reviews under section 70 of the 2022 Act do not become excessive, thereby discouraging challenges under the section, was an entirely laudable one."

Panel composition

Q41. Do you agree that there are decisions that could appropriately be made by a chair sitting alone or sitting with only one other panel member? [Yes / No / Not sure] Please explain your answer.

Yes. Flexibility for a chair sitting alone or with one other member is justified for discrete, predominantly legal (amendment of parts of pleadings, construction of the CAT Rules, privilege issues, disclosure disputes, costs, etc.), case-management issues (if the latter does not turn on contested economic methodology or central issues), or uncontested or largely paper applications (consent orders, etc.).¹⁵⁶ The strike-out application of part of the statement of case provided for in the Consultation rightly illustrates the point.¹⁵⁷

Q42. Are there particular decisions or issues that should always be dealt with by a full panel of three with no exceptions? [Yes / No / Not sure] Please explain your answer.

A full three-member panel appears necessary for final merits determinations, regulatory appeals and price-control appeals, penalty appeals, permission to appeal, trials, certification of claims and any material variation of a CPO, hearings turning on economic evidence, summary judgment or strike-out that disposes of the whole claim or the whole defence, and other high-stakes mixed law/economics decisions.¹⁵⁸

Q43. Are there other ways to increase efficiency in decision-making by the CAT on discrete issues that should be considered? [Yes / No / Not sure] Please explain your answer.

Not sure. The CAT is already a relatively efficient forum. One of its strengths is the flexibility of its procedures and the lower degree of formality compared with other courts, such as the

¹⁵⁶ Given the scarce courtroom time and the difficulty in coordinating three diaries (especially ordinary members who typically have other professional commitments), a three-member panel may slow down judicial determinations and generate additional costs for the parties.

¹⁵⁷ Consultation, para. 142. As noted, a CMC involving consideration of economic evidence could also appropriately be heard by a chair sitting with a single economist member, without an additional ordinary member.

¹⁵⁸ Following the same logic and by way of example, see CMA, Price control appeals under section 193 of the Communications Act 2003: CMA guidance, October 2017, CMA72: "*the determination of a price control reference is to be carried out on behalf of the CMA by a group, constituted for the purpose by the CMA Chair and consisting of at least three CMA panel members. At least one, but not more than three, member(s) of the group appointed to decide references under the Act must be drawn from the CMA's Specialist Communications Panel appointed for this purpose.*"

High Court. For example, it has recently introduced a number of practice directions aimed at improving efficiency.¹⁵⁹

¹⁵⁹ E.g., CAT, Practice Direction 1/2026: Bundles for hearings, 11 May 2026; CAT, Practice Direction 2/2026 Disclosure: Management of Confidential Information, 10 August 2026; CAT, Practice Direction, 2/2025 Skeleton arguments and other documents – formatting and page lengths, 26 November 2025; CAT, Practice Direction, 3/2025, Expert Evidence, 2 December 2025; CAT, Practice Direction 3/2022 Conduct of Collective Proceedings after Certification, 1 August 2022.

Chapter 2 – Simplifying the regulatory appeals framework

Appellate body

Q44. Should Regulatory Appeals be transferred to the CAT? [Yes / No / Not sure] Please explain your views.

Not sure. The proposal, as set out in para. 156 of the Consultation, is that regulatory appeals within the CMA's competency (and as listed in the table in para. 163) (**Regulatory Appeals**) are transferred to the CAT. The Consultation also proposes the transferal to the CAT of telecoms price control appeals "**Telecoms Appeals**" (as described in para. 164), along with Water Redeterminations and Water Regulatory References (as also listed in the table in para. 163 – having first been converted to appeals). Collectively, we refer to these as the "**Consultation Appeals**".

As a point of principle, we do not oppose the Consultation's intention to create an appeals framework that is "*more consistent, efficient and proportionate, promotes stakeholder confidence and better supports an effective use of resources.*"¹⁶⁰ However, we have concerns that the proposals **will not** achieve this stated aim given the Consultation proposes a 'one-size-fits-all' approach for all regulated sectors and types of appeal (appellate body, appeal standard, remedies available). In doing so, primacy appears to have been given to consistency and perceived efficiencies over ensuring that the appeal framework is the most appropriate for the particularities of each individual sector, and the subject matter and type of appeal.

It is also challenging to give a firm view of the relative merits of the proposal when the Consultation provides no further substantiation of the efficiencies referenced. The Consultation merits further consideration as regards possible process efficiencies in particular. For example, there is limited detail on important practical factors such as timelines, remittals, the resourcing of the CAT, and the CAT's ability to hear an increased number of cases.

We therefore consider that it is critical that before any amendments are made, or changes implemented, a detailed analysis is conducted of the positive and negative implications of the proposals on a sector-by-sector basis and a clear proposal on the way in which the changes would be implemented is made available for consultation.

Challenges of a 'one-size-fits-all' approach

The Consultation proposes a 'one-size-fits-all' approach. Without clear evidence to the contrary, we do not consider that this is the most appropriate way to drive efficiencies: the outcome of the Consultation must not be consistency for consistency's sake, and such an

¹⁶⁰ Consultation, para. 154.

approach will inevitably lose some of the existing benefits of the current appeals framework. The Consultation Appeals span a wide range of sectors (Water, Energy, Air, Postal Services, and Telecoms). Each of these sectors are highly complex, have their own statutory regimes (the legislation and guidelines / guidance of which will require amendment to accommodate the proposals of the Consultation), regulators and stakeholders. Account should be taken of these differences, the dynamics of which are important to ensuring an efficient appeal framework. By way of example, the strategic use of appeal avenues by third parties (contrary to the broad intentions of Government summarised above) may differ between largely liberalised industries and those which still remain essentially network monopolies.

The proposals cover a wide range of appeal and reference types, including: modification of appointment / licence conditions, code modifications, and price controls. The complexity of each of these appeal and reference types is not equal: it is not controversial that the price control process requires a complex factual and econometric analysis (both by the regulator at the time of setting the price control, and then, we submit, in any ensuing appeal) which may be absent from a more straightforward code modification.¹⁶¹ As discussed in the response to **Q47** below, it is unclear whether the proposed appeal standard of judicial review principles with regard to the merits would allow the CAT to adequately interrogate and assess these complexities, particularly of a price control appeal.

In turn, each of these existing appeal or reference types has its own statutory basis on which to bring an appeal, timelines for hearing the appeal and for which the CMA has differing powers of determination (ranging from full redetermination or substitution of its own decision to remittal). As discussed further below, it is likely that the Consultation proposals (particularly in respect of price controls) will lead to a significant increase in inefficiencies for successful appellants: where the CMA can currently redetermine / substitute its decision, this will instead be remitted by the CAT to the relevant regulator. Contrary to the intention of the Consultation, this runs the real risk of materially increasing uncertainty and inefficiency for the regulated companies in question and any interested stakeholders.

Is the CAT the appropriate appellate body?

It is unclear whether the CAT is a more appropriate body than the CMA to hear the Consultation Appeals. As a purely practical matter, the CAT has a very full docket and if the CAT is to have increased jurisdiction as an appellate body in regulatory matters, it would be important to ensure that it is sufficiently resourced both to handle such appeals as well as its other casework. It is therefore not clear that it currently has the capacity to accommodate the increased number of cases that the Consultation's proposals would likely generate. Although acknowledging that

¹⁶¹ A point which the Consultation makes at para. 199: "[m]any aspects of price control decisions (e.g. the cost of capital) are complex matters requiring the exercise of regulatory judgement with no single right answer."

additional resources are likely to be required by the CAT, the Consultation does not consider this factor in any detail.

We recognise the considerable expertise and robust approach of the CAT in hearing complex cases, cases which often require a detailed analysis of regulated sectors and associated economic and operational context. However, whilst there will be complementarity between the types of technical expertise and understanding that the CAT requires when (i) determining cases within its current purview (for instance the appropriate level of pass on in a competition law damages case and supporting econometric analysis) and (ii) understanding and interrogating the extensive business planning and econometric models underpinning a price control determination, these are quite different disciplines. Further, the Consultation Appeals are subject to – often very challenging – statutory timescales in which an appeal is required to be determined by the CMA. The Consultation provides no detail on whether these timelines will be binding on the CAT, and the changes that would be required to the CAT Rules to address this (nor in the alternative does it provide any explanation of the changes to these statutory timelines that will be required). When these factors are taken together, alongside the CAT's existing case load and without further clarity regarding the practical process points identified, this risks less certainty than the current appeals framework, and calls into question whether the CAT would be able to conclude appeals more expeditiously and efficiently than the CMA is currently able to.

As recognised by the Consultation, the CAT is a judicial body, not a regulator. We therefore support the proposal that, where the CAT quashes a decision, it remits the *“matter back to the regulator with a direction to reconsider and make a new decision in accordance with the CAT's ruling.”*¹⁶²

Notwithstanding our support of the proposal for remittal, it is important to ensure that re-determinations on remittal can be undertaken on an efficient basis (as opposed to being duplicative or acting as a means for regulators simply to reconfirm prior conclusions on the basis of adjusted analyses). In this regard, we would welcome further clarity and the opportunity to comment on how this process is intended to work: the Consultation provides no suggestion of how directive this remittal would be, and the existing section of the Guide to Proceedings on this point, is not instructive:

[t]he Tribunal must decide an appeal under the 2003 Act on the merits and by reference to the grounds of appeal set out in the notice of appeal: section 195(2). If the Tribunal allows the appeal, its decision must include a decision as to what (if any) is the appropriate action for OFCOM to take in relation to the subject-matter of the decision under appeal, **and the Tribunal shall then remit the decision under appeal to OFCOM with such directions (if any) as the**

¹⁶² Consultation, para. 204(d).

Tribunal considers appropriate for giving effect to its decision: section 195(3) and (4).¹⁶³

As noted by the Consultation, certain Consultation Appeals already require the CMA to remit a successful appeal to the regulator, and so this proposal would not appear to materially change the *status quo*. However, there are also instances where the CMA has the power to determine the outcome itself (notably in price controls). In these instances, this approach, combined with the uncertainty around timetabling of the hearing and determination of an appeal, will arguably create greater uncertainty than the current regulatory appeal framework. This being the case, it would be beneficial to provide guidance on how the CAT will direct the remittal of a decision to the relevant regulator, along with timelines for the regulator to reach its redetermination, and such guidance to be the subject of further consultation on a sector-by-sector basis.

Q45. Should the CAT have jurisdiction to determine price control matters in Telecoms Appeals? [Yes / No / Not sure] Please explain your views.

Not sure. See further our response to **Q44** above.

Q46. Would any amendments to the CAT Rules be necessary to ensure that Regulatory Appeals can be heard fairly and efficiently? [Yes / No / Not sure] Please explain your views.

Yes. As explained in the response to **Q44**, changes to the CAT Rules will be required to give effect to the various statutory timelines for the hearing and determination of the Consultation Appeals.

Appeal standard and parameters

Q47. Should Regulatory Appeals be determined in accordance with the standard of review set out in paragraph 204(a)? [Yes / No / Not sure] Please explain your views.

Not sure. The standard of review set out in para. 204(a) of the Consultation is judicial review while taking due account of the merits of the case (**JR on the merits**). The Consultation states that this “*means that the CAT would review the regulator’s decision on judicial review grounds (unfairness, illegality, unreasonableness) and would assess whether the regulator’s decision is materially wrong after considering the merits of the case, in line with the approach explained and taken by the CAT in the case law*”, citing *TalkTalk Telecom Group PLC v Ofcom*.¹⁶⁴

¹⁶³ Guide to Proceedings, para. 2.35 (emphasis added).

¹⁶⁴ *TalkTalk Telecom Group PLC v Ofcom* [2020] CAT, paras 137-140.

As noted in response to **Q44** above, it is challenging to give a firm view of this proposal given it covers such a wide range of appeal and reference types across a diverse range of sectors, which are currently subject to a range of grounds of appeal, differing appeal standards and diverse bases of standing to appeal. This means that the implications and consequences of the change in the standard of review which will materially vary on an individual appeal or reference basis. However, we are not convinced of the need for a change of standard from full-merits appeal/redetermination to JR on the merits, at least in so far as the appeal relates to a periodic price control. We reach this conclusion as:

- JR on the merits sets a materially higher bar for a party seeking to bring a claim irrespective of how the CAT applies the 'merits' standard: in practical terms it is likely to be challenging to demonstrate that a regulator's decision is so materially in error that it is unfair, illegal or unreasonable for the purposes of a judicial review standard. This is likely to have a 'chilling effect' on appeals made to the CAT and may risk regulator decisions being made on reduced robust grounds.
- There is limited caselaw applying the JR on the merits standard (and none specifically in respect of the price aspects of price control decisions), and as such a lack of clarity in how the CAT is likely to interpret and implement that standard in practice. The CAT's approach to JR on the merits, as set out in *TalkTalk* is that: "*Given that Article 4(1) continues to apply, it would appear that, in accordance with the Court of Appeal's view in BT v Ofcom and the High Court's view in Hutchison 3G, as set out helpfully by the Tribunal in the recent Virgin Media judgment, we should continue, as before, to scrutinise the Decision for procedural unfairness, illegality and unreasonableness but, in addition, we should form our own assessment of whether the Decision was "wrong" after considering the merits of the case. In doing so, we note that the Decision we are required to assess is a complex one, and only one part of an even more complex assessment, in which the knowledge and experience of a specialised sectoral regulator are heavily engaged. We must therefore "modulate" our approach to fit the circumstances of this case and allow an appropriate degree of respect for the regulator's expert assessment.*"¹⁶⁵ This would appear to offer the CAT wide discretion in how it interprets the application of the merits standard. We respectfully submit that the relevant stakeholders would benefit from greater certainty as to the deference that the CAT would give to the regulator in question, and the impact that will have on the nature of the CAT's interrogation of key evidence (for instance of underlying factual evidence or econometric models in the price control context).

¹⁶⁵ *TalkTalk Telecom Group PLC v Ofcom* [2020] CAT, para. 139 (emphasis added).

- The implication of raising the bar to bringing a successful appeal is not trivial. In regulated sectors the consequence of a successful appeal/redetermination, particularly of a price control, can be material: in the CMA's recent redetermination for five water companies, the CMA allowed "*a total increase of £463 million in confirmed revenue for the Disputing Companies (17% of what they collectively sought) compared with Ofwat's PR24 FD [...and] six enhancement schemes in 'gated' processes, where additional allowances can be released during the price control when required funding becomes clearer.*"¹⁶⁶ It is not clear, but would appear unlikely, that the water companies would have been able to achieve this outcome under a JR on the merits standard.

Q48. Should the notice of appeal set out the grounds of appeal and indicate whether the regulator's decision was based on an error of fact, an error of law, or an error in the exercise of the regulator's discretion, as set out in paragraph 204(b)? [Yes / No / Not sure] Please explain your views.

Yes. We see merit in this proposal, provided the appellant is not precluded from raising as many of the grounds as it wishes, or in presenting appeal grounds in a manner that may cut across these categorisations.

Q49. Should parties be allowed to submit new evidence on appeal? [Yes / No / Not sure] Please explain your views.

Yes, subject to being governed by the CAT Rules of evidence as proposed by the Consultation (para. 204(c)).

Q50. Should the cross-examination of witnesses be permitted, in line with the CAT Rules? [Yes / No / Not sure] Please explain your views.

Not sure. However, if permitted, this should be governed by the CAT Rules of evidence as proposed by the Consultation (para. 204(c)).

Q51. In case the CAT quashes the decision, should the matter be remitted to the regulator, as proposed in paragraph 204(d)? [Yes / No / Not sure] Please explain your views.

Yes, if DBT concludes that the CAT should be the appellate body to hear the Consultation Appeals. However, this affirmation is subject to the concerns and issues we raise in response to **Q44**.

¹⁶⁶ CMA, Water PR24 Final Determinations Summary, 10 March 2026, para. 34.

Q52. Would the proposed appeal parameters set out in paragraph 204 create any barriers or challenges for the parties seeking to appeal a regulator's decision? [Yes / No / Not sure] Please explain your views.

Please see our response to **Q47**.

Q53. Should the new appeal replacing Water Redeterminations be overseen by the CAT in accordance with the appeal parameters set out in paragraph 204? [Yes / No / Not sure] Please explain your views.

Please see our responses to **Q44** and **Q47**.

Q54. Should Water Regulatory References be converted into an appeal process, overseen by the CAT in accordance with the appeal parameters set out in paragraph 204? [Yes / No / Not sure] Please explain your views.

Please see our responses to **Q44** and **Q47**.

Q55. Should Energy Regulatory References be removed to simplify the order-making process and ensure greater consistency with similar powers existing for other licensable activities? [Yes / No / Not sure] Please explain your views.

Please see our response to **Q44**.

Eligibility to appeal or intervene

Q56. Should eligibility criteria be harmonised across sectors? [Yes / No / Not sure] Please explain your views.

Not sure. As noted in the response to **Q44**, we have concerns about a 'one-size-fits-all' approach to reform of the regulatory appeal framework, and this applies to the harmonization of eligibility criteria. The Consultation Appeals span a wide range of sectors (Water, Energy, Air, Postal Services, and Telecoms). Each of these sectors are highly complex, have their own stakeholder dynamics, statutory regimes, regulators and stakeholders. For example, the balance in the relationship between airlines and airports is much different to that between a water company and an individual consumer. The decision on which persons are eligible to bring a challenge against a regulator's decision should be taken on a sector-by-sector basis (and potentially on an appeal-by-appeal type) taking account of these factors, rather than as a blanket approach.

While one positive outcome of a wider set of eligible appellants is that regulators would be held to greater scrutiny, care should also be taken to ensure that this does not have unintended consequences, for instance opening up appeals of regulatory decisions to misuse through frivolous or 'nuisance' claims (i.e. claims designed purely to delay implementation of a regulatory decision, or claims designed purely to engage either the regulator or the regulated company in question (as an intervener) in litigation), or introducing process delays which may impact on investment decision making and implementation. Care should be taken to ensure that any appeal standing granted to representative consumer groups is genuinely representative rather than being a vehicle for vested or political interests. For this reason, we also support the Consultation's proposal that parties to an appeal (potentially, other than the directly regulated entity which is the subject of the regulatory decision) should be required to obtain the permission of the CAT before bringing an appeal.

Q57. In case of harmonised eligibility criteria for Regulatory Appeals and Telecoms Appeals, should the right to appeal be granted to (i) licence holders and companies holding an appointment, and (ii) persons whose interests are materially affected by the regulator's decision and bodies or associations representing such persons, including consumer bodies? [Yes / No / Not sure] Please explain your views.

Please see the response to **Q56** above.

Q58. Should parties be required to seek the permission of the CAT to bring an appeal? [Yes / No / Not sure] Please explain your views.

Yes. For the reasons outlined in the response to **Q56**, we consider that permission to appeal (potentially other than by the directly regulated party which is the subject of the regulatory decision) should be obtained from the CAT before a party is able to bring an appeal.

Should permission to appeal be required, any such threshold should be set at a level that it would filter out frivolous or 'nuisance' claims, while at the same time not becoming unduly time or resource intensive.

Q59. Should third parties be permitted to intervene in an appeal, subject to obtaining permission from the CAT? [Yes / No / Not sure] Please explain your views.

Not sure. Any widening of existing statutory rights that would permit third parties to intervene (where no such right currently exists) requires a careful consideration of the rationale for that restriction in the first instance, and a balancing of the ability to bring a legitimate intervention against the need to ensure that cases are conducted expeditiously.¹⁶⁷ However, if such a right

¹⁶⁷ *Pfizer and Flynn v CMA* [2022] UKSC 14, para. 42.

was introduced, we support the proposal that it should be governed by CAT Rule 16 (including a need to obtain permission from the CAT to intervene). As regards representative appeals, there may be lessons learned from the CAT's approach to competition law CPOs.

Costs

Q60. What barriers to appeal exist for consumer groups or other groups (such as environmental groups) in regulated sectors? Please specify the sector you are referring to.

See our responses to **Q56 to 59** above

Q61. In addition to existing CAT Rules on cost recovery, what cost arrangements or other aspects of the appeal process could help ensure fair participation by all eligible parties in Regulatory Appeals and Telecoms Appeals?

Not sure.

Q62. Should costs be capped for certain parties, such as consumer groups? [Yes / No / Not sure] Please explain your views.

Not sure. While we support the right of all eligible parties to exercise their appeal rights, the Consultation provides no evidence to support its assertion that "*it appears that although consumer bodies are eligible to challenge certain decisions, they often do not do so because they are concerned about the cost implications of losing.*"¹⁶⁸ If a cap is to be introduced, careful consideration must be given to ensure that the cap is not set (which, in our view should be on a case by case basis taking into account the parties in question) at such a level that it enables "*frivolous*" or "*nuisance*" claims – especially as regulators may have required or provided the opportunity for consumer representative engagement during the regulatory determination under challenge.

Q63. Should specific cost arrangements exist in relation to the costs incurred by regulators in defending their decisions? [Yes / No / Not sure] Please explain your views.

No. We consider that the principles of *Pfizer and Flynn v CMA* should be applied: that the starting point should be that costs follow the event.¹⁶⁹

¹⁶⁸ Consultation, para. 220.

¹⁶⁹ *Pfizer and Flynn v CMA* [2022] UKSC 14.

Q64. We welcome any further views on how to improve the effectiveness of Regulatory Appeals.

As noted above, we have some reservations regarding a “one-size-fits-all” cross-industry approach to regulatory appeals. We recognise the potential for applying best practices between industries, which can be facilitated both by the appellate body in its decision making as well as by the regulators (including through the work of the UKRN). However, this does not obviate the need to reflect industry differences and to consult closely with key stakeholders on an industry-by-industry basis as reforms are progressed.

Chapter 3 – More efficient CA98 enforcement

Streamlining the CMA decision-making model in CA98 cases

Q65. Should Rule 3 be omitted to enable the CMA in guidance to establish its decision-making model in CA98 cases? [Yes / No / Not sure] Please explain your views.

No. In our view, the Consultation has not demonstrated that any potential efficiency benefits would outweigh the reduction in procedural safeguards resulting from the removal of a formal separation between investigation and decision-making.

The Consultation proposes to remove Rule 3 of the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (**CMA Rules**). Rule 3 currently provides a formal separation between the investigative and decision-making functions in Competition Act 1998 cases, with decisions taken by the Case Decision Group (**CDG**), whose members have not previously been involved in the investigation.

As the Consultation itself acknowledges, the CDG is an important procedural safeguard. It provides a genuine "second pair of eyes" before an infringement decision is adopted and helps ensure that the evidence and proposed findings are subject to independent challenge and scrutiny. As noted in our response to DBT's consultation Refining our Competition Regime, we do not support the Government's proposal to abolish the CMA Panel. Although the CMA's current guidance envisages the inclusion of a CMA Panel member on the CDG only "*where appropriate*", we consider that the involvement of Panel members brings valuable external perspective and expertise to the decision-making process. It also helps to mitigate perceptions of confirmation bias that may arise where the decision-making body is comprised solely of CMA staff.

While the Consultation states that the Government "*expects that the CMA will adopt a decision-making model that continues to introduce input from individuals not previously involved*" in the case, we consider that this safeguard should be embedded in binding procedural rules rather than left to the CMA's discretion through guidance. Fundamental procedural protections should not depend solely on the content of guidance, which can be amended over time, but should instead form part of the framework governing the CMA's investigative and decision-making processes.

The Consultation identifies as "*one option*" a decision-making structure comprising an SRO and two additional decision-makers. In our view, this approach would provide weaker procedural safeguards than the current CDG model. Unlike the current regime, the SRO will already have been involved in the investigation and, as the Consultation recognises, will have responsibility for the conduct of the case. There is therefore an inherent risk that the SRO may be perceived

as having become invested in the outcome of the investigation. Moreover, where the two other decision-makers disagree, the SRO would have the casting vote. In practice, this means that the individual most closely associated with the investigation could determine the outcome, thereby reducing the degree of independent scrutiny currently provided by the CDG process.

The Consultation also suggests that alternative decision-making models may deliver greater efficiency, but it does not explain why the current CDG framework is considered to impede timely decision-making. Nor does it identify a preferred alternative model against which the existing regime can be assessed. As a result, it is difficult meaningfully to evaluate the purported benefits of the proposed reform. In particular, it is not apparent why a model involving an SRO and two additional decision-makers would be materially quicker than the current three-member CDG structure. The Consultation provides no evidence that the involvement of three independent decision-makers is a significant source of delay, nor does it quantify the efficiency gains that might be expected from the proposed changes.

Q66. Should Rules 9(2) to 9(4) be omitted to enable the CMA to establish its decision-making model in CA98 settlement cases in guidance? Note: The CMA would be required to consult on guidance setting out such decision-making processes. [Yes / No / Not sure] Please explain your views.

No. The Consultation proposes to remove Rules 9(2) to 9(4) of the CMA Rules, which effectively require the Senior Responsible Officer (**SRO**) to obtain approval before settling a CA98 investigation. Under the CMA's current practice, settlement proposals are considered by the Case and Policy Committee (**CPC**).¹⁷⁰ The CPC comprises, amongst others, executive members of the CMA Board and at least one Panel Member, many of whom will not have been involved in the investigation itself.

For the reasons set out the answer to **Q65**, we consider it important that the decision to settle an investigation is subject to independent scrutiny by individuals who have not been directly involved in the conduct of the case. The requirement for a "second pair of eyes" serves as an important procedural safeguard and helps ensure that settlement decisions are taken following appropriate challenge and review rather than solely by those responsible for the investigation. If Rules 9(2) to 9(4) were removed, it would be open to the CMA, through revisions to its guidance, to permit settlement decisions to be approved by the SRO alone without any requirement for independent oversight or approval. In our view, the requirement for review by individuals not previously involved in the investigation should be retained as part of the CMA's procedural framework and should not be left entirely to the CMA's discretion through guidance.

¹⁷⁰ See para. 14.18 of Guidance on the CMA's investigation procedures in Competition Act 1998 cases, CMA8, 19 December 2024 (**CMA8**).

More proportionate confidentiality requirements

Q67. Should Rule 7 be amended, or omitted in its entirety, to give the CMA greater flexibility to decide on a case-by-case basis when it would be appropriate to seek further views on confidentiality? [Should be amended / Should be omitted in its entirety / Should be retained / Not sure] Please explain your views.

Should be amended. Rule 7 of the CMA Rules requires the CMA, where a person has indicated that information supplied should be treated as confidential, to take reasonable steps to notify that person of any proposed disclosure or publication of that information and to provide a reasonable opportunity to make representations. While we acknowledge the Consultation's concern that this requirement can impose a significant administrative burden and delay investigations, any reforms must strike an appropriate balance between procedural efficiency and the protection of legitimately confidential information.

In particular, the CMA's approach should continue to: (i) protect commercially sensitive information from inappropriate disclosure, particularly where disclosure may be made to competitors or customers of the person concerned; (ii) ensure that confidentiality claims are properly scrutinised so that non-confidential information can be made available where appropriate; and (iii) preserve incentives for complainants, third parties and other stakeholders to engage openly and voluntarily with the CMA by providing documents and information.

We do not support the removal of Rule 7 in its entirety and the replacement of the existing framework with guidance based solely on the CMA's obligations under Part 9 of the Enterprise Act 2002. Although it is unclear whether the CMA intends to depart from its current approach, we note that the CMA's Transparency and Disclosure Statement (**CMA6**) provides the CMA with greater discretion than Rule 7 in two significant respects.

First, CMA6 states that, where confidentiality is claimed, the CMA will take such steps as it considers reasonable and practicable to seek further views on confidentiality. This would appear to permit the CMA to assess the merits of a confidentiality claim without further consultation with the person who supplied the information or to whom it relates. We do not consider that this is appropriate in all cases. The person concerned will frequently be best placed to explain why information remains confidential,¹⁷¹ particularly where the sensitivity of

¹⁷¹ For example, relying on the guidance of the European Court of Justice in *Evonik Degussa*, the courts have recognised a rebuttable presumption that information more than five years old is unlikely to remain confidential. (Case C-162/15 P, *Evonik Degussa GmbH v European Commission* [2017] EU:C:2017:205, para. 64). The CMA may therefore conclude, on the basis of the age of the material alone, that it no longer warrants confidential treatment. However, the party concerned may be able to rebut that presumption by demonstrating that the information remains commercially sensitive, for example because it continues to reflect the undertaking's current business practices, strategy or commercial arrangements.

the information depends on factors that may not be apparent to the CMA. Conversely, circumstances may have changed such that information previously treated as confidential is no longer sensitive and could be disclosed more widely. In either case, consultation with the affected person is likely to result in a more accurate assessment of confidentiality and a more appropriate balance between transparency and protection of commercial interests.

Second, CMA6 indicates that the CMA may not always provide advance notice before disclosing information where confidentiality has been claimed. The examples provided suggest that the CMA may consider prior opportunities to make confidentiality submissions, or measures such as anonymisation or aggregation, sufficient to justify disclosure without further notification. This could, however, result in information being disclosed without the affected party having an opportunity to comment on whether the proposed protections are adequate or whether the information remains confidential in the particular circumstances. Given the potentially significant consequences of disclosure, including disclosure to competitors or customers, affected parties should ordinarily be informed of the CMA's intended course of action before disclosure takes place.

We recognise the CMA's desire to reduce administrative burdens and avoid unnecessary delay. Nonetheless, rather than removing Rule 7 altogether, we consider that a more proportionate approach would be to amend the Rule so that:

- (i) the CMA requests confidentiality submissions when seeking or obtaining information and makes clear that information may subsequently be disclosed where confidentiality claims are not adequately justified;
- (ii) the CMA is entitled to determine, on the basis of the information and submissions provided, whether a claim to confidentiality should be accepted or rejected, without being required to undertake repeated rounds of consultation; and
- (iii) before disclosing information, the CMA must provide notice to the person who supplied the information, or to whom the information relates, setting out the proposed disclosure, the manner in which disclosure will occur (for example, publication in a non-confidential decision or disclosure within a confidentiality ring), and any measures proposed to protect confidentiality.

Where the affected person considers that disclosure would be inappropriate, it should have an opportunity to make representations and, where necessary, raise the matter with the Procedural Officer. Similarly, where a party no longer claims confidentiality over a document, this could be communicated to the CMA.

In our view, this approach would materially reduce the burden associated with repeated confidentiality consultations while retaining an important safeguard against inappropriate disclosure. It would therefore support more efficient investigations without undermining

confidence in the CMA's handling of confidential information or discouraging parties from voluntarily providing information and assistance to the CMA.

More efficient settlement procedures

Q68. Should Rule 9 be amended to include a requirement that the settling parties must agree not to challenge or appeal the infringement decision as a condition of settlement? [Yes / No / Not sure] Please explain your views.

No. We do not consider that any clear justification has been provided for amending Rule 9 to reflect the CMA's current practice of requiring, as a condition of settlement, an undertaking to confirm that it will not challenge or appeal the infringement decision.

If the Government's intention is to remove the ability of settling parties to appeal infringement decisions, we consider that such a change would require amendment of the primary legislation rather than being effected through procedural rules. Section 46 of the Competition Act 1998 expressly provides that any party to an agreement in respect of which the CMA has made a decision may appeal to the CAT against, or with respect to, that decision. For these purposes, a "decision" includes a determination as to whether the Chapter I or Chapter II prohibitions have been infringed. It is therefore unclear how a procedural rule could lawfully curtail a statutory right of appeal conferred by Parliament.

More fundamentally, we do not support any measure that would prevent a settling party from appealing an infringement decision in all circumstances. While appeals following settlement decisions are, and should remain, exceptional, the availability of an appeal is nevertheless an important safeguard and a core component of a party's rights of defence, including the fundamental right to a fair hearing. Settlement does not eliminate the possibility that a material procedural irregularity, serious error of law or other defect in the decision-making process may only come to light after settlement has been concluded. For example, a party may settle an investigation on the basis of an agreed set of facts, but the CMA's subsequent infringement decision may fail accurately to reflect those facts or may make findings that implicate the settling party in conduct falling outside the scope of what it agreed. This could have significant consequences for the settling party. In particular, under Section 58 of the Competition Act 1998, unless the court or Tribunal directs otherwise, a relevant finding of fact made by the CMA may be binding in subsequent proceedings once the time for appealing that finding has expired or, where an appeal has been brought, the finding has been confirmed on appeal. An absolute waiver of appeal rights could therefore result in a settling party being bound by a factual finding which it did not accept as part of the settlement and which it considers to be inaccurate, without having had any opportunity to challenge that finding on appeal. In those circumstances, the

affected party should retain an effective means of challenging the decision. A rule which excludes any possibility of appeal would remove that important safeguard entirely.

We acknowledge the CMA's reliance on *McGown v B*¹⁷² and *David Cameron Millar v Procurator Fiscal (Scotland)*¹⁷³ as authority for the proposition that a waiver of a right to a fair hearing can be valid when it is voluntary, informed and unequivocal. However, those authorities did not arise in the context of the CMA's settlement procedure. In our view, the application of these principles established in those cases would necessarily depend on the particular facts and circumstances, including the nature of the issue that the party subsequently seeks to challenge. If a Court were to conclude that the requirements for a valid waiver had not been satisfied, it could permit the appeal and proceed to safeguard the party's right to a fair hearing. By contrast, a rule that removes the right of appeal altogether would preclude any such scrutiny and prevent the issue from being considered, regardless of the circumstances of the particular case.

Q69. Should Rule 9(5) be amended to remove the requirement to issue a SO in cases which are settled with all parties pre-SO? [Yes / No / Not sure] Please explain your views.

Yes. Where all parties to an investigation have agreed to settle, we support the removal of the requirement in Rule 9(5) for the CMA to issue a full Statement of Objections and its replacement with a Summary Statement of Facts or draft Statement of Objections. This streamlined approach should generate material procedural and timing efficiencies and would be broadly consistent with the European Commission's settlement procedure, which is intended to facilitate the efficient resolution of cases where all parties have agreed to settle.

Q70. Should Rule 9(5) be amended to specify that the SSF or draft SO provided to the settling parties constitutes a written notice for the purposes of section 31 CA98? [Yes / No / Not sure] Please explain your views.

Not sure. We agree that, where all parties to an investigation settle, Rule 9(5) should be amended to provide that the Summary Statement of Facts or draft Statement of Objections constitutes written notice for the purposes of section 31 of the Competition Act 1998, provided that the subsequent infringement decision accurately reflects the agreed factual and legal basis of the settlement as set out in those documents.

However, a different approach is required in hybrid settlement cases, where one or more parties do not settle and the investigation continues against them. In those circumstances, we do not consider that the Summary Statement of Facts or draft Statement of Objections issued during the settlement process should constitute written notice to the settling parties of any subsequent

¹⁷² *McGown v B* [2011] UKSC 54.

¹⁷³ *David Cameron Millar v Procurator Fiscal (Scotland)* [2001] UKPC D4.

contested infringement decision. Given that a contested infringement decision will typically concern the same conduct, facts and legal assessment as the settlement decision, it is likely to affect the interests of the settling parties. Settling parties should therefore be given notice of the contested decision. This would provide an important procedural safeguard by enabling settling parties to verify that the contested decision remains consistent with the scope of the infringement admitted as part of the settlement process.

Access to evidence

Q71. Should there be a prescribed legal framework for confidentiality rings? [Yes / No / Not sure] Please explain your views.

Not sure. We consider that further detail regarding the proposed legal framework for confidentiality rings is required before meaningful comments can be provided. We nevertheless make the following observations based on the information contained in the Consultation.

In broad terms, we support the use of confidentiality rings in Competition Act 1998 investigations (and across the CMA's wider functions). Confidentiality rings are commonplace in both investigations and litigation and can be an effective means of balancing the need to protect confidential information with the need to provide parties with timely access to relevant material.

Any framework should retain sufficient flexibility to accommodate the circumstances of individual cases. In particular, it should be capable of evolving to reflect legal developments, good practice and changes in market standards, including in relation to the storage and destruction of information. It should also permit bespoke arrangements to be agreed where justified by the circumstances of a particular case, including to reflect differences in businesses' internal systems or the sensitivity of the information concerned. Such flexibility is an important feature of the CMA's current approach.

The Consultation states that a prescribed legal framework would remove the need for the CMA to negotiate confidentiality ring arrangements on a case-by-case basis. However, it is unclear whether the degree of flexibility required in practice can be achieved through a fully prescribed framework. While standardisation may generate efficiencies, confidentiality rings often need to be adapted to the specific circumstances of the parties and the information being disclosed.

We are also unconvinced that legislative reform is necessary to address any administrative burden associated with agreeing confidentiality ring undertakings. Given the widespread use of confidentiality rings in litigation and regulatory proceedings, we would have expected such arrangements to be relatively straightforward to agree in most cases. An alternative approach may be for the CMA to review and update its standard confidentiality ring templates on a regular

basis, following consultation with the legal community, whilst continuing to permit bespoke variations where appropriate. We note that the CMA's confidentiality ring templates were last updated in January 2017.

The Consultation further suggests that confidentiality rings can be difficult to operate because they depend on participants complying with their obligations. As explained further in our response to **Qs 72 and 73**, members of confidentiality rings already take those obligations extremely seriously and we do not consider that concerns regarding compliance justify a more rigid framework.

We agree that any confidentiality ring framework should be available to both legal and non-legal advisers. However, we also consider that in-house counsel and a limited number of business representatives should be eligible to participate in a confidentiality ring. Advisers are often unable to assess the significance of documents, or formulate instructions effectively, without consulting those individuals within the business who possess detailed operational knowledge. Allowing a limited number of appropriate business representatives access to the ring would facilitate the effective exercise of legal rights and reduce the administrative burden associated with seeking the removal of documents from the ring on a document-by-document basis.

More fundamentally, the CMA's duty to consult requires affected parties to be given a fair opportunity to understand and respond to the substance of the CMA's concerns. It is well established that consultation requires the gist of the decision-maker's reasoning to be disclosed to the affected party. In competition investigations, which frequently involve complex factual, economic and technical issues, providing the "gist" of the case will often require disclosure at a relatively high degree of specificity. In practice, external advisers may be unable to determine the significance of particular documents or allegations without discussing them with appropriately identified individuals within the business. We note in this regard that, in *Meta v CMA*,¹⁷⁴ whilst recognising that confidentiality rings limited to external advisers may be appropriate in some circumstances, the CAT expressed reservations regarding the CMA's approach to balancing the protection of confidential information against the requirements of procedural fairness where no representatives of the affected business had been included within the confidentiality ring.

The Consultation also proposes that information could be disclosed into a confidentiality ring without prior confidentiality representations being sought from the party that provided the information. As explained in our response to **Q67**, we consider it important that notice is provided before confidential information is disclosed into a confidentiality ring. This would enable the disclosing party to explain, for example, that it no longer considers the information

¹⁷⁴ *Meta v CMA* [2022] CAT 26.

to be confidential, thereby allowing wider disclosure, or to identify any limited redactions which remain necessary. The disclosing party should also retain the ability to raise concerns with the CMA and, where appropriate, seek review by the Procedural Officer.

Finally, any framework should encourage the prompt reporting of confidentiality ring breaches to the CMA and require parties to explain the steps taken to investigate, mitigate and remediate any such breach.

Q72. Should civil sanctions be available for breaches of confidentiality rings? [Yes / No / Not sure] Please explain your views.

See our response to **Q73**.

Q73. Should these sanctions be applicable to both the individual responsible and their employer? [Yes / No / Not sure] Please explain your views.

No. We do not support the introduction of civil sanctions for breaches of confidentiality ring obligations. The Consultation identifies no evidence that the existing sanctions under Part 9 of the Enterprise Act 2002 are insufficient to incentivise compliance. In our experience, both in investigations and litigation, members of confidentiality rings take their obligations extremely seriously, not least because of the significant reputational, professional, and potential criminal consequences that may arise from any breach. In the absence of evidence of a systemic problem, we do not consider that additional civil penalties are justified.

If the Government nevertheless decides to introduce civil sanctions, they should apply only to companies or firms rather than individuals. Companies are best placed to address any confidentiality ring breaches through their internal governance and compliance procedures, whereas imposing sanctions on individuals risks discouraging advisers from participating in confidentiality rings without materially improving compliance.

Q74. Should this legal framework, and the associated civil sanctions, be applicable across the CMA's other functions such as in mergers and markets? [Yes / No / Not sure] Please explain your views.

Yes. Insofar as the Government proceeds with its proposals to implement a legal framework for confidentiality rings and civil sanctions, we agree that this should apply in respect of the CMA's other functions. However, in the merger control context, any such framework should recognise that there may be legitimate circumstances in which confidential information needs to be exchanged between the merger parties, including where the exchange is directly related to and necessary for the implementation of the transaction.

Q75. Should Rule 6(2) be amended to include the same exceptions as those set out in the Rule 5 of the Direct Consumer Enforcement rules? [Yes / No / Not sure] Please explain your views.

No. As currently framed, while we agree with certain aspects of the proposal, we have concerns regarding the proposed expansion of the CMA's ability to withhold documents from inspection on the basis that they identify an individual. We therefore propose a modified approach that would address the Government's concern regarding the disclosure of identifying information while preserving parties' rights of defence.

The Consultation proposes to amend Rule 6(2) of the CMA Rules to align the exceptions to access to the administrative file with those contained in Rule 5 of the Direct Consumer Enforcement Rules.

Access to file is an important procedural safeguard and a fundamental component of the rights of defence. It enables parties to review not only the inculpatory material on which the CMA relies, but also any exculpatory evidence that may rebut, qualify, or place the CMA's allegations in context. Effective access to the administrative file is therefore essential to ensuring that parties can respond fully and meaningfully to the case against them.

In addition to withholding documents to the extent that they contain confidential information or amount to "*internal documents*", the Direct Consumer Enforcement Rules allow the CMA to withhold any document: (1) "*to the extent that it identifies an individual consumer*," (2) "*which is routine correspondence*," or (3) "*which was provided by the respondent*".¹⁷⁵

The Consultation appears to propose that the CMA would be permitted to withhold "*documents to the extent that they identify an individual*". This is materially broader than the equivalent exception in the Direct Consumer Enforcement Rules, which is confined to documents identifying an "*individual consumer*". Given that most modern business communications identify one or more individuals, whether in email headers, signatures, or correspondence chains, the proposed formulation could significantly expand the categories of documents capable of being withheld from inspection. This creates a risk that parties may be denied access to material that is relevant to their defence, including potentially exculpatory evidence.

Moreover, the Consultation does not explain why such a significant restriction on access to file is necessary in the competition enforcement context, beyond noting that a similar exception exists in the Direct Consumer Enforcement Rules. We do not consider the existence of such an exception in a relatively new consumer enforcement regime to be, without more, a sufficient justification for curtailing a well-established procedural safeguard in competition investigations.

¹⁷⁵ See CMA's Rules on the direct consumer enforcement regime set out in the Digital Markets, Competition and Consumers Act 2024, CMA 201, 4 April 2025 (Direct Consumer Enforcement Rules).

For the same reason, we also do not consider that documents should be capable of being withheld solely because they identify an “*individual consumer*”.

Any legitimate concerns regarding privacy or confidentiality can be addressed through less restrictive measures, including the use of confidentiality rings and/or the redaction of identifying information. Such mechanisms would protect the interests of the individuals concerned while preserving parties' ability to inspect potentially relevant evidence.

To achieve this outcome, we suggest amending Rule 6(2) of the CMA Rules to permit the CMA to withhold “*documents or information*”, rather than only documents.¹⁷⁶ The CMA should also confirm in CMA8 that the presence of information identifying an individual or individual consumer will not, of itself, justify withholding a document from inspection and that the CMA will instead redact the identifying information and provide access to the remainder of the document.

We have no objection to the proposed exceptions relating to routine correspondence or documents provided by the respondent.

Q76. Should Rule 6(2) be amended to specify that access to file can be granted in hard copy or by electronic means? [Yes / No / Not sure] Please explain your views.

No. We do not consider it necessary to amend Rule 6(2) to specify that access to the file may be provided either in hard copy or electronically. The current wording of Rule 6(2), which requires the CMA to give a relevant party a reasonable opportunity to inspect the documents, is deliberately neutral as to the means by which such inspection is provided and therefore already permits access to be granted through either method.

As the Consultation acknowledges, the CMA already provides access to file electronically and, where appropriate, in hard-copy form. In our view, the existing drafting therefore affords the CMA sufficient flexibility to determine the most appropriate means of access in the circumstances of a particular case.

If, nevertheless, the Government proceeds with its proposed amendment to Rule 6(2), we consider that the Rule should reflect the CMA's established practice by providing that access to file will normally be granted in electronic form, with hard-copy access being used only where the particular circumstances of the case, or the nature of the documents concerned, make this necessary or appropriate. This would preserve the operational efficiencies associated with electronic access whilst ensuring that the CMA retains appropriate flexibility to depart from that approach where justified.

¹⁷⁶ Rule 6(2) of the CMA Rules currently only permits the CMA to withhold documents.

Q77. Should Rule 9 be amended to disapply access to file requirements set out in Rule 6(2) in cases where the CMA has followed settlement procedure? [Yes / No / Not sure] Please explain your views.

No. CMA's approach to be determined through guidance. As the Consultation itself recognises, the CMA is already able to adopt a streamlined approach to access to file in settlement cases under the existing framework. The Consultation does not explain why the current Rule prevents the CMA from doing so, nor does it identify any practical difficulties that would justify removing this important procedural safeguard altogether.

Nor is it clear what approach the CMA would adopt in the absence of Rule 9. While the CMA's current practice is to provide streamlined access to file in settlement cases, the proposed amendment would leave the scope of access to file entirely to the CMA's discretion and create uncertainty as to the extent of disclosure that parties could expect to receive. In our view, the fact that the CMA already operates a streamlined process demonstrates that there is no need to disapply the access to file requirements.

The Consultation suggests that the proposal would provide greater clarity and better reflect current practice. We respectfully disagree. Removing the Rule would risk creating uncertainty by suggesting that access to file in settlement cases is a matter of discretion rather than a procedural right. It would also leave open the possibility of materially different approaches being adopted in different cases. If the Government considers that the current drafting does not adequately reflect the CMA's existing practice, a preferable approach would be to amend Rule 9 expressly to confirm that access to file may be provided in a streamlined manner in settlement cases. This would provide clarity while preserving an important procedural safeguard.

We also emphasise the particular importance of access to file in circumstances where settling parties are expected to waive their rights of appeal. As noted in response to **Q68**, the CMA's position is that such a waiver is valid because it is voluntary, informed and unequivocal. Access to file plays an important role in ensuring that those conditions are satisfied. A party cannot be expected to make a properly informed decision as to whether to settle, admit liability and waive its appeal rights unless it has had a reasonable opportunity to review the evidence relevant to the CMA's allegations. For that reason, any move to reduce access to file rights would sit uneasily with the rationale relied upon by the CMA in support of settlement waiver.

Q78. Should Rules 13(1) and 13(2) be omitted to give the CMA more discretion on access to file in relation to interim measures, with the aim of faster decisions? [Yes / No / Not sure] Please explain your views.

No. We do not support the proposal to remove Rule 13(1) of the CMA Rules and leave the CMA's approach to access to file in interim measures cases to guidance. The Consultation

states that the CMA would continue to provide reasons for proposing interim measures and that the level of disclosure would be determined on a case-by-case basis to ensure that businesses have a meaningful opportunity to make representations. However, this would represent a weakening of an important procedural safeguard without any clear justification.

As a preliminary matter, the Consultation understates the significance of interim measures. Whilst interim measures do not involve a final finding of infringement or the imposition of a financial penalty, they are nevertheless highly intrusive and can have significant commercial and reputational consequences. They may alter a business's conduct for an extended period pending the outcome of an investigation, which may take several years to conclude. In some cases, the effects of interim measures may be difficult, or impossible, to reverse even if the CMA ultimately concludes that no infringement has occurred. Unlike an applicant for interim relief in civil proceedings, the CMA does not provide a cross-undertaking in damages and therefore faces no equivalent exposure should interim measures ultimately prove to have been unwarranted. Given that Competition Act 1998 investigations can continue for several years, and that there is no corresponding incentive on the CMA to accelerate the completion of its investigation once interim measures are in place, it is particularly important that businesses have a meaningful opportunity to understand and challenge the evidence relied upon by the CMA before such measures are imposed.

The CMA's current approach already strikes an appropriate balance between speed and procedural fairness. As recognised in CMA8, the CMA generally provides access only to documents relevant to the proposed interim measures, rather than granting access to the entire investigation file. Whilst documents relating solely to the underlying suspected infringement are not normally disclosed, the CMA provides a schedule of additional documents and may grant access where an addressee can demonstrate that a document is necessary to respond to the proposed measures. This is already a streamlined form of access to file tailored to the interim measures context.

We are concerned that the removal of Rule 13(1) would allow the CMA to dilute these safeguards further. Access to file is a fundamental component of a party's rights of defence and helps ensure that the CMA's decisions are robust, fair and properly informed. The ability to inspect relevant documents enables businesses to test the evidential basis for the proposed measures, identify factual errors and make effective representations. We therefore do not consider it appropriate to remove this safeguard and leave its scope entirely to the CMA's discretion.

Nor does the Consultation explain why the current arrangements are said to be unduly burdensome or how they materially impede the CMA's ability to impose interim measures promptly. The fact that interim measures have been used relatively infrequently may instead reflect the deliberately high statutory threshold which the CMA must satisfy, namely that urgent

action is required to prevent significant damage or protect the public interest. That threshold is an important safeguard given the potentially significant impacts of interim measures and should not be diluted. Equally, access to file should not be weakened without clear evidence that it is responsible for delay.

The experience at EU level also calls into question the suggestion that access to file is incompatible with the prompt adoption of interim measures. The European Commission recently imposed interim measures on Meta in relation to WhatsApp and third-party AI assistants within a relatively short timeframe, notwithstanding that the addressee was afforded access to file and an opportunity to respond to the Commission's concerns. Moreover, the Commission must establish a *prima facie* infringement before imposing interim measures, a more demanding standard than applies in the UK. The EU experience therefore demonstrates that procedural safeguards and effective interim enforcement are not mutually exclusive.

Accordingly, the Consultation has not made a sufficient case for removing Rule 13(1). If the Government nevertheless proceeds with the proposal, the current Rule should at a minimum be replaced with an obligation on the CMA to provide full access to the file once interim measures have been imposed. This would ensure that the addressee is able to exercise its appeal rights effectively and challenge the interim measures before the CAT on an equal footing with the CMA.

Modernising publication requirements

Q79. Should the publication requirements under Rule 19(2)(b) be removed? [Yes / No / Not sure] Please explain your views.

Yes.

Q80. Should the requirement under Rule 20(2)(a), to maintain a physical copy of the CA98 Public Register at the CMA's head office, be removed to reflect modern practices? [Yes / No / Not sure] Please explain your views.

Yes. We agree that the requirement for the CMA to maintain a physical copy of the Competition Act 1998 Public Register should be removed, given that the Register is publicly available online.

However, we note that the online Competition Act 1998 Public Register is not always updated promptly following relevant decisions. By way of example, the Register was updated on 15 April 2026 to include the CMA's decision to accept commitments in its investigation into suspected anti-competitive conduct by housebuilders, notwithstanding that those commitments had been accepted and published on 30 October 2025, approximately five months earlier.

Given that the Register serves as an important central repository of UK competition enforcement activity, we consider that the removal of the requirement to maintain a physical register should be accompanied by an obligation on the CMA, and the concurrent sector regulators, to update the online Competition Act 1998 Public Register promptly following the publication of any relevant decision or other registerable event. This would improve the accessibility, completeness and utility of the Register for businesses, advisors and other interested stakeholders and would help ensure that it remains an accurate and up-to date record of enforcement activity.

Competition Disqualification Orders

Q81. Should section 9A(5)(b) CDDA86 be amended to specify that a court can have regard to the conduct of a person as a director of an overseas company for the purposes of making a CDO? [Yes / No / Not sure] Please explain your views.

Yes. In principle, we agree that section 9A(5)(b) of the Company Directors Disqualification Act 1986 (**CDDA 1986**) should be amended to make clear that, when considering whether to make a Competition Disqualification Order (**CDO**), the Court may have regard to a director's conduct in relation to another breach of competition law by an overseas company. Such conduct may be relevant to the assessment of whether the individual is fit to be concerned in the management of a company. We would, however, welcome confirmation as to whether the Government intends to make a corresponding amendment to the Company Directors Disqualification (Northern Ireland) Order 2002.¹⁷⁷

We also agree with the proposal to align the wording of section 9A(5)(b) with section 6(1)(b) of the CDDA 1986. In particular, that amendment would clarify that the Court may assess the conduct of the director of the infringing company in England, Wales or Scotland either in isolation or together with that individual's conduct as a director of one or more other companies, including overseas companies, which have separately breached competition law.

The CMA's Guidance on CDOs states that, in addition to relying on information obtained for the purposes of its Competition Act investigation, the CMA may use its information gathering powers in deciding whether to apply for a CDO.¹⁷⁸ However, it is unclear how the CMA intends to establish and evidence the conduct of directors of overseas companies in practice. In particular, it is not clear whether the CMA would ordinarily rely on findings or decisions of overseas competition authorities alone or whether it would seek to obtain and assess the underlying evidence itself.

Given the potentially significant additional burden associated with responding to CMA information requests, it would be helpful for the CMA to provide further guidance, following consultation, on its intended approach. This guidance could usefully address the circumstances in which the CMA would seek underlying evidence relating to the conduct of an overseas company, the weight it would typically attach to findings made by overseas competition authorities and the evidential basis upon which it would ordinarily seek to establish such conduct when considering or pursuing a CDO application.

¹⁷⁷ [The Company Directors Disqualification \(Northern Ireland\) Order 2002](#).

¹⁷⁸ See, CMA, [Guidance on Competition Disqualification Orders](#), CMA102, 6 February 2019.

Q82. Should section 9 CDDA86 be amended to clarify that a court can make a CDO against former directors? [Yes / No / Not sure] Please explain your views.

Yes. Nevertheless, insofar as any uncertainty may arise from the drafting of the CDDA 1986, we would support a legislative amendment to clarify the position and ensure that the scope of the Court's powers is expressed unambiguously.

We also invite the CMA to reconsider its position on immunity from Competition Disqualification Orders (**CDOs**) for former directors. The CMA's Guidance states that, whilst the CMA will not ordinarily seek a CDO against a current or former director of a company that has benefited from leniency, it may nevertheless consider applying for a CDO where a director has been removed or has otherwise ceased to act as a director because of their involvement in the competition law infringement.

The Guidance further explains that a director whose company has engaged in cartel activity can reduce the risk of a CDO application by seeking to ensure that the company approaches the CMA for leniency. However, a former director, including one who voluntarily stepped down upon recognising that their conduct may have constituted cartel activity, may have little or no ability to influence whether their former company applies for leniency. As a result, such individuals may be unable to benefit from the protection afforded by the leniency regime, despite no longer having any control over the company's actions.

In our view, this creates a potential misalignment of incentives. Former directors may nevertheless be well placed to provide valuable evidence and assistance to the CMA's investigation. However, where they remain exposed to the risk of a CDO notwithstanding substantial cooperation, they may be less willing to engage closely and proactively with the CMA. The CMA should therefore consider whether greater protection, or clearer recognition for meaningful cooperation by former directors, would better support the objectives of the leniency regime and the effective detection and investigation of competition law infringements.

Q83. Should section 9A(5)(b) be amended to clarify that the requirement not to have regard to the matters set out in Schedule 1 CDDA86 does not apply to breaches of competition law? [Yes / No / Not sure] Please explain your views.

Yes. It seems already clear that Schedule 1 CDDA 1986 does not apply to breaches of competition law and this is consistent with the CMA's current guidance on CDOs which notes that Schedule 1 CDDA 1986 "*specifies matters to be considered when determining unfitness of directors in non-CDO cases*". Nevertheless, insofar as any uncertainty may arise from the drafting of the CDDA, we would support a legislative amendment to clarify the position.

Introducing a penalty cap for undertakings that have no turnover or where that turnover is not representative

Q84. Should the CMA be able to impose a financial penalty on undertakings with no turnover, or no representative turnover, in the last business year? [Yes / No / Not sure] Please explain your views.

See our response to **Q85**.

Q85. If so, would a fixed-amount penalty cap of up to £300,000 be appropriate? [Yes / No / Not sure.]

Not sure. The Consultation suggests that there is an enforcement gap where the CMA may be unable to impose a financial penalty on an undertaking that has no turnover in the last business year, or the preceding business year, notwithstanding that it may hold substantial assets or that its turnover during the relevant period is not representative of its normal level of economic activity. However, it is unclear whether the Consultation has identified a genuine deficiency in the existing regime or merely a perceived one. The CMA already has significant fining powers, including the ability to impose penalties of up to 10% of the worldwide turnover of the undertaking (including the parent company). The Consultation does not provide evidence demonstrating that undertakings have been able to evade effective sanctions as a result of the current turnover-based approach.

If the Government nevertheless proceeds with the proposal, it will be important for the CMA's guidance to address the impact that any financial penalty may have on the ability of those harmed by the infringement to recover compensation for losses caused by the anti-competitive conduct. In particular, consideration should be given to whether the imposition of a significant financial penalty could prejudice the interests of victims seeking redress.

We are also concerned that the proposal may inadvertently undermine deterrence. The CMA's existing power to impose fines of up to 10% of worldwide turnover is a significant deterrent to anti-competitive conduct. If the legislation were amended to provide for penalties of up to £300,000 or 10% of worldwide turnover, whichever is greater, there is a risk that businesses unfamiliar with the competition law regime may incorrectly perceive £300,000 to be the maximum penalty available. Careful consideration should therefore be given to how any new power is framed and explained.

Finally, the Consultation does not explain how the proposed £300,000 threshold has been derived or why it represents an appropriate and proportionate cap. In particular, it is unclear whether the figure has simply been selected by analogy with the consumer enforcement

regime. Without a clearer explanation of the rationale for the proposed threshold, it is difficult to assess whether the proposed level of penalty is justified.
