Department for Business & Trade Consultation on Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement: Responses to Chapter 1 Consultation Questions

Response of Mishcon de Reya LLP
25 September 2026

About Mishcon de Reya LLP

Mishcon de Reya LLP has a market leading claimant-side Competition disputes practice, with a long history of advising both large corporate claimants and class representatives (**CRs**) in collective proceedings in the UK Courts, including notably:

- Advising Sainsbury's Supermarkets in its interchange fee claims against Mastercard, successfully litigating the claims up to and including the Supreme Court.
- Advising the lead claimants in the Second Wave Trucks Proceedings, who were a group of the UK's largest retailers, in the Competition Appeal Tribunal (**CAT** or **Tribunal**) against the European Trucks Cartelists.
- Advising Justin Le Patourel in the first collective proceedings action to reach trial in the CAT in early 2024.
- Advising Chris Warner in pending collective proceedings against Booking.com.

Mishcon de Reya LLP also has a wider group actions practice and considerable experience in the management of claims outside the collective proceedings regime, notably:

- Advising a group of institutional investors in the Royal Bank of Scotland rights issue litigation.
- Advising over 100 investors in the Ingenious Media group in major group litigation.
- Advising Wirral Council in its securities action against Indivior Plc and Reckitt Plc, which began as the first representative action in that sphere, and is now proceeding as a group claim for hundreds of institutional investors.
- Advising 13,000 licensed black cab drivers against Uber for unlawful means conspiracy in the Commercial Court.
- Advising hundreds of businesses badly affected by the pandemic and their insurers' failure to pay out claims in Burger & Lobster & Ors v Allianz and the Hiscox Action Group.
- Advising Andrew Prismall, the proposed representative claimant in an opt-out representative action in the English High Court on behalf of 1.6 million individuals against Google and Deepmind Technologies regarding the misuse of private information.

Executive Summary of Mishcon de Reya LLP's Responses to Chapter 1 Consultation Questions

This response addresses the Department for Business and Trade's consultation on "*Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement*". We have limited our responses to Chapter 1 – Opt-out collective actions. Our key positions are summarised below and expanded upon in our responses to the individual consultation questions.

Funding and DBAs. We strongly support lifting the prohibition on damages-based agreements (**DBAs**) in opt-out collective proceedings. This will align the interests of law firms and the class and unlock meritorious claims that currently fall below the quantum threshold at which third-party litigation funders are willing to invest, and could also potentially increase competition in the funding market. Third-party litigation funding must, however, remain available alongside DBAs (both being subject to appropriate court oversight). Many law firms may not be able to meet the entire cost risk of a large-scale action, so even with DBAs available, there will remain a role for third-party funding.

Funder certainty. We support an early, non-binding indication of the reasonableness of funder returns and order of payment at certification, provided the CAT retains discretion to revisit that indication at the conclusion of proceedings where there has been a material change in circumstances.

Certification. We do not support introducing an absolute suitability test or a standalone statutory cost-benefit or aggregate-damages evidential requirement at certification. The Supreme Court in *Mastercard v Merricks*[1] correctly held that certification is not the stage for a merits mini-trial, and defendants who consider a claim unmeritorious already have the option to apply to strike it out. Existing statutory tools and developing case law provide an effective and proportionate filter without introducing further uncertainty around a new threshold test and the associated cost of satellite litigation in that regard.

Costs. The current asymmetry between CRs' constrained litigation budgets and defendants' largely unconstrained spending is one of the most significant structural problems in the regime. We support the introduction of updated Guide provisions (rather than updating the CAT Rules themselves) requiring costs budgeting and notification of likely material cost overruns from both CRs and defendants, with consequences for non-disclosure, alongside more robust case management to prevent costs being used as a tool of attrition. This would broadly align the CAT with the approach in the High Court, yet still retain the CAT's wide discretion on costs issues generally.

Redress schemes and CMA powers. We are not persuaded that a simplified, presumption-based approach to CMA-directed or voluntary redress schemes should be pursued unless it is accompanied by safeguards to ensure fair and adequate compensation. While a proportionate discount may be justified by the benefits of speed, certainty, simplicity and avoided litigation costs, the methodology should not operate as a de facto cap that produces materially inadequate outcomes or undermines deterrence. Our view of CMA-secured redress to date suggests that such schemes have delivered materially lower outcomes than litigation can achieve.

Leniency and immunity. If immunity is introduced, it should be accompanied by robust cooperation obligations perhaps modelled on the US ACPERA regime, with suitable modifications to provide clarity, and by a clear power for the CAT to set aside immunity where damages would otherwise be unrecoverable.

Consumer trust and distribution. We support the CAT's new webpage listing damages awards and settlements, although note a "*.gov.uk*" website is likely to have wider reach. We also consider that defendants should play a more active role in distribution, including by sharing customer data and

[1] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51

making direct payments where feasible. Undistributed sums should go to charity, with the CAT retaining discretion to direct sums to sector-specific charities that serve the interests of the relevant class.

Overarching theme. The regime remains in its infancy, having produced only a small number of final judgments and distributions to date. Success should not be measured solely by consumer take-up: the regime's wider deterrent effect, its role in filling gaps left by public enforcement, and its capacity to direct undistributed sums to good causes are equally important measures of its value. We therefore urge the government to prioritise a targeted approach that focuses more on clarification and codification of settled practice rather than wholesale reform (save for the introduction of DBAs which would obviously be a fundamental change).

Chapter 1 — Opt-out Collective Actions

Class Representatives

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

1. We reiterate our position set out in the Response of Mishcon de Reya LLP to the DBT Call for Evidence dated 14 October 2025 (**Mishcon October 2025 Response**) that the current framework to be eligible to act as a CR ensures flexibility in the CAT being able to exercise its judgement and discretion on a case-by-case basis.[2] We do, however, recognise that there have been a number of points in this regard where the CAT has taken a consistent approach (for example, with respect to the role of the proposed class representative (**PCR**) in relation to funding arrangements), and that it may be appropriate to codify these in the Guide to reduce the scope for inconsistent rulings by differently constituted CAT panels. This would serve to reduce inefficiency and satellite litigation at the certification stage. Any such codification exercise should clarify the existing bar, not raise it. The point being that it should crystallise what is already required in practice so that PCRs can plan with confidence, rather than introducing new or more onerous hurdles to authorisation that would risk narrowing still further the pool of available CRs and, in turn, access to justice for prospective class members.

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

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

2. We consider that all the areas identified could benefit from greater certainty in principle, but the government should be cautious about codifying detailed requirements in a one-size-fits-all manner.

3. We consider that greater clarity in relation to funding arrangements is particularly important following *Riefa v Apple*,[3] as the consultation document itself notes that the PCR's inability to demonstrate "*strong understanding*" of the funding terms was fatal to certification. Clear guidance on the minimum level of engagement expected of PCRs with funding arrangements will give PCRs confidence and reduce expenditure on demonstrating compliance with unspecified standards. We consider this important particularly as the expectations of the PCR's role in relation to funding arrangements have sometimes appeared inconsistent. For example, in *Waterside*[4] the CAT noted the gaps it perceived in the PCR's witness evidence in relation to funding, such as not explaining:

    (a) Cost synergies with joint case management of similar claims.

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[2] Paragraph 54 of the Responses section of the Mishcon October 2025 Response.

[3] *Christine Riefa Class Representative Limited v Apple Inc. & Others* [2025] CAT 5.

[4] *Waterside Class Limited v (1) Mowi ASA, (2) Mowi Holding AS, (3) Grieg Seafood ASA, (4) Salmar ASA, (5) Lerøy Seafood Group ASA, and (6) Scottish Sea Farms Limited* [2026] CAT 32.

(b) How the case budget was arrived at and the steps taken to manage costs.

(c) A costs and benefits analysis.

(d) How the PCR's level of remuneration was arrived at (together with commentary that the CAT would expect remuneration to be in line with public sector rates).[5]

4. However, in *Stasi*[6] and *Shotbolt*[7] the CAT was tolerant of the PCRs having come on board after the funding agreements were put in place and their resulting more limited involvement in the funding agreements, albeit in *Stasi* with an expectation that the PCR would be more involved going forwards[8] and in *Shotbolt* with an expectation that the PCR would "*take responsibility personally*" and file witness evidence confirming the appropriateness of the current funding arrangements.[9]

5. We consider that clarity in relation to consultative panels may be useful, but do not consider that it is appropriate to mandate them for all CRs. Cases to date show significant and legitimate variance in the need for, and frequency of, such arrangements depending on the nature of the CR. A CR that is a charity, an industry association (such as the *RHA*), or a special purpose vehicle comprising a small number of individuals (such as in the *Ad Tech Collective Action*, and *JLP TCR Ltd*), may have no genuine need for a consultative panel, whereas this may be helpful for others. Prescribing the composition or terms of reference of a consultative panel in detail is unlikely to be helpful given this variability, and risks imposing unnecessary cost on CRs that do not need the assistance of a consultative panel. The types of expertise a CR brings onto a panel, and when, should remain a matter for the CR's own judgement. Non-prescriptive guidance confirming that these arrangements are not automatically required, and that their necessity should be assessed by reference to the CR's own structure and circumstances, would offer more useful certainty than mandatory codification. Where a CR does decide to use a consultative panel, the CAT should allow flexibility as to how it is structured and used, which may in some cases warrant a regular structure and in others a more ad hoc arrangement depending on the CR and the needs of the case. It should remain for the CR to explain and rationalise whichever model is put forward when applying for a CPO. A key factor driving the appropriate structure will be cost, and whichever model is adopted should be reasonable and proportionate from a costs perspective.

6. Similarly, it may be useful to receive non-prescriptive guidance on when independent costs specialists are required, as not all CRs may need one, but it would be helpful to better understand the CAT's position on this to avoid possible over-compliance, which would ironically drive up the very costs such guidance is intended to control. Indeed, there is a valid concern that the CAT's insistence on a CR retaining an external costs specialist to assist with reviewing monthly fee invoices is an unnecessary additional cost to budgets which are already substantial (particularly given that monthly fee invoices are in any event carefully scrutinised by the funder to ensure they are reasonable and in line with the agreed budget).

7. In summary, we consider that any guidance should expressly recognise that imposing costs specialists, consultative panels, or other structures on CRs cannot sensibly be on the basis of a single, uniform approach. Otherwise, for cases where CRs do not need one or more of them, this would divert resources away from the class and risk discouraging otherwise

[5] *Ibid,* paragraphs 51-58.

[6] *Dr Maria Luisa Stasi v Microsoft Corporation, Microsoft Limited & Microsoft Ireland Operations Limited* [2026] CAT 34.

[7] *Vicki Shotbolt Class Representative v Valve Corporation* [2026] CAT 4.

[8] [2026] CAT 34, paragraph 164.

[9] [2026] CAT 4, paragraphs 145-154.

meritorious claims from being brought at all, particularly by CRs with limited means such as charities or grassroots representative bodies.

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

8. We consider that non-statutory guidance, supplemented where appropriate by targeted amendments to the Guide are the most appropriate mechanisms to increase clarity. Non-statutory guidance is more flexible, can be updated more readily as case law develops and can distinguish between mandatory requirements and best practice. Where matters are settled enough to codify (for example, the standard of engagement expected of a PCR with funding arrangements), an amendment to the Guide may be appropriate for increased certainty.

Certification

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

9. No. We do not agree that specifying an absolute suitability test will provide a more meaningful filter to certification.

10. A statutory merits test is not the only, or even the primary, safeguard against weak claims: it is open to a defendant who considers a claim to be unmeritorious to apply to strike it out. This has rarely been used in practice: of 52 CPO claims issued to date, defendants have applied to strike out all or part of a claim in only six cases.[10] This itself raises the question of whether there is a genuine concern with the quality of claims being certified. In practice, funders and claimant law firms already perform a rigorous gatekeeping function, since funders will not commit capital to unmeritorious claims and claimant law firms would not want to expend their resources and put considerable time and fees at risk on unmeritorious claims. In addition, pursuant to Rule 85, the CAT retains the power to decertify proceedings at any later stage should genuine merits concerns emerge, including at its own initiative.

11. There are several instances of the CAT refusing to certify CPO applications demonstrating that it is, in fact, performing its role of gatekeeper and that it has the appropriate statutory toolkit to do this effectively.[11] The case law has evolved in any event to require a more substantive evidential basis at certification, with the application of the *Pro-Sys* test as set out in *Merricks*[12] and the requirement to provide a "*blueprint to trial*".[13] We consider that the correct approach is to allow the developing case law to bed in, rather than to legislate prematurely in a way that could stall the regime. An absolute suitability test would, in practice,

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[10] *Association of Consumer Support Organisations v Amazon.com, Inc. & Others* (Case No. 1749/7/7/25); *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* ("*RoRo*") (Case No. 1339/7/7/20); *Mr Justin Gutmann v Apple Inc. & Others* (Case No. 1468/7/7/22); *BSV Claims Limited v Bittylicious Limited & Others* (Case No. 1523/7/7/22, in relation to a sub-class of class members); *Mr Justin Gutmann v Vodafone Limited and Vodafone Group PLC* and related cases (Case Nos. 1624/7/7/23, 1625/7/7/23, 1626/7/7/23 and 1627/7/7/23, being an application in relation to losses arising before 1 October 2015); and *Consumers' Association ("Which?") v Apple Inc.* (Case No. 1689/7/7/24, in relation to part of the claim).

[11] For example, the CAT refused certification in *UK Trucks Claim Limited v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others* [2022] CAT 25, *Christine Riefa Class Representative Limited v Apple Inc. & Others* [2025] CAT 5, *Professor Carolyn Roberts v (1) Severn Trent Water Limited and Others* [2025] CAT 17, and *Mr David Alexander de Horne Rowntree v (1) the Performing Right Society Limited and (2) PRS For Music Limited* [2025] CAT 49.

[12] [2020] UKSC 51.

[13] *London & South Eastern Railway Limited, First MTR South Western Trains Limited and Another v Justin Gutmann* [2022] EWCA Civ 1077.

filter out claims on cost grounds alone before their merits are properly tested, undermining both access to justice for the class and the regime's deterrent function against anticompetitive conduct.

12. The Supreme Court correctly decided *Mastercard v Merricks*[14] and found that certification is not the appropriate stage for a mini-trial on the merits; that assessment is for trial. The practical effect of an absolute suitability test at certification would be to create a second, earlier merits filter that is prohibitively expensive for PCRs to clear, may require evidence to be adduced at an earlier stage, and will likely reduce access to justice as meritorious claims may not be brought because of the increased hurdles to certification, which is the opposite of the consultation's stated aims. We would also caution that introducing an absolute suitability test risks generating fresh uncertainty as to how it should be applied, uncertainty which may ultimately need to be resolved by the Supreme Court. This has a chilling effect on the regime in the interim, as was seen while *Merricks* was making its way through the appellate courts, with proposed and ongoing claims stayed pending the outcome.

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

13. No. The CAT is already entitled to consider the cost-benefit analysis under Rule 79(2) and has given it decisive weight in the recent decision in *Waterside Class Limited v Mowi ASA*.[15] There is a risk that changing the statutory certification standard now will introduce further uncertainty. A statutory cost-benefit factor would apply in every case regardless of whether it is actually needed to test the suitability of the particular claim, which risks raising the certification hurdle across the board and increasing the costs of certification even in cases where cost-benefit is not a genuine concern. Whilst we understand the rationale for considering the cost-benefit assessment at the certification stage, we are concerned about the requirement to demonstrate take-up rates at the outset. Not only does this enhance the risk of satellite litigation, in which parties will incur costs arguing about this before the claim's merits are properly tested at trial, but it goes to a fundamental question about the purpose of the regime and what value the court places on the ending of competition law infringements that would not otherwise have been investigated. If we reduce the viability of a case to whether there will be take-up by the class members – which is an issue impacted by a number of factors, not least the infancy of the regime and the lack of awareness amongst the general public – this may erode the important enforcement value of the regime. We also refer to our responses to questions 34-36 below, in which we discuss our views on the likely increase of the take-up of damages by class members as trust in the regime grows. We note that the Court of Appeal has separately recognised the tension between enabling mass consumer actions and the risk that the system perversely incentivises disproportionately high costs, observing that the proffering of an exorbitant costs budget does not mean that those costs will be ordered to be paid if the class prevails at trial, and that the answer to such concerns lies in the close supervision of costs by the CAT to ensure that they are proportionate (our comments on this in practice are above in response to question 2).[16]

14. If the government does proceed with amending the statutory certification standard, we consider it important it is made clear that: (a) low individual claim value does not of itself mean the cost-benefit test is not met, given the aggregate value and the wider deterrence

[14] [2020] UKSC 51.
[15] [2026] CAT 32.
[16] *London & South Eastern Railway Limited, First MTR South Western Trains Limited & Stagecoach South Western Trains Limited v Justin Gutmann* [2022] EWCA Civ 1077, paras. 83-86.

function of the regime; and (b) likely take-up is a factor but not a determinative one, particularly in novel claims where awareness is necessarily limited at the outset.

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

15. No. We do not consider it necessary to introduce a discrete statutory requirement that the Tribunal consider whether there is sufficient evidence for aggregate damages as a factor relevant to certification, because the existing certification framework already operates sufficiently well in this regard. Following the Supreme Court's judgment in *Merricks*,[17] the Tribunal already assesses whether a CR's proposed expert methodology is capable of establishing aggregate damages on a class-wide basis, applying the *Pro-Sys* test and requiring a credible "*blueprint to trial*". This is, in substance, an assessment of whether there is a sufficient evidential and methodological basis for aggregate damages to be determined at a later stage, and it is conducted by reference to the same certification-stage evidence a new statutory factor would rely on. A separate statutory requirement would therefore largely duplicate an inquiry the Tribunal already undertakes, while adding a further formal hurdle at a pre-disclosure stage of proceedings, when there is a significant asymmetry of information and position as between the PCR and the defendant and the PCR will have little or no additional evidential basis available to it. To be clear, adding a separate statutory requirement to demonstrate "sufficient evidence" for aggregate damages risks conflating certification with the merits assessment that properly belongs at trial, particularly in standalone claims where there has been no prior regulatory finding. As mentioned above in our response to question 4, if defendants consider the claims they are facing are unmeritorious, they can apply to strike the claim out.

Financing a Claim

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

16. Yes. This is a very significant and positive proposal from the DBT and is consistent with other class action jurisdictions. There are two positives which flow from this proposal: (1) it aligns the interests of law firms and the class in a way that the current conditional fee agreements cannot always achieve; and (2) it could introduce greater competition into funding of cases and could allow funding of smaller claims.

17. Permitting DBAs would provide an additional financing option for CRs alongside third-party litigation funding, increasing competition among funders and reducing the regime's near-total dependence on commercial litigation funders. The Civil Justice Council has likewise recommended that DBAs should be permitted in opt-out collective actions,[18] noting that the distinction between opt-in and opt-out proceedings in this respect is no longer justified, and that concerns about excessive remuneration can be addressed by court and regulatory control. Lifting the prohibition on damages-based agreements would open the collective proceedings regime to a wider pool of claimants and funders and would introduce meaningful competition in the funding market. Claims that currently cannot attract a litigation funder (because their quantum, while substantial, falls below the £500 million[19] threshold at which funders are reportedly willing to invest) may become viable when law firms can share the risk through a DBA. The experience in the state of Victoria, Australia, is instructive: following the

[17] [2020] UKSC 51.
[18] CJC Report on Litigation Funding, 2 June 2025 (Recommendation 54).
[19] Feedback in the Call for Evidence – see paragraph 38 of Chapter 1 of the Consultation dated 17 July 2026.

introduction of contingency fees for class actions in 2020, funding rates decreased and claimant returns improved.[20]

18. It is likely that the full costs of collective proceedings will not always be able to be borne by the relevant law firm such that even with a DBA there will remain some requirement for third party litigation funding.

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

19. Yes. The current framework already contains substantial safeguards against speculative litigation: (a) the certification stage provides a meaningful filter, requiring CRs to satisfy the CAT that the proposed proceedings are suitable; (b) the 'loser pays' principle applies, meaning that CRs who bring unsuccessful claims face adverse costs liability; and (c) CRs are required at certification to demonstrate how they would meet an adverse costs order, in practice necessitating very significant after-the-event (**ATE**) insurance. These protections have operated effectively in practice.

20. The very process of obtaining funding and the level of due diligence that is required is in itself a substantial safeguard. Our experience is that funders conduct highly detailed due diligence before the funder's investment committee (or equivalent) decide whether or not to fund a claim. This process is likely to weed out the majority of weak and unmeritorious claims. Additionally, given the 'loser pays' principle, the CR will need to obtain ATE for claims funded under DBAs, and insurers therefore represent another layer of scrutiny.

21. A further safeguard is that defendants can seek strike-out or decertification at any point during the collective proceedings. This option is also open to the Tribunal to do so on its own initiative. If an unmeritorious claim is struck out or decertified, it is open to defendants to seek their costs on an indemnity basis.

22. All the above negates any need for additional protection. Should the government be minded to introduce additional protection, any such protection should be carefully balanced so as not to create a chilling effect on otherwise meritorious claims.

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

23. Not sure. Permitting DBAs should not undermine the continued availability of third-party litigation funding, which remains essential to the regime. Given the scale of costs involved in opt-out proceedings (running into the tens of millions), DBAs alone are unlikely to be sufficient to finance all claims. We are not aware of other risks of permitting DBAs into the regime, though we recognise that others may identify risks we have not foreseen. It will therefore be important to ensure that: (a) third-party litigation funding remains available alongside DBAs; and (b) appropriate court oversight of DBA terms is maintained to guard against disproportionate remuneration.

Preserving the Use of Litigation Funding

[20] https://assets.publishing.service.gov.uk/media/6ab276b0734e2435f202ee79/swifter-and-simpler-competition-redress-regulatory-appeals-and-competition-enforcement.pdf

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

24. Yes. We support this. The CAT currently has a discretion it can exercise at the conclusion of a case to determine a funder's entitlement, which in principle is appropriate as it allows the CAT to take a holistic view of the outcome. However, this is fundamentally at odds with the commercial reality that funders make funding decisions at the outset of litigation. Recent judgments have demonstrated inconsistency in how funders' entitlements are approached. For example, in *Merricks* the CAT determined the amount due to the funder prior to distribution to the class, whereas in *Trains*[21] the CAT considered the funder's entitlement following distribution. This inconsistency has created uncertainty and can drive a reluctance by funders to support otherwise meritorious claims.[22] An early indication of reasonableness at certification, expressed in a manner that does not fetter the CAT's later discretion, would assist in providing the certainty funders require to commit to funding claims. One way in which the CAT could frame such an indication without over-committing itself would be by reference to worked examples: for instance, indicating that if damages of a given level are recovered and a given level of distribution take-up is achieved, the funder's return would fall within a particular range, with costs incurred also taken into account as a relevant factor. This would allow the CAT to caveat the circumstances in which it would regard a particular return as reasonable, whilst preserving the flexibility to revisit that indication if circumstances change materially.

Q11. Will a presumption that funders will receive their return at the point of a damages award being ordered or settlement sum being approved be likely to increase certainty for funders and reduce the risk of their withdrawal from the regime? [Yes / No / Not sure] Please explain your answer.

25. Yes. As noted at question 10 above, funders make funding decisions at the outset of litigation. Greater certainty as to when a funder will receive its return would reduce the risk of funders withdrawing from the regime and should encourage funders to continue to invest. However, any presumption must be carefully calibrated against the interests of the class.

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

26. Yes, provided the indication of reasonableness given at certification is understood as provisional rather than binding, and the CAT's power to revisit both elements of the proposal is preserved and exercised in practice, where warranted. The proposal already incorporates an important safeguard here: the CAT is to retain discretion to revisit its reasonableness assessment at the conclusion of a claim where there has been a notable change in the course of proceedings, such as to the quantum of the claim. We consider this to be an appropriately high threshold, and deliberately so: a lower threshold, allowing the indication to be revisited on any shift in circumstances, would undermine the very certainty the indication is intended to provide to funders at the point they commit capital. This is the correct approach; it gives

[21] *Justin Gutmann v London & South Eastern Railway Limited* and related case (Case Nos. 1304/7/7/19 and 1305/7/7/19).

[22] Regarding the Merricks litigation, the CR, in addressing the High Court's decision in 2026 to dismiss the funder's application for judicial review, "*described the ruling as 'a complete vindication' and 'a total victory for me and the class I have represented over the last 10 years'. […] Jeremy Marshall, chief investment officer of Winward Litigation Finance, which was not involved in the case, took a different view, warning that the outcome would 'put the brakes on funders' appetites to provide funding for CAT claims' by adding uncertainty over whether funders can rely on their agreements.*"(https://iclg.com/news/victory-for-merricks-as-funder-loses-mastercard-settlement-challenge/).

funders the certainty they need to commit capital at the outset, while ensuring the CAT can still take a holistic view of the final outcome, the costs actually incurred, and which party succeeded on which issues, rather than being locked into an early-stage estimate that no longer reflects reality by the time the claim concludes. It is also worth noting that, in practice, under a standard LFA, a funder will in any event continually be updated on the merits of a claim and whether there has been any material change in that regard.

27. The same logic should apply to the proposed presumption on order of payment. Here again, the proposal preserves the CAT's discretion to depart from the presumption where there is a demonstrable risk that paying the funder ahead of the class or other stakeholders would produce an unjust outcome. As with the reasonableness indication, we consider this to be, and rightly so, a high threshold: a demonstrable risk of injustice, appropriately calibrates the exception so that it is not used to routinely reopen agreed waterfall arrangements, while still protecting against genuinely unfair results. Were the threshold lower, the presumption would offer funders little more certainty than the status quo, defeating its purpose.

28. To be clear, we regard both thresholds, a notable change in circumstances and a demonstrable risk of injustice, as intentionally high bars, and we support them being so. The value of an indication given to funders at the outset lies precisely in its durability: an indication that could be readily displaced would not give funders the certainty the proposal is designed to provide. Any implementing rule or guidance should therefore make clear that: (a) the reasonableness indication given at certification is not intended to be revisited absent a genuinely notable and material change, and does not invite routine re-litigation of the underlying assessment at the end of proceedings; and (b) neither the reasonableness indication nor the order-of-payment presumption should be codified as, or interpreted to require, a binding cap or fixed formula for funder returns. The value of both proposed mechanisms lies in the certainty they offer to funders at the point of commitment, while preserving a genuinely high threshold, and no more than that, for the CAT to depart from its earlier indication at the conclusion.

Costs

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

29. Yes, although not exclusively through changes to the CAT Rules.

30. Rule 104 of the CAT Rules already confers broad discretion on the Tribunal in relation to costs. It may be that targeted updates to the Guide, rather than primary rule changes, represent the more appropriate mechanism for addressing the specific issues that arise in collective proceedings. Where, however, the problems identified are structural and require enforceable, predictable consequences, rule changes may still be warranted in specific respects.

31. The most significant problem in the current regime is the stark asymmetry between the costs positions of CRs and defendants. CRs operate under constrained litigation budgets, typically funded by third-party litigation funders who commit capital on the basis of anticipated duration, claim value, and adverse costs exposure at the outset of proceedings, and importantly before proceedings are actually filed. Conversely, defendants, often large companies with substantial in-house legal teams, are able to deploy costs at a level that progressively erodes a CR's litigation budget and may exceed the level of insurance for adverse costs, often without incurring those costs proportionately or at a level that would be considered reasonable if scrutinised.

32. This creates a structural incentive for defendants to engage in attrition through costs. Where a defendant's cost exposure is unbudgeted and subject to no meaningful consequences for excess or unreasonable expenditure, the costs process itself can become a litigation strategy. This is inimical to the Tribunal's Governing Principles[23] and to the effective functioning of the collective proceedings regime. The Court of Appeal has itself recognised this tension: in the *Trains* litigation it acknowledged that, while mass consumer actions will invariably require third-party funding, "*there is a risk that the system perversely incentivises the incurring or claiming of disproportionately high costs*", and that the appropriate safeguard "*lies in the close supervision of costs by the CAT to ensure that they are proportionate*".[24]

33. To neutralise this asymmetric vulnerability, the Tribunal has transformed this conceptual safeguard into proactive case management by enforcing bilateral cost-budgeting obligations. This practice of demanding mutual expenditure transparency at an early stage has been firmly introduced in cases such as *Dr Maria Luisa Stasi v Microsoft* and *Bulk Mail Claim Limited v International Distribution Services Plc*, where the CAT required defendants to provide parallel cost forecasts to eliminate spending secrecy. The mechanism was formalised in *Consumers' Association (Which?) v Apple Inc*, where the Tribunal explicitly mandated that both sides submit mutual "Precedent Z" high-level cost spreadsheets, emphasising that such steps are essential to enforce proper scrutiny against escalating litigation costs.[25] Parallel to this pre-emptive strategy, the Tribunal has also demonstrated a willingness to issue severe retrospective costs sanctions where attrition has occurred.[26]

34. The Guide could be amended to make clear that the Tribunal, as a default position, require <u>both</u> CRs and defendants to file costs budgets at an early stage of proceedings – usually at the CMC following certification (albeit the Guide should set out a default timetable for the filing of budgets and the process for their consideration) – unless there are specific circumstances which may warrant a departure from this approach. The High Court's costs management regime under CPR Part 3 provides a useful model which could be replicated in the CAT with relative ease. Defendants should be required to file and exchange costs budgets in the same way as CRs, with the Tribunal able to have regard to those budgets when making costs orders. The possibility of costs budgeting will help the parties and the Tribunal to determine what is appropriate when considering the litigation timetable to trial.

35. The Guide should establish a clear expectation that parties notify the Tribunal and the opposing party where costs in any phase are likely to be materially exceeded, which is the same requirement of costs budgeting in the High Court. Where no such notification is given without good reason, the Tribunal may, in its discretion, treat unnotified excess costs as a factor when determining what costs are recoverable. The Guide should make explicit that the Tribunal may, in the ordinary course of exercising its discretion, decline to allow recovery of costs incurred in excess of a budget where there has been no prior notification, therefore mirroring the approach taken in the High Court. We note that the Tribunal itself is already moving in this direction: at the CAT User Group meeting on 18 March 2026 it was recorded that, "*the President noted the Tribunal's intention to produce a PD relating to costs in collective proceedings,*" which was welcomed by User Group members, who "*suggested that the Tribunal work towards a PD relating to costs and case management in collective proceedings.*" Members also noted "*the need for costs budgets to reflect actual costs involved in proceedings, as opposed to only*

[23] CAT Rule 4.
[24] *London & South Eastern Railway Limited, First MTR South Western Trains Limited & Stagecoach South Western Trains Limited v Justin Gutmann* [2022] EWCA Civ 1077, paras. 83-86.
[25] [2026] CAT 51.
[26] See for example *Gutmann v First MTR South Western Trains Limited and Another, Gutmann v London & South Eastern Railway Limited, Gutmann v Govia Thameslink Railway Limited & Others* [2026] CAT 21.

the costs which the parties seek to recover," a point we would endorse and which reinforces the case for the notification requirement proposed above.[27]

36. It is important to appreciate the limits of what costs budgeting can achieve. Even if the regime in the High Court were to be adopted in the Tribunal, defendants retain the right to spend what they choose on their own defence of the litigation, and thus – unlike CRs – can still spend what they choose even knowing that those costs can be unrecoverable if they are outside of the approved costs budget. A CR on the other hand relies on the level of funding that is approved by the funder. The problem of costs being used as a means of attrition is therefore not fully resolved by costs budgeting. We would be supportive of the Tribunal adopting a more interventionist approach in ensuring close and effective case management to ensure that litigation strategies are not deployed with the intention of running down costs budgets (akin to the approach in the High Court regarding 'oppressive behaviour' under Practice Direction 3D paragraph 13). For example, we note that CMCs have, in some cases, become disproportionately frequent, and this has a tendency to generate substantial costs that are not always commensurate with the case management benefit achieved. CMCs can run down case budgets and so the Guide should set out clearer criteria for when CMCs are to be listed, encourage the use of written submissions and orders made without a hearing where appropriate, and signal that the Tribunal will look critically at costs generated by unnecessary or prolonged CMC hearings. This concern is not merely anecdotal: at the CAT's own User Group meeting on 18 March 2026, members suggested "*determining a greater number of applications on the papers, noting that the number of case management conferences held in proceedings can exceed the allocation for that in the budgets of class representatives*," and further suggested "*in some cases, dispensing with the first case management conference and instead proceeding straight to a CPO hearing, with a case management conference setting directions to trial to follow closely afterwards, if proceedings are certified*."[28]

37. As recommended by the Civil Justice Council, in its Review of Litigation Funding – Final Report (2 June 2025) at paragraph 11.43 (Recommendation 40), dedicated judicial training on costs in collective proceedings is a necessary complement to any updates to the Guide. Costs management in funded litigation is a specialist discipline. The effectiveness of updated guidance will depend in significant part on the consistency and rigour with which Tribunal members apply it, and formal training addressing both the mechanics of costs management and the wider strategic dynamics of funded litigation is essential to achieving that consistency.

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

38. Yes, we consider that increased oversight of costs budgets in collective proceedings would have a positive effect on their stability and transparency, though the precise form that oversight takes matters considerably. The key is to adopt a model that is effective, proportionate, and does not itself generate disproportionate costs.

39. The absence of any meaningful costs discipline on defendants creates significant unpredictability for CRs and their funders, as indicated above. In *Which? v Qualcomm*, the defendant estimated costs of approximately £42 million to the first of two trials, which was more than double the amount of funding the CR had secured to pursue the case to conclusion. In *Le Patourel v BT*, the defendant claimed costs exceeding £26 million at the conclusion of proceedings, a figure that had not previously been notified to the CR in any meaningful way. These figures are illustrative of a systemic pattern in which defendants are

[27] Competition Appeal Tribunal, Minutes of the Competition Appeal Tribunal User Group Meeting (01/26), 18 March 2026 (CATUG/2026, 30 March 2026), items 3(a) and 5(a)-(b).
[28] *Ibid.*

able to incur and then assert costs at a level that bears no relationship to any budget that was visible to the CR or the Tribunal during the proceedings.

40. This unpredictability has direct consequences for CRs and their funders. Adverse costs cover is calibrated at the outset against the defendant's anticipated costs exposure. Where that exposure is unknown or knowable only at conclusion, it is impossible to obtain adequate cover at the outset, or to increase the level of cover in a timely and cost-effective way as proceedings develop. Funders commit capital on the basis of duration risk and projected adverse costs exposure; where those projections are unreliable because defendants face no obligation to disclose or maintain a costs budget, the financial stability of the proceedings is undermined from the outset.

Alternative Dispute Resolution

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

41. Yes, it should be encouraged. It may be that mandating mediation is a step too far and may lead to additional unnecessary costs. However, we would support a regime in which it is actively encouraged and in which there are meaningful costs consequences for parties who unreasonably fail to engage. A costs-consequences model preserves party autonomy whilst creating a real incentive to participate meaningfully.

42. Collective proceedings are structurally different from ordinary commercial litigation in ways that bear directly on the viability of mediation at any given stage. The regime depends almost entirely on third-party litigation funding, and CRs operate under significant constraints on their litigation budgets as a result. A mandated stay of proceedings for the purposes of mediation, if timed at an inappropriate juncture, could prejudice the litigation timetable, create difficulties for funder commitments that are calibrated to particular duration assumptions and impose disproportionate cost on a CR who is unable to engage meaningfully because the evidential position has not yet crystallised.

43. If mediation is to be encouraged, an appropriate stage may be after the exchange of expert evidence. In collective proceedings, a great deal turns on the expert evidence, particularly in relation to the existence and quantification of loss. This is largely due to the asymmetry between a CR and defendant. It is only once the parties have a full picture of the competing expert positions that they are in a position to assess the strength of their respective cases with sufficient confidence to engage meaningfully in settlement discussions. Mediation before that point is unlikely to produce outcomes and risks becoming a costly procedural formality.

44. A prerequisite for any effective mediation process, mandated or otherwise, is that the CAT grapples more rigorously with trial timetabling. One of the reasons settlement discussions occur so late in the process is that timetables are not structured in a way to accommodate a mediation window in a meaningful way. There is often limited flexibility in the lead-up to trial which allows parties to dedicate sufficient time and resources to consider and engage meaningfully in settlement discussions. The Guide could therefore be updated to include a default mediation window in the standard collective proceedings timetable, positioned after the exchange of expert evidence and before the trial preparation phase. That window should be long enough to allow the parties to select a mediator, prepare, and conduct the mediation without those activities cannibalising the time needed for trial preparation.

45. Notwithstanding this, the Guide should make clear that the Tribunal will have regard to a party's conduct in relation to mediation and other ADR when making costs orders at the

conclusion of proceedings. This is consistent with the approach taken in the High Court. Where a party unreasonably refuses to engage in mediation, or engages in a manner that is plainly designed to frustrate rather than advance the process, the Tribunal should be prepared to reflect that conduct in its costs order. The Guide should make this explicit, so that parties are in no doubt that unreasonable conduct in relation to mediation carries a real costs risk.

46. Whatever approach is adopted, it is important to preserve the parties' ability to engage in without prejudice discussions throughout proceedings, independent of any formal mediation process. The without prejudice rule serves important functions in collective proceedings and should not be inadvertently undermined by a regime that channels settlement discussions exclusively through a formal mediation process. The Guide should make clear that the existence of a default mediation window does not preclude or discourage direct without prejudice engagement between the parties at any stage.

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

47. Not sure. The use of case management powers to bring parties together could have a meaningful impact in some cases, but is unlikely to be universally effective. In particular, cases involving ongoing conduct where any settlement may require a fundamental change to the defendant's business model, may be unsuitable for ADR given the potential 'precedent effect' of settling in one jurisdiction. The effectiveness of case management powers in facilitating settlement will therefore vary considerably depending on the nature and complexity of the underlying claim.

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

48. Yes. As above, if a party unreasonably refuses to engage in ADR when encouraged or ordered to do so by the CAT, it is appropriate for that conduct to be taken into account when determining costs. Cost sanctions are a well-established tool in litigation to incentivise proportionate conduct and reasonable participation in settlement discussions. Any such mechanism should be applied consistently and proportionately, having regard to the specific circumstances of the case.

Settlement

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

49. Yes. The settlement procedure for collective proceedings must reflect the unique nature of opt-out claims (including the need for CAT approval of any settlement). Consideration should be given to allowing parties to make Rule 45-style offers carrying automatic costs consequences, which do not currently exist in the opt-out context. This could provide a meaningful incentive for parties to engage with and consider settlement discussions, and could be taken into account by the CAT when considering costs at the conclusion of proceedings. However, as set out in response to question 21 below, these must be tailored to the different pressures that exist in collective proceedings.

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

50. Yes. The funding asymmetry between CRs and defendants means that CRs, who operate within a fixed litigation budget agreed with their funder may face undue pressure to settle where defendants are able to run down that budget through deployment of disproportionately high costs.

51. Safeguards should therefore include: (a) extended costs budgeting and notification requirements for defendants as set out above; and (b) ensuring that the CAT retains full oversight of any settlement and satisfies itself that the settlement terms are just and reasonable, reflecting the interests of the class as a whole.

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

52. Yes, in principle, although the design of the consequences mechanism requires careful thought.

53. We support the introduction of a Rule 45-style offer mechanism in collective proceedings. The availability of equivalent mechanisms in the High Court and Commercial Court already serves this purpose, and there is no principled reason why a similar mechanism should not be available in opt-out collective proceedings.

54. Our principal reservation is whether conventional adverse costs consequences will provide a sufficiently meaningful constraint on defendants in large-value collective proceedings. Where a claim value runs to hundreds of millions or billions of pounds, an adverse costs consequence involving paying a higher proportion of costs is likely to run into millions or tens of millions of pounds at most. This may not represent a meaningful incentive to settle a claim a defendant would otherwise wish to contest.

55. A more targeted and significant consequence, specific to the funded collective proceedings context, could be to provide that, where a CR beats a Rule 45-style offer, the recoverable costs payable by the defendant include the litigation funder's return, insurance premia and/or any success fees payable to legal advisers. These are real and substantial costs of the litigation directly attributable to the defendant's failure to settle. Treating them as recoverable would impose a materially greater financial risk on defendants who unreasonably decline reasonable offers, and would more accurately reflect the true economics of funded collective proceedings.

56. The mechanism should be available throughout proceedings, but the Guide could make clear that the Tribunal will have particular regard to offers made after the exchange of expert evidence, when the parties are best placed to evaluate them meaningfully.

Q21. Do you consider it to be necessary to make changes to the settlement approval process at this time to increase efficiency? [Yes / No / Not sure] If yes, what changes do you believe would be beneficial? If no, is this an area that would benefit from review in due course once the Tribunal and its users have more experience of settlement approval processes in collective proceedings?

57. No. The current settlement approval process is detailed and well-structured. Given the detail of this process and the CAT's developing expertise in approving settlements, it is not clear that further changes to the process are needed at this stage. It may however be appropriate to review this area once the CAT and its users have accumulated greater experience of settlement approval in collective proceedings.

Empowering the CMA to Order Redress

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

58. Not sure. A simpler approach to quantum assessment is only beneficial if it delivers fair and adequate redress. The government proposes setting an assumed level of overcharge, based on OECD guidance and academic studies, to create a presumption for calculating redress under both voluntary and mandatory schemes. Our experience is that CMA-directed redress tends to be significantly lower than private enforcement outcomes. For example, the CMA's fludrocortisone investigation resulted in fines of almost £2.3 million and a separate £8 million payment by Aspen to the NHS. This is likely well below what the NHS could have recovered privately, given the price of the product supplied to the NHS rose by up to 1800 per cent following the anticompetitive agreement.

59. We also see a structural risk in how an assumed-overcharge methodology would work in practice. If a redress scheme assumes a 10 per cent overcharge but the true figure (as might be established at trial) is 12 per cent, that 2 per cent delta is likely too small to justify a standalone collective proceedings claim. Funders are unlikely to back what would be a comparatively modest recovery once litigation risk and costs are weighed against it. Claimants who accept a redress payment on this basis may therefore have no realistic route to recovering the balance of their true loss, even though it is capable of proof. More fundamentally, the CMA, by setting the assumed overcharge and then directing or approving a scheme calculated on it, may in substance be constraining redress below what a tribunal would find at trial. Cartel conduct, overcharge levels and pass-on vary enormously between cases, and we question what proportion of cases a simplified, presumption-based approach is genuinely suited to, and whether the government holds evidence on this. Such a methodology may potentially work for straightforward, high-volume cases but fit poorly where the true overcharge is contested or foreseeably higher than assumed.

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

60. Any simplification of the Competition Act 1998 (Redress Scheme) Regulations 2015 should focus on reducing procedural and administrative friction for defendants and the CMA in establishing a scheme, not on watering down the substantive protections that ensure claimants receive fair and adequate compensation. The consultation itself acknowledges that no statutory voluntary redress scheme has ever been established under the current Regulations, with feedback citing the complex and burdensome nature of setting up and running a scheme, a lack of incentives for defendants, and, significantly, insufficient certainty that redress payments would be taken into account in any subsequent private litigation.

61. We consider the following areas capable of simplification without compromising claimant protections:

    (a) First, the CMA approval process itself should be streamlined with clear, published timescales and a standard-form template for scheme rules, so that defendants face less uncertainty about the process and duration of approval. This addresses the administrative burden without touching the substance of what a scheme must deliver to claimants.

    (b) Second, given the acknowledged uncertainty as to how a redress payment interacts with later litigation, the Regulations should be amended to put beyond doubt, on the terms proposed elsewhere in this consultation,[29] precisely how and when a redress payment operates as a bar or set-off against a subsequent claim, so that defendants have certainty about the extent of the protection they receive, while claimants have equal certainty about what rights they retain (or waive) in accepting redress.

(c) Third, we would resist any simplification that reduces transparency requirements around how the quantum of redress is calculated and disclosed to eligible claimants, or that removes independent verification of a scheme's terms before CMA approval. Simplifying the process of establishing a scheme is legitimate; simplifying scrutiny of whether a scheme delivers adequate compensation is not and risks the same de facto reduction in redress levels identified in our response to question 22.

(d) Finally, any simplified process should retain a mechanism for claimant or CR input before a scheme is approved (whether voluntary or, under the proposed new power, mandatory), given that redress scheme terms, including the assumed overcharge rate, will materially affect claimants' practical ability to pursue any shortfall through litigation.

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

62. Not sure. Protection from duplicative liability may provide some incentive for businesses to use redress schemes following an infringement finding. However, that protection is only meaningful if the scheme provides fair and adequate compensation. If, as our experience suggests, the amounts recoverable via a CMA-directed redress scheme are likely to be significantly lower than in litigation without adequate justification, protection from duplicative liability may be unlikely to be a sufficient incentive in itself, particularly for well-resourced defendants.

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

63. Not sure. The prospect of a CMA-directed scheme may encourage defendants to establish schemes voluntarily, particularly where doing so allows them greater influence over the scheme's design, earlier certainty and protection from subsequent liability. Those incentives may be stronger where the scheme produces compensation below the amount potentially recoverable through litigation. That makes robust safeguards important: any voluntary scheme should be independently scrutinised, transparently calculated and required to provide fair and adequate compensation. Although a proportionate discount may reflect a simpler procedure, the framework should not permit defendants to secure protection from further liability through materially inadequate redress. The practical impact of the CMA's power to direct the establishment of such a scheme will in any event be limited principally to follow-on cases, because a scheme cannot be directed without a prior infringement finding.

[29] See paragraph 92 of the DBT Questionnaire: "… **Giving greater certainty of protection against duplicative damages liability** by making explicit that a) schemes may include a waiver of further actions for those that accept the redress offered to them and b) sums offered via redress scheme (be it voluntary or mandatory) should be taken into account when quantifying the value of a potential claim, and this will be considered at certification. Particularly in light of proposed revisions to the certification threshold, including greater emphasis on the cost benefit analysis, it is expected that this will give greater certainty of protection against duplicative damages liability…" (emphasis added).

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

64. Not sure. A framework of CMA-directed redress could reduce the need for litigation where: (a) it delivers fair and adequate compensation, allowing for a proportionate discount that reflects the benefits of speed, certainty, simplicity and avoided litigation costs; and (b) it provides appropriate transparency, scrutiny and a deterrent effect. Our view is that the sums secured by the CMA under existing arrangements fall significantly short of private enforcement outcomes. If the sums available through a CMA-directed scheme are materially inadequate, consumers and businesses will not have access to justice in any meaningful sense.

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

65. Not sure. Voluntary redress schemes have not yet been used in practice, and the reasons for that are addressed in our response to question 23 above. Beyond removing the procedural and certainty barriers already identified, the government could consider more direct incentives to encourage voluntary use, for example: (a) public recognition of businesses that establish a scheme meeting a defined compensation benchmark, such as a CMA-endorsed kitemark or listing, to provide a reputational incentive alongside the legal protection from duplicative liability; (b) treating early and adequate voluntary redress as a mitigating factor in any subsequent CMA penalty assessment for the same conduct, provided the scheme meets the safeguards identified below; and (c) a fast-track CMA approval process for schemes that adopt a pre-agreed compensation methodology, reducing the time and cost of establishing a scheme for businesses willing to commit to fair and adequate compensation. Any such incentive should, however, be conditional on the scheme following an infringement finding, maintaining appropriate transparency and scrutiny, and providing fair and adequate compensation. Whilst wrongdoers may end up paying less under such schemes than the amount potentially recoverable in litigation, this is balanced by the benefits of speed, certainty and use of the simpler procedure, which is designed to avoid the need to litigate. The relevant distinction is between a proportionate discount attributable to those benefits and a materially inadequate outcome that confers an unjustified windfall on the infringer and undermines deterrence.

Ensuring Harmony with Regulatory Action

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

66. No. Private enforcement and public enforcement serve different but complementary objectives. Private enforcement is the only mechanism by which those harmed by anticompetitive conduct can obtain financial recompense. The CMA's Prioritisation Principles already expressly provide that, in deciding whether to act, the CMA will consider the existence of private enforcement action – the two regimes are therefore designed to operate in a complementary fashion. Intervening at this stage of the regime's development to protect public cartel enforcement work at the expense of private enforcement would be premature and is not justified by the evidence.

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

67. Yes. If such immunity is introduced then we consider significant additional protections would be necessary (which we address below).

68. We appreciate that the government's proposal to grant Type A leniency applicants full immunity from civil litigation is intended to remove the disincentive that exposure to follow-on damages currently creates for cartelists considering coming forward, thereby strengthening public enforcement. However, the Call for Evidence responses underlying that proposal flagged real risks of unfairness – namely that the leniency recipient could escape very substantial liability while remaining cartelists absorb the shortfall, and that victims' overall compensation could be reduced if the immune party is simply removed from the pool of defendants. We restate paragraph 50 of the Mishcon October 2025 Response.

69. If such immunity is introduced, we suggest that the government legislates along similar lines to the US Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), Title II of Public Law 108-237, 118 Stat. 661, 665 (2004). ACPERA offers a useful precedent for managing this tension, albeit on a more limited basis than what is proposed for Type A applicants in the UK: rather than removing civil liability altogether, ACPERA caps a qualifying leniency applicant's damages exposure at the actual damages attributable to its own commerce and removes joint-and-several liability. This relief is only available if the applicant is judicially determined to have provided "satisfactory cooperation" to civil claimants, including a full account of all potentially relevant facts, production of all potentially relevant documents, and best efforts to secure cooperation (including interviews, depositions and truthful testimony) from covered individuals.

70. We note, however, that US case law offers only limited guidance on what constitutes "satisfactory cooperation" in practice, and if a similar conditionality is transplanted into the UK's proposed full immunity regime, the government should give careful thought to defining that standard with sufficient precision to avoid generating a further layer of satellite litigation over whether cooperation has been satisfactory.

71. The same conditionality, cooperation as the price of relief, could be transplanted into the UK's proposed full immunity regime for Type A applicants, notwithstanding that the UK proposal goes further than ACPERA by removing liability entirely rather than merely capping it. Requiring a Type A applicant benefiting from full immunity to disclose relevant documents and, where necessary, provide witness evidence to claimants would preserve claimants' ability to evidence a cartel that, by its nature, the immunity applicant is often best placed to prove, mitigating the disadvantage that "it is exceptionally difficult to prove a cartel by way of private action" would otherwise create for those who purchased from the Type A applicant party.

72. This addresses the fairness and redress concerns raised in the consultation responses without diluting the incentive effect the government is seeking to achieve, since it is the applicant's exposure to damages, not its cooperation obligations, that would be removed. It would also sit naturally alongside the safeguard the government has already proposed: that the CAT should retain power to set aside the immunity where damages become otherwise unrecoverable from the remaining cartelists, such as in cases of their insolvency, ensuring claimants are not left without a route to compensation purely because the party best able to satisfy a judgment is the one shielded from damages claims. We also consider this to be a critical condition.

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

73. Not sure. This depends on what the outcome of the consultation is. We consider this should provide that immunity will be set aside: (a) when there is no other route to compensation; and (b) when an immunity recipient fails to provide meaningful cooperation to claimants (in addition to other breaches of an immunity agreement already required by the CMA).

Interaction with Wider Regulatory Action

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

74. Not always, and this will inevitably depend on the facts of the individual claim. Where a claim is a follow-on claim based on a prior CMA (or other regulator) infringement decision, the relevant concurrent regulator(s) will generally already be apparent from that decision. The position is less straightforward in standalone claims, where the claim may only reveal a sector-specific dimension as the pleadings and evidence develop. We propose that the CMA, given its central coordinating role and sight of the wider regulatory landscape, should notify other relevant sectoral regulators, or otherwise flag to the claimant if another concurrent regulator is relevant, at the point such relevance becomes apparent to the CMA, rather than as a one-off assessment at the outset of a claim. The CMA is best placed to make this assessment on an ongoing basis, given its visibility across sectors and its existing relationships with sectoral regulators.

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

75. Not sure. We support appropriate coordination between the CMA, concurrent regulators and the CAT where a claim raises issues within a sectoral regulator's expertise. However, we would not characterise notification of concurrent regulators as strictly necessary in every case in order to ensure harmony between public and private enforcement. The existing regime already contains mechanisms for managing overlap between regulatory action and private proceedings, and private enforcement should not be delayed or inhibited simply because a sectoral regulator may have an interest in the subject matter.

76. That said, a clear notification mechanism could be beneficial where a claim has obvious sector-specific dimensions – for example, regulated pricing, market access, licensing conditions, network infrastructure, consumer protection obligations or sector-specific remedies. In those cases, early notification may help ensure that relevant regulatory context is available to the CAT and the parties, reduce duplication of effort, and avoid inconsistent approaches between public and private enforcement.

77. Any such notification mechanism should therefore be framed as a proportionate case-management tool rather than a mandatory step. In particular, notification to a concurrent regulator should not create a presumption that private proceedings should be paused pending regulatory consideration, nor should it allow public enforcement priorities to displace the right of affected parties to seek damages through private enforcement.

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

78. Not always, and only where the claim genuinely raises sector-specific issues beyond the central competition law questions, consistent with our answer to question 32 above. Where that is the case, early notification to the relevant concurrent regulator may be useful: sectoral regulators may hold relevant expertise, market knowledge, data or prior regulatory analysis

that could assist the CAT in understanding the commercial and regulatory context in which the alleged infringement occurred. This will not be so in every case, and the benefit should not be assumed simply because a sector-specific dimension exists.

79. This may be particularly valuable in regulated sectors where market structure, pricing, access terms, technical standards or consumer outcomes are shaped by sector-specific rules, but only to the same targeted and limited extent described in our answer to question 32. In such cases, regulatory input could help identify whether proposed remedies or redress mechanisms are workable, whether there is a risk of overlap with ongoing regulatory intervention, and whether particular sector-specific considerations should inform case management.

Consumer Trust

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

80. Yes. We support the listing of damages awards and settlements in collective claims on the CAT's website and support the introduction of the new webpage titled "*Collective Proceedings: Notices of Damages Awards and Settlements*", as we consider both the CAT and the government have an important role to play in building consumer trust and encouraging take up of damages in the collective action regime. We note that users of the CAT and its website currently tend to be repeat, sophisticated participants, whereas ordinary consumers are less likely to visit the site directly; the webpage nonetheless serves a valuable cross-check function for consumers who might otherwise be suspicious of a claims process, even if it is not, on its own, a complete solution to the challenge of maximising take-up. Recent research published by Thorndon Partners found that, "*Low consumer awareness and a high level of concern about scams means it is essential that trusted and credible messengers engage with consumers during the claims process.*"[30] The report found that 47 per cent of consumers would trust a "gov.uk" website more than any other URL when claiming compensation from a website.[31] As only 4 per cent said the same for the CAT's URL, it would be useful if a webpage could also be set up on the government's website with either the same details as the CAT's new webpage, or at least provide an overview and link to the CAT's new webpage.

81. Listing claims on the CAT and/or government's website is only part of building up consumer trust in the regime. As only very few of these claims have concluded, we need to wait for more cases to reach the distribution stage to build up public awareness and trust in the regime. We are keen to work with the government and the CAT as the regime develops to ensure that the aim to provide redress to consumers and small businesses who have been harmed by anticompetitive behaviour is met. We have therefore set out further views we have on this under questions 35 and 36 below.

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

82. Yes. We consider another effective way that we can increase trust among class members is to place a greater emphasis on the role of defendants in distribution, especially where defendants have current, relevant class member data available. In particular, we consider that: (a) defendants should be required to provide relevant customer information to the claims administrator (through appropriately secure means) to facilitate communications with the class members; (b) where defendants retain the ability to make direct credits or payments to class members, that should be seriously considered and, where appropriate, used as a means

[30] Thorndon Partners, "Beyond Dispute: Consumer behaviour and collective actions 2026", p.12.
[31] *Ibid*, p.13

to provide redress to class members rather than relying on class members to come forward; and (c) where a CR has won at trial, the CAT should be willing to make wide-ranging orders against the defendant to support effective distribution, such as including the redress mechanisms in our suggestion at (b). We note that the CAT is already open to this thinking, as in *Waterside* the CAT stated that there was, "*an opportunity for a more creative mechanism for returning damages to the class*" and considered there was potential for a scheme to be devised in cooperation with retailers in that supply chain, notwithstanding that those retailers were not themselves defendants in the proceedings.[32]

83. Certain defendants are likely to have an established commercial relationship and communication channels with class members, so we consider that requiring the defendants to take a more active role in distribution will help build up trust in the regime. However, we consider it appropriate that any defendant-led communications regarding distribution to class members are agreed with the CR in advance.

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

84. Yes. Further to our response to question 35, a collaborative approach between the parties could be incentivised by making clear that a defendant's willingness to assist proactively with distribution (for example, by providing contact details to the claims administrator, or making direct credits available) is a factor the CAT may take into account when considering costs. Conversely, a defendant's unhelpful or obstructive approach to distribution following an adverse judgment or approved settlement should be capable of being reflected in the orders the CAT is prepared to make, including by way of an adverse costs order, so that defendants have a real financial incentive to cooperate rather than simply leaving the burden of maximising take-up to the CR and the claims administrator. In the settlement context specifically, we have previously noted that the potential for unclaimed funds to revert to a defendant can provide an appropriate incentive for a defendant to settle and thereby increase the prospect of litigation concluding sooner. However, this must be balanced against the fact that the defendant would otherwise be rewarded for its conduct by being permitted to retain unlawfully gained profits, and so the level of any reversion should continue to fall within the CAT's discretion, exercised by reference to the extent to which the defendant has cooperated with distribution.

Undistributed Sums

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

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

85. We consider that undistributed damages should be given to charity, with the CAT carefully exercising discretion as to the amounts to be distributed. We would add a note of caution

[32] *Waterside Class Limited v (1) Mowi ASA, (2) Mowi Holding AS, (3) Grieg Seafood ASA, (4) Salmar ASA, (5) Lerøy Seafood Group ASA, and (6) Scottish Sea Farms Limited* [2026] CAT 32, para 61.

that the level of any such charitable award should always be considered carefully against the funder's return on investment to avoid any chilling effect on the availability of future third-party litigation funding for meritorious claims. We consider the government are best placed to decide which organisation(s) the CAT distributes undistributed damages to. The Access to Justice Foundation has received significant sums in both *Merricks*[33] and *Trains*,[34] and we are encouraged by the fact that this money is being used meaningfully to improve access to justice and benefit the public, which indirectly enables class members to be compensated for the harm they have suffered. We also note that Which? has acted as class representative in a number of collective proceedings over many years, giving direct support to the regime which is much needed in the early days of the regime. It is our understanding that Which? would use any additional funding to scale its charitable work and help address the most pressing areas of consumer harm across the economy.[35] Another suggestion is that the CAT could exercise discretion to give undistributed damages to a sector-specific charity that best serves the interests of the class members.

86. Whilst a large part of the regime's success is about successfully distributing damages to consumers and small businesses who have suffered loss due to anticompetitive behaviour, it is also intended to provide a wider deterrent effect against anticompetitive behaviour. We reiterate our views set out in the Mishcon October 2025 Response.[36]

Fees

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

87. The introduction of CAT fees is unlikely, in our view, to have a significant impact on access to justice in the majority of cases, provided that fees are recoverable as costs of the proceedings and that the regime is structured with appropriate regard to claim value and the stage at which fees are payable. We note that the introduction of CAT fees is not limited to collective proceedings; for smaller business-to-business claims outside the collective regime, a filing fee set at a level comparable to the High Court (for example, £10,000) could represent a material cost consideration and a genuine barrier to access to justice for smaller businesses, in a way that is less likely to be the case for well-funded opt-out collective proceedings.

88. The principal access to justice concern with court fees is that they may deter meritorious claims from being brought. In the context of collective proceedings, we do not consider this risk to be significant. By the time a collective proceedings claim is issued, the CR will, in almost all cases, have secured third-party litigation funding. The decision to fund a case, and the financial commitment that flows from it, will have been made on the basis of a detailed assessment of the merits, the anticipated costs of proceedings, and the projected return. A filing fee, even one set at a meaningful level, is unlikely to alter that calculus at the point of issue. The funding threshold, in other words, will not act as a deterrent to the pursuit of meritorious claims: where a funder has committed to fund, a court fee will not stop the case from being brought.

89. The critical condition is that fees should be recoverable as costs of the proceedings. Where a CR succeeds, court fees should be recoverable from the defendant in the ordinary way. Where fees are irrecoverable or where the recoverability position is uncertain, they represent a direct charge on the litigation budget and, by extension, on the returns available

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[33] *Merricks v Mastercard* (Case No. 1266/7/7/16).
[34] *Justin Gutmann v First MTR South Western Trains Limited and Another* (Case No. 1304/7/7/19).
[35] Which? Briefing, "*The Consumers' Association as recipient of undistributed damages*", September 2026.
[36] See paragraph 6 of the Overview and paragraph 47 of the Responses of the Mishcon October 2025 Response.

to class members and funders. The CAT and the government should ensure that any fees regime introduced in the context of collective proceedings is accompanied by clear provision for recoverability, and that this is reflected in the Guide to Proceedings.

90. Fee levels should be calibrated to the value and nature of the claim. In larger, fully-funded collective proceedings, a fee set at, for example, £10,000 will not have any material impact on whether the claim is pursued. At that level, the fee is unlikely to present an access to justice concern in substantial claims. However, the position may be different for smaller or fast-track claims, where the economics of the litigation are more finely balanced and where the litigation budget is more constrained. The fee regime should reflect this distinction, with reduced or no fees applicable to lower-value or fast-track proceedings. A flat-fee structure applied uniformly across all proceedings regardless of claim value would be disproportionate and could have a chilling effect on the development of the fast-track regime, which is intended to provide a more accessible route to redress for lower-value claims.

91. We note that the appropriate level and structure of fees is ultimately a matter for the CAT and the government to determine. We would encourage that determination to be made with full regard to the economics of funded collective proceedings and to the importance of ensuring that the fee regime does not inadvertently distort the incentives of CRs, funders, or defendants. We would welcome the opportunity to engage further on the detail of any proposed fee structure before it is finalised.

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

92. No comment.

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

93. We anticipate this will be an area where the CAT is best placed to provide comment. Generally speaking, we are aware that the CAT's resources are finite and given the increasing use of the CAT as a forum for damages claims (including collective proceedings), it may be the case that the introduction of CAT fees would alleviate any budgetary pressures faced by the CAT.

Panel Composition

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

94. Yes. We support increasing flexibility in panel composition and agree that some decisions could appropriately be made by the chair alone, or with just one member of the panel. Whilst we note that the chair already has the ability to make some decisions alone, we encourage this flexible approach to be extended to apply to other members of the panel, and to be actively applied to decisions on case management, timetables, disclosure, and, as the proposal envisages, applications that relate to purely legal issues and do not require specialist expertise, such as applications to strike out part of a statement of case.

95. A real strength of the CAT is the breadth of experience that its chairs and ordinary members have. We note there are currently 12 ordinary members and three chairs with solicitor experience. We consider that they could usefully be deployed alone or on reduced member

panels to make decisions on disclosure-related matters, as these often turn on procedural and practical considerations, which those with solicitor experience are very familiar with.

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

96. Yes. Whilst we consider that there are some decisions which should always be dealt with by a full panel of three, namely those that substantively affect the determination of the proceedings as a whole (such as certification, liability, approval of a collective settlement), we do not consider it necessary to identify a fixed category of these types of decisions. Instead, it would be preferable for the CAT to have discretion to convene a full panel where the complexity and significance of the issue would benefit from the full panel's combined legal, economic and sectoral expertise.

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

97. Yes. In addition to increasing flexibility in panel composition (see our response to question 41), we consider that greater use could be made of decisions on the papers for discrete, non-contentious applications, which would reduce the cost, resources and time spent on oral hearings. We consider that a similarly flexible approach to the panel composition could apply to decisions on the papers.

98. Further, where decisions on straightforward issues, such as timetables, are made, we would support a guideline expectation that rulings should typically be made within two weeks.

99. Overall, we consider these proposals which aim to increase the flexibility in panel compositions and decision-making will lead to efficiencies for the CAT in respect of its time and resources and will also benefit the parties involved in the litigation.