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Call for evidence Response

Which? Response to the Opt-out Collective Actions Regime Review: Call for Evidence

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Introduction

Which? welcomes the opportunity to review the operation and impact of the UK's opt-out collective action regime (the Regime), and respond to the Department for Business and Trade's (DBT) call for evidence. Which? strongly supported introducing the Regime and its aims to provide access to justice for consumers who have suffered loss from competition law breaches, and deter anti-competitive behaviour. It follows that Which? firmly supports DBT's commitment to consumer protection and achieving the Regime's aims, and the government's position that consumers should have a right to redress. Fair and competitive markets are ones that consumers can confidently participate in, providing an engine for economic growth.

The Which? group is headed by the Consumers' Association, a UK charity whose objects include to, "*uphold and promote compliance with consumer laws, regulations and public policies ... for the benefit or protection of the rights of consumers*". Through the Consumers' Association and in furtherance of those objects, Which? is a participant in the Regime, having been certified to act as class representative (CR) in *Consumers' Association v Qualcomm*¹ and is the proposed class representative (PCR) in *Consumers' Association v Apple*². *Consumers' Association v Qualcomm* was filed in February 2021, certified in May 2022, and at the time of writing the first trial of two is taking place. *Consumers' Association v Apple* was filed in November 2024 and a certification hearing is scheduled for November 2025. Which? also intervened at the Supreme Court at the collective proceedings order stage of *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*³ and was the only entity authorised to bring proceedings under the predecessor opt-in only regime.

¹ Case 1382/7/7/21, <https://www.catribunal.org.uk/cases/13827721-consumers-association>

² Case 1689/7/7/24, <https://www.catribunal.org.uk/cases/16897724-consumers-association-which>

³ Case 1226/7/7/16, <https://www.catribunal.org.uk/cases/12667716-walter-hugh-merricks-cbe> (*Merricks v MasterCard*).

In responding to this call for evidence, Which? has been mindful of the fact that it is restricted in the information and experiences it can share related to its two live collective actions. We have nevertheless sought to answer the questions posed constructively, based on firsthand experience, where possible and established consumer insight and expertise. Where Which? has suggested interventions or areas for further investigation, these should be treated as examples. There may be multiple additional ways in which the Regime can be improved to better achieve its aims, and Which? looks forward to contributing at further stages of the government's review in order to achieve this.

Summary of Which?'s Position

Ten years from the introduction of the Regime in 2015, outcomes so far are limited. An accurate picture demonstrates that only a modest number of claims are being progressed.⁴ These claims feature both opt-in and opt-out, stand-alone and follow-on, consumer and business classes. Only the case of *Justin Le Patourel v BT Group Plc* has reached a final judgment;⁵ there have been partial settlements in two cases and a final settlement is subject to a judicial review challenge in *Merricks v Mastercard*⁶; distribution has occurred only on the partial settlement in the *Justin Gutmann v First MTR South Western Trains Limited and Another* (the so-called *Boundary Fares* claims), returning approximately £216,500 to consumers and an additional £3.8 million is set to go to the Access to Justice Foundation;⁷ certification has been denied in four claims.⁸ To date, consumers' direct benefit from the Regime has been disappointing, though it remains the only realistic mechanism for access to justice for breaches of competition law. Evidence of the Regime's ultimate effectiveness is still emerging, and will be significantly supplemented in the next two to five years by anticipated outcomes of multiple claims that are well advanced.

The context in which the Regime sits has also changed. Since inception in 2015 the UK has left the EU and the Competition and Markets Authority (CMA) now has primary responsibility for public competition enforcement.⁹ The period has also seen the continued concentration of power within a handful of businesses, particularly global online platforms and technology companies. Regulatory responses have followed, with the establishment of the Digital Markets Unit at the CMA and Digital Markets, Competition and Consumers Act 2024 (the DMCCA). It is unsurprising that private enforcement mirrors these changes, despite the focus of the 2012/13 impact assessment.¹⁰

⁴ Around 35 cases in total, if claims are grouped together in relation to the same infringement but different defendants. By way of comparison, there were 14,600 claims filed in the Chancery Division of the High Court alone in 2024 (Civil Justice Statistics Quarterly Q1 2025).

⁵ [2024] CAT 76 (*Le Patourel v BT*).

⁶ [2025] CAT 28.

⁷ [2024] CAT 32: Case 1134/7/19 (*Boundary Fares*); as reported in Legal Futures; the Tribunal's judgment for the Stagecoach South Western Trains Limited settlement is pending.

⁸ Data from the Class Representative Network's Litigation Tracker:

<https://classrepresentativenetwork.notion.site/d1849ab3d8944d7797b1fe640fde4e94?v=4c0965baf3534625b7e18c26cd319c30>

⁹ Which? notes that the CMA does not have sole responsibility given concurrency with other regulators, such as the Financial Conduct Authority.

¹⁰ <https://assets.publishing.service.gov.uk/media/5a796fb4ed915d07d35b5772/13-502-private-actions-in-competition-law-a-consultation-on-options-for-reform-final-impact.pdf>.

However, it has become clear through Which?'s experience as a participant in the Regime and as an interested stakeholder, that the Regime is being held back by costs, delay, uncertainty and the narrowness of its scope. These issues are hindering the Regime's aims and reducing its effectiveness. In particular:

- **Costs:** the costs of litigating claims under the Regime are extremely high, whether opt-in or opt-out, creating a significant barrier to access to justice. Government should therefore explore how costs can be meaningfully reduced, including through mutual costs budgeting, greater availability of costs capping, availability of public funding and insurance, costs shifting and rebuttable presumptions favouring claimants.
- **Delays:** claims under the regime are taking too long to resolve, which in turn increase costs and delays redress for consumers that have suffered harm. In addition to suggestions above, the government should therefore explore how claims can be progressed more quickly, including through increased resourcing for the CAT, early targeted disclosure, fast-track permission/appeal mechanisms, reduction in or early resolution of satellite disputes and greater use of ADR for parties.
- **Uncertainty:** also linked to costs and delay, is the uncertainty stemming from the limited outcomes and continued evolution of Regime jurisprudence, which is discouraging investment in claims, further reducing access to justice and the Regime's effectiveness.
- **Scope:** the Regime's restriction to competition law infringements means that claims that might otherwise or in the alternative be brought, for example, as a (more simple, cost-effective) consumer law claim are being pursued under the Regime as there is no viable alternative. It has long been Which?'s position that opt-out collective actions should be more widely available, including for breaches of consumer protection laws. To further the government's position that consumers should have a right to redress and to better achieve the Regime's aims, Government should take this opportunity to expand the Regime.
- **Other redress:** the Regime should do more to encourage early resolution of claims, and we are supportive of redress via other avenues provided effective safeguards are in place. For example, voluntary redress schemes and the extension of CMA powers to mandate redress for competition infringements.

Which? views these issues as ones of implementation and scope, rather than structure: the framework established by section 47B of the Competition Act 1998 (CA98) remains appropriate. At the same time, Which? is aware of extensive and self-interested lobbying against the Regime, and believes the claimed costs to businesses and the wider economy are exaggerated. We caution against changes (including those that are well intentioned) that could neuter the Regime, for example, by making private funding uncommercial. Interventions at this stage in the Regime's development should therefore be limited to addressing issues of implementation.

Full response

Access and Funding

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

No, the Regime is not currently affordable to a diverse range of classes. As demonstrated by the claims currently being made, only claims with very high aggregate quantum figures have been able to be brought, typically in the hundreds of millions or billions of pounds. This is regardless of whether the claims are opt-out or opt-in, stand-alone or follow-on, consumer or business classes. As quantum is contingent on class size, this also means that consumer classes tend to be very large: in the millions or tens of millions.

This is because the costs of bringing a competition collective action in the CAT are extremely high: in the tens of millions of pounds. As explained in Which?'s response to the CJC's Review of Third Party Litigation Funding (the CJC Response¹¹), currently the only practically feasible way of funding these costs is with commercial third party litigation funding¹² and the Regime was established on the express understanding it would require such funding¹³. Naturally, commercial litigation funders will want to fund claims that are more likely to result in a settlement or damages award that provides them with a commercial return (often as part of a portfolio of claims), directing them towards higher value claims.

As a result, meritorious claims with relatively low aggregate quantum values are unlikely to be funded.

The uncertainty for some funding arrangements caused by the effect of the Supreme Court decision in *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) (PACCAR)*¹⁴ has exacerbated funding challenges, and Which? supports calls for the government to address this as soon as possible.

¹¹ Published by the CJC at <https://www.judiciary.uk/wp-content/uploads/2025/05/Lucy-Anderson-Which-Consumers-Association.pdf>.

¹² We understand there is one exception: the case of *Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc* (Case:1698/7/7/24), which is being funded publicly funded by the Home Office. See *Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc* [2025] CAT [2025] CAT 60 (CPO Judgment) at [23].

¹³ As acknowledged by the relevant government minister in the House of Lords during the passage of these legislative provisions in 2014, HL Hansard, 3 November 2014, at Col. 583 - <https://hansard.parliament.uk/Lords/2014-11-03/debates/14110315000095/ConsumerRightsBill#>.

¹⁴ [2023] UKSC 28.

We also understand that the extremely high costs of bringing a claim (and therefore capital required to fund them) is reducing competition between litigation funders. As explained in Which?'s CJC Response, litigation funding is not a homogenous product, nor are funders a homogeneous group. So what one funder may be prepared to fund, another may not, and the higher the costs of bringing a claim, the fewer funders available who will have the capacity and interest to fund. This is heightened further in current circumstances where: (i) a funder may already have significant commitments to fund ongoing collective actions (i.e. concentration risk) and has capital deployed or contractually committed for longer than anticipated due to the excessive time these claims are currently taking to resolve (i.e. duration risk); and (ii) we have observed some funders exiting the market to fund claims brought under the Regime.

As Which? discusses below, including when discussing the scope of the regime and relative simplicity of consumer law claims, to secure the future success of the regime, the costs and time of bringing opt-out collective actions must be reduced, though this cannot be in a way that further restricts access to justice. This will have multiple benefits, including to facilitate a more resilient and competitive funding market.

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

Only the *Boundary Fares* claims have resulted in a (partial) final outcome on treatment of unclaimed settlement funds; the position in *Merricks v MasterCard* is subject to a judicial review challenge by the litigation funder. There have been no damages awards to date. It is therefore premature to definitively answer whether the way litigation funders' share of settlement sums or damages awards as approached currently is fair and/or proportionate. Further outcomes will provide additional evidence and related jurisprudence should aim to foster greater certainty.

Which? does however continue to support the CAT's jurisdiction to consider and approve payment of a CR's costs, including payments to funders. Indeed, funding agreements are typically made at the start of a claim, well before the outcome, and with the understanding that the CAT will make the final decision on a funders' entitlement.

Which? also endorses the principle applied by the CAT in *Merricks v MasterCard* that the relative 'success' of a claim is relevant when considering payment of a funder's return (that is, in addition to the capital outlay required to bring a claim). Together these provide for a more equitable outcome than might otherwise be the case based on the terms of funding agreements alone, which is important to support the integrity of the Regime. This became a more acute issue as a result of the Supreme Court's decision in *PACCAR* and subsequent changes to replace percentage based returns with multiples of capital invested. Perversely, this has the effect of increasing the risk of inequitable outcomes as the multiple approach has no link to the relative success of the outcome, unlike a percentage based approach.

However, Which? is also mindful that the Regime is currently entirely reliant on commercial litigation funding, and it understands concerns expressed by funders that the CAT's

intervention creates uncertainty - it becomes harder to forecast future returns and procure investment. A balance needs to be struck. Yes, funding can be thought of as a 'cost' to the class of obtaining redress, and funders must be able to earn a commercial return on successful cases, but funders' shares of settlement or damages funds cannot be to the exclusion of the class.

In response to Question 5 below, Which? discusses interventions that could assist to provide greater certainty to funders and parties, supporting fair and proportionate outcomes.

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

Which? supports further investigation of the viability of a public funding vehicle for consumer collective actions. However, given the extremely high costs of currently litigating a collective action under the Regime, any such fund would need to be incredibly well capitalised for it to have an impact, presenting a significant barrier. Alternative funding should therefore be considered in addition to, and not as an alternative to, reducing costs and time of bringing a claim and reducing uncertainty. Also for the same reason, it should not be expected to replace commercial litigation funding.

To the extent public funding is explored, Which? encourages considering provision of public adverse costs protection, which is a significant and necessary cost of bringing a claim under the Regime. This is particularly important in the collective actions Regime where CRs are not private litigants seeking the vindication of their own rights or recovering damages for themselves, but are performing a public function on behalf of the class they are certified to represent. As explored further below, there is therefore justification to re-consider the current costs regime to better manage costs, encourage settlement and support the success of the regime.

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

We do not have direct experience of this market. However, as a well known charitable consumer organisation, Which? is considered in who we partner with, including when acting as CR. It is important for Which? to therefore maintain its autonomy over its funding arrangements.

Q5. The CJC made recommendations in its report on litigation funding in relation to terms and approval of litigation funding agreements (for example, recommendations 19 and 20). However, we would like to understand more about litigation funding

agreements used in cases before the CAT specifically. Are funding agreements fair and transparent for class members and clear for the court to understand? If not, why? How could they be improved?

The CAT has demonstrated through its jurisprudence that it is able to understand Litigation Funding Agreements (LFAs), or at least that they pose no greater interpretive difficulty than other commercial agreements. However, the funding issues that have gained traction have been to some extent amorphous, and certainly evolved since early certification hearings in 2021 and 2022. Which? considers the impetus of this was the Supreme Court's judgment in *Merricks v MasterCard* and proposed defendants subsequent pivot away from vigorously challenging the merits of a collective proceedings application, to the authorisation condition, including a PCR's funding arrangements. As a result, matters not raised or focused on in earlier proceedings have been raised subsequently. This has created uncertainty for litigants and PCR's in particular, and created additional costs and risk for claims already certified. The most obvious example being the *PACCAR* decisions, where ultimately the Supreme Court found that LFAs with percentage-based funder returns were unlawful damages based agreements, despite these being the standard industry approach at the time.

Which? therefore supports the CJC's Recommendation 20, enabling a PCR to seek approval of its funding terms on a without notice basis. This would increase certainty for litigants, as well as reduce costs of certification by reducing or eliminating satellite disputes about funding. This is important because funding issues can generally be resolved. Even if certification fails based on funding, this does not preclude the same claim being brought again with different funding arrangements (or indeed a different CR).

Which? also supports greater standardisation of funding agreements and their terms as a further means to increase certainty and reduce costs and delay. This should be possible, particularly as regards matters consistent across opt-out collective actions, such as a CR's obligations, or the requirement for funders not to control litigation. At the same time, Which? acknowledges that variation will be required to take into account different circumstances.

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

No. While there is scrutiny of the PCR's costs and ability to cover adverse costs if required to do so, there is no reciprocal scrutiny of a prospective defendant's costs. This creates and sustains an asymmetry between the CR and defendant. As explained in Which?'s CJC Response, this asymmetry is vulnerable to being weaponised by a well-resourced defendant who is not constrained by a set budget, as in the case for funded parties whose funding is not open-ended. For this reason, the government should consider requiring costs budgeting for all parties and making the possibility of costs-capping orders more available, particularly for consumer organisations and others who are seeking to enforce competition law in the public interest¹⁵.

¹⁵ As can be the case in relation to the CAT fast-track procedure under Rule 58 of the CAT rules.

This would also help address any legitimate concerns about the direct costs to business of defending opt-out claims under the Regime (as well as providing actual data). Though in considering this criticism, government should note (i) costs are not evenly dispersed across the economy, but predominantly focused on a small number of large businesses; (ii) the fact alleged infringements include business classes, who stand to benefit from redress and more competitive markets; (iii) aggressive defense tactics adopted by defendants, through actions like taking every point, offering belated compromises on case management matters and pursuing appeals, which drive up their own costs; (iv) for foreign defendants domiciled in the United States, opt-out class actions (not limited to competition claims) have been a feature of that market for decades; and (v) that if a defendant has infringed competition law, its costs of defending itself against claims flowing from that are a cost of the infringement that it must bear responsibility for.

Costs pressure is compounded by the length of time being taken to resolve claims under the Regime, exemplified by the *Merricks v MasterCard* case, which has now been running for over 9 years. Of all the claims filed under the regime, only *Le Patourel v BT* has reached a litigated outcome, three years and 11 months after filing in January 2021 (not including the CR's unsuccessful request for permission to appeal, which took another seven months). Other claims, like *Boundary Fares* (which only settled against one defendant), which was filed in February 2019, or *McLaren v MOL*¹⁶, filed in February 2020 and also partially settled, have been running for significantly longer.

Government should therefore explore additional ways to decrease CR's costs, their vulnerability to defendant tactics that increase costs (including as a result the requirements for additional adverse costs protection) and the protracted nature of litigating under the Regime. This could include costs shifting or deviation from the loser pays principle in favour of CRs post-certification, and the imposition of rebuttable presumptions favouring claimants, particularly to address the asymmetry of information between CRs and defendants (whereby the defendant will have significant probative material relevant to the alleged infringement, likely including factual witnesses, but a CR will not) and complexity caused by infringements within value chains with multiple levels.

Other interventions aimed at increasing certainty and reducing length of claims (and therefore reducing costs) could include fast-track permission/appeal mechanisms, as well as early defendant disclosure and an expectation/requirement for defendants to put forward a positive case (or at least closer scrutiny by the CAT on non-admissions in pleadings). This would promote early narrowing of issues, and potentially facilitate earlier and more informed settlement discussions, which would be beneficial to PCRs/CRs and defendants alike.

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

¹⁶ *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* Case 1339/7/7/20.

required to be used to resolve conflict between the funder and class representative or class?

As a starting point, in the context of the Regime, where PCRs and CRs are acting in the interests of the class they represent, this obligation should take precedence. But the mere risk of conflict between this obligation and a PCR's or CR's obligations to its funder does not mean that the PCR/CR would not be apt to manage it.

To the extent that disputes arise, based on Which?'s experience, a binding dispute resolution process is already a common feature in LFAs. In the event of a dispute, it is important that an alternative dispute resolution (ADR) mechanism is not allowed to compromise the litigation. For example, a defendant might be able to weaponise the fact of a dispute, harming a CR's prospects of a successful outcome. It is also important that CRs are protected, and that disputes in relation to LFAs are not leveraged by funders into more advantageous terms.

Scope and Certification of Cases

Q8. Is the current scope of the regime appropriate?

Yes, the current scope is appropriate, but it could be significantly improved.

The Regime remains appropriate for competition infringements. Competition law infringements are not exhaustive, so any criticism or indication that 'novel' claims represent a failure of the regime must be treated with caution. Indeed, some element of 'novelty' is to be expected and is paralleled in public enforcement.¹⁷

Further, claims do not proceed without scrutiny. As recognised by the Supreme Court in *Merricks v MasterCard*, the CAT has a screening or gatekeeping role over the pursuit of collective proceedings;¹⁸ there are sufficient checks and balances within the existing regime, including: (i) the CAT's permission is required for a Collective Proceedings Order (CPO), which includes applying for a CPO; (ii) collective proceedings may be terminated by the CAT at any stage by the revocation of the CPO; and (iii) defendants to such proceedings may, by way of an application, apply to strike out collective proceedings, or apply for summary judgment.

Finally, as is the case for any ordinary civil litigation, not all applications for CPOs, nor all certified collective proceedings, should be expected to be successful. The failure of three recent CPO applications (*Riefa*¹⁹, *Water Cases*²⁰, *Rowntree*²¹) and the *Le Patourel v BT* claim cannot therefore be considered as evidence of the regime not working. Given the

¹⁷ See for instance the CMA's approach to the loss of dynamic competition, as applied to Meta's acquisition of GIPHY, and endorsed by the CAT in *Meta Platforms, Inc. v Competition and Markets Authority* [2022] CAT 26.

¹⁸ *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51, Paragraph 4.

¹⁹ CPO Judgment [2025] CAT 5.

²⁰ CPO Judgment [2025] CAT 17.

²¹ CPO Judgment [2025] CAT 49.

relatively few number of claims on foot,²² as well as the limited outcomes, it is too early to come to conclusions about structural flaws in the Regime.

However, the Regime could be significantly improved by expanding it to include (at a minimum) consumer protection infringements. Which? has long maintained this position. The expansion of private consumer enforcement to include opt-out proceedings would provide a better and more efficient mechanism for resolving widespread breaches of consumer protection laws and the harms that flow from these²³. That would also enable claims based on breaches of consumer protection laws to be pleaded as such, or as competition claims in the alternative where appropriate, addressing criticism that claims are being ‘shoehorned’ into the Regime.

As stated in our CJC Response, court-based large-scale consumer redress is most efficiently achieved through collective proceedings, there being no ‘ready alternatives’ to fund collective proceedings to enforce consumer rights (see footnote 23 on other procedural mechanisms).²⁴ Since consumer claims are generally less complex than competition cases, Which? believes that expanding the Regime to include consumer law claims would significantly increase the Regime's effectiveness by reducing complexity (and the associated costs, for example, of expensive and often voluminous economic evidence) and providing greater deterrence (owing to the more tangible nature of consumer law infringements and transferability of precedent).

We set out the arguments in detail (including from an efficiency of managing claims perspective) on expanding collective redress to consumer law breaches in our response to the government's ‘Reforming Competition and Consumer Policy’ consultation in 2021²⁵. We were disappointed that (having asked the question) the government at the time were then unwilling to engage further in considering the issue.²⁶

Yet, this is now against a landscape whereby recent legislation such as the DMCCA reinforces the point that competition policy and consumer policy go hand-in-hand. The DMCCA establishes a new regime that is designed to boost competition in digital markets for the benefit of businesses and consumers, as well as enhancing consumer protection and enforcement of consumer law. In our view, this was another missed opportunity to bring consumer enforcement in line with competition enforcement (including opt-out collective proceedings). Therefore, we strongly urge government to use this opportunity to rectify this inconsistency and enhance the efficacy of the Regime by expanding it to include consumer protection claims.

²² Ibid, FN4.

²³ There are other procedural mechanisms such as GLOs and representative actions but they are not as effective as opt-out collective proceedings when it comes to delivering widescale redress. GLOs are effectively an opt-in procedure, as each claim within a GLO is an individual claim. Representative actions (via CPR 19.8) can be used for opt-out actions but are narrow in that claimants must have the same interest in a claim, this also extends to uniform damages. The current opt-out regime goes wider in that you can have sub-classes with different remedies.

²⁴ See the “Summary” section in our CJC Response, page 2.

²⁵ <https://www.which.co.uk/policy-and-insight/article/consultation-on-competition-and-consumer-policy-reform-which-response-ahxMi3P5j9Nk>

²⁶ See Which?'s responses to questions 72 and 73 in our response to ‘Reforming Competition and Consumer Policy’, BEIS, April 2022.

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

Cases across multiple areas: Competition claims should not be dismissed solely due to alternative characterisations, particularly in light of frameworks like the DMCCA, which exemplifies multiple areas within a ‘competition law’ focused framework. By way of example, the DMCCA introduces conduct requirements to address anti-competitive behaviour of firms with designated Strategic Market Status. These requirements oblige or prohibit specific actions for the purposes of one or more objectives - fair dealing, open choices and trust and transparency. The conduct requirements go across multiple areas including processes for handling complaints by and disputes with users, choice architecture in the form of options or default settings, discriminatory terms, access to data, using data unfairly etc.²⁷

As such, claims in the DMCCA ‘competition law’ framework could also be characterised in a different way by reference to other legislation (for example, UK GDPR, the Consumer Rights Act 2015, Consumer Rights and dispute provisions in Part 4 of the DMCCA itself). Equally, the same conduct could give rise to other causes of action. In a different example, it is common practice in English law to plead a tortious claim in the alternative to a breach of contract claim. The one does not preclude the other.

Properly formulated competition claims should therefore not be precluded because they may also be characterised in an alternative way. It would be an artificial exercise and contrary to established practice to seek to delineate claims on a ‘strictly’ competition law basis.

Certification decisions: Which? disagrees that certification decisions are sufficiently predictable, though draws a distinction between the ultimate outcome of certification applications and the contents of decisions. The former is reasonably predictable, as a result of (i) the Supreme Court’s ruling in *Merricks*, which provided much needed clarity on the merits threshold; and (ii) the fact many matters raised by proposed defendants in response to certification are ones that can be resolved if needed, for example around funding terms. Well considered, prepared, adequately funded and represented claims are likely to get certified in the absence of a carriage dispute.

However, uncertainty remains owing to the continuing evolution of the CAT’s certification jurisprudence (see our response to Question 5 above which also addresses this). To some extent this is to be expected as this is still a developing Regime, but has nevertheless created uncertainty for litigants and PCR’s in particular. On the one hand, there are the CAT Rules, which set out specific requirements (i.e. the authorisation conditions), and on the other hand there is jurisprudence from the CAT which is continually supplementing the Rules. Given it is a PCR’s aim to be certified, they will naturally look to adopt the latest indications from the CAT as to what it considers acceptable or preferable (and likely be advised to do so), which may not be necessary in all circumstances and go beyond the express requirements in the Rules.

²⁷ See section 20 DMCCA.

This has resulted in layering of additional de-facto requirements for PCRs/CRs and seen issues taken with matters present in claims previously certified. One example is in *Bulk Mail* where the PCR was required to retain independent costs specialists in reviewing invoices²⁸ even though this is not a provision in the CAT Rules and/or there is no indication in the CAT's Guide to Proceedings. Advisory panels have also become a focus, which were originally an invention of Mr Merricks in the very early days of the Regime, but also do not feature in the CAT Rules or CAT Guide to Proceedings.

That is not to say these developments are undesirable or unjustified, but to identify that where the position is not fixed, parties cannot sufficiently predict outcomes. Moreover, the ability to pursue novel points, sometimes regardless of merit or ultimate impact on the litigation, becomes a target for proposed defendants looking to defeat or frustrate certification (and potentially to push up costs and create delay). This was indeed acknowledged by the CAT in *Stephan v Amazon* where it observed that the proposed defendant's "...real interest is to throw up obstacles to certification of this large claim against it..."²⁹. Yet if proposed defendants need encouragement to adopt this approach, they need only look to *PACCAR*, which as stated above, made unlawful an approach that until that time had been industry standard.

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

The current approach to manage the envisaged conflict affords flexibility and should be maintained. We have seen no evidence that existing provisions are failing to manage this scenario. These existing provisions include for the CMA to be notified of the collective proceedings claim form at the same time it is served on other parties to the claim³⁰ and for the CMA or the defendant(s) to seek a stay³¹. Further, under the CAT's Rules, the CMA can intervene in proceedings relating to the application of Chapter I or Chapter II of the CA98. It has taken such action on multiple occasions, including in the *Dr. Rachael Kent v Apple*³² collective proceedings.³³

Further, since the UK left the EU, there has been limited CMA enforcement activity - Which? has identified only four infringement decisions and the CMA must of course prioritise how it allocates its limited resources. The result is that the risk of concurrent investigations is unlikely to regularly arise (by reference to the number of claims being brought). Indeed, the CMA has acknowledged that private enforcement by way of standalone claims (where there is no CMA infringement decision) plays an important role in competition enforcement.³⁴

²⁸ *Bulk Mail Claim Limited v International Distribution Services Plc* (formerly Royal Mail Plc)[2025] CAT 19, at paragraph 40.

²⁹ *Professor Andreas Stephan v Amazon.com Inc. & Others* [2025] CAT 42, at paragraph 139.

³⁰ Rule 76 (6) CAT Rules.

³¹ Rule 85 CAT Rules.

³² *Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd* Case 1403/7/7/21.

³³ See register of cases in which the CMA has intervened, including opt-out collective actions: <https://www.gov.uk/government/publications/competition-law-court-proceedings-serving-documents-on-the-cma/service-of-documents-on-the-cma-in-court-proceedings-relating-to-competition-law>

³⁴ Where Sarah Cardell, CEO of the CMA, said: "*It follows that public and private enforcement are both important parts of the UK's single overall competition law regime.*" - https://www.gov.uk/government/speeches/private-actions-and-public-enforcement#_ftn2

When the CMA does take enforcement action, this is typically a very lengthy process and has not historically resulted in compensation to consumers; the CMA has not utilised its power to approve a Voluntary Redress Scheme (VRS). This means that follow-on claims are usually significantly dislocated from when the infringement occurred, to when compensation is paid. Conversely, standalone claims are able to address ongoing infringements, thereby having direct, positive impacts on competition, in addition to compensating those harmed and deterring future infringements.

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

The premise that defendants of opt-out claims cannot take a view on liability is misconceived. In the same way they would for bilateral claims or internal risk assessments, and given their typical sophistication and access to legal and expert resources, as well as probative documents and information (by virtue of the fact that they most likely hold it), defendants should be able to estimate their level of liability. Further, claims brought in the Regime regularly concern conduct that has been the subject of litigation and/or regulatory investigations in other jurisdictions. In those circumstances, a defendant should be expected to have the ability to take an informed view on its potential liability to a claim brought in the UK under the Regime.

Of course, all litigation is uncertain, and Which? has made the point that outcomes under the Regime to date are limited. So Which? does not claim that there is no uncertainty for defendants and makes suggestions below to reduce uncertainty. But the current uncertainty does not properly explain the lack of settlements, which is addressed further in responses below.

Greater certainty across the Regime will benefit all parties. That will come from more outcomes under the Regime, including appellate judgments.

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

Subject to the leniency regime already in place for cartel cases, it is hard to justify any restriction on liability where a business's actions does not extend to proactively compensating those affected by its anti-competitive conduct.³⁵ Providing immunity from private actions or some expanded leniency regime could critically undermine the deterrent aim of the Regime, put undue pressure on the CMA's already stretched resources, and leave those harmed by anti-competitive conduct with no effective remedy. It would be 'open season' on competition abuses. Informed by the CMA's limited competition enforcement activity, a dominant undertaking (particularly one not operating in a CMA focus area) could

³⁵ Under the current leniency regime that limitation on liability is with respect to any sanction imposed by the CMA.

engage in infringing conduct in the knowledge that it could subsequently seek the protection of a leniency regime.

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

There are already requirements to act as a CR, as set out in Rule 78 of the CAT Rules, which from Which?'s experience is a significant commitment.

Unlike in the US, which is often held out as an example of what the UK Regime does not want to be, the UK has had a high standard of CRs and PCRs by comparison. They include consumer experts, law professors, former regulators, industry experts and industry associations. Having engaged with PCRs and CRs through the Class Representative Network (Which? is a member), Which? has observed dedication and genuine desire to achieve justice in the interests of those they represent.

We therefore do not see that there is evidence to support additional, more specific requirements. Such requirements are likely to reduce the pool of CRs, acting as a capacity constraint and thereby weakening the effectiveness of the Regime. Indeed, one only need to look at the previous regime where Which? was the sole entity authorised to bring claims. It was only used once by Which? in the 15 year period that it existed in the so-called '*replica football shirts*' case.

Q14. Do you feel the current rules for class representatives are clear enough regarding the relationship between the class, class representative and funder and how to manage potential conflicts of interest? Whilst we are aware that conflicts of interest between funders and funded parties are covered in recommendation 14 of the final report in the CJC's review of litigation funding, we are interested in exploring this topic in the unique landscape of the opt-out regime.

Clarity of rules: Yes, the current rules are clear enough, but uncertainty has been created by sustained attacks on funding arrangements from proposed defendants at certification. This increases costs and potentially creates delay, when ultimately any legitimate points raised are usually capable of being resolved, meaning that they do not impact the substance of the dispute.

As explained above, the focus on funding and the authorisation condition has grown since the Supreme Court's decision in *Merricks v MasterCard*, as merits challenges became less viable. In Which?'s view, funding points pursued by defendants are regularly self-serving, despite being presented as being advanced in the interests of the proposed class. This together with the Regime's evolving jurisprudence has created uncertainty around the rules (see our response to Question 9 above).

Conflicts: Conflicts, and potential conflicts, must be monitored and managed. It must also be recognised that in circumstances where commercial litigation funding is required to give effect to the Regime, and the individual class members are not present, conflicts are an inherent risk. However, as already stated above, PCRs and CRs should be expected to be able to manage conflicts that arise, guided by their overarching obligation to the class - an

authorisation condition which must continue to be met to the conclusion of proceedings. As a PCR in one action and a CR in another action, Which? takes this very seriously.

Interventions should be avoided that reduce a PCR's or CR's autonomy, create yet further scope for challenge by defendants and result in satellite disputes, or make funding opt-out collective actions unattractive.

In terms of the CAT's supervisory role, at certification (and before a CPO is made), as reiterated in *Hammond & Stephan*, amongst other things "...the Tribunal is concerned to ensure that the PCR remains in essential control of the proceedings for the benefit of the class"³⁶. This supervisory role also extends to approving settlements and costs. As stated in Which?'s CJC Response, the CAT's supervisory role in approving settlements is a check and balance in circumstances where there might be a conflict of interest/differences between the funder and the CR (and its legal representatives), and where members of the class are not present. The CAT will determine whether the terms are just and reasonable, so there is an independent assessment of the terms of the settlement, as well as a judgment on the reasonableness of terms. Which? supports this.

Any conflict resolution mechanism should not involve the proposed defendant or defendant, who has no interest in acting on anyone's behalf but their own.

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

No, subject to Which?'s view on the expansion of the Regime to include at least breaches of consumer protection laws more widely³⁷.

The current certification stage and relevant rules are sufficient to determine whether a claim is appropriate to be opt-out. More defined rules are likely to increase the scope for costly satellite disputes about whether a claim is in or out of scope at the certification stage, thereby increasing the uncertainty of bringing a claim (as well as the associated time and costs) - thereby discouraging claims being made and reducing access to justice.

The policy intent behind introducing opt-out claims was that by their very nature they are unlikely to be viable as opt-in claims. This was certainly Which?'s first hand experience in its '*replica football shirts*' case, which was brought under the limited opt-in regime prior 2015. Which? successfully settled the proceedings in 2008, where payment of between £5 to £20 would be made to affected consumers, but constraints of the limited opt-in regime meant that a very small number of consumers opted-in (130 out of a possible pool of around 130,000). Which? observed the difficulty getting consumers to take action at the prospect of a modest recovery, something that is addressed by opt-out proceedings where class members only have to take action at the end when claiming the recovery. Which? brought no further claims under the old regime given the inefficiencies and the limited effectiveness experienced in the '*replica football shirts*' case.

³⁶ See paragraph 42 in the Joint CPO Judgment *Hammond & Stephan* [2025] CAT 42.

³⁷ See as a starting point the legal infringements included in Schedule 15 DMCCA.

ADR, Settlement and Damages

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

First, it is important to distinguish what is meant by ADR, as it could be (i) ADR in the context of court proceedings or (ii) ADR as a mechanism for those who have suffered wrongdoing to resolve that outside of the court system.

ADR within proceedings under the Regime could add value, particularly at an early stage, when it is sufficiently incentivised to do so. The CAT should actively encourage ADR in a similar way to the change in the civil procedure rules resulting from *Churchill v Merthyr Tydfil County Borough Council*.³⁸ However, mandatory ADR should be approached with caution as without adequate criteria and guarantees in place it will add costs and may create scope for tactical delay by defendants.

Which? sees little scope for ADR for competition infringements as a general redress mechanism given their complexity, meaning most consumers will not have the expertise to identify them in the first place, nor the ability to pursue them on their own behalf. So while appropriate redress for class members through ADR has occurred in Europe, it followed litigation by consumer organisations. In addition, under the Regime defendants have so far demonstrated a reluctance to settle (by reference to the lack of settlements), strongly suggesting that without further incentives, ADR is unlikely to lead to appropriate redress on its own. As a result, it is also an ineffective deterrent to anti-competitive practices - it is no substitute for the right to court action.

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

Voluntary Redress Schemes (VRSs) can provide a tool for achieving justice quickly and avoiding the delays and costs of litigation. Indeed, the availability of VRSs is a factor which the CAT will take into account (amongst other things) when deciding whether a claim is eligible for inclusion in collective proceedings. However, they have never been utilised, indicating obstacles that need to be removed - though given a VRS by implication requires a

³⁸ [2023] EWCA Civ 1416.

business to have infringed UK law, VRSs must serve those harmed over the businesses offering them.

A key barrier is the lack of incentive for a business to agree to a VRS (or disincentive not to agree to one), even with an existing public infringement decision. A business has no protection from private litigation if it uses a VRS, making it an unattractive option in addition to the fact that it crystallises a liability and removes the possibility of avoiding or reducing a damages award by fighting claims in the courts. Where a CMA infringement decision exists, the CMA should actively pursue a VRS and consideration should be given to reducing total liability equivalent to the likely litigation costs for both parties, or a VRS extinguishing an infringers liability (subject also to requirements and safeguards to ensure the VRS was effective, for example, proactivity in offering the VRS and certain levels of uptake). Mechanisms would also need to be put in place to ensure voluntary compensation is fair and adequate. For example, an independent assessment could be conducted. However, to be effective, it would need to circumvent the possibility of lengthy disputes over quantum, or disputes between participants in the value chain as to where the loss was suffered.

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

Yes, alternative routes for redress should also be pursued. Firstly though, the CMA should utilise its current powers to maximum effect. Second, the CMA should be empowered to issue directions for redress in cases of competition and consumer infringements, particularly where there is significant detriment but individual claim values are low.

However, realism is required as to the likely limited impact of this. It only addresses those cases that the CMA investigates to an infringement finding. Given their infrequency owing to the CMA's limited resources and prioritisation requirements discussed above, this will leave infringements unaddressed. The Regime seeks to close this significant gap.

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

As explained above in response to Questions 16 and 17, defendants lack incentives to engage in ADR or offer a VRS (or disincentives not to). Defendants have been shown to take calculated risks on the outcome of the Regime, where costs of defending claims are likely to be significantly lower than the costs of early resolution, including because of the potential precedent effect for multi-jurisdictional conduct.

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

Within the context of the Regime the answer is not binary. Yes, direct financial damages deliver justice in that they compensate the individuals who have suffered the harm, returning them (in aggregate) to the position they would have been in absent the harm. Indirect or

cy-pres damages can also deliver justice effectively and may be more appropriate in some circumstances (for example, if the individuals are difficult to identify). Both have limitations. Direct financial damages requires the identification and action of individuals to ensure distribution; indirect damages requires identifying a proxy for the harmed individuals or a recipient or recipients that aligns with the nature and scope of the harm being compensated for, or some other appropriate recipient or remedial action by the defendant. Which? sees the two approaches as complementary, and can work together to better deliver justice for a class who have suffered as a result of an infringement.

Justice also should not be defined as simply compensating those harmed, but considered more widely to take into account ending an infringement, the precedent value and deterrent effect of a final judgment and the future benefits that flow from fairer, better functioning and more competitive markets.

In this context, it is welcome that the DMCCA reintroduced the prospect (in exceptional circumstances) of exemplary damages for individual competition law cases, and the government may want to revisit the arguments for such damages to be an option in collective proceedings too. This could apply in situations, for example, of evidenced deliberate flouting of competition law, or where a well-resourced defendant has weaponised litigation processes because the prospect of standard costs orders against them is no deterrent.

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

Which? supports the principle that funders should not control litigation and has explained above in response to Question 5 how the requirement for the CAT to approve settlements assists to manage this dynamic. However, the requirement that claims are funded by commercial litigation funders inevitably creates scope for funders to influence the outcome of a case, whether contractually or as a practical matter. For example, if funding has been exhausted and the funder is not prepared or unable to provide additional funding, the claim is highly likely to fail absent a new funder. The risk of influence is heightened when a CR's bargaining power is diminished, as demonstrated in *Merricks v MasterCard* where the funder sought more advantageous terms as part of a budget variation and subsequently challenged settlement. The existence of this risk does not however mean that it will always manifest, and exploring whether it is currently an issue in cases before the CAT may be restricted by parties' confidentiality requirements or perceived risks of prejudicing the litigation by exposing an issue with a funder. It is yet another example where further outcomes will better inform future actions.

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

Safeguards can take two forms: interventions that reduce the impetus for a funder to seek to inappropriately influence a case, and those protecting against influence should the impetus arise. As to the former and as identified above in response to Question 21, the need for a budget variation can create such impetus. So interventions discussed by Which? supporting reduction of costs and delay and increased certainty will mitigate the risk of inappropriate influence. In addition, specific safeguards could include: (i) greater standardisation of litigation funding agreements and terms that support a CR's independence, mitigate the risk of improper influence (or attempted influence), and make it easier for CRs to report, and the CAT to identify, if it has occurred; and (ii) using appropriately structured ADR between CRs and funders. Furthermore, as discussed at Question 5, the CAT should approve funding terms on a without notice basis.

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

If the availability of remedies in addition to compensatory damages are likely to encourage early resolution of claims, better deter infringing conduct in the first place or provide additional funds to support the regime (for example, the creation of a public fund), government should consider these as part of its review of the Regime.

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

Settlement offers certainty for both parties. From a claimant perspective, it is likely to reduce the costs and time required to reach a resolution, bringing forward a distribution to the class, particularly in circumstances where a final judgment is likely to be appealed (or permission sought). Settlement should also offer greater flexibility than a damages judgment, which may be used to better serve a class's interests, depending on the circumstances. In accordance with their obligations to the class, CRs will be guided by the interests of the class, and how they think those should be met: value of a proposed settlement (considering class size, expected up-take and avoided delay to compensation), perceived merits and avoided risks will be particularly relevant in this assessment.

However, settlement is only viable if both parties are willing to engage constructively. In addition to comments about settlement made elsewhere in its response, Which? is therefore interested to explore further how this might be facilitated, and how more settlements can be encouraged.

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

The CAT already has significant oversight and influence over settlement, as demonstrated in *Merricks v MasterCard* and *Boundary Fares*. In *Merricks v MasterCard*, that saw the CAT effectively vary the contractual obligations between the CR and its funder. It is therefore unclear what further oversight or a "stronger role" would entail.

We would however caution the CAT's preparedness to require privileged information to be disclosed as part of the settlement approval process, particularly if that is to the same tribunal hearing the case or might otherwise prejudice the claim if settlement isn't approved. Given settlement will typically involve assessing a known outcome against the uncertainty of a litigated outcome, advice on settlement is highly likely to contain such prejudicial material.

As also explained above, the extent to which the CAT intervenes in the funder/funded party relationship is likely to have an impact on the availability of commercial litigation funding. Consistent with the Court of Appeal's decision in the case of *Justin Gutmann v Apple Inc & Ors*,³⁹ a balance must be struck between adequate incentives for private enforcement, and outcomes that are in the interests of each class, bearing in mind that the individuals that make up a class have a more general interest in the effectiveness and integrity of the Regime.

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

This will depend on the circumstances, including, the terms of the settlement, value of settlement and unclaimed funds, size and nature of the class, the CR's costs, the terms of the CR's funding arrangements and the CR's view on use of unclaimed funds. As such, it is important to maintain flexibility in how unclaimed settlement funds are dealt with.

Which? expands on this further in response to Question 30 below.

Distribution of Funds

When considering distribution of funds it is critical to bear in mind that only one distribution has taken place under the Regime in the *Boundary Fares* cases. The uptake in that distribution was disappointing, but a single distribution cannot be presumed to set the precedent for distributions to follow. Indeed, there are characteristics of that distribution that make this unreliable: the subject matter is technical, the class is small by comparison to most other opt-out claims, is restricted geographically, and there were significant barriers to class members making a claim, including evidential requirements such as proof of residency and ticket purchase. Learnings from this distribution can also be applied in future distributions to increase uptake.

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

With only one distribution to date and limited outcomes from current cases, there is a lack of experience to provide specific recommendations.

To the extent an answer can be given, it is to reiterate principles likely to support effective distribution: the communications with the class must be clear and engaging; the source and mode of the communication must be trustworthy (particularly important in an environment where the pervasiveness of scams has eroded trust); and barriers or frictions to a class

³⁹ [2025] EWCA Civ 459.

member making a claim (for example, evidence required; personal information disclosed) must be as low as reasonably possible.

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

The answer to whether consumers are made sufficiently aware of proceedings/their right to claim their share of damages by current notice requirements requires quantitative data to properly respond to, and should also be considered in light of above comments about limited outcomes to assess this against. Reliance on studies or figures cited from other jurisdictions should be treated carefully, as there may be distinguishing factors or limitations to the figures themselves.

However, from Which?'s experience with noticing at earlier stages in collective proceedings, it can be overly legalistic and formulaic, and can result in lengthy and complex communications. Drawing on our experience engaging consumer audiences over decades, and with the benefit of dedicated press and communications professionals in the organisation, we know that overly legal, formulaic, long or complex communications are less likely to get engagement. As the aim of noticing is to inform class members, requirements, expectations or reliance on past practices that create noticing campaigns of this nature will be counterproductive. Which? supports flexibility in the noticing requirements to best seek to achieve their aims, which may also vary from case to case.

Importantly, consumers have demonstrated that they are interested and prepared to engage with collective actions. Which? has seen this on both its claims. Most recently, and outside of formal notice requirements, Which? publicised the fact that trial was starting on its claim against Qualcomm through a press release, news article on its website and activities on its social media channels. The story appeared in BBC, Mail Online, Independent, Yahoo, GB News and Tech Advisor, and also featured on BBC Radio 4's Today programme and BBC Breakfast. Similarly, when Which? launched its claim against Apple the overall media press activity reached an estimated 229 million people, including featuring as the number one most read story for a period on BBC News. There is therefore good evidence of consumers being prepared to engage with the subject matter of collective actions, particularly when communicated through trusted sources. This evidence should be leveraged across the Regime to increase consumer awareness and engagement.

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

Yes Which? considers £100 million in aggregate and £45 - £70 per person is meaningful. Indeed, the Regime was established to enable claims for these sorts of individual losses to be brought in circumstances where they otherwise would not be.

By analogy, the median pre-tax hourly pay for employees in 2024 was £17.09, showing that half of all UK employees work for £17 or less per hour, significantly less than £45 - £70.⁴⁰

This is in an environment of high inflation and tight household budgets: half of consumers (49%) said that their household had to make adjustments like dipping into savings or cutting back to cover their essential spending in September 2025, and the vast majority are worried about the costs of essentials like food and energy.⁴¹

Another analogy can be found with delay repay compensation for delayed train journeys. In 2023 the Department for Transport found that 44% of people claimed compensation for a delayed train journey when the value of their ticket was between £10 and £50. Since the compensation amounts paid are either 25% or 50% of the value of the ticket, these consumers were claiming for a maximum of £25 assuming they are due 50% compensation on a £50 ticket. A third (34%) claimed for a delayed journey on a ticket up to the value of £10, which would mean a maximum of £5 compensation.⁴²

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

Unclaimed or residual damages: There are two primary and interrelated roles for unclaimed or residual funds, whether these are the result of a damages award or collective settlement.

The first is to provide indirect compensation to the class (i.e. cy-pres compensation in addition to amounts claimed by and paid directly to class members), particularly if the class is difficult to identify or if uptake has been low. The second is to cover the CR's costs, including costs of funding (including a reasonable return), insurance and contingent advisory fees that have enabled it to pursue the claim and obtain compensation for the class. Currently opt-out collective actions are only made possible by commercial third party litigation funding, without which no compensation would be made available to the class. As a consequence, and subject to the CAT's jurisdiction to approve the CR's costs, if these are not recovered, the Regime will grind to a halt.

Having provided compensation to the class and met the CR's costs, unclaimed funds should be used to promote access to justice in a wide sense, that is, in a way that maximises the benefits to society. In Which?'s view, that aim is not served by having a single designated charity to receive undistributed funds from damages awards. This is principally because the needs and means of delivering access to justice across society are so varied.

As it currently stands, only the Access to Justice Foundation is designated to receive undistributed damages funds, yet its activities, experience and charitable objects focus

⁴⁰ Office for National Statistics - Annual Survey for Hours and Earnings, 2024, Table 1.5a: <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/dataset/s/allemployeesashetable1>.

⁴¹ Which? - Consumer Insight Tracker, August 2025 and September 2025: <https://www.which.co.uk/policy-and-insight/consumer-insight-tracker>.

⁴² Department for Transport - Rail delays and compensation 2023: <https://assets.publishing.service.gov.uk/media/654e4ae06a650f000dbf4812/dft-rail-delays-and-compensation-2023-full-report.pdf>.

narrowly on provision of free legal advice and support and improving understanding and awareness of the role of the law as a tool for social justice. Such interventions, while important and worthwhile for the individuals and communities that benefit, are unlikely or unable to address systemic or widescale issues negatively affecting UK consumers (and which if addressed as a result of the support of additional funding, may reduce the need for advice services in the first place).

Expectations for settlements: Yes, different expectations should apply to settlements.

By their nature settlements are a different outcome to a damages award, which require the CR to pursue its claim to a final judgment (including any appeals) and a conclusive finding that the defendant(s) infringed competition law and the class suffered a loss as a result. There also appears to be broad consensus, that Which? agrees with, that the regime should be structured to encourage settlements (even if that is yet to be borne out). These support different approaches to treatment of unclaimed or residual funds. For example, the availability of reversion to defendants being available in settlements but not damages awards. Which? continues to support this, despite its limited use to date.

In addition, settlements are necessarily bilateral or multilateral (depending on number of parties) agreements, reflecting willing compromises of the parties. As such, parties should be afforded a level of autonomy in the terms of settlement, provided the terms are just and reasonable, and the CAT should give due consideration to a CR's proposal for dealing with undistributed settlement funds, particularly in light of a CR's expertise and experience. For example, in the case of Which? where it has decades of experience and deep expertise on matters affecting UK consumers, it would be right to take this into account should it make a proposal about what should happen to unclaimed or residual damages in a case where it is CR for a consumer class.

In any event and as explained above in response to Question 2, Which? supports collective settlements continuing to be subject to the jurisdiction of the CAT and requirement that it approve them, as is the case under current CAT Rules.

Closing question

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

About Which?

Which? is the UK's consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We're the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we're not for profit and all for making consumers more powerful.

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