ISSUE 13 - MAY 2026

Competition

MAGAZINE

Positioning for Impact: Q2's Competition Law and Litigation Update

Thought Leadership for and by the Competition Community

INTRODUCTION

"Change is the only constant"

- Heraclitus

We are delighted to present Issue 13 of the TL4 Competition magazine, our second edition of 2026: Positioning for Impact: Q2's Competition Law & Litigation Update. Delving into the ever-changing landscape of law and litigation, this edition navigates countless unique topics and covers a range of jurisdictions.

We would like to thank our valued Corporate Partners and those who have contributed to this edition. We hope that you enjoy reading Issue 13 of the magazine.

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QUARTERLY EVENT ROUND UP

THE IRISH COMPETITION LAW FORUM

The Irish Competition Law Forum brought together members of the competition law community in Dublin for a full day of expert discussion on key regulatory and enforcement developments in Ireland and at EU level. The programme featured keynote insights from the CCPC and the European Commission, alongside panel sessions on sectoral regulation, merger control, regulatory investigations, foreign direct investment screening, digital markets regulation, remedies, and cartel enforcement. The conference concluded with practical analysis of recent trends shaping competition law practice, reflecting the rapidly evolving regulatory landscape. We extend our thanks to the event chair, Darach Connolly, and to our event partners Frontier Economics, FTI Consulting, NERA and RBB Economics for their generous support in delivering a highly successful conference.

UK COMPETITION LITIGATION CIRCLE

Entering its second year, the UK Competition Litigation Circle brought together around 40 senior, handpicked practitioners for two days of focused discussion at the Fairmont, Windsor Park. The invitation only forum explored key developments and strategic issues in competition litigation, with the agenda curated by an expert advisory board comprising Boris Bronfentrinker (Willkie Farr & Gallagher LLP), Simon Day (Macfarlanes), Kim Dietzel (Herbert Smith Freehills Kramer), Kenny Henderson (CMS), Sarah Houghton (Mishcon de Reya LLP) and Zoë Mernick Levene (RPC). We extend our thanks to our advisory board for their invaluable support in leading the discussions, and to our event partner Epiq for helping to deliver another highly successful UK Competition Litigation Circle.

2ND ANNUAL COMPETITION NEXT GEN SUMMIT

The 2nd Annual Competition Next Gen Summit brought together practitioners, regulators, economists and in house counsel for two days of high level discussion on key developments in competition law and litigation. Across plenary sessions and interactive breakouts, the programme explored enforcement trends, merger control, digital and AI related antitrust risk, collective actions, FDI, sustainability and litigation funding. We thank all speakers, delegates and event partners for contributing such strong insight, energy and collaboration throughout the Summit.

2ND ANNUAL EU DIGITAL MARKETS COMPETITION LITIGATION & COMPLIANCE FORUM

The 2nd Annual EU Digital Markets Competition Litigation & Compliance Forum brought together the competition community in Brussels for a full day of discussion on enforcement, compliance and litigation issues shaping Europe's digital markets. The programme featured keynote insights on the state of digital competition regulation, alongside panels examining DMA enforcement, global coordination of antitrust actions, merger control, AI regulation, private enforcement and the interplay between competition law and wider tech compliance. We extend our thanks to our co chairs, Stijn Huijts and Miranda Cole, and to our event partners AlixPartners, BRG, Cornerstone Research, Econic Partners and RBB Economics for their support in delivering another successful edition of the Forum.

UK COMPETITION LAW CIRCLE

The inaugural UK Competition Law Circle brought together handpicked UK competition law practitioners for two days of in depth discussion and peer to peer exchange. The programme was led by an expert advisory board spanning private practice, consultancy and international law firms, creating a highly focused and collaborative forum for senior practitioners. We extend our thanks to our advisory board for their invaluable support in shaping and leading the discussions, and to our event partners Verita and Econic Partners for their support in delivering this exclusive Circle.

EUROPEAN COMPETITION LITIGATION CIRCLE

The European Competition Litigation Circle brought together senior competition litigation practitioners for two days of in depth discussion and collaboration in Vevey, Switzerland. Set within an invitation only format, the Circle provided a trusted forum for candid exchange on key trends and challenges shaping competition litigation across Europe. We extend our thanks to the Advisory Board for expertly leading the programme, to our partners Verita Global and RBB Economics for their valued support, and to all delegates for the openness and insight that continue to define this growing community as it enters its third year.

2ND ANNUAL GLOBAL MERGER CONTROL FORUM

The 2nd Annual Global Merger Control Forum brought together practitioners, economists, in house counsel and regulators in Brussels for a full day of high level discussion on the evolving political, legal and technical challenges shaping global merger control. The programme included keynote insights from the European Commission, alongside panels examining updated merger guidelines, divergence across merger regimes, remedies, efficiencies, sector specific challenges, and the growing impact of foreign investment and subsidy regimes on global deals. We extend our thanks to all speakers and delegates for their thoughtful and practical contributions, and to our event partners The Brattle Group, BRG, Econic Partners, Frontier Economics and RBB Economics for their continued support in delivering a highly successful Forum.

Upcoming Events

The EU Competition Law & AI Regulation Forum
3 June 2026 | DoubleTree, Brussels, Belgium

The Competition Collective Actions Forum - 4th Annual
11 June 2026 | One Great George Street, London, UK

The UK Competition Law Summit - 3rd Annual
18 June 2026 | Carpenters' Hall, London, UK

The UK Digital Markets Competition Regulation Forum - 4th Annual
24 September 2026 | The Royal Horseguards Hotel, London, UK

European Competition Law Regulatory Circle
14 - 16 October 2026 | Auberge du Jeu de Paume, Chantilly, France

The Merger Control Forum - 2nd Annual
3 November 2026 | London, UK

The EU Competition Law Private Enforcement Forum - 3rd Annual
5 November 2026 | Amsterdam, The Netherlands

The Nordic Competition Law Summit - 2nd Annual
11-12 November 2026 | Radisson Blu Scandinavia Hotel, Copenhagen, Denmark

The Competition Law & Artificial Intelligence Summit - 3rd Annual
1 December 2026 | London, UK

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> – Global Competition Review (2025)

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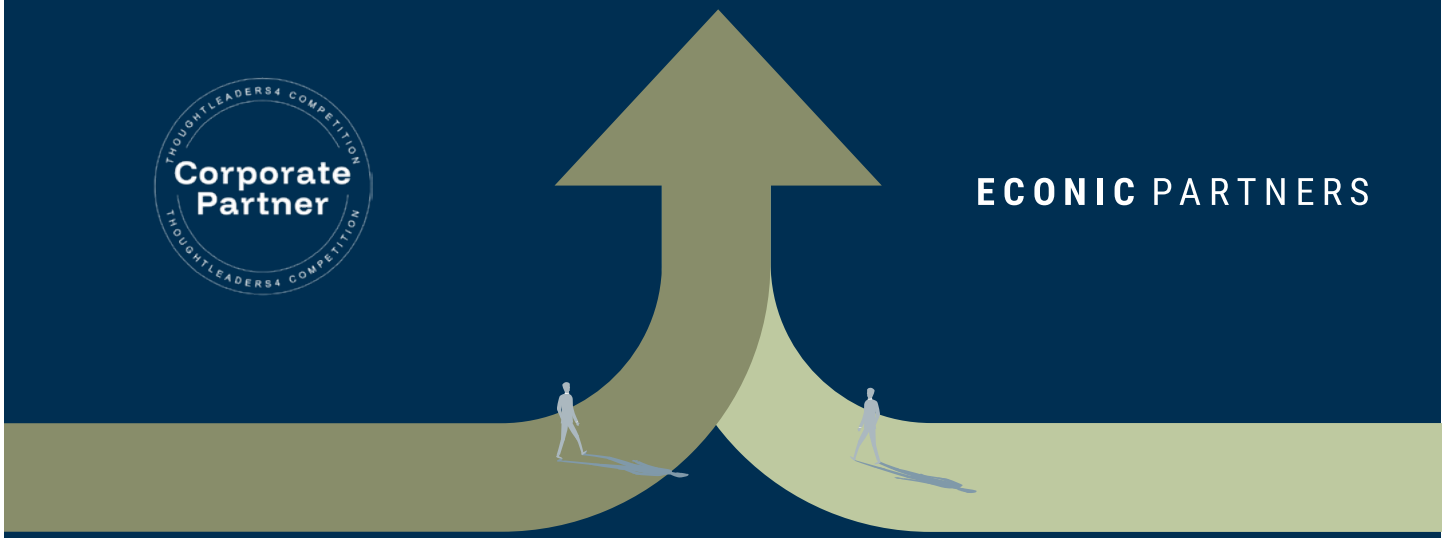
REFINING THE UK MERGER REGIME



THE IMPACT ON THE CMA'S INDEPENDENCE

Authored by: Fabrizio Vasselli (Principal) & Daniel Westrik (Principal) - Econic Partners

Will the Government's proposed reform of the Competition and Markets Authority ('CMA')'s governance achieve its stated objectives – greater accountability, predictability and speed of decision-making – if the CMA's independence is compromised?

The Government is consulting to change the CMA's governance structure by replacing independent panel members ('Panel') as decision makers in Phase 2 merger investigations and the new single-phase market review tool with sub-committees of the CMA's Board, composed of (i) senior CMA staff (such as the CEO or Chair), and (ii) non-executive members of the CMA's Board and/or non-CMA staff experts, accounting for at least 50% of the Sub-committee.

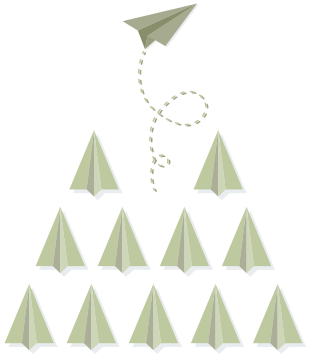
According to the consultation, the reform would have three objectives: (i) greater accountability, given that senior CMA staff (who are ultimately accountable to Parliament) are directly involved in the most significant mergers and markets decisions; (ii) greater predictability and consistency; and (iii) a faster decision-making.

But What About Independence?

Independence does not explicitly feature among the stated objectives of the Government's reform of the CMA's Mergers and Markets regimes, nor are the effects of the reform on the CMA's independence discussed in the consultation. Yet independence is crucial for the credibility of any authority such as the CMA.

Compromising independence would not only be undesirable, but also likely to undermine the very objectives the reform seeks to achieve. When decisions are more easily influenced by political interests or lobbying, (i) the CMA becomes less accountable for its own decisions, as politics and/or lobbying play a part in the decision making, (ii) outcomes might differ across factually similar cases (i.e., less predictability); and (iii) appeals and remittals might increase if the courts remain independent (i.e., lower speed).

The central question is, therefore: does the reform strengthen or weaken the CMA's independence?



The Importance of Independence for the UK Competition Regime

Independence is crucial for maintaining credibility, as it enables regulatory agencies to pursue their policy objectives effectively while providing certainty and predictability for the business community. The House of Lords' Industry and Regulators Committee report, as well as the

proposed reform itself, stress this point. In this context, independence should be understood not only as freedom from political influence, but also as protection from lobbying by various interest groups.

The independence of the UK competition regime has, to date, largely been safeguarded by the role of the Panel. In particular, while Phase 1 decisions are made by CMA staff, Phase 2 mergers and market investigations use independent decision-makers (who are separate from those responsible for Phase 1 decisions and market studies). This has been a central feature of the regime and an important mechanism for protecting the CMA's independence, particularly given that CMA decisions are subject to judicial review rather than a full merits appeal.

Evidence from the CMA's Outcomes

Nonetheless, following the election of the current UK government in July 2024 and removal of the CMA's previous Chair in January 2025, there have been recent claims that the pro-growth government agenda may have influenced the CMA's decision making, under the existing regime.

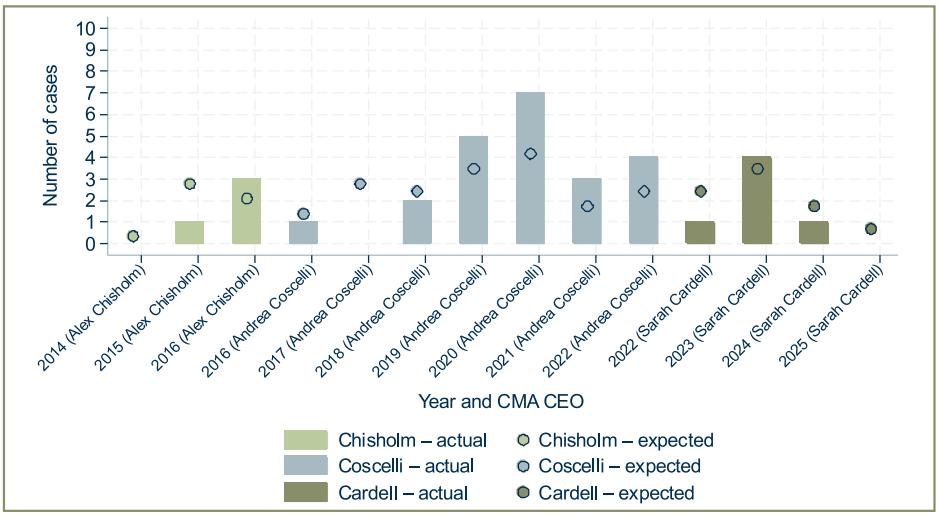
To explore this claim, we analysed data on CMA's Phase 1 and Phase 2 merger decisions for cases opened (and have subsequently closed) since the CMA's launch on 1 April 2014.

Figure 1 compares the actual Phase 2 interventions for each CMA CEO and year (bars) with the expected interventions. (circles). Interventions are defined as either prohibitions or cancellations at Phase 2 in each year. Expected interventions in each year are determined based on the relative proportion of prohibitions or cancellations (over clearance decisions) observed over the period 2014–2025.

Two patterns stand out:

- First, Phase 2 interventions were lower than expected in 2024 and 2025, albeit in years with relatively few Phase 2 decisions overall.
- Second, within individual CEO tenures, there is meaningful variation across years in the gap between actual and expected outcomes. For example, during Andrea Coscelli's tenure, Phase 2 interventions were lower than expected during the period 2016-2018, but higher than expected during the period 2019-2022.

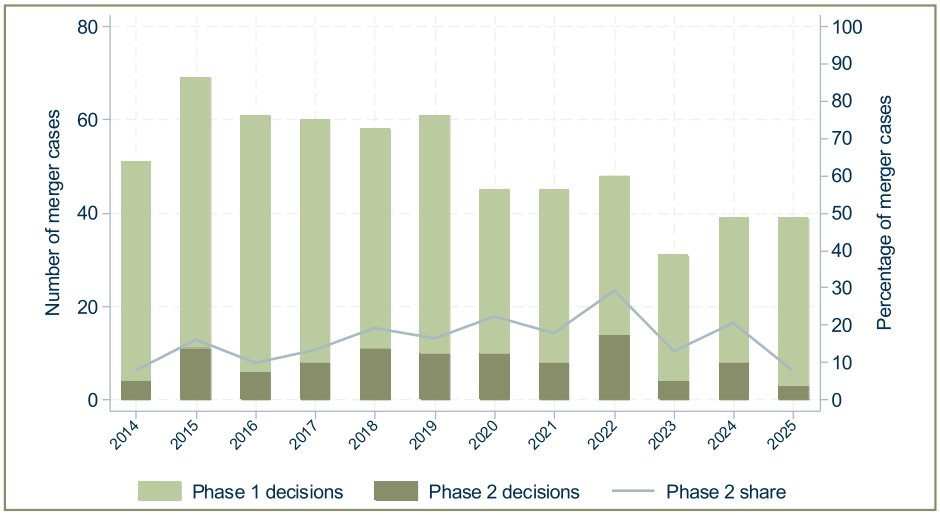
Figure 1: Phase 2 Merger Prohibitions or Cancellations by Year and CMA CEO (Actual vs. Expected)



This suggests that even under the current regime, where the Panel should safeguard the independence of the CMA's decision-making in Phase 2 merger investigations, the regime may not be fully immune to the political environment.

Figure 2 below provides the number of mergers resolved at Phase 1 or referred to Phase 2 in a given year. It shows that there was a general drop in Phase 2 references in 2023-2025, compared to a peak of 29% of mergers in 2022, with only 8% Phase 2 referrals in 2025 (which was the lowest annual number and percentage since the CMA's existence).

Figure 2: Phase 1 and Phase 2 Mergers by Year (of P1 decision)



The findings in Figure 2 are notable because Phase 1 referral decisions are taken by senior CMA staff rather than independent decision-makers. While multiple factors may explain the particularly steep decline in 2025, it raises the possibility that such decisions are responsive to the Government's pro-growth agenda (and may be more so than decisions by the Panel).

Implications of the Proposed Reform

Against this background, the proposed removal of the Panel warrants careful scrutiny.

Concentrating both Phase 1 and Phase 2 decision-making more directly within the CMA's leadership risks increasing the exposure of merger outcomes to political and lobbying pressures. Even if current office-holders exercise these powers responsibly, governance structures should be robust to changes in personnel and political priorities.

Historically, lobbying has played a limited role in UK merger control, in part because it has been perceived as ineffective. A governance model that places greater discretion in the hands of senior decision-makers could alter these incentives and, over time, weaken the perceived independence of the regime, and potentially undermine the very objectives that this reform hoped to achieve.

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LOCKED-IN OR HELD-UP?

THE ECONOMICS OF EMPLOYEE NON-COMPETE CLAUSES

Authored by: Paul Armstrong (Director) & Chanwoo Kim (Economic Consultant) - AlixPartners

Introduction

Non-compete clauses ("NCAs") that restrict employees from working for a competitor or starting a competing business after leaving their employer have come under increasing scrutiny by policymakers and competition authorities. The UK Department for Business and Trade ("DBT") published a working paper on NCAs in November 2025, which raised questions about whether these clauses restrict competition.[1] The U.S. Federal Trade Commission ("FTC") introduced a rule banning NCAs in 2024,[2] but, despite this rule subsequently being revoked,[3] the FTC has stated that anticompetitive NCAs are still a focus.[4] A ban on NCAs for certain workers, especially below a salary threshold, has also been proposed in Australia.[5]

By contrast, the broad view from the European Commission ("EC") is that NCAs are

> ***"considered less restrictive ways of protecting the employers' investments in training or non-patent IP as, unlike no-poach agreements, they are transparent vis-a-vis employees".[6]***

The economics of NCAs is complex and fact-specific. On the one hand, relaxing the restrictions that NCAs create allows locked-in workers to move to where they are most productive and where they prefer to work. This better allocation of a factor of production strengthens competition in product markets, encourages new start-ups,[7] and ultimately fosters innovation and economic growth.[8]

On the other hand, employers may have valid reasons for using NCAs. When a worker leaves, the impact goes beyond simply the frictions of finding a replacement employee: the returns to employee training are reduced and employers are disadvantaged when

1 Working paper on options for reform of non-compete clauses in employment contracts - GOV.UK

2 FTC Announces Rule Banning Noncompetes | Federal Trade Commission

3 Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule | Federal Trade Commission

4 Moving Forward: Protecting Workers from Anticompetitive Noncompete Agreements, noting the statement on page 11 that "the FTC should focus its enforcement resources on those noncompete agreements that do not advance a procompetitive purpose or else are not narrowly tailored to advance a procompetitive purpose."

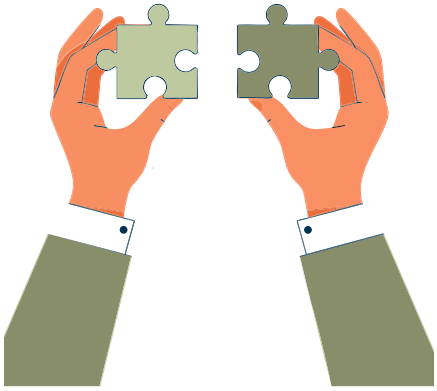
5 Major employers push back against Australian non-compete ban - Global Competition Review

6 Competition policy brief – Antitrust in Labour Markets, page 5.

7 FTC Announces Rule Banning Noncompetes | Federal Trade Commission, noting the statement that "[t]he FTC estimates that the final rule banning noncompetes will lead to new business formation growing by 2.7% per year, resulting in more than 8,500 additional new businesses created each year."

8 Working paper on options for reform of non-compete clauses in employment contracts - GOV.UK, paragraph 8.

their investment in training benefits a competitor. This can lead to a "hold-up" problem[9] of employers foregoing investment in employees, consequently reducing innovation[10] and undermining productivity.[11] In other words, an employer may have made an employee-specific investment, which it may not be able to recoup if the employee leaves and joins another firm that is able to "free-ride" on a rival employer's investment in training.



Separating Lock-in from Hold-up: Human Capital Theory

Given the potential benefits and disbenefits of NCAs, it is important to understand situations in which these clauses may hinder competition and innovation, and those in which they may mitigate a hold-up and free-riding problem. A key distinguishing factor is the type of human capital — a worker's knowledge, skills, and experience — developed in a given role.

Workers can perform very different roles. For instance, consider a stylised example of a general accountant and an IT system technician working on a firm's proprietary system. The accountant's skills may typically be applicable when working across a range of firms: if the accountant moves to a new employer, that new employer may free-ride on the investment the accountant's previous employer made in the accountant's skills. On the other hand, the IT technician's skills may (depending on the facts) be more closely tied to the specific systems and software that their employer uses. If the technician switches jobs, the investment their original employer made will not be as beneficial to the new employer, and so there will be less free-riding. In this stylised example, absent an NCA, the accountant's original employer may be less likely to invest in the accountant's skills, whereas the IT technician's employer would be more likely to invest, regardless of whether an NCA is in place.

In short, the risk of hold-up varies depending on the type of human capital developed on the job.

Generalising from this example, economists have distinguished between three types of human capital:

(a) **Firm-specific human capital**[12] — skills valuable only within a single firm, such as familiarity with internal processes or proprietary tools. For example, an employee trained on a company's custom software gains expertise that is largely unusable elsewhere. As these skills cannot be easily transferred, employees cannot leverage them to move to another firm. Therefore, the risk of an employer holding up investment in these skills is generally low.

(b) **Industry-specific human capital**[13] — skills valuable across firms in the same sector, such as proficiency with standard industry software or knowledge of sector regulations. For example, engineers trained on widely used Computer-Aided Design (CAD) software can apply these skills at other firms. The hold-up problem exists, but its significance depends on labour market specifics, in particular on how easily a worker can move to another firm within the industry that will value the training received. [14]

(c) **General human capital**[15] — skills transferable across industries and firms, such as people management, project management, or public speaking. The hold-up problem may be most pronounced here, but it may be difficult to distinguish skills gained through employer training from those acquired independently. This makes it harder to assess in practice whether NCAs are justified.

This taxonomy provides a framework to assess whether a given employer training investment could justify an NCA. NCAs are more likely to resolve hold-up problems where industry-specific or general human capital is created, and less likely to do so where firm-specific human capital is involved. Consequently, NCAs may be more likely to be anticompetitive where firm-specific human capital is created, though even for industry-specific and general human capital, NCAs could have anticompetitive effects.

There is a further question of whether the specifics of an NCA are proportionate, and whether any less anticompetitive clause or employer conduct could plausibly deliver the same benefits. Even if an employer makes material investments in industry-specific skills of an employee, there will be limits to the duration or exact conditions of an NCA that such investments can justify.

9 More generally, the hold-up problem arises when one party invests in a relationship, but the other party can take advantage of that investment afterwards (Moore, J., & Hart, O. (1988). Incomplete Contracts and Renegotiation. Econometrica, 56(4), 755-785).

10 FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf, page 3.

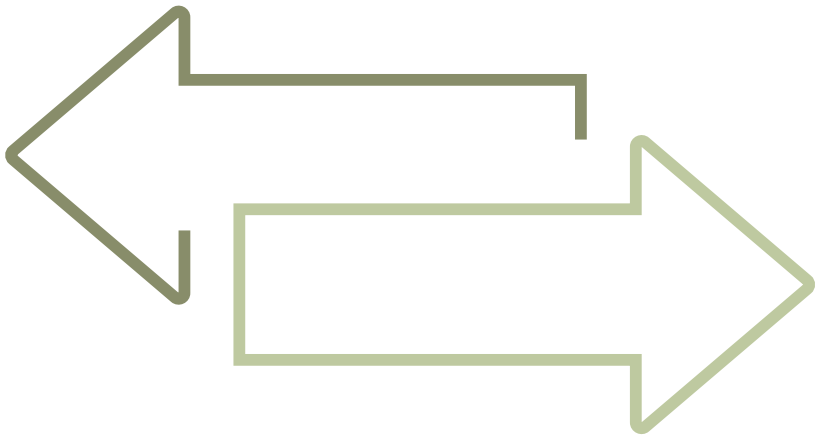
11 Competition and market power in UK labour markets, paragraph 6.39. The Competition and Markets Authority ("CMA") found on average workers with a non-compete agreement are slightly more likely than those without to receive formal on-the-job training, amounting to five or more training days per year on average.

12 Becker, G. S. (1962). Investment in Human Capital: A Theoretical Analysis. Journal of Political Economy, 70(5), 9–49.

13 Neal, D. (1995). Industry-Specific Human Capital: Evidence from Displaced Workers. Journal of Labor Economics, 13(4), 653–677

14 In sectors with higher unemployment, a trained worker cannot easily find another employer willing to compensate for the training received from their current firm. Since switching jobs is more costly in such sectors, the current employer has greater monopsony power and can capture a larger share of the returns on its training investment (Acemoglu, D., & Pischke, J.-S. (1999). The structure of wages and investment in general training, Journal of Political Economy, 107(3), 539–572). As a result, the hold-up problem is likely less severe. Similar logic applies in more concentrated labour markets: if there is only one firm in a (local) labour market, or only one firm that hires a given occupation, industry-specific human capital effectively becomes firm-specific human capital.

15 Becker, G. S. (1964). Human capital: A theoretical and empirical analysis, with special reference to education. New York, NY: Columbia University Press. The classic definition of general human capital is skills that are transferable to other firms. While the term is often used more broadly to include industry-specific human capital, we restrict it in this article to skills transferable across sectors.



Policy and Practice: Where to Go from Here?

A general ban on NCAs may have adverse effects, as it could lead some employers to invest less when rivals can free-ride. The extent of firm-specific, industry-specific, and general human capital creation differs across industries, and even across firms. Consequently, one-size-fits-all interventions may yield benefits in some markets and harm in others.

For authorities concerned with potentially anticompetitive NCAs in specific markets or for certain types of employees, a starting point could be to review the nature of employer-sponsored training provided by firms within an industry. Training materials could be examined to identify the type of human capital involved, and whether an NCA is likely to resolve a hold-up problem. Comparing the format and content of programmes across similar companies can also be helpful: the less overlap there is, the more likely the training generates firm-specific human capital. However, training does not need to be formal or incur easily identifiable monetary costs to employers. For example, employees may be assigned tasks they are not yet fully prepared to perform consistently, working alongside a peer or mentor in order to gain experience. Such assignments are also an investment for employers, as they entail the opportunity cost of time that could otherwise be used more productively (or savings on the labour costs of the employee being trained).

The harm from limiting the scope of NCA may also be mitigated depending on the viability of less restrictive alternatives. One approach to addressing investment hold-up concerns for formal training is the use of claw-back provisions for employees who resign within a certain period after being up-skilled.[16] For example, if a firm funds training, it could require employees to remain with the firm for a set period afterward to recoup the cost, or to pay deferred compensation or bonuses once the service period is completed, subject to the enforceability of such contracts. However, as noted above, not all training is formal.

Conclusion

A blanket rule or simple heuristics based on employee salary or firm size are unlikely to be appropriate to address potential anticompetitive effects of NCAs,[17] while preserving the investment benefits these clauses can support. Rather, a more appropriate approach would be to focus on specific markets or types of employees where restrictive NCAs are commonplace. In these cases, assessing the type of human capital created is more appropriate to prioritise where interventions that limit or restrict NCAs should be made. This would both protect employer investment from being held up and minimise unnecessary restrictions on worker mobility.

16 For example, this is suggested in the CMA's response to the DBT consultation: CMA response to working paper on options for reform of non-compete clauses in employment contracts - GOV.UK, paragraph 14.

17 For example, this is proposed in Australia and in the DBT consultation.

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Q What aspect of your practice area do you find most rewarding?

A Knowing that the work has real-world consequences. E.g. when you're advising on a merger case, your analysis can directly influence how markets evolve. For me, it's also the combination of analytical rigour and persuasion: you have to do serious quantitative work, but then translate it into a compelling narrative for competition authorities, lawyers, or clients. It's not enough to be right – you have to make the argument land.

Q What personality trait has contributed most to your success?

A Good judgment: knowing when to go deeper, when to simplify or be pragmatic, and when to challenge the prevailing view.

Q What is the best film of all time?

A The Dark Knight – because Batman does not have any super powers and still saves the world (or Gotham).

Q Where has been your favourite holiday destination and why?

A Mexico – starting in Mexico City with its intensity and incredible food, then heading to the coast where everything slows down.

Q What songs are included on the soundtrack to your life?

A Goo Goo Dolls – Iris (is it even possible to not love this song?); The Beatles – Here comes the sun (always makes me think of my daughter); Gerry Rafferty – Right down the line (a classic from our wedding day); Eminem – Real slim shady (masterpiece!), Spice Girls – Viva forever (high school nostalgia), 2Pac – Changes (that's just the way it is!), Fatboy Slim – Praise you (high school nostalgia and Cruel Intentions soundtrack!); Oasis – Don't look back in anger (well, you never should!).

Q What is the one thing you could not live without?

A Good food and hunting for hot spots wherever I travel.

Q What would you be doing if you weren't in this profession?

A Likely fewer Excel spreadsheets and more time spent browsing interior design blogs for renovation ideas – but I suspect I'd soon start to miss the intellectual challenge...

Q What's a fun fact about you most colleagues wouldn't guess?

A I danced ballet four times a week for over a decade in my youth – so precision and high standards come fairly naturally.

Q If you could have dinner with any historical legal figure, who would you choose?

A Does Margarethe Vestager count as historic?

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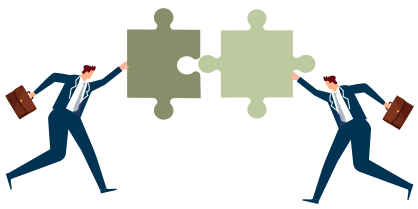
BELOW THRESHOLD MERGER REVIEW

SHIFTING TIDES IN REGULATORY APPROACHES TO NON-NOTIFIABLE DEALS

Authored by: Gwen Ballin-Reeler (Partner) & Chanelle Cattin (Managing Associate) - Mishcon de Reya

A below-threshold merger — also referred to as a non-notifiable deal — is one that falls below the filing thresholds set by merger control regimes. Historically, such transactions were considered low-risk from a regulatory standpoint. That assumption is no longer safe as regulators are asserting jurisdiction over deals that would once have been untouched. Although the driving concern is the issue of "killer acquisitions", it is increasingly difficult to identify which deals may be called in or the subject of ex post enforcement action and this difficulty will only increase as approaches diverge.



The Aftermath of Illumina/GRAIL Across the Channel

At the EU level, the picture is shaped significantly by the Court of Justice's well-known ruling in Illumina/GRAIL (2024), which curtailed the European Commission's ("EC") ambitions for extending its reach over below-threshold transactions. The EC claimed jurisdiction to review Illumina's acquisition of GRAIL under Article 22 EUMR, asserting that a Member State can refer a deal to the EC even if it falls below filing thresholds. The EC had been pursuing this policy for several years, arguing that it enables review of so-called "killer acquisitions" (the acquisition of an innovative start-up by a larger company) which otherwise often escape scrutiny due to the target's size. The Court rejected this, noting that it would undermine the predictability and legal certainty that must be provided to businesses. This was a welcome development, but the ruling did not impact the ability of national authorities to introduce or exercise below-threshold call-in powers to assess the competitive effects of a deal in their jurisdiction. Indeed, there has been significant activity on that front.

Since gaining call-in powers in 2022 (prior to Illumina/GRAIL), the Italian Authority has called in ten transactions, including Nvidia/Run:ai which was then referred to the EC for review. The EC did not oppose the deal, but the parties have appealed the referral, arguing that it breached principles of institutional balance, legal certainty and proportionality. The appeal judgment – which is expected to resolve an uncertainty left by Illumina/GRAIL regarding whether the EC can accept an Article 22 referral where the referring authority was relying only on its discretionary call-in power – is eagerly awaited.

Similarly, the Danish Competition and Consumer Authority ("DCCA") has made good use of its call-in power, introduced in July 2024. The DCCA's stated expectation was that only one to two transactions would be called in each year – an expectation that was quickly met for 2025 when two below-threshold mergers (Uber/Dantaxi and OneMed/Kirstine Hardam) were called-in in just two days. The DCCA's concerns with both deals are grounded in traditional theories of harm arising from horizontal and/or vertical overlap which demonstrates the DCCA is not, despite original stated intentions, exclusively focused on preventing "killer acquisitions". Further, the Irish Competition and Consumer Protection Commission has recently exercised its call-in power for the first time in Uniphar/TouchStore, confirming its belief that the deal may affect

competition in pharmacy sectors in Ireland. The Irish government is now considering increasing the turnover thresholds for mandatory reporting which may increase below-threshold call-ins, making this a jurisdiction to watch. Many other EEA Member States either have call-in powers or are actively considering introducing them, with relevant criteria varying between jurisdictions.

Meanwhile, the UK's merger regime remains largely voluntary, but it has been the subject of significant policy and legislative change. Most relevantly, the Digital Markets Competition and Consumers Act 2024 introduced a "hybrid" test targeting these "killer acquisitions". This test operates irrespective of the familiar thresholds regarding the target's UK turnover and any supply overlap. More broadly, the UK regime retains the flexible "share of supply" test that, in practice, allows it to call-in deals that may fall below objective turnover thresholds (subject to a safe harbour). Although legislative change is expected to reduce this discretion, the UK regime undoubtedly remains more flexible than the traditional, binary tests adopted by most other jurisdictions.

Not To Mention Ex-Post Enforcement Tools

Beyond traditional merger control, regulators are increasingly deploying ex post competition enforcement tools as a parallel mechanism to scrutinise deals, even if notification was not required, building on Towercast. The CJEU in Towercast confirmed that acquisitions by dominant firms (thereby including "killer acquisitions") may be subject to scrutiny under Article 102 of the TFEU as an abuse of dominance. The obvious criticism is that such ex post enforcement might disincentivise innovation by and acquisitions of start-ups, undermining their business strategies to be bought out.

The immediate consequences of this judgment materialised through a series of investigations and, as might be expected, deals being abandoned. Less than a week after Towercast, the Belgian Competition Authority ("BCA") launched an investigation into Proximus' completed acquisition of edpnet under Article 102, prompting divestiture. In mid-2024, the French Authority ("ADLC") investigated a series of non-notifiable mergers from 2015 in the meat-cutting industry – in fact under an expanded interpretation of Towercast to include Article 101. The EC's own Article 102 investigation into Zoetis' below-threshold acquisition of a rival pipeline therapy product was launched in 2024 and is ongoing – though interestingly, this is currently the EC's only such (public) investigation.

More recently:

- The BCA investigated Dossche Mills' proposed acquisition of Ceres' artisanal bakery activities in early 2025, again applying Towercast principles by analogy to Article 101, rather than Article 102. The parties quickly abandoned the deal, highlighting the significant impact that investigations can have, regardless of formal findings. The BCA has also opened an investigation into Live Nation's below-threshold acquisition of Pukkelpop music festival under Article 102, which is ongoing and will provide further useful guidance as to how the BCA will approach its ex post review of these cases.
- The ADLC fined Doctolib in late 2025 for its 2018 acquisition of MonDocteur, finding that Doctolib was dominant, and that it intended to snuff out MonDocteur as a competitive threat. The fine was modest at €50,000, but the ADLC expressly took account of the fact that the acquisition predated Towercast, therefore the significance of the decision should not be ignored.

Clearly, ex post review offers competition authorities the benefit of hindsight and consideration of actual market developments, rather than what could be perceived as speculative forward-looking analysis in ex ante merger control. But it means firms can no longer rely on familiar threshold assessments, with careful consideration of their market positions being required.

Mind the Gap as Regulatory Approaches Vary

Most call-in powers implemented to date are subject to post-closing deadlines and maintain a turnover test, limiting the regulators' discretion and offering useful benchmarks for parties to work with. But as more jurisdictions get on board with these powers, divergence between regimes will likely increase with unwelcome consequences for planning and executing deals, even those that once seemed to bear little to no risk. For dominant firms, ex post review presents an additional concern, blurring the boundaries between merger control and behavioural enforcement.

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RECENT CASES IN ANTITRUST ENFORCEMENT BY THE ITALIAN COMPETITION AUTHORITY

Authored by: Andrea Venanzetti[1] (Director) - Italian Antitrust Authority

Introduction

Among national competition authorities in the European Union, the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato – AGCM) occupies a prominent position. This derives both from the size of the Italian internal market[2] and from the breadth and effectiveness of the Authority's enforcement powers. In the context of investigative proceedings, the AGCM enjoys extensive powers, including the ability to conduct inspections and issue requests for information backed by penalties in cases of non-compliance. Decisions adopted at the conclusion of investigations take the form of immediately enforceable cease-and-desist orders, and the Authority may impose fines of up to 10 per cent of the undertaking's turnover[3]. In addition, the AGCM exercises advisory and advocacy functions vis-à-vis the Government, the Parliament and Italian public administrations.

Article 1(4) of the Italian antitrust law (Law No. 287/1990) further provides that national competition rules must be interpreted in accordance with the principles of EU competition law. This provision has consistently ensured alignment between AGCM enforcement practice and that of the European Commission[4]. During the three-year period 2022–2024[5], the AGCM conducted 42 investigations into abuses of dominance and restrictive agreements, imposing fines in excess of €60 million, and initiated 12 Phase II merger proceedings. According to the Authority's impact analysis, carried out using a consolidated OECD methodology[6], AGCM enforcement generated consumer savings totalling approximately €9.2 billion over the period 2015–2024.

This article examines the most recent and significant antitrust cases handled by the AGCM, grouped into three main areas: the digital economy, other restrictive practices, and merger control. Reports 2022, 2023 e 2024. The 2025 Annual report is due to be published by mid-April 2026 on AGCM's website.

Digital Economy

Artificial Intelligence and Messaging Platforms

In the field of artificial intelligence (AI), the AGCM has opened proceedings against Meta for an alleged abuse of a dominant position under Article 102 TFEU, concerning the pre-installation of Meta AI within the WhatsApp application. The service allows users to interact with AI through a dedicated chat and/or a toolbar function, but this option is available exclusively for Meta's own AI service and not for competing AI chatbots. As of 15 October 2025, Meta amended the WhatsApp Business Solution Terms, with the effect that providers of chatbot or AI assistant services were prohibited from accessing the WhatsApp channel or using it to offer such services to WhatsApp users.

The proceedings are still ongoing and their final outcome cannot yet be predicted. Nonetheless, both the decision opening the investigation and the interim measures order[7] provide insight into the Authority's analytical approach to antitrust issues in AI-related markets, including market definition and the identification of a potential theory of harm. The AGCM identified two distinct relevant product markets: first, the market for consumer communication services via applications (including, inter alia, WhatsApp, Facebook Messenger, Signal, Telegram and Viber), which is distinct from social networking services offering a broader social interaction experience; and secondly, the market for AI services for general-purpose queries (commonly referred to as chatbots or AI assistants). The latter comprises services based on generative AI systems using large language models (LLMs), capable of producing new content in response to user prompts and providing a wide range of virtual assistance functions.

1 Department Director, Autorità Garante della Concorrenza e del Mercato – AGCM. The views and opinions expressed in this article are those of the author and do not necessarily reflect the views of the Authority.

2 At the end of 2024, Italy's population stood at almost 59 million; in 2024, Italy's GDP amounted to €2,192 billion (equivalent to approximately 12% of the EU's total GDP), placing Italy in 8th place among the world's largest economies.

3 Appeals against the Authority's decisions may be lodged with the administrative courts (the Regional Administrative Court at first instance and the Council of State at second instance).

4 For a description AGCM's intervention areas, including abuse of ec onomic dependence and consumer protection, see its website www.agcm.it, English version https://en.agcm.it/en/

5 Source: AGCM, Annual Reports 2022, 2023 e 2024. The 2025 Annual report is due to be published by mid-April 2026 on AGCM's website.

6 OECD "Guide for helping competition authorities assess the expected impact of their activities", April 2014.

7 Both decisions are available in AGCM's website, https://www.agcm.it/pubblicazioni/bollettino-settimanale/, on the Bullettins No. 30/2025 and No. 50/2025 respectively.

On the basis of observed market shares, the AGCM considered Meta to hold a dominant position in the market for consumer communication services via apps. As regards the theory of harm, the Authority took the view that Meta's conduct could amount to a refusal to grant access in breach of Article 102 TFEU, insofar as it excluded competing AI chatbot providers from access to WhatsApp's extensive user base. By leveraging its dominance in consumer messaging services, Meta could obtain an undue competitive advantage in the nascent market for AI chatbot services, as millions of WhatsApp users were almost instantaneously exposed to Meta AI. The conduct was therefore characterised as a form of leveraging capable of excluding competitors.

On 22 December 2025, the AGCM adopted interim measures, finding a risk of serious and irreparable harm to competitors and, indirectly, to consumers pending the final outcome of the proceedings. Meta was ordered to suspend the application of the amended contractual terms insofar as they produced effects in Italy. The compliance verification phase is ongoing. In parallel, the European Commission has opened similar proceedings for the remainder of the EU (excluding Italy) and is expected to impose interim measures. The AGCM and the Commission are cooperating closely to ensure consistency and coordination between the two investigations.

App Tracking Transparency and Digital Ecosystems

In December 2025, the AGCM concluded an investigation into an abuse of dominance by Apple relating to its App Tracking Transparency (ATT) policy, introduced in April 2021 within the iOS operating system[8]. Under the ATT framework, third-party app developers distributing apps via the App Store were required to obtain user consent for the collection and linking of data for advertising and tracking purposes through a system-imposed prompt. However, this mechanism was deemed insufficient to satisfy privacy law requirements, effectively obliging developers to duplicate consent requests. By contrast, Apple's own apps were not subject to equivalent constraints, resulting in asymmetric treatment.

The conduct concerned the market for the provision to developers of platforms for the online distribution of apps to users of the iOS operating system, a market in which Apple holds an absolute dominant position through the App Store. The AGCM found that the ATT conditions were imposed unilaterally, were detrimental to Apple's commercial partners and, based also on information obtained from the Italian Data Protection Authority, were disproportionate to the stated objective of protecting user privacy.

Given that access to user data is a key input for personalised online advertising, the duplication of consent requests significantly restricted developers' ability to collect and use such data. This adversely affected developers whose business models rely on advertising revenues, as well as advertisers and advertising intermediaries. The Authority therefore imposed a fine of €98.6 million on Apple.

Similar enforcement action was undertaken by other national competition authorities. France imposed a fine of €150 million[9]; the German authority is assessing remedial measures proposed by Apple[10]; and the Polish and Romanian authorities continue to investigate the ATT policy. Two elements of the AGCM's theory of harm are of particular interest: first, the unilateral imposition of onerous conditions within a closed digital ecosystem, resulting in significant revenue losses for third-party developers; and secondly, the competitive and economic advantages accruing to the ecosystem operator itself. The case illustrates how an analysis of a digital platform's business model can assist in identifying exclusionary effects and harm to actual or potential competition[11]. The AGCM found that, following the introduction of the ATT policy, Apple increased revenues from developer fees, as well as advertising revenues linked to its own apps, which were subject to less stringent rules.

Quantum Computing Market Study

Finally, in March 2026 the AGCM launched a market study into quantum computing (QC)[12], a sector which remains at an early stage of development. Quantum computing represents an innovative computational paradigm with the potential to transform the handling of complex problems. According to the Authority, growth in this sector is blurring traditional distinctions between hardware and software production and commercialisation. At the same time, the market features the coexistence of global technology firms—often active in cloud services—and smaller operators, typically start-ups specialising in specific technologies.

In this context, the AGCM anticipates the emergence of competition concerns already observed in AI markets, including economic, technological and knowledge-based barriers to entry, lock-in effects and technological pre-emption, against a background of sustained growth in patent activity.

Other Restrictive Practices

Recent enforcement activity in more traditional sectors can be grouped into four main categories: margin squeeze, exclusionary strategies, exclusive dealing and hub-and-spoke agreements.

Margin Squeeze in EV Charging Services

In 2025, the AGCM investigated an abuse of dominance by the Enel group in the electric vehicle (EV) charging infrastructure sector, classifiable as a margin squeeze[13]. Enel was found to hold a dominant position in the management of charging points, an essential input that is difficult to replicate. The investigation focused on Enel's vertical integration as both a charging point operator (CPO) upstream and a mobility service provider (MSP) downstream.

8 https://en.agcm.it/en/media/press-releases/2025/12/A561
9 https://www.autoritedelaconcurrence.fr/en/press-release/targeted-advertising-autorite-de-la-concurrence-imposes-fine-eu150000000-apple.
10 https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2025/12_02_2025_ATTF.html
11 On this point, see for example A. Venanzetti, "Piattaforme digitali, ecosistemi e antitrust; l'esperienza dell'AGCM", in E. A. Raffaelli (ed.), Antitrust Between EU Law and National Law – XVI Treviso Antitrust Conference, Bruylant 2025.
12 https://en.agcm.it/en/media/press-releases/2026/3/IC59
13 https://www.agcm.it/dotcmsdoc/bollettini/2025/32-25.pdf

According to the complaint, Enel set wholesale roaming prices for access to its charging infrastructure at levels that, when compared with its own retail tariffs, prevented equally efficient competing MSPs from operating profitably. The AGCM defined two vertically related markets: the upstream market for the installation and operation of publicly accessible non-motorway EV charging infrastructure (segmented by charging power below and above 100 kW), and the downstream national market for EV charging services provided to end users. Enel's dominance was supported by its extensive network, nationwide coverage and first-mover advantages. The Authority concluded that the pricing practices were exclusionary and imposed a fine of €2.3 million.

Exclusionary Strategies in Air Transport

Another 2025 case concerned Ryanair, which was found to have implemented a systematic strategy aimed at obstructing online travel agencies (OTAs)[14]. The AGCM identified an upstream market for short-haul scheduled air passenger transport services to and from Italy, in which Ryanair held a dominant position, and a downstream market for air travel intermediation services.

The conduct included technical and contractual barriers to booking Ryanair flights via agency channels, burdensome post-purchase verification procedures for agency bookings, dissemination of misleading information to passengers, and selective access to flight inventories via global distribution systems. Taken together, these practices raised rivals' costs, foreclosed downstream competition and channelled demand towards Ryanair's direct sales channels. The Authority found that agencies' sales revenues in Italy had fallen by up to 70–80 per cent and imposed a fine of €255.7 million.

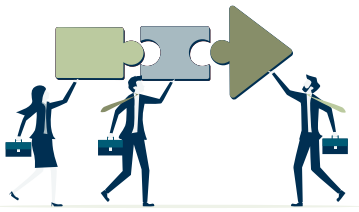
Exclusive Dealing in Bioplastics

The Novamont case illustrates a two-level system of exclusive dealing in the bioplastics and compostable shopping bags sector[15]. Novamont, which held a dominant position in the production of bio-compounds, imposed exclusivity obligations on processors and entered into exclusive supply agreements with large-scale retailers. This coordinated strategy foreclosed competitors at both the upstream and downstream levels of the supply chain.

The AGCM assessed the exclusivity system as a single exclusionary strategy and found that it restricted access to the market for competing bio-compounds, even where such alternatives complied with environmental legislation and were more cost-effective. Novamont was fined €30.3 million.

Hub-and-Spoke Coordination in Fuel Pricing

Among restrictive agreements, particular significance attaches to the case involving Eni, Esso, IP, Q8, Saras and Tamoil, concerning the exchange of sensitive information on the biofuel component of fuel prices[16]. Between 2020 and 2023, the companies coordinated increases in this price component, including through public announcements in an industry publication, thereby facilitating transparency and cartel stability. The AGCM imposed total fines of €936 million.



Merger Control

AGCM merger control practice can be analysed along three dimensions: the role of industrial policy considerations, the assessment of efficiencies and remedies, and the treatment of below-threshold concentrations.

Italian antitrust law establishes the AGCM as an independent authority, not subject to political direction. Although Article 25 allows the Government to set general principles according to which otherwise anti-competitive concentrations can be authorized for overriding national economic interests, no such criteria have ever been adopted. Merger assessments therefore remain grounded exclusively in competition analysis, in line with EU jurisprudence.

Statistics confirm that rigorous merger control has not unduly hindered consolidation. Of more than 80 mergers notified annually in 2024 and 2025, only around five per year proceeded to Phase II, all of which were cleared subject to remedies.

A notable case is the 2024 acquisition of Vodafone Italia by Swisscom, through its subsidiary Fastweb[17]. The parties claimed significant efficiencies, including network integration, economies of scale and enhanced investment capacity. Applying established EU criteria, the AGCM found that many claimed efficiencies were not merger-specific, not sufficiently substantiated or unlikely to benefit consumers directly. The transaction was therefore authorised subject to extensive remedies, including wholesale access obligations for MVNOs and internal safeguards to prevent discriminatory conduct.

With regard to below-threshold concentrations, the AGCM issued guidelines in 2024 clarifying the circumstances in which it may exercise its call-in powers18. In practice, such interventions have been limited and have largely concerned traditional sectors rather than digital start-ups. In one case (Nvidia/Run:AI), that was started through information gathered ex officio by the Authority, AGCM ultimately referred the transaction to the European Commission under Article 22 of the EU Merger Regulation.

Conclusions

"Business as usual": the AGCM's recent enforcement activity may be characterised as largely consistent with established antitrust principles. Traditional categories of restrictive conduct continue to feature prominently, and merger control assessments remain firmly rooted in competitive effects analysis. At the same time, in digital markets the Authority has demonstrated an ability to adapt conventional antitrust concepts to novel technological contexts. Overall, the AGCM has combined doctrinal continuity with pragmatic flexibility, including through the acceptance of commitments and the imposition of targeted remedies, while repeatedly reaffirming the central role of effective competition in promoting economic growth.

14 https://en.agcm.it/en/media/press-releases/2025/12/A568
15 https://en.agcm.it/en/media/press-releases/2025/6/A573-
16 https://en.agcm.it/en/media/press-releases/2025/9/I864
17 C12659 – Swisscom Italia/Vodafone Italia, https://www.agcm.it/dotcmsdoc/bollettini/2024/49-24.pdf

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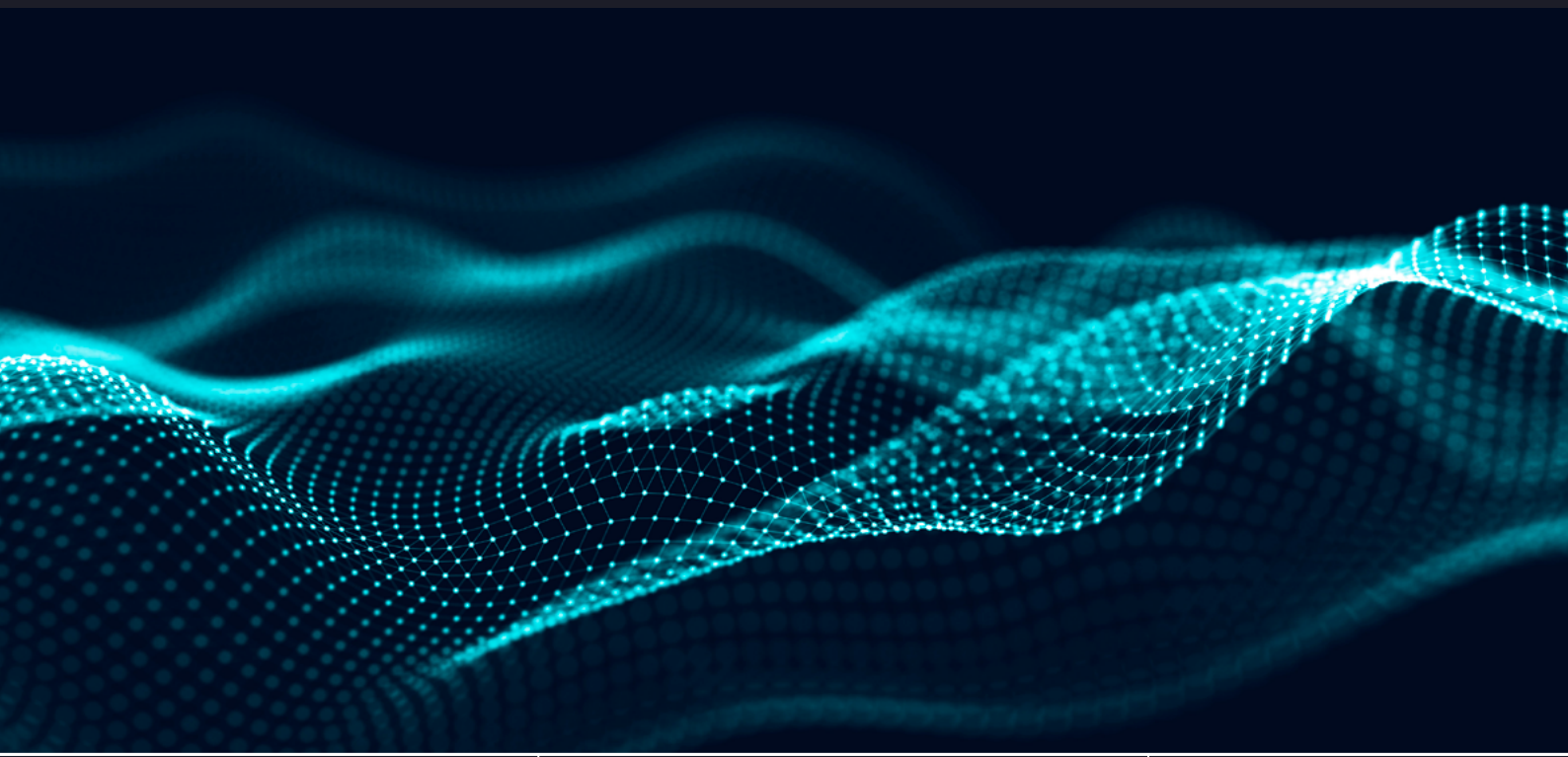

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NEW MILESTONES AND IMPORTANT JUDGMENTS

UK COMPETITION LITIGATION IN 2025 AND 2026

Authored by: Jon Adlard (Executive Director), Fraser Davison (Director), Robert Bowdery (Senior Principal), Mike Naylor-Smith, (Senior Principal), Rachel Keyserlingk (Senior Principal) & Sam Law (Senior Principal) - Frontier Economics

2025 was another busy year in the UK competition litigation arena, marked by a succession of significant milestones, trials, and judgments. In this article, we explore some of the main themes from 2025 and look ahead to the rest of 2026, including:

- Hitting the ten-year mark for the collective actions regime.
- The growing jurisprudence on key economic issues.
- The Competition Appeal Tribunal's new practice direction on expert evidence.
- The review of the collective actions regime by the Department of Business and Trade ('DBT').

Ten Years of the Collectives Regime

Figure 1 below illustrates that, since 2015, slightly more than 60 cases were registered with the Competition Appeal Tribunal ('the Tribunal') under the collective actions regime, around half of which have now been certified. These cases relate to a range of alleged infringing conduct across different sectors, several of which have been brought on a standalone basis rather than 'following-on' from an infringement decision.

Figure 1: Evolution of Collective Proceedings Cases Registered with the Tribunal

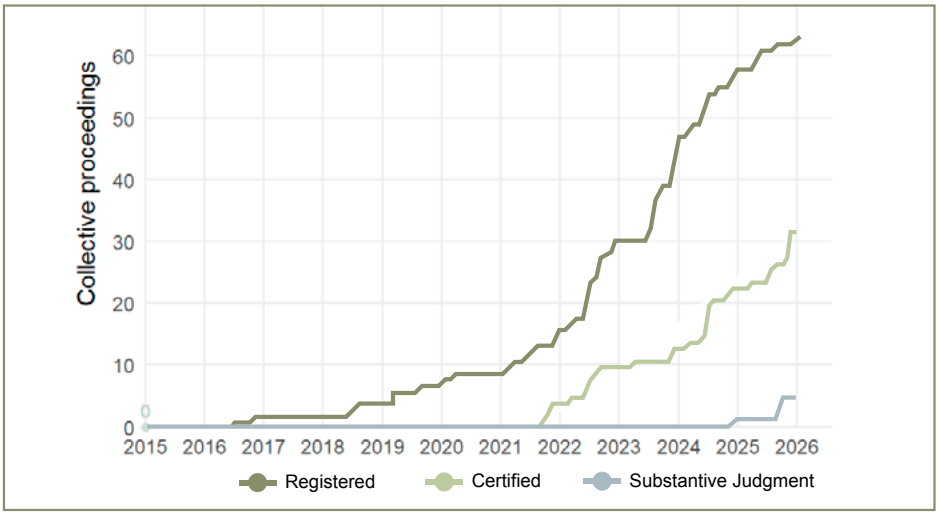


Figure 1 masks an important trend that has emerged in the collective actions landscape: many claims stem from the same alleged underlying conduct, whether through multiple actions against different defendants, cases brought at different levels of the supply chain, or overlapping claims that have triggered carriage disputes. Taken together, these affect around half of the cases in Figure 1.

Figure 1 also shows that most of the cases have been filed since 2020, following the Supreme Court's judgment in Merricks v Mastercard in which it provided clarification on how the Tribunal should approach certification.

The number of new cases registered before the Tribunal has fallen in more recent years – for example, almost 20 cases were registered in 2023 and 11 in 2024, whereas five were registered in 2025.

As shown in both Figure 1 and Figure 2 below, few collective actions have reached substantive judgment or settlement as of the end of 2025. However, activity on this front has increased over the past two years as the frontrunner cases have approached trial and the first substantive judgments and collective settlement approval orders have been handed down.

Figure 2: Status of Collective Proceedings Cases Registered with the Tribunal

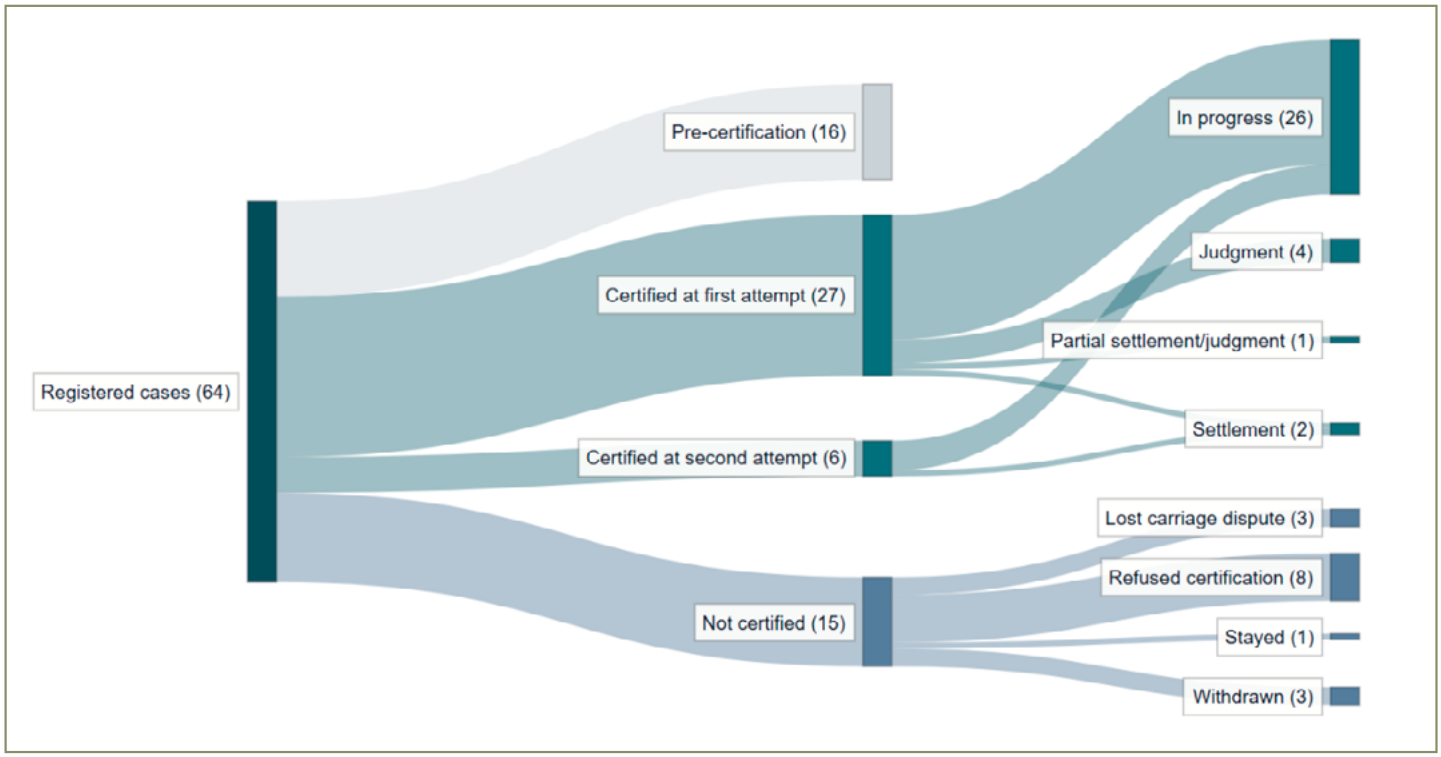


Figure 2 also shows the diversity in how collective actions have progressed. For example:

- Many cases have yet to reach the certification stage – of the cases registered since the start of the regime, 15 remain at the pre-certification stage.
- Certification is not a foregone conclusion – 15 claims were not certified for various reasons, including eight that were refused certification (although this figure includes the six Water cases which were heard together).

All of this suggests that we are still very much in the learning phase of the collective actions regime, with plenty of activity to come in 2026 and beyond. This includes new cases that have recently been announced, trials scheduled in 2026 in ongoing cases, and substantive judgments in cases which have already reached trial. Figure 2 may therefore look very different at the end of 2026.

The Growing Jurisprudence on Key Economic Issues

In 2025 there were several important judgments which have added to the growing jurisprudence on key economic issues in competition litigation. We expect judgments in 2026 to add to this further.

- Excessive pricing cases in the spotlight. In 2025 the Tribunal handed down its judgment in Kent v Apple and Le Patourel v BT concluded after the Court of Appeal refused to grant the class representative permission to appeal the Tribunal's 2024 judgment. These two cases offer guidance on how the Tribunal is likely to approach the United Brands test for assessing whether a firm has abused its dominant position through the charging of prices that are excessive and unfair.
- Further learnings on the Tribunal's approach to assessing pass-on. Several judgments handed down by the Tribunal during 2025 considered the issue of pass-on of a potential overcharge – Stellantis v Autoliv, Spottiswoode / London Array v Nexans and Kent v Apple. While these rulings underscore that any assessment of pass-on is necessarily case-specific, they also suggest that the Tribunal is likely to be cautious about making broad inferences based solely on a single and definitive source of evidence and that the 'broad axe' may play an important role in determining the Tribunal's findings. The Tribunal's recent judgment in the Umbrella Interchange cases also provides guidance on the relative roles of factual and economic evidence in the assessment of pass-on.
- The value of different economic analyses in the toolbox for assessing overcharge. London Array v Nexans and Stellantis v Autoliv add to the growing number of cases where a UK court has considered detailed economic evidence on overcharge. These judgments highlight that econometric evidence may not always be the most appropriate method for assessing overcharge, and that the Tribunal will scrutinise the probative value of such evidence closely.
- Clarifying the limits to the duties of dominant undertakings. Finally, the Tribunal's judgment in Gutmann v Train Operators clarified that the responsibility of dominant firms does not extend to a requirement to 'promote or advertise a product that will benefit some of its customers so as to increase their awareness of that product'. This is likely to set an important precedent going forwards for the legal test in certain abuse of dominance cases.

New Practice Direction on Expert Evidence

Judgments from the Tribunal in recent years have expressed frustration regarding the volume of expert evidence, the breadth of issues covered by experts and the perception that at times experts have not acted in accordance with their duties to the court. The new Practice Direction on expert evidence sets out principles that are relevant to these issues, with an emphasis on expert independence and directing experts to focus on key issues to assist the Tribunal.

On expert independence, the Practice Direction emphasises the importance of an expert's duty to provide objective and unbiased evidence before the Tribunal. This includes calling for the early disclosure of experts' prior work for their client or related to the case at hand, and setting an expectation that experts should be able to justify their methodological choices and consider how their results and conclusions might change under alternative approaches.

In relation to the experts assisting the Tribunal, the Practice Direction highlights multiple techniques that the Tribunal may use to narrow the scope of the issues addressed by the experts and/or to manage the volume of evidence that they produce. These include early engagement between the parties, a tightly managed approach to disclosure, and page limits for all expert reports.

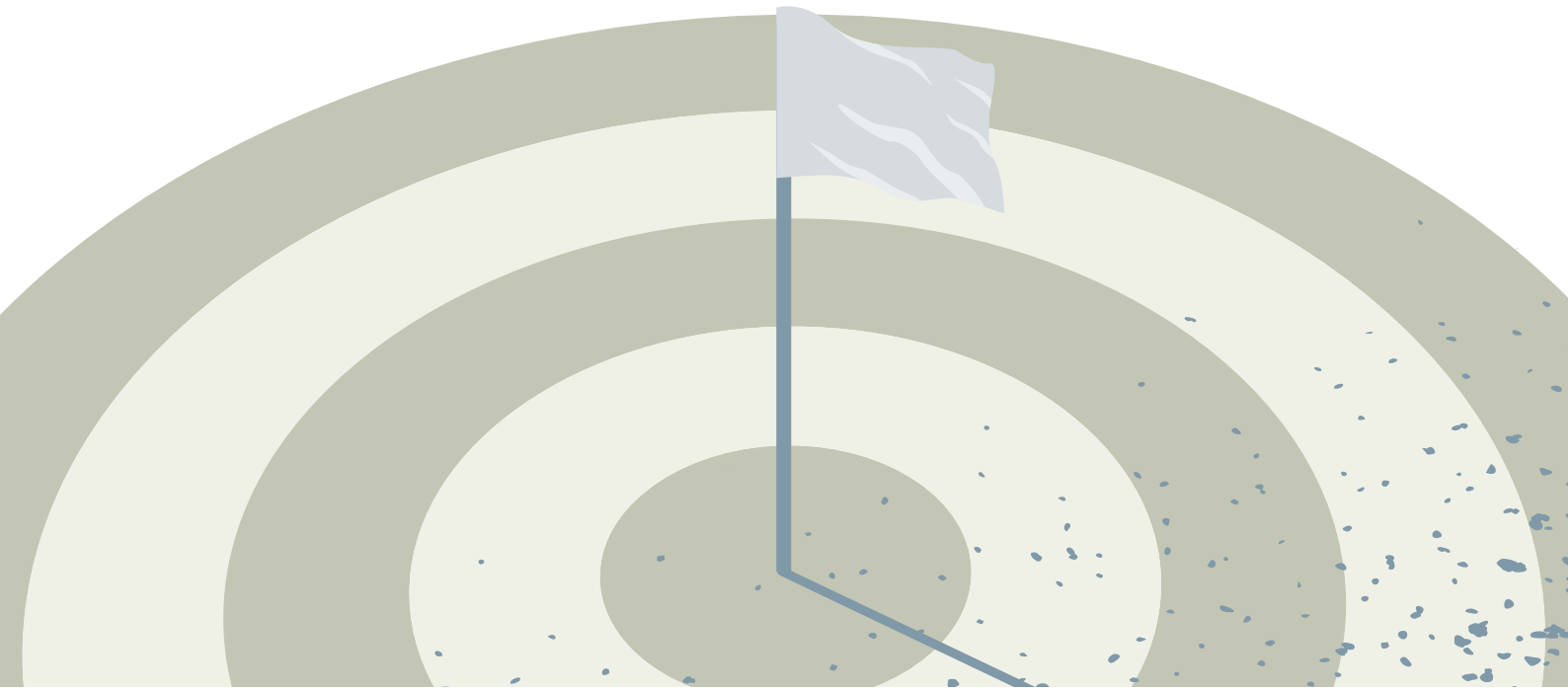
We expect 2026 to provide further clarity on how the principles set out in the Practice Direction will play out in practice, both in terms of how the Tribunal will apply them and how experts will respond to the guidance provided in the Practice Direction. For example, it will be interesting to see how the Tribunal will seek to strike the balance between its desire to receive more focused expert evidence, with the risk that this results in expert evidence that does not consider, in sufficient depth, the issues that the Tribunal considers to be most relevant at trial.

DBT Review – Shaping the Next Decade?

The DBT's call for evidence announced in August 2025 on how effectively the collective actions regime is functioning led to a flurry of responses. Based on those that were made publicly available, the call for evidence has triggered lively debates – including around:

- Whether it is possible to assess meaningfully the functioning of the regime now, given its relative infancy and the small number of cases reaching resolution.
- The extent to which the scope of the regime should be expanded beyond competition law to areas such as consumer law, data protection and environmental law, or alternatively restricted to exclude standalone abuse of dominance cases and indirect claims.
- The significant costs and uncertainties inherent in collective proceedings, and whether these can be reduced.

The DBT is currently reviewing the responses to consider what, if any, reforms to put forward. Any proposals that emerge over the coming year are likely to play an important part in shaping the next chapter of the collective actions regime.



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1629/7/7/23 - PROFESSOR CAROLYN ROBERTS V (1) YORKSHIRE WATER SERVICES LIMITED AND (2) KELDA HOLDINGS LIMITED

1628/7/7/23 - PROFESSOR CAROLYN ROBERTS V (1) UNITED UTILITIES WATER LIMITED AND (2) UNITED UTILITIES GROUP PLC

1603/7/7/23 - PROFESSOR CAROLYN ROBERTS V SEVERN TRENT WATER LIMITED AND SEVERN TRENT PLC

1601/7/7/23 - DR SEAN ENNIS V APPLE INC. AND OTHERS

1599/7/7/23 - DOUG TAYLOR V BLACK HORSE LIMITED AND OTHERS

1595/7/7/23 - ROBERT HAMMOND V AMAZON.COM INC. AND OTHERS

1582/7/7/23 - CHARLES ARTHUR V ALPHABET INC. & OTHERS

1572/7/7/22 - MR CLAUDIO POLLACK V ALPHABET INC., GOOGLE LLC, AND OTHERS

1527/7/7/22 - ALEX NEILL CLASS REPRESENTATIVE LIMITED V. SONY INTERACTIVE ENTERTAINMENT EUROPE LIMITED AND OTHERS

1523/7/7/22 - BSV CLAIMS LIMITED V. BITTYLICIOUS LIMITED AND OTHERS

1468/7/7/22 - MR. JUSTIN GUTMANN V. APPLE INC., APPLE DISTRIBUTION INTERNATIONAL LIMITED, AND APPLE RETAIL UK LIMITED

1443/7/7/22 - COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED ("CICC I") V. VISA INC. AND OTHERS

1433/7/7/22 - DR LIZA LOVDAHL GORMSEN V. META PLATFORMS INC., META PLATFORMS IRELAND LIMITED AND FACEBOOK UK LIMITED

1336/7/7/19 - MR PHILLIP EVANS V BARCLAY BANK PLC AND OTHERS

60 SECONDS WITH...

AJMAL CHOUDRY

SR. PROJECT MANAGER

ANGEION GROUP INTERNATIONAL

Q What aspect of your practice area do you find most rewarding?

A Probably seeing everything come together at the end of a complex matter. A lot of what we do involves moving parts, different stakeholders, and tight timelines, so when it all lands and delivers a real outcome, that's the most satisfying part.

Q What is the best film of all time?

A Shawshank Redemption, It's a masterclass in patience and long-term thinking. Sometimes the quiet, consistent approach beats everything else.

Q Where has been your favourite holiday destination and why?

A Hawaii. It's one of the few places that genuinely feels like you have switched off from everything, incredible scenery, laid-back atmosphere, and just a completely different pace of life.

Q What songs are included on the soundtrack to your life?

A A mix of UK rap, R&B, and a few tracks that get you locked in when it matters. Drake's started from the bottom definitely resonates with me along with 50 Cent's Many Men.

Q What personality trait do you most attribute to your success?

A Decisive, I have learned that not every decision will be perfect, but making the right call at the right time is often more important than waiting for perfect information. That mindset has helped me deliver consistently and keep on track with deliverables.

Q What is the one thing you could not live without?

A My Family, everything I do ultimately comes back to them, they keep me grounded and give me perspective.

Q What would you be doing if you weren't in this profession?

A If I had the level of ability to make it professionally, I would definitely have pursued a career as a footballer or cricketer.

Q What's a fun fact about you most colleagues wouldn't guess?

A I have swum with whale sharks, easily one of the most surreal experiences I have had.

Q If you could have dinner with any historical legal figure, who would you choose?

A Muhammad Ali Jinnah — for his clarity of thought, discipline, and decisiveness. "With faith, discipline and selfless devotion to duty, there is nothing worthwhile that you cannot achieve."

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THE ALIGNMENT IMPERATIVE

COLLABORATION IN COLLECTIVE COMPETITION CLAIMS

Authored by: Jade Tess Weiner (Vice President of Business Development) - Angeion Group International

The UK's opt-out collective actions regime is shifting. On 2 June 2025, the Civil Justice Council (CJC) published its Final Report on Litigation Funding, containing 58 recommendations addressing the future regulatory framework for third-party funding in England and Wales. The CJC's report was followed in August 2025 by the Department for Business and Trade (DBT) launching a call for submissions on the opt-out regime itself, the first formal review since the Consumer Rights Act 2015 introduced it. The DBT acknowledged the CJC findings but noted that the unique relationship between funders, class representatives and class members in opt-out proceedings may require a bespoke policy response. A broader consultation on competition regime reform followed in January 2026, with DBT confirming a separate consultation specifically on the opt-out regime to follow in the coming months.

At the heart of any policy consideration lies the various interests of the multiple stakeholders involved in the collective action regime. For example, the Government requests the regime to deliver genuine consumer redress without encouraging speculative litigation while maintaining the independence of the Competition and Markets Authority (CMA). Following the Supreme Court's ruling in PACCAR, funders require regulatory certainty on matters such as permitted returns and funding models. Claimant practitioners want regime's principles preserved but innovation refined. Defendants and their lawyers want clearer certification criteria and assurance to be protected from disproportionate exposure. Class Representatives need certainty as to their roles, permissible rates, and liability and indemnity limits.

While much of the policy debate has focused on these interests, there remains little coordinated effort to bring stakeholders together and foster alignment across the ecosystem. Collaboration is a practical precondition for delivering access to justice at scale and a critical determinant of whether consumers ultimately receive meaningful redress, as illustrated at the distribution stage.

A System Built on Interdependence

Collective competition claims depend on an ecosystem working in concert. Law firms lead legal strategy and court representation. Litigation funders set commercial parameters and timelines. Class representatives spearhead the class and are accountable to it. Consumer rights organisations raise awareness and advocate for access. Regulators, including the CMA, establish frameworks within which claims develop. Claims administration translate settlement terms into operational reality at scale, handling aggregation, notice, verification, payment and audit. Specialist consultants and economists help model and discern quantum and damages awards.

Each player brings a capability the others often lack. None can deliver meaningful outcomes working alone. The problem is that the natural logic of litigation pulls these actors towards sequential engagement rather than genuine collaboration. Legal teams focus on certification. Funders focus on returns. Administration experts are typically brought in late, once the structure of a settlement has already been fixed. Consumer organisations may be consulted on communications but rarely on process design.

Professor Jonathan Trevor identifies the core challenge: most practitioners understand that their strategy, capabilities and systems should be aligned, but in practice focus on their own domain to the exclusion of how all the parts fit together. The enterprise, Trevor argues, functions as a value chain, only as strong as its weakest link.

This framework maps directly onto collective claims. A legally sound settlement means nothing if the distribution process cannot reach the people it is intended to serve. A well-funded case produces a poor outcome if claimant communications were designed without input from organisations that have genuine relationships with the affected class. The weakest link determines the result.

What Misalignment Costs in Practice: The Distribution Example

The Gutmann v First MTR South Western Trains litigation illustrates this trajectory. In May 2024, the Tribunal approved a collective settlement of up to £25 million with Stagecoach South Western Trains.

By the time the claims window closed, class members had claimed approximately £200,000, less than 1% of the settlement pot. The CAT described the take-up as "very low" and, concerned about the prospect of lawyers and funders being the primary beneficiaries of the settlement, encouraged the parties to donate £4 million of the undistributed funds to The Access to Justice Foundation.

The Tribunal's own settlement approval judgment pointed to the root cause. At the approval hearing, the CAT stated it would have been preferable had the parties conducted proper research into anticipated take-up rates

"based on seeking feedback from actual or potential class members"

before finalising the distribution plan. That research did not happen because distribution planning was treated as a downstream exercise rather than a central design question requiring input from all stakeholders from the outset.

This is the direct consequence of sequential rather than integrated working. The legal architecture of the settlement was sound. The operational reality of reaching 1.4 million rail passengers (many of whom had no awareness of collective proceedings and received unexpected correspondence about money they did not know they were owed) was not adequately tested until it was too late to redesign the process.

Alignment as a Design Principle in Distributions

Trevor's research draws a distinction that is useful in our context. Strategic alignment is not about everyone agreeing. It is about the deliberate arrangement of purpose, capabilities and processes so that they work towards the same outcome. In the collective claims context, that means funders, legal teams, class representatives and administrators collaborating on distribution design at, or shortly after, certification, not weeks before a settlement approval application. The parties responsible for reaching claimants and those responsible for paying them should be working from shared assumptions about what is achievable.

In good practice, there is a clear corollary between early engagement and distribution efficacy. When funders understand the operational constraints on distribution timelines, their commercial expectations are calibrated accordingly. When legal teams understand which verification requirements will reduce take-up, they can negotiate settlement terms that do not inadvertently exclude the very people the claim was brought to help. When class representatives are connected to the communities they represent, they can test whether a proposed process will work for those people in practice, not just on paper.

The CAT itself has begun to signal this expectation explicitly. Guidance from the Gutmann settlement approval indicates that future applicants are likely to need to provide evidence on anticipated take-up from the outset. The forthcoming DBT consultation is expected to address certification criteria, funding and costs, and settlement incentives. Each of these reforms, if implemented, will require closer and earlier coordination between stakeholders than the current practice typically delivers.

Keeping Claimants at the Centre

When the people the opt-out regime exists to serve have not chosen to engage with the process, this makes collaboration even more necessary. Often, they are members of a class by operation of law, often unaware of proceedings conducted in their name, often skeptical of unexpected correspondence asking them to claim money they did not know they were owed.

Reaching those people requires a combination of legal authority, operational infrastructure, trusted community relationships and clear, accessible communication. Law firms and administration experts can provide the first two. Consumer organisations and class representatives provide the third and fourth, but only if they are genuinely integrated into the process rather than consulted at the margins.

The Broader Case

The CJC report, the DBT call for evidence and the forthcoming consultation on the opt-out regime collectively represent significant moments of scrutiny the regime has faced since its introduction. The resulting reforms will reshape funding structures, certification processes and settlement approval requirements. They will not, on their own, change how the people operating within the system choose to work together.

The cases that deliver genuine access to justice will be those where funders, lawyers, administrators and consumer advocates treat alignment as a shared design requirement, not a secondary consideration once the legal strategy is settled. The regime already has the architecture it needs. The question is whether the ecosystem that operates within it will rise to meet the moment.

Justice must not only be done but must be seen and felt to be done. Opt-out collective proceedings make that possible at scale. Collaboration is what makes it real.

Sousa Ferro

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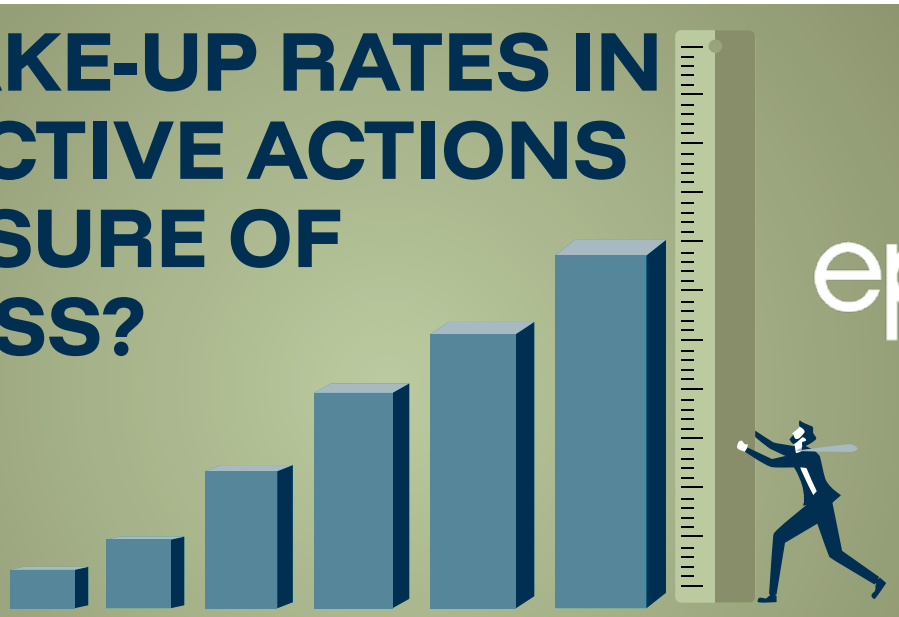
ARE TAKE-UP RATES IN COLLECTIVE ACTIONS A MEASURE OF SUCCESS?



Corporate Partner

WHY PARTICIPATION MATTERS AND WHY IT DOESN'T TELL THE WHOLE STORY

Authored by: Clare Ducksbury (Senior Vice President) - Epiq Class Action Solutions Europe

Discussion has intensified concerning take-up rates within the UK's collective actions regime in the past quarter, including in judicial comments, policy consultations, media coverage, and industry debate.

The Competition Appeal Tribunal (CAT) has signalled that engagement levels in distributions may be a central indicator of the regime's efficacy, and both the Department for Business and Trade (DBT) and the Civil Justice Council (CJC) have sought views on the appropriate role of take-up in assessing success. These developments have pushed to the fore questions of what take-up measures, how it should be interpreted, and its suitability as a primary benchmark.

Take-up rates matter, but they cannot be stretched beyond their purpose to be the sole indicator of success. The UK regime is in its infancy, and expectations must be calibrated accordingly. Overinterpreting outlier results or early data risks distorting the strategic environment for years to come.

Defining the Measure: Number of Class Members or Proportion of the Fund?

Proper evaluation of take-up rates begins with clarifying the term, particularly whether it refers to how many individuals or businesses submit a claim, or the percentage of the available settlement fund ultimately paid out. These are not interchangeable and can diverge sharply, particularly in hybrid classes with both consumers and businesses.

Consider a £100 million settlement fund in which half is allocated to consumers and half is allocated to businesses, with 10 million consumers and 50 businesses. If no consumers submit claims but every business does, £50 million – 50% of the fund – will be distributed, viz., to 50 class members, but with less than one ten-thousandth of more than 10 million eligible class members engaged, a ratio of one per 200,000. Both statements are correct, but neither clarifies whether the process has achieved its objectives.

Regime-Level Success and Case-Level Success are Distinct

A similar issue arises when evaluating the success of the opt-out regime as a whole versus that of a particular case. These two assessments are not interchangeable.

In a narrow business-only class, where each class member is identifiable and experienced in formal processes, high engagement and rapid verification may constitute success. In a mass consumer case, entirely different dynamics are at work. Millions of people need to be located, contacted, reassured the distribution is legitimate, and then motivated to participate.

Expecting identical take-up percentages across such different case types ignores the realities of outreach, behaviour, and scale.

Low participation levels in the first UK distribution program, Boundary Fares, have understandably generated significant attention and debate, but they are not a reliable long-term indicator. The process in the UK is in its infancy and will evolve as awareness grows, class member education improves, and outreach methodologies become more sophisticated.

Relatedly, public understanding of the CAT, the legitimacy of the regime, and the credibility of court-approved communications remain limited. Structured education, not only for the public but also for government bodies and other institutional stakeholders, remains necessary to help build long-term trust.

What International Experience Shows

International comparisons must be interpreted with care. The US Federal Trade Commission's (FTC) September 2019 analysis of 149 consumer class action settlements found low consumer take-up rates. The median claims rate was 9% and the weighted mean, by notice recipients, was 4%. Canada and Australia, both with mature class action systems, display similar figures.

With the CAT suggesting such numbers are inadequate for the UK, the pressure to innovate is on, accompanied by an opportunity to develop more effective and holistic approaches to class member engagement.

The UK benefits from the Competition Appeal Tribunal's demonstrated willingness to accommodate developing collective proceedings mechanisms, particularly in relation to case management, funding, and distribution.

Drivers and Barriers to Participation

Assessing take-up requires understanding class member behaviour. Financial motivation is relevant but not determinative. Perceptions of value are highly subjective. For example, does an individual feel £45 is enough to participate?

Emotional factors can increase engagement, such as anger about misconduct affecting personal data or the feelings toward a trusted brand, though positive feelings toward a brand may suppress engagement. Media coverage is another factor.

Beyond variations in motivations and emotions, the structural distance between class members and the claim also matters. Individuals in opt-out cases who are included automatically at the outset may have no awareness of the proceedings until distribution is proposed years later.

In the interim, the underlying conduct can fade from memory, particularly where the harm was diffuse, low- level, or embedded in everyday transactions, and people may struggle to recognise their eligibility or to connect formal notices with a real and relevant experience.

There is a second, equally material barrier: heightened public vigilance against scams and unfamiliar requests for personal information. The UK's efforts to educate consumers to be cautious of unexpected communications, unsolicited messages about money, or engaging with unfamiliar organisations are the very behaviours impacting engagement. Overcoming that requires legitimacy in addition to complying with notification guidelines.

Clearer institutional signalling is needed, such as a government-backed payment regime portal as a trusted interface for class members, with active distributions listed on an official CAT-hosted platform. Whether those would boost engagement is unclear, but certainly enhanced transparency and official endorsement would assist greatly.

Business classes behave very differently, being more experienced in managing formal claims, often having larger claims at stake, and are typically amenable to engagement via professional networks such as LinkedIn, and organisations such as the British Chambers of Commerce and the Federation of Small Businesses.

Myths that Need to be Retired

Several misconceptions continue to shape industry debate.

- **Early cases set the standard for long-term performance.** They do not and are not determinative of what a still-developing regime can ultimately achieve.
- **Low take-up means the regime is failing.** Take-up is but one indicator of effectiveness, along with behavioural change by defendants, removal of gains from alleged misconduct, and broader policy impact, as well as the incredibly important work being undertaken by the Access to Justice Foundation (ATJF) in the utilisation of undistributed funds.
- **The UK has limited scope to innovate.** Alignment between stakeholders and the judiciary's openness to innovation creates opportunities to improve class member engagement. That said, the sector may need to revisit assumptions around reversion.

The prospect of undistributed damages reverting to the defendant can operate as a disincentive to invest heavily in engagement and distribution efforts. But reversion can incentivise settlements or influence the settlement calculus.

Other approaches, such as redistribution of remainder funds to the class or their use to support further redress, establish a virtuous cycle by strengthening incentives to maximise participation and reinforcing the legitimacy of collective proceedings.

Whilst the procedural burden for ensuring good distribution outcomes rests largely on class representatives and their claims administrators, there is an important role for all corners of the collective action ecosystem to play in driving class member engagement in collective actions.

Now is the optimal opportunity to mobilise that incentive, when the regime is on the cusp of some significant distributions.

Looking Ahead

A holistic and tailored framework is essential for improving participation. Some classes benefit from personalised engagement, while others require clearer education, guidance, or trust-building outreach to overcome scepticism.

Participation outcomes may also be improved by ringfencing a dedicated distribution budget from the outset, supported by early collaborative planning to reduce uncertainty and ensure aligned, consistent messaging throughout the process.

Take-up rates matter, but they are part of a wider picture. If the industry grounds its expectations in context and avoids premature standardisation, the UK can develop a regime that is credible, accessible, and effective.

Progress will come from measured evolution, shared understanding, and thoughtful innovation.

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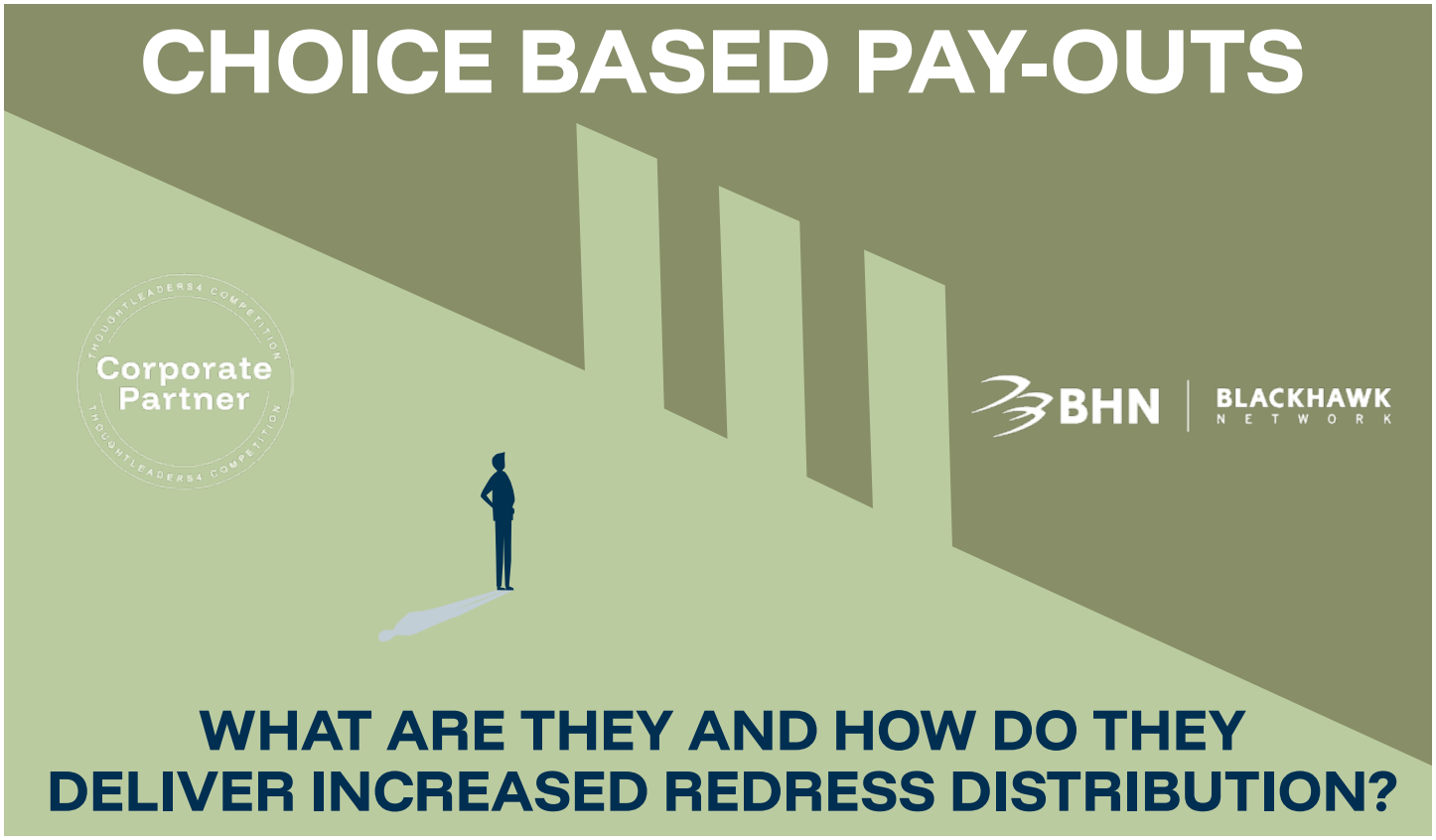


WHAT ARE THEY AND HOW DO THEY DELIVER INCREASED REDRESS DISTRIBUTION?

Authored by: Chris Ford (Senior Director) - Black Hawk Network

The Collective Redress regime, in the UK and across Europe, has gathered significant momentum over the past decade and now has multiple opportunities to make good on the promise that when business is found to have done wrong, claimants will receive the damages they are entitled to.

We have now entered the exciting phase of distribution planning and processing on some notable cases such as Merricks v's Mastercard, Kent v's Apple and McLaren v MOL. Alongside these actions there are a number of later stage cases that are linked to data breaches, car emissions, car financing, price fixing and overcharging to name but a few.

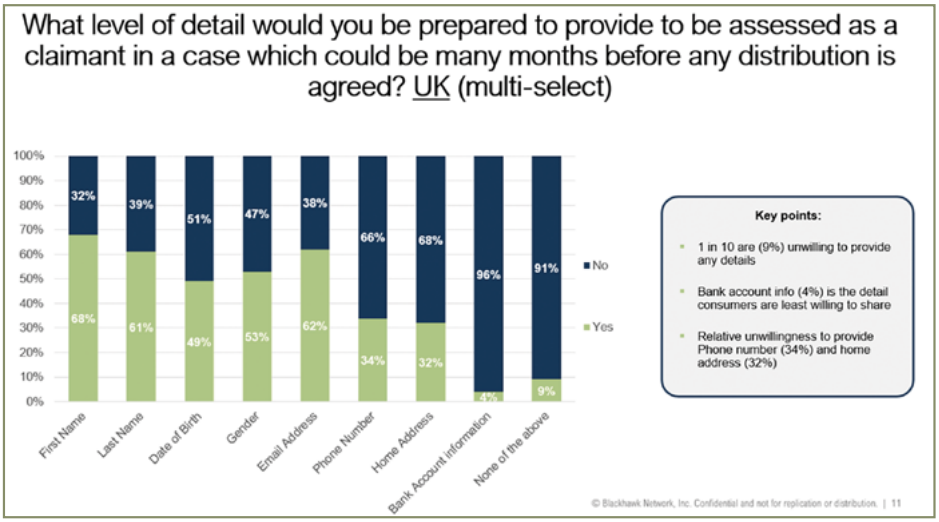
The UK's Competition Appeal Tribunal (CAT) continue to highlight the need for class representatives to consider innovative and creative methods of distribution. The Tribunal has also stressed the need for a detailed distribution plan at the certification stage to enable a proper assessment of the costs/benefit analysis. It's no longer OK to push for certification of a case without being clear about how payouts will be delivered to claimants and in what quantity, ensuring that the collective proceedings offer a real prospect of benefit to the class members.

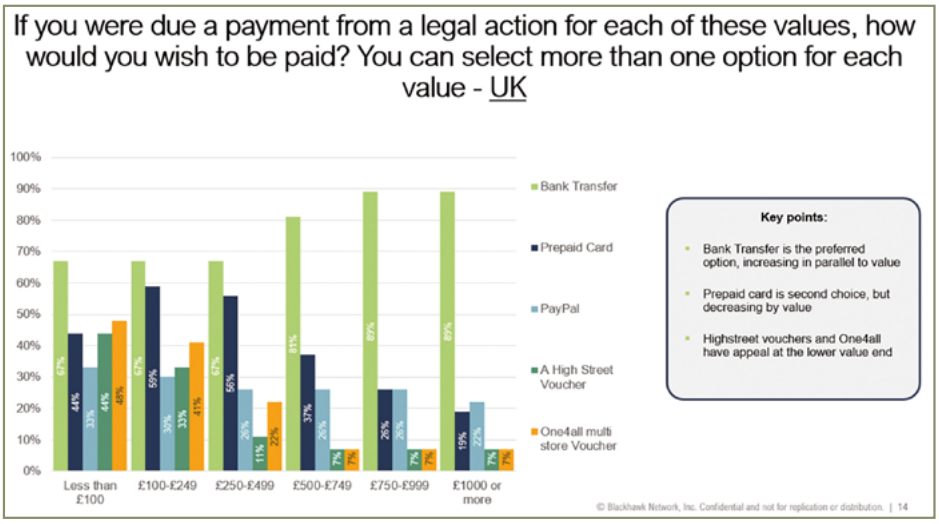
At BHN, we have spent years perfecting the payout options available to consumers across the globe and are responsible for the distribution of damages to millions of claimants on an annual basis. Having been party to UK distribution planning discussions, it feels appropriate timing to explain what is meant by Choice Based Payouts, and how, by allowing a claimant to choose how they receive their damages, we see increases in redress distribution.

Let's start with the "What".

Making a payment i.e. paying a friend or family member is very different from receiving a payout from a business or in this case a Legal Settlement or Class Action.

You will remember the BHN survey from Issue 12 82663_Competition_Magazine_Issue_12v9_lr.pdf where we asked 1,000+ UK consumers a range of questions relating to their understanding and interest in Class Actions. The data defines what a claimant would be prepared to share to receive their damages and how they would prefer to receive a payout based on the value of redress.





As you can see, getting claimants to provide sensitive banking data is a challenge, but many want this option to be available to them. So, the regime has a quandary. How to maximise distribution when claimants are reluctant to provide sensitive data, and particularly banking data?

A second BHN survey completed in March 2026, with 2,274 UK respondents, supported the concept that a "gift" card is perceived as an acceptable payment type:

- 36% of people feel that gift cards are a good form of compensation to resolve an issue or problem
- 32% feel that gift cards are a good form of payment to cover the cost to replace a broken product.
- 37% say that they have received a payment or money back from a merchant or company based on a rebate, a refund, class action settlement or a utility refund.

Across Europe, based on a representative sample of 15,815, 61% say that they would be either 'somewhat' or 'very' excited to receive a payout from a company on a gift card.

Most people are familiar with the most popular payout choices in the UK:

Prepaid Card

- Often delivered virtually (but can be a physical card)
- Allows the claimant to spend anywhere Mastercard is accepted
- Requires first name, last name, email address and ideally a mobile phone number
- No banking data required

Voucher – Select

- Allows the claimant to choose a voucher that suits their needs
- The voucher choices are curated to fit the case i.e. gaming content, supermarket content, technology content, clothing content, food and drink, travel etc.
- Delivery is typically via a digital voucher allowing the recipient to spend immediately
- Requires first name, last name, email address or mobile phone number (SMS delivery)
- No banking data required

Multi-store gift card – One4all

- A single voucher that allows the claimant to spend at hundreds of outlets across the UK
- Typically delivered digitally but can be a physical card
- Requires first name, last name, email address or mobile phone number (SMS delivery)
- No banking data required

Bank Transfer

- A claimant can elect to place the damages directly into their bank account
- Typically delivered through the Faster Payments network
- Requires first name, last name, bank name, sort code, bank account number, email address

PayPal

- Allows the claimant to place the funds into their PayPal account
- Requires first name, last name and email address or mobile phone number
- No banking data required

So, that's the "what" now let's talk a little more about the "why".

Consumers state that they believe businesses should face legal proceedings that lead to financial redress for claimants. What of course they also point out is that they do not wish to share sensitive data, specifically banking data, to receive their pay-out.

BHN have spoken at length about providing "Payout Choice" to counter the consumer concerns around being a claimant in a case where the sharing of sensitive personal data happens in advance of payouts being made, often leading to claimants dropping out of proceedings due to concerns over potential fraud. In addition, some claimants will be unbanked or under banked meaning that a bank transfer is not valued or viable for them.

So, the "why" is obvious, provide the claimant with payout choice when the damages are due to be distributed, allowing them to decide what channel they receive their damages through. Providing "Payout Choice" is now the generally accepted best practise approach to distributing damages across the globe.

No longer does a claimant need to provide sensitive payment information at the beginning of their claim journey, instead they provide simply what is needed to validate their claim (often just contact data and evidence of involvement with the case). Once validated as a claimant, and the relevant funds are available, they can then be issued with a payment token that allows them to choose how they wish to be paid, at the point the funds are due to be sent.

This approach significantly reduces the reluctance to be part of the case by a claimant and allows the appropriate time for consumers to gain trust in the case itself.

The BHN consumer survey shows that "Payout Choice", that provides alternative payout options, gain strong traction when the damages payment is below £500. Furthermore, the concept of choosing how you wish to receive the payout, at the point payment is due, gathers strong acceptance across all respondent groups.

At BHN, we have distributed millions in payouts on a global scale and continue to lead the market in obtaining the highest claim rates across the industry. Once we have the claimant data (first name, last name, mobile number, email address) and are provided with the relevant funds, which we hold in safeguarded accounts, we issue 100% of the value at a fraction of traditional processing costs based on the Payout Choice the claimant makes.

We all play a role in delivering the promise of the Collective Proceedings regime, and we look forward to the ongoing collaboration.

For more information please visit Appeasement and settlement administration made simple | BHN or get in-touch with chris.ford@bhn.com who would be delighted to walk you through the full BHN payout options.

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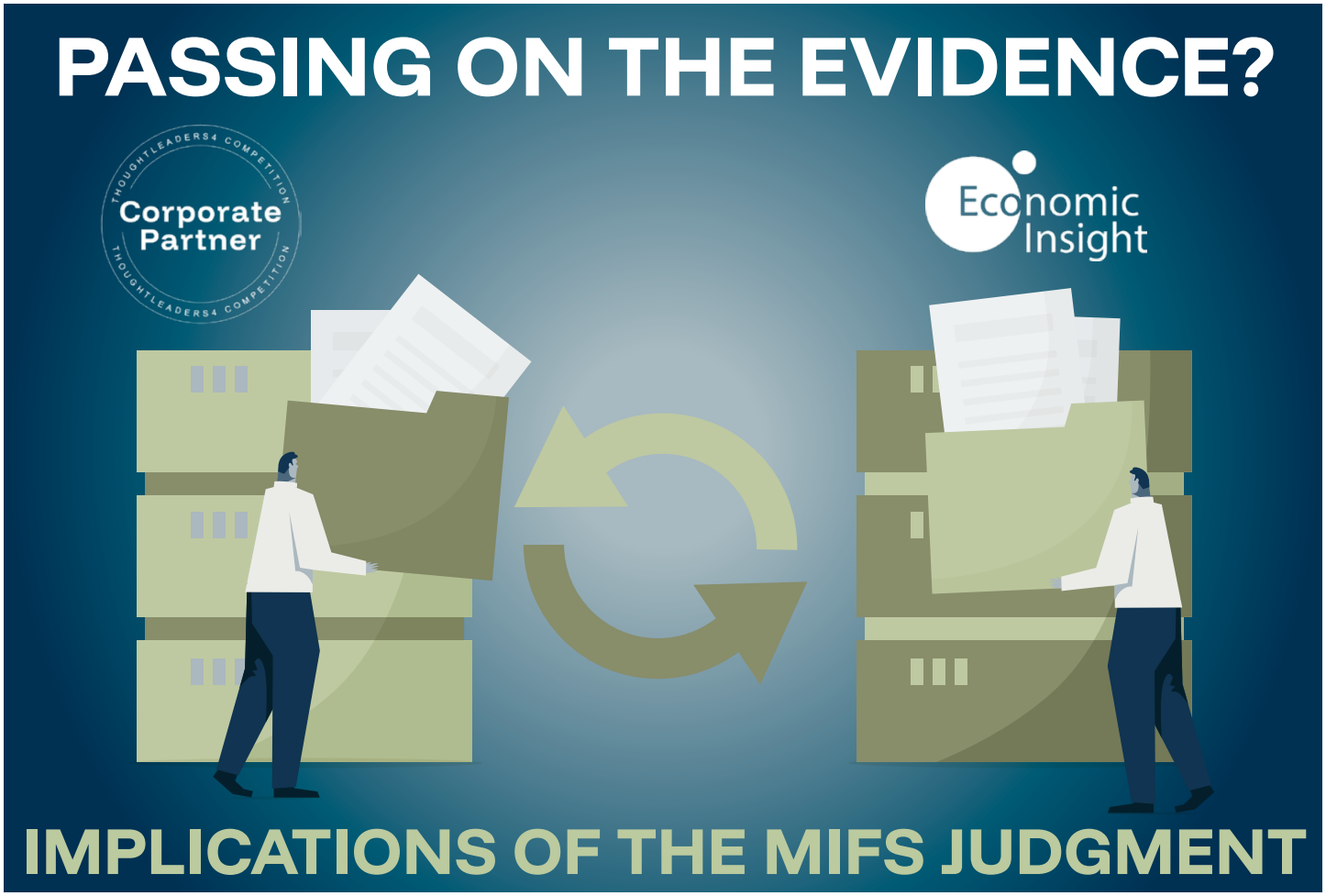


Authored by: Hywel Cleverdon (Principal) & Joe Minichiello (Consultant) - Economic Insight

Introduction

In February this year, the Competition Appeal Tribunal (CAT) handed down its highly anticipated judgment on pass-on in the Multilateral Interchange Fee (MIF) Umbrella Proceedings. This judgment addressed two forms of pass-on: (i) the extent to which an overcharge on MIFs was passed on from acquiring banks to merchants, with the CAT finding that 85% of the overcharge was passed on under standard contracts; and (ii) the extent to which merchants subsequently passed on the overcharge to consumers, with the CAT finding no such pass-on, except in a few select industries where clear factual evidence supported it.

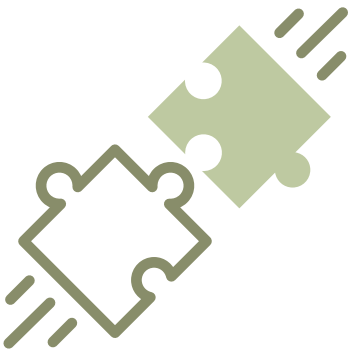
This judgment provides some increased clarity on the legal approach to pass-on. In particular, the CAT held that a "direct causative link" is required to establish pass-on as a mitigation defence, and that indirect channels, such as a firm's ordinary planning and budgetary processes, margin targets, or observation of competitor pricing, are insufficient to meet this threshold.

This article sets out three implications of the CAT's legal approach to pass-on for future cases (if the judgment withstands any appeal).

1. Proving Pass-On: Factual Evidence is Required, as Economic Theory or Econometrics Alone May be Insufficient

In reaching its judgment, the CAT first examined the factual qualitative evidence of the claimants analysed in these proceedings, to consider whether a direct channel through which pass-on could occur was present. Only once causation had been established through factual evidence did the CAT turn to economic and econometric evidence, to quantify the extent of pass-on. For sectors in which the factual evidence did not show a direct pass-on channel, the CAT considered there to be no pass-on, irrespective of the economic evidence.

The CAT's approach in this judgment arguably differs from standard economic practice. Economists typically answer an economic question by developing an economic theory, then testing this empirically, often through econometric analysis. If an economist applied this approach to quantifying pass-on and found a significant price-cost relationship, this would usually be sufficient to prove a passing on effect, in economic terms. However, this judgment suggests the CAT would consider this approach insufficient, given its emphasis on factual evidence. Therefore, to align with the legal test for causation that the CAT has sought to clarify in this judgment, future cases should instead focus on factual evidence of direct pricing mechanisms, such as any existence of cost-plus pricing.



2. Quantifying Pass-On: The Design of Expert Evidence must Align with the Facts of the Case

The CAT emphasised that expert evidence for quantifying pass-on must be grounded in the specific facts of the case and must relate to direct pass-on channels. For example, it considered that expert reliance on academic studies to quantify pass-on was "problematic", if those studies were not sufficiently connected to the MIFs in question, or the relevant direct pass-on channels. The CAT therefore placed little weight on this material. The CAT also criticised aspects of the experts' econometric models on the grounds that the regression models could not distinguish between direct and indirect pass-on channels.

Whilst alignment between expert evidence and a direct pass-on channel specific to the facts of the case may sound reasonable in theory, it poses challenges for economists who rely on econometric models. In econometrics, it is difficult to distinguish whether pass-on has occurred through a direct channel (for example, a clear price-setting mechanism) or an indirect one (for example, longer term profit targets). Should a firm consider both direct and indirect channels in setting its prices, both effects would likely occur concurrently, creating a risk that econometric models may fail to capture direct pass-on channels alone.

The CAT relied on econometric evidence in quantifying pass-on in this judgment, using the broad axe, indicating that econometrics remains useful. However, it remains unclear whether the CAT will only accept econometric evidence that isolates only direct pass-on channels going forward, or if econometric models that partially capture indirect pass-on channels will be permissible too. Therefore, econometric models should be carefully designed to minimise the risk of the CAT rejecting such evidence.

3. The Evidential Hurdle for Pass-On Appears High: Damages Claims for Intermediate Purchasers may become more Prevalent

This judgment implies that the evidential hurdle to legally prove pass-on is materially higher than what is needed to demonstrate pass-on in an economic sense. This may make it challenging to prove pass-on in future cases. For example, experts in this case proposed that pass-on to consumers could have occurred through pricing processes such as EBITDA targets or competitor price monitoring, which the CAT rejected. The CAT considered these mechanisms of pass-on to be economically plausible but insufficient to meet the legal test. This high evidential hurdle could have several consequences:

- **Fewer, smaller claims on behalf of downstream purchasers.** The high evidential hurdle for pass-on is likely to make damages claims by downstream purchasers more difficult, particularly where the alleged harm arises through indirect pass-on mechanisms.
- **A corresponding increase in claims from intermediate purchasers.** The high evidential hurdle for establishing pass-on may increase the likelihood that intermediate purchasers retain the full overcharge they faced, with lower risk of a reduction in damages through a pass-on defence.
- **A risk of over/under compensation relative to economic theory.** If indirect pass-on mechanisms do arise in practice (as would be expected by economic theory), this judgment raises the risk that parties are under/overcompensated relative to the position they would have been in 'but for' the infringement, since legal pass-on can only be claimed via direct pass-on mechanisms.

Conclusion

Overall, the MIFs judgment demonstrates a clear divergence between the economic view of pass-on and the legal principles. With this in mind, economists in future cases should take care to align the evidence they produce on both the causality and quantification of pass-on, to the principles set out in this judgment. Economists who rely too much on economic theory and standard economic practice may produce evidence that – although economically sound – fails to satisfy the CAT's evidential requirements.

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