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RESPONSE TO CONSULTATION

Which? Response to the Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement

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Introduction

Which? welcomes the opportunity to respond to the Department for Business, Innovation, Science and Trade's consultation on Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement (the Consultation). Which? responded to the Opt-out Collective Actions Regime Review Call for Evidence (CfE Response) (see [here](#)). 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 therefore supports the government's (Government) ambition for redress to be swifter and simpler.

Which? is a participant in the Regime, having been certified to act as class representative (CR) in *Consumers' Association v Qualcomm*¹ (which settled post-trial) and is the CR in *Consumers' Association v Apple*.² Which? also intervened at the Supreme Court at the collective proceedings order stage of *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*³ (*Merricks*) and was the only entity authorised to bring proceedings under the predecessor opt-in only regime.

Which? has responded only to the proposals in Chapter 1, which concern opt-out collective actions. In responding to this consultation, Which? has been mindful of the fact that it is restricted in some of the information and experiences it can share related to its two collective actions. We have nevertheless sought to answer the questions posed

¹ Case No: 1382/7/7/21.

² Case No: 1689/7/7/24.

³ [2020] UKSC 51.

constructively, based on firsthand experience, where possible and established consumer insight and expertise.

Summary of Which?'s Position

It is positive to see Government's continued commitment to the Regime. Which? supports Government's ambition for collective redress to be swifter and simpler as consumers' benefit from the Regime has been disappointing to date. We agree that there are improvements that can be made now. We note, however, that the Regime is still in its relative infancy and outcomes from multiple advanced claims over the next two to five years will provide essential evidence to evaluate the Regime's true effectiveness.

In this context, we welcome several of the proposals in this consultation - such as presumptions on funder returns, increased oversight of defendant budgets, and extending the Competition and Markets Authority's (CMA) powers to mandate redress for competition infringements - but favour allowing jurisprudence to develop in other areas such as distribution and the settlement approval process.

We are also excited by the opportunity to be designated (as the Consumers' Association) as a specified body to receive undistributed damages. As an independent champion for UK consumers with seven decades of experience, such funds would be reinvested into work that tackles consumer harm, improves market outcomes, and advances consumer protection, allowing us to scale (and potentially broaden) work that is already delivering impact for millions of UK consumers.

On proposals to amend the operation of the Regime, Which?'s response highlights the following:

- **Costs and delays:** current proposals do not go far enough to reduce the very high level of costs and delays experienced under the Regime, and some proposals are likely to introduce more cost and delay. As a result, Government's ambition for redress to be swifter and simpler will not be fully realised. We encourage Government to build upon current proposals by exploring additional measures to bring down costs and reduce delays: allowing without-notice approval of funding arrangements, better use of precedents/standardisation, rebuttable presumptions to streamline expert evidence in collective proceedings, greater resourcing for the Competition Appeals Tribunal (CAT) and active costs control.
- **Certification:** Which? is opposed to changes to the statutory certification test at this time. We consider changes to the suitability test unnecessary - *Evans v Barclays*⁴ already provides for an elevated merits assessment. Further, introducing

⁴ [2025] UKSC 48 ("*Evans*").

an "absolute suitability" standard ignores the stark information asymmetry proposed class representatives (PCRs) face during certification. Changing the statutory test at this juncture will also introduce uncertainty and inevitably trigger costly and time-consuming satellite litigation and appellate appeals, creating a chilling effect likely to deter investment in the Regime.

- **Distribution & redefining "Benefits":** the cost benefit analysis of claims at certification must extend beyond estimated direct take-up to include indirect benefits, deterrence, and future market benefits. As for distribution, there is only one example to date which is widely recognised as a poor precedent for future outcomes. Insights from upcoming distributions will be vital in testing and assessing what works and shaping future approaches. Rules around distribution must remain flexible to accommodate different case dynamics and take-up rates. Government could also proactively support distribution by providing funding and resources for initiatives that engage and increase trust among class members, and encourage take-up on distribution.
- **Rule 45 offers:** whilst Which? supports Government's aim to facilitate more settlements, it opposes introducing Rule 45-style offers into collective proceedings. Due to finite budgets and adverse costs/After-The-Event (ATE) insurance constraints, class representatives (CRs) are vulnerable to tactical, lowball offers. Whereas the nature and size of claims under the Regime also means that defendants' exposure to indemnity costs is unlikely to create sufficient disincentive to encourage them to settle. Strict safeguards must be implemented if this proposal is taken forward.
- **ADR and redress schemes:** Which? supports in principle the CAT encouraging mediation to drive more settlements, as well as the extension of CMA powers to better enable public enforcement to deliver redress for consumers. Both offer potential routes to outcomes, and are therefore complementary to, not mutually exclusive of, the ability for private enforcement to end in a final judgment.
- **Scope:** it has long been Which?'s position that opt-out collective proceedings should be widely available, including for consumer law breaches. Whilst not taken forward in this consultation, Which? welcomes the Law Commission's project to explore a consumer class actions regime. Creating a consumer class actions regime will improve access to justice, offer consumers a clearer and likely simpler path to vindicate their rights (as some claims in the Regime might otherwise or in the alternative be brought as a consumer law claim), and could be more cost-effective.

As a participant in the Regime and a stakeholder in the long-term development of competition and consumer policy, Which? looks forward to engaging with Government as this work progresses.

Full response to Chapter 1: Opt-out collective actions

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. We agree with Government's decision not to increase the requirements or obligations placed on CRs, as current rules around the authorisation of CRs are sufficient. But uncertainty stems from the iterative way in which certification jurisprudence has developed, and proposed defendants' creativity generating issues to seek to defeat certification.

The need for 'greater certainty' therefore relates less to the CR authorisation requirements and more to how the process unfolds. As mentioned in our CfE Response, it stems primarily from proposed defendants targeting funding arrangements at certification, as well as the CAT's preparedness to layer additional requirements on PCRs/CRs. That is not to say that some of these developments are undesirable or unjustified, but parties cannot sufficiently predict outcomes, particularly when matters that have not been issues in prior certifications gain traction in later certifications.

As we elaborate further below, we therefore support updating the Guidance to clarify expectations and requirements for PCRs/CRs and support more consistent outcomes.

However, these proposals are unlikely to move the dial on the time and costs incurred at the certification stage, and may even increase them (for example, if appointing costs solicitors becomes the norm). In our view, the CAT should refrain from imposing extra requirements on PCRs/CRs where defendants employ scorched earth litigation tactics solely to derail certification, without clear benefit to the interests of the class.

As Sir Marcus Smith explained in *McLaren v MOL*,⁵ defendants do not act in the interests of the class. Their interest is to defeat certification, or otherwise limit the claim certified. This is exemplified in funding points put forward by proposed defendants, which even if they have some merit, are generally capable of being remedied (often by minor amendments to litigation funding agreements (LFAs)). While guidance can clarify CAT expectations regarding a PCR's knowledge of funding arrangements, amending the CAT Rules to allow without-notice approval of terms in LFAs would have a far greater impact. We see no reason why the CAT could not carry out an ex parte assessment given its considerable experience on funding matters. A change such as this would make a

⁵ [2022] CAT 53.

meaningful impact, increasing certainty for litigants, as well as reducing costs of certification by reducing or eliminating satellite disputes about funding.

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

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

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

We respond to Q2 and Q3 together.

PCRs/CRs will have varying levels of experience and expertise so any further clarity on requirements should be added to guidance rather than the CAT Rules, so that PCRs/CRs and their advisers can consider what the appropriate course of action is based on the skills of those involved. In any event, whether added to CAT Rules or guidance, these requirements must remain flexible to take into account the characteristics of a PCR/CR and its claim, rather than a strict, one-size-fits-all approach.

For example, in a consequential hearing which took place on 3 June 2026 in Which?'s case against Apple, the CAT agreed with Which? that costs lawyers were unnecessary.⁶ However, another PCR might find the use of cost lawyers helpful, particularly if they are not familiar with costs management and litigation more generally. Indeed, there is no requirement that CRs be legally trained, nor does Which? think that there should be - whilst PCRs/CRs should be actively involved in their cases and not just a figurehead, they must also be able to rely on the advice they receive from experienced solicitors owing them a fiduciary duty.

It is also important that any additional requirements or limitations on the role of CRs, including a CR's remuneration, do not reduce the pool of CRs who are willing and able to bring collective proceedings on behalf of a class. It was therefore concerning to see comments in *Waterside v Mowi ASA & Ors (Waterside)* where the CAT indicated that it expects a CR's remuneration to be in line with the levels of remuneration received for work in the public sector.⁷ While Which? agrees that the role of a CR should not be undertaken for commercial purposes, *Waterside* fails to reflect the significant weight of responsibility and the intensity and practical requirements of acting as CR. From Which?'s experience as CR in *Consumers' Association v Qualcomm* (which settled post-trial) and currently in *Consumers' Association v Apple*, we know firsthand the immense dedication,

⁶ *Consumers' Association v Apple*.

⁷ Case No:1643/7/7/24, CPO Judgment [2026] CAT 32, paragraph 55.

time, and resources required to fulfil this statutory function. Furthermore, it should not be lost that CRs vindicate rights on behalf of a class without absolute protection from personal risk (as seen vividly in *Merricks* where the CR was sued personally by their funder over the CAT-approved settlement).

Which? wants to see a varied and diverse group taking on the role of CR, believing that will support a wider variety of claims and build credibility in the Regime. When amending the Competition Act 1998 (CA98) in 2015, it was clearly Parliament's intention to broaden who could act as a representative in collective proceedings. This breadth was carried through into the authorisation condition. Parliament's intention should be respected when making any rules or guidance amendments, and be a relevant factor in the CAT's certification decisions.

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.

No. Government's view, despite recent developments in case law, is that the certification threshold is still low, weakening the filter effect intended to guard against 'speculative claims'. Which? disagrees, and has serious concerns about Government's proposals.

In our view, the evolutionary application of the certification threshold reflects Parliament's intention in drafting section 47B(6) CA98 in broad, high-level terms - requiring that claims raise '*the same, similar or related issues of fact or law*' and be '*suitable for collective proceedings*'. Working alongside Rule 79 of the CAT Rules, this statutory framework provides sufficient flexibility for the threshold to adapt.

Since *Merricks*, the CAT has applied the *Pro-Sys v Microsoft*⁸ test where CRs are required to show a "blueprint to trial" in order to succeed in seeking certification. More recently, the Supreme Court in *Evans* has elevated the role of a merits assessment at certification by finding that it was right for the CAT to have considered the strength of the claim when deciding whether the claim was suitable to bring on an opt-out, rather than opt-in basis. The CAT considered the merits at certification in *Evans* as part of its consideration of the cost/benefit analysis required as a result of Rule 79(3). Therefore, a rebalancing of the certification criteria is already underway. Government should allow the elevated merits test in *Evans* time to bed in before implementing changes to certification that may simply replace current challenges with new ones.

⁸ [2013] SCC 57.

In particular, it is unclear what ‘absolute suitability’ entails, or what other higher threshold could be adopted that does not then lead to a mini-trial at the certification stage (something there seems to be near consensus on avoiding). At a minimum it is likely to create additional costs and delays while appellate courts clarify the inevitable disputes about the meaning and application of a new test. That in turn risks stalling the Regime and creating a chilling effect on future claims - it took five years for the Supreme Court’s landmark decision in *Merricks* to clarify the certification criteria, and another five for *Evans*.

Furthermore, the application of the current certification threshold has meant that some CPO applications have not progressed (*Water Cases*⁹, *Rowntree*¹⁰) - evidence that the certification threshold is filtering claims. It is also overlooked that proposed defendants can apply for strike-out or summary judgment at the certification stage. Existing procedural mechanisms such as these already allow defendants to challenge unmeritorious claims early on in the proceedings. Notably, the proposals concerning ‘absolute suitability’ fail to take into account the stark structural imbalance between PCRs and proposed defendants at the certification stage. PCRs do not benefit from early disclosure or defendant expert/witness evidence. Imposing an ‘absolute suitability’ standard (or ‘suitability’ which goes beyond the standard for strike out or summary judgment) without addressing this information asymmetry would prejudice class members and lead to unjust outcomes.

More generally, Government has identified no evidence that claims brought under the Regime are speculative, nor has it explained what constitutes a “speculative claim”. Certainly this cannot mean that all claims must succeed (whether by judgment or settlement). That would be unreasonable and inconsistent with ordinary litigation. Nor should it mean that there are novel claims, given that the boundaries of competition infringements are not static.

In the CAT’s recent judgment in *Mark McLaren v Mol (McLaren)*, “*The Tribunal recognise[d] that collective proceedings may fail at trial or settle for modest sums for various reasons: such outcomes reflect litigation risk....*”¹¹ In *Consumers’ Association v Qualcomm*, when assessing the settlement application the CAT stated that “*The Tribunal has not, in its experience, encountered wholly unmeritorious claims being advanced by funders seeking to extract settlements from defendants. This has not been a feature of the cases that have come before it.*”¹²

We therefore do not consider amending the legislative certification threshold is justified. If, despite our concerns, proposals to change the certification threshold are taken

⁹ CPO Judgment [2025] CAT 17.

¹⁰ CPO Judgment [2025] CAT 49.

¹¹ CSAO Application Judgment [2026] CAT 6, paragraph 59.

¹² CSAO Application Judgment [2026] CAT 50, paragraph 87.

forward, the wording of any new certification test must be consulted on and Government should illustrate by example the types of claims it intends to filter out at certification.

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.

No. The cost/benefit analysis is already provided for in the CAT Rules. There is no compelling justification to move this into the statutory certification test.

First, Which? questions the rationale for Government's proposal given it appears to rely on the disappointing settlement take-up in *Gutmann v SWTT*,¹³ while rightly acknowledging elsewhere in the Consultation that "...this is one particular claim, with one particular class, and it cannot be viewed as an indication of how all other claims may proceed". The latter aligns with the view of the CAT, who recently stated in *Brook v Google* that "...we accept that take-up has been extremely low in *Gutmann* but do not regard it as a yard-stick or benchmark".¹⁴

Second, Government (in the Consultation) and the CAT (in *Waterside*) appear to be taking an overly restrictive approach to what amounts to the benefits of a claim, and one that is inconsistent with the purpose of the regime. A broader framework is required. Which?'s considers that in addition to direct financial benefits to the class, benefits when assessed at suitability should take into account:

- **Indirect benefits.** In the form of the undistributed damages or settlement funds which go to charity and are then applied to reduce consumer harms and improve consumer outcomes.
- **Deterrence.** The precedent effect and signal a successful claim sends to the market to deter participants from engaging in anti-competitive behaviour (an express policy aim of the Regime).
- **Future benefits.** The future benefits of fairer, better functioning and more competitive markets where claims successfully address anti-competitive practices.

Although these additional benefits may be more difficult to estimate, that should not exclude them from being considered as part of the cost/benefit assessment. Making this explicit in CAT Guidance will provide clarity as well as support more equitable and fair outcomes at certification.

Decision makers should also:

¹³ [2025] CAT 72.

¹⁴ CPO Judgment [2026] CAT 65, paragraph 46.

- remain aware that in circumstances where a business has broken competition law and harmed consumers, but that harm is very small and diffuse (the very type of case the Regime was intended to make possible), the current alternative to a collective action is that the business gets to keep the proceeds of their unlawful activity. Given its limited resources and need to prioritise, this is not a gap the CMA can close through public enforcement.
- be realistic about potential uptake when setting expectations about distribution at the CPO stage. In *Waterside*, the CAT intimated that it could not see why a scheme could not be devised which had potential to return close to 100% of damages to members of the class. Whilst Which? shares the CAT's concern about the risk of low uptake by class members in *Waterside*, and unless the CAT was also referring to indirect distribution of damages (though that was not obvious), unrealistic expectations about distribution, including the involvement of commercial third parties, risk becoming yet another target for proposed defendants seeking to defeat or frustrate certification. Given the single distribution to date, there is also little to no evidence of what 'good' looks like. Distribution strategies will also be non-uniform and depend on case-specific factors, such as the level of defendant cooperation (if any) and the nature of the market where the harm occurred. Yet if expectations now around distribution can be a reason to refuse certification, those expectations should be tempered.

Consequently, a prescriptive requirement in legislation (in circumstances where the CAT Rules are already adequate) should be avoided. It is unnecessary, would reduce flexibility to accommodate future evidence on distribution and risks baking-in what Which? considers an overly restrictive assessment of the benefits of collective actions.

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.

No. First, this proposal fails to grapple with the information asymmetry and practical hurdles PCRs face at certification. At this stage PCRs generally have no disclosure or expert/factual evidence from proposed defendants. Absent this, Government's proposal is likely to create an insurmountable barrier for some claims, while protecting wrongdoers from being held to account. But requiring disclosure and proposed defendant evidence at certification would fundamentally change the nature of the certification process.

Further, at certification PCRs are already required to show a 'blueprint to trial' - whereby they must advance an expert methodology which (amongst other things) requires a PCR to show whether data is available to support the proposed methodology - another safeguard against unmeritorious claims advancing to trial.

Financing a claim

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

Yes. Currently commercial third party litigation funding is the only practical option available to finance claims under the Regime.¹⁵ So while this source of funding will continue to play a crucial role, DBAs are likely to provide an important alternative. This is because we understand that claimant law firms will look to build a portfolio of cases where they act under DBAs, including ones that are unlikely to be fundable at present due to lower estimated aggregate damages. DBAs therefore have the potential to enable a more diverse range of cases to be brought under the Regime, expanding access to the regime.

Further, DBAs have the advantage of aligning the relative success of the outcome for the class and claimant lawyers, which had been the general approach for third party litigation funding until the Supreme Court's decision in *PACCAR Inc and others (Appellants) v Competition Appeal Tribunal and others (Respondents) (PACCAR)*¹⁶ (see our CfE response to question Q2). Which? continues to support calls for the government to reverse *PACCAR* by allowing percentage based returns.

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.

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

We respond to Q8 and Q9 together.

While it is unclear what Government means by “speculative litigation”, and no examples are provided, Which? is cognisant of the fact that DBAs allow law firms to fund claims, and that in the CfE summary of responses some respondents highlighted that law firms are not set up to fund claims. In Which?'s experience, law firms vary in expertise and capabilities, meaning not all firms will be well placed to advise on collective actions and manage their scale and complexity. Should Government proceed with the proposal to allow DBAs, Which? expects PCRs, and in due course the CAT (as part of certification), to scrutinise law firm's capabilities and be satisfied that it is in the interests of the class for them to act on a claim (i.e. safeguards already exist).

¹⁵ An exception to this are the *Spottiswoode v Airwave* (Case No: 1698/7/7/24) proceedings.

¹⁶ [2023] UKSC 28.

In addition, Which? considers that there should be a standard form DBA (or at least standardised terms) so that proposed defendants are restricted from weaponising PCRs use of DBAs in the adoption phase (as has been seen, and continues to be seen, with the terms of LFAs). Such tactics might slow down or discourage use of DBAs, generate satellite disputes and add to costs and delay of proceedings (for example, by generating issues that are appealed). Measures to mitigate these risks should be considered.

Preserving the use of litigation funding

Which? welcomes Government's efforts to preserve the availability of litigation funding as a crucial enabler of the Regime. However, the current proposals alone will not reduce the risk that funders withdraw from the Regime. Rather, there needs to be a holistic approach that better aligns funders' interests with that of the CR and the class, provides greater certainty and seeks also to reduce the extremely high costs (and time) required to bring collective proceedings to conclusion. As Government will be aware, reversing *PACCAR* to enable funders to receive a percentage based return would be a good start.

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.

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

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

We respond to Q10 to Q12 together.

While primarily questions for funders, Which?:

- Expects that an early indication of the reasonableness of a funder's return and order of payment would be welcome. Whether that creates long-term impact reducing risk of funder withdrawal will depend on what weight the indication then carries at the end of proceedings, potentially three or more years later.
- Agrees with the proposed presumption that funders receive their return at the point of a damages award being ordered or settlement sum being approved, which

is consistent with the Court of Appeal's decision in *Gutman v Apple*,¹⁷ where it held that funders and lawyers can be paid ahead of the class. The longer investment funds are locked into a claim, the lower the investment return due to the time/value of money and the less attractive the Regime becomes for funders and claimant lawyers. However, returns paid prior to class members need to be subject to limitations so that a sufficient portion of a judgment or settlement award is ring-fenced to ensure adequate compensation to the class. It is unclear what is meant by "unfair outcomes", but Which? notes that neither proposal under consideration is mandatory, meaning the CAT still retains a discretion which it can exercise if the circumstances justify it.

Costs

Which? is disappointed that Government's proposals fail to grasp the nettle of the extremely high litigation costs experienced under the Regime. While well-meaning, the proposals fall short and are unlikely to significantly reduce costs, and in some instances are likely to increase them (see further below). This means that the Regime will continue to be held back by cost barriers and the misconceived perception that it exists primarily for the benefit of lawyers and funders, rather than consumers.

We note that Government is considering the Civil Justice Council's recommendations in relation to costs in funded proceedings. However, this should not preclude Government from grappling with this important issue now, particularly as funding is not causative of high costs of collective proceedings but it is the nature of UK legal proceedings which drives up costs.

In addition, Which? understands that the CAT is currently considering costs and case management in collective proceedings. But as we are unsighted on this work, we cannot form a view on whether it is likely to meaningfully reduce the costs of litigation.

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.

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.

We respond to Q13 and Q14 together.

¹⁷ [2025] EWCA Civ 459.

Defendant budget oversight welcomed. Yes. Which? agrees that the CAT Rules should be amended so that cost budgets are required from both parties following certification. Currently only CRs are required to provide this information as part of the authorisation condition, whereas defendant costs do not have the same level of scrutiny or transparency. It already appears the CAT is moving in this direction, as evidenced by the Tribunal's requirement that both parties in *Consumers' Association v Apple* file a high level budget of their respective costs to trial for the post-CPO consequentials hearing.¹⁸ A specific rule mandating defendant costs budgets will ensure (i) that the CAT has visibility on the level of both parties' costs; and (ii) greater fairness between the parties.

Crucially, requiring defendant costs budgets provides greater certainty for PCR/CRs adverse costs exposure. So although what a party spends on litigation is not directly within the CAT's control, the CAT can (and should) give a view at the outset on whether a CR's specified level of adverse costs cover is sufficient. This would enable PCR/CRs to proceed with the confidence that, if unsuccessful, they will not be personally exposed to an adverse costs award if there is a shortfall in their costs cover. In addition, it will prevent CRs from having to obtain top-up ATE cover during proceedings (potentially due to a defendant's unrestrained spending), which can be difficult and expensive to obtain, and becomes increasingly so as trial approaches.

Costs sanctions a double-edged sword. As for a rule which stipulates that cost sanctions will apply in relation to behaviour that unreasonably drives up costs, whilst Which? endorses the intention (discouraging unconstructive, obtrusive or scorched-earth litigation tactics), experience to date where indemnity costs are already available implies that it is unlikely to be effective. Further, it seems highly likely to create satellite litigation as parties will inevitably disagree on whether behaviour has unreasonably driven up costs, leading to further time and costs being incurred resolving these disputes.

In addition, the asymmetry between a CR with a finite budget and restrictions on adverse costs cover and well-resourced defendants means that the risk of costs sanctions are unlikely to have equal impact on parties. This will disadvantage CRs, as explained in more detail below in the context of Rule 45 offers (Q18 - 20).

Instead, the CAT ought to take a more proactive approach to crystalising and resolving disputes when they arise, as explained in response to Q43 below.

Alternative means of reducing costs should be pursued. Which? expected to see more proposals aimed at controlling and materially reducing the level of costs in collective proceedings (for example, mutual costs budgeting, greater availability of costs capping, costs shifting, etc).

¹⁸ [2026] CAT 51.

Additionally, we believe several practical steps to simplify proceedings and reduce costs should have been explored - such as adapting proposals already contemplated elsewhere in this consultation. For example, setting presumptions on the assumed level of overcharge and pass-on in collective proceedings, on an industry by industry basis, with a review mechanism built in after five years to assess outcomes based on Organisation for Economic Co-operation and Development (OECD) and relevant academic studies.

Further, the CAT has sought to address the management of confidential information in its recently published practice direction 2/2026 (*Disclosure: Management of Confidential Information*).¹⁹ It has rightly recognised that excessive claims to confidentiality and the use of overly complex confidentiality rings increases costs (amongst other things). We consider a prescribed legal framework (as contemplated for confidentiality rings in CA98 investigations) could be established so that there is a more standardised and streamlined approach to the use of confidentiality rings.

Finally, as part of our responses to Q11 and Q43, we mention practical proposals such as the ability for a PCR to seek approval of its funding terms on a without notice basis, as well as greater standardisation of funding agreements, which would play a role in reducing costs at the certification stage. The same rationale should be extended to DBAs if and when they are introduced.

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'.

We support the CAT actively encouraging ADR by way of mediation, but do not support mediation being mandated at set points in proceedings.

Defendant-side commentary on the lack of settlements to date has highlighted that one reason may be defendants' perception that liability and quantum are too uncertain. Mediation at the right point of proceedings - where sufficient information has been exchanged to provide the foundation for informed decisions - may be able to shift that. However, mediation is expensive and CRs have finite budgets already under costs pressures. Bearing in mind the size and complexity of these cases, if done properly, mediation will require significant time and resources in order to prepare and present a parties' position and to properly assess what is presented by the other side.

¹⁹<https://www.catribunal.org.uk/sites/cat/files/2026-08/Practice%20Direction%202-2026%20%28Disclosure%20-%20Management%20of%20Confidential%20Information%29%2010%20August%202026.pdf>.

Therefore caution is required. Defendants have so far demonstrated a reluctance to settle (in that there have been few settlements), while opting for scorched earth tactics that deplete a CR's budget. Mediation creates further scope for tactical and costly delay and distraction. That is why mediation should not be mandated at set points in proceedings, but should be encouraged where there is genuine scope for meaningful engagement between the parties, and that this can occur without impacting trial dates. Parties should be allowed to submit representations around the feasibility and impact of ADR.

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

See response to Q15 above.

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. However the CAT must (i) be alive to the risk that this could create satellite disputes about the actions of a party, and be prepared to resolve these quickly and cost-effectively; and (ii) take into account in considering any cost consequences the asymmetry between CRs and defendants, where similar to the position on Rule 45 offers below, cost consequences do not have equal implications on CRs and defendants. So while the effect on CRs is likely to be that they will engage in ADR so as to avoid the risk they may be alleged to have acted unreasonably, as that could impact on their insurance cover and personal liability, defendants may be prepared to risk cost consequences given the nature of the claims at stake.

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.

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.

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.

We respond to Q18 to Q20 together.

Which? agrees in principle that settlement should be encouraged. However, proposals for settlement offers with automatic cost shifting consequences (akin to Rule 45 offers) in collective proceedings should not be taken forward. For reasons explained below, such a regime would operate asymmetrically, placing CRs at a significant disadvantage, while failing to meaningfully impact defendants' willingness to settle.

Asymmetry creates disadvantage. In non-collective proceedings Rule 45 offers provide a tactical lever to encourage settlement, creating greater jeopardy for parties in the way of increased costs consequences if offers are not accepted and a claim goes to trial. However, the asymmetric nature of funding and insurance arrangements in collective proceedings, together with the resources available to defendants, lends itself to defendants weaponising Rule 45 offers by putting forward early, lowball offers.

A CR is not a private litigant seeking the vindication of its own rights or recovering damages for itself. It is performing a public function on behalf of a class it is certified to represent. In doing so, it will have entered into funding and adverse costs arrangements, commonly by way of ATE insurance policies. It is standard for these policies to include provisions requiring insurer's approval for a CR to not accept a defendant's settlement offer, or alternatively, to make a counter-offer (such approval not to be unreasonably withheld).

These provisions constrain a CR's ability to reject an offer or propose a counter-offer; CR's do not have a completely free hand, and as identified by the CAT in *Consumers' Association v Qualcomm*, settlement judgment insurers' interests may not be aligned with those of the class.²⁰ Insurers may therefore prefer to accept a lower offer that eliminates their contingent risk of paying out under a policy, while retaining the benefit of any premiums already received for the policy. Insurers are also likely to be focused on the financial element of a settlement, whereas CRs may also be seeking non-financial commitments from defendants that go to addressing the harm at the root of their claim.

A Rule 45 regime therefore risks placing CRs in dispute with their insurers and in breach of their insurance policies. If a CR acts outside of the terms of its insurance, it risks voiding its policy and losing its ATE cover (and the collective proceedings being de-certified), as well as becoming personally liable. Dispute resolution provisions in ATE policies provide some safeguards, but Which? does not consider that rules should be implemented with the expectation that they will put CRs in dispute with their insurers.

²⁰ CSAO Judgment [2026] CAT 50, paragraph 93.

Taking on the role of CR is already an onerous task. Government should not proceed with proposals likely to add to that and the personal risk faced by CRs.

Limited impact on defendants. Conversely, well resourced defendants facing claims in the hundreds of millions or billions of pounds face little relative downside in rejecting a CR's Rule 45 offer - the additional exposure to indemnity costs is unlikely to present a meaningful incentive when compared to the size of the claim being defended and/or cost of settlement.

Therefore, the risks of rejecting a Rule 45 offer fall far more heavily on CRs than on defendants.

Strong safeguards required. If these proposals are taken forward despite Which?'s concerns, strong safeguards need to be implemented to address the structural asymmetry identified above. At a minimum this should include (i) offers only having costs consequences if made later in proceedings where information is available to better assess the reasonableness of an offer (i.e. after expert and witness evidence has been exchanged); (ii) enhanced costs consequences beyond indemnity costs for defendants who reject offers, so as to create sufficient incentive to settle; and (iii) the CAT should be allowed to disapply the automatic cost consequences where a CR's rejection of an offer is reasonable and in the interests of the class.

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]

o If yes, what changes do you believe would be beneficial?

o 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 at this time.

There have been limited settlements under the Regime to date, with each presenting different issues and factual scenarios. The Tribunal and its users continue to learn from each outcome. Which? considers that the CAT's settlement jurisprudence should be allowed to develop, and a review to take place in due course to reconsider Government's questions.

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.

Yes. While Which? does not consider redress schemes a substitute for private enforcement, it supports their use in principle as another means of addressing anti-competitive conduct (particularly where a business has made commitments) and delivering compensation to affected consumers. Which? therefore supports efforts to reduce barriers to their use, provided that consumer protection safeguards are also adopted.

A simpler approach to quantum in appropriate cases may at least facilitate consumers receiving some compensation rather than none at all - perfection does not need to be the aim.

The proposals on setting an assumed level of overcharge to create a presumption to be used to calculate the level of redress lends itself to streamlining the process and avoiding the delays and costs of litigation. Any assumed level of overcharge must take into account where participants are in the value chain in order to identify where the loss is suffered (and the extent of any pass-on).

However, Government should be under no illusion that the proposed changes will mean that redress schemes are used, nor that implementing a redress scheme will be a quick, straightforward, noncontentious matter. As we noted in our CfE response, the CMA has not utilised its power to approve a Voluntary Redress Scheme (VRS) and there have been few settlements to date in the Regime, demonstrating defendants' reluctance or inability to resolve matters early or without the jeopardy created by litigation, and strongly suggesting that without further incentives, redress schemes will continue to go unutilised.

Further, given redress schemes feature an inherent compromise between accuracy and efficiency (i.e. consumers receiving some compensation rather than all or none), the CMA must (i) carefully scrutinise the parameters of any scheme (i.e. market definition, the value chain, extent of pass-on, etc) and whether it adequately remedies the conduct, as well as delivering compensation to consumers; and (ii) be prepared to reject schemes where compensation is not fair and adequate or the scheme is defined or implemented in a way so as to effectively exclude affected consumers - redress schemes should not become a cheap way for those who infringe UK competition law to limit their liability.

Which? welcomes additional information on how this process might work if these proposals are taken forward and whether the CMA has sufficient resources to ensure their effective implementation.

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

We consider other stakeholders might be better placed to suggest changes.

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.

As explained in our CfE response, this is a significant barrier. Realistically, there is little incentive for businesses to agree to a VRS (or disincentive not to agree to one) without protection from duplicative damages, as they could theoretically end up paying twice for the same conduct. However, any protection from duplicative damages should not have blanket application. The compensation to consumers must be fair and adequate (see our response to Q22 above) if it is to extinguish the liability of a defendant for the same or similar conduct in other claims.

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.

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.

We respond to Q25 and Q26 together. See also our response to Q22.

Which? supports the CMA being given powers to direct businesses to establish a redress scheme, with these including a similar mechanism for calculating overcharge and requirements for approval as for a VRS. Whether this power encourages the take up of VRS is likely to depend on the CMA's readiness to use its direct redress powers, so that businesses expect to be ordered to provide redress if they do not offer it themselves.

There is of course another barrier, which is that voluntary or mandatory redress schemes follow public enforcement. Since leaving the EU and owing to the CMA's limited resources and understandable need to prioritise, there has been limited public UK competition enforcement in recent years. Regardless of the nature of an infringement, if there is little enforcement then (i) it creates a barrier to the CMA establishing meaningful expectations around VRS; and (ii) more generally, it reduces deterrence as the prospect of a business being singled-out for enforcement activity decreases. Which? continues to believe strongly that private enforcement is important to close this gap.

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

We have provided responses around incentivising use of VRS above.

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.

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.

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.

We respond to Q28 to Q30 together.

No. We recognise that public and private enforcement both play a key part in upholding and enforcing UK competition law. However, it is hard to justify any restriction on liability where a business's actions do not extend to proactively compensating those affected by its anti-competitive conduct. Which? repeats its response to Q12 of the CfE here.

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.

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

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.

We respond to Q31 to Q33 together.

Yes. Which? agrees that the subject matter of claims before the CAT varies greatly, therefore it may be beneficial for concurrent regulators other than the CMA to be notified of a claim, as well as be of assistance to the CAT should it require this. Which? expects that this should be apparent based on the nature of the claim.

However, based on the operation of the Regime to date, Which? sees this more as a matter of good practice, rather than being necessary to address a real or perceived risk of conflict between public and private enforcement. This is primarily because (i) claims are

restricted to competition infringements, which is predominantly the CMA's domain and it is already being notified; and (ii) public enforcement actions are relatively infrequent and spread across the economy, reducing the scope for overlap.

Distribution

As recognised by Government, there has only been one example of distribution to date in the case of *Gutmann v SSWT*. That outcome was disappointing, but Which? agrees with Government that “*it cannot be viewed as an indication of how all other claims may proceed*”²¹ and with the CAT in *Brook v Google* where it recently said “*...we accept that take-up has been extremely low in Gutmann but do not regard it as a yard-stick or benchmark*”.²² That said, perfection, or near perfection, cannot be expected, unless that also recognises the use of undistributed damages or settlement funds as an indirect benefit to the class.

Which? therefore agree with Government's view that “*the aspiration of the regime must be to achieve a greater rate of returns to class members than was seen in [Gutmann v SSWT]*”.²³ This has been reflected in the approach taken in *McLaren*, where lessons learnt from *Gutmann v SSWT* are being applied in the second distribution to take place under the Regime. Which? encourages this ‘test and learn’ approach at this early stage of the Regime’s development.

As distributions in *McLaren*, *Merricks* and (provided it is upheld on appeal) *Kent v Apple*²⁴ take place, they will generate useful qualitative and quantitative data to inform an evidenced based approach to future distributions and any potential changes to rules and guidance to facilitate distribution. At this early stage, flexibility should be maintained to take into account evidence as it emerges and the variability between cases.

Which? also encourages parallel efforts outside of individual cases to identify and test possible means of facilitating distribution, for example, through a centralised portal or trusted service provider.

²¹ Consultation, paragraph 116. Indeed, *Gutmann v SSWT* has been widely acknowledged as providing a poor precedent for future distributions, owing to several characteristics. These include (i) high communication barriers given the relatively small and geographically concentrated class; (ii) evidential and administrative hurdles given the complexity of assessing class membership and providing evidence of past train journeys; coupled with (iii) the relatively modest individual claim values.

²² CPO Judgment [2026] CAT 65, paragraph 46.

²³ Consultation, paragraph 116.

²⁴ Case 1403/7/7/21.

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.

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

We respond to Q34 and Q35 together.

Building trust. Yes. As explained in our CfE response, there is good evidence of consumers being prepared to engage with the subject matter of collective actions, particularly when communicated through trusted sources. Listing claims on the CAT website is a welcome step to support building trust, as it provides another marker of legitimacy. As a trusted source of information, Which? also intends to support upcoming distributions to amplify communications and encourage class members to come forward to claim. Which? will consider assisting on future distributions on a case-by-case basis.

Government support. However, more needs to be done. Given Government's stated priority of bringing redress within reach of consumers (including businesses) it could further support by making funding and resources available for initiatives that engage and increase trust among class members, and encourage take-up on distribution.

Simpler, clearer communications. Which? highlighted in its CfE response that there needs to be more flexibility in the noticing requirements. In Which?'s experience, noticing in collective proceedings can be overly legalistic and formulaic, resulting in lengthy and complex communications to the class. Drawing on our experience engaging consumer audiences over decades, we advocate noticing that is simple and clear. It should meet consumers where they are, and recognise with realism the challenges engaging consumers en masse in legal actions. That is likely to require compromise, where consumers are directed to sources of further information, rather than including all information in communications.

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. Creative and collaborative approaches are already being considered by CRs and their advisers, as evidenced by the approach to distribution being taken in *McLaren*. The challenge lies in how defendants, and potentially third parties, are incentivised or required to assist with distribution.

Defendants have a role. Which?'s view is that defendants have a role to play in maximising distribution where they hold information that would facilitate distribution. For example, where they hold class members' contact details or account information. This is regardless of whether the claim has settled or been determined by a judgment following trial: where a claim has settled and the defendant takes the benefit of the certainty of that settlement, it is right that its responsibilities extend to ensuring the effectiveness of the settlement in the form of funds being distributed to class members; where a defendant has been found to have infringed competition law and caused harm to consumers, it is right that it takes steps to see that harm is redressed.

Rules to facilitate collaboration. The CAT too has an important role, ensuring that defendants facilitate distribution. It therefore requires the right powers to do so. Currently those powers are not clearly articulated in CAT Rules or Guidance, though a defendant's involvement may be considered for example as part of whether the CAT considers a settlement just and reasonable. Which? supports amending the CAT Rules to address this, supplemented by Guidance that builds in flexibility for the CAT to assess and direct a defendant's involvement on a case-by-case basis.

Establishing rules and/or precedent that creates an expectation of defendant involvement may also mean that defendants will be more prepared to offer support proactively, so as to mitigate the risk of being ordered to by the CAT to do something more onerous than they might otherwise agree to do. Although self-interested, that would incentivise a more collaborative approach.

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)

The Consumers' Association (commonly known as Which?) welcomes the opportunity to be considered as part of Government's proposals. We are excited by the opportunities we could unlock for consumers by using undistributed damages for their benefit.

Seven decades advocating for consumers. For seven decades, the Which? group has advocated for consumer rights. In line with our [charitable objects](#) we:

- use our high-quality multidisciplinary research, extensive consumer insight, respected legal and policy expertise, and vigorous campaigning to shape the **UK's consumer legislation**, operating at a systemic level that delivers impact for millions of UK consumers. Notably, our work as an independent consumer champion has helped to shape the most significant consumer legislation of the last decade including the Digital Markets, Competition and Consumers Act 2024, the Online Safety Act 2023 and the Product Regulation and Metrology Act 2025;
- have a strong track record of tackling **unfair business practices** across a range of markets, from misleading pricing to the sale of unsafe products. We work with and challenge regulators to enforce consumer protection and thoughtfully exercise our statutory rights as a super-complainant. More recently, we have acted as a CR under the collective redress regime;
- are committed to ensuring the voices of all consumers are heard, including those from diverse and disadvantaged communities. We recognise that specialist technical bodies or grassroots organisations working directly within specific communities are sometimes better placed than Which? to address specific issues facing those communities. That is why we launched the **Which? Fund** in 2021 to grant fund partner organisations that align with our charitable objects. Funding allocations follow a rigorous selection process involving thorough organisational due diligence and expert proposal reviews. You can find more details in our [Which? Fund page](#).

A full account of how we use our resources to deliver tangible results for consumers can be found in our 2025 [annual Impact Report](#), with our 2026 report due to be published imminently.

What designation would enable. Historically, the Consumers' Association has relied on profits generated by its commercial subsidiary, Which? Ltd, to fund its charitable work. However, a challenging commercial environment has constrained these trading returns, limiting our capacity to expand our charity activities. Appointment as a designated charity would provide a vital additional funding stream, enabling us to review our current strategy, scale our charitable work, significantly increase financial support to partner organisations and potentially widen the nature of work we support through the Which? Fund or through other routes (including considering how we might support legal actions to protect and enforce consumer rights). We would not use funds received as a designated charity to invest in, or provide funding for, Which? Ltd.

Governance and accountability. To ensure our resources deliver maximum impact in line with our current strategy, we already operate under robust governance frameworks. Each year, we identify the most pressing areas of consumer harm across the economy to inform our strategic priorities for the year. These are approved by our charity trustees and progress against them is monitored and regularly reported on to our Council of Trustees.

However, if made a designated charity under the regime, we would review and adapt these governance processes to ensure that they are appropriate for our role as a designated charity and the scale of funding received, along with our strategy and ensuring we remain a beacon of consumer trust. We would operate transparently, in line with clearly articulated principles, and effectively identify and address conflicts of interest. This is not new to us. As a charity with a broad remit to empower and protect consumers, and as the owner of a commercial business that aims to be the UK's definitive source of trusted advice, we already have to be mindful of actual and perceived conflicts of interest. As a group, we have published conflicts of interest policies for our trustees and directors, principles for commercial partnerships and a code of editorial independence. We also have additional policies and principles that apply when the Consumers' Association exercises a statutory role already granted to it, such as the ability to issue supercomplaints. This means we have something to build from, as well as a network in the charity sector and beyond, including close cooperation with our international sister organisations, which means we can learn from others' best practice experiences.

Conflicts management. Given our role in the Regime to date has been to act as CR, it seems appropriate to specifically recognise the risk of conflicts arising if a designated charity holds multiple roles within a single collective action. The issues would require careful consideration. We would of course refrain from undertaking conflicting activity that we believe could not be appropriately managed (for example, through governance controls). Crucially, the CAT maintains a vital role at the outset of any proceeding to evaluate the suitability of both the action and the CR. We believe this provides an important safeguard to ensure potential or perceived conflicts are addressed.

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.

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.

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

We respond to Q38 to Q40 together.

Which? supports proposals to introduce CAT fees as consistent with other private litigation forums. Given fees will be restricted to private litigation and subject to a cap, and

provided they are reasonable, we consider that the impact on access to justice will be neutral. A staged approach will allow this to be properly assessed.

More resources required. In its response to the CfE, Which? advocated for increased resourcing for the CAT to help address the length of time and delays resolving claims. Which? maintains this position. Implementing fees that are reinvested into the CAT is one way to support this and therefore the CAT's efficient operation. However, fees alone may be insufficient, and Government has not published information on how much it anticipates a fee regime will generate, or the changes this funding is expected to bring. It is therefore currently unclear whether CAT fees will have a meaningful impact on efficiency.

Limited impact on claim values. Contrary to the view expressed in the Consultation, Which? considers that linking fees to claim value will have limited impact on claim values included at the start of a claim in the application for certification. A persistent feature of the regime is the asymmetry between claimants and defendants - at the point of filing claims PCRs have little or no disclosure from defendants, and typically access only to publicly available material. Quantum assessments are by necessity only a best estimate at the time.

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. Which? supports encouraging more efficient use of CAT resources and moving proceedings forward more quickly by enabling appropriate decisions to be made by the chair sitting alone or with one other panel member. It should of course also be open for the sitting chair and/or panel member to adjourn a decision if it is felt that the input of a non-sitting panel member is required before a decision is made.

Considerations for when decisions can be taken by less than the full Tribunal should include:

- The magnitude of the decision, in particular whether it has the potential to determine the whole or part of the claim.
- The nature of the issues to be determined.
- Whether a particular panel member's expertise is relevant/beneficial to the adjudication of the issue.
- The availability of Tribunal members and delay or prejudice caused if a decision is delayed until it can be heard by the full Tribunal.

However, a degree of flexibility and pragmatism is required as not all decisions will be capable of being neatly demarcated for one or two panel members to decide, and while some decisions may appear minor, they could have the potential to have an outsized impact on the proceedings. Overly strict or inflexible rules could therefore lead to perverse outcomes.

As a next step, Which? requests that Government and/or the CAT consult on the detail of how to implement this change.

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.

Yes. Decisions that have the potential to determine the whole or part of a claim should be heard before a full Tribunal. These include certification, strike-out, preliminary issues and CSAO applications.

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.

Yes. The CAT should support measures which lead to increased judicial efficiency and cost control.

Use of precedents. Encouraging greater use of precedents would streamline decision making processes and reduce the scope for satellite disputes, thereby reducing costs and delay. For example, precedents (or precedent terms) could be used for confidentiality rings, LFAs and DBAs (assuming the latter are adopted).

Funding terms approval. Which? continues to believe that the CAT Rules should be amended to allow for without-notice approval of funding terms. The CAT now has significant experience having reviewed many funding agreements under the regime, so it is well placed to make an ex parte assessment. As highlighted above, many of the issues raised at certification in relation to funding (for example, funder returns, control or distribution of returns) have either been resolved in previous claims or are capable of being resolved such that they do not materially threaten certification.

Crystallising disputes early. Where possible, the CAT and parties should be encouraged to resolve interlocutory disputes as they arise, rather than deferring them to case management conferences where parties often delay concessions until the hearing. This creates high volumes of correspondence and generates unnecessary costs. These issues may also be ones that would be appropriate for the chair or the chair plus another member of the Tribunal to resolve, including by doing so on the papers.

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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