Responding to the 2025 Burrell Lecture:

Five proposals for class action reform

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EXECUTIVE SUMMARY

- Upon his retirement as a High Court judge, the former Competition Appeal Tribunal President Sir Peter Roth delivered a lecture looking back at his decades of experience in UK competition law.

- The lecture raised significant points for the class action debate: (1) the scrutiny of claims management efficiency at the class certification stage, (2) the role of consolidation of analysis down damages chains (so-called "passing on" analysis), and (3) issues with "dressing up" non competition claims to access the Tribunal. This report considers the points raised alongside the wider class actions debate at a time when even the Tribunal itself has warned: "The Tribunal is not a rubber stamp."[1]

  Three related questions arise:

  Why are cases so expensive relative to claims?
  How can costs be lowered?
  How can the case load focus on the strongest cases?

1. **Why are the cases so expensive?** Regarding **claims management,** there are serious concerns about high costs relative to compensation paid to consumers. This is driven by low claim rates.

   In the leading settlement, *Rail Fares*, just 2% of consumers claimed, and they only claimed 0.5% of the asserted damage. The allegation here was that ticket machine displays could have shown certain discounts more prominently.

   Initially, that case had asserted that 3 million consumers were affected. Even at settlement, experts said that 140,000-180,000 would come forward, and that their notional loss was £38.99m.

[1] *Justin Gutmann v First MTR South Western Trains Ltd & Ors* [2024] CAT 32 (SSWT Collective Settlement, hereafter "Stagecoach settlement") [55].

In the end, just 7,290 would claim, and they would claim £216,724 – even though, in some cases, they were not even required to show receipts. And this low rate persisted despite a £450,000 promotional budget. **The advertising budget alone (£450k) was more than double what the claimants actually got (£216k).**

As the case reportedly cost £18.7m *just on the claimant side*,[2] **moving each £1 to the allegedly harmed travellers cost at least £86.29.**

Importantly, other rail operators did not settle – and they **won** at trial. This was because they showed that they were **not even keeping the money** from the contested rail fares.

So, the wider "deterrence effect" so often discussed in these cases is not only absent. The case was a £18.7m "nothingburger." Fundamentally, the settlement indicates a concern about **litigation costs,** not **liability exposure.**

But even if the case *had* been sound, the **86x cost ratio exceeds even very high-end estimates of deterrence benefits.**[3] While a payment of £3.8m was made to charity, this only reflects that so few came forward – and under standard procedures, unclaimed monies go to charity.

Regarding the idea that mass lawsuits would bring better business behaviour by compensating consumers, the first paid out settlement is simply an abject lesson in what not to do.

What might improve things? As early as 2008, a RAND study warned that:

> Class counsel has little interest in seeing these anemic distribution rates publicized. They have the potential to make class counsel look simultaneously incompetent and greedy: incompetent because the system they settled for yielded little relief, but greedy because they nonetheless took home a generous fee. *Worse still, publicity about low claim rates may encourage judges in future cases to pin fee awards to the actual claiming done by the class.*[4]

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[2] Id. [67] "The CR has incurred costs of £18,788,166 and only 7,290 valid claims were made by class members."

[3] See e.g. Daly (2008), London Economics (2011), Davies et al (2018), and CMA (2025) (citing a range from 3x to 28x deterrence ratios).

[4] Pace and Rubinstein (2008) (Emphasis added).

Or as Judge Richard Posner put it, memorably, in 1968:

> There is no feasible method of locating and reimbursing the consumer who several years ago may have paid too much for a toothbrush.[5]

The overlooked insight is that it can be very challenging to get even 5% of consumers to come forward. Multiple studies have found rates around or even below 1%. At these low claim rates, class actions are very expensive.

To fix this the class action system must secure commitment over actually getting money to claimants, by making that the metric by which lawyers and funders are paid.

Is it just that the rail case went off the tracks? There is a pending settlement of overcharges for car shipping. The same problem may yet emerge there.

The relevant survey in that case suggests claims rates in the range of 1-4%. If 4% claim, then scenario modelling shows **authorised costs of between £16.49 and £38.67 to move every £1 to the consumer.**

Unless cost management is exceptionally strong, the low takeup rate will drive very expensive cases moving relatively little money. There would be a sharp irony if the legal costs of class actions prove to be higher than those for other lawsuits.

Much more transparency over how much claimants will get, and at what cost, is therefore required. Transparent commitment to key performance metrics, such as the amount consumers will get and the implied fee to them, will help to close the gap between low recovery rates and high fees.

The key cost-effectiveness recommendations are:

> (1) **Ex ante analysis of take-up rates**, to focus on claims which will actually render compensation to the class; and
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> (2) **A dashboard of key performance metrics** to bring transparency and thus improve competition over efficiently rendering compensation.

Ex ante take-up analysis is the missing link in moving more money to claimants. Studies from other jurisdictions identify important take-

[5] Posner (1968, p.1590).

up dynamics, such as *whether records exist* for automatic refunds, vs relying on consumers stepping forward. These factors can alter recovery rates from <1% to as much as 72%. Early work before certification to show that people will actually claim, and committing to this analysis as a condition of class certification, would avoid the current prominent issue with limited claimant take-up. The key here is professional commitment to being paid based on claimants actually receiving money.

The **dashboard** would show **expected damages, costs budgets, the cost per claim, the putative claimant number, and the expected uptake rate.** That would then bind the lawyers and funders when settlement comes around.

As these metrics are all assembled in constructing a claim they can and should all available online **in real time**. That they are only shared later, once costs are incurred, accentuates the principal-agent problem between the class, class representative, funders, and lawyers. Real-time transparency to claimants should be the default.

Not only would this improve competition over claims; it would also prevent excessive inflation of damages estimates. This has been a recurrent issue in recent litigation.

- In *Rail Fares*, the asserted total loss was £93m, but as the trial failed, the proven loss was £0.

- In *Merricks v Mastercard,* the peak asserted loss was £17bn, but the settlement was £200m. Notionally, the lawyers and funders get c. £100m, and the class *may* get £100m, although it remains to be seen how much is claimed. Millions are still charged in professional and finance fees, despite overstating damages by 17x.

Cost-benefit analysis can hardly be done if loss estimates are inflated. **There should be transparent and binding estimates of compensation relative to fees from an early stage.** At least at settlement (and perhaps before) these estimates must bind the advisors and funders. Inflated estimates would then have real costs. Those with accurate estimates, good cost control, and strong claims have nothing to fear from commiting to an ex ante deal on costs and compensation.

2. **How might the costs be lowered?** Regarding the debate on **pass on** of damages and how to approach it, there is substantial scope for consolidation and simplification of complex supply chain analysis. Currently, some ***trials*** are consolidated, but ***claims*** are not consolidated across the supply chain. Two recommendations would help to lower costs:

    (1) **Embracing analysis of overcharges rather than damages.** This simplifies analysis significantly. The difference is between simply working out how much someone was overcharged, vs working out precisely how much everyone lost. The former is much more workable, but the latter is currently the focus.

    (2) **A Presumptive Allocation Scheme (PEAS)** to allocate the overcharge across the supply chain, e.g. 25% per layer, rather than litigating the precision of damages estimates across the whole supply chain. A presumptions based approach complements the **dashboard** recommendation because the costs and benefits accruing to further supply chain analysis, vs. simplified approaches, become much clearer (e.g., by lowering the average fee per claim).

3. **Is there a way to focus on fewer, stronger cases?** Regarding **dressing up cases**, there is a trend away from the most egregious forms of shoehorning of non-competition cases into the CAT. However, there is still limited attention to *market* (rather than factual) context at the class certification stage. Market analysis is often simply not done before the CPO, even where there is ready evidence such as CMA analysis of the same points. This is also relevant to cost-benefit analysis, because how well the market is working (or not) affects how useful the lawsuit is.

    There is also an issue in falsely equating dynamic and static markets. There is currently no clear framework to distinguish large scale from growth, vs. large scale from monopoly. That is so even where existing regulatory analysis has spoken to the point. For example, the "Blur drummer" case *PRS v Rowntree* revisited points which the CMA had dismissed based on thorough investigation as recently as November 2022 – but which do not feature in the Tribunal's class action analysis in that case.

    The three recommendations here are to require claims to:

    (1) **State a specific market failure when applying for a CPO**, thereby sharpening focus on addressing the underlying root cause of consumer harm, while avoiding bare pleadings that markets-might-be-better (since that is a general property of markets);

(2) **Describe existing regulation and explain its relationship with the claim** so that regulators can be consulted earlier for crucial insights into alleged issues, including any remedies they have applied (or rejected) – thereby avoiding double jeopardy; and

(3) **Collect empirical information on dynamic competition to complement static analysis**, thereby distinguishing truly entrenched market power from dynamic growth.

While these final market-based recommendations are more cerebral, they have the most to offer in terms of actually making markets work better for consumers, rather than just suing people over losses. Information about wider market function is seldom assessed before the litigation begins, despite its availability and the established metrics and models which can be used to assess how well a market is working. These metrics would, again, sharpen cost-benefit analysis at the CPO stage.

I. Introduction

On 18 November 2025, Sir Peter Roth delivered the intellectual highlight of the UK competition law calendar, namely the Competition Law Association's Burrell Lecture entitled *The Private Enforcement of Competition Law: Reflections upon its development, progress, and challenges*.[6]

As Sir Peter was the long-standing President of the Competition Appeal Tribunal (2013-2021; 2024-5), his words carry particular weight in the debate about the future direction of UK competition law class actions. That is all the more so because the lecture amounted to a valedictory address following his retirement as a High Court judge effective 29 July 2025.[7]

What did Sir Peter have to say about class actions? His remarks addressed three high profile topics in the class action debate:[8]

1. **Cost-benefit analysis of class certification:** Sir Peter took apparent pleasure in the opportunity, upon retirement, to comment freely on the Supreme Court precedents bearing on class certification (so-called "Collective Proceedings Orders" or "CPOs"). The main legal question is what it means to be "suitable" for a class action.[9] The elephant in the room is the 2020 Supreme Court precedent in *Merricks v Mastercard*, which significantly eased class certification. Sir Peter picked up on criticism that analysis of *relative* rather than *absolute* suitability of a case for class action litigation is inapt, because focusing on the relative ease of collective claims will tend to point towards certification even if, net, the case is not helpful – as where it incurs costs, but does not improve markets.[10]

   The same point emerged in the Supreme Court precisely one month later, on 18 December 2025, when *Evans v Barclays* was handed down.[11] Without actually overturning *Merricks*, the *Evans* case emphasises that *some* class actions can be harmful, chiming with Sir Peter's point that more exacting cost-benefit analysis should apply to class certification.

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[6] Competition Law Association, "25th Annual Burrell Lecture: The Private Enforcement of Competition Law – Reflections upon its Development, Progress and Challenges," delivered by Sir Peter Roth, 18 November 2025 (hereafter, "Lecture").
[7] Sir Peter continues to sit as a part-time Chair in the Competition Appeal Tribunal.
[8] The Lecture also discussed other aspects of private enforcement bearing less directly onto the class actions debate, such as the historic development of UK competition law and activities to enhance access to competition law judgments across jurisdictions and languages. This report focuses on the aspects most relevant to the class actions debates.
[9] Consumer Rights Act 2015, s 47B; Competition Appeal Tribunal Rules 2015, r 79.
[10] Institute of Economic Affairs, *Class Act: The case for reforming Britain's class action system* (12 September 2025) (hereafter *Class Act*), p.44 ("there is no escaping some direct analysis of the economic quality of the case, since this is the anterior question before any relative analysis of opt-out vs other options.")
[11] *Evans v Barclays* [2025] UKSC 48.

With the Supreme Court and the former CAT President speaking with one voice on this pivotal recommendation, and with scope for more exacting analysis at certification, the priority question is *how* to engage in better cost-benefit analysis at class certification. As outlined above, this report recommends (1) ex ante work on likely claim rates, and (2) transparency over efficiency metrics, in response to this call.

2. **The role of the pass on defence:** Sir Peter discussed the pass on (sometimes called pass through) debates. This is the doctrine that allows damages to be adjusted on the basis that they were not faced by a particular claimant, typically by being passed on in the supply chain. This engages with a debate about the relative merits of consolidation of lawsuits and how detailed modelling of overcharges and related damages ought to be.[12] This report identifies currently underexplored distinctions between overcharges and damages. A clean focus on overcharges, rather than the precision of damage estimation, allows the use of presumptions rather than actual modelling of supply chains. These presumptions would move money to claimants down the supply chain without duplicating the analysis of the market at each layer. This is already a recommended reform in the USA, and it could save very substantial costs from reduced duplication of associated professional work.

3. **Keeping competition law within bounds:** Sir Peter emphasised the unique anomaly by which the Competition Appeal Tribunal is the pre-eminent forum for an opt-out class action in the UK.[13] While there are other devices, such as Group Litigation Orders ("GLOs") these lack the power – strongly emphasised by the Supreme Court in both *Merricks* and *Evans* – of binding all who might be affected. Sir Peter noted that this creates an incentive to "squeeze claims which in essence are for violation of another field of law into competition law clothing."[14]

   The major risk is that special interest pleading is attracted to a jurisdiction which is supposed not to award or transfer economic rents, but rather to ***improve*** market performance for consumers. If the costs of intervention exceed the benefits then a class action harms consumers – just *other* consumers than those in the lawsuit (who now face increased costs from resource misallocation into litigation). Relatedly, false positive risks arise if innovators are punished for growth just because they are large. So the prospect of allowing litigation without a clear link to market *improvement*, as opposed to just rendering compensation, is a material anti-consumer risk. That is even more the case if the underlying argument is simply *big is bad*.

[12] See e.g. *Class Act*, pp. 38-48.
[13] For completeness, it should be noted that representative actions might be thought of as a form of opt-out class action. Representative actions have existed since at least the 1883 Rules of the Supreme Court but they have been very rarely used for a range of procedural reasons, mostly relating to difficulties in proving commonality of loss. See further: Jolowicz (1988).
[14] Lecture, p. 13.

To safeguard against this risk, this report recommends a sharp focus on what the **market failure** is from the earliest stages of litigation. If class actions state the market failure early on, this allows focus on improving it. This also paves the way for more use of existing regulatory wisdom, which has been downplayed in certain key chapters to-date.

For instance, more regulatory dialogue would have exposed key factual misconceptions in the *Rail Fares* litigation earlier on, notably that the rail operators were not actually keeping the allegedly mischarged fares, and would have highlighted the role of regulation as a better pathway to deliver more to consumers at lower cost.

Further helpful work can also be done on whether the market itself is growing, vs. stagnant, as this affects how valuable the class action is to society at large. False positive risks are strong in growing markets where consumers benefit from new capital formation much more than they do from lawsuits. The inverse is also true: class actions help more in sleepy monopolistic markets. The CMA routinely uses a range of market performance metrics, notably in its *State of Competition* reports, but these are not yet integrated into cost-benefit analysis for class actions.[15] This analysis should be routine at an early stage to improve cost-benefit analysis, but it has been overlooked in current practice.

Sir Peter specifically highlighted the risk of abuse by "interest groups and campaigning organisations" who are not really raising a point of competition law. This contemplates a distinction between cases improving wider societal welfare, and so-called rent-seeking claims by special interest groups, which seek only to **redistribute**, rather than to **add** to total societal welfare. Sir Peter concluded with pointed remarks that the judiciary should therefore "keep private enforcement of competition law within proper bounds," which he defined in conventional market power and market exclusion terms. The question for those following Sir Peter is therefore how exactly to distinguish a genuine market harm, from special pleading by rent seekers – and at what stage in proceedings.

This report will expand on these key extracted themes affecting the class action debate. It concludes with five concrete policy recommendations.

[15] CMA, *The State of UK Competition Report 2024*, 24 October 2024.

II. Class certification, take-up analysis, and cost effectiveness

Class actions are supposed to address a perceived need for large-scale litigation. This scale cuts both ways. If the cases are good, then class actions amplify justice and efficiency. If they are bad, they amplify injustice and inefficiency.

As the Supreme Court has commented:

> A class action procedure which has these features [the potential to opt out and to recover aggregate damages] provides a potent means of achieving access to justice for consumers. But it is also capable of being misused. The ability to bring proceedings on behalf of what may be a very large class of persons without obtaining their active consent and to recover damages without the need to show individual loss presents risks of the kind already mentioned, as well as giving rise to substantial administrative burdens and litigation costs. The risk that the enormous leveraging effect which such a class action device creates may be used oppressively or unfairly is exacerbated by the opportunities that it provides for profit.[16]

At the time of Sir Peter's speech, the above comment was still a minority judgment. It would later be endorsed by the Supreme Court decision in *Evans v Barclays*, but this would only happen one month after Sir Peter spoke.

So it was extraordinary to hear Sir Peter say:

> We have not been entirely well served by the two Supreme Court judgments … concerning collective proceedings. In both *Merricks* and *PACCAR*, I think that the powerful dissenting judgments are very persuasive.[17]

The specific criticism is that by casting the question only in *relative* suitability terms, *Merricks* tends to point towards certification without thinking whether that is a good idea in *absolute* terms (*PACCAR*, on funding, is addressed below).

As Sir Peter put it:

> the gatekeeper function of the CAT… is attenuated when the statutory requirement that the case should be 'suitable' for collective proceedings is interpreted as not having a substantive meaning but only a relative meaning – i.e. more suitable than by way of individual proceedings.

So, *Merricks* left the CAT in a difficult position because it seemed to say that classes should be certified whenever they are easier for claimants, rather than

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[16] *Evans,* op cit, [89] quoting *Merricks v Mastercard* (Supreme Court) [98] – "Although this was said in a minority judgment, the majority judgment in Merricks given by Lord Briggs said nothing inconsistent with these observations and we do not consider them to be controversial."
[17] Lecture, p.11.

an assessment of the costs and benefits of class certification from the societal (not party) point of view.

The key underlying rule on whether a class action can proceed is Competition Appeal Tribunal Rule 79, which fleshes out the requirement for cases to be "suitable" from the underlying legislation.[18]

Importantly, this includes a reference to "cost-benefit analysis." This is a different concept than *cost-effectiveness analysis*.

The difference is that cost-benefit analysis refers to wider societal welfare from litigation: does the case make markets work better from the wider societal point of view, or is the case just somebody's payday?

The issue is far from academic. The *Ennis v Apple* decertification hearing of 22 April 2026, for instance, applied **cost-effectiveness** concepts, but not **cost-benefit** concepts.[19]

It is instructive to consider the underlying case in *Merricks* from which the 2020 Supreme Court judgment derived. The case addressed the allegation that payment fees were inflated because of rules against competition over certain inter-bank fees ("interchange"). *Merricks* sought to claim on behalf of the end consumer, i.e., the general purchasing population. The CAT initially refused to certify the class action, reflecting concerns about precisely how proof of loss would work. The Supreme Court overruled the CAT.

The CAT's reluctance would be vindicated:

- *Merricks* eventually settled after nine protracted years of litigation for under 2% of the alleged £17bn overcharge (£200m).
- Approximately half of that 2% settlement went to funders and lawyers, rather than consumers (the precise numbers depend on what happens to fees after damage distribution).

In the eventual words of the Tribunal:

> Although the settlement has secured a positive payment, **the outcome of the present case is very far from a success for a class of some 44 million claimants.** The Settlement Sum is only a little over 1.4% of the original value placed on the claim of £14 billion (with interest only to September 2016), and under 1.2% of the revised claim value of £16.7 billion (with interest only to September 2022).[20]

[18] Competition Act 1998 s47B(6).
[19] I am grateful to Paritosh Purohit for kindly attending the hearing to check for cost-benefit analysis.
[20] *Merricks* Settlement Review ([2025] CAT 28), 20 May 2025), [182], emphasis added.

Nonetheless, the Supreme Court had taken the view that the class action reforms in 2015 had sought to make cases easier to bring. This significantly overlooked cost-benefit analysis. Specifically, it is unclear why modelling the entire supply chain in this way is a benefit, compared with (1) letting merchants claim the overcharge and passing compensation on via price competition or (2) just using presumptions.

The Supreme Court did not show why it was better to have this detailed supply chain analysis from a cost-benefit point of view. Instead, it just noted that it was *relatively* easier for claimants to claim small amounts using a class action. This missed the point that, if the case is unsound, then that is a bug and not a feature.[21]

As Sir Peter put it, very tersely, "the powerful dissenting judgments are very persuasive."[22]

Sir Peter's suggestion to move the debate on is to make more fulsome use of Tribunal Rule 79, which provides for cost-benefit analysis to gate claims at the class certification stage. That would force a class representative to show that they can actually move money to the claimants, and to elaborate on how they propose to do so, rather than just asserting that a class action is relatively easier for them.

This involves engaging in better ex-ante analysis at the class certification stage. Importantly, Sir Peter highlighted that the CAT will expect analysis of likely claimant take-up **at the class certification stage:**

> "As we start now to have more damages awards and settlements, we will gain experience of distribution. And I think that may feed into the cost-benefit analysis which can be applied under rule 79(2)(b) at the time of certification, so that where expectation of take-up is particularly low, the CAT can consider whether the enormous costs to be incurred justify certification of the proceedings."

A wider point can be made about the relative relationship between robust damages estimates, and possible take-up. Sir Peter noted that there have been "some indications of [broader cost-benefit analysis] in recent judgments." This seems to refer to the denial of the CPO in *PRS v Rowntree.*[23] That is the so-called "Blur drummer" case alleging that royalties did not flow accurately to songwriters in the Performing Rights Society's royalty system.

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[21] It is very unfortunate that the CAT cast this point as one of requiring proof of *compensation* as a principle, rather than simply an element of cost-benefit analysis, since then there would have been no argument that it had unduly introduced a new compensation-based test to class certification.
[22] Lecture, p.11.
[23] *PRS v Rowntree* [2025] CAT 49 [105].

There, class certification was denied in part on the basis that there was no evidence of net positive impacts on the class; rather, the class was merely moving money around, and at net cost – thus, harming the class on average.

It has been widely noted that the class was effectively suing itself. It is less highlighted, but perhaps more consequential, that the claimant had not actually identified any specific estimate of damages.[24] Without a number by which to evaluate the argued overcharge, cost-benefit analysis of addressing it with litigation is very challenging.

> "The size of the claim is not known because the PCR is unable to produce an estimate of the proportion of that £200m of Black Box royalties which should have been paid to writers in the counterfactual."[25]

So the context of Sir Peter's remark is that current CPO applications contain **neither** a robust estimate of overcharge, nor any indication of whether money will actually flow to claimants.

There seems to be much work to be done on cost-benefit analysis.

a. Rail Fares

The most revealing chapter relating to settlements is the only one so far paid out: that in *Rail Fares*. The case featured a settlement with just one of several rail operators who had been sued allegedly for not showing a discounted bundled fare on ticket machines.

As the Tribunal put it:

> It is important to note, at the outset, that in the Tribunal's view **this case cannot be considered a success overall…** it avoided an expensive trial for SSWT [but] the way things have unfolded since then undermines the positives.[26]

[24] Id., [99].
[25] Id., [99]
[26] *Justin Gutmann v First MTR South Western Trains Limited and Another* [2025] CAT 72 (hereafter, "Stagecoach stakeholder entitlement hearing") [67].

Arguably for unrelated reasons relating to Stagecoach's exit from rail operation,[27] Stagecoach offered a settlement to close out the six-year litigation. The other operators defended their cases and eventually won.

The late Californian State Senator Randolph Collier once quipped that some mass transit was not so much *rapid transit,* as "rabbit transit."[28] The six-year *Rail Fares* case was certainly not rapid. Was it a "rabbit" of a case for **cost-benefit analysis**?

It certainly fails a **cost-effectiveness** test. Analysis of the settlement documents shows that £0.213m moved to claimants at a cost of £18.7m just on the claimant side (of which £10.95m was redeemed in cost-shifting awards).[29] So for the claimant class, **moving £1 to the allegedly affected consumer cost at least £86.29 – in a case which was fundamentally unsound as a matter of competition law.**

No wonder Stagecoach settled: the cost risks are far greater than the actual liability. The same dynamic also creates incentives to bring complex cases in the hope of settlement.

As the Tribunal would sharply put it when reviewing the *Rail Fares* history in its April 2026 review of the proposed settlement of the alleged *Waterside* salmon cartel:

> We take from this that when considering the costs and benefits of the proceedings it is appropriate, at certification, to consider how damages are to be distributed. Outcomes which appear predominantly for the benefit of lawyers and litigation funders, rather than class members, are not in the public interest.[30]

Indeed, even in *Rail Fares* itself the Tribunal had insisted that, when it comes to damages awards and analysis of take-up:

> The Tribunal is not a rubber stamp.[31]

The fundamental problem was that insufficient work had been undertaken on **both** the take-up rate, and on the case merits from a broader cost-benefit perspective. In fact, the Tribunal had to chase for a clear breakdown of how much funders and lawyers would get under various distribution scenarios.

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[27] RAIL magazine, Analysis: The Final Chapter of Stagecoach's Railway Adventure? 5 July 2024, http://railmagazine.com/news/2024/07/04/analysis-the-final-chapter-of-stagecoach-s-railway-adventure

[28] W Turner, "Randolph Collier, 'father' of the Coast Freeways' *New York Times* Aug 3, 1983.

[29] Stagecoach stakeholder entitlement hearing [67].

[30] *Waterside Class Ltd v Mowi et al.* [2026] CAT 32 [20]

[31] *Justin Gutmann v First MTR South Western Trains Limited and Another* [2024] CAT 32 (hereafter "2024 Stagecoach settlement" [55]

> "[We want to] know how much would likely go to the CR for the legal expenses and the funders, in respect of return on advances and funders' fees. We would want a full breakdown of that in the future to be filed with the application **rather than necessitating a request from the Tribunal**."[32]

The frustration is obvious. What makes it remarkable is that there were already several warning signs of a likely problem with take-up. There had not been robust analysis even of the cost-effectiveness of the litigation, let alone its cost-benefit ratio considering the market for rail fares.

The history was foretold

The pivotal chapter was the March 2021 CPO hearing for the pertinent part of *Rail Fares*. If looking for detailed analysis of how many people would be likely to claim, a reader will be disappointed.

While that CPO judgment in *Rail Fares* was certainly lengthy, it did not materially engage in analysis of how many would claim. Instead, there was analysis of the *total **possible** claimant class size*[33] resulting in an initial damage estimate of £57 million relative to the South Western franchise proceedings, and £36 million for the Southeastern Proceedings.

Remarkably, whether anyone would actually claim was addressed based not on pertinent analysis of the rail fares in question, but instead on a consumer protection class action concerning Californian jeans sales from 1986. The cited case, *State v Levi Strauss & Co*, considered a 1976 US FTC investigation.[34] And even there, the headline number was only a 14-33% class claim rate.

So at the CPO stage, the Tribunal overlooked important and much more recent materials, most notably a 2017 literature review including a one-page summary of likely claims rates from Juska in the *Antitrust Bulletin*.[35] Thus, the comment that "we find it difficult to speculate in the present actions as to what the likely uptake would be" ([175]) seemed to be particularly wide of the mark. There was plenty of evidence to consider, and it would have highlighted the pivotal role of assessing the availability of records by which to automate payment. That could then have fed cost-effectiveness analysis by requiring commitment to a relationship between claimed damage, and actually rendering compensation.

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[32] Id., [69]. This repeats the frustration already stated at [55].
[33] *Rail Fares* CPO [2021] CAT 31 [150-151].
[34] *State v Levi Strauss & Co* (1986) 41 Cal 3d 460 (maximum recovery of $2 per pair of jeans purchased; 14%-33% of class members applied for refunds of overcharges, many claiming for multiple purchases, but only those claiming to have purchased more than 35 pairs over five years were required to submit a notarised confirmation of their claim).
[35] Juska (2017).

The overlooked literature review

The essential point from the literature review is that when records to render automatic refunds exist, then cases tend to work well. However, where they rely on people coming forward, recovery rates are low. Accordingly, there is a risk that allowing a case to proceed without **first** engaging in material analysis of *this case's* likely recovery rate leaves the Tribunal with no practical option but to "rubber stamp" a settlement.

Juska's 2017 literature survey considered literature from 1986-2015 and found that *claims made* settlements – that is, those requiring consumers to come forward – often achieved claim rates below 20%, and sometimes in the single figures.

Juska's literature review

A major literature review identified the following key metrics for claims redemption:[36]

Study name	*Claims rate type*	*Settlements in study*	*Redemption rate*
Gramlich	Redemption of coupons	12 antitrust cases of which 10 were consumer	26.3% on average but **only 13.1% in consumer cases**
Mayer-Brown	Claiming rate	6	Claiming rates of: 0.000006% 0.33% 1.5% 9.66% 12% 98.72%* *ERISA retirement litigation = 98.72%; average payout there is $2.5m

[36] As the author explains: "The claiming rate (CLr) considers the number of class members who file claim forms to receive payments. The compensation rate (Cr) addresses when class members receive some kind of compensation, and usually applies to settlements with automatic distribution." Both are measures of money making its way to consumers as the system is *supposed* to achieve, and their alternate use reflects data set differences.

CFPB	Claiming rate	251 settlement of which 105 provided a claim rate	Unweighted average claims rate 21%; median 8%. **Weighted average claims rate 4-11%.**
Hensler	Compensation rate	2 small settlements (of 6)	35% of 4 million class members received $5 90% of 60,000 received $134
Pace-Rubenstein (Part 1)	Compensation and claiming rate	Sample of 6/31 federal settlements	Part 1 (federal settlements): **Automatic distribution:** Compensation from 72% ($35) to 99.5% ($2000). **Claims made:** From 4% (1 million claiming $20 each) to 20% (3,500 claiming $1000 each)
Pace-Rubenstein (Part 2)	Compensation and claiming rate	Sample of 9/57 settlements found on claims administrator websites	**1-5% recovery:** 3 settlements; 2 are just 1%. **20-40% recovery:** 4 cases **Above 50%:** 2 cases but small classes: n=431 and n=350.
Fitzpatrick-Gilbert	Compensation and recovery rates	15 (bank overdraft fee disputes)	**Average <u>compensation</u> rate:** **Automatic distribution (n=13):** 55%

			Claims made basis (n=2): 5% **Average <u>recovery</u> rate:** **Automatic distribution** (n=13): 38% **Claims made basis:** Not available.

In summary:

- Early work such as the Gramlich (1986) study found that **only 13.1% of consumers** redeem compensation, against an average redemption rate of 26.3% in those cases for which information was available.

- The 2013 Mayer Brown study[37] found remarkably low take-up in the six settlements for which data were available: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%. The 98.72% in the table is an outlier because it relates to Employee Retirement Income Security Act (ERISA) litigation where payouts average $2.5 million – of course *those* claims are made.

- The 2015 CFPB study considered 105 settlements relating to financial products. Although this identified a headline figure of 21% claims rates, the piece is criticised for using reported (rather than demonstrated) claims rates and for failing to distinguish certain classes in which the rate may only be 5%.[38]

- The picture is better for **automatic distribution** cases, that is, those in which there are sufficient records to order automatic refunds. In Hensler et al. (1999), a $5 refund made it to 35% of 4 million affected consumers. That rate increased to 90% when the class was smaller (n=60,000) and average payout was larger ($134).

- The same distinction by records availability appears in the two-part Pace and Rubinstein study (2008). Four **automatic distribution** cases ranged from 65% (class size=4,800; average payout $35) to 99.5% (class size=200; average payout $2,000).

[37] It is important to note that this study was financed by the US Chamber of Commerce's Institute for Legal Reform, which is typically considered a pro-defence body. However, the statistics are relevant and useful, and can still be assessed against other studies despite their origin.
[38] Juska (2017).

- But for other settlements in Pace and Rubinstein (2008) involving **claims made**, the rates changed dramatically. Even if claiming an average of $1,000 only 20% would claim (class size=3,500). For a smaller amount ($30 in the form of software), just 4% of a class of 1 million consumers would come forward and file their claim.

- Pace and Rubinstein (2008) also collected data from settlement distribution companies to complement the above numbers, which had been drawn from federal claims. Information was available on nine of the claims administration company cases. Three of these settlements had claiming rates below 5% (of which two were under 1%), three had claiming rates between 20% and 40%, two above 50%, one with 65% (431 got $5,000 on average) and one with 82% (350 class members got $2,600).

- Interestingly, Pace and Rubinstein (2008) did not notice a strong relationship between **claim size** and **claim rate** across their sample, although they cautioned regarding the low base in the underlying data set (pp.32-33, noting relatively low response rates and sample size at 19% of cases). However, the **scale** of the class was materially related to recovery rates. The authors highlighted that:

  > "The cases with the highest claiming rates had very small class sizes (a few hundred class members), while those with the smallest distribution rates tended to have class sizes of several hundred thousand class members. **Only one case involving a large class (roughly a million class members) had a more than negligible distribution rate (35 percent).**"[39]

So, the Pace and Rubinstein study strongly indicates that the main difficulty is simply identifying the large number of claimants involved, more so than it is about the amount of the claim.

The authors noted that very few class action attorneys responded to them. They put this down to an interest in a lack of transparency, just as the Tribunal would identify in *Rail Fares* as it sought better information on relative payments to lawyers, funders, and claimants. In the words of Pace and Rubinstein (2008, p.35, emphasis added):

> Class counsel has dual interests – securing the best relief possible for the class while simultaneously obtaining a fee that exceeds the expenses invested in the case and its opportunity costs.
>
> This context gives rise to forms of class relief – coupon settlements, complex claiming programs, superficial notice campaigns, etc. – unlikely to yield significant claiming by the class. **Class counsel has little interest in seeing these anemic distribution rates**

[39] Pace and Rubinstein (2008, p.32).

> **publicized. They have the potential to make class counsel look simultaneously incompetent and greedy: incompetent because the system they settled for yielded little relief, but greedy because they nonetheless took home a generous fee.** ***Worse still, publicity about low claim rates may encourage judges in future cases to pin fee awards to the actual claiming done by the class*****;** this possibility, which would likely result in far lower fee awards, creates added incentives for class counsel to under-emphasize the issue of likely rates of claiming and payout and to not push for the transparency of claiming data.

This observation chimes with comments by Crane (2010, p.684) that redemption rates are opaque. Leslie (2005, p.1396-7) thought that coupon redemption rates were as low as 26.3%. Crane therefore raised the question whether prices might simply rise in response to the coupon grant, especially as the redemption rate is low (2010, p.683).

- It is striking that one of the few results finding high levels of payments to class members concerned bank overdraft overcharges: Fitzpatrick and Gilbert (2015). There, bank account records exist. So, the high rates relate to the simple point that **automatic claims achieve reasonably high compensation rates (average = 55% class participation).** Adjusted for damage, recovery rates were 38-42% (depending on outliers). But in the two settlements requiring **making a claim**, **the compensation rate was just 1.76% and 7.39%.**

Tribunal analysis

At the Tribunal itself, best practice has now advanced to accounting for better analysis of awareness of class actions. A recent survey featuring in the 2026 *McLaren (RoRo)* settlement review cleverly adjusted **file-to-claim** analysis by whether respondents falsely claimed awareness of the class action. **However, this is only happening relatively late in the process, and not at the beginning, when it would be most valuable.**

The crucial innovation from Thorndon Partners is to adjust for survey bias by which respondents claim false awareness. Thorndon shrewdly put a red herring in their survey, asking whether people had heard of a *made up* class action as well as the real one, to rebase *self-reported awareness* based on whether people were just saying yes (thereby diminishing confirmation bias).

As can be seen, this significantly lowers the number likely to claim from self-reported levels. These drop for consumers from an average of 16.4% to just 1% (Table A, left column) and 53.3% to 3.7% for business-to-business fleet purchasers (Table B, left column):

Table A: Estimated percentages of take-up for consumers that may seek to make a claim, across three recovery scenarios absent steps to improve awareness of and interest in the Proceedings

Segment	Average across scenarios	Scenario A: amount is £5	Scenario B: amount is £45	Scenario C: amount is £100
1. Willing to claim	57.6%	39.8%	67.1%	64.9%
2. Self-reported aware and willing to claim	16.4%	11.1%	19.1%	18.5%
3. Behaviourally likely and willing to claim	34.8%	24.0%	40.5%	39.2%
4. Self-reported aware, behaviourally likely, and willing to claim	9.7%	6.8%	11.5%	11.2%
5. Adjusted-awareness, behaviourally likely, and willing to claim	**1.0%**	**0.7%**	**1.2%**	**1.2%**

Table B: Estimated percentages of take-up rates for fleet managers that may seek to make a claim across three recovery scenarios absent steps to improve awareness of and interest in the Proceedings

Segment	Average across scenarios	Scenario A: amount is £500	Scenario B: amount is £5,000	Scenario C: amount is £25,000
1. Willing to claim	90.7%	86.3%	92.1%	93.6%
2. Self-reported aware and willing to claim	53.3%	50.7%	54.2%	55.0%
3. Behaviourally likely and willing to claim	53.3%	50.7%	54.2%	55.0%
4. Self-reported aware, behaviourally likely, and willing to claim	33.3%	29.8%	31.9%	32.3%
5. Adjusted-awareness, behaviourally likely, and willing to claim	**3.7%**	**3.5%**	**3.8%**	**3.9%**

The single-digit claim rates when adjusted for awareness chime with the wider warning in the literature that single-figure uptake is a common scenario if people need to file to claim.

Thus, the survey literature bears out Judge Posner's memorable comment that "There is no feasible method of locating and reimbursing the consumer who several years ago may have paid too much for a toothbrush." (Posner (1968, p.1590)).

The key point from this wide survey evidence is that settlements requiring active claims by consumers often fall to the <20% redemption range, whereas automatic distributions based on pre-existing records by which to render compensation achieve far higher rates (e.g., 55%).

So even at the time of class certification, there was ample evidence that it would be difficult to move money in the absence of a mechanism for automatic payment. This point would come back to haunt the case at the May 2024 settlement hearing:

> …[T]hese are relatively small amounts and when one is talking about a ticket here or a ticket there, many people may just not bother to claim because the claim period relates to dates between 2015 and 2017. It may be tedious for class members to search for records and make enquiries of their banks and credit card issuers to get the statements showing the payments made for relevant journeys. With average losses estimated to be £27.90, many will simply not want to spend the time and effort.[40]

Based on an expert report drawing on the US studies, the Tribunal said:

> Even 10% [claim participation] may be an overestimate… The empirical research needed to provide a robust estimate of likely take-up in this case simply has not been done[41]

The curiosity is why, if this "simply has not been done," that had been allowed to sit from 2021-2024. The time to do it was at the CPO grant, by analysing the prospects for rendering compensation at that time.

The ultimate claims rate

In the end, just 7,290 would claim, against a headline 3 million allegedly affected at the start of the case. Even by the time of the partial settlement in 2024, it was still anticipated that between 140,000 to 180,000 were still expected to claim from the partial settlement: and this despite no need for evidence of purchase for

[40] 2024 Stagecoach settlement [50].
[41] Id, [77].

one of the settlement pots.[42] Literally, free money was left on the table, but still claimants did not come forward. This should have raised alarm bells much earlier through a proper cost-benefit analysis accounting for the likely limitation to the claim rate (e.g. via a survey of claimants *before* the litigation).

It would also have been helpful to account for the existing survey evidence, by requiring evidence of how many people would claim at an earlier stage in the ligitation.

That was instead left for a later day, meaning that the expert, Mr Holt, could continue to apply an estimate of £38.99 million in damage just for the *Stagecoach* component – when in fact just £216,485 would be claimed.

The discrepancy between £38.99 million in alleged damage, and just £216,485 making it to the class is all the more striking because costs of £10.95m were ringfenced, against a total of £18.7m in claimant costs accrued in the litigation.[43]

So, £18.7m was incurred just on the claimant side to move just £216,485. That is a victory for the advisors, but not for the class, just as Pace and Rubinstein (2008) had so sharply warned.

As early as the 2021 CPO judgment in *Rail Fares*, the Tribunal had said, very ominously:

> [171] We would be concerned if it appeared that collective proceedings would be likely to benefit principally the lawyers and funder as opposed to the members of the class. Such proceedings are hugely expensive for the parties and also demanding on the resources of the Tribunal.

This is of course precisely what came to pass in the 2024 settlement and 2025 trial loss. The curiosity is why this accurate concern voiced at the CPO judgment [171] was not followed through with more fulsome analysis of the context of the claim **at the class certification stage.**

[42] Stagecoach stakeholder hearing [67].
[43] See further workings below on ringfenced/non-ringfenced components.

Cost-effectiveness analysis: Costs accounting for the actual claims rate

Perhaps *Rail Fares* was a particularly difficult case. This section considers the cost-effectiveness of the much more promising, and intellectually sounder, hardcore cartel claim in *McLaren (RoRo).* The *RoRo* case addressed hardcore cartel activity in vehicle shipping. This is a conventional theory of harm based on price fixing. It is at the core of the class action system's mission.

The real test, then, is not adventuresome cases about whether ticket machines might look different, but rather whether the Tribunal is catering to hardcore cartel cases at reasonable cost. This requires first, an estimate of costs, and then an estimate of takeup rates.

1. **Costs**

In *RoRo*, although the estimated damages are relatively small per consumer, at £3.59 - £4.85 each ([50-52]), when scaled up for the estimated 17 million purchases involved, there is a substantial claim. Moreover, the case concerns a strong theory of harm: this is simply proven hardcore cartel activity with large societal costs. It is just that they are dispersed.

Interestingly, the case precipitated significant settlement. These were initially slow to come. The claim was filed in 2019. In December 2023, the first settlement was approved. It accounted for just 1.7% of the market. However, from 2024-6, further settlements emerged accounting for over 90% of the market; and perhaps 100%, depending on accounting.[44] Of an initial estimate of loss between £86.1m and £215.8m, the settlement is £92.75m.

At first blush, this seems far more appealing than the outcomes in *Merricks* or *Rail Fares*. Gone was the hyperbolic £14-17bn claim met with £200m in settlement in *Merricks*.

However, there is a significant question of cost efficiency and the amount going to consumers. Ring-fencing of funds is used to allow costs and damages to be claimed against particular pots. Of the £92.75m in *McLaren (RoRo)*, the amount ringfenced to go to consumers is £35.14m. Costs, fees and disbursements can draw on a guaranteed £34.36m fund.

A further £20.75m could be claimed by consumers, but fees can also be charged against all but £3.25m of this **non-ringfenced** pot.

Thus, in theory, £17.5m of the **non-ringfenced** pot could go to funders, experts and lawyers, leading to a total possible recovery of £55.89m for the **consumer**, and £51.86m for the **professionals**.

[44] *McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* [2026] CAT 6 [20].

The cost of distributing claims is a cost to the consumer of £2.5m.[45]

Scenario modelling

Tribunal reviews of settlement funds provide figures allowing estimates of how much the legal case is costing consumers, compared with how much they would get.

The analysis reveals that ***even if everyone claims the maximum possible claim of £51.86m***, then fees are still 66% of the total recovery. If the maximum possible damages award of £55.89m is made, this leaves £36.86m for fees (Ringfenced £35.36m + £2.5m distribution costs).

Number of claimants	17 million
Fees	£36.86m
Damages	£55.89m
Fees as a % of damages	66%

The figures also allow calculation of how much it costs to move £1 of damage to consumers.

Number of claimants	17 million
Fees	£36.86m
Damages	£55.89m
Fees as a % of damages	**66%**
Fees paid to get £1	**66p**

Recall that this is the most optimistic scenario, far above the claims level seen in the survey evidence which is often <10%. **Even at 100% recovery, fees are still 66% of the damages award.**

The situation is worse if assuming that the maximum possible fee award is made. This would arise if there is a shortfall in takeup, as is likely based on the survey data, leading advisors to argue that they should be able to redeem fees from the non-ringfenced funds (those which could be used for damages, or for fees).

This will be particularly attractive because, as the courts have repeatedly recognised, class representative and funded parties more generally have less ability to impose cost pressure on their lawyers than defendants. Where there is a risk that fees may reduce the net sum paid to the class, there is a strong need for a mechanism to impose cost pressure.

[45] For simplicity, this is held constant in the analysis below.

In the scenario where the lawyers and professionals are able to claim the maximum £35.14m available to them, then for every £1 paid to the consumer, costs are £1.55:

Number of claimants	17 million
Fees	£54.36m
Damages	£35.139m
Fees as a % of damages	**155%**
Fees paid to get £1	**£1.55**

It is important to note that, unlike *Rail Fares*, it is possible that these figures pass typical estimates of cartel deterrence benefits. These can be high in the case of a hardcore cartel. Thus, the cost-benefit analysis ought to ask: is the alleged matter one in which hardcore cartel activity is present? In such a case, a 66% commission might be more acceptable than in more speculative abuse-of-dominance matters.

Even so, there is the question whether such large fee awards (up to £54.36m) are required. Cost control is helpful even if there are deterrence benefits, as these are also societal costs. There would seem to be scope to reduce costs compared with these very large budgets, perhaps by tendering, applying damages-based cost caps, and/or improving competition between providers.

Moreover, public enforcement may be significantly cheaper. Public enforcement by the CMA would be very unlikely to spend £54.36m on a single case. Indeed, the **entire** 2026-2027 CMA budget across **all functions** – not just cartel enforcement – is £138.9m.[46] As the CMA redeems its costs from proven cartels, the answer may be to provide more finance to the relatively cheaper CMA, rather than to engage in relatively expensive litigation.

Impact on settlement dynamics

The problem is not only the relatively high proportion of the money going on fees, but the relationship with settlement dynamics.

In *RoRo,* the settlement is for £92.75m, against an initial loss estimate of £86.1-£215.8m.

But wherever the settlement is in that range, the amount of the fees does not vary very much. It is not as though professionals are gaining very much extra from getting a good settlement. Rather, the fees are charged to the tune of at least £34.36m without any obvious benefit from driving a better settlement.

So, there is not a very strong incentive for the professionals involved to push for greater settlement, just as Pace and Rubinstein (2008) warned. While they

[46] UK CMA, Annual Plan 2026 to 2027 (budget includes £8.5m capital allowance).

castigated the possible "greed" and "incompetence" involved, one might also observe that this is not very fair on talented claimant side lawyers: **claimant lawyers cannot easily appropriate the benefits of proving more harm, which is societally beneficial provided that the case is sound.**

The ideal mechanism would unite the interests of claimants, their representatives, and society at large. The ringfenced fee redemption model does not do so, because it does not provide any strong incentive towards working on the cases proving the most loss (and vice versa).

Giving lawyers and funders commission on compensation actually passed to consumers would be much preferable.

The Tribunal could implement a regime whereby the sums paid to the funders, lawyers and ATE provider will be referable to the distribution rate achieved. A clear and consistently applied rule of this type would signal to claims originators that they should focus on claims with higher distribution rates. Even if it is not possible to know the absolute distribution rate in advance, it is possible to differentiate claims based on how strong the distribution rate is likely to be, for instance by researching this. Those bringing claims that move more money to more consumers would achieve greater rewards.

2. **Claim rate**

The Thorndon Partners' analysis of potential claim rates in *RoRo* was provided above. This section now applies it to cost-effectiveness analysis under the indicated damages and fee provisions in the case.

It will be recalled that the key innovation is to adjust for whether people were simply playing along and saying that they knew about any class action mentioned. This strips out a framing effect. It results in claims rates <5%, in line with the survey literature above.

Those survey results show striking decreases in claims rates, when adjusted for robust measures of awareness. This is the red herring model, discussed above, by which a false class action was included in the awareness questions to see if respondents were just saying yes.

That survey indicated an average claim rate of 1.0% for consumers and 3.7% for fleet managers. Interestingly, the Thorndon survey chimes with the Pace and Rubinstein (2008) result that claim rates do not increase very much according to the amount: in the Thorndon survey, even if claiming £25,000 (their Scenario C), still only 3.9% of *fleet* managers are likely to claim.

For ease, the pertinent lines of the consumer and fleet manager tables are reproduced again here:

Consumers	Average claim rate	Amount <£5	Amount <£45	Amount is £100
Adjusted awareness, likely to claim, and willing to claim	1.0%	0.7%	1.2%	1.2%

Fleet managers	Average claim rate	Amount is £500	Amount is £5,000	Amount is £25,000
Adjusted awareness, likely to claim, and willing to claim	3.7%	3.5%	3.8%	3.9%

So, how would these newly adjusted claim (in all cases, <5%) affect the cost-effectiveness analysis above?

Recall that the estimate of loss per consumer is £3.59 - £4.85:

- Thus, for the **consumer** claim, even by the analysis of the case itself, the Thorndon survey predicts consumer claims of <1% (0.7% claim rate for £5 claim).

- For **fleet** purchasers, the claim rate is 3.7-3.9%. Some will have much larger claims, but the statistic does not change by much.

There is the important question of *relative* claims intensity by consumers and fleet managers, as well. There will be uneven distribution of damage amounts between and among the different groups:

- A consumer might purchase 1 car, or 2-3 in the time period but both are "consumers."

- A business might purchase 5 cars or 5,000, but are both "fleet purchasers."

Nonetheless, there is no reason to suppose that an average would be materially misleading. It is common to use claims rates rather than specific recovery rates in the surveys because more data is then available. While imperfect, a claims-rate adjustment (rather than recovery rate adjustment) expands the available data and brings helpful insight based on how many people are likely to claim, just on the assumption that their claims average out over the class.

The core concern would be if the average understates a large amount of settlement by those who are actually claiming. However, the very largest purchasers are likely to claim anyway (well advised; can seek settlement direct).[47] Further, the survey chimes with others in finding that the headline number is surprisingly unimportant in inducing claims. So, it is reasonable to proceed based on an average claims-rate adjustment.

For simplicity, this could simply be set at 4%, since all pertinent (awareness adjusted, behaviourally likely and willing to claim) rates from the relevant Thorndon Partners survey for *RoRo* are below it (0.7%-3.7%). The small headroom from rounding up from the largest reported number (3.7%) to 4% also provides an allowance for the instances of large purchasers making large claims. This is also a generous estimate of claims, because it significantly exceeds the consumer rates (<1.2%).

Applying the survey's 0.7-3.9% claim rate

For ease, this section will apply a 4% claims rate as a generous assumption.

Applying a 4% claims rate results in **between £16.49 and £38.67** in costs to move just £1 to the consumer, depending on how the ringfenced fees are applied.

Let us revisit the scenarios, but now adjust them for the 4% claim rate from the survey. If 4% claim, that means that 680,000 of the 17 million claimants come forward.

The same analysis of the maximum damages, and maximum fee, scenarios can then take place:[48]

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[47] This dynamic is frequently seen in merchant-facing litigation, because large merchants may not want to settle. See especially *In re Payment Card Interchange Fee and Merchant Discount Antitrust,* No. 20-339 (2d Cir. 2023).

[48] This is a generous estimate, because if only 4% of claimants come forward, then the hypothetical maximum damages of £55.89m would not be claimed, and in practice it would then be available for fees rather than damages. However, for consistency, both tables are recreated like for like based on the same numbers from before.

Maximum damages: Fees of up to £36.86m

Number of potential claimants	17 million
Fees	£36.86m
Damages	£55.89m
Damages rebased for claim rate (4%, n=680,000)	**£2.23m**
How much larger are fees than damages?	**16.5x (Fees = of 1649% damages)**
Fees paid to get £1	**£16.49**

Maximum fee scenario: Fees of £54.36m

Number of potential claimants	17 million
Fees	£54.36m
Damages	£35.139m
Damages rebased for claim rate (4%, n=680,000)	**£1.41mm**
How much larger are fees than damages?	**38.6x (Fees = of 3867% damages)**
Fees paid to get £1	**£38.67**

Even with a substantial 680,000 claims made – almost 100x the 7,290 in *Rail Fares* – fees are still many multiples of recovery.

At least 16x the damages award is incurred in fees.

10% claim rate

The same tables can be reproduced with a 10% claim rate. This is still relatively high, but would account for marginal claims from more marketing. At this rate, 1.7 million consumers come forward and make a claim.

This is a remarkable participation rate. As the Tribunal itself has reminded us, "Even 10% [claim participation] may be an overestimate."[49]

But for completeness, it is worth considering a 10% number, just in case the marketing were to bring forward claims filed by the million. At a 10% rate, i.e. 1.7 million claims filed, the numbers would be as follows:

Maximum damages: Fees of up to £36.86m

Number of potential claimants	17 million
Fees	£36.86m
Damages	£55.89m
Damages rebased for claim rate (10%, n=1.7m)	**£5.59m**
How much larger are fees than damages?	**6.6x (Fees = 660% of damages)**
Fees paid to get £1	**£6.60**

Maximum fee scenario: Fees of £54.36m

Number of potential claimants	17 million
Fees	£54.36m
Damages	£35.139m
Damages rebased for claim rate (10%, n=1.7m)	**£3.51m**
How much larger are fees than damages?	**15.5x (Fees = of 1547% damages)**
Fees paid to get £1	**£15.47**

[49] 2024 Stagecoach settlement [77].

35% claim rate

The highest substantiated **mass** claim rate in Pace and Rubinstein (2008) was 35% for a 1 million consumer claim. Most **mass** claims in the survey were at rates <10% and often <5%. However, for caution, it is worth asking what the numbers would look like at a 35% claim rate – even if that is a little unrealistic, because it implies 5.95 million car purchasers becoming aware of and actually making a valid claim.

Maximum damages: Fees of up to £36.86m

Number of potential claimants	17 million
Fees	£36.86m
Damages	£55.89m
Damages rebased for claim rate (35%, n=5.95m)	**£19.56m**
How much larger are fees than damages?	**1.9x (Fees = 188% of damages)**
Fees paid to get £1	**£1.88**

Maximum fee scenario: Fees of £54.36m

Number of potential claimants	17 million
Fees	£54.36m
Damages	£35.14m
Damages rebased for claim rate (10%, n=1.7m)	**£12.3m**
How much larger are fees than damages?	**4.4x (Fees = 442% of damages)**
Fees paid to get £1	**£4.42**

Therefore, fees outstrip claimant recovery by 1.9x even on the most generous (and unrealistic) assumptions (a remarkable 35% claim rate). In fact, claimant recovery rates have been <2% in the UK experience (*Rail Fares*).

Summary of claim rate analysis

Consolidating the analysis into cost-effectiveness by claim rate:

Claim rate	4%	10%	35%
Cost to move £1 (max damages award)	£16.49	£6.60	£1.88
Cost to move £1 (max fee award)	£38.67	£15.47	£4.42

The key driver of these statistics is that the amount of the claim is not very large. But it is important not to overemphasise this, because there is evidence that consumers do not make claims **even if the amounts *are* relatively large**. Recall that the Thorndon Partners survey adjusted for this, by asking consumers about a £100 and fleet managers a £25,000 claim (Scenario C). Even so, their awareness-adjusted participation figures did not exceed 4%. Therefore, and in line with the earlier Pace and Rubinstein (2008) result, it is not the small amount driving the low participation.

Claims size

What would this look like with larger claims? Although cost effectiveness would increase with larger claim ticket sizes (since more would then pass to consumers in total), the issue with low participation remains. This can be seen in an easy adjustment to the above summary table.

Suppose that the damages per claimant were 10x the amount in *RoRo* (i.e., increased 10x to £35.90 - £48.50), so the maximum damage award is now £558.9m, up from £55.89m.

As all figures remain the same except for the 10x to the damages, the cost to move £1 decreases by the same factor 10x factor for the maximum damages award scenario:

Claim rate	4%	10%	35%
Cost to move £1 (max damages award)	£1.65	66p	18p

This indicates where the regime could have a very useful role: *if* there is enough damage in the case, **and** claim rates are high, then the costs start to drop.

Importantly, the 10% recruitment level is well above that which the surveys suggest will attain, whether looking at the Juska literature review or the more recent Thorndon Partners work. It bears emphasis that even £100 claims do not induce even 2% of eligible consumers to come forward (their Scenario C).

Realistically, the higher rates only attain in automatic distribution scenarios. So the underlying issue with low take-up still seems to be in prospect, even if the claims are larger. This accords with the survey literature finding that whether distribution is automatic or otherwise easy, tends to dominate over claim size.

So, the real question is whether automatic distribution can occur. If it can, then costs are more easily spread between claimants such that better cost efficiency may be seen. However, in claims-made scenarios, with rates in the 1-4% range, it is very unlikely that cost effectiveness is achieved, even for very substantial claims (e.g., £0.5bn).

Cost effectiveness analysis of this sort would greatly assist in identifying the costs and benefits of litigation at the class certification stage.

Early sign up schemes

The CAT could simply require pilot schemes – essentially, a test run with the website – offering money *as though* the claim had won. The resulting percentage claim from the pilot can help calibrate whether "proceedings [which] are hugely expensive for the parties and also demanding on the resources of the Tribunal"[50] are merited.

This would be a particularly valuable tool in cases like *Rail Fares* where the lawyers and funders have made more money than claimants, because the pilot scheme before CPO would weed out scenarios where lawyers and funders benefit more than the class does. The proposed fees to funders and lawyers could then be estimated against the likely claim rate.

It would, however, be important to account for issues with pilot schemes, notably that they tend to overestimate early participation, and may not track non-linear participation rates over time. Experience would doubtless develop, and for all their faults, a realistic pilot scheme showing participation by consumers (e.g. via seed payment) relative to marketing and promotional costs would bring more transparency than there is at present.

What about the payments to charity?

Against this it will be said that the Access to Justice Foundation was paid £3.78m from the *Rail Fares* settlement. Surely that is a good thing, at some level?

Without in any way impugning important charitable works, it is important to recall that the true benchmark here is the high cost of the case. As the costs were reportedly £18.7m, it would actually be cheaper for all those involved simply to write a cheque to charity.

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[50] *Rail Fares* 2021 CPO, [171].

There is no case that charity is served by burning an additional £18.7m in legal fees[51] to move £3.78m to charity.

It would be better, if wanting charity, simply to fund the Access to Justice foundation direct. Moreover, if resources are employed in the litigation, and if dynamic economic harms arise from any false-positive cases, then costs arise elsewhere in the economy. This increases costs to consumers in the end, compared with simply funding the AJF without incurring the high costs.

Fundamentally, therefore, the charitable payment is a response to a **failure to distribute, and not a solution to it.** The real prize here is to get distribution rates up so that money flows to those with strong claims.

Moreover, even accounting for the charitable payment, the £4m combined charitable + compensation payment is still only 21% of the costs. **Even for the £3.78m going to charity, it therefore cost £4.68 in legal costs to move £1 to charity.**

Further, regardless of whether charity payment is present, the risks of false positives remain. Even if a charity gains a substantial sum, there is injustice in having to pay damages when there was no underlying legal fault. Notably, these costs will appear elsewhere (e.g., in rail subsidy bills).

It is also a curious moral claim, because:

- the underlying case was found to be unprincipled;
- the CAT had already said even at the CPO that any deterrence failed a cost-benefit analysis;[52] and
- at least one railway was actually subsidising its passengers to travel.

As there was no underlying legal breach one might as well argue that *any* property should be given to legal aid charities. This would, of course, all be quite different if the case had been strong. In a strong case the return to charity would also be higher. The charity benefits just as much as the claimants do from focusing on the better claims, because then undistributed damages are larger and so the payment to charity is larger. So the same recommendation stands: **there ought to be sharper focus on the cases passing cost-benefit analysis at an early stage.**

[51] £18.7m with recoupment of £10.95m from settlement.

[52] Rail Fares 2021 CPO [177-178].

b. Funder returns under, and after, *PACCAR*

Sir Peter's comments also engage the question of how to replace the much-maligned *PACCAR* case. As noted above:

> "We have not been entirely well served by the two Supreme Court judgments … concerning collective proceedings. In both *Merricks* and *PACCAR*, I think that the powerful dissenting judgments are very persuasive."[53]

Let us now turn to *PACCAR*. The case limits the scope for funding agreements to align the incentives of funders and the class, because *PACCAR* bans returns based on how much money was rendered to the class. This undermines the policy of getting money to claimants, based on a technicality from a 1990 law.[54]

This effectively stops funders from claiming a percentage of damages. This has indeed led to some anomalies. *PACCAR* already has few supporters.

The anomalies improve by requiring more attention to how much is actually going to claimants at an earlier stage. This helps to locate excessive returns in funding agreements. This arose particularly in the pre-*PACCAR* practice of contracting for funder returns the **greater** of a set percentage or a set multiple of damage. As with the wider issue on distribution, it would be helpful to link the return to the distribution out from the earliest funding agreement reviews.

While this is an area of developing practice, there are several examples where returns to funders have been high, often because of effectively charging extra for time in complex cases rather than focusing on simpler ones involving less time and complexity.

The risk with a model that charges for time is that if that time is then charged to settlements, this blunts incentives to settle. Ideally, one would want the funder to make more from a quicker settlement, and not vice versa. Changing the metric to ex ante commitment over how much is going to consumers thus helps to overcome the *PACCAR* issue as well.

i. Returns to delay

Although capital has a time-cost, it is not clear why consumers in class actions should specifically have to pay for delay. It is not as though they directly pay more if a car or a holiday they want to buy took longer to design. Normally, the time cost of capital is incorporated into the price of products.

For an undisclosed reason, the Tribunal has not insisted on the same. Instead, specific uplifts for time are allowed.

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[53] Lecture, p.11

[54] S.58A Courts and Legal Services Act 1990.

For example, the funding agreement in the "Blur drummer" case, *PRS*, charged time before the case had effectively begun.

The funder tried to apply a start date of 14 September 2021 such that the maximum, 30% compound interest rate would necessarily apply by the time of trial. Writing on 27 August 2025, the Tribunal noted:

> 82. … It is pointed out that the trial of the claim, if it were to proceed to trial, will almost certainly be heard 5 years after 14 September 2021 which will engage the maximum multiplier. It is also pointed out that compound interest on capital deployed is thereafter to run at 30%.

In other words, the funder wanted extra payment because the case had silently languished for several years. Rowntree only filed *PRS* on 2 April 2024, that is, over 2.5 years after starting.[55] If the Legal Funding Agreement ("LFA") is not effectively rebased to the date of filing, there is an obvious incentive to sit on a case so that returns go up, essentially by delaying justice.

A simple reform here would be to require the formal date of starting proceedings to bind the funding agreement. Otherwise, a strong incentive towards delay arises.

Against this it will be argued that nobody would risk a carriage dispute, but in practice the risk is relatively low as it is still possible to file a competing claim if another party comes forward with a substantively similar claim. As the return to the funder is larger with delay, that delay may well dominate the risk of a carriage dispute, since several years' compound returns are available from the delaying strategy. All that is required is to have a sufficiently large portfolio to defray the risk of an occasional carriage dispute.

As a carriage dispute is negative for classes and efficiency (duplicative costs), this is another instance of third-party funders facing different incentives from those of the class and society at large. It is powerfully addressed by a metric change to ex ante competition on efficiency, rather than capping time-based returns.

While the Tribunal was rightly critical of this in *PRS*, and rejected the CPO, it had no difficulty with similar incentives in *Merricks* (Settlement review, [133]):

- *Settlement before 1 July 2024:* x6
- *Settlement after 1 July 2024 and on or before 30 September 2025:* x8
- *Settlement after 30 September 2025 and on or before 31 December 2026:* x10
- *Settlement after 31 December 2026:* x15

A similar concern arose in *Hammond and Stephan v Amazon* (CPO review [57]):

[55] And after losing the same point at the CMA in 2022, as explored below; and interestingly, the funding review reveals that the case developed **in parallel**.

- £40 million for any win;
- A further £40 million for a prompt settlement (90 days from CPO until the list of documents to exchange);
- Winning after that: a further £60 million, **rather than the £40 million for the quicker settlement;**
- A 15% interest charge on the maximum amount in the litigation plan in any event.

Here, the Tribunal noted that the package "could potentially result in an exceptionally high return." While this is a warning shot, it is unclear why the incentives are not simply set at the outset to create greater returns from avoiding delay.

ii. Returns on hypothetical funds

In *Hammond and Stephan*, the Tribunal also provisionally allowed the use of hypothetically committed, as opposed to drawn down, funds. That is, the cap on capital costs is in practice only a notional one. If, for instance, fees of £1m arise to bring the case to CPO, in fact a return is chargeable on the entire committed funds – there, £16.9m – and not just the £1m actually employed:

> [58] Following the hearing, by an undated letter from FourWorld to one of Mr Hammond's solicitors, sent to the Tribunal by his other solicitorswith a letter dated 15 May 2025, the funder stated expressly that this percentage is levied on the funder's committed amount of £16.9 million. It therefore amounts to some £2.5 million p.a. By a further letter dated 9 June 2025, Mr Hammond confirmed that he agrees that this is the correct meaning of cl. 9.2.4. On that basis, FourWorld says this amount is justified as the economic return which it is expected to earn on capital, and that as a result of the funder's commitment under the LFA it is "unable" to deploy this sum elsewhere.

The Tribunal's pointed use of quotation marks on "unable" is shrewd. Indeed, it is only *said* that these funds cannot be deployed elsewhere. They were, not, in fact, deployed and could therefore still generate a return. This is simply double counting of the time-cost of capital at points when it is not actually employed.

This approach risks undermining cost-effective approaches to capital management. Changing the metric away from time towards results would greatly assist funding market efficiency, in line with the market-based approach of its founding father.[56]

[56] Molot (2009).

The dashboard

The strongest reform to create transparency over both legal and professional services incurred by the class of claimants is to require a dashboard, maintained on the CAT or the claim website, committing to key performance metrics for the lawsuits.

There are already challenges, as seen in *Apple and Amazon*, with even class representatives tracking the complexities.

However, the complexities will be readily known by lawyers and funders, for this is the basis on which they invest.

A lawyer or funder with a good claim identifying a large overcharge should not be worried by transparency over these metrics.

But if bringing a case with doubtful returns, then there would be every reason to be worried about disclosure.

For instance, imagine if a dashboard had shown that *Rail Fares* had incurred £18.7m in costs, but that an early sign up scheme showed just <1% of claimants would come forward? The case might have been stopped at the £5m point, or before. In-flight cost-benefit analysis would become available.

Key metrics are:

- Early disclosure of expected take-up rates and the factual basis (e.g. pilot schemes) for the claimed consumer benefits;

- How this relates to the professional fees and why they remain efficient at the identified take-up rate;

- Real time updates (e.g. every quarter) on how much the claimants are paying for professional services, expressed as a percentage of the total claim.

While there is always debate about the confidentiality of the Legal Funding Agreement (LFA) it is unclear why this is merited. There is a substantial principal-agent problem in class actions. Many end up in the public domain regardless because of the CAT's review, and the trend seems to be against confidentiality.[57] So the details end up in the public domain; just too late to do anything about it.

The requirement for up-front information was made particularly clearly on 10 March 2025 by the CAT Chairman, Ben Tidswell:

[57] See, e.g., analysis of the *Bulk Mail* LFA [34-35].

> My question for those who are putting such arrangements together is this: how and when is the Class Representative given the opportunity to assess the funding and retainer arrangements, through the lens of the best interests of the class? And how is that going to be evidenced, so that the Tribunal will be able to accept it at face value, rather than having to conduct its own inquiry?
>
> You'll remember that many of the tools available to the Tribunal to regulate such things can only be exercised towards the end of the proceedings – in the context of a settlement or in relation to distribution.
>
> It's not very helpful for anyone in the system for the rebalancing of funder and class members interests to be imposed by the Tribunal at the end of the case, where the exercise might turn out to be quite painful for everybody involved. Much better, I suggest, to get it demonstrably right up front.[58]

The clearest answer to this call is to publish the key metrics early on via a simple online dashboard.

It is worth repeating the frustration of the Tribunal at a late stage in *Rail Fares*:

> The other information we would expect, **based on likely take-up on a range of scenarios, is to know how much would likely go to the CR for the legal expenses and the funders, in respect of return on advances and funders' fees.** We would want a full breakdown of that in the future to be filed with the application **rather than necessitating a request from the Tribunal**.[59]

The antidote is to publish at least this information **early in the case, prominently and in binding form**:

- **Expected recovery per claimant,**
- **Costs budgets,**
- **The cost per claim,**
- **The putative claimant number, and**
- **The expected uptake rate.**

That would then bind the lawyers and funders when settlement comes around, addressing Ben Tidswell's call. Any later awards, e.g. of costs or funder uplift, can be benchmarked against what was initially promised. The class representative could then depend on the robustness of the numbers, and the principal-agent problem between the class, the lawyers, and the funders would attenuate.

[58] Speech by Ben Tidswell to the Hausfeld/Linklaters/Alix Partners conference on 10 March 2025.
[59] Stagecoach Stakeholder Entitlement Hearing [69]. Emphasis added.

III. Improving cost effectiveness: Simplifying pass-on analysis

The above analysis considers approaches to fee transparency and competition. There is also scope to decrease costs by changing substantive rules to simplify cases. The key example is the so-called pass on or pass thorugh defence.

This defence allows a defendant to refuse payment of damages to the extent that they were passed on by the claimant. Typcially, a further claim then arises later on in the supply chain – which may be taken (at the cost of duplicative analysis) or may be left (risking incomplete deterrence).

Sir Peter noted that: "the pass-through defence is now presenting a real challenge to effective conduct of many cases."[60] This is a highly significant remark in a charged debate.

The problem with pass on analysis is that it degenerates into full supply chain analysis, which in a mass claim amounts to an attempt to model the entire economy – at great expense. *Merricks* provides an important example: while models could be designed for this in theory, the data on which to run them was unavailable.[61] This is a major part of the dynamic behind the dramatic fall from a £17bn damages estimate, to a £200m settlement.[62]

Moreover, as the real economic question is to deter overcharges, rather than to locate damages precisely, there is a very real sense in which a damages-precision focus is wrong:

(1) It is wasteful to do all this damages modelling compared with just identifying the overcharge.

(2) Detailed damages analysis may result in less compensation than the actual overcharge.

So this is a key debate in which legal instincts towards precision of corrective justice will come up against more economic and consumer policy visions of overall market efficiency. For the lawyer, there is a claim and it belongs to somebody, but for the economist, the question is whether the overcharge is deterred so that consumers benefit from a well-functioning market. On the latter view, it does not matter exactly where the compensation arises, provided that the overcharge is addressed (and deterred).

The contractual parallel

Sir Peter reflected recent observations that contract damages analysis may be a fruitful parallel to competition law damages.[63]

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[60] Lecture, p.7.
[61] *Mastercard v Merricks* (Supreme Court) [32]).
[62] The other major dynamic was the use of unrealistic benchmarks of zero-fees.
[63] *Class Act*, p.44.

The classic case here is *Hadley v Baxendale*. That case concerned the late repair of a shaft for a mill. As the mill would typically have had a spare shaft, the repairer was not responsible for the stoppage of the mill despite breach of contract in lateness. The loss from the factory stoppage was not sufficiently closely linked to the breach, and so the damages were not due, especially as the risk had not been disclosed nor its coverage by the contract agreed. Thus was born "remoteness" tests for contract law.

The case provides that claimable losses are those *naturally* resulting or "reasonably… in the contemplation of both parties, at the time they made the contract … as the probable result of breach of it."[64]

Just as some damages in contract law are said to be too remote from the breach of contract to be claimed, so too cartel class actions face the issue of a remote class of consumers. The parallel is very close. In both cases, the issue is diffusion of loss.

Sir Peter emphasised that in a contractual breach case, the pass-through of damage would not be a defence: if, for instance, the Royal Mail had to incur costs because of defective machines, then the vendor could hardly claim that the pass-on of some of those costs to the purchasers of stamps would limit the contractual damages claim.[65]

Pointing to the *Trucks* litigation, Sir Peter noted that "in the long run the great majority of cost increases… are passed on."[66] Thus, "the notion that loss suffered can be reduced or avoided completely as a result of pass-on of this kind is 'curious from a legal perspective.'"[67]

What can be gleaned from these parallel doctrines? The contractual damages debate eventually alighted on the need to consider the relationship between the loss, and how the market evaluates risk. The landmark judgment in *Transfield v Mercartor (The Achilleas)* built on *Hadley* to ask also how the market prices risk, rejecting a foresight-of-damage test.[68] So the contract analysis essentially asks: how far did the breach depart from market pricing of the alleged loss?

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[64] Hadley v Baxendale (1854) 9 Exch 341.
[65] Lecture, p.7.
[66] Id.
[67] Id.
[68] As noted by McKendrick: "It is, however, clear that it is no longer sufficient simply to show that the loss which has been suffered is a reasonably forseeable consequence of the breach. In decsiding whether or not the loss is recoverable, it may be important to ask whether or not the defendant accepted responsibility for the loss in respect of which the claim has been brought. The expectation of the market would also appear to be an important factor to take into account when deciding whether the defendant should be held responsible for the loss which has been suffered." (*Contract Law* (3 ed.), ch.23, p. 889).

What would this shift in approach to analysis of market impact mean for supply chain disputes in mass torts, such as a hardcore cartel?

The market impact point is to focus on the **overcharge**, more so than on the precision of **damages,** because the overcharge is the factor distorting the market.[69] Thus, on a contracts-inspired approach, there would be no need, in Sir Peter's words, for "an elaborate and intensive scrutiny of the way Royal Mail recovered its costs in the pricing of its various products, with all the burdensome and expensive disclosure this would require."[70]

So the key point on pass-on is that an expensive analysis is inapt if the result is for litigation to bog down in an ultimately fruitless debate about precisely where losses arose, as opposed to achieving deterrence.

International divergence

Different jurisdictions have approached the issue of supply chain analysis in different ways:

1. **USA:** The most prominent example is the US experience. At least under federal antitrust law, damages are trebled as a deterrent but can only be claimed by the first purchaser.[71] This was done expressly for deterrence purposes, and to make for workable lawsuits.[72]

2. **EU:** When the EU passed the Antitrust Damages Directive in 2014,[73] it adopted a rule of "full compensation" (Art 3(1))) with a mandatory pass-on defence, even mandating access to documents to prove the pass-on (Arts 12-13). Recital 39 of the Directive specifically limits recovery to loss on the basis that claims other than for loss are not "harm."

3. **UK:** In the UK, even before the Antitrust Damages Directive or the new class action regime, there was already an argument that loss would be limited to provable loss. This followed from the decision to treat antitrust claims as statutory-breach torts,[74] which apply a compensation-based analysis, as is now captured in s.47C(2) of the Competition Act 1998. Only

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[69] See discussion of Gavil (2009) below.
[70] Lecture, p.7
[71] Illinois Brick v. Illinois, 431 US 720 (1977).
[72] Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968): "Treble damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories. In addition, if buyers are subjected to the passingon defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case, the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit, and little interest in attempting a class action." (White J)
[73] EU Directive 2014/104/EU ('Antitrust Damages'). The Directive enshrined the standing confirmed in Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619 (providing a right to damages before national courts under EU law).
[74] Garden Cottage Foods Ltd v Milk Marketing Board [1984] AC 130; see also R v Secretary of State for Transport, ex parte Factortame Ltd (No. 5) [2000] 1 AC 524.

very rarely would English courts allow a departure from loss-based approaches.[75] Essentially, departures from proof of actual loss were seen to be punitive and unlike the American example, in which damages are trebled for deterrent reasons, the punitive element was frowned upon rather than embraced.

This focus on compensation was even heightened with the passage of the new digital antitrust law known as the DMCCA, which expressly bars punitive damages from collective actions.[76]

So, a fundamental rethink would be required to move the UK to a streamlined overcharges-based approach. It would however be merited because of significant potential for cost reduction.

a. Overcoming the "real challenge"

Sir Peter cited US, German, and Canadian experience with pass-on analysis:

- As noted above, the US system is unusual in that, at least at the federal level, there is consolidation into the first purchaser claim. Potential deterrence gaps are then closed by increasing this amount.[77]

- By contrast, Sir Peter noted that the Canadian Supreme Court had rejected an affirmative pass-on defence in its seminal *Pro-Sys* judgment,[78] so it is possible for indirect purchasers to sue there.

- He also cited analysis by the German Federal Supreme Court in the *Rail Track Cartel* judgment which considered whether pass-on analysis is practical, specifically excluding it if calculation was expensive and if "scattered losses" mean that downstream claims are unlikely.[79]

Thus, the position under contemplation seems to be reviewing when to curtail pass-on analysis.

Curtailing pass on

This is where the debate heats up: if curtailing the defence, then what happens next?

[75] *Rookes v Barnard and others* [1964] UKHL 1
[76] Digital Markets, Competition and Consumers Act, s.126.
[77] In principle, different permutations can exist, such as uplifts in damages with partial of complete bars on downstream purchaser claims. In practice, the U.S. position is simple and clear by doing *no* further analysis of the supply chain, at least in federal law, and trebling the proven first-tier damage as a workable alternative.
[78] Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57, [2013] 3 S.C.R. 477.
[79] Lecture, p.8.

There are no easy answers here, as can be seen in the classic statement by Landes and Posner's article on damages claims in supply chains:

> Unless they are willing to countenance multiple liability, the courts cannot allow suits by indirect purchasers without also permitting the defendant to assert a "passing-on defence" against direct purchaser plaintiffs.[80]

At some level, there is thus a choice between (1) simply consolidating loss and (2) moving compensation through the supply chain.

The Canadian experience

If departing from the simplicity of one consolidated lawsuit, the question then becomes how far to model downstream losses. There are no easy answers here, as can be seen in the Canadian experience.

The application of *Pro-Sys* in concurrent case law highlights some difficulties.[81] Two further pass-on cases arose in Canada in just that same year (2013). In addition to *Pro-Sys Consultants Ltd v Microsoft*,[82] the court handed down *Sun-Rype v Archer Daniels Midland*[83] and *Infineon Technologies v Option Consommateurs*.[84]

While the three Canadian cases all confirmed that indirect purchasers can sue, there is still the question of identifying the class of consumers, who may be remote and difficult to find.

Sun-Rype, one of the sister cases to *Pro-Sys*, eptiomises the point. The underlying cartel was the high fructose corn syrup cartel of the 1980s and 1990s, which had allegedly affected consumers who had purchased downstream products.[85]

As quipped in the film adaption of the cartel known as *The Informant*: "Everyone in this country is the victim of corporate crime before they finish breakfast."[86]

The Canadian *Sun-Rype* litigation had to consider whether that is actually so.

Crucially, large purchasers had also used liquid sugar, and they had done so "interchangeably" with the cartelised corn syrup.[87] Quoting ADM's defence:

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[80] Landes and Posner (1979, p.603).
[81] See discussion by Juska (2017) regarding the oversimplification of the *Pro-Sys* precedent.
[82] *Pro-Sys*, op. cit.
[83] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545
[84] *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59
[85] E.g., Coke, Pepsi, Coke, Pepsi, Vitality Foodservice Canada Inc., Ocean Spray Cranberries and George Weston Limited [55].
[86] *The Informant* (2009).
[87] *Sun Rype* [63]

> A generic label indicating "sugar/glucose-fructose" could be used for either liquid sugar or HFCS. The result is that a consumer who purchased such a product during the class period would have had no way of determining whether that product contained HFCS, even if they had bothered to check the label.[88]

ADM's point was sharply worded, but also ultimately credited. Even the representative plaintiff stated that "she did not know whether any product she purchased during the class period actually contained HFCS". Thus, "[i]f the proposed representative Plaintiff in this action is unable to say whether any product she bought in the class period contained HFCS, it is difficult to see how any other potential class member could be aware of this fact."[89]

Thus, whereas *Pro-Sys* featured receipts for software, a mass consumer claim such as *Sun-Rype* lacked an evidentiary basis for claims down the supply chain. The Canadian Supreme Court would not countenance a class action in circumstances where, really, no one knew who had overpaid, nor by how much, in the downstream consumer class.

This is the warning to the UK context which has struggled with the same issue in leading cases such as *Merricks v Mastercard*[90] and *Rail Fares*.[91] It also integrates the important insight from the surveys that records for automatic distribution are a game-changer, whereas cases where claimants must come forward are much weaker.

Moving compensation down the chain is possible, but the more downstream damages analysis that takes place, the more acute the evidence issues become. There will always be the issue that a defendant might say: there is no factual basis to say that I caused *that* loss. One the facts of ADM: people buy plenty of juice, but who is to say what exactly is in it?

That would suggest a focus on operating the system to create meaningful consolidation of claims, rather than trying to work out who bought what orange juice and what was in it from 1988 to 1995 (as on the facts of *Sun-Rype*).

The German position cited by Sir Peter is interesting. Indeed, it is arguably more societally efficient to have consolidated lawsuits. If the result of analysis of diffusion into a supply chain is just more analysis at considerable expense, then it might be better simply not to do it. The question is how to do so without introducing unfairness from undue claims, or – worse – rent-seeking litigation simply seeking a payout.

The key to this thorny issue is to recast the analysis in terms of **overcharges** rather than **damages.**

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[88] *Sun Rype* [55] quoting ADM factum [100]
[89] *Sun Rype* [55] quoting ADM factum [18], [103]
[90] Op cit.
[91] Op cit.

The US experience: Distinguishing overcharges from damages

The observation that full supply chain modelling can be a sleeveless errand aligns with an extremely important distinction in the US literature on *Illinois Brick* which tends to be understated in the UK. That distinction is between ***overcharges*** (as in the economic models) and ***actual damages*** (as provided for in s.4 of the Clayton Act).

As one would expect, there is recurrent discussion of the *Illinois Brick* rule barring indirect purchaser claims in the US context.[92] There is a nuanced debate about the interaction of state claims, especially the important decision in *ARC America* allowing for different state law on the point.[93] The high watermark in this debate came when the Antitrust Modernization Commission of 2007 recommended consolidation of direct and indirect claims in federal courts "to the extent necessary to allow both direct and indirect purchasers to sue to recover for **actual damages** from violations of federal antitrust law."[94]

Perceptively, US commentators distinguish this recommendation of *actual damage* recovery from a claim for *overcharge*.[95] As curtly noted by Gavil in response to the Antitrust Modernization Commission recommendation of a federal *damages* claim:

> Relying on mixed metaphors – trying to integrate overcharges with actual damages – can only further confuse the issue.[96]

It is important to note the tension between overcharge-based and damages-based claims:

> Overcharges are the equivalent of actual damages only when the direct purchaser is also the end user.[97]

That is, as actual damages are adjusted in the supply chain, leakage occurs because the overcharge is no longer fully accounted for.

Importantly, it follows that even if possible, full recovery of *damages* simply results in the same position as obtains by recovering the *overcharge* at the first purchaser level:

> By calculating pass-on, it also might be possible to demonstrate the actual damages to a consuming user at the end of a chain of distribution. In these two instances, overcharges and actual damages are likely to be co-

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[92] E.g., Landes and Posner (1979), Gavil (2009), Crane (2010).
[93] Gavil (2009).
[94] AMC report, 270. Gavil (2009, p.184-5). Emphasis added
[95] Gavil, (2009, p.184 (noting that the AMC recommendation "cryptically" glosses over how the two relate)).
[96] Gavil (2009, p.183)
[97] Gavil (2009, p.181)

> extensive, so [in that circumstance] recovery of the overcharge … will serve the goals of both deterrence and compensation.[98]

This subtle point is a key insight into efficient case management. Indeed, there is a supply chain, and it is expensive (perhaps practically impossible) to model it fully. But even if it is fully modelled, all that results is the same outcome in deterrence terms as if allowing recovery of the overcharge in the first place.

This is a particularly important insight in the UK, where attempts to model supply chain losses have tended towards low recovery and high legal costs. Simply focusing on the overcharge sharpens focus onto cases where there is real evidence of actual economic harm in the form of a concrete cartel overcharge – and not more speculative claims.

i. What then of compensation?

Seen in this way, the real question is how far it is worth investing in the costs of modelling to move compensation down the supply chain. The US answer is crisp, at least at the federal level: deter at the first purchaser level, and do not unduly model the supply chain. This results in significant case consolidation benefits.[99]

However, it does not result in compensation moving down the supply chain as a matter of law: that instead happens through the product market, as affected firms compete. There is a strong argument that this is simpler and better than attempting to account for the knock-on effects, because consumers want a functioning market and not compensation per se. This also helps to address the fact, explored in the detailed analysis of recent settlements below, that relatively few come forward for smaller sums.

As consumers ultimately want low prices, they ought to be indifferent between two mechanisms for moving money (law vs the market). The question is which is the cheapest mechanism for improving markets.

Further, there is risk of anti-consumer harm to consumers as a group, if fees exceed wider market benefits. Consuming resource for purely distributional reasons, rather than deterrence, increases industrial costs. For instance, the <1% recovery in *Rail Fares* at £18.7m cost[100] will have harmed *others*, such as taxpayers paying rail subsidy, the loss making railway's owners, or other passengers.[101]

It would be better just to lower prices for rail travel using regulation on a prospective basis: a larger discount could be achieved, since the cost of doing so is lower.

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[98] Gavil (2009, p.181)
[99] See, e.g., *Class Act* pp. 38-48.
[100] Total expenditure, of which £10m was redeemed.
[101] See detailed treatment of cost-benefit analysis issues in *Rail Fares* (above for cost-effectiveness issues, and below for cost-benefit issues in a market sense).

Thus, it ought not to be an aim to move money for its own sake, not least where indirect consumer harm can occur from doing so. A major benefit in a once-and-done overcharge lawsuit is precisely that it can evaluate whether there are meaningful cartel deterrence benefits, and meaningful prospects of claiming compensation, across the supply chain. The promotes consolidated cost-benefit analysis.

It seems, however, that simply consolidating into a once-and-done direct purchaser lawsuit may be a step too far in the UK context. Sir Peter expressed compensatory aim as well:

> "The offensive reliance on pass-on … is justifiable and necessary, otherwise all indirect purchaser claims would be precluded… Even the merchants claiming damages for excessive credit card MIFs are relying on pass-on: the pass-on to them by way of the merchant service charge levied by their acquiring banks that paid the MIF."[102]

The underlying reform package leading to the CAT's opt-out class action is also noteworthy.[103] The 2013 Government Consultation leading to the institution of the regime spoke to both compensatory damages and deterrence, but placed more emphasis on the interaction between them than had than the Antitrust Modernization Commission had. For instance, BIS pointed to the 5:1 return in stand-alone cases proving new cartel damage.[104] BIS always had in mind growth from deterrence as a major motivation for granting compensation.

ii. Fresh thinking on the supply chain: The Presumptive Allocation Scheme (PEAS)

Even if complete consolidation may not be desired, it is still true that lowering costs from duplicative analysis also case efficiency. A major cost saving is to decrease the depth of analysis of supply chains.

The idea here is to apportion the initial **overcharge** across the supply chain using presumptions, e.g., layers 1-3 each get 33% of it. This avoids the need to model **damages** it in detail at each supply chain layer, as currently occurs.

The main reason why this is such a powerful cost saving is that it decreases duplication. While it does involve less theoretical purity, a simpler approach lowers costs and therefore expands access to justice.

At the moment, **trials** are consoliated but **claims** are not. So while there will be a consolidated trial, the parties are still allowed to argue about precisely where all the money went – and all at very high hourly rates.

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[102] Lecture, p.9.
[103] Department for Business, Innovation and Skills (2012, 2013a and 2013b)).
[104] BIS (2013a, p.3).

Thus, there are different claims for merchants and for consumers – and they are all entitled to be represented by their own lawyers and economists. This is not necessary if one accepts that it is easier to consolidate analysis and just give those affected a slice of the overall overcharge.

For example, immediate buyers could get 25% of the overcharge, other consumers 25%, the lawyers 25%, and the funders 25%. Instead of modelling the whole supply chain, it is only necessary to identify the overcharge at the start of the supply chain.

If administered in turn, it is essentially a queuing system. It would be simple, cheap, and effective. This proposal is called the **Presumptive Allocation Scheme, or PEAS** for short. This integrates insights from a range of international best practice.

As above, it might be cleaner just to have one consolidated lawsuit. If however policy reasons dictate that compensation should nonetheless pass to some further affected parties, then the art form would be doing so without defeating claims or incurring excessive costs from the societal point of view.

This is the heart of Sir Peter's point: excessive modelling is counterproductive. How, then, might one marry the desire to keep things simple – which points to overcharge-led analysis – with the desire to pass compensation to consumers, without incurring excessive and self-defeating costs?

One option would be to apply the existing CAT practice on "pots" for different claimants, but across the supply chain.

The Tribunal already applies the "pots" idea to damages distribution by ring-fencing aspects of settlement funds. The same idea can simply be applied to different layers in the supply chain.

Thus, the Tribunal already differentiates between different tranches of claims. The innovation here would be to do the same *across* the supply chain, rather than just at a layer within it.

This echoes an important proposal to resolve the direct/indirect purchaser debate in the US. Gavil argues that the better approach would be for one court to consider the overcharge across the supply chain, and to award a share of overcharge across the chain.[105]

This so-called "presumptive allocation scheme" (PEAS for short) would be set at the value of the overcharge, and then pro-rated based on presumptions in favour of dispersal of the overcharge relative to the distribution levels. In a US context, Gavil suggests the following approach:

[105] Gavil (2009, p. 195).

Number of distribution levels	Presumptive Allocation of Overcharges (%)
1	100
2	50/50
3	50/25/25
>3	50% to direct purchasers; 25% to consumers; 25% divided equally among all intermediate levels.

Table recreated from Gavil (2009, p.195).

A single class representative could then represent the classes, avoiding duplicative professional work. That would resolve the conflict of interest issue between classes ex ante, simply by agreeing to a PEAS schedule early on, and increase the scope for compensation to pass because fees would reduce.

While it is technically a conflict of interest, as the interests of the layers are opposed, it is preferable to lower costs than to preserve purity on this point at great expense.

In any event, the class representative already manages a conflict of interest: that within the class itself (since not all claims are equal).

Put simply, better 25% of something, than theoretical purity about next-to-nothing.

This important proposal could greatly reduce costs from supply chain disputes, responding to Sir Peter's observation that the current system is unwieldly.

Merely running concurrent trials does not achieve this because each layer then has its own legal, expert and finance costs.

iii. Addressing the underlying principal-agent issue using the Presumptive Allocation Schemes (PEAS)

There is scope to adapt the proposal to the specifics of the UK system. While some third-party funding is on the rise in the US, there is a larger element of self-funding by class action attorneys than in the UK. UK lawyers tend instead to work on deferred fees rather than a specific share of damages.[106] The issue of how to pay attorneys is usually considered separately in a US context, because it is a wider class action litigation point and is not therefore directly linked to the antitrust dispersal/consolidation debate under *Illinois Brick*.[107]

[106] Lewis (2020); Yeazell (2018).
[107] See e.g. Kobayashi and Parker (1999).

By contrast, the UK class action system uses third party funding with CAT supervision over returns. It is, by some margin, the most signifiacnt opt-out class action mechanism,[108] meaning that there are fewer – if not quite zero – vested interests against reform. Therefore, it is possible to integrate the analysis of returns to funders, lawyers, and the supply chain – without any dependencies on other class action reforms of the type which have hindered such reforms in the United States. This is a valuable flexibility, and it ought to be used.

It is important to recall that the major issue is an underlying principal-agent problem between those who have lost money, and those representing them. This is especially acute in diffuse claims.[109] Ideally, the law would help to close the principal-agent problem so that money flows to claimants at a competitive fee.

iv. Addressing the underlying principal-agent issue

The Tribunal has noted that an incentive arises *not* to pay out proven damages.[110] This is because claims depress the money left for other returns, as explored above in the analysis of ring-fenced fund systems.

The epitome of a funder-claimant dispute arose in *Merricks v Mastercard*, in which the funder at one stage tried to claim £179m of a £200m settlement, which would have left 48p for claimants had all claimed. Even though this was rejected, it is still likely that lawyers, funders and claims administors will get over £100m of the £200m.

Interestingly, the pass-on issue can be approached in terms which help to resolve this important principal-agent concern. A very straightforward approach would be for the funders and lawyers to certify at the class certification (CPO) stage how much they propose to pass to each part of the class. The develops Professor Gavil's proposal by including the **funders and lawyers** as tranches within the presumptive allocation scheme. They would simply bid on the percentage pot they propose to charge relative to total proven and claimed damage.

Consider the classic case: interchange fees. Rather than running two cases involving merchants and consumers, a single lawsuit arises in which the funder transparently states how much will pass to each part of the class.

For instance, it could say that it will give 25% to merchants, 25% to consumers, and 25% as fees for lawyers and 25% financing.

Alternatively, margin could be given on claims actually paid, with the above percentages as a cap for each class. That would essentially be a commission system (e.g., if accepting 2:1 cost ratios, this could be set so that for every £1

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[108] See above, n.13 (discussing representative actions).
[109] Id.
[110] 2024 Stagecoach settlement review [69].

redeemed by merchants, £1 can be accessed from the funds for lawyers and £1 for financiers).

That would encourage identification of the classes who will actually claim (e.g., 40% to merchants and 10% to consumers) because the funders and lawyers then have an incentive to find out how to move money to consumers at lowest cost. They would very likely seek out the direct purchasers and some larger indirect purchasers, which moves money down the supply chain at low cost.

No longer would there be an incentive to seek out cases in which few claim. Rather, the incentive would be to find and pay consumers so as to claim the respective tranche of commission.

This reverses the perverse incentive by which funders (and indirectly lawyers) effectively get more money the fewer claims are made. On the contrary, the more claims *actually paid*, the more return.

Moving to proportionate allocation of overcharge, rather than precision of damages claims, is a very promising reform to decrease costs.

IV. Keeping competition law within bounds

We now turn to the final strand of Sir Peter's lecture addressing the class action debate. This raised the question of shoehorning cases into the class action regime.

There were pointed remarks about the tendency to shoehorn cases which are not truly competition law cases into the Tribunal, because of its unique ability to certify opt-out UK class actions:

> "I think there is a risk that people will try to squeeze claims which are in essence for violation of another field of law into competition law clothing… I believe there have already been some instances of that."[111]

Interestingly, Sir Peter noted that he was surprised that so many abuse of dominance claims emerged: "When the collective actions regime was introduced, I thought that these cases would be mostly follow-on claims."[112] These cases are often complex and arise in industries which have generated growth and wealth. Sir Peter gently joked: "I feel one can hardly claim to be a leading digital platform if one is not a defendant to a collective action before the CAT."[113]

If not very careful, there will be an incentive to bring rent-seeking claims, that is, those which detract from societal welfare without adding to it.[114] This can occur if allegations aim at agendas other than improving market function.

Tactfully, Sir Peter did not list specific examples of this shoehorning phenomenon, but instead gave the example of US litigation addressing the Trusted News Initiative, by which the BBC, Washington Post, Reuters and the Associated Press had exchanged information with internet platforms about Covid-19 and Covid vaccine misinformation.[115] There was no obligation to use the information, and Sir Peter intimated that he thought that the case would not proceed.[116] But this was not before the US Department of Justice had filed a Statement of Interest in support of the case based on the concept of "viewpoint competition" rather than a more conventional market-based antitrust theory of harm.[117]

The case recalls another such allegation of collective boycott, namely *X v GARM*: the so-called Twitter lawsuit in which X sued advertisers who had similarly established an initiative to provide voluntary tools to prevent brands' content

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[111] Lecture p.13
[112] Lecture, p.12.
[113] Lecture, p.12.
[114] Schrepel (2019).
[115] Lecture, p.12.
[116] Lecture, p.13
[117] L Gardner, "Antitrust law may bar news organizations from policing disinformation, DOJ says," *Politico* 11 July 2025.

from appearing near harmful and illegal content.[118] As the World Federation of Advertisers put it:

> Since its launch, GARM has enhanced transparency in ad placements on digital social media by providing voluntary and pro-competitive tools for the advertising industry. These tools provide information to help advertisers avoid inadvertently supporting harmful and illegal content, reducing such ads from 6.1% in 2020 to 1.7% in 2023. GARM's toolset includes the Brand Safety Floor and the Adjacency Standards Framework, which have supported brand owners in their independent development of their own bespoke, brand-specific safety frameworks to ensure that their advertising dollars do not inadvertently support illegal or harmful content that damages their brands.[119]

However, the risks from and costs of the associated litigation when GARM was sued by X were such that the WFA decided to discontinue GARM.[120] Eventually X would lose its case.[121]

The GARM and Trusted News Initiative examples highlight the risks of political antitrust law. There are strong views in several directions in relation to the topics involved. But using antitrust law to settle them is usually unwise.

Sir Peter expressed a concern about special interest pleading from "the general growth of litigation in the UK brought by interest groups and campaigning organisations" such that "this sort of tactic or strategy" should not "be dismissed so lightly."[122]

Several recent cases have engaged arguments falling outside conventional competition law analysis:

- In ***Mowi***, the Green Britain Foundation ("GBF") sought to intervene in the pending salmon cartel case on the basis that the "structure" of the salmon fishing industry had led to "challenges" in "obtaining accurate and timely information from salmon producers concerning matters such as fish mortalities, pollution incidents, chemical treatment and welfare practices." There was also an allegation of discrepancies between marketing claims, and fishing practices.

  On 9 February 2026, the Tribunal denied GBF's intervention on the basis of no link to the alleged cartel overcharge: There was "no reference to the NASDAQ Salmon Index or the pricing of salmon in the UK." Further, Justin Turner KC found that "the specific matters to which Mr Evelyn's

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[118] X Corp v. World Federation of Advertisers, 7:24-cv-00114 (N.D. Tex. Aug. 6, 2024).
[119] World Federation of Advertisers, Statement on the Global Alliance for Responsible Media (GARM) https://wfanet.org/leadership/garm.
[120] Disclosure: The author was engaged by certain affected parties in relation to the case.
[121] BBC, "Elon Musk's X advertising boycott lawsuit dismissed by US judge," 26 March 2026.
[122] Lecture, p.13.

letter refers are either irrelevant or tangential to the matters to be determined in these proceedings."

This sharp focus on price impacts echoes Sir Peter's articulation of a focus on a conventional "commercial competition" focus.

- ***Roberts v Severn Trent Water*** concerned alleged under-reporting of pollution discharges such that higher returns were possible, and thus an effectively higher quality-adjusted price. A specific statutory bar on private law remedies in s.18(8) of the Water Industry Act 1998 led to the exclusion of the claim, because the pollution reporting issue fell within the licence conditions.[123] Thus, as there was an express immunity in relation to the matters within those conditions, the theory of harm was seen to read on a metric shielded by the statuory immunity.

  The Court of Appeal upheld the Tribunal's decision.[124] Moreover, the Supreme Court accepted that the 1991 Act does not bar tort claims, such that the underlying externality was not left without a remedy.[125]

a. How to avoid special interest pleading

Sir Peter cautioned against straying from conventional competition law theories of harm:

> "The CAT and our appellate courts can be relied on to keep private enforcement of competition law within proper bounds. **It is a law to protect against impairment of commercial competition and to protect businesses and consumers against commercial exploitation by dominant companies which have substantial market power. Those objectives promote dynamic growth and consumer welfare.** And I think it is clear that in pursuing those objectives, private enforcement of competition law has come to play a vital role."[126]

This is an orthodox definition of the role of competition law: it is there to prevent undue restraints to competition and to correct "substantial market power" abuse. Thus, it promotes growth – thereby paying its way.

While Sir Peter was careful to say that sometimes competition harms might arise without direct financial impact, he specifically noted that even the more innovative theories of harm, such as those concerning "attention or clicks," still should be rooted in "competitive dynamics… or the use of market power in exploitation of consumers."[127]

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[123] Professor Carolyn Roberts v (1) Severn Trent Water Limited & Ors [2026] EWCA Civ 244 [4].
[124] Id.
[125] Manchester Ship Canal Company Ltd v United Utilities Water Ltd (No. 2) [2024] UKSC 22
[126] Lecture, p.13, emphasis added.
[127] Lecture, p.12-13.

So on the crucial question of benchmarking and impact, Sir Peter was clear: there ought to be a link to "dynamic growth and consumer welfare."

This addresses the risk that cases might incur costs without commensurate benefits (known as rent-seeking, that is, seeking an economic fee or "rent" without adding to societal welfare).

If there is concern about rent-seeking special pleading, then how could the Tribunal separate claims improving market performance from rent-seeking claims? The key here is to appreciate and apply the difference between cost-effectiveness analysis, and fuller cost-benefit analysis. Both are relevant, and significantly, both are required.

Cost-benefit analysis

The analysis of costs in section (II) above is cost-effectiveness analysis. It is important, because it is always good to save on costs where possible. Therefore, cost-effectiveness analysis ought to be undertaken before the CPO in all cases, just as the CAT and Sir Peter have both recently signalled.

However, this must be expanded to full **cost-benefit analysis and not just cost-effectiveness analysis**. There is a simple, and underappreciated, legal reason for this: the law mandates cost-benefit, and not cost-effectiveness, analysis:

Tribunal Rule 79(2) requires the Tribunal to consider (emphasis added):

> "all matters it thinks fit… including fair and efficient resolution [and] **the costs and benefits** of continuing the collective proceedings."

That is **not** a reference just to the cost-effectiveness of proceedings – relevant though that is – but rather of their wider costs and benefits.

Most of the attention at the Tribunal is on the class, and not on wider societal costs and benefits. This came up in a deft comment by a litigation expert, Mr Lawrence, who was consulted on the proposed *Rail Fares* settlement.

As perceptively noted in Mr Lawrence's expert report to the Tribunal on the proposed settlement – and with great economy of words:

> "I see no material risk of disadvantage to the Class and, potentially, substantial benefits."[128]

Indeed, Mr Lawrence was right to point out that there was no material *disadvantage* **to the class** from settlement. While that was the relevant

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[128] Jon Lawrence, Report on *Rail Fares* settlement, [4.5]; see 2024 Stagecoach settlement [110].

question for his report, it is indeed incomplete from the **societal** point of view. This deeper question differs, and it is whether the market is improved by the case, considering its costs.

What happens if widening the cost-effectiveness analysis to true cost-benefit analysis? Cost-benefit analysis requires a reasonable weighing of the likely societal benefits and costs from litigation.

First, the positive. Even though the per-claimant costs are high, there may be wider economy effects (both positive and negative) from litigation. For instance, hardcore cartels might be deterred, which is a societal saving.

Second, the negative. If costs of litigation are very high, they may outstrip deterrence benefit. As *somebody* has to pay the fee, the costs amount to a tax on *other* consumers. If the deterrence benefit is less than the fees, then society overall loses out (whereas the lawyers and experts win from the fees).

In a worst-case scenario, rent-seeking litigation increases costs by enforcing bad rules (as addressed in section IV below). For example, litigation effectively forcing sharing of property via damages for not doing so might deter investment in it. That would be a serious cost to society because, dynamically, less capital would form. This may be the single greatest cost to consider.[129]

All of these factors come into play once the cost-effectiveness analysis is broadened to **cost-benefit** analysis.

Applied to Rail Fares

What might true cost-benefit, and not just cost-effectiveness, analysis have looked like in *Rail Fares*?

Puzzilngly, the case failed its cost-benefit analysis, but proceeded regardless. Even accounting for possible behavioural changes (*CPO judgment* [177]), still that cost-benefit analysis failed (*CPO Judgment* [178]).

This was a bright red flag, and it was ignored.

It was ignored because there was not material analysis of how the case related to *societal* interests in efficiency. In fact, there was only a weak (or perhaps no) plausible link to economic efficiency from the allegation that fares presentation might have been different. This is because there is no obvious cost saving from the societal point of view from which particular discount is presented, and how. No early analysis was undertaken on this crucial point which was instead left to the trial.

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[129] Teece and Sidak (2009).

The relevant evidence would, instead, be analysis of how resources are *misapplied* (market failure) and how the lawsuit corrects the market failure. There was very limited, if any, material work on the market dynamics surrounding the case:

- Regardless of the litigation, the rail line will continue to operate along the same lines, subject to price regulation and oversight, including of fares and their presentation. It is not as though the fundamental costs and benefits of running the railway will somehow change because of the class action.

- If there were a concern about an overcharge, then cheaper ways exist to address it. Importantly, as a regulator is in place, *prospective* fares could be altered much more cheaply than the cost of the litigation. Importantly, **the regulator was already requiring train operators to make ticket sales more transparent to consumers, and to encourage shifts to other mechanisms such as apps and smart tickets**. **So, the class action addressed a legacy issue** (*Final Judgment* [36]). The CPO hearing could have asked what the benefit of the litigation would be, compared with the existing regulatory scheme and technological change, rather than asking simply whether it was *possible* to mount a case.

- If there were concerns about marketing not highlighting low fares, then it is striking that there was also a specific requirement from the regulator to market to particular classes of purchaser to ensure affordability. The regulator had chosen leisure journeys and advance tickets (*Final Judgment* [37]).[130] The claim form essentially sought to second guess the expert judgment call that the better place for marketing emphasis was the leisure and advance markets. Thus, there was never any analysis of why mandating the boundary fare presentation was more **economically efficient** than the existing leisure/advance marketing scheme which the expert regulator had deliberately chosen to prioritise *instead of mandating promotion of the boundary fares*.

  And that seems right: what really are the net benefits of litigating how tickets appear on vending machines, which we learn later in the case were actually in the process of replacement with smart cards?

  On this crucial point, namely whether there is a market improvement from how fares are presented – which it bears repeating was the very heart of the case – no cost-benefit analysis was done whatsoever (at least on the face of the CPO judgment). Yet the regulator had already considered the point and chosen a *different* promotional priority.

[130] *Rail Fares* final judgment [47]: "However, we do regard it as relevant that the SoS imposed a wide range of onerous obligations, including as regards the introduction of particular fares or boosting forms of tickets or as regards capital expenditure, which legitimately influenced the priorities which the TOCs had to adopt in the management of their businesses, and their commercial strategies were heavily guided by the objectives set by the DfT."

So the argument that the market would change for the better from the case was never made out, as could be seen by simply delivering into whether the market was plausibly likely to improve relative to regulation. Interestingly, a major reason why boundary fares are not promoted is that they are used fraudulently.[131]

These regulatory insights were not integrated into the cost-benefit analysis, despite an obligation to consider regulated solutions such as prospective discounts (Tribunal Rule 79(2)(g): "*any other means of resolving the dispute*"). Excruciatingly for those who want good value from litigation and public subsidy, the Department for Transport only appeared at the *2025 judgment* – not the 2021 class certification. So, it seems that there were many ways to pick up on the warning signs that a claim that *machines might be clearer* ought never to have proceeded. The key was to integrate insights from regulation into the CPO cost-benefit analysis, rather than waiting for the trial and thus the costs of £18.7m on the claimant side alone.

Merricks, Evans **and the scope for cost-benefit analysis**

The generosity towards class action certification ("CPOs") in the 2020-2025 period is conventionally attributed to the generosity of the 2020 Supreme Court judgment in *Merricks*. Indeed, we saw Sir Peter flag the downsides of its approach above, namely, that by asking whether class actions are relatively easier than claiming individually, the case fails to identify that, sometimes, an easy lawsuit is a bug and not a feature.

Exactly one month after Sir Peter spoke, on 18 December 2025, the Supreme Court made this very point. *Evans v Barclays* develops *Merricks* with a strong emphasis on the risks of undue leverage from abuse of the class action system. We noted the crucial passage above, but it bears repetition in a cost-benefit context:

> A class action procedure which has these features [the potential to opt out and to recover aggregate damages] provides a potent means of achieving access to justice for consumers. But it is also capable of being misused. The ability to bring proceedings on behalf of what may be a very large class of persons without obtaining their active consent and to recover damages without the need to show individual loss presents risks of the kind already mentioned, as well as giving rise to substantial administrative burdens and litigation costs. The risk that the enormous leveraging effect which such a class action device creates may be used

[131] There was also the not insubstantial point that when boundary fares were sold, they resulted in fraud losses of £2-4 million per year for one operator alone (*Final Judgment* [123]) but as this emerged at trial it is important not to be too strict about it. Nonetheless, it does raise a question: why were more queries about the context not raised at the CPO stage, such that crucial facts such as the fraud and the regulatory dialogue would have surfaced?

oppressively or unfairly is exacerbated by the opportunities that it provides for profit.[132]

This is the backdrop of the risk of abuse of the Tribunal: even if cases are not very successful, millions of pounds can still be made from them. In fact, the more complex the case, the higher the fees.

This is an important point. It means that class actions should not be treated like other competition law claims. This is because the *class action*, as opposed to competition law claims, faces unique possibilities of abuse.

The solution is to ask sharper questions about the costs and benefits of the case, as is in any event required by the cost-benefit analysis in Rule 79.

i. Putting the "rubber stamp" away using preliminary economic analysis

Returning to *Rail Fares*, it is very striking that two simple questions would have indicated that there was unlikely to be any material benefit from the litigation from the societal point of view, even without engaging with the regulator.

First, there is the question of whether any money was made by the monopolist.

Strikingly, we learnt that one of the rail companies (SWR) was actually **subsidising** the passenger who was busily suing it:

> SWR found that the revenue generated from the service was less than the running costs, so that its parent group had to make up the franchise premium payable to DfT. [42]

Some monopoly! And, considering that *paying to run the railway* prompted a lawsuit, some gratitude!

A simple question before certification could have asked: is there a ballpark indication of whether anyone made any money from the alleged abuse? This would pave the way for a preliminary analysis which would have spotted a crucial point from trial, namely that **the railway was not being paid for the alleged overcharge:**

> The revenue allocation model under the successive Travelcard Agreements used for the apportionment tracks, as accurately as possible, the actual use of Travelcards on the services of each operator (TfL or the relevant TOC), and a TOC does not receive payment in relation to Travelcards that are not actually used on its services. [90]

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[132] *Evans* [89] quoting *Merricks* (SC) [98] – "Although this was said in a minority judgment, the majority judgment in Merricks given by Lord Briggs said nothing inconsistent with these observations and we do not consider them to be controversial."

Instead, five years of litigation at a cost of over £18.7 million had proceeded based on a simple factual error that would quickly have been spotted if only the Tribunal had insisted on a few preliminary questions about whether profits were made from the alleged activity.

The point is captured very well by Rose J (as she then was), as cited by the Tribunal at [91]:

> If a dominant undertaking can show that it has nothing to gain from refusing to supply a customer, that would support its contention that, as a matter of fact, the refusal was based on an entirely legitimate objective justification – why else would it forego the sale? (*Arriva The Shires,* [99])

Regulation was in place, and there were fraud concerns about the fares. So there was a ready explanation and it did not indicate a monopolistic conspiracy. There ought to have been enquiry into these preliminary matters to decide whether the CPO was worthwhile on a cost-benefit approach.

Against this, there is said to be no substantive legal requirement to prove benefit to the monopolist from abuse of dominance – a curious statement that may say more about the myopia of legacy EU competition law, than it does about the sensible administration of justice. There are very good reasons to consider whether a monopoly gains a long-term profit from consumers, because that is the means by which market power is exercised.

Market failure analysis, not just damages estimates

This wider market analysis is harder than just asserting amounts of possible loss. If consulting, it is easier to avoid it. But it is harder because it is more valuable, and the Tribunal ought to insist on more true welfare economics, identifying market failure, and less accountancy of hypothetical loss amounts.

There have been striking failures in the over-emphasis on an "accounting approach." In *Rail Fares*, as above, the model predicted £38.99m of overcharge to be claimed on the settled portion. Really, only £0.213m was claimed. Further, as regards the whole picture, the total estimate of loss was £93m across all operators.

In fact, there was no loss because the companies successfully defended the claim. So it is accurate – if sharp – to say that this accounting approach to damages was out by a factor of **infinity: £93m / £0.**

Of course, facts do sometimes conspire in cases to confound expectations. Nonetheless, it make more sense to use at least some of the economic time to analyse *the market* for sharper CPO cost-benefit analysis, rather than solely to estimate loss using these apparently hypothetical models.

This would also help to address a recurrent point in the debate, which is that *financial* and *economic* analysis are used interchangeably. They are different concepts.

Finance refers to money, whereas economics refers to resource use. These are quite different things, but they are frequently mixed up in the debate.[133] The relevant point is the economic one, because this is what affects market performance. Instead, the debate has turned to a numbers game about how many cases are brought, which overlooks the underlying economic point, namely whether they add value via better market performance.[134] This is essentially a debate about denominators in statistics, rather than the quality of claims.[135]

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[133] After the IEA proposed seed funding to a small portion of the class to promote transparency and objectivity in damages estimates, the claimant firm Hausfeld said:

> "The economics of this [seed payment] would kill funding of claims."

As with the *Global Legal Post* piece from July 2025 by the same author, there is a failure to distinguish finances (money) from economics (resource use).

Accurately stated, the Hausfeld allegation is that the *finances* – not the "economics" – of seed payment would kill the funding of claims. But the piece incorrectly says that this is an *economic* problem.

On the contrary, the economic point is exactly that certain claims ought not to be funded. Finances drying up in bad cases is economically helpful, just as it is harmful if it happens in economically strong cases (those correcting market failure).

For reform proposals, the ideal is for *finance* to move from *economically* weak to economically strong claims. Those bringing *economically* strong claims ought to welcome this additional *finance* flowing to them as weak claims leave the market.

[134] Hausfeld locked horns with the IEA on how often class actions arise, rather than engage with the debate over the different quality of different claims., Hausfeld's response to the Government's consultation would speak only of high level benefits of competition in general, rather than identifying a boundary by which a judge might distinguish an economically helpful, from an economically harmful case. By this logic, *all* claims are helpful, whereas the Tribunal is crystal clear that some cases have been "far from a success." Indeed, the claimant firm would assert that "there is currently no evidence that weak cases are being certified" which (inter alia) overlooks the single most important chapter, namely the *Merricks* settlement. In the words of the Tribunal:

> Although the settlement has secured a positive payment, the outcome of the present case is very far from a success for a class of some 44 million claimants. The Settlement Sum is only a little over 1.4% of the original value placed on the claim of £14 billion (with interest only to September 2016), and under 1.2% of the revised claim value of £16.7 billion (with interest only to September 2022).

It is therefore unclear how the claimant bar can sustain the position that "there is currently no evidence that weak cases are being certified."

[135] Hausfeld's position is that there are 61 CAT class actions, whereas the IEA cited research by CMS which shows 33 class actions filed overall in England and Wales in 2024. Considering this alongside the 2020 figure of 74 and the 2021 figure of 64, the IEA averaged this to approximately one per week. The Hausfeld allegation is that saying that claims arise roughly weekly is stretching the numbers, as only some of the cases are in the CAT.

A requirement to state a market failure

The key to getting cases to improve market function is to focus on what ***market failure*** they seek to address.

If the key is to consider the economic context of the cases a little more fulsomely, then how do the most recent developments look?

The key question here is to compare conventional market harm claims, from areas where dynamic competition exists despite short-term effects.

Two cases in the housing market will be used as a comparative case study. Both cases arise in the housing market, but in terms of the economics, they could not be more different.

The two cases are *McLaren v Housebuilders*, a hardcore price-fixing cartel featuring the same class representative as for *McLaren (RoRo)*, and *Newman v Rightmove*.

By including the quiet period of 2015-2020, the Hausfeld position strongly downplays the very busy years of 2023, 2024 and 2025 which specifically raise the concerns about excess, because they post-date the pertinent change which made it easier to bring cases (*Merricks* in the Supreme Court, December 2020).

The lengthy denominator thus understates the acceleration in claims after the legal change at the heart of the debate (the CPO test in *Merricks*). 2024 CMS analysis estimates £94.75 bn in pending claims on behalf of 655 million claimants rising to £134 bn if including opt ins (CMS *European Class Action Report* pp.14, 36-37). Whichever way one cuts the metrics, and however defining “class action” (e.g., whether to include CPR-based claims), this is a very substantial amount of litigation.

It is common for two or more class actions to be filed in a week: Kaye v Google on 27 May 2025 and Wolfson v Microsoft on 30 May 2025; Stasi v Microsoft on 3 December 2024 and Spottiswoode v Motorola on 5 December 2024.

There were five in just one month in spring 2024: 29 May 2024: Bulk Mail; 6 June 2024: Shotbolt v Valve; 7 June 2024: BIRA v Amazon; 20 June 2024: Waterside v Mowi; 28 June 2024: Stephan v Amazon.

The peak is the two-week period in August 2023 when six claims were filed in two weeks (albeit some claims relate to each other):

- 21 July 2023: *Taylor v Santander*
- 21 July 2023: *Taylor v Black Horse*
- 21 July 2023: *Taylor v MotoNovo*
- 25 July 2023: *Ennis v Apple*
- 1 August 2023: *Riefa v Apple and Amazon*
- 2 August 2023: *Roberts v Severn Trent Water*

The numbers debate simply plays with the denominator of an average by including the quiet period of 2015-2020. This does not move the debate forward. It would be more fruitful to debate what distinguishes a market-helpful case from a market-harmful case.

Housebuilders concerns the allegation that house purchasers overpaid for houses because of illegal exchange of pricing information. This is a conventional theory of market harm, because false transparency softens price competition.

By contrast, *Rightmove* argues that Rightmove fees *might* have been cheaper without any clear identification of *why the market fails*. Thus, there is no mechanism to assess whether the case is beneficial on a cost-benefit approach.

1. *McLaren v Housebuilders*

On 12 January 2026, the *McLaren (Builders)* lawsuit was announced. The Competition and Markets Authority (CMA) had accepted commitments from housebuilders on 30 Oct 2025.[136]

Those Commitments disclosed allegations of hardcore cartel activity (4.1(a)) involving anti-competitive information exchanges from January 2022 to February 2024 engaging a wide range of competitively sensitive metrics:

- Prices including discounts from published prices;
- Discount incentives (e.g. kitchens and stamp duty incentives);
- The market status of leads;
- Visitors and their type (e.g. first time vs later buyer);
- The number of properties involved.

This is highly sensitive information and its ability to soften price competition is well known. For instance, in a market with just two local building sites, price increases and consumer harm are plausible from exchanging sensitive pricing information.

As there was no evidence to say that the builders had not taken the prices into account, the CMA inferred that they had (4.1(d)).

The result was a set of Commitments essentially not to do the same thing again (5.7), plus a £100m payment for affordable housing.

In principle, there are strong indications here of a useful and workable claim. The purchases are large; there are good records for repayment. Even a small overcharge percentage could result in a large amount of damage. There is no element of *the market might be better* or speculation about whether a large market share is exploitative.

[136] The counterparties are Barratt Redrow, Bellway, Berkeley, Bloor, Persimmon, Taylor Wimpey, and Vistry.

2. *Newman v Rightmove*

Rightmove is a recent claim funded by the same funder which stood behind the later stages of *Merricks v Mastercard*, namely Innsworth Capital.

The issue here is that unlike the housebuilders, whose information exchange indicates serious competition concerns, **there is no substantial *impairment* to the market on the facts.**

Arguments against Rightmove focus on the relatively high amount of their commission esate agents pay to Rightmove: on average, 7.2% of their commission is paid to Rightmove (Estate Agent Today, 13 Nov 2025). 2024 saw a 6.5% fee increase. But in itself, this does not show whether the market is failing. It simply shows that prices increased. Sometimes prices rise for a variety of good reasons, as well as bad. Most obviously, firms invest.

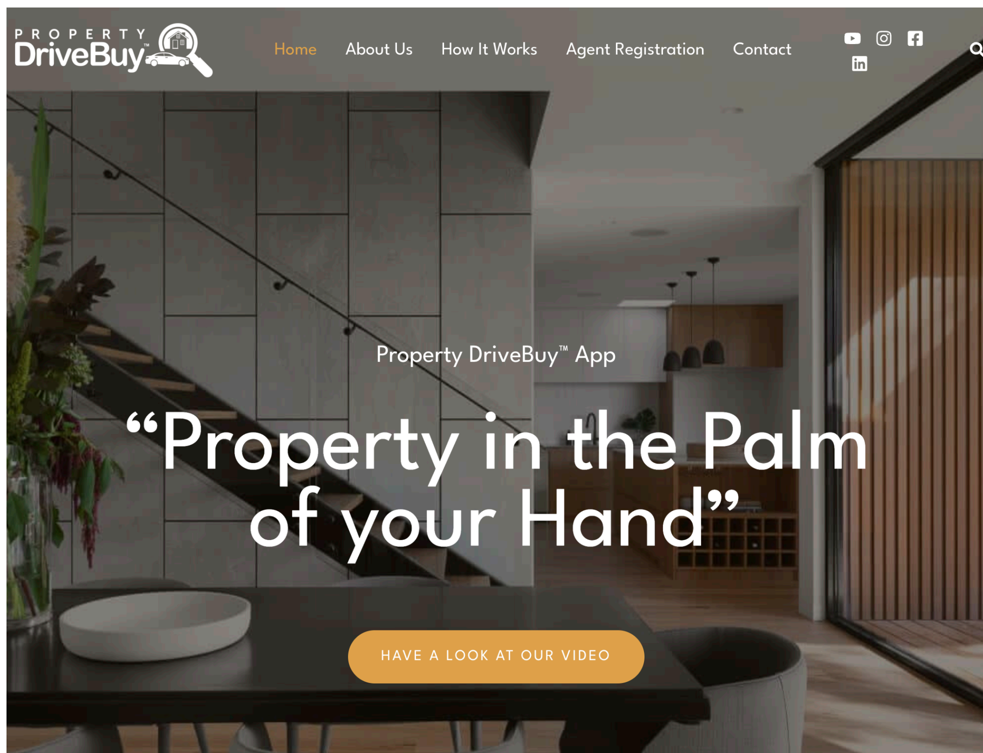
The real question is therefore whether *competition* softens, and not just that prices increased. Crucially, competitors are present in the market.

There are several rivals: at least Zoopla and OnTheMarket. Further, in late 2023, US investor CoStar bought OnTheMarket, doubtless with the aspiration of eroding Rightmove's fees.

Indeed, the above figures come from a *competitor's* survey (Property DriveBuy).

This new entrant will harness location data to identify properties of interest based on where users walk and drive. This new app is free to agents:

> "The Property DriveBuy was created to offer a genuine alternative – a fairer, modern way to connect buyers and properties without hitting agents with heavy fees. Our platform is completely free for agents to use, allowing them to retain more of their income and reinvest in what truly matters: providing great service to clients and growing their businesses."
>
> (Estate Agent Today, 13 Nov 2025)



New entry from Property DriveBuy

Moreover, even if interested in prices per se, the fees paid by agents do not appear to be as extractive as one might first assume:

- Fees are higher for areas of lower average house prices: 13.5% of earnings in Glasgow, and 12.4% in Newcastle.
- Edinburgh clocks in at 9.5%; and Birmingham at 8.7%.
- London features Rightmove fees of an average of just 2.9% of earnings.

If the market were truly monopolistic, one would not expect Rightmove to leave more on the table for higher value homes. The variation is consistent with the same fee applied to all regardless of the prospect of extracting more from more valuable markets. Thus, the case may really be about the relative distribution of fees in the UK, rather than a monopoly issue as such.

It is instructive to consider what financial investors have to say about the lawsuit. Investor comments clearly favour investing based on other metrics, and not just high market shares:

> Over the past two decades, the company has built something close to a monopoly, with a market share of around 75%. This dominance is clearly reflected in the numbers. Revenues compounded about 17% annually over the last 20 years. At the same time the profitability also reached exceptional levels, with an operating margin of about 67% and a free cash flow margin of 53%. That is one of the reasons why long term shareholders

> who stayed invested for the past 20 years turned their investment into more than a ten bagger, or roughly 13% per year.
>
> **However, the seemingly perfect story has recently started to show a few cracks. Concerns around future growth, competition and the potential impact of artificial intelligence have started to emerge.**
>
> So the real question is no longer how impressive Rightmove's past has been. The more interesting question is whether Rightmove can defend its dominant position and continue to create value in a changing environment. That is exactly what we are going to explore in this deep dive.[137]

The analysis at the CAT will be exactly different: lawyers and funders asking what previously happened, rather than where the market is going. This overlooks focus on what the market failure is, and how it might be corrected.

This risks missing an important point: if the market is moving to better performance anyway, then there is limited economic benefit from a protracted and expensive lawsuit, since the market is then righting itself such that consumer harm is declining (or absent). The analyst continues:

> In 2024, revenue increased by 7% while profit declined by 1%, which at first glance looks disappointing. However, there was a clear reason behind this development. **The number of employees was increased by 14% to around 900, with roughly 60% of new hires in technical roles. This expansion served to build additional IT teams focused on innovation and the implementation of AI related capabilities.** As a result, personnel expenses grew faster than revenue, which temporarily reduced margins and earnings growth. While this initially appears negative, it actually shows that management is prioritizing long term development over short term numbers.

There is a particular risk that cases based on pricing metrics or margins alone will miss the dynamic competition at play. This is avoided by focusing on **market failure,** rather than just prices.

Interestingly, another investor provides a comment to the post flagging the competition law class action. This comment specifically discusses the wider strategy of the funder, Innsworth, in *Merricks* in somewhat negative terms:

> The class action is being funded by Innsworth, a hedge fund specialised in lawsuits. They have class actions against oligopolies like Meta, Amazon, Mastercard, for similar anti-competitive behaviours to the ones they're

---

[137] Daniel's Deep Dive: Rightmove – The Real Estate Monopoly https://danielsdeepdive1.substack.com/p/rightmove-the-real-estate-monopoly (emphasis added)

> claiming RMV is responsible for, as well as against companies who are accused to have committed straight out illegal actions like fraud, bribery.
>
> They also appear to have made large claims that ended up with much smaller settlements, like in the case of Mastercard they claimed damages for £12 billion [sic] and got £200 million.
>
> RMV is their largest claim / market cap ratio so far out of the first category of claims.
>
> I think their whole strategy here is to create headlines for the newspapers, let the stock price bleed and then settle for something like £100 millions, which will hurt RMV revenue for the year but remove the uncertainty.

By highlighting the risk of extractive settlements, the investment analyst speaks with the same voice as Lords Sales and Leggatt in the Supreme Court (*Merricks*; *Evans*).

The analyst concludes with a note on prospective competition from CoStar:

> The other reason is that the market is fearing CoStar competition. CoStar is a much larger business in the US, dominant in the commercial real estate market just like RMV is dominant in residential in the UK. They are burning huge amount of money to expand in the residential market both in the US and the UK.[138]

These are potentially very strong "dynamic competition and consumer welfare" aspects, to apply the terminology from Sir Peter's lecture. The consumer aspect is particularly striking, because if there is strong competition between two large investing parties, such as Rightmove vs CoStar, then it is better to allow that competition via investment to take place. The alternative is to prevent Rightmove from investing in the competition with CoStar simply on the basis that its past prices were high, therefore removing funds from it. If done despite strong competition from CoStar, that effectively reduces competition in the future products market including competition with CoStar (which would then itself lack competition just as is alleged against Rightmove).

There is also the risk that estate agents who would like to pay for *neither Rightmove nor CoStar's OntheMarket* get a refund on some *Rightmove* fees, whereas consumers may want them to pay the fees (so as to decrease their search costs). While consumers and estate agents both benefit from competition in the search systems, there is a risk that consumer benefits from innovation can be missed if the analysis focuses only on the estate agent impacts. Ultimately, all businesses want a refund on past marketing costs – but the real question is a

[138] Comment on *Daniel's Deep Dive*, 18 February 2026.

very different one, and it is how dynamic competition in the market will work for the consumer in the future.

The focus would be greatly improved by focusing on the market failure and what caused it, rather than simply asserting large scale or "must have" status, since for the reasons above these do not themselves show a market failure and therefore do not show net benefit from the lawsuit.

Integrating analysis of existing regulatory action

Market performance analysis would also be greatly improved by more attention to regulatory action adjacent to Tribunal cases.

We saw above that working more closely with the regulator in *Rail Fares* would have surfaced close regulatory supervision of ticket promotion, and the factual error about ticket monies that a regulator would have been much less likely to make.

Strikingly, the same issue of regulatory adjacency arises in other matters.

Airwave and Motorola: The real market failure is contracting, not prices

A similar regulatory-adjacency issue arises in *Spottiswoode v Airwave and Motorola ("Motorola").* This subtly different issue addressed not so much legacy assets per se, as the mechanism by which they would be replaced. Superficially, the case looks like a classic "sweating assets" monopoly issue, in that depreciated assets are charged at prices above their cost of provision. This was the Government's allegation.

But the issue was more complex. The underlying issue was not a market impairment, but rather the failure to replace a Public Finance Initiative (PFI) in time.

In summary, the defendant operates assets which derive from a legacy 2000 PFI agreement between BT and the UK public sector. The relevant communication services are used by emergency services, and the Government claims to have limited alternatives. Thus, when it had not replaced the legacy assets with a new Emergency Services Network ("ESN") following a 2014-15 tender, it found itself facing a requirement to keep using the legacy assets.

Little pricing information is given, but we are told that Motorola provided a discount for the continued service; it was just that the Government did not think the discount large enough. What looks like an excessive pricing claim, is in fact about government contracting shortcomings. As Motorola argued before the CMA, there was no clear link to market failure as such: just a contractual

shortcoming.[139] In any event, the CMA has adopted a price control. So it is unclear how the claim **improves** the market failure in a net sense.

Rowntree v PRS: The second bite of the cherry

A striking example of regulatory-adjacency arises in relation to the *PRS* claim, which had sought a class action on the basis that PRS *might* have paid more to songwriters. As noted above, the claim was that so-called "black box" royalties *might* have been paid out differently. A class action was denied in part because the class was essentially suing itself, there being no clear basis on which the total amount of royalties would increase (and a very real sense in which royalties would be depressed by costs).

The case also disclosed its development timing as the CAT reviewed its funding. As noted above, this disclosed that the case had been on the back burner since 2021: the funder tried to apply a start date of 14 September 2021 to funding returns.

This key insight reveals that the case was developed *alongside* a CMA matter and effectively sought to have a second bite of the cherry.

The CMA considered income to songwriters including the operation of the PRS system in a 2022 Market Study. The Study came back with a clean bill of health.[140] Remarkably, the Market Study does not feature in the PRS CPO judgment, even though it is recent and the claim was developed alongside it (as we know from the disclosures on funding: see above).

And no wonder: the CMA had estimated the "black box" royalties at the heart of the case at much lower levels than the £200m asserted in the CAT proceedings:

> 2.53 Such unclaimed royalties (often referred to within the industry as 'black box' income) are dealt with in line with PRS' Constitutional Rules and specified PRS for Music policies.
>
> 2.54 The amount of unclaimed UK royalties distributed by PRS for Music (on behalf of both PRS and MCPS) was £[0-5]m in 2019, £[10-15]m in 2020, and £[10-15]m in 2021, representing less than 2% of royalties distributed each year by PRS for Music.

By contrast, the Tribunal was told:

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139 *Spottiswoode v Airwave and Motorola* [72].
140 Disclosure: The author was engaged by a rights owner in relation to the Music and Streaming Market Study.

> "The size of the claim is not known because the PCR is unable to produce an estimate of the proportion of that **£200m of Black Box royalties** which should have been paid to writers in the counterfactual."
>
> PRS v Rowntree [99] (emphasis added)

This is simply the complainant in a CMA matter failing and then bringing an inflated claim to the Tribunal and asserting an "unknown" damages measure when in fact an expert regulator had reviewed exactly this point.

The Tribunal was wise to see through the double dipping. Had it not done so, it would have badly cut across the CMA's work to estimate wider market dynamics, notably publishing operating margins which were found to be low:[141]

Table 2.6: Operating margins for major labels' UK publishing businesses

	FY17	*FY18*	*FY19*	*FY20*	*FY21*
Universal	[10 to 20]%	[10 to 20]%	[10 to 20]%	[10 to 20]%	[10 to 20]%
Sony	[10 to 20]%	[10 to 20]%	[10 to 20]%	[0 to 10]%	[10 to 20]%
Warner	[10 to 20]%	[0 to 10]%	[0 to 10]%	[0 to 10]%	[0 to 10]%

Source: CMA analysis of major labels' management accounts.

Contrary to the *Rowntree* claim, the earlier and public CMA analysis actually found decreasing margins:

> "operating margins [have] been decreasing over the review period… **driven almost entirely by an increase in the proportion of royalties paid out**." (2.56 CMA, emphasis added).

So just as in *Rail Fares* the alleged overpayment was not actually kept by the railway, here the CMA found that the allegedly depressed royalties were in fact **going up, and they were going up at the expense of the major record labels.**

The oddity, then, is why the Tribunal's analysis made nothing of the Market Study. The helpful indicators of a healthy market do not feature in the CPO judgment, despite their acute relevance to the likely costs and benefits of granting a class action.

It is strongly recommended that CPO applications are **required** to address how their claim relates to existing regulatory analysis, and how a class action would improve the market relative to it, based on the striking failure to apply available expert market analysis to support an attempt at costly double dipping in *Rowntree*.

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[141] The CMA caveats this with the observation that some recording activities are present in the data, but the wider point of declining margins and increasing royalties stands.

Commitments decisions

A similar issue arises with Commitments decisions. A topical example is the recent *Daley v Apple* lawsuit, which alleges increases to end-consumer prices because of restrictions by Apple on NFC chip access.[142] The claim alleges that this showed up in small increments to fees to banks which add up to large economy-wide losses. The acute issue is that, as with *Merricks*, this will involve modelling the supply chain (at least if the same approach is to be repeated). This has not worked well when tried before.

Further, payments processing fees had come to be regulated by the time of the *Merricks* claim.[143] Similarly, the CMA has just entered into consultations on Commitments settling the matter of access to the NFC chip.[144] There is also a 2024 EU Commitments package on point.[145]

A simple improvement would be to require CPO applicants to state how their case will improve a market failure relative to the regulatory package in place (if any). At least in those cases engaging strong elements of regulatory response to market power, they might be asked about *other regulatory activity* that could address the points, without the expense of class action litigation.

Accounting for dynamic competition

A particular issue arises in technology markets: scale may arise from dynamism, so dominance-based claims may punish investment that has resulted from scale.

The particular issues of platform cases is that the correct regulatory approach differs based on whether there is truly entrenched monopoly, or inter-platform competition. The two are often difficult to spot, especially if the framing is narrow. However, there are many important examples of platform competition *for* the market as well as within it.

A classic analysis by Weyl and White notes that mere scale is not the problem, and that tipping to large providers is often a form of competition.[146] Care is therefore needed to distinguish **large scale competition between platforms** from **problematic entrenched monopoly.**

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[142] James Daley Class Representative LLP v Apple Inc, Apple Distribution International Limited, Apple (UK) Limited, Apple Europe Limited, and Apple Payments Services Limited case number 1761/7/7/26.
[143] Payment Card Interchange Fee Regulations 2015 (SI 2015/1911).
[144] https://www.gov.uk/government/news/cma-secures-commitments-from-apple-and-google-to-improve-fairness-in-app-store-processes-and-enhance-ios-interoperability
[145] https://ec.europa.eu/commission/presscorner/detail/da/ip_24_3706#:~:text=40452.-,Citat(er),mobile%20wallets%20to%20choose%20from.
[146] Weyl and White (2013).

Almost a decade ago, competition policy was concerned that winner-takes-all markets could not host competition. For instance, the influential HM-Treasury sponsored Furman Review stated:

> "Facebook has been dominant for over a decade. Prior to this, Myspace was the most popular social network for no more than a few years."
>
> Furman Review, 1.101

But in fact, just as Weyl and White warned, there was inter-platform competition:

- In social media, TikTok and YouTube would both be found to compete with Meta in *FTC v Meta* based on careful study of traffic patterns.[147]

- Zoom's worldwide expansion in competition with Microsoft Skype, Microsoft teams, Cisco WebEx and Google Meet would not easily have been predicted from the Furman viewpoint that markets tip to just one provider.

- Even the poster children for a tipped market, namely Google and Meta in the CMA's 2019-20 Online Advertising Market Study, have faced competition from Amazon's significant entry in online advertising.

What emerges from this picture is not so much abuse of dominance, as successive and pro-consumer competition *for* a large share of the market (mistaken for problematic dominance). There is no clear mechanism in the law, at least as it stands, to weed out the dynamic competition cases from the CAT workflows.

Indeed, it is striking that there is essentially no analysis of market dynamism before the CPO is granted. Thus, even if there is successive dynamic competition, it will count for naught in defending the CPO. This means that even the most dynamic market could give rise to a CPO, at least to judge by the CPOs to date. None has been ruled out on the basis that the *wider* market is sufficiently dynamic such that there is no need for the case.

Using all available information

Prior litigation

For this reason, it is wise to consider the wider context of the case, including at an early stage. By contrast, recent CPOs shy away from stating how they relate to existing litigation.

Consider the *Stephan v Amazon* CPO application. This only considers a few examples of regulatory proceedings without specificity as to why there is harm to

[147] *Federal Trade Commission v. Meta Platforms, Inc.*, No. 1:20-cv-03590 (D.D.C. filed Dec. 9, 2020).

competition. For instance, the European antitrust enforcement cited by the Tribunal in the carriage dispute (i.e., who gets to represent the class) between BIRA and Professor Stephan is openly based on the concept of self-preference. For instance, the Italian decision cited is openly based on the idea that dynamics between competing platforms, rather than those facing purchasers, ought to be the focus ([14-15]).

A pivotal EC Decision is cited but only for the fact that Amazon might have "an advantage," as distinct from harm to competition.

There is no mention of the consumer welfare impact. It would be helpful to include this from the earliest stages, to avoid punishing scale arising from investment and competition.

Expert literature

There are also insights to be had from expert literature. A good example exists in recent treatments of platform pricing dynamics pertinent to the self-preference claims before the CAT. While non-discrimination in access might sound pro-competitive, in fact, the expert literature notes that the opposite can be true.

There is a particularly clear example in Zou and Zhou (2025), who identify *competition alleviation* and *entry deterrence* issues from interventions to mandate non-discriminatory access to platform search systems. This is highly relevant to product platform cases, such as *Stephan v Amazon*.[148]

The crux of the issue is that mandating non-discriminatory access can soften competition in related markets. This can arise if those who do not have easy access to the platform are currently competing hard to gain custom. Giving platform access may soften the quality of competition in this scenario.[149]

Similar results arise in Bergemann and Bonatti (2023) who consider the relationship between on-platform and off-platform sales. Those authors identify that large-share platforms can induce strong competition within a brand, such as offering a low price on the platform to benefit from expensive advertising.[150] Further platform analysis by Anderson and Beadre-Defoliue (2024) emphasises the critical importance of identifying *whether* a platform is a must-have volume before results about increased fees would obtain.[151]

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[148] *Professor Andreas Stephan v Amazon.com Inc. & Others* [2025] CAT 42

[149] Significantly, the Zho and Zhou study was not funded by any party. Interestingly, a further incentive to increase prices can arise in Zou and Zhou's model, because the non-discriminatory search traffic award can lead the platform to derive less value from the presence of the platform; therefore, as they share margin, it may increase fees.

[150] In their model, proposition 3.

[151] The authors cite the US Congressional Report (2020) "Investigation of Competition in Digital Markets" for the proposition that 37% of Amazon listing merchants single-home. The authors are

These points are very practical. For example, CPO analysis could set out and weigh possible adverse impacts from intervention, and not just consider whether a case is plausible. This would improve the quality of cost-benefit analysis.

Analysis of the wider market

At the CPO stage, there is also little to no analysis of how well the wider market is working. Instead, arguments proceed on market share-based abuse of dominance analysis. These can result in certification just because a firm is large, rather than any analysis of why the market is failing.

Advances in methods since the concept of abuse of dominance was created can be used to help calibrate the analysis.

The underlying question is not scale, but whether competition is working well. Thus, the priority question at all times is, as in the title of a recent article summarising the state of research on the point, *How to spot a monopoly?*[152]

The key point here is to move away from bare measures of shares, concentration, or markups, towards more reliable indicators of whether scale or margins are bad.

Albrecht introduces new research which shows limitations in historic measures sometimes used in competition cases, such as *market share*, *concentration*, and *markups:*

- **Market share** can result from competition. Sometimes a high market share at a national or global level results from bringing a new product to a market, meaning that shares can go up while competition is also increasing.
- **Concentration** in the market can result from efficiency; if so, profits rising with concentration would not necessarily be bad, and may be good.
- **Markups** can reflect investment, so equating the markup on a product to a bad market outcome is unreliable.

These are not themselves new observations. They lie at the heart of the justification for using economic methods to consider competition matters. The US case law put the point very crisply as early as 1974:

> Statistics concerning market share and concentration, while of great significance, [are] not conclusive indicators of anticompetitive effects.[153]

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careful to caution that the model requires empirical tests to work out whether harm is, in fact, present (e.g., p.607).

[152] Albrecht (2025).

[153] United States v. General Dynamics Corp., 415 U.S. 486, 497 (1974).

While the limitations of these structural measures are well known, they do still surface in a surprising number of CPOs. What might take their place?

There is no need for detailed analysis in hardcore price-fixing cartels, whose harm is reasonably widely agreed. However, dominance cases raise substantial issues of possible false positive, as indicated above: for instance, a larger share might be merited by pro-competitive growth, in which case a CPO is inapt. How might one derive an early indication of market performance?

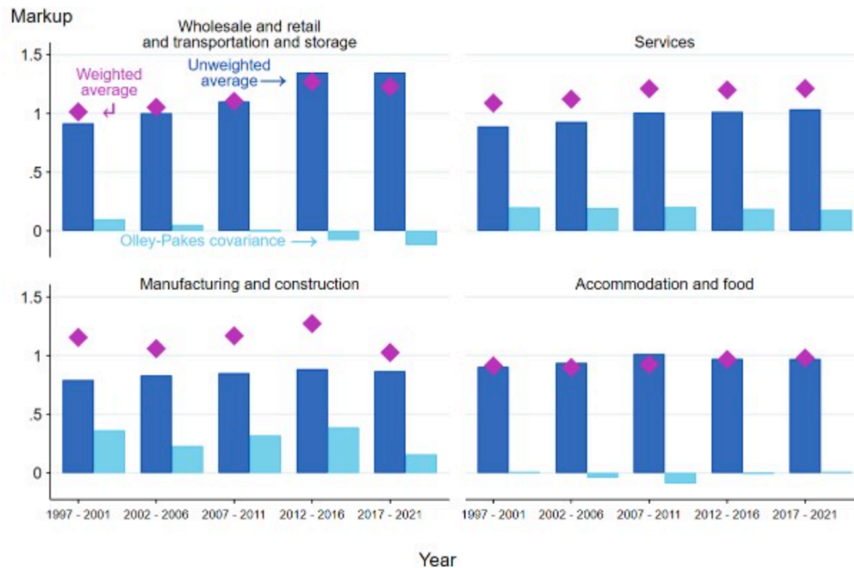
An interesting option is to compare the productivity of firms involved in the lawsuit, with the wider market. This comparison between particular firms' and wider firms' productivity is known as the Olley-Pakes decomposition,[154] and it can help to identify whether there is a good, or a bad, reason for firm size. Albrecht explains:

> Olley-Pakes… breaks down productivity … to two components: the average efficiency of firms weighted by market share; and the simple unweighted average efficiency of all firms, regardless of size. The difference between these, called the 'covariance' reveals whether the market is actually rewarding efficiency [because it compares the average efficiency rate with party efficiency].
>
> If it is positive, larger firms are more productive than the industry as a whole and the market ins performing well. If it is negative, something is stopping better companies from growing larger than their rivals.[155]

It is very significant that the CMA uses this data in its *State of Competition* reports:

[154] Olley and Parkes (1992). I am grateful to Paritosh Purhoit for drawing the Olley-Parkes framework to my attention.
[155] Albrecht (2025, p.6).

Figure 8: In most sectors, reallocation plays a minor role in the rise of markups
High-level sectoral markup Olley-Pakes decompositions: weighted average (purple diamond) overall increase is decomposed into the unweighted average (dark blue bar) and the Olley-Pakes covariance term (light blue bar). Estimates are averaged over sub-periods. Markups computed using Ordinary Least Square (OLS) estimation of a Translog production function with materials as flexible input. Data from the Annual Respondents Database X (ARDx) 1997 to 2020 and Annual Business Survey (ABS) 2021. GB only



Markups are calculated following our baseline approach described in the report. Calculations exclude Standard Industrial Classification (SIC) sectors: A, B, D, E, K, L, O, P, Q, T, U. Olley-Pakes decompositions averaged over sub-periods. Industries are ranked by their weighted markup in the period 2017-2021. Data from the *Annual Respondents Database X* (1997-2020) and *Annual Business Survey* (2021).

As the CMA notes, when looking at the equivalent question:

> "The number of firms in a market is one possible indicator of competition in a market. But the prevailing technology in an industry also matters for concentration, and, in any case, it only provides a static view of how firms interact.
>
> A different view of markets emphasises the dynamic aspects of competition: the ability of new entrants to displace incumbents, the introduction of new ideas into the economy by way of entry and exit of firms, and the constant churn of labour and capital as firms try to find their most productive use.

The crux of this debate is whether scale is good or bad. It is very striking that the CMA directly addresses this point:

> There are many explanations for why markups and concentration may be rising, but two are by far the most common.

> The first is a story of technological change. Firms are becoming more intangible capital-intensive, which means they need to invest upfront in fixed costs such as R&D, software, and branding.
>
> However, this investment makes it cheaper to produce each additional unit (for example, because an increasing share of consumer goods consists of software components, which can be reproduced at zero cost). As a result, innovative firms become larger and markets more concentrated, producing goods more cheaply and at greater scale.

In the context of very expensive lawsuits, there ought to be some test at the CPO stage for whether scale is helpful, or harmful. As the CMA advises:

> Another way to understand the changing role of fixed costs is to estimate returns to scale. Returns to scale measure how much output changes in response to changes to all inputs simultaneously and therefore helps us understand if technology pushes firms to be larger or smaller.
>
> If increasing all inputs more than proportionally increases output, returns to scale are increasing; if increasing all inputs less than proportionally increases output, returns to scale are decreasing. If output scales one to one with input increases, returns to scale are constant.
>
> …
>
> The correlation between markups and returns to scale is high; there is significantly less variation in profit shares over time. Therefore, the rise in markups is mostly associated with rising returns to scale, not rising profit shares.

Collecting this information on whether scale is helpful or harmful by considering the relationship of scale to productivity *before* a multi-million pound lawsuit would be very sensible – not least, as the CMA does this when the question comes up there.

It would make much more sense to require expert economists to work on this, instead of submitting what have now been repeatedly inflated damages and claimant rate estimates, which are not really measures of market *performance* at all.

A slightly different skill set is required from the consulting economists, but it is certainly available: 10,785 authors cite the seminal 1992 study of telecommunications industries from which the Olley-Pakes analysis flowed.

V. What have recent CPOs done?

Leaving all the theory aside, let us conclude with a brief analysis of some prominent CPOs and how they have addressed the themes identified in this report. Those themes are:

> (1) the importance of cost-effectiveness analysis to moving money to claimants;
> (2) scope to simply supply chain analysis to save costs; and
> (3) scope for sharper analysis of market failures and market dynamics to align competition law class actions with wider societal interests.

A review of four recent CPOs shows limited attention to the identified concerns.

Shotbolt v Valve

If the Supreme Court showed an appetite in *Evans v Barclays* for more fulsome cost-benefit analysis at the class certification stage, it is fair to say that this has yet to feed through to the CPO analysis.

For example, in the 26 January 2026 CPO judgment in *Shotbolt v Valve,* evaluation market context is left entirely to a trial:

> 75. The Pro-Sys Test is considered above at paragraph 28 (et seq). This does not require the Tribunal, at the certification stage, to conduct a "mini-trial" or to have the actual evidence before it to be able to validate that a specific analysis can be done. Rather, what is required, in essence, is for the Tribunal to conclude that there is a sufficiently well considered and feasible: (i) theory as to **how a case can be proved**; and (ii) route to producing the evidence required so that a trial can be expected to be effective in fairly determining the issues the case raises.
>
> (Emphasis added)

This understates the scope to conduct a modest amount of analysis to see if the case is likely to improve market performance.

There is also limited attention to another critical question, which is whether people will actually come forward to claim damages for the purposes of Rule 79(2) analysis of "suitability" ([135-6]). Instead it considers only the methodology of "establishing a right to damages." This limits analysis of whether claimants are easily found; whether they can come forward, etc. This vindicates Sir Peter's comment that more can be done to identify the relationship between moving money to claimants and the CPO analysis.

Kent v Apple

It is interesting to see that *Kent v Apple* engaged with substantive competition points more than most CPOs, perhaps prompted by Apple's parallel strike-out application. Analysis of possible innovation benefits was much more fulsome. The Tribunal cited Mummery LJ's memorable comment in *AtTheRaces*[156] that "for whatever else it does, Article [102] does not create a European system for determining prices."

Even outside of the strike-out discussion, there is care to consider out-of-market effects and the correct approach to excessive pricing considering a range of different possibly applicable precedents.[157] It would be helpful if other CPOs did the same, rather than just uncritically citing *United Brands*.

That being said, the link between the case and the class is still understated, even in the *Kent* CPO. When applying Tribunal Rule 79(2), which casts suitability in cost-benefit terms, the Tribunal only identified the costs *of litigation* ([37(2)]) without considering possible wider *market* costs and benefits from the litigation.

AdTech Collective

A similar point arises in the CPO for the AdTech Collective. This CPO adopts "blueprint to trial" language taken from *Pro-Sys v Microsoft* (cited at [42]), and therfore does not require specific assessment of the efficiency or value of a class action. Importantly, the CPO is cast in "barrier[s] to justice" terms ([38]) rather than the relationship to the market. Accordingly, there is no material analysis of the relationship between the abuses and the wider market, nor of whether distribution will occur and if so to whom.

The case is also a particularly strong example of where pass-on reform could save costs. The supply chain is large and complex, featuring a multi-billion pound market containing many layers between advertisers and publishers. So, considering how to structure the case to get money to claimants as part of the preliminary analysis would be especially valuable. The case is a key example of where a change to apportioning overcharge, rather than estimating damages, would streamline costs.

Neill v Sony

Neill v Sony raises the cost-benefit Rule in Tribunal 79(2), but only cost-effectiveness analysis occurred: the case is addressed in terms of the relative ease of funding the claim if it is a class action. There are many more factors to consider to determine the **costs and benefits** of the claim, for instance, whether and how any compensation would pass to claimants, and whether the case will improve market performance.

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[156] *Atheraces Ltd & Anor v British Horseracing Board Ltd* [2007] EWCA Civ 38.
[157] *Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd* [2022] CAT 28 [68].

In summary, the recent CPOs raise interesting points, but they stop well short of the more exacting ex ante analysis which would help to improve case quality. It will therefore be particularly interesting to see how the Court of Appeal approaches the issue following the leave to appeal granted to *Rowntree v PRS* on 22 October 2025.

VI. Conclusion and recommendations

Sir Peter challenged us to reflect about several aspects of the Competition Appeal Tribunal at a time when it is much debated. This report has focused on improving the relationship between the provision of money to claimants and class certification, simplification of supply chain analysis, and the risk that cases have drifted away from conventional competition law theories of harm.

Recommendations

1. **Ex ante claims rate estimation.** At an early stage, there should be analysis of how many people will actually claim. At the moment, very little is done on this, and significant issues have emerged with low take-up rates. The single most important improvement to analysis would be to identify how many people are likely to claim early on, so that cases focus onto those with the strongest prospects of moving money to claimants (and not just advisors).

2. **A transparent dashboard of key performance metrics.** Key performance metrics only emerge late in the cases. As analysis exists, but is kept privately, a simple reform is to require KPIs to be shared on the class represntatives' and/or CAT websites. This information can also be used for competition between competing providers at the CPO stage, which would effectively become a tender for consumer-facing KPIs:

    a. ***How much is the case worth?*** Overcharge estimates should be clear and robust. A CAT "driving licence" for consulting economists should be adopted to address cases of overblown damages estimates, because these prevent robust cost-benefit analysis at the CPO stage.

    b. ***What will the case cost?*** The maximum legal services cost per claimant and finance cost per claimant should be binding and periodically updated. Budget employment relative to headroom should then be disclosed in real time to promote competition between funders and lawyers – a *no surprises* regime. Importantly, this would improve shopping around by the class representative.

    c. ***How many people are expected to claim, and how much will the funders and lawyers charge in each scenario?*** Binding fee caps relative to each level of consumer take-up are a must. Drawing on the ex ante claims rate estimate, this KPI helps to focus the regime onto the stronger cases where claims are larger and in which records are better, so that people come forward and claim.

       The tendering process must identify binding fee caps: A maximum fee relative to compensation, e.g., at 1%, 2%, 5%, and 10% take-up rates. Those bringing valuable and strong claims have nothing to fear from committing to fee metrics relative to compensation,

because if more total compensation is claimed, they will make more money. The Tribunal could also use this metric to manage costs ex ante on a transparent basis reflecting its view of true case complexity relative to the societal value of the case (e.g., flexing up or down based on cost-benefit analysis, perhaps to include an uplift for any instances of truly merited case complexity).

Lawyers should then keep to the indicated cost controls, rather than seeking discretionary cost awards later, in line with the stronger cost control in other litigation (notably the Jackson reforms). This addresses the recurrent problem with limited and unreliable information for cost-benefit analysis, and cost-effectiveness analysis, at the class certification stage.

The lack of transparent KPIs feeds a principal-agent problem by which claimants cannot easily control costs incurred on their behalf. By clarifying proposed costs, transparency here would enable easier and bidding by competing providers for the class of claimants' business.

This would further deepen the incentives to bring simpler and stronger claims, such as hardcore cartels – and not the *Bleak House*-esque attempts to model entire industries, to ask if investors in new technologies might have been nicer/fairer in an abstract philosophical sense, or to second-guess regulators.

3. **Replacing damages analysis with overcharge estimation.** Simply identifying the overcharge at the top of the supply chain is simpler, and easier, than identifying damages at each layer of the supply chain.

   Accepting this simple but powerful tweak would greatly reduce costs. It also accords better with the underlying economic rationale of the regime, which is to use the payment of compensation to deter harmful overcharges. Making *each* claimant *precisely* whole relative to their loss is less effective and much more expensive than simply stripping out the overcharge.

4. **Presumptive Allocation Schemes (PEAS) for supply chain dynamics.** Recommendation (3) to model overcharges not damages enables the use of presumptions to pass compensation down supply chains, rather than specific analysis of *precisely whose* damages these are. Drawing on US analysis from a comprehensive review of class actions there in the 2000s, the presumptive allocation or "PEAS" approach identifies and agrees a queue of claimants and agrees an amount for each layer, e.g., 50% for direct purchasers, 25% for layer 2, and 25% for layer 3, or other permutations.

   The simplest reform is just to allow only the first purchaser to claim the entire overcharge, and then to allow compensation to pass down the

supply chain via price competition. However, if there is appetite for direct compensation beyond the first purchaser layer, then a system of presumptive sharing of the overcharge – rather than precise damage estimation – is the cheapest way to achieve it.

The major reason this did not take root in the USA was simply that it affected entrenched interests who benefit from cost duplication arising from different rules at the federal and state levels. There is no such issue in the UK, so this cost-effective streamlining is a clear benefit available to UK reformers.

At present, some trials are consolidated across supply chains, but different different layers are still treated as different claims. This implies duplication of expensive professional work, expert advice, and finance costs.

A PEAS queue of claimants involves accepting that, for class actions, cost control is more important than the theoretical purity of separate representation at each supply chain layer. This should not be controversial, as it chimes with the underlying logic of that decreasing costs expands access to justice. Embracing a system of presumptive overcharge sharing at the CPO stage then renders duplicative work moot, because all that remains is to determine the overcharge.

5. **Market failure focus from day one:** The point of competition law is to make markets work better for consumers. It is not to render permanent damages settlements at high cost. Three specific recommendations keep a focus on improving markets rather than just moving money:

    (1) **Specification of the market failure as the focal point.** From the earliest stages of the case, pleadings should specifically address what the perceived market failure is so that work can focus on mechaisms to correct it. Currently, it is common practice just to allege "abuse of dominance" in broad strokes, and wait for trial. Committing to analysis of a specific allegation of market failure would greatly sharpen focus.

    Importantly, this also promotes alternative dispute resolution, as the defendant can simply agree to meet the small early costs of the early analysis and remove the perceived market imperfection (especially if it was inadevertent). There is a risk that the claimant bar and funders would prefer a cash payday to this efficient outcome.

    (2) **Specific analysis of regulatory actions:** Identification of the relevant regulator and their recent actions should be specifically required including on the claim form. This promotes dialogue. There are several instances in which recent CPOs – and even trials – have understated existing regulatory analysis. Important facts have only been found at trial (*Rail Fares*). Others have simply tried to have a

second bite of a cherry after a CMA regulatory proceeding has decided not to act (*PRS*). Requiring early analysis of the regulatory scheme and why a class action lawsuit marginally improves on it would not only be a powerful efficiency: it would also respect, and lever, sector-specific regulatory expertise.

(3) **Sector analysis:** There is a significant issue with dominance law possibly punishing scale even if it has resulted from investment and growth. The key to overcoming this is to use the same metrics the CMA uses in its *State of Competition* report to identify whether a market is working well. Well functioning markets ought not to host class actions, even if large firms are involved. Important indicators are currently understated and can identify whether margins reflect efficiency and investment, vs sweating monopoly assets. It would be helpful to include information on the wider industry picture in the cost-benefit analysis at class certification because it will help to avoid bringing cases in industries which are dynamic.

These recommendations can work alone, or in concert, to improve the contribution of the class action regime to consumers.

List of Cases and Legislation

Ad Tech Collective Action LLP v. Alphabet Inc. and Others, Competition Appeal Tribunal ("CAT") Cases 1572/7/7/22 & 1582/7/7/23

Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited et al CAT case 1527/7/7/22

Professor Andreas Stephan v Amazon.com Inc. & Others [2025] CAT 42

Antitrust Modernization Commission Act of 2002 (P.L. 107-273)

Arriva the Shires Ltd v London Luton Airport Operations Ltd. [2014] EWHC 64 (Ch)

Attheraces Ltd & Anor v British Horseracing Board Ltd [2007] EWCA Civ 38.

Bulk Mail Claim Limited v International Distribution Services Plc (formerly Royal Mail Plc), CAT case 1639/7/7/24

California v. ARC America Corp., 490 U.S. 93 (1989)

Professor Carolyn Roberts v Severn Trent Water Limited & Ors [2026] EWCA Civ 244

Christine Riefa Class Representative Limited v Apple Inc. & Others. CAT Case 1602/7/7/23

Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc, CAT case 1698/7/7/24

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CMA, Google's Commitments to Fully Address Category 1 Issues in the Roadmap of Possible Measures dated 23 July 2025, 30 March 2026

CMA, Music and Streaming Market Study, Final Report, 29 November 2022

CMA, Online Platforms and Digital Advertising Market Study, Final Report, 1 July 2020

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Courts and Legal Services Act 1990

David Alexander de Horne Rowntree v the Performing Right Society Limited and PRS For Music Limited CAT case 1634/7/7/24 [2025] CAT 49

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Evans v Barclays [2025] UKSC 48

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James Daley Class Representative LLP v Apple Inc, Apple Distribution International Limited et al., CAT case 1761/7/7/26.

Jeremy Newman v Rightmove PLC and Rightmove Group Limited, CAT case 1771/7/7/26

Justin Gutmann v First MTR South Western Trains Ltd & Ors CAT case 1304/7/7/19 [2021] CAT 31; [2024] CAT 32; [2025] CAT 72

Mark McLaren v Barratt Redrow PLC et al., Case number pending.

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

Payment Card Interchange Fee Regulations 2015 (SI 2015/1911).

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Manchester Ship Canal Company Ltd v United Utilities Water Ltd (No. 2) [2024] UKSC 22

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