

Milberg London LLP – Response to the DBT Consultation: Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement

About Milberg London

Milberg London (“**Milberg**”) has a market-leading competition litigation practice, recognised for its role in some of the UK's most significant collective and group actions. The firm is widely recognised for its expertise in complex standalone collective proceedings and has been involved in several of the highest-profile competition cases before the Competition Appeal Tribunal, including:

- Acting for Alex Neill in the abuse of dominance claim against Sony in relation to the PlayStation Store (*Alex Neill Class Representative Limited v Sony*)
- Acting for Vicki Shotbolt in the excessive pricing claim against Valve Corporation, owner of the Steam gaming platform (*Vicki Shotbolt Class Representative Limited v Valve Corporation*)
- Acting for James Daley in collective proceedings against Apple, alleging that Apple has refused app developers and other third parties access to the iPhone's Near Field Communication (NFC) input, making Apple Pay the only option for UK iPhone users who want to pay contactlessly in-store (*James Daley v Apple*)

Beyond the collective proceedings regime, Milberg London also has a leading group actions practice and is widely recognised for its pioneering work in managing large-scale consumer claims. The firm has acted for hundreds of thousands of claimants across a range of high-profile actions, including:

- Advising a group of over 130,000 consumers who bought vehicles with defective components in group litigation against Jaguar Land Rover
- Representing over 100,000 consumers in the Pan-NOx Emissions Group Litigation against Mercedes-Benz, BMW and Vauxhall.
- Representing thousands of individual consumers for mis-sold car finance via the FCA's redress scheme.

Questions Chapter 1 – Opt-out collective actions

Class representatives

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

Yes, but that certainty should not come from legislation.

Milberg agrees that greater certainty in relation to the authorisation of class representatives (“CRs”) is desirable. In our view, it is best delivered by consolidating the substantial body of guidance the Competition Appeal Tribunal (the “Tribunal”) has developed into a dedicated Practice Direction for Class Representatives, rather than by statutory amendment. The Tribunal’s recent decisions show two things: the authorisation condition in rule 78 of the Competition Appeal Tribunal Rules 2015 is working, and the Tribunal can respond quickly to new problems as they emerge. What the regime lacks is a single, accessible statement of the standards that CRs are now expected to meet.

Case law development

The clearest statement of the role of a class representative came in *Riefa v Apple* (January 2025): there the Tribunal held that a class representative (“CR”) is not merely a “figurehead for a set of proceedings being conducted by their legal representatives”, but an independent advocate for the class as a whole.¹ The Tribunal recognised that the role carries a “heavy responsibility”, because the interests of the class, the funder, and any solicitors acting under a CFA will not always align.² Its scrutiny focussed on whether the CR understood the funding arrangements, and it refused authorisation because it was not satisfied that the CR had demonstrated “sufficient independence or robustness so as to act fairly and adequately in the interests of the class”.³

Two months later, in *Bulk Mail* (March 2025), the Tribunal addressed one of the concerns most frequently raised about the regime: that claims are often identified by lawyers, who then approach a funder, and only afterwards a CR. It did not treat that sequence as disqualifying. It responded instead by requiring that the CR receive independent advice on the funding arrangements and on legal costs, and by expecting the CR to retain a costs specialist independent of both the funder and the solicitors.⁴ The Tribunal also required updated costs budgets at each case management conference.⁵

In *Rowntree v Performing Right Society* (August 2025), the Tribunal criticised a CR for making unilateral decisions on litigation strategy without consulting the advisory board. That criticism reinforced the expectation that governance structures are used in practice, and do not simply exist on paper.⁶ The

¹ *Christine Riefa v Apple Inc* [2025] CAT 5, [115].

² *Ibid*, [115].

³ *Ibid*, [114].

⁴ *Bulk Mail Claim Ltd v International Distribution Services plc* [2025] CAT 19, [22], [26] to [27], [40].

⁵ *Ibid*, [39].

⁶ *David Alexander de Horne Rowntree v Performing Right Society* [2025] CAT 49, [116].

same concern has been expressed extra-judicially, where Ben Tidswell (a Chair of the Tribunal) has observed that CRs do not always have the cost-management expertise the Tribunal would like to see.⁷

The Tribunal's response to that concern is illustrated by *Shotbolt v Valve* (January 2026), in which Milberg acts for the CR. Of its own motion, the Tribunal raised cost control. The collective proceedings order recited the CR's agreement to report progress of costs against the litigation budget to the Tribunal quarterly. It also recited the CR's agreement that the legal team would submit funding requests to the funder only after review and approval by costs counsel or a costs draughtsman.⁸ The Tribunal also held that the suitability of the funding was a matter for which the CR should take responsibility personally, even where the arrangements had been negotiated before the CR was appointed.⁹

In *Waterside* (April 2026)¹⁰ the Tribunal refused to authorise a CR that it considered had not produced a satisfactory litigation plan addressing the costs and benefits of the proceedings.¹¹ It recognised that the role of CR "carries with it solemn responsibilities and is likely to be time-consuming", but held that remuneration at commercial rates risked aligning the CR's interests with those of the advisers it is required to scrutinise.¹² It also required the CR to justify the cost of its consultative panel and to identify who on that panel could scrutinise costs as they were incurred.¹³

It is clear that the Tribunal expects panels to be used in practice, not merely constituted. Panels must be consulted on strategic decisions, their cost and composition justified, and records kept of their work.¹⁴ The Tribunal has also required specific expertise where the class calls for it, such as a senior lawyer where the class includes many minors.¹⁵ These expectations are well suited to a Practice Direction, which can set out the matters the CR should address without prescribing a single panel model for every class.

In *Sciallis v Fender & Others* (July 2026), the Tribunal confirmed that CRs owe the Tribunal a duty of candour that extends to any material change in their funding position.¹⁶ The indemnity costs order that followed has prompted concern about the personal exposure of CRs. Milberg reads this decision not as revealing a gap in the law, but more as a pointed reminder to solicitors, CRs, funders and the Tribunal alike of how demanding the role is. It supports the requirement for an independent advisory board as standard practice and for continued scrutiny of those advising CRs. It does not demonstrate the need for a new statutory framework.

⁷ Ben Tidswell, 'Collective Actions: who acts and with whose money?', British Institute of International and Comparative Law, 15 January 2026.

⁸ *Vicki Shotbolt Class Representative Ltd v Valve Corporation* [2026] CAT 4, [157] to [158].

⁹ *Ibid*, [151]

¹⁰ *Waterside Class Limited v (1) Mowi ASA, (2) Mowi Holding AS, (3) Grieg Seafood ASA, (4) Salmar ASA, (5) LerøySeafood Group ASA, and (6) Scottish Sea Farms Limited* [2026] CAT 32.

¹¹ *Ibid*, [58].

¹² *Ibid*, [53] to [55].

¹³ *Ibid*, [60].

¹⁴ *David Alexander de Horne Rowntree v Performing Right Society* [2025] CAT 49, [116]; *Waterside* [2026] CAT 32, [60]; *Or Brook Class Representative Ltd v Alphabet Inc and Others* [2026] CAT 65, [77] to [78].]

¹⁵ *Shotbolt* [2026] CAT 4, [155].

¹⁶ *Elisabetta Sciallis v Fender & Others* [2026] CAT 56, [85].

In *Or Brook v Alphabet* (August 2026), the Tribunal approved a CR's remuneration by reference to a daily cap. It described rates of £1,000 per hour for consultative panel members as "extremely high", and required records of the panel's work and ongoing review of its use.¹⁷

Most recently, *JLP A&A v Apple and Amazon* (September 2026) shows the system working as intended. The claim refused certification in *Riefa* was refiled by a reconstituted CR, and has now been certified subject to conditions. The Tribunal held that including the costs of the failed *Riefa* application in the funding arrangements was "manifestly unreasonable and inappropriate", and required their removal before any order is made.¹⁸ It fixed the CR's maximum hourly rate and a daily cap, and required that CRs' rates be published on claims websites as standard practice.¹⁹ It also made clear that an application for certification "is not a process of negotiation with the Tribunal".²⁰

Why a Practice Direction, not legislation

Three features of this case law point towards a Practice Direction rather than statutory reform.

First, the Tribunal has been responsive. Each of the concerns most often raised about CRs has been addressed by the Tribunal within months of arising: lawyer-led origination, inadequate cost control, excessive remuneration, weak governance and non-disclosure of funding problems. Legislation would fix standards at a single point in time, in a field where they are still developing quickly.

Second, the Tribunal has itself indicated that it may publish general guidelines on CR remuneration, and that its conclusions may be revisited in light of a broader consultation.²¹ A Practice Direction would allow that guidance to be developed in consultation with practitioners, funders and CRs, and updated as practice evolves.

Third, a proven model already exists. The Tribunal's Practice Direction 3/2025 on expert evidence sets out the duties of experts and requires disclosure of any prior involvement with the case and of the steps taken to ensure independence.²² The questions that arise for CRs are of the same character: independence from those instructing and funding them, transparency about how they came to be involved, and continuing candour with the Tribunal.

Milberg also recognises the limits of the present position, and this is the strongest case for consolidation. The relevant guidance is now spread across more than a dozen judgments, much of it expressed in fact-specific terms. In *Or Brook*, for example, the Tribunal stated that its decision on remuneration was "not to set a pattern, precedent or significant data point going forward".²³ Yet the daily cap approved there was adopted as the benchmark in *JLP A&A* a few weeks later.²⁴ Prospective CRs, particularly those acting for the first time, cannot readily identify the standards they must meet.

¹⁷ *Or Brook Class Representative Ltd v Alphabet Inc and Others* [2026] CAT 65, [73] to [78].

¹⁸ *JLP A&A Class Representative Ltd v Apple Inc and Others* [2026] CAT 75, [210], [213].

¹⁹ *Ibid*, [273] to [280].

²⁰ *Ibid*, [234].

²¹ *Ibid*, [251], [279].

²² CAT Practice Direction 3/2025, [2], [3], [8] to [9]; applied in *JLP A&A* [2026] CAT 75, [64], [84].

²³ *Or Brook* [2026] CAT 65, [72].

²⁴ *JLP A&A* [2026] CAT 75, [275].

That is a problem of accessibility, not of substance, and a Practice Direction is the proportionate solution.

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)**

Subject to our answer to Q1, Milberg considers that each of these areas would benefit from greater certainty, together with two further areas: the remuneration of CR's and their personal exposure to costs. In each case, the Tribunal has already developed substantive guidance. What is needed is consolidation in a Practice Direction for CRs, not legislation.

We believe that funding arrangements is the area that would benefit most from greater certainty. On funding arrangements. Milberg supports the Civil Justice Council's recommendation that an independent, binding process be established to resolve disputes between funders and funded parties, promoting consensual resolution and with its costs borne by the funder.²⁵ The voluntary, self-regulatory model of the Association of Litigation Funders has, in practice, little bite in this respect. At present, disputes between CRs and funders are resolved under dispute resolution clauses that the funder itself proposes, typically referral to a King's Counsel. The Tribunal has had to intervene case by case to ensure those clauses turn on an objective assessment rather than the funder's opinion.²⁶ A standard, independent process would give CRs certainty that their ability to hold a funder to its commitments does not depend on terms negotiated from a position of weakness.

Milberg considers that CR's need clearer guidance on three related matters: their role in funding arrangements, their potential exposure to costs, and what adverse costs insurance can realistically be obtained to cover it. *Sciallis* has drawn attention to the second. There, the Tribunal ordered costs against the CR on the indemnity basis, after funding had been withdrawn and that change had not been disclosed.²⁷ A Practice Direction could identify the minimum features that adverse costs arrangements are expected to have and when arrangements should be in place by.

The Tribunal now assesses CR remuneration by reference to the "public service element" of the role, and has capped remuneration accordingly.²⁸ Milberg does not dispute the importance of scrutinising CR remuneration though would welcome further consultation on this.²⁹ But if the role is to be remunerated as a form of public service, the allocation of risk should be consistent with that characterisation. Holders of public appointments are not exposed to personal liability for costs in the way that a CR may be. Clear guidance on remuneration should therefore be accompanied by clear

²⁵ Civil Justice Council, Review of Litigation Funding: Final Report (June 2025), [3.16] (Recommendation 15).

²⁶ *Carolyn Roberts v Severn Trent Water Ltd* [2025] CAT 17, [93] to [94]; *JLP A&A* [2026] CAT 75, [218] to [222].

²⁷ *Elisabetta Sciallis v Fender Musical Instruments Corporation and Others* [2026] CAT 56

²⁸ *JLP A&A* [259], [273] to [276]; *Waterside Class Ltd v Mowi ASA and Others* [2026] CAT 32, [53] to [55]

²⁹ And other options available to the Tribunal to deal with the concerns of a funder return being applied to the CR's remuneration.

guidance on the protections CRs can expect, so that capable individuals are not deterred from taking on a role on which consumers depend to vindicate their rights through private enforcement. Given how central CRs are to consumers vindicating their rights via private enforcement, the risk of personal liability represents an unbalanced allocation of risk, especially considering heightened scrutiny on their levels of remuneration after *Waterside*.

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

As set out in response to Question 2 above.

Certification

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

No. Milberg does not consider that redefining "suitability" as absolute suitability would provide a more meaningful filter. In our view it would reverse considered Supreme Court authority, duplicate safeguards which the Supreme Court has very recently strengthened, and require merits evidence at the stage of competition proceedings at which it is least likely to exist.

The proposal would reverse *Merricks* without principled justification. In *Merricks v Mastercard*, the majority of the Supreme Court held that suitability, in section 47B(6) of the Competition Act 1998 and Rule 79(1)(c), is a relative concept: suitable to be brought in collective proceedings rather than individual proceedings.³⁰ Lord Briggs explained that the Rule 79(2) factors are weighed together in a single value judgment: "The listed factors are not separate suitability hurdles, each of which the applicant for a CPO must surmount".³¹ The relative test reflects the reality the regime was designed for. For most consumer and SME class members, the alternative to collective proceedings is not an individual claim but no claim at all. Lord Briggs, giving the majority judgment, found that the Tribunal had erred. It had allowed difficulties with data to deny claimants with a real prospect of success a trial by the only procedure available to them in practice.³² An absolute suitability test would reintroduce that error by statute.

The proposal would in substance adopt the view of the minority in *Merricks*. Yet even the minority considered that any merits inquiry at the certification stage must not amount to a mini-trial, and that suitability should not be read as imposing a merits test higher than strike out or summary judgment.³³ The unanimous Supreme Court in *Evans*, including both members of that minority, has since confirmed that the merits are irrelevant to certification itself and bear only on the choice between opt-in and opt-out proceedings.³⁴

The merits are already assessed on their own terms, through strike out and summary judgment and, following *Evans*, through the choice between opt-in and opt-out proceedings under Rule 79(3)(a). The proposal would move that inquiry into a provision which the Supreme Court has held asks a different,

³⁰ *Merricks v Mastercard Inc* [2020] UKSC 51, [56], [70] to [71] (Lord Briggs).

³¹ *Ibid*, [61]

³² *Ibid*, [64(c)] to [64(d)], [73].

³³ *Ibid*, [113] to [114] (Lord Sales and Lord Leggatt)

³⁴ *Evans* [2025] UKSC 48, [58].

comparative question, and which was never designed to carry it. Suitability is not, and should not become, a merits test.

The merits of a claim are not a relevant factor in the decision whether to certify, save through strike out or summary judgment and the choice between opt-in and opt-out proceedings.³⁵ The Microsoft test is likewise not concerned with the merits. It asks whether the proposed methodology offers a credible and workable blueprint for determining the common issues at trial.³⁶ Folding the merits into suitability would blur exercises the courts have deliberately kept distinct. Unlike a strike out, a refusal of certification does not finally determine a claim and does not preclude a further application.³⁷

The merits are already tested at certification, and Evans has strengthened that filter. Milberg recognises the concern identified by the Supreme Court that opt-out proceedings “carry the risk that defendants may be driven to settle unmeritorious claims by their sheer size and the heavy costs of defending them”.³⁸ The regime already addresses that risk through three safeguards.

First, strike out and summary judgment test the merits directly. They may be heard at the certification hearing,³⁹ and the Tribunal may consider strike out of its own initiative.⁴⁰ Such applications have succeeded, in whole or in part, in a number of cases.⁴¹

Second, the certification process itself filters speculative claims. A methodology “cannot be purely theoretical or hypothetical” and must be grounded in the facts of the case.⁴² The Tribunal has made clear in recent decisions that this requirement is not confined to quantum. It extends to infringement, the counterfactual and the theory of harm.⁴³ Certification has been paused where the methodology did not provide a blueprint to trial,⁴⁴ and in *JLP* it was refused for a claim which could not be struck out, because the proposed methodology did not show a coherent and workable route to proving it.⁴⁵ Where certification is paused, the Tribunal’s scrutiny improves the quality of the claims that proceed, without the finality of a strike out.⁴⁶

Third, following *Evans v Barclays Bank*, the strength of the claim is a material factor under Rule 79(3)(a) in the choice between opt-in and opt-out, assessed on a sliding scale.⁴⁷ As the Supreme Court put it, “Surviving strike-out or summary judgment is a low bar”. A claim may survive summary disposal yet

³⁵ *Merricks* [2020] UKSC 51, [59] to [60]; *Evans* [2025] UKSC 48, [58].

³⁶ *London & South Eastern Railway Ltd v Gutmann* [2022] EWCA Civ 1077, [56]; *Gormsen v Meta Platforms Inc* [2023] CAT 10, [38]; *JLP A&A Class Representative Ltd v Apple Inc* [2026] CAT 75, [51(1)].

³⁷ *JLP* [2026] CAT 75, [60] to [62].

³⁸ *Evans* [2025] UKSC 48, [3].

³⁹ Competition Appeal Tribunal Rules 2015 (SI 2015/1648) (“Tribunal Rules”), r. 79(4); *Evans* [2025] UKSC 48, [43]; Guide to Proceedings 2015, [6.43], as recited in *Merricks* [2020] UKSC 51, [29].

⁴⁰ Tribunal Rules, r. 41(1); *Evans* [2025] UKSC 48, [79].

⁴¹ *BSV Claims Ltd v Bittylicious Ltd* [2024] CAT 48; *Gutmann v Vodafone Ltd* [2025] CAT 77, [51] to [62], [78]; *Gutmann v Apple Inc* [2026] CAT 20; *Rowntree v PRS* [2025] CAT 49.

⁴² *Gutmann* [2022] EWCA Civ 1077, [53] to [55].

⁴³ *Gormsen* [2023] CAT 10, [38(3)]; *JLP* [2026] CAT 75, [51].

⁴⁴ *Gormsen* [2023] CAT 10, [57], [62]; *Commercial and Interregional Card Claims I Ltd v Mastercard Inc* [2023] CAT 38, [2], [149], [158]–[161].

⁴⁵ *JLP* [2026] CAT 75, [127] to [130], [149] to [150].

⁴⁶ *Ibid*, [60] to [62]; *Gormsen v Meta Platforms Inc* [2024] CAT 11.

⁴⁷ *Evans* [2025] UKSC 48, [88], [91], [94] to [96], [104].

be too weak to proceed on an opt-out basis.⁴⁸ Where opt-in proceedings are uneconomic, a refusal of opt-out certification may end a claim as effectively as a strike out. That scrutiny continues after certification: in *Ennis* the Tribunal reconsidered an existing collective proceedings order in light of *Evans*.⁴⁹

These safeguards are actively used. Defendants to collective proceedings are typically large, well resourced undertakings advised by experienced firms, and they deploy every procedural tool available to them. They oppose certification on the Microsoft test, on authorisation and on the choice between opt-in and opt-out proceedings. They also bring applications to strike out or for summary judgment, which the Tribunal will generally hear at the certification hearing.⁵⁰ Where no application is made, the Tribunal may strike out a claim of its own initiative.⁵¹ Scrutiny does not end at certification, since a collective proceedings order may be varied or revoked at any time.⁵² A class representative must also show that it is able to pay the defendant's recoverable costs if ordered to do so,⁵³ so a defendant who successfully resists an unmeritorious claim is protected as to its costs. Claims do not reach trial without sustained and well-resourced challenge. The proposal therefore addresses a problem which the regime, and now the Supreme Court in *Evans*, has already resolved.

Merits evidence is least available at certification

Certification takes place before disclosure. The Court of Appeal has recognised that a methodology assessed at that stage is "necessarily provisional".⁵⁴ Competition claims are heavily led by expert evidence, and at the outset it is hard to predict exactly what a case will look like.⁵⁵ In standalone claims, there is usually a marked information asymmetry between a class representative and the proposed defendants, who hold much of the relevant evidence.⁵⁶ A test requiring the merits to be demonstrated at certification would front-load disclosure and expert costs. It would fall hardest on standalone claims, contrary to the requirement that cases be dealt with at proportionate cost.⁵⁷

New statutory language would cost predictability. The role of the assessment of merits under the existing wording took from *Le Patourel* in 2022 to *Evans* in 2025 to settle at appellate level.⁵⁸ The Supreme Court in *Evans* also emphasised that certification decisions are evaluative judgments for the specialist Tribunal.⁵⁹ A new concept of absolute suitability would invite a further cycle of satellite litigation and appeals. That would increase cost and uncertainty for defendants and class members alike and likely materially impact on the availability of funding.

⁴⁸ *Ibid*, [101] to [102].

⁴⁹ *Ennis v Apple Inc* [2026] CAT 55, [62].

⁵⁰ Tribunal Rules, r. 41(1)(b), 43(1) and 79(4); Guide to Proceedings 2015, [6.43].

⁵¹ Tribunal Rules, r. 41(1); *Evans* [2025] UKSC 48, [79].

⁵² Competition Act 1998, s. 47B(9); Tribunal Rules, r. 85(1); *Merricks* [2020] UKSC 51, [4], [28].

⁵³ Tribunal Rules, r. 78(2)(d)

⁵⁴ *Gutmann* [2022] EWCA Civ 1077, [55].

⁵⁵ *Meta Platforms Inc v Gormsen* [2026] EWCA Civ 993, [35] to [36]; *BT Group plc v Le Patourel* [2022] EWCA Civ 593, [105]; *Evans* [2025] UKSC 48, [100].

⁵⁶ *Gutmann v Vodafone* [2025] CAT 77, [145] to [146].

⁵⁷ *Evans* [2025] UKSC 48, [108].

⁵⁸ *Le Patourel* [2022] EWCA Civ 593; *Evans* [2025] UKSC 48, [97] to [105], in particular [102].

⁵⁹ *Ibid*, [114], [128] to [133].

Commercial scrutiny reinforces the judicial filter. Lawyers acting under CFAs, funders and ATE insurers each assess a claim's prospects independently before committing resources or accepting risk. The Tribunal scrutinises funding arrangements and the class representative's independence at certification.⁶⁰ These commercial checks are not a substitute for judicial scrutiny, but they mean that unmeritorious claims reaching the Tribunal are the exception rather than the rule.

For these reasons, Milberg's answer is no. If the Government considers that further clarity is needed, the more proportionate course would be to reflect *Evans* in the Tribunal's Guide to Proceedings rather than amend primary legislation.

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

No. The regime exists to deliver redress where individual losses are small. As Lord Briggs explained in *Merricks* "The evident purpose of the statutory scheme was to facilitate rather than to impede the vindication of those rights"⁶¹. The Supreme Court in *Evans* confirmed that facilitating the vindication of rights and deterring future wrongdoing remain goals of the regime, while emphasising that they must be balanced against the protection of defendants from unmeritorious claims.⁶² A statutory cost-benefit certification threshold, particularly one measured chiefly against per-claimant payout, would by design fail the claims with modest individual value that the regime exists to serve, whatever their merits or deterrent value. Yet the Supreme Court in *Evans*, described a large class of ordinary consumers, each with a claim too small to pursue individually as the '*paradigm type of case[s] in which opt-out proceedings are likely to be justified*'.⁶³

Cost-benefit is already a statutory consideration at certification under Rule 79(2)(b) of the CAT Rules 2015.⁶⁴ The primary legislation – s.47B Competition Act 1998, as substituted by Schedule 8 Consumer Rights Act 2015 – was deliberately drafted at a high level of generality, leaving detail like this to the Rules,⁶⁵ and the consultation paper itself accepts at paragraph 29 that this is 'currently provided for in the CAT Rules'.⁶⁶ So the real question is not whether cost-benefit is a relevant factor when deciding if a claim should be certified, but whether introducing a statutory certification threshold would be an improvement. Recent case law suggests such a change is neither necessary nor helpful since the Tribunal already pro-actively exercises its 'gatekeeper' function in applying the cost-benefit test at certification.

The recent decision in *Waterside* (April 2026) showcases this point.⁶⁷ In that case, the Tribunal refused to grant a CPO at that stage because it was not satisfied that the relevant costs and benefits justified

⁶⁰ *Riefa v Apple Inc and Amazon.com Inc* [2025] CAT 5

⁶¹ *Merricks v Mastercard Inc* [2020] UKSC 51, [54]; see also *BT Group plc v Le Patourel* [2022] EWCA Civ 593, [26], [29].

⁶² *Evans v Barclays Bank plc* [2025] UKSC 48, [35], [137] to [138].

⁶³ *Evans v Barclays Bank* [2025] UKSC 48, [116].

⁶⁴ CAT Rules 2015 (SI 2015/1648), r.79(2)(b). See *Evans* [33] to [34]: Parliament enacted section 47B knowing the detail would sit in Rule 79.

⁶⁵ Competition Act 1998, s.47B(6) (as substituted by Consumer Rights Act 2015, Schedule 8).

⁶⁶ *Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement* (DBT, 17 July 2026), [29]; n.15.

⁶⁷ *Waterside Class Ltd v Mowi ASA and Others* [2026] CAT 32, [48]; see also [38]-[42] on the litigation budget.

continuing the proceedings, nor that it was just and reasonable for the applicant to act as the CR. The claim was said to be brought on behalf of some 35-44 million salmon consumers with estimated individual losses of £2-£9 each, against a litigation costs budget of roughly £21 million including ATE deposit premium. Noting that this sum was, on its face, ‘*unexpectedly high*’⁶⁸, the Tribunal on that occasion also criticised the PCR for not pursuing cost synergies with parallel retailer claims that had been brought on behalf of supermarkets arising out of essentially the same facts. In so doing, the Tribunal distinguished the case from *Gutmann*⁶⁹ on the basis that certification will not ordinarily follow where the cost-benefit balance is ‘plainly against’ continuation of the proceedings.⁷⁰ In doing so, the Tribunal applied, rather than departed from, the framework set out in *Merricks*. Suitability remains a non-merits assessment: the merits bear on certification only through strike out or summary judgment and, following *Evans*, through the choice between opt-in and opt-out proceedings.⁷¹ The balance of costs and benefits is one of the factors weighed in a single value judgment on suitability.⁷² Lord Briggs accepted that one factor may be decisive in that exercise, provided the Tribunal says so expressly.⁷³ That is what the Tribunal did in *Waterside*, explaining why the balance was plainly against continuation of the proceedings as then formulated.⁷⁴ It also read Lord Briggs’s observation that distribution is generally premature at certification as directed to the interests of class members among themselves, not to whether an award could reach the class at all.⁷⁵

Whilst the Tribunal declined to certify the claim *Waterside*, it did not strike out the claim, acknowledging that collective proceedings were “*prima facie* appropriate” and invited⁷⁶ the PCR to reformulate the claim and make a further CPO application. This demonstrates the benefit of the current regime, in which the flexibility already built into the rules allowed the PCR to amend its claim with a smaller budget and more ‘creative’ mechanism for returning damages to the class, rather than having the claim immediately struck out. The CAT has shown recently in *Or Brook Class Representative Ltd v Google Inc*⁷⁷ (August 2026) its appetite to seek to proactively manage cost budgets and duplication through active case management and budgetary scrutiny, rather than refusing to certify a claim on that basis alone.

Milberg accepts that a proposed class representative should address likely take-up at certification, as the Tribunal now expects.⁷⁸ What it opposes is a statutory requirement to demonstrate take-up rates as a condition of certification. Such a requirement would risk squeezing out claims involving modest individual losses, which are exactly the harm the regime exists to address. Take-up depends on the size of any award and the distribution mechanism, neither of which can be known with confidence before the evidence is heard. The Tribunal’s current practice deals with this by requiring a credible distribution

⁶⁸ *Ibid* [40].

⁶⁹ *Gutmann (CPO)* [2021] CAT 31

⁷⁰ *Ibid.* [47], distinguishing *Merricks v Mastercard Inc* [2020] UKSC 51.

⁷¹ *Merricks* [2020] UKSC 51, [59] to [60]; *Evans* [2025] UKSC 48, [58], [95].

⁷² *Merricks* [2020] UKSC 51, [61].

⁷³ *Ibid*, [68].

⁷⁴ *Waterside* [2026] CAT 32, [46] to [49].

⁷⁵ *Ibid*, [25]; *Merricks* [2020] UKSC 51, [80].

⁷⁶ *Ibid*, [61].

⁷⁷ *Or Brook Class Representative Limited v Google Inc & Others* [2026] CAT 65

⁷⁸ *Waterside Class Ltd v Mowi ASA* [2026] CAT 32, [20], [25]–[26], [49]; *Gutmann v First MTR South Western Trains Ltd (Stakeholder Entitlement)* [2025] CAT 72, [67], [183].

plan and refining it under supervision, as in *Spottiswoode*,⁷⁹ rather than by applying a fixed threshold at a single hearing. Recent CAT decisions thus point to a regime that corrects and refines itself through ongoing case management, and that allows proposed class representatives to reformulate claims under the Tribunal's close supervision, as in *Waterside*.⁸⁰ That flexibility is itself the safeguard against the risk this question is concerned about, and it is exactly what a rigid statutory threshold, applied once at certification, would put at risk. Recent CAT decisions thus point to a regime that corrects and refines itself in response to the specific qualities of claims that come before it through ongoing case management, and that allows proposed class representatives to reformulate under the close supervision of the CAT claims that were, as in the case of *Waterside*, 'prima facie appropriate'. That flexibility is itself the safeguard against the very risk this question is concerned about, and it is exactly what a rigid statutory threshold, applied once at a single certification hearing, would put at risk.

This focus on case management by the CAT is visible at the level of funding, too. CFAs, certification-stage budget scrutiny, and post-certification budget revision are all in active use in the current regime. Post-PACCAR scrutiny of funding in *Gutmann v Apple* already shows the Tribunal willing to force renegotiation of terms disproportionate to the benefit the class.⁸¹ Using those tools to ensure the cost-benefit of a claim is open to scrutiny through the existing flexible rules is a far more proportionate response to the concerns about low take up and distribution shortfalls than inventing a new, rigid statutory test.

Although Milberg does not agree that cost-benefit analysis should form part of a statutory threshold test at certification, three safeguards should be non-negotiable if the law must be amended:

1. Preserve the principle that a low individual claim value cannot, by itself, make a claim disproportionate. The test should instead focus on how efficiently costs are being incurred and how credible the proposed distribution mechanism is, not the raw estimation of per-capita recovery at the outset of a claim.
2. Require the Tribunal to consider, and where appropriate order, cost-mitigation measures that might include cost-sharing with parallel claims (as in *Waterside*) and more creative distribution mechanisms, before certification can be refused on cost-benefit grounds, mirroring current practice (e.g. *Waterside*, *Spottiswoode* and *Or Brook*).
3. Recognise expressly that the benefits of collective proceedings are not confined to sums claimed by individual class members. Compensating the class remains the primary objective. Where damages go unclaimed, however, they are paid to charity rather than returned to the defendant, so that an infringer does not retain the proceeds of its infringement.⁸² The Tribunal already treats the outcomes that benefit class members or charity as legitimate, and outcomes that predominantly benefit lawyers and funders as contrary to the public interest.⁸³ Effective private enforcement also deters future infringement a goal of the regime which the Supreme

⁷⁹ *Spottiswoode v Nexans France SAS* [2024] CAT 31, [43], [53]–[55], [59(1)].

⁸⁰ *Waterside* [2026] CAT 32, [61]–[62].

⁸¹ *Justin Gutmann v Apple Inc and Others* [2024] CAT 18, para 38; *Apple Inc v Justin Gutmann* [2025] EWCA Civ 459, [78].

⁸² Competition Act 1998, s. 47C(5); *BT Group plc v Le Patourel* [2022] EWCA Civ 593, [43], [98]; *Waterside* [2026] CAT 32, [45].

⁸³ *Gutmann (Stakeholder Entitlement)* [2025] CAT 72, [183]; *McLaren v MOL (Europe Africa) Ltd* [2026] CAT 6, [60].

Court has recognised, albeit one to be balanced against the protection of defendants from unmeritorious claims.⁸⁴ Low individual take-up should not alone brand a claim unsuitable for certification.

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.

As with the answer to Q5, Milberg considers that the existing certification framework is sufficient to address the question of whether there is sufficient evidence for aggregate damages at certification.

To introduce a new statutory test would introduce uncertainty and increase costs, when the current regime following the Supreme Court in *Merricks* already applies a sufficient threshold to ensure that the methodology must be sufficiently credible to offer a ‘*real prospect of establishing loss on a class-wide basis*’. The current threshold for the assessment of aggregate damages at certification applies broad principles familiar to English Courts when assessing the quantification of loss, including the ‘*broad axe*’ principle that is applied following *Merricks*, meaning that the forensic difficulty in quantifying loss should not stop a class claim at the certification stage. The current certification framework enables the CAT to play its gatekeeping role while minimising unnecessary expenditure on expert evidence and disclosure at that preliminary stage.

Financing a claim

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

Yes.

Milberg supports the proposal to permit damages-based agreement (DBAs) in opt-out collective proceedings. Removing the current prohibition would provide greater flexibility in the financing of claims, encourage competition between different funding arrangements and potentially improve access to justice for individuals and businesses harmed by infringements of competition law.

The current regime depends heavily on third-party funding. While such funding plays an essential role in facilitating collective proceedings and should remain an important feature of the regime, reliance on external funders can constrain the range of claims that are commercially viable. In particular, the investment criteria and return requirements of third-party funders may mean that otherwise meritorious claims struggle to attract funding.

Permitting DBAs would give law firms greater flexibility to assume litigation risk directly and to structure their remuneration by reference to the outcome of the proceedings. It would also create opportunities for alternative arrangements combining solicitors’ investment with third-party funding, where appropriate. This would enable PCRs to consider a broader range of financing structures, taking account of the particular circumstances and requirements of individual claims.

Increased choice may also promote more competitive financing terms. However, DBAs should not be regarded as inherently less expensive than third-party litigation funding. The overall cost of any

⁸⁴ *Merricks* [2020] UKSC 51, [53]; *Evans* [2025] UKSC 48, [137].

arrangement will depend on the nature and extent of the risks assumed, the capital committed, and the anticipated duration and complexity of the proceedings. The benefit is therefore the greater flexibility and competitive tension that alternative funding arrangements may introduce.

DBAs may also promote a closer alignment between the financial interests of solicitors and the outcomes achieved for the represented class, insofar as the solicitors' remuneration is contingent on a successful recovery. While potential conflicts of interest must be appropriately managed, these are not unique to DBAs and can be addressed through existing professional obligations, the independence of the class representative, and appropriate oversight by the Competition Appeal Tribunal.

Milberg would support a review of the DBA Regulations to ensure that their requirements do not unnecessarily restrict the flexibility of arrangements available or create uncertainty as to their enforceability. We would welcome the opportunity to participate in any consultation on their reform.

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.

Yes.

Milberg considers that the existing collective proceedings regime provides substantial and proportionate safeguards against speculative or unmeritorious litigation. We do not consider that permitting DBAs would create a need for additional restrictions beyond those already available under the existing legal and regulatory framework.

The Tribunal performs an important gatekeeping function through its certification process. In determining whether to grant a collective proceedings order, the Tribunal must assess whether the claims are suitable for collective proceedings and whether the PCR should be authorised on behalf of the class. This includes scrutiny of the funding arrangements, the ability to meet the costs of proceedings, and the adequacy of arrangements for adverse costs exposure. These requirements, alongside the Tribunal's extensive case management and costs powers, provide meaningful protection against speculative litigation.

It is important, however, to distinguish genuinely speculative or abusive litigation from claims that raise novel or complex issues of competition law or involve inherent litigation risk. The collective proceedings regime is intended to facilitate access to redress, including in cases where individual claims would not be economically viable. Safeguards should not operate so restrictively as to discourage meritorious claims simply because their outcome is uncertain.

Solicitors are also subject to professional obligations, including duties to act in their clients' best interests, maintain their independence, manage conflicts of interest, and comply with their duties to the court. These obligations apply irrespective of the funding arrangements adopted. DBAs do not displace those duties. Moreover, the financial exposure assumed by solicitors acting under a DBA provides a commercial incentive to assess the merits and prospects of a claim carefully prior to committing resources to it.

Milberg is not aware of any persuasive evidence that the existing safeguards are inadequate to address speculative litigation, or that permitting DBAs would increase any risk. Any proposal to impose

additional restrictions should therefore be supported by evidence of a specific regulatory deficiency and assessed against its potential impact on access to justice.

To the extent that additional safeguards are considered necessary, Milberg would favour a proportionate approach, preserving the Tribunal's discretion to scrutinise funding arrangements and address identifiable conflicts of interest or concerns about the conduct of particular proceedings. Such scrutiny should not result in unnecessary procedural burdens or create satellite disputes.

Milberg would not support rigid caps on solicitors' remuneration or funding returns as a means of preventing speculative litigation. Such measures do not directly address the merits of a claim and risk making otherwise viable proceedings commercially unattractive, particularly where the litigation involves substantial complexity, duration, or financial risk.

Milberg therefore considers that the existing framework of professional regulation and judicial oversight provides a sound basis for addressing concerns about speculative litigation, and that caution should be exercised before introducing additional prescriptive restrictions which could inadvertently undermine the objectives of the collective proceedings regime.

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

Yes, though we consider that the risks are manageable. The most important distinction for Government to draw is between risks that arise out of how a claim is financed and risks that arise out of how litigation is conducted. Aggressive pleading, inflated costs, unnecessary procedural steps and inappropriate settlement pressure are primarily matters of litigation conduct and case management and should be dealt with through the CAT's existing powers and the professional regulatory framework. Restricting DBAs would not necessarily fix these issues; it could instead limit the financing options available for meritorious claims without addressing the underlying concerns.

There is a related risk in over-regulating the financing side instead. Uncertain, duplicative or excessive requirements could discourage law firms and funders from committing capital to opt-out collective proceedings, reducing the availability of funding arrangements and potentially increasing their cost. Any new safeguard should be weighed against that risk before it is adopted.

As for the risks more directly associated with DBAs themselves, such as conflicts of interest, information asymmetry, and the possibility that financial incentives influence decisions on strategy or settlement, these are legitimate concerns, but they are not necessarily unique to DBAs. Litigation funding, CFAs and ordinary solicitor-client relationships all can give rise to competing interests, and the question is whether such risks can be identified, disclosed and appropriately managed. Milberg's view is that they can, not least because the alignment that DBAs can create between solicitors and the class has a genuine upside: class members typically hold very small individual stakes and cannot realistically supervise complex litigation themselves, while a firm with its own capital and reputation at stake has a strong commercial incentive to run the case efficiently and maximise recovery.

Solicitors' professional duties remain applicable throughout, requiring them to act in their clients' best interests, maintain their independence and appropriately manage any conflicts of interest, and the CAT's oversight of the PCR / CR and of settlements adds a further layer of oversight and protection. Where particular misconduct does surface, it can be addressed through regulatory enforcement,

professional discipline and case management. Milberg therefore considers that any additional measures should be proportionate and directed at identifiable risks, rather than imposing blanket restrictions which could unnecessarily limit the availability or commercial viability of DBAs in collective proceedings.

Preserving the use of litigation funding

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

Yes.

However, it must be emphasised that Milberg would strongly resist fixed caps, rigid multiples or percentages, or anything resembling a standard tariff. Measures such as these do not necessarily reduce the cost of funding and risk making certain claims involving greater merits risk, longer duration, substantial capital requirements or more modest potential recoveries commercially unviable, which works directly against the access-to-justice objective Government is trying to protect.

The better starting point for assessing the reasonableness of a funder's return is the circumstances known, or reasonably foreseeable, when the litigation funding agreement (LFA) was signed, including merits risk, anticipated duration, capital commitment, funding structure, adverse costs and security exposure, enforcement risk, portfolio effects and the possibility of a total loss on the investment. A case that resolves quickly or achieves a substantial recovery may have looked highly uncertain at the point when capital was first committed, and reasonableness should therefore be judged against that starting position rather than solely by reference to the eventual outcome. It should not, in other words, become a route to standardising returns across investments that are not alike: financing litigation is an individual risk and investment decision, priced closer to insurance than to a commodity, where price tracks the nature, likelihood, duration and scale of the risk and the capital at stake.

With that framing in place, yes, an early indication of reasonableness of both the funder's return and the agreed order of payment should increase certainty for funders. Litigation funding ties up substantial capital for an uncertain period with a genuine chance of total loss, and the economics can only work if a funder can judge, from the outset, what contractually agreed returns and payment priorities are likely to be acceptable. If that question is left open until the end of proceedings, funders may require a higher return to compensate for the uncertainty or decline to provide funding altogether. Greater certainty regarding the agreed waterfall is particularly important where funders and other stakeholders have committed resources in reliance on the anticipated priority of payments. How much value this actually delivers depends on how predictable it proves in practice, and a discretion applied inconsistently will not solve the underlying problem. The CAT needs a principled, consistently applied approach, which gives meaningful weight to the indication provided at certification, while retaining appropriate flexibility to respond to material changes in circumstance. Milberg considers that departure from an earlier indication should be supported by clear and material reasons, rather than simply a reassessment of the commercial terms with the benefit of hindsight. Published guidance identifying the relevant considerations, without prescribing acceptable rates of return, could further improve predictability while preserving the flexibility necessary to accommodate the circumstances of individual claims.

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.

Yes. Milberg supports a presumption that funders should ordinarily receive their return upon the making of a damages award or approval of a settlement, rather than being required to await completion of the distribution process. The successful conclusion of proceedings represents the point at which the litigation risk assumed by the funder has substantially crystallised. Making the funder's return contingent on the level of take-up by class members would introduce an additional source of uncertainty over which the funder has limited (or no) control. Even where reasonable efforts are made to facilitate distribution, take-up may be affected by factors unrelated to the merits of the claim or the outcome achieved. A successful claim may nevertheless have secured meaningful redress for the class and contributed to the deterrent effect of private competition enforcement.

The Tribunal is also well placed to assess the reasonableness of the proposed funder's return at the point of an award or settlement approval, taking into account of the funding risks originally assumed, the amount recovered and the outcome achieved for the class, including where relevant the relationship between the recovery and the value originally claimed. These issues have already arisen in the Tribunal's consideration of the settlement in *Merricks v Mastercard*.

The crucial point concerns the impact of delay on the cost and availability of funding. Uncertainty over the timing of realisation affects a funder's internal rate of return and its ability to reinvest capital. Where collective proceedings routinely tie up capital for longer than is necessary to resolve the litigation, the likely results are higher required returns, more selective investment, and less competition, none of which serves proposed class representatives or class members.

That is the backdrop against which the timing of payment matters so much in practice. Making a funder wait, unpaid, through what can be a lengthy distribution process even after a damages award has been made or settlement has been already approved, extends the life of the investment, adds uncertainty and reduces the funder's internal rate of return, without necessarily producing a corresponding benefit to the class. A clear presumption that the funder's return will be provided for at the point of award or approved settlement, with payment made when the relevant funds become available, removes an avoidable source of risk, and recognises that the funder supplied the capital and carried the downside risk that made the claim possible.

None of that should operate without appropriate transparency and oversight. The proposed class representative should understand the priority of payments and what that entails under realistic scenarios, with that information available to the CAT when considering the funding arrangements and, where appropriate, explained to class members in a clear and accessible manner.

Milberg recognises that the CAT should retain discretion to depart from the presumption where the circumstances of a particular case justify doing so, including where necessary to protect the interests of the class or ensure the effective administration of a distribution scheme. However, any such departure should be exceptional, proportionate and supported by clear reasons. Exercise it too freely, and the certainty this reform is meant to deliver would be undermined, with funders pricing the resulting risk into the cost of capital regardless. Subject to that safeguard, yes, Milberg considers that

the proposed presumption would improve predictability, support the continued availability of litigation funding, and reduce the risk of funders withdrawing from the collective proceedings regime.

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

Yes.

Milberg consider that the proposed approach broadly retains sufficient discretion for the CAT to safeguard against unfair outcomes, while recognising the important of providing greater certainty to litigation funders. Litigation funding is not, and should not be treated as an off-the-shelf product. Cases vary enormously in their merits, anticipated duration, capital requirements, adverse costs exposure, enforcement prospects and expected recovery, which is why fixed caps or ceilings would be inappropriate. Such restrictions would fail to reflect the different risks associated with individual claims and could make certain meritorious proceedings commercially unviable.

The preferable approach is to establish clear principles for how funding returns are assessed, combined with an appropriately defined discretion for the CAT to revisit an earlier indication or depart from the proposed payment presumption. Milberg considers that the current proposal broadly reflects this. A material change in a claim's economics or funding structure may justify reconsideration of an earlier assessment. Similarly, the CAT should retain the ability to depart from the proposed order of payment where there is a demonstrable risk that adhering to it would result in an unjust outcome. However, the exercise of either discretion should be supported by clear reasons and informed by the particular circumstances of the case. The mere fact that a funder receives a substantial return should not, on its own, establish unfairness, given that successful investments must be assessed in light of the real risk of total loss assumed by the funder, the broader commercial context in which litigation funding operates, and the circumstances that existed when the investment decision was made.

Milberg would, nevertheless, caution against an unduly broad exercise of that discretion. Uncertainty about whether an agreed return will ultimately be honoured is itself a risk from a funder's perspective. If the CAT's approach varies materially between cases, or an indication given at certification is reopened simply because the eventual outcome is more favourable than expected, the practical benefit of this reform could be undermined. This may increase the cost of funding and discourage investment in claims involving greater risk or more modest potential recoveries.

Milberg therefore considers that the proposed approach strikes an appropriate balance between safeguarding the interests of the class and providing funders with greater commercial certainty, provided that the CAT's discretion is exercised proportionately and with due regard to the funding arrangements previously agreed and assessed.

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.

Milberg recognises that it is important that the Tribunal maintains a high level of scrutiny regarding the level of costs being incurred by the parties to collective proceedings, and that there is a need for

costs to be the subject of proper scrutiny. Milberg considers that reform would be beneficial in relation to costs of collective proceedings, but that reform would not necessarily require a change to the CAT Rules.

Any review of this kind needs to keep equality of arms in view, given that CRs and their advisors are constrained by strict costs budgets and rely on limited third-party funding that might only kick in after a substantial amount of investment has been made before a case has even been issued, contrasted with better-resourced defendants who in the past were able to operate with unconstrained budgets. Recognising this asymmetry, the Tribunal in recent cases has required defendants, as well as the CR's legal team, to provide costs forecasts on a regular basis. In *Which v Apple*⁸⁵ and *Spottiswoode v Airwave*⁸⁶, the CAT by its own volition required the parties to provide high level costs budgets in the form of precedent Z spreadsheets typically used in the High Court in lower value cases. Alongside that, Milberg supports the work already underway through the CAT User Group's sub-group on costs and efficiency, drawing on the experience of concluded cases.

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.

Yes. Milberg agrees that meaningful oversight of budgets would be positive. However, meaningful oversight has to mean visibility and discipline over what parties are actually spending at the outset (claimants and defendants), not just what is recoverable. Meaningful oversight should not only include costs budgets but also assist with imposing clear limits on adverse-cost exposure. This would assist CRs to obtain appropriate insurance from the outset, which form a significant proportion of a case budget. For example defendants' recoverable costs could be capped against an agreed budget, with only narrow scope to revisit that figure, given how much harder and more expensive it typically becomes to top up ATE cover once a case is underway.

The one note of caution is that preparing and presenting budgets should not itself become a significant expense or risk giving rise to satellite litigation, delay and further costs with the parties arguing about the method or scope of preparing budgets, which in themselves can be a costly and time-consuming exercise. The Tribunal recognised this in *JLP A&A Class Representative v Apple & Amazon*⁸⁷, where, in light of the PCR's experience and to avoid unnecessary additional cost, it accepted arrangements under which the PCR would itself undertake the scrutiny of legal costs, supplemented by periodic external review by way of cross-check. Increased budget oversight should likewise remain proportionate and avoid generating additional cost and complexity.

Any new framework also needs to leave room for CRs to pursue meritorious claims effectively against well-resourced defendants, bearing in mind that the Tribunal already has the power to vary or revoke a CPO where continuing costs outweigh the benefits. Subject to those two safeguards, yes: greater budget oversight for all parties should improve stability and transparency in collective proceedings, and Milberg welcomes it.

Alternative dispute resolution

⁸⁵ *Consumers' Association ("Which?") v Apple Inc and Others Case 1689/7/7/24*

⁸⁶ *Spottiswoode v Airwave Case 1698/7/7/24*

⁸⁷ *JLP A&A Class Representative Ltd v Apple & Amazon [2026] CAT 75, [217]*

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'.

The Tribunal should encourage mediation wherever it looks genuinely capable of helping, but Milberg would not support making it a mandatory requirement at fixed points. The right moment for settlement discussions varies too much from case to case for ADR to be triggered automatically at fixed stages in the proceedings. It belongs as an active, ongoing case-management decision for the Tribunal to make as a case develops, not a box to tick at fixed points.

Mediation can be costly, and an unwilling party may simply use it to add further cost or delay to the litigation timetable, rather than it being a meaningful tool to encourage settlement discussions at an appropriate junction. Milberg would support, for example, amendments to the Guide to encourage a window in the litigation timetable for when the parties should engage in ADR, that is not too early in the process but is not too close to trial so as to risk prejudicing the litigation timetable.

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

The answer depends on the nature of the proceedings and whether a defendant has a genuine commercial incentive to settle, or to engage in ADR. Where the challenged conduct is still ongoing, or where there is a risk that a settlement could encourage litigation in other jurisdictions, a defendant may simply not be incentivised to pursue out-of-court resolutions, whatever case-management powers are in play.

Where that incentive does exist, though, these powers could make a real difference, particularly as the collective settlement regime develops and parties become more familiar when collective proceedings are genuinely ready for resolution.

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

Yes. Milberg agrees that any mandatory ADR procedure should carry automatic costs consequences if parties refuse to engage. The High Court has already recognised that a party who agrees to mediate but then causes the mediation to fail by taking an unreasonable position is in reality in the same position as a party who unreasonably refuses to mediate, and that the court can and should reflect this in its costs order.⁸⁸ The obvious objection is that mediation is confidential, so the Tribunal will rarely know what position a party took. In *Malmesbury* the court could examine the mediation only because the parties had waived privilege, and it did so at the costs stage, after judgment.⁸⁹ The Tribunal is already experienced in managing that tension. When approving the Merricks settlement, it received the parties' advice on their prospects under a waiver of privilege limited to the Tribunal, and recognised that, had approval been refused, the proceedings would have continued before a

⁸⁸ *Earl of Malmesbury & Ors v Strutt & Parker (a partnership)* [2008] EWHC 424 (QB), [72]

⁸⁹ *Ibid*, [24], [72].

differently constituted panel.⁹⁰ The same safeguards could apply here: conduct in mediation could be considered on a limited waiver, and only at the costs stage or by a panel other than the one that will try the claim. In practice, the Tribunal could encourage parties to record their final positions in mediation without prejudice save as to costs, so that those positions can be considered when costs are determined without any wider waiver of privilege.

Where the Tribunal has encouraged or directed ADR and a party then behaves unreasonably or does not engage with the process, that conduct should feed into costs, consistent with the approach under the Civil Procedure Rules. However, as explained at Question 15, ADR must be tailored to the case in question and should generally be encouraged, at appropriate stages, rather than imposed as a matter of routine.

Settlement

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

Yes, the cost shifting consequences of the settlement procedure for collective proceedings should be sufficiently flexible and different to the Rule 45 mechanism in the CAT or Part 36 Offers in the High Court. Whilst the regime has produced only a handful of settlement hearings so far, only a few claims have reached final judgment, each case is unique, meaning that CRs are not likely to be in a position to judge whether an offer is fair and reasonable until a case is close to trial, or even during trial. A defendant, by contrast might pitch a Rule 45-type offer strategically low, at strategic points in the funding or insurance cycle (e.g. as budgets run out), while still creating pressure over whether the commercial cost consequences of refusing make acceptance the sensible choice, which might not always be in the interests of the class.

Whether that matters depends heavily on the type of case. Where the parties are genuinely evenly matched and the conduct in question has already stopped, a Rule 45-style mechanism might help focus minds on settlement. Where a well-resourced defendant is not incentivised by costs as much as the CR, which is often the case in opt out proceedings, or the infringing conduct is ongoing, the same mechanism risks doing little beyond pressuring the CR to settle, without any real extra incentive on the defendant to settle.

That imbalance is precisely why we understand that Rule 45 was excluded from the opt-out regime in the first place – to protect the CR from unreasonable pressure. Milberg considers the Tribunal should keep its discretion over costs in this area, having regard to: (i) the CR's duty to act in the interests of the class; (ii) the fact that the regime depends on multiple stakeholders - lawyers, funders and insurers; and (iii) how reasonably the parties conducted themselves during settlement discussions.

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.

Yes, as discussed in the answer to Question 18 above.

⁹⁰ *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* (Judgment (CSAO Application)) [2025] CAT 28

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.

It depends on the circumstances of the case. Milberg is concerned that a rigid cost-shifting mechanism could cut against the proposal's stated aim: defendants may see automatic cost-shifting less as an incentive to settle and more as a lever for pushing CRs towards settlement offers that might be more in the interests of funders or insurers but not necessarily in the best interests of the class.

That risk is sharpest where the challenged conduct is ongoing. A defendant may treat the costs of litigation as an important part of its financial strategy, or choose not to settle for other strategic reasons not necessarily related to the proceedings in question, such as parallel proceedings elsewhere, regardless of cost consequences. Where such defendants have significant financial resources, they may simply treat the cost of litigation, cost-shifting included, as the price of doing business. Milberg's view is that a cost-shifting mechanism for collective proceedings seems unlikely to have a meaningful impact on some defendants, but could be useful.

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?

Yes. Milberg considers that an immediate change to the settlement approval process would be beneficial, in order to update the evidential threshold for settlement approval. Early cases have set a high bar for evidence of proposed settlement structures and distribution methodologies, with the Tribunal describing the requirement for CRs in an early settlement approval hearing to provide '*an estimate, with empirical evidence or by survey of the Class Members, of the likely take-up*' as '*critically important*'.⁹¹ In practice, collating reliable empirical or survey evidence of that kind is costly, slow, and hard to obtain in circumstances where settlement discussions and trial preparation are likely to be ongoing, given that most settlement discussions necessarily occur close to trial. The Tribunal has already recognised that the absence of a finalised distribution plan at the settlement approval stage should not be, on its own, an absolute bar to approval.⁹²

In this context, Milberg considers that an amendment to the Rules would be beneficial to provide greater certainty as to the evidential requirements on settlement approval. Detailed empirical evidence should not be a pre-condition for approving a collective settlement application, provided a robust distribution plan is provided to the Tribunal for review and approval once the settlement approval order has been granted.

Only a small number of collective settlements have been reached to date, and therefore it is to be expected that the settlement mechanism will continue to evolve. As CSAOs become more commonplace, the procedure is likely to become more cost- and time-efficient to reflect increasing

⁹¹ *Justin Gutmann v Apple Inc and Others* [2024] CAT 18, para 38; *Apple Inc v Justin Gutmann* [2025] EWCA Civ 459, para 78.

⁹² *Justin Gutmann v First MTR South Western Trains Ltd and Another* [2024] CAT 32; (*Stakeholder Entitlement*) [2025] CAT 72.

experience of the Tribunal and its users, as was seen in the recent *Barry Rodger v Google*⁹³ settlement, which took less than 2 years from the publication of the claim form in September 2024 to the CSAO being made in October 2026.

The evidential change referenced above is the one change Milberg proposes should be prioritised now rather than waiting for further experience to accumulate.

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.

No. Collective proceedings routinely run into many millions of pounds, and sometimes billions, but a meaningful redress scheme should preserve genuine equality of arms between claimants and large, well-resourced defendants and a simpler approach isn't necessarily the answer.

That requirement for balance is why independence matters so much in how a redress scheme actually operates. The 2015 Regulations exist to protect claimants and keep the assessment process independent of the wrongdoer, and nothing in this reform should weaken that. The Post Office redress scheme remains the clearest recent illustration of what happens when independence is imperfect: the underlying commercial incentive for a corporate wrongdoer running its own redress process is to keep compensation as low as possible, acting in the interests of its shareholders rather than its victims. Any quantum assessment process and conclusions made as part of a redress scheme should apply as much scrutiny as would apply in an ordinary judicial process, including the ability to challenge the outcome in court if the redress scheme assumes, for example, damages below what the Tribunal might award in trial.

Opt-out collective proceedings are not simple refund cases. Assessing the quantum resulting from anticompetitive conduct, in a complex abuse of dominance case for example, involves genuinely complex economics, and claimants cannot be expected to navigate that without adequate scrutiny.

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

Milberg supports simplifying the 2015 Regulations, provided the independence of the process is preserved, and suggests that the out-right prohibition on third-party claims in Regulation 7 be narrowed rather than retained in its current form.

Independence should be preserved. The Regulations require a scheme to be devised through an independent process, including an economist with appropriate expertise, subject to rules on conflicts of interest, and recommended by an independent chair and board before it is submitted for approval.⁹⁴ That independence is what distinguishes an approved scheme from a unilateral offer by the infringer. The House of Commons Public Accounts Committee has recently found, in the context of government compensation schemes, that trust collapses where those harmed must rely on the body that caused

⁹³ *Barry Rodger v Google* [2026] CAT 76

⁹⁴ Competition Act 1998 (Redress Scheme) Regulations 2015 (SI 2015/1587), reg. 5.

the harm to run the compensation process.⁹⁵ It also matters beyond the scheme itself. The availability of a redress scheme is a factor the Tribunal weighs when deciding whether collective proceedings are suitable,⁹⁶ and those who accept redress under a scheme will generally give up their right to bring proceedings.⁹⁷ Simplification should therefore streamline how the independent board is appointed and operates, not remove the requirement for independent design.

Regulation 7 should be narrowed. Regulation 7(a) requires every scheme to provide that a third party may not submit a claim on behalf of those entitled to compensation.⁹⁸ The aim, to ensure that compensation reaches those entitled to it rather than intermediaries, is legitimate. An outright prohibition goes further than that aim requires, however, and risks depressing take-up among those least able to navigate a claims process unaided, including vulnerable consumers and small businesses. Experience in collective proceedings shows that a free and well-publicised claims process does not of itself secure take-up: in *Gutmann*, only 7,290 valid claims worth about £217,000 were made against a settlement of up to £25 million, despite considerable efforts to improve the claims process and publicise the settlement.⁹⁹

Milberg suggests replacing the prohibition with a sequenced approach. Each scheme should have an initial period during which claims are made directly to the scheme, giving it a fair opportunity to reach those entitled to redress. After that period, and earlier if reported take-up shows the scheme is not reaching those entitled, claimants should be able to submit claims with the assistance of a third party, and the scheme should remain open for long enough after that point for such assistance to be effective. Without assistance, many of those entitled to redress will not know they have a claim, or how to make one. The same Committee found that over half of those it surveyed regarded the evidence requested by compensation schemes as unreasonable or too difficult, and that schemes are not advertised effectively throughout their life.¹⁰⁰ Experience in collective proceedings shows that a free and well-publicised claims process does not of itself secure take-up.¹⁰¹ Third parties who identify eligible claimants the scheme has not reached, and help them to claim, provide a genuine service, and there is no principled reason why they should not be paid for it. The collective proceedings regime already accepts that those who make recovery possible may be paid from the sums recovered, subject to appropriate oversight.¹⁰² The appropriate safeguards are transparency and informed choice: claimants should be told before engaging a third party that they can claim directly at no cost, and what the third

⁹⁵ House of Commons Public Accounts Committee, *Government compensation schemes: update* (September 2026),

⁹⁶ Tribunal Rules, r. 79(2)(g).

⁹⁷ CMA, *Guidance on the approval of voluntary redress schemes for infringements of competition law* (CMA40, 14 August 2015), [2.39] to [2.40].

⁹⁸ Competition Act 1998 (Redress Scheme) Regulations 2015 (SI 2015/1587), reg. 7(a); see also CMA, *Guidance on the approval of voluntary redress schemes for infringements of competition law* (CMA40, 14 August 2015), [1.14].

⁹⁹ *Gutmann v First MTR South Western Trains Ltd (Stakeholder Entitlement)* [2025] CAT 72, [65] to [69], as recited in *Waterside Class Ltd v Mowi ASA* [2026] CAT 32, [18].

¹⁰⁰ House of Commons Public Accounts Committee, *Government compensation schemes: update* (September 2026)

¹⁰¹ *Gutmann (Stakeholder Entitlement)* [2025] CAT 72, [65] to [69].

¹⁰² *Gutmann v Apple Inc* [2025] EWCA Civ 459.

party will charge. The conduct of those providing claims services is already subject to regulation, and the redress scheme regime does not need to duplicate it.

Outcomes should be reported. Any simplified regime should require schemes to report on take-up and the sums paid, so that the approving authority can assess whether a scheme is delivering redress in practice. Any scheme that does not deliver should not be taken into account by the Tribunal as part of the authorisation for collective proceedings under Rule 79(2)(g).

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.

No. Duplicative liability is only one of the reasons the consultation identifies for the absence of statutory redress schemes, alongside their complexity, cost and a lack of incentives for business.¹⁰³ So far as duplication is concerned, the waiver already available to schemes addresses it, and the further protection proposed would go beyond what is needed.

The proposal has two elements.¹⁰⁴ The first, making explicit that a scheme may provide that those who accept redress waive further claims for the same loss, reflects existing practice, and Milberg does not object to it. The CMA's guidance already contemplates that a scheme will typically provide that a beneficiary who accepts redress does so in full and final settlement, and cannot then bring or join proceedings in respect of that loss.¹⁰⁵ Those who do not accept redress keep their right to claim.¹⁰⁶ That allocation is fair, and it already protects an infringer from paying twice.

The second element provides that sums offered via a scheme should be taken into account when quantifying the value of a potential claim, and that this will be considered at certification.¹⁰⁷ Milberg accepts that a redress scheme can be relevant to collective proceedings, as Rule 79(2)(g) already recognises¹⁰⁸. Its relevance, however, depends on three matters the proposal does not address. The first is how many members of the class have actually received redress. What matters is redress paid, not redress offered, and the two can differ greatly: in *Gutmann*, only around 0.9% of a settlement sum of up to £25 million was claimed.¹⁰⁹ Crediting an infringer with sums offered but never claimed would protect it against a liability it has not discharged. The second is the extent of the overlap between the scheme and the claim. A scheme may differ materially from a collective claim in its claim period, the infringement or heads of loss it covers, those entitled to claim, or the defendants concerned, and it cannot bar claims for losses outside its scope.¹¹⁰ The third is the effectiveness of the scheme: whether the compensation offered is adequate, particularly where it is calculated on an assumed level of overcharge,¹¹¹ and whether its process enables those entitled to claim. Each of these can only be

¹⁰³ Department for Business and Trade, *Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement* (CP 1640, 17 July 2026) ("DBT consultation"), [88].

¹⁰⁴ *Ibid* [92].

¹⁰⁵ CMA, *Guidance on the approval of voluntary redress schemes for infringements of competition law* (CMA40, 14 August 2015), [2.39].

¹⁰⁶ *Ibid*, [1.30], [2.40].

¹⁰⁷ DBT consultation, [92].

¹⁰⁸ *Tribunal Rules*, r. 79(2)(g).

¹⁰⁹ *Gutmann v First MTR South Western Trains Ltd (Stakeholder Entitlement)* [2025] CAT 72, [67], [69].

¹¹⁰ CMA40, [2.14], [2.40].

¹¹¹ DBT consultation, [92].

assessed on evidence, much of which, take-up in particular, will not exist at certification. They are better addressed at the point duplication actually arises, by defining the class to exclude those who have accepted redress, or by giving credit for sums paid when an aggregate award is assessed or distributed. Where a scheme can show that it has in fact delivered redress to those entitled to it, that is properly a matter for the Tribunal when weighing the costs and benefits of the proposed proceedings and the availability of other means of redress, and it may lead the Tribunal to refuse to certify a claim, or the part of a claim the scheme has addressed.¹¹² The burden of showing that success should rest on the party relying on it, who holds the relevant data, and the reporting requirement proposed in our response to Q23 would provide it. Where a scheme is still operating at the time of certification, the Tribunal can revisit the question as the evidence emerges, using its existing power to vary or revoke a collective proceedings order.¹¹³ None of this requires legislative change: the existing rules already allow it.

For the same reasons, Milberg does not support the suggestion of a rebuttable presumption against certifying claims that overlap with a redress scheme.¹¹⁴ A scheme designed and funded by the infringer, whose terms may compensate only part of the loss, should not displace the class's right to have its claims determined by the Tribunal, still less without any assessment of whether what is offered is adequate. The use of redress schemes will be encouraged by schemes whose independence and terms give claimants confidence, as discussed in our response to Q23, rather than by further limiting the alternatives available to those who do not accept them.

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

Not sure. A power to direct redress may encourage infringers to offer schemes voluntarily, since a business may prefer to design its own scheme than to have one imposed. Whether it does so in practice will depend on how credible the prospect of a direction is. The consultation envisages the power being used mainly in straightforward cases,¹¹⁵ and the CMA itself recognises that assessing redress, particularly where pass-on is involved, may be complex, and that it would decide case by case whether a direction was appropriate.¹¹⁶ If directions are rare, the incentive they create will be limited.

If the power is introduced, three safeguards should apply. First, directed schemes should meet the same independence requirements as voluntary schemes, as the consultation proposes,¹¹⁷ including an independent chair and a board member able to represent the interests of those entitled to compensation, as discussed in our response to Q23.¹¹⁸ Those requirements become more important, not less, if the Regulations are simplified. Second, a directed scheme should be treated in the same way as a voluntary one when its relevance to collective proceedings is assessed: by reference to the

¹¹² Tribunal Rules, rr. 77(1)(b), 79(2)(b) and 79(2)(g); *Merricks* [2020] UKSC 51, [61]; *Waterside* [2026] CAT 32, [47].

¹¹³ Competition Act 1998, s. 47B(9); Tribunal Rules, r. 85(1)

¹¹⁴ CMA, *Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement: Consultation Response from the Competition and Markets Authority* (2026), [19(b)].

¹¹⁵ DBT consultation, [92].

¹¹⁶ CMA, *Consultation Response* (2026), [24].

¹¹⁷ DBT consultation, [92].

¹¹⁸ Competition Act 1998 (Redress Scheme) Regulations 2015, reg. 5(3) and (5)(c).

redress actually paid, the extent of its overlap with the claim and its effectiveness, as set out in our response to Q24, and not merely to what is offered. This matters particularly where compensation is calculated on an assumed level of overcharge, which may leave those entitled undercompensated.¹¹⁹ Third, those who do not accept redress under a directed scheme should keep their right to claim, as they do under a voluntary scheme.¹²⁰

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

Yes, in a limited sense. No redress scheme has yet been approved under section 49C of the Competition Act 1998, although redress has been paid voluntarily in some CMA cases, most notably to the NHS.¹²¹ Any framework that results in more schemes being offered or directed will therefore increase the redress made available without litigation. Those payments, however, were made to a single, readily identifiable purchaser. Redress for large numbers of consumers raises different challenges, and redress made available is not the same as redress received, or as adequate compensation.

Whether the framework delivers either will depend on the matters addressed in our responses to Q23 to Q25: whether schemes are independently designed, whether those entitled can obtain help to claim where they need it, whether compensation calculated on an assumed level of overcharge is adequate, and whether take-up is monitored. Experience in collective proceedings shows that redress can be made available without much of it reaching those entitled to it.¹²² The framework should therefore be judged by the redress it actually delivers, not by the number of schemes it produces. Those who do not accept redress under a scheme should also keep their right to claim, so that the framework complements collective proceedings where a scheme falls short rather than replacing them.

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

Yes. First, infringers should be given certainty that redress actually paid under a scheme will be credited when damages are quantified or distributed in any later proceedings. That would address the concern about paying twice more directly than the duplication proposals in the consultation, without crediting infringers with redress that never reaches those entitled to it, as explained in our response to Q24.

Second, the cost of running a scheme can be reduced by paying redress automatically where the infringer holds data identifying those harmed. Automatic payment would also increase take-up.

Third, the penalty discount available for an approved scheme could be made more predictable and more widely available. At present it is limited to schemes approved in the authority's own investigations, and is not available where an infringement decision has already been made.¹²³

¹¹⁹ DBT consultation, [92].

¹²⁰ CMA40, [1.30].

¹²¹ DBT consultation, [88] and n 41; CMA, "CMA pharma probe secures £8m for the NHS" (press release, 2019).

¹²² See our response to Q24.

¹²³ CMA40, [3.10], [3.25], [3.30].

Each of these would encourage infringers to offer schemes while ensuring that their success is measured by the redress that actually reaches those harmed.

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.

Yes. Milberg agrees that cartel enforcement needs strengthening. Cartels are secret by design, and private claimants lack the investigative tools needed to uncover them. As Sir Peter Roth has observed, it is exceptionally difficult to prove a cartel by way of a private action.¹²⁴ Almost all cartel claims brought in recent years have followed a competition authority investigation or decision.¹²⁵ Private enforcement against cartels therefore depends on effective public detection, and the decline in Type A leniency applications, from an average of 21 a year in 2014 to 2016 to eight a year in 2022 to 2024,¹²⁶ is a concern for those harmed by cartels as much as for the CMA.

Milberg does not agree, however, that the right intervention is to remove the civil liability of Type A applicants, for the reasons set out in our responses to Q29 and Q30. Leniency is only one route to detection: the consultation records that around half of cartel cases originate from the CMA's own intelligence work.¹²⁷ Milberg would support measures that strengthen detection and enforcement without reducing compensation for those harmed, including:

- (a) dedicated and protected resourcing for cartel enforcement, so that intelligence-led investigations are not displaced by other priorities;
- (b) greater investment in proactive detection, including the screening of market data, and stronger rewards and protections for informants and whistleblowers; and
- (c) an accountability mechanism, drawing on the "use it or lose it" approach applied to sector regulators under the concurrency regime, requiring the CMA to report publicly on the progress of cartel investigations and leniency markers and to explain closures, so that cases do not stall without consequence. The CMA's budget should be directly impacted by a failure to use its powers.

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.

Yes. Milberg's primary position, explained in our response to Q28, is that full immunity from civil liability should not be introduced. Type A immunity recipients already have substantial protection. Since 2017 they have not been liable, alone or jointly, to pay damages except to their own direct and

¹²⁴ DBT consultation, [99], quoting Sir Peter Roth, 25th Burrell Lecture.

¹²⁵ CMA, *Consultation Response* (2026), [30].

¹²⁶ DBT consultation, [104].

¹²⁷ *Ibid*, [102].

indirect purchasers and providers, and to other injured parties only where full compensation cannot be obtained from the other cartelists.¹²⁸ That follows the approach of the EU Damages Directive.¹²⁹ The CMA's most recent changes to strengthen incentives for Type A applications were made in October 2025,¹³⁰ and their effect should be assessed before civil liability is removed altogether.

If immunity is introduced, Milberg considers the following protections necessary.

First, immunity should be conditional on cooperation with those seeking redress, not only with the CMA. In the United States, a leniency applicant's civil exposure is reduced only if it provides satisfactory cooperation to civil claimants.¹³¹ A UK immunity recipient should likewise be required to provide claimants with relevant evidence and witnesses, other than its protected leniency statement, and should lose its civil immunity if it fails to do so.

Second, the remaining cartelists should remain jointly and severally liable for the whole of the loss caused by the cartel, including the share attributable to the immunity recipient. Immunity should reduce the number of defendants, not the compensation available to those harmed.

Third, the power to set immunity aside should not be confined to insolvency. It should apply wherever full compensation cannot in practice be obtained from the remaining cartelists, for example where they are outside the jurisdiction or their assets cannot practicably be reached. The burden should be on the immunity recipient to show that compensation is available elsewhere, and claimants should not be prejudiced by limitation where the need to proceed against the immunity recipient emerges only later. Schedule 8A makes no specific provision for this: the general six-year limitation period, suspended during a competition authority's investigation and for a year after its decision becomes final, may expire before it becomes clear that full compensation cannot be obtained from the other cartelists.¹³² The Damages Directive, by contrast, required that the limitation period for such claims be reasonable and sufficient to allow them to be brought.¹³³ Any extension of immunity should include an equivalent protection.

Fourth, civil immunity should fall away automatically if leniency is revoked, for example for failure to cooperate with the CMA or for providing false or misleading information.

Finally, the operation of civil immunity should be reviewed after a fixed period, against evidence of its effect on Type A applications and on the compensation obtained by those harmed.

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

No. The consultation proposes that the Tribunal retain a power to set aside immunity where damages are otherwise unrecoverable from the remaining cartelists, giving insolvency as an example.¹³⁴ That leaves three questions open. The first is the threshold: whether "unrecoverable" is limited to cases

¹²⁸ Competition Act 1998, Sch. 8A, para. 15(1), in particular sub-paras. (a), (d) and (e); DBT consultation, [104].

¹²⁹ Directive 2014/104/EU, art. 11(4).

¹³⁰ DBT consultation, [104].

¹³¹ Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (US), s. 213

¹³² Competition Act 1998, Sch. 8A, paras. 18, 19 and 21.

¹³³ Directive 2014/104/EU, art. 11(4).

¹³⁴ DBT consultation, [108].

such as insolvency, or extends to cases where recovery is impracticable, for example because the other cartelists are outside the jurisdiction or their assets cannot practicably be reached. The second is the burden: who must show whether compensation is available elsewhere. The third is timing: whether the question is to be determined at certification, at judgment, or only after enforcement against the other cartelists has failed. The existing equivalent provision, which applies to claims by persons other than the immunity recipient's own customers and suppliers,¹³⁵ does not answer these questions either, and would apply far more widely if immunity were extended.

Uncertainty on these points matters particularly in collective proceedings, where class representatives and funders must assess at the outset whether damages will be recoverable, and from whom. Without clear answers, the question is likely to generate satellite litigation, adding cost and delay. Our response to Q29 proposes answers on the threshold, the burden and limitation. In addition, claimants should be able to join the immunity recipient as a defendant from the outset, with the claim against it stayed until it is clear whether full compensation can be obtained from the other cartelists. That would allow the question to be decided once the facts are known, without claimants losing the ability to pursue it.

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.

Yes, Milberg does not currently anticipate any difficulty in identifying the relevant concurrent regulator in a given claim.

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

No. In assessing damages, the court or tribunal applies long-established principles of liability, causation and quantification to ensure that victims are properly compensated. It is unclear what purpose regulatory intervention would serve in that process. Such intervention is likely to generate additional interlocutory disputes, costs and delay.

There is already well-established jurisprudence on when a court or tribunal will interfere in matters forming part of the regulatory, rather than judicial, process. The assessment of damages falls squarely within the latter.

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.

No, for the reasons addressed in Q32, Milberg does not see a need for this additional procedure. The CAT is well equipped to deal with sector-specific issues through its existing case management powers and expert evidence.

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.

¹³⁵ Competition Act 1998, Sch. 8A, para. 15(1)(e).

Yes. Milberg welcomes this proposal.

Milberg considers that the CAT should go further than include a simple list of claims on the CAT website: its site should link directly to each live claim or distribution website, clearly flagged as verified, on a page that is easy to search and simple for consumers to navigate. More broadly, the CAT has a constructive part to play in supporting take-up. Publishing information on the CAT website has an important role to play in building public trust, helping to verify legitimacy of claims.

Listing live claims on the CAT website should increase trust and encourage take-up, giving class members a single, authoritative reference point against which to check that a claim website is genuine and directly addressing the fraud and scam concerns that potentially discourage engagement amongst class members.

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

Yes – Milberg considers that this is also an opportunity to relaunch the regime on a better footing. Publicising recent high-profile developments (settlements and final judgments) via trusted Government sources would build public awareness, and prominent, easy-to-find information and links on gov.uk websites would give consumers a trusted, official starting point.

Underpinning all of that, government endorsement would make a real difference to trust: a statement from a DBT minister actively encouraging eligible consumers to take part in distributions would carry real weight and help counter the perception that engaging in consumer class actions carries a risk of fraud. Alongside public ministerial statements, the Government could consider conducting a procurement process to appoint third parties (who could include supermarkets and other major retailers) to support effective distribution to large numbers of class members. Milberg would be happy to discuss this proposal in more depth.

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

Yes. That cooperation should be ordered, not incentivised. Rewarding a defendant for assisting with distribution, whether through a settlement discount or an enhanced reversion of undistributed sums, would benefit the very party responsible for the underlying infringement, running counter to the deterrent purpose of the regime. The underlying point stands regardless: where class members are the defendant's direct customers, the defendant is usually best placed to reach them and effect distribution, given its existing access to contact and payment details. The Tribunal should be empowered to require that cooperation in appropriate cases, for example by providing customer data or directly facilitating 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)**

Milberg considers that a 50/50 split between the Access to Justice Foundation and Which? should be the default recipient of undistributed sums, preserving consistency across cases. However, when appropriate, Milberg would also welcome the option for CRs to propose an alternative charity or cause associated with a clear connection to the subject matter of the claim. The option to provide undistributed sums to a charity that is plainly in the interests of the class, subject to the CAT's approval, would allow a more directly relevant beneficiary to be nominated where one genuinely exists (whilst preserving the option to still award undistributed sums to the default recipients of the Access to Justice Foundation and Which?).

Fees

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

Neutral. Milberg does not consider that the introduction of CAT fees broadly comparable to fees in the High Court would have any material impact on access to justice in collective proceedings. Milberg would note that the introduction of a fee regime should take into account the value and complexity of the claim and considers that CAT fees would be unlikely to impact the decision of CRs or funders about whether to issue a collective proceedings claim.

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

Yes. Milberg considers that it would be appropriate to confine fees to private litigation, at least initially. Regulatory appeals and challenges to decisions of the CMA and concurrent regulators serve an important public accountability function, and imposing fees on those bringing such challenges risks deterring meritorious cases in a way that is far less of a concern in private damages litigation.

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

Milberg would caution against linking fees to the number or value of applications in a way that changes how the Tribunal operates or how parties conduct proceedings – a fee structure that discourages appropriate applications would undermine effective case management rather than support it.

Subject to that caveat, yes, Milberg believes that CAT fees could be beneficial to the operation of the CAT if the money raised is used to increase the Tribunal's resources and staff capacity. Without that reinvestment, the efficiency benefit is doubtful.

Panel composition

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

Yes. The right composition should track the nature of the hearing.

Milberg agrees that discrete interim or case management applications can be dealt with effectively by a chair sitting alone, or with one other member, and that existing practice works well and should continue.

Trials should retain a full panel of three, including an economist, since the range and balance of expertise across three members is integral to the fairness of the outcome, and certification and decertification decisions should always be made by a full panel. More substantive interim applications, for example complex disclosure applications can be better heard by a chair sitting with a member who has economic expertise.

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

Yes. Trials and final determinations on the merits, certification of collective proceedings, and decertification should always be reserved for a full panel of three, including a member with economic expertise, with no exceptions. Each turns on the balance of legal and economic judgement a three-member panel is designed to provide, and each carries enough significance for the class, and for the integrity of the regime, that the full range of expertise should be brought to bear.

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

Yes. Milberg considers that greater efficiency in decision-making could be possible by holding more remote hearings, as well as greater use of decisions on the papers where circumstances allow for more straightforward interim applications.

In addition, Milberg thinks that the judgment embargo process could be reformed to allow more members of the parties' legal teams to access the draft embargoed judgment, subject to appropriate confidentiality safeguards being in place. This would allow for shorter embargo periods, which can last ten days to two weeks, and which can delay hand-down. This would allow more members of the legal teams to assist with corrections, prepare for the judgment being made public and consider permission to appeal.

Beyond that, several further measures would help: short, half-day hearings at which the Tribunal offers initial views on non-adversarial matters such as distribution before the trial; more use of ex tempore judgments where appropriate; and reduced panels for discrete applications, consistent with Milberg's answer to Question 41.