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CLASS ACT

The case for reforming Britain's class action regime

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Stephen Dnes

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About the author

Stephen Dnes is a competition lawyer with fifteen years of experience in the legal academy and practice in Brussels, London and New York. He is currently a lecturer in law with Royal Holloway, University of London, and a partner in Dnes & Felver PLLC. He regularly writes and advises on EU, UK and US antitrust law. In 2024, he was closely involved in the passage of the UK's new digital technology law, the Digital Markets, Competition and Consumers Act.

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Summary

- Recent years have seen sharp growth in the number and scale of class actions filed before the UK Competition Appeal Tribunal ('Tribunal'). Pending claims are worth an estimated £134 billion. There are 655 million claimants, that is, ten claims per person. On average, there is roughly one new class action every week.

- The sudden increase in the scope of claims raises questions about their quality. The strong economic case against hardcore cartels applies equally to private litigation, but there are also some more adventuresome cases which stray from true cases of economic harm. Such cases increase costs and could harm innovation.

- Three specific concerns arise: (1) Cases are not getting much money, even against hardcore cartels; (2) Some low-quality cases have crept in, but they are mixed up with stronger ones which ought not to be undermined by reform; (3) Cases are very slow.

- This paper explores five related policy options to address these three issues. They can be used together or in isolation to focus cases onto the stronger ones and away from the weaker ones. The proposals span several major aspects of the cases and would significantly focus their remit.

Recommendations

1. A seed payout before class certification. Funders should be required to commit to an estimate of damage and to pay it out to a portion of the class (e.g., 5% of the class) before the Tribunal grants the right to continue to pursue a collective lawsuit (known as 'class certification'). This disproportionately increases costs for weak cases relative to stronger ones by accentuating risk.

2. A market for claims. Property rights in claims are currently difficult to trade because of a lack of timely public information. By contrast, the *seed payout* gives rise to a clear, public and early valuation of the claim. If another funder thinks that it can improve on that seed payout, it can buy out the earlier funder and increase damages, thereby competing for claims. Competition to serve the claimant class, and not just funders and lawyers, would then be stronger. Setting a damages amount ex ante also encourages cost efficiency from that point forward. This approach requires greater investment in claimant book building to weed out bad cases, as occurs in German and US models. The fundamental mistake in the underlying 2015 UK reforms was to adopt a Canadian model, which allows class certification *without* adequate prior book-building investment and without attention to the specific information needed for a funding market to compete for a diffuse class of claims.

3. Sharper economic differentiation at the class certification stage. Several recent Tribunal cases adopt a strongly economic approach, but this is not universal and sometimes only comes after expensive trials.

Several economically questionable classes were certified, and not just early on: for instance, claims that Facebook *might* have worked with less data (*Meta*); that Amazon *might* have been fairer in how it innovated in cheap, fast shipping (*Stephan v Amazon*); and that railway ticket machine displays *might* have been clearer (*Boundary Fares*). These adventuresome claims do not, at least as pleaded, show a clear link to diminished economic efficiency. They should not have been entertained without better evidence of a *market harm*, as distinct from an *interest group loss*. The issue stems from refusal to engage in deeper economic analysis of the *marginal value* of a class action from a societal rather than party perspective at an early stage because of fears that this would collapse into a mini trial.

But a mini trial is apt if it can distinguish good cases from bad – especially early on. Indeed, the UK Supreme Court *expressly* preserved scope for such 'mini trials' in *Merricks*. Drawing on the US experience with the important *Daubert* case, the paper recommends more fulsome use of openly economic reasoning to differentiate good cases from bad at an early stage. Importantly, this can be done within the flexibility of applicable UK Supreme Court precedent, the existing legislation and the Tribunal Rules as they currently stand.

4. Consolidation of loss. Much of the issue in the much-lamented *Merricks* settlement – which at one stage saw an attempt by a funder to settle for just 48p per claimant – derives from an attempt to model losses through a supply chain. This is not only expensive but also unnecessary. Instead, policy makers should consider consolidation of loss into a claim by the first purchaser – and no one else – *if* their case is sound. This avoids protracted disputes within supply chains, and where applied, as in US federal antitrust law, it results in important efficiencies in analysis. There is an underappreciated contrast with the

analogous US case to *Merricks*, which provided a $5.6 billion settlement to over 12 million direct purchasers. Legislation could alter the inherited position from an EU Directive, which, by mandating full supply chain analysis, undermines this efficiency.

5. Avoiding de facto rate-of-return regulation in litigation funding agreements. Following the UK Supreme Court *PACCAR* judgment, there is a risk that Tribunal review of funding is – perhaps reluctantly – having to apply analysis of a reasonable return on funder investment. This can result in incentives to incur costs and to introduce complexity to justify them ('rate packing'). Although many agreements pre-date *PACCAR*, several in the public domain credit time-based elements of return on investment. This ought to be a private capital allocation matter, because there is no public interest in specifically rewarding delay. Whereas currently, funders can charge more if there is a delay. This dynamic may well have fed funder pressure on the class representative to delay settlement in *Merricks*, which took place just before a return on funding uplift was due.

A more hands-off approach would simply leave analysis of returns to funders – incidentally, more in line with the underlying theory, including that written by a Burford Capital founder (Molot 2009). Instead of asking whether funder returns are reasonable, the real question is whether money is flowing to strong claims.

That is easily established in this paper's approach because funders must commit to an articulated damages payment under recommendation (1) above, before class certification. The early seed payment to *some* (not all) claimants is then applied to *all* at the end. Therefore, the concern about funders seeking returns at the claimant's expense, as arguably seen in *Merricks*, diminishes because of an early commitment device. If faced with a true attempt to underpay claimants, the class representative

could then sell the claims to another funder offering to beat the damages estimate (after costs).

This package of reforms requires an open mind, because in places it implies a fundamental rethink of current received wisdom. This is, however, merited because of some concerning elements in the current system. As before, these are (1) low/no compensation in good cases; (2) certifying some bad cases even recently; and (3) delay. The above package addresses all three points:

1. The **seed payment** forces money towards claimants, thereby focusing litigation onto only those cases in which payments out are realistic.

   Indeed, the requirement to assemble a *partial* seed payment book of claimants (e.g., 5%) before a case establishes that there is a realistic prospect of people claiming damages. This answers the long-standing question of whether consumers will actually claim by requiring proof that some do first.

2. **Stronger cost–benefit analysis at the class certification stage** would distinguish economically rational use of the regime from instances where more adventuresome claims have been filed.

   By openly pointing to the lack of economic efficiency benefits in weaker claims, the Tribunal would encourage focused investment into those cases that can show an economic efficiency benefit – and not others. This chimes with both the growth objective underlying the 2015 reforms and the government's current growth agenda.

   Furthermore, the seed payment makes the pursuit of inefficient small claims untenable. Abusive strategies such

as settlements based on legal costs alone rather than real market harms become far less tenable, because of the need to commit to a damage estimate before claims and to fund the seed payout.

3. **Reduced delay incentives.** Requiring initial investment into seed payouts and early open articulation of a damages estimate abates the risk of effectively paying funders for delay. Unlike the current system, there would be no uplift for the time involved in funding a claim: that would simply be a private funder risk, as it ought to be, since it is a basic risk element.

Presently, funders are perfectly happy to invest in lawyers and class representatives but, for some unspecified reason, do not invest in the purchaser class itself.

For the reasons above, an early payment to purchasers, and not just lawyers, is the single simplest and most effective available reform to focus the regime onto only the strong cases.

Avoiding unintended consequences from reform

The risk is that more stringent requirements on funders would accentuate delay tactics for defendants. The underlying policy aspiration is to move compensation to claimants. Making it too hard to bring a claim could be self-defeating.

First, it is important to note that some cases *ought* not to be brought: those that amount to special interest pleading. If those fall out of the market, that is a good thing.

What about strong claims? Here, the market must look to the Tribunal to credit strong claims more quickly. This is an essential part of the recommendations and ensures balance. The triage of stronger from weaker claims at class certification brings focus, and the prospect of much higher damages for the *strong* claims because of the recommendation to consolidate loss into the first purchasers – and not others – brings very strong funder rewards if they can show a strong claim.

Consider hardcore cartels. These are widely accepted to be harmful. So, why has only 1.7% of the market settled in a leading hardcore cartel case (*McLaren*)? That ought to be 100%: there is public evidence of wrongdoing, and the book ought to be thrown against those who did it, if not on day 1 then at least by day 100. Part of the answer here is to accept that precision of compensation is not the aim when it comes to hardcore cartel class actions: deterrence is. But cases have often bogged down in the precision of compensation estimates.

So, when cases are economically strong – such as hardcore cartels – then speedy justice should emerge with fewer questions asked. Whereas in cases that do not articulate clear economic efficiency benefits, such as the troublingly high number of cases against innovators, *many* questions should be asked, if the cases are even entertained at all. In a sense, this involves treating some claims very differently from others, but that is the point.

Therefore, the key to moving the debate forward, at a deeper intellectual level, is to accept that the rationale for the regime is deterrent and not compensative except as a by-product, thereby sharpening focus. The paper supplies an economic analysis articulating this and locates scope to apply it within the

Tribunal's existing powers before considering how this change of perspective might alter some important case studies.

First, however, an introduction to the competition law class action regime and its history is in order.

An introduction to the UK class action regime

As UK opt-out class actions celebrate their aluminium anniversary in 2025, the question that arises is, are they working well? There is certainly no shortage of them. The claimant pool now numbers 655 million, that is, 10 per person. In just one year, 2020, 74 claims were filed. Although this abated to 33 last year, current estimates value these claims – if successful – at £134 billion (Legal Futures 2025). So, with ten claims per person and a new class action roughly every week, what kind of innovation was this?

Moreover, what should the government make of it in its current consultation on possible reforms (Department of Business and Trade 2025)? The mere size of this new legal sector is not a criticism. As in the title of the astute book, sometimes *Big is Beautiful*, just as much as big can be bad (Atkinson and Lind 2019). It depends critically on what the claims are achieving.

Who pays for it all?

There is a long history of class actions dating back at least 900 years. (A full summary of the history follows later in the paper.) Class actions concern diffuse costs to large numbers of claimants. A key question is therefore who pays for the litigation. There is a significant free rider issue which funding by a third party can meet.

For centuries, third-party litigation funding was simply banned in England and Wales. But in 1967, the Criminal Law Act finally lifted the ban on litigation funding at common law ('champerty'). It was not, however, until later developments in the 1990s and 2000s that a more fulsome scope for third-party funding would develop:

- Conditional fee arrangements, that is, a payment to lawyers in part for success, arose subject to regulation under ss.58 and 58A of the Courts and Legal Services Act 1990.

- A 2002 Court of Appeal case, *Factortame (No. 8)*, expressly condoned third-party litigation funding if it does not 'undermine the ends of justice' ([36]).

- The Jackson Civil Litigation Costs Review of 2010 implemented several important reforms in 2013 (Jackson 2010). These increased the scope for damages-based awards, that is, the ability to share in damages. However, the reforms also limited the scope to claim success fees from the costs recoverable from the losing party.

- In 2023, the UK Supreme Court decision in *PACCAR* limited the scope for funders to be paid a percentage of damages claims because these were found to contravene the Courts and Legal Services Act 1990. This sits uneasily with the opt-out regime because *provided that* a case is strong, more proven damages are better: that is the point of the regime. A proposal to reform *PACCAR* – the Litigation Funding Agreements (Enforceability) Bill 2024 – stalled with the expiry of the last Parliament but may well return to Parliament soon.

What is an opt-out class action?

An opt-out class action is one that binds all claimants unless they opt out before a given date. The Consumer Rights Act 2015 amended the Competition Act 1998 to provide for opt-out class actions but only for competition law.

Third-party funding paved the way for opt-out class actions, because the free rider problem could at least in theory be overcome by a third-party funder seeking a return on investment. This investor would then be entrusted with the claim, achieving redress in a way that no individual litigant realistically could.

The logic is that large numbers of claimants suffer relatively small losses, such as from an overcharge by a cartel, and therefore would not claim by themselves. In principle, allowing a third party to invest in bringing a class action closes a compensation gap – and perhaps also an enforcement one – because large claims can be consolidated.

The exact mechanics are that a class action is *certified* via a Collective Proceedings Order ('CPO' or 'class certification' for clarity in this paper). This sets out a framework by which a class representative brings a class action before the Competition Appeal Tribunal.

Who are the key players?

- **Funders** provide money to bring claims in exchange for return on investment. They typically assemble portfolios of claims to spread risk. Litigation funding is considered a high-risk/high-reward emerging market because its contours are still developing. They also insure against adverse costs,

sometimes via third parties or through self-insurance, so if they lose, they must pay a substantial bill.

- **Lawyers** provide legal advice on claims. They are allowed to defer some fees, thereby effectively participating in success, but are not allowed specifically to claim a portion of damages.

- **A class representative** represents claimants. They represent the class with the assistance of legal counsel. Interestingly, they need not be members of the class, unlike in the US system. The focus is instead on whether there is a conflict of interest between the representative and the claimant class.

- **Claimants** receive money in the case of success. For instance, they would gain a portion of damages awards, or a settlement. They must eventually identify themselves to claim in cases of success but are not required to participate beforehand. If they do not want to participate in an opt-out class action, they must say so before a deadline.

- **Defendants** seek to settle or defend claims as they see fit. Like funders, they face adverse cost rulings if they fight claims and lose.

- **Experts.** Economic experts advise the parties on the economic theory surrounding claims. Interestingly, this role has typically focused on quantitative analysis of counterfactuals, e.g., the extent of loss in pounds and pence, rather than a more fulsome evaluation of whether claims are themselves promoting economic efficiency in a broader societal sense.

- **Courts.** The Competition Appeal Tribunal hears cases. The judges decide on whether to certify the class action and thus let it proceed via a CPO. They also adjudicate causation and damages trials. The Tribunal also assesses settlements and funding agreements. Appeals from the Tribunal go to the Court of Appeal and ultimately the UK Supreme Court.

- Any **unclaimed monies** from a class action, where consumers do not come forward, are given to a charity, typically the Access to Justice Foundation once the litigation funders and lawyers are paid.

Where did the inspiration come from?

The competition law class action system in the UK is based on the Canadian model. So-called 'class proceedings' were adopted in Quebec in 1978 and in Ontario following a Law Reform Commission report in 1982 (Ontario Law Reform Commission 1982). Subsequent reforms followed in Ontario in 1992 and in British Columbia in 1995. The 2001 case *Western Canadian Shopping Centres, Inc. v Dutton* effectively expanded this to all of Canada (Beisner et al. 2008). There is a perception of similarity between the English and Canadian legal systems that seems to have encouraged adoption of the model.

In essence, the Canadian system is designed to allow easier class action *certification* than the US system. The major difference is that a US class action must show predominant claimant similarity within a class, whereas a Canadian one need only show that a class action is a *preferable* procedure to individual claims. The main check and balance is instead cost shifting: like England and Wales, Canada applies a loser-pays rule. By contrast, cost risks usually remain with the parties in US litigation.

In practical terms, the adoption of the Canadian model has made it relatively easy to gain class certification in the UK system. Significantly, the Tribunal therefore resists assessment of merits before the full trial. There is also no documentary disclosure before the class certification.

What is the leading case?

The leading case, *Merricks v Mastercard*, took nine years. Following difficulties in proving causation of loss to consumers, it settled for £200 million – under 2% of the £14-17 billion originally claimed. Half of the settlement went to funders and lawyers. At one point, the funder remarkably sought to diminish payments to the class to just 48p per person by demanding £179 million out of the £200 million.

Although the Tribunal wisely rejected the 48p proposal, a wag might note: *for attempts at 48p class action settlements, there is the Competition Appeal Tribunal. For everything else, there's Mastercard.*

What are some risks? Are there indications of success or failure?

A class action aims to overcome transaction costs. It does not eliminate them. Therefore, there remains scope for abuse of transaction costs. The most obvious risk is the exploitation of the class by a funder, because for any given recovery, paying out claims can effectively lower returns to funders.

It is difficult to call the unedifying attempt at a 48p settlement in *Merricks* a successful chapter. This is explored when discussing the funding regime in more detail below.

Moreover, while some allowance might be allowed in the first major case, other cases raise concerns. Significantly, the first judgment after a full trial, *Le Patourel v BT*, found no consumer harm – but not before significant resources had been spent on the trial.

There are always trade-offs in any public policy context. It would be overkill to see the failure to prove causation in *Merricks* or the failure to prove consumer harm in *BT* and to draw the conclusion that *all* the claims are weak. That *some* cases are economically weak calls for a sharper focus on which ones, and much earlier in the cases. From an economic perspective, the value of the cases depends on whether they correct deadweight loss from market power.

A more targeted approach would instead look at case and funding dynamics to improve the focus onto the stronger claims which clearly identify such competitive effects – while discrediting those which do not.

A short history of class action litigation

This is not the forum for a detailed history of the class action, not least because excellent histories have already been written (Yeazell 1987; Madiraju 2024). Some highlights are of interest to a wider policy debate, nonetheless:

- The earliest evidence of a class action device is exactly 900 years old. In 1125, King Henry I wrote to the Archbishop of Canterbury complaining that group litigation ought not to be abrogated (Yeazell 1987 referring to Cam 1962).

- The earliest recorded common law case is *Master Martin Rector of Barway v Parishioners of Nuthampstead* (1199). The case concerned a dispute over burial fees in which Martin, the rector, sued his *parishioners* for what would now be called a rent-seeking payment. Basically, he wanted the parish to bury its dead at a distant location where he would be paid for it or to pay the fee anyway even if they wanted to bury their dead locally.

- The class action retreated somewhat in the period between Lord Coke's judgment in the 1612 *Case of Sutton's Hospital* and the Companies Acts of the 1850s. Although there were exceptions, such as the important 1722 South Sea Bubble case *Chancey v May*, class actions struggled to survive Lord Coke's formalisation of the company. The grant theory of the corporation construed the company as a formal grant and a

> formal entity. Thus, informal unincorporated associations such as the medieval class action collectives fell out of favour.

Interestingly, the demise of the class action in England and Wales was not copied in the United States, chiefly because of no direct analogue to the 1850s Companies Acts. The first federal class action was *West v Randall* (1820), in which the titan of early American constitutional law, Justice Story, penned an erudite 19-page judgment identifying many important themes: the due process of joining all parties versus the efficiency of not doing so; and the jurisdictional impact of joining parties in different geographic locations (*West* at *8-*12).

Further, Justice Story gently chided with a warning that still rings true over two hundred years later: 'I have taken up more time in considering the doctrine as to making parties, than this case seemed to require' (West at *12). Not only did he perceive undue complexity, but also the indeterminacy of 'distinctions (not always very well defined).'

Show me the money

However, the class action was not taken up in earnest in the United States until an innovation which helped lawyers to get paid. The 1881 case *Trustees v Greenough* pivotally allowed lawyers to claim their fees from undistributed damages derived from a 'common pool' of shared investment loss, not all of which would be claimed. Later litigation would enable uplift to these fees (*Pettus*, 1885), and even negotiation over them despite expense to the class (*White*, 1982).

This amounted to a powerful exception to the common law bars on champerty and maintenance – respectively, third party

investment in claims and other undue third party intervention. Commentators highlight the *Greenough* payment from undistributed damages as the *sine qua non* of modern American class action practice (Yeazell 1997). Intriguingly, this feature *is* present in the UK opt-out regime because legal fees effectively come out of settlements.

American cases had become complex by the 1920s. One mid-century commentator even wished that class actions had remained in the 'learned obscurity of Calvert', the author of an influential 1837 treatise promoting class actions (Chafee 1950, citing Calvert 1837). The essential issue was balancing the requisite degrees of commonality between *factual* and *legal* questions within classes, which are not the same thing, a theme dating back at least to the 1722 case *Chancey v May*.

Nonetheless, an influential 1941 argument from Kalven and Rosenfield (1941) proved irresistible. The authors argued that class actions could enforce New Deal regulation by closing enforcement gaps.

In 1966, the Supreme Court credited this argument by passing Rule 23 of the Federal Rules of Civil Procedure (FRCP). In essence, the bargain was that large-scale class actions could be brought, but subject to requirements to provide notice to the class. We shall return to the governing factors in American litigation below when comparing different case funding models.

Developments in the UK

After the Companies Acts of the 1850s, and especially following the law reforms of the Judicature Acts of 1873-5, the class action fell into disuse in the UK: in the words of the leading historian, a

'theoretically available' possibility but in practice just 'an exotic offshoot of a happily abolished doctrine… dragged out of the litigative attic at irregular intervals to deal with exotic cases… clearly good for something, even if no one could quite figure out what' (Yeazell 1987: 223-4).

Spencer highlights the 1910 case *Markt & Co. v Knight Steamship Co.* as an example of the modern parsimony (Spencer 2013). While the representative action was on the books – Order 16, Rule 9 of the 1883 Rules of the Supreme Court, for those inclined to keep track – differences between the *contracts* at issue meant that consolidated treatment was inapt, despite many *other* commonalities between relevant claims. Like so many Victorian contract cases, *Markt & Co* addressed bills of lading used in shipping contracts. As the contracts were not the same, the court held that they could not be the subject of a representative action. Effectively, this reduced class actions to a vanishing point. As late as the 1980s, Jolowicz (1988) would still describe the then-applicable procedural rule (RSC Order 15 (1965)) as 'extremely restrictive'.

It is important to note that England and Wales made extensive use of consequential collective remedies systems, just on a sector-specific and issue-specific basis. For example, the Pneumoconiosis etc. (Workers' Compensation) Act 1979 provides for a sector-specific regime to address black lung disease suffered by miners. It was not that collective justice was neglected; it was just that, as with the nineteenth-century Companies Acts experience, it was approached on an issue-specific basis. There is an underexplored question as to when sector-specific regimes might be the more efficient approach.

The competition law class action under s.47B of the Competition Act 1998 drew on a 2008-2015 reform programme, culminating

in a 2015 amendment to the 1998 Act. In 2008, the Civil Justice Committee report, *Improving Access to Justice Through Collective Actions*, recommended an expansion in collective remedies (Civil Justice Committee 2008). This idea was applied to competition law claims in the 2012 consultation by the Department for Business, Innovation and Skills (BIS) *Private Actions in Competition Law* (BIS 2012). Pointing to dispersal of loss and procedural economies from consolidation of claims, BIS recommended the introduction of an opt-out class action regime for competition law infringements under the exclusive jurisdiction of the Tribunal (BIS 2012: 3.14). As noted above, a Canadian model was used as inspiration.

Today, five legal devices address dispersed harm:

1. **The opt-out class action in s.47B of the Competition Act 1998.** It authorises the Tribunal to certify class actions for competition law breaches – but not other types of claim – on an *opt-out* basis. This means that if the Tribunal finds damage on behalf of the class, that determination applies unless claimants *opt out* before a deadline. Thus, a formal CPO can arise to govern the mass claim.

2. **Representative actions under Civil Procedure Rule (CPR) 19.8.** This regime requires only proof of the 'same interest' between parties for collective litigation to arise – and court approval, there being no right to its application. In principle, CPR 19.8 *could* support an opt-out claim. However, courts have interpreted 'same interest' such that widespread losses cannot readily be consolidated under CPR 19.8. Recent attempts to use this jurisdiction in relation to flight delays (*Smyth v British Airways and others*) and data use (*Prismall v Google*) failed because of a perceived lack of common issues or a shared methodology for loss calculation. In the case of

Smyth, the existence of a regulatory regime for flight delays further pointed the court away from a class action.

There has been particularly close analysis of how the representative action relates to the normal requirement to build an opt-in case in recent securities litigation under ss. 90 and 90A of the Financial Services and Markets Act 2000. The essential position is that courts will not allow the normal requirements of case building to be bypassed (*Wirral Council v Indivior*) – chiefly because the courts contend that normal multi-party proceedings would be more likely to settle.

3. **Multi-party litigation as in CPR 7.3.** There is no specific requirement as to how many parties can be listed on a lawsuit, provided that the use of the form is 'convenient'. The closest analysis of this device is in securities litigation, in which the difficulty of proving common loss in a pool of ever-changing shareholders proves challenging.

4. **Group Litigation Orders under CPR 19.11.** In opt-in proceedings, the courts can consolidate *litigation*, and thus indirectly *claims*, using a Group Litigation Order. This is not, strictly, an opt-out regime, but the common disposal of common issues can be very powerful. The so-called Dieselgate litigation is the most prominent current example – more formally, the Pan-NOx Emissions Group Litigation – involving 13 Group Litigation Orders and over 2,000 retailers and finance companies. Recent commentary notes that cost overruns were perceived in the Dieselgate litigation, including a 75% court reduction in claimed claimant costs from £207 million to £52 million (CMS 2025: 32).

5. **Umbrella proceedings in the Tribunal.** The Competition Appeal Tribunal can run so-called umbrella proceedings across separate but related cases. For instance, the *merchant*

(not consumer) claim on payment fees proceeded via an Umbrella Proceedings Order.

Developments in the EU

Since at least the 1990s, the EU Commission (as it now is) has sought greater use of private damages claims in antitrust matters.

As cartels were banned under what is now Article 101 of the Treaty on the Functioning of the European Union (TFEU), a damages claim could – at least in theory – arise from cartels. The EU Commission actively pursued an antitrust policy culminating in major fines against cartels in the 1990s as part of a wider global effort (Evenett et al. 2001). The particular EU issue was that, unlike the US federal courts, there was no clear pathway towards consolidation of claims between EU member states as damages claims arise in national, rather than federal, courts. Cases such as *Courage v Crehan* ([25-29]) and *Manfredi* had established a right to compensation for cartel damages, but it was not clear exactly where practically it would come from.

Ultimately, the proposals would culminate in EU Directive 2014/104/EU, known more commonly as the Antitrust Damages Directive. In essence, the Directive requires EU countries to provide 'full compensation' for antitrust damages claims (Art 3(1)). The package is interesting in that it supports claims, as in the evidence handling rules in Arts 5-6 and 10, but also limits claims by mandating a defence based on the passing on of damage down a supply chain and even creates a right of access to documents to prove such a defence (Arts 12-13). The position of indirect purchasers is similarly limited if their loss has passed into a supply chain (Art 14(2)). Recital 39 specifically limits recovery to loss, arguing that unless a loss arises for an

individual then it is not 'harm'. This understates diffuse harm from cartels and overlooks difficulty in mass proof across a fragmented supply chain. Whether that is a case of 'Nelsonian' or deliberate blindness, perhaps reflecting lobbying, is an interesting question.

The EU Antitrust Damages Directive did not address litigation funding. In September 2022, the European Parliament called for the Commission to act to increase transparency of funding terms, but no further action has been taken. The EU Representative Actions Directive (Directive (EU) 2020/1828) requires EU countries to provide a collective action mechanism for a wider range of consumer laws but allows them to elect between opt-in and opt-out versions. Largely a response to the so-called Dieselgate emissions scandal, the 2020 Directive does not fundamentally alter the 2014 political settlement.

Claims have grown in the EU, especially in Germany (8% share of new claims 2020-2024), Portugal (15%) and the Netherlands (12%). England and Wales is the largest European jurisdiction by some margin, with 43% of the 2020-2024 claims (CMS 2025: 8).

Assessing the quality of litigation

The class action introduced in 2015 has certainly proven to be popular. As noted in the introduction, significant numbers of large claims are under way. Current trackers show 36 claims, worth in the region of £95-135 billion – the exact total varying depending on accounting for settlements and whether certain non-competition claims are included (Simmons and Simmons 2025; CMS 2025)[1].

There are strong views on whether this is societally beneficial litigation. Not only are there direct costs on the courts to consider, but also indirect effects in the wider economy.

A recent exchange relating to an expert report by the European Centre for International Political Economy (ECIPE) provides a good example. In a detailed report, the authors claim that the financial cost of UK class action litigation could be as much as £18 billion (Guinea et al. 2025). The paper presents scenarios for the growth of litigation, drawing on analysis of the US class action system. It particularly emphasises two important studies:

- McKnight and Hinton (2024), providing estimates for the costs of the US class action system as a proportion of GDP;

1 See also, M. Ward-Brennan, 'UK class actions worth £135bn but landmark losses raises questions over regime', *City* AM, 11 August 2025 (**https://www.cityam.com/uk-class-actions-worth-135bn-but-landmark-losses-raises-questions-over-regime/**)

- Kempf and Spalt (2020), providing estimates for the impact of class action litigation on the market capitalisation of innovative companies.

It should be noted that the McKnight and Hinton study was funded by the Institute for Legal Reform of the US Chamber of Commerce, which has historically advocated against class actions. However, McKnight and Hinton still provide relevant data points. Detractors have not, so far, provided any better data. Further, many sources used by Guinea et al. (2025) are not subject to this point.

The Guinea et al. (2025) paper uses the data to derive low-, medium- and high-impact scenarios based, respectively, on 10%, 20% and 30% of the observed US impact. The high-impact scenario results in the commitment of £17.9 billion to litigation based on share of GDP analysis. Regarding innovation, a high-growth scenario results in an £11.2 billion reduction in market capitalisation, which the authors note is equal to approximately half of the public investment into research and development (Guinea et al. 2025: 47). The paper also explores alternatives to class actions, such as the voluntary redress scheme in the Consumer Rights Act 2015.

The paper was sharply criticised by a leading claimant lawyer in an 11-point rebuttal in the legal press[2]. Maton's response points to the role of the courts (but curiously, not lawyers) in differentiating strong claims from weak ones; the desire of the 2015 reforms to achieve redress for consumers; as regards growth, the presence of other barriers to investment besides

2 A. Maton, 'Warnings about an unchecked rise in mass litigation are simply wrong', *Global Legal Post*, 22 July 2025 (**https://www.globallegalpost.com/news/warnings-about-an-unchecked-rise-in-mass-litigation-are-simply-wrong-611764308**).

class action litigation; the possible entrepreneurship of funders; and concerns about the use of extrapolation from the US class action data.

Ultimately, while both contributions to the debate are interesting, and both qualify as helpful landscape research, both are limited if considered from an economic perspective:

- Guinea et al. (2025) is an interesting exercise in quantification and draws on some helpful estimations from the USA. However, the paper does not engage in a net analysis of costs and benefits. While the benefits of litigation are acknowledged (Guinea et al. 2025: 7), there is no attempt to *compare* the identified costs against possible benefits. This limitation means that the paper is not a net cost–benefit analysis but rather a statement of costs – itself interesting, but not dispositive of the underlying economic question, which is that of efficiency enhancement from the expenditure (or not).

  There is also a risk of blending into industrial policy, as with the consideration of sector-specific impacts rather than the broader question of quantitative evidence of net societal welfare improvement across all sectors.

- The response from Maton also suffers from several limitations. The emphasis is on the courts assessing the quality of claims rather than lawyers before going to court. There is an element of whataboutism to the paper, such as the reference to other barriers to growth than those at issue. Such a criticism can always be made, and it does not advance analysis of whether class actions are efficient. There is also reliance on analogy rather than data, by likening the class actions to the 1983 robbery of the Brink's Mat gold. The

problem with this analogy is that not all the cases are bank robberies; if weak claims succeed, then the defendants are the ones being robbed (by crediting a false claim).

The point about the 2008-2015 reform package is insufficiently explored. Although an assessment of aims is apt, they ought to be evaluated specifically and not just generally asserted based on the aspirations of a prior generation of policy makers. Further, of the BIS aims, Maton only materially credits *compensation* from claims and therefore understates *growth*. If the argument is that the sector may be financially valuable, that does not answer the charge that the value of the sector may in fact reflect rent seeking; if so, it harms growth and size is bad. This fails to distinguish *financial* from *economic* analysis (to be fair, a widespread legal shortcoming).

The point on extrapolation from data should be met with better **different** data and not just a methodological rebuke, to avoid the *it might be different* fallacy – this ought, instead, to be shown using *better* evidence (Demsetz 1969).

Finally, the entrepreneurship point is interesting and chimes with theory identifying this role, including Coffee (1986, 2015), Molot (2009) and Yeazell (2018) – but it should be demonstrated, and not just asserted, using data to support the claim that the societal benefit from the litigation outstrips its cost.

There certainly are some interesting points to take from the exchange. For example, the finding that US class action costs *grew* at approximately double the rate of inflation with a persistent circa 50:50 split between costs and damage (McKnight and Hinton 2024: 3) is a very interesting result. In an efficient

market, real volume-adjusted costs and the efficiency of proving cases should decrease over time. If it truly is the case that costs *grew* on a volume-adjusted basis, then that would suggest caution about expenditure, since that is evidence of a market that is not becoming efficient over time. Their estimate that costs as a percentage of GDP climbed from 1.88% in 2016 to 2.13% in 2020 – i.e., a 13.2% increase in GDP share in just four years – is consistent with this concern (McKnight and Hinton 2024: 3). An interesting study could explore why the costs have gone up and whether the claims related to them are nonetheless efficient – or not.

So, the current state of the debate leaves something to be desired from an economic perspective. It is therefore worth revisiting first principles to consider what economically efficient claims might look like and how they may (or may not) resemble current activity before the Tribunal.

An economic approach to competition law class actions

The determination of litigation quality is always a challenging task. If Justice Story had concerns about 'distinctions (not always very well defined)' in *West*, then one approach would be to clarify aims.

Interestingly, for all the use of economics *in* cases, there is not much attention to the economics *of* them as a wider concept.

Justifications tend to be relatively high level. For instance, the government consultation response at the institution of the regime pointed to growth *and* fairness from compensation (BIS 2013a: 3). But there was no indication of how to approach tensions between the two.

More openly, economic analysis has typically identified the aim of cost reduction, i.e., that lowering the cost of claims expands their scope, and a more subtle collective action problem by which opt-out regimes overcome a perceived free-riding problem, especially relating to settlements (Noble 2017).

However, analysis of the litigation pattern tends to overlook the important point that the claims themselves can have radically different economic effects. The fundamental difference is between cases that enhance total societal welfare and those that just employ resources to move money. The latter is a form of rent seeking which merely moves funds without creating output, thereby creating a concentrated benefit but one that comes at a diffuse cost (Buchanan and Tullock 1962; Bidwell 2024).

This becomes clearer with sharper attention to the welfare effects of monopoly and their correction. To begin, let us consider the classic model of monopoly in Figure 1.

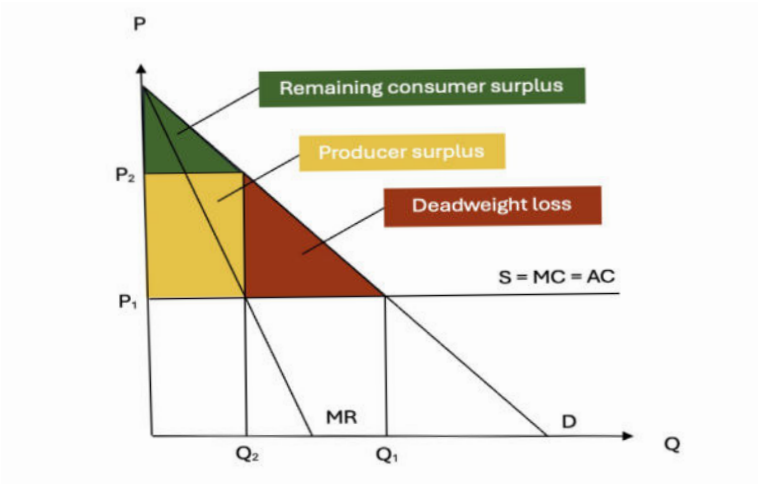

Figure 1 The deadweight loss
Note: Adapted from Blair and Kaserman (2009: 36)

In an extreme case in which monopoly results from the cartel, price increases from P_1 to P_2 and quantity reduces from Q_1 to Q_2. Therefore, the green consumer welfare triangle reduces and the yellow producer surplus area increases for the segment of the market still purchasing (Q=0 to Q_2). Significantly, some consumers who used to purchase in the Q_1 to Q_2 range have stopped purchasing, giving rise to a deadweight loss of foregone output that does not then come into existence.

Importantly, the deadweight loss in the model is an example of a *real* (sometimes called *technological*) and not merely pecuniary externality. That is, the deadweight loss represents welfare that has not come into existence (McKean 1958: 386; Worcester 1969).

Avoiding compensation for its own sake

The economic model focuses sharply on improving resource use rather than compensation per se. The issue with correcting mere pecuniary transfer is that it costs money. Strictly speaking, incurring cost *just* to correct a pecuniary transfer *increases* deadweight loss rather than reducing it. It also does so for a group of consumers who have a surplus anyway.

As Blair and Kaserman (2009: 37) note:

> The deadweight social welfare loss (the welfare triangle) is the fundamental *economic* harm to society caused by monopoly. The primary damage caused by monopoly flows from the fact that too few resources are employed and, therefore, too little output is produced… neither the monopoly profit nor the monopoly price is the social problem. Instead, these are symptoms of the real problem, which is the misallocation of resources.

It follows that there ought to be analysis of that misallocation rather than just the price effects.

What would that analysis look like here? In class action matters losses are highly diffuse. They may be very large in total. But if pecuniary transfers are corrected on a large scale, increased costs arise. In principle, those costs harm other consumers since they use resources up and so are still costs elsewhere in the economy. The real issue is therefore not to seek to correct overcharges precisely but rather to identify the true cases in which deterring anti-competitive conduct is most worthwhile. That depends on whether litigants can show that their case addresses the deadweight loss.

It helps to put numbers on these abstract frameworks. If the issue is, as in one pending class action, that salmon prices might have risen by £1.97 to £10.71 per consumer following alleged cartel activity[3], then there is a very real risk that spending large sums, essentially to move two-pound coins or ten-pound notes on a nationwide scale, incurs widespread costs.

A focus on deadweight loss addresses this concern, because correcting the deadweight loss is societally valuable. Such a focus thus avoids the possibility that expensive and possibly duplicative litigation imposes widespread costs exceeding the marginal benefits of the litigation.

3 C. Baksi, 'Class Actions and the Row About Litigation Funders', *The Times*, 3 October 2024 (**https://www.thetimes.com/uk/law/article/class-actions-and-the-row-over-litigation-funders-p600q7tmg)**

Wealth effects from compensation

Against this it will be argued that distributional effects arise, including for those with consumer surplus. This is dangerously close to the deep pockets theory, but there is a grain of truth to the observation that consumers are, on average, not as well off as owners of companies. Therefore, a wealth effect may arise from correcting overcharges, *including* in the group that purchased anyway (Greenwald and Stiglitz 1986).

The point is nuanced, however, because if litigation increases average costs but with no commensurate decrease in deadweight loss, then a wealth effect arises for *other* consumers in those *other* markets where consumers now face higher costs. Therefore, it is unclear how reliably the concern about wealth transfers from cartels, as opposed to their efficiency effects, can guide the discussion.

Ultimately, as Bork (1993) argued, the matter comes down to economic efficiency because the other aims often conflict with each other in application, whereas efficiency does not, since there is widespread societal benefit from economic efficiency (decreased costs) (cf. Lande 1982). This aspect of the debate is rather academic, as the s.47B class action regime as we know it renders compensation and will continue to do so.

The interesting question is not, therefore, these ambiguous wealth effects between parties, but rather, how to ensure that any regime that is openly compensative is correctly tracking deadweight loss, despite a focus on compensation.

The real question is how best to achieve deterrence

It has always been an economic curiosity that the class action regime focuses so strongly on compensation and not deterrence. Ultimately, there is no difference, from an economic perspective, between a public body and a court identifying and correcting a harmful real externality. In both cases, information is produced that helps to address the real externality. The fact that this might come from one legal pathway or another does not fundamentally change the underlying analysis.

The economic critique of a purely compensative focus runs still deeper than this. Drawing on the influential analysis of crime by Becker (1968), it is significant that cartels are often hidden. As cartels – if truly hardcore cartels – inflict widespread real externality but create a concentrated benefit to cartelists, finding the information to prove them is likely to be societally beneficial. However, as with other information markets, the public goods aspect of new insight means that a market may well undersupply it at the margin. While one must be mindful of the point from the Arrow–Demsetz debate, namely, that the net benefit of this information ought to be benchmarked and not just assumed (Demsetz (1969). It is quite plausible that a new class action, if rooting out real externality and not merely seeking a transfer of money, is a substantial public good.

At the time of the 2015 reforms, BIS even estimated the return on investment in a stand-alone case to be 5:1, as opposed to 1:1 for a follow-on claim based on an existing finding of regulatory infringement (BIS 2013b: 3). A major part of the logic behind the opt-out class action regime is that allowing them helps to close an enforcement gap, thereby promoting growth (BIS 2012). Therefore, potentially non-compensative elements of a class action settlement – such as damages not claimed but

still charged, and compensation to those who had a surplus nonetheless – are tolerated on the basis that deterrence is fostered.

Seen in this way, the role of class actions is actually very similar to that of public enforcement. As both public and private enforcement cost resources, the real question is whether, on balance, real externalities such as the deadweight loss from monopoly are abrogated more than the system costs.

How should the law approach compensation vs deadweight loss?

Interestingly, there is no express articulation of the difference between pecuniary and real externality in the current Tribunal practice. There are indirect indicators, such as the extensive analysis of causation in *Merricks*, but the focus is on proving a transfer rather than proving a real externality. The view seems to imply that correcting the transfer will correct the externality, but this does not necessarily follow because only sometimes is the deadweight loss substantial. Sometimes, it may be completely absent.

Therefore, a sharper distinction would significantly help with case management because it would enable truncation of analysis that is undue from a societal perspective. In particular, the legalistic tendency to focus unduly on class consistency, as opposed to the strength of evidence of externality, is wasteful in at least some cases.

A very important implication of this theory is that it is then logical to consolidate claims at just one level of the supply chain, rather than to try to prove losses throughout one.

Consolidating losses at the first purchaser level

The case for consolidation of loss to track deadweight loss is clear from the most prominent CPO of all: that in *Merricks v Mastercard*, which went all the way to the Supreme Court. The judgment precipitated no fewer than 74 claims that year.

What, exactly, did the Supreme Court do to prompt so many claims, and so suddenly? The case revolved around how the Tribunal had approached certification in the consumer class action brought by the former financial ombudsman Walter Merricks CBE for allegedly anti-competitive payments processing fees. The claim is based on a complaint to what is now the EU Commission dating back to 1992, which eventually resulted in competition enforcement against Mastercard in 2007 for:

- The application of a fallback default fee for the processing of card-based payments by banks in the Mastercard system. Although banks could negotiate bilateral agreements, the widely applied default rule for cases in the absence of agreement was seen effectively as a concerted practice between those involved to set a price floor.

- Related restrictions on card acceptance dynamics, notably a requirement to honour all cards (the 'honour all cards rule' or HACR) and prohibitions on displaying surcharges to consumers (European Commission Decision 2007).

The economics of card acceptance is complex. For instance, at least early on, there is an argument that some default rule is required for the system to work. However, the direct restrictions of processing price competition have drawn worldwide scrutiny, as there seems to be some scope to extract rent from the payments network, at least to the extent that it is not replicable in the short term. As the leading US case *NaBanCo* emphasises, much depends on the level of inter-system competition. Trackers show a range of fees in different jurisdictions (Federal Reserve Bank of Kansas City 2025).

Whether the findings against Mastercard were merited is beyond the scope of a paper on class actions. Instead, the interesting point for us is the difficulty in running class actions across a supply chain. This is clearest in a comparison with the analogous US case.

The New York approach – Here's your $5.6 billion. Have a nice day.

Before considering the UK Supreme Court's position on the supply chain in *Merricks*, it is instructive to consider the result in analogous US litigation before the US District Court for the Eastern District of New York: *In re Payment Card Interchange Fee Merchant Discount Antitrust Litigation.*

This litigation has been, if anything, more protracted than *Merricks*. But unlike Merricks, it has accepted the consolidation of loss into the merchants purchasing the payment processing. There is an approved settlement for 12 million **merchants** of $5.6 billion and pending injunctive relief (effectively a prospective discount) which may prove to be worth $30 billion.

This reflects an important rule in federal US antitrust, namely that loss is consolidated at the level of the first purchaser under *Illinois Brick v Illinois.* The logic is that rather than attempting to model the supply chain in its entirety, it is more sensible to run the analysis at one purchaser level – even if, effectively, a purchaser windfall results. (It should be noted that state laws differ on this point.)

Consolidation is a logical outcome because at least the purchaser has not broken the law, whereas – at least if the case is sound – the defendant has. Furthermore, a purchaser will effectively remit at least some of the compensation, just like any other industrial cost change. So, damages move from lawbreakers to those harmed.

There is even sympathy for this in UK commentary, notably an imaginative suggestion to use restitution remedies to strip out gains (Odudu and Virgo 2009a; 2009b).

The Merricks CPO analysis instead focused on how far commonality must be shown within a class. Instead of the Tribunal or Supreme Court weeding out the duplication, there was an extensive and legalistic discussion of similarity within an arguably unnecessary claim.

The problem compared with the US position is that this can result in two entirely duplicative classes since just one can be used to correct the deadweight loss. Indeed, on 14 June 2025, UK *merchants* would settle with Mastercard quite separately from the consumer claim brought by Merricks.

There is, therefore, a very real question as to whether it is wise to analyse the supply chain at multiple levels in several

overlapping claims. By consolidating the loss into one consumer class action (for merchants), the US legal system, avoiding a costly and *merely distributional* dispute between different levels of the consuming supply chain.

Such consolidation is now possible because the UK is not bound by the EU law which, by mandating a pass-on defence, had effectively required fragmentation of supply chain analysis.

This Anglo-American contrast on loss consolidation is extremely acute from an economic perspective. The reason is that if the deadweight loss is corrected with one-stop shopping, as in the US model, then the need for further analysis ceases.

Significantly, downstream consumer compensation would then only be indirect, via competition to pass on the decreased costs at the level of the first purchaser. This simplification would, however, greatly help in tracking the deadweight loss, as a once-and-done approach would emerge, allowing the Tribunal to take a view on the deadweight loss and effectively reward those who bring cases diminishing it – while rejecting those who bring *merely distributional* claims within a supply chain.

By contrast, *Merricks* focused mainly on whether there was a common methodology for loss estimation.

The incorrect assumption here is subtle but important: that somehow the analysis of class homogeneity will be useful, without first identifying whether *having the class in the first place* is useful. Only then would the *commonality* point be ripe.

The dispute centred on class certification. The Tribunal had refused to certify the class in *Merricks*. Based on the New York experience, this may have been wise as a matter of economic policy since the problem is most efficiently resolved at the level of the immediately purchasing merchants. However, the reason given was, unfortunately, open to legal challenge.

The underlying legal rule is that a class must pose 'the same, similar or related issues of fact or law and [be] suitable to be brought in collective proceedings' (CA 98, s.47B(6)). Tribunal Rule 79 further provides that the Tribunal can engage in a cost–benefit analysis on a very broad range of factors. The Tribunal has the power to engage in unrestricted 'fairness and efficiency' analysis (Rule 79(2)(a)) and to undertake a cost–benefit analysis under Rule 79(2)(b), so there is no real limit here on proper economic analysis.

The simple answer here was to point to the merchant as the correct location of the claim and therefore to deny certification using the broad 'suitability' discretion of the Tribunal. Sometimes, when justifying a decision, less is more. For instance, the Tribunal could have openly asked Mr Merricks to prove a marginal impact on economic efficiency beyond that achieved by a direct purchaser lawsuit.

Instead of openly engaging with an economic assessment of the marginal value of Mr Merricks' claim, the Tribunal somewhat talked its way into a problem.

The Tribunal accepted that the alleged payment processing overcharge was at some level a common issue for the *Merricks* class, but the Tribunal held that the claims were not 'suitable' for aggregated damages essentially based on a data limitation. While the claimants' expert, Dr Veljanovski, had provided an

excellent model of how consumer damages *could* differ from those of merchants, it was not clear to the Tribunal that data would arise on which to run the model (retold in *Merricks* SC [32]). So far so good – yes, the practical approach is just to consolidate the claim into one merchant class.

However, the Supreme Court took strong issue with the Tribunal's application of the general principle that common law damages are compensatory. A purely compensatory focus is wide of the mark for the economic reasons above. The Tribunal's concern was that there was no mechanism to show that the payouts tracked actual compensation, applying the same limitation which has long stalked English class actions. Indeed, this exacting approach to class homogeneity also drove the failure of the 1910 *Markt & Co* case we surveyed above.

The problem for the Supreme Court was that there was no statutory basis for the compensatory principle articulated by the Tribunal. Lord Briggs therefore overruled the Tribunal on this crucial point. Reasoning that the purpose of the class action regime is to collectivise claims without direct analysis of each one, Lord Briggs therefore emphasised that the fundamental question was whether it is 'just and reasonable' to use the class action device, considering the costs and benefits of doing so.

Imbuing 'suitable' with a requirement to prove *actual compensation*, therefore, was a legal error.

From an economic perspective, the case is puzzling. In a class with consumer surplus, why the focus on actual compensation? The real question is instead whether the litigation brings net societal benefits from enhanced economic efficiency. The particular puzzle is why the Tribunal did not just openly discuss this within its broad discretion. That would have helped to

manage out the case at an earlier stage; although, to be fair, the Tribunal will have been constrained by the requirement to credit pass-on such that pure consolidation into the purchaser alone was not on the cards.

A sharper criticism applies to the Supreme Court than to the Tribunal.

Lord Briggs justifies the reversal of the Tribunal in part based on the purpose of the statutory scheme ([54]): 'to facilitate rather than to impede the vindication of those rights.' Understandably – but still, unfortunately – that is very much a lawyer's view of the regime. The problem is that not all competition law cases are equal. Vindication is therefore only due when the cases are strong ones. If the case is rent seeking, then there is harm to consumers from inflated costs and undue damages (which show up as prices elsewhere). Therefore, the bare reference to 'facilitation' abrogates analysis of BIS' *growth* aim by considering only *compensation.*

This is hardly novel; it also arises in contracts where damages are routinely assessed on a market basis to avoid rent seeking claims (*Transfield v Mercator*). So, the Supreme Court seems to have understated the well-known issue of the false positive despite its acute relevance (Easterbrook 1984). Therefore, it did not provide any analysis of how class certification might respond to it.

Put another way, when Lord Briggs noted that the opt-out class action 'expressly, and radically, modified' the compensatory principle, he did not continue to analyse *why.* He simply assumed that an increase in litigation was the aim. The problem with this position is that it credits an increase in litigation as a societal benefit when that will only be so where there is a net benefit from the litigation considering its costs.

The precise error, from an economic perspective, arises in para 64(c) of Lord Briggs' reasoning for overturning the Tribunal:

> In any event the CAT failed to construe suitability (in both of the respects in which it played a part in the process) in the relative sense, and thereby failed to take into account the need to consider whether individual proceedings were a relevant alternative, which they plainly were not, and whether the same difficulties as affected quantification in a collective claim would in any event afflict an individual claimant.

This applies an incomplete benchmark for analysis. It only considers the *relative* costs of collective versus individual lawsuits. The issue is that this fails to identify a third option: that *no* lawsuit might be better, even if the costs of a collective action are relatively lower than an individual one. That would be so if the net societal costs of the litigation are negative; indeed, relative ease in bringing a claim is then *bad*.

Seen in this way, 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.

But in the Supreme Court's view this is only a *data cost* question:

> The fact that data is likely to turn out to be incomplete and difficult to interpret, and that its assembly may involve burdensome and expensive processes of disclosure are not good reasons for a court or tribunal refusing a trial or to a large class who have a reasonable prospect of showing they have suffered some loss from an already established breach of statutory duty. [73]

Further, neither incomplete data nor disclosure costs 'justif[y] the denial of practicable access to justice to a litigant or class of

litigants who have a triable cause of action, merely because it will make quantification of their loss very difficult and expensive'. [74]

The issue with this truncated analysis is that it does not identify, much less weigh, the *benefit* of collecting the data against the costs. So, it is not a net analysis.

Mass consumer markets are quite different from individual tort claims in that net negative class action litigation harms consumers (just different ones). Therefore, unlike other claims, it is not sound simply to point to a breach of right: there ought – always – to be an analysis of the reasonably likely impact of the class action on consumer welfare. Even if this were only approached in qualitative rather than quantitative terms, the analysis would still be useful. On the Supreme Court's approach, it is overlooked.

Who doesn't love a lawsuit?

In essence, what the consumer wants is a well-functioning market, whereas the Supreme Court seemed to assume that the consumer wants the right to a lawsuit.

That is quite the lawyer's lacuna because it fails to identify that the consumer is served by an efficient market, much more so than by litigation. So, there ought to be analysis of when litigation is likely to improve the market.

Residual Tribunal discretion – The saving grace

There is a saving grace to this judgment. The Supreme Court was careful to defer to the Tribunal despite overturning it:

> 64 f. By contrast I would not criticise the CAT, as did the Court of Appeal, for having conducted a trial within a trial at the certification stage.
>
> g. Nor do I regard it as inevitably premature for the CAT to have regard to a proposed distribution method at the certification stage.

It follows that provided that the Tribunal avoids legal error such as implying a compensatory principle that is not there, it can still strongly gate claims using its broad discretions under Rule 79 – even up to a 'trial within a trial' should one be needed.

The Supreme Court's list of factors in [64] is undoubtedly incomplete from an economic perspective, since it contains no reference to the market (as opposed to the claim) – but it is also not prescriptive. It is just a statement that legislation ought to be applied.

It therefore remains open for the Tribunal to be economically discerning, using its expressly credited expertise ([5], [72], [90]), including at the class certification stage. As noted above, there is an express power to undertake a cost–benefit analysis under Rule 7(2)(b): 'the costs and the benefits of continuing the collective proceedings'. Therefore, there is no legal reason why the Tribunal could not save costs in a future *Merricks*-like scenario by requiring a fulsome economic analysis of the marginal value of the requested class from the societal point of view before certification.

Indeed, having so strongly emphasised that the precision of compensation is the wrong focus, the Supreme Court could hardly complain if the Tribunal starts to apply an economic cost–benefit analysis to certification instead.

Promoting growth through focused litigation

The economic theory strongly suggests that the issue is to focus the cases more sharply on economic harm. How could this be done at an early stage of the case? Is it possible at the class certification stage?

Interestingly, there is a developed practice in the USA enabling the analysis of the quality of a claim before class certification. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) allows for challenges to expert methodology before a lawsuit can proceed. That is, experts are not taken on faith. More recent cases such as *Comcast v Behrend* (2013) and *Wal-Mart v Dukes* (2011) deepen the requirement to prove rigour in class certification analysis (Saltzstein and Cohen 2019).

There is an opening for the Tribunal to push harder on experts to prove deadweight loss and not just transfers before certifying a class, just as their US counterparts use *Daubert* to avoid taking claims on faith. Indeed, the Tribunal seems effectively to have done so in one very recent case – *Rowntree v PRS* – in which there was an allegation that royalties had not flowed aptly to songwriters. The Tribunal rejected the CPO in part on the basis that the class was, effectively, suing itself ([105]), that is, it was simply moving money between songwriters.

This is a very striking result considering the above economic theory because it distinguishes merely moving money from creating output, precisely in line with the economic theory.

This gives voice to the *two* aims articulated by the 2013 BIS consultation, namely, compensation *and* growth. By contrast, many claimants only ask for compensation and fail to articulate a relationship between their claim and growth.

Against this it will be argued that judges are ill-placed to adjudicate based on wider economic efficiency grounds. However, this understates (1) the readily available indicators of the presence/absence of deadweight loss; (2) the demonstrated ability of the Tribunal (if not the Supreme Court) to draw economically rational distinctions in its recent practice; and (3) the fact that class actions could impose widespread cost just as much as diminish it, and therefore call for sharper analysis.

What would direct analysis of deadweight loss look like?

It is important to note that no competition law system has ever required full modelling of deadweight loss as a prerequisite for a claim. That would be too high a bar, compared with more workably analysing the impact of restrictions on competition (Francis 2022). Even so, it is still possible to focus analysis sharply using the insights from the economic approach, and especially the distinction between real and pecuniary externality.

If courts wish to analyse deadweight loss, and not just transfers, in class certification, then several indicators can be used:

- **Direct evidence of price effects.** Evidence of persistent price increases based on an event study, such as a price change, is just as compelling at a court as it is at the CMA. That would be classic evidence of deadweight loss, and showing at least a plausible case that there was an anti-consumer price impact relative to the situation before the

alleged agreement or restraint is a strong indirect indicator of the presence/absence of deadweight loss.

- **Volumetric growth (or not).** A growing market is unlikely to contain an artificial deadweight loss. While it is *possible* that a market *might* grow more quickly, it is unlikely that a growing market would be a strong case of competitive harm, especially where volume-adjusted prices fall. Again, this is simple analysis based on public data and can easily be requested before class certification. If there is no evidence suggesting a market malfunction, then it is very unlikely that a deadweight loss is present, much less that one has been artificially enhanced.

  This is a powerful test because volume does not, generally, increase in monopoly cases. Therefore, analysis of volumetric effects before class certification will focus cases onto true cases in which competitive restraints have enhanced monopoly power – and not mere transfers within supply chains.

- **Innovation sense check.** Relatedly, if a market contains new options competing with old ones, then it seems unlikely that the introduction of those products, even on a single-provider basis in the short/medium term, creates a deadweight loss. On the contrary, such a product is likely to be correcting a deadweight loss in *another* market. (Without such a profit to compete away, why else was there innovation?) Therefore, class actions against innovators raise particularly acute concerns about false positives, as they may depress returns from innovation if those returns are seen to be excessive.

  This is, after all, routine in CMA analysis (e.g., in the *Phenytoin sodium capsules* excessive pricing matter at 2.2*:*

'Phenytoin sodium is a very old drug … It has long been off-patent'). That the Tribunal might also need openly to distinguish innovation and rent seeking is not a principled reason to shy away from it.

- **Distinguishing artificial market power from market imperfections.** Several cases do not distinguish between (1) the artificial enhancement of market power and (2) the fact that a market is imperfect. This typically derives from overly generous Article 102 TFEU EU case law, which is both old and flawed. The cases assert a 'special responsibility', essentially, to help counterparties overcome market imperfections, but these cases do not map to sound economic evidence. For instance, the classic *Michelin* case misidentifies a distribution network as a barrier to expansion – the wrong focus, because there were several competing networks.

  These early EU cases made early errors. It would be a mistake to import these cases 1:1 to the class action sphere because they are overinclusive, especially of competitor, rather than market, harm. Nonetheless, several claims have alleged this vague 'special responsibility' to support claims essentially that markets *could* have worked better. But that is a general property of markets. It does not show a net benefit from intervention. The leading example, *Boundary Fares*, badly fails this test and is addressed in detail below.

  In principle, causation, theory of harm and quantification analysis *should* focus the cases. In practice they do not, because the underlying law is too broad and inherited vague boundaries. The shortcoming also arose particularly clearly in *Merricks.* The case initially proceeded despite the claim providing only the weak gruel, copied from the EC, that 'a payment system such as Mastercard's *could* operate without

a MIF' (CPO judgment, p.8 [emphasis added]). That is merely the identification of a *possibility*. The real question is whether the case makes a difference to the deadweight loss and not whether it was *possible* to do something differently.

- **Generosity where there is evidence of wider economic harm.** In the context of BIS' estimate of a 5:1 return on stand-alone claims, a class action that credibly shows substantial real economic harm ought therefore to be assisted by the class action regime – even over misgivings about commonality of loss.

Refocusing class certification away from commonality of loss and towards these factors – it bears emphasis, exactly those a competition authority would use in case prioritisation – would significantly change the mood music at the Tribunal. The *PRS* case is very promising in this regard.

Recent tribunal decision-making

It is interesting to compare these competition policy considerations with the diverse range of cases before the Tribunal.

In *Amchem Products v Windsor* (1997), Justice Ruth Bader Ginsburg memorably remarked that some US class actions were becoming rather 'adventuresome'. That can certainly be said of some of the *claims* before the Tribunal. There is a tendency to 'shoehorn' other claims, such as consumer protection issues, into the s.47B class action because it allows for an opt-out class action.

As before, it is important to note that hardcore cartels differ from more speculative competition law claims. Naked price fixing as found by enforcers in *Spottiswoode v Nexans (Prysmian)* and *McLaren* – amongst others – is harmful to a diffuse group of consumers, and action against it is not really 'adventuresome' in an economic sense. They act like a tax or tariff on a supply chain, and use of s.47B to deter them is helpful. The only debates there are more nuanced, such as possible issues with double counting and the *relative* merits of public and private enforcement.

The much more urgent question is how the anti-dominance provision in Chapter II of the Competition Act 1998, as derived from what is now Article 102 TFEU, applies to class actions. There is no direct requirement to analyse the relationship between conduct and market power accretion, as is legally required in the USA. Instead, the law is relatively vague and seems to have

invited claims that essentially argue that a market *might* have worked better.

The focus issue arises in three main areas:

1. Arguments that consumers *might* be better off, without proving harm to them.

2. Arguments that unbundling of two separate markets *might* be efficient, without evidence of a market improvement from it.

3. Arguments that less data *might* be taken, without showing why that is a good thing.

In all cases, it is possible to argue that a *mere market imperfection* falls within the regime, as opposed to market harm caused by a company. Importantly, there is very little attention to this crucial issue at the class certification stage, which instead focuses on *plausible methodologies*.

The maximalist claimant

If a mere market imperfection is taken to be the basis of a class action, then it is possible to claim just because a market *might*, hypothetically, have been better. This is a particularly acute issue in innovation markets because:

- Innovative markets often involve a return for a period. This can be mistaken for a bug when it may well be a feature.

- Rather than a deadweight loss, these cases will often involve the inverse: innovation displacing a *prior* deadweight loss. They are therefore quite unlike the cartelisation of a relatively mature market. In the mature market, deadweight loss is created, whereas an innovation diminishes it.

- Therefore, a bare focus on distribution, rather than deadweight loss, risks ordering compensation from an innovator essentially because it was first to market.

Compounding this issue, opening a market via CMA settlements known as Commitments may be impeded if litigation is overly broad. If Commitments are taken to signal illegality, rather than a practical compromise to open a market, firms may be deterred from them. This dynamic emerged in relation to Amazon where Commitments about aspects of the platform were shortly followed by private lawsuits.

This section will consider three key case studies to assess whether the class certification regime is aptly distinguishing true cases of market harm from the mere observation that

markets *might* have been better – in Demsetz' (1969) immortal term, the 'greener grass' fallacy arising from arguments that markets *might* have been better, without proving it.

Boundary Fares: Consumers might shop around but these ones didn't

The Boundary Fares litigation – now partly settled – alleges that those holding a partial discount from a London area travel card were overcharged because they were not shown a discount fare reflecting the travel card. The claim is that the ability to do so resulted from dominance.

The essence of the claim, then, is that people *might* have shopped around.

There are some significant economic concerns with this framing:

- A failure to display a discount does not itself affect market power.

- It is normal for consumers to pay different amounts (Ramsey Pricing), so difference in price alone is not evidence of harm.

- The case protects those who did not shop around by checking non-advertised prices. While competitive markets do protect those who do not shop around, it is a mistake to assume that all markets are perfect and to benchmark from this. All markets would fail a test based on perfect shopping around. This is ultimately a consumer protection matter regarding whether there is

problematic pricing – and there is a specific consumer protection regime to address unfair omissions, not to mention specific rail fare regulation.

- By overprotecting the consumer who did not check other fares, costs are imposed on *all* travellers, including those who did shop around. The case does not identify this potentially anti-consumer outcome.

- The rail company can easily respond by just introducing one average price (if the regulator allows this). By insisting that all gain a discount, there is a serious risk of discouraging future discounts, thereby softening price competition.

- In any event, the rail regulator could have mandated an ex-post fare reduction at much lower cost than the class action, completely obviating the need for a class action if this is truly a priority consumer protection matter.

- Apps developed since the litigation routinely show split fare ticketing, including the option of adding rail cards to apps, so innovation and investment fixed the issue anyway.

- Finally, as there is market power in the rail line (hence regulation), there is no real prospect of switching based on the proposed intervention. Therefore, the case appears to be purely distributional – money moves and captive users continue to travel anyway. Strictly speaking, therefore, the case imposes costs for no clear benefit in real economic terms since there is no readily apparent change to activity

Gormsen v Meta: Facebook might have used less data

If Harold Demsetz were still alive, he might well highlight the pending *Meta* litigation as a good example of all three of his fallacies: *greener grass, people might be different* and the *free lunch* (Demsetz 1969).

The case alleges, essentially, that Facebook took too much data from users. This is said to be in breach of Chapter 2 because it was possible to run the service using less data – another *it might have been different* argument.

First, the case contains a *greener grass* argument because it does not identify a net reduction in harm. The case notes that Facebook's terms and conditions changed. That does not prove that anyone was harmed. Instead, consumers gained a new product for free – just under two different contracts.

Second, the *people might be different* fallacy is present. The fact is, they like to use Facebook and do not seem perturbed by the data collection. This reflects surveys showing that a substantial majority (69%) of consumers are happy to trade data – even personal data within the meaning of the GDPR – for service (Interactive Advertisers Bureau (2024) slide 17). Perhaps the argument here was that people *ought to be different*: the elitist thought that people *ought* to be listening to the Reith Lectures on the BBC and not their Facebook news feed.

Third, the *free lunch* fallacy arises because Facebook must be paid for somehow. If not by data-for-service trades, then

how? This is crucial because strictly speaking *more* data use is consumer beneficial if it supports free service, whereas the claim asserts that data use is harm.

A memorable article likened anti-data arguments of this type to an episode of *South Park* known as 'Underpants Gnomes,' in which gnomes collect underpants as part of a plan to get rich. The step between collecting underpants and getting rich remains undefined – and that's the joke. As Cooper (2012) argued, anti-data arguments often seem to imply that data is collected for no reason, whereas for publishers, advertisers and their agents it is valuable. They *do* have step two in the get-rich plan – growing an audience by funding content – and that is why they want the data.

Further, when others tried to prove a loss here, they failed: in England and Wales, in *Lloyd v Google* and *Prismall v Google*, and in the USA in *Spokeo v Robins* and *TransUnion v Ramirez*.

The case may really be about the electrically charged politics surrounding data-rich options such as Facebook and how they have made the media and electoral landscape more competitive.

The Tribunal was certainly at its most amusing when it made a *Monty Python* reference, proving the asserted data loss here was no more relevant than comparing the load capacity of African and European swallows.

The discerning Tribunal

It is easy to stack up further examples of *claimants* filing what appear to be *markets might be better* claims.

The same class representative as for *Boundary Fares*, Justin Gutmann, has filed another striking claim alleging that the market for mobile phone service is imperfect and thus that there is a so-called loyalty penalty from not switching. That implicates a particularly thorny issue of consumer protection: whether and when cutting prices, but only to new customers, is a problem vs. a consumer protection issue. It is another prime example of a *market might be better* claim. As with car insurance, the wiser path is to leave such questions to specialist regulators.

Against this background, it is reassuring that the Tribunal has shown a discerning approach to the more 'adventuresome' claims before it.

- ***Le Patourel v BT:*** Le Patourel sued BT for £1.3 billion in alleged overcharges. BT noted that consumers could change products if they wanted to and that they seemed to be satisfied; perhaps they even attached some brand value to the legacy provider. In a deft economic move, the Tribunal noted that while BT's prices had, in a strict economic sense, involved a positive return even after accounting for capital – and thus were 'excessive' *stricto sensu* – they were not *unfair*. This was chiefly because the prices were not particularly high, and consumers were 'not captive or generally inert' (*Patourel* summary, para 29).

Even more remarkably, the Tribunal noted that using returns in market A to fund investment in market B – effectively a form of Ramsey pricing to fund innovation – was not necessarily an abuse ([31]). The case effectively requires proof of harm to consumers and allows a degree of latitude to avoid undue strictness where consumers seem to be reasonably well served in a slightly broader sense than the exact price charged to each one. The case should be closely read by those thinking of filing any claims that would struggle to show consumer detriment.

- ***Merricks (Causation):*** As noted above, the *Merricks* causation loss was a watershed moment for the case. Most importantly, *Merricks* struggled to prove a UK market effect in part by applying a counterfactual in which fees dropped to zero following the EU's 2007 decision. Was there really any concrete evidence that UK payments would have worked better in an economic sense based on the alleged theory of harm? Ultimately, payments have proven to be an innovative and growing market. There has also been significant sector-specific regulation, including of interchange fees. The wisdom in reconstructing markets long since passed was never clear, and the Tribunal was wise to be discerning. Perhaps it was more so than the Supreme Court.

- ***Roberts v Severn Trent Water and others*** concerned allegations that under-reporting of pollution increased profits for water companies. The Tribunal's refusal of class certification in March 2025 helps to focus the regime onto conventional conceptions of market power harms to markets, in this case on the basis that the relevant price charges were mandated by regulation [44, 49].

- ***Rowntree v PRS*** alleged that the Performing Rights Society (PRS) had failed to distribute performing rights royalties suitably in cases of inadequate information. This was perhaps the apogee of a *market might be better* claim. The Tribunal rejected it in part on the basis that the claim was merely distributional within the class, as opposed to stating a market harm [105].

A sharper economic focus at the class certification stage would save costs and bring much-needed finality sooner to the more 'adventuresome' cases, thereby focusing resources on the strongest claims. It should be applied more fulsomely, for instance by challenging vague claims of 'self-preference' and instead requiring plausible theories of deadweight loss correction on pain of denial of class certification.

Funding: The crux of the matter

The major gating device for all class action litigation is funding. As we saw with the US experience, the ability for lawyers to charge fees to undistributed damages – the so-called *Greenough* payment – was pivotal to the emergence of the modern class action there. How, exactly, claims are funded, and the milestones for certification relative to investment, strongly affects whether class actions focus on sound claims.

What is the theory behind litigation funding?

The merits of a funding system need to be evaluated against aims. What might those aims be?

The classic justification is that litigation funding prevents a market failure in litigation arising from risk aversion and financial constraints.

Professor Molot's work (2009) provides a core example. Professor Molot would move from pure scholarship to application when he became involved in the founding of Burford Capital, an early and leading funder currently estimated to have 18 claims worth a stated £30 billion in stated claims before the Tribunal: that is, double the next largest funder (Fortress, 9 claims worth £15 billion) (CMS 2025: 39).

Molot (2009) sets out an interesting theory based on the marketisation of legal risk. Observing that the judicial role is to reconcile party externalities with societal costs (Molot 1998), Molot takes an openly economic approach in which the core issue in litigation is to overcome loss and risk aversion as with any other insurance market. Provocatively: 'In important respects law practice is simply another branch of risk management' (Molot 2009: 368).

In the seminal contribution, *A Market in Litigation Risk*, Molot (2009) set out a perceived market failure driven chiefly by divergent abilities to carry risk. Indeed, this seemed to arise in the *Mobility Scooters* matter early in the Tribunal's history: the costs of continuing litigation apparently prohibited case progression (Noble 2017).

Whereas other markets readily financialise risk to allow investment, the traditional common law bars on champerty and maintenance – respectively, third party investment in claims and other undue third party intervention – prevent such a market from emerging for litigation. Therefore, the power of the market to evaluate risk is abrogated. Even a strong claim fails, essentially for reasons of bargaining inequality. Unlike relatively weak theories of bargaining inequality, Molot (2009) presents a credible hypothesis that the evaluation of benefits from a purely party perspective may lead settlement dynamics, or even the anterior decision to litigate, to diverge from societal efficiency.

Seen in this way, the common law may have failed to distinguish champerty and maintenance from vexatious litigation (barratry). Molot's (2014) reflections on the early days of Burford Capital repay close reading. Not only is there the interesting origin story that financiers approached the professor, but early return on investment information is also disclosed.

The core example is *Epicenter Partners LLC v Northeast Phoenix Partners*.

Early experience with litigation funding to close real externalities:
Epicenter Partners LLC v Northeast Phoenix Partners ***(2010)***

Gray owned land near Phoenix, Arizona. Northeast was ultimately found to have abused powers as master developer to prevent construction by Gray at a development known as Desert Ridge, in competition with Northeast's project.

That is a plausible real externality because development was stopped. For the Phoenix homeowner, the ability of Northeast to prevent growth amounted to at least a semi-permanent extraction of rent, specifically by blocking a competing developer. This is not just a pecuniary externality because real development was stopped.

While the issue could be addressed through different contractual structures – notably, by excluding a competing developer from the project in the first place – that option may not have been open to Gray, which only purchased the competing land in 2004, i.e., after governance was set for the wider project.

A jury found for Gray on all counts and awarded $110 million. Ultimately the parties would settle on terms favourable to the competing developer. Molot's (2014) account as the funder is unusually open, because Gray consented and aspects of the case were already the subject of press coverage in the *American Lawyer* (Longstreth 2010). Molot (2014) mentions that the case would not have proceeded without funding.

Moreover, the account discloses aspects of funding returns. As of 2014, Molot reports that Burford had achieved a 46% return on investment across concluded cases (Molot 2014: 180). As regards *Gray v Northeast*, Burford earned back its $6 million investment plus a 40% return of net recovery after an attorney uplift.

A copy of Burford's 24 January 2013 update to investors is available via the Wayback Machine and Investegate, although not Burford's website as of 12 September 2025. The 2013 update discloses a 250% return on the *Gray* matter (Burford Capital 2013: 2).

Interestingly, the update also mentions that the settlement involved remitting land to the competing developer Gray. So, litigation funding opened up the landholdings to more competition and likely, therefore, a substantial consumer welfare improvement.

Figure 2 Desert Ridge, Phoenix – In part, the product of litigation funding

(*Source*: **https://desertridgelifestyles.org/**)

Although some later court filings show some subsequent disputes between parties involved, it is still true to say that the apparently thriving community is arguably a product

of third-party litigation funding, including a 250% return on Burford's investment.

Are there excesses in the current UK litigation pattern?

There will be UK readers who think that a 250% return and a $110 million jury damages award sound like the Wild West.

It is worth pausing to consider the *costs* state of play in the UK, even if, strictly speaking, Molot is right that efficiency, and not cost, ought to be the focus.

- The cost of litigation has been far higher than anticipated. The government's 2013 impact analysis estimated a cost of just £31.4m per annum in litigation costs (BIS 2013b: 46 (Option 3)). This will have been exceeded many times over in the 36 pending claims (Simmons and Simmons 2025).

- It is also unclear whether settlements reflect consumer impacts and economic efficiency losses or just the cost of litigation and perhaps defendant tactics. Settlements to date have tended to be relatively low compared with asserted claim value, typically in the 1-2% range.

Headline cost figures have raised concerns about rent seeking in the public debate. For instance, a *Law Society Gazette* interview with prominent claimant lawyer Thomas Goodhead was picked

up in *The Times* in a series of 2024 articles[4]. Goodhead founded Pogust Goodhead using an initial $552 million investment from the US emerging markets investment manager Gramercy, billed as the largest ever litigation funding deal in history (Pogust Goodhead 2023).

In 2022 alone, the firm was reported to have posted a £290 million loss[5]. There was discussion in the press about high pay rates[6]. Ultimately, though, this cost analysis is not the core question from an economic perspective. Many early investments take time to bear fruit. As with the early Burford investment in *Gray v Northeastern*, the real question is not the return on early capital, but the net economic efficiency benefits of the activities.

Goodhead was quite open about his viewpoint here: 'This isn't an NGO though I know we look like one. We are here to make a profit. I'm quite a free marketeer and we're dealing with market failure to compensate for negative externalities[7].'

4 J. Ames, 'Class action claims for "competition law breaches" total £160bn", *The Times*, 28 February 2025 (**https://www.thetimes.com/business-money/companies/article/class-action-claims-for-competition-law-breaches-total-160bn-fk5tqwvtp**); M. Cross, 'Meet the claims firm boss who owes $1bn', *Law Society Gazette*, 27 November 2023 (**https://www.lawgazette.co.uk/news-focus/news-focus-meet-the-claims-firm-boss-who-owes-1bn/5118020.article**).

5 J. Hamilton, 'Pogust Goodhead writes off £4.2m loan to boss amid "material uncertainty" it can continue', *RollOnFriday*, 25 April 2025 (**https://www.rollonfriday.com/news-content/pogust-goodhead-writes-ps42m-loan-boss-amid-material-uncertainty-it-can-continue**)

6 J. Ames, 'Class action claims for "competition law breaches" total £160bn", *The Times*, 28 February 2025 (https://www.thetimes.com/business-money/companies/article/class-action-claims-for-competition-law-breaches-total-160bn-fk5tqwvtp).

7 M. Cross, 'Meet the claims firm boss who owes $1bn', *Law Society Gazette*, 27 November 2023 (**https://www.lawgazette.co.uk/news-focus/news-focus-meet-the-claims-firm-boss-who-owes-1bn/5118020.article**).

However, the negative externalities remained undefined, and at least in the public comments, there is no clear attempt to identify the deadweight loss as the essential justification for the claims. For instance, the firm selected easy cases in which information is already well known and in which deterrence is already likely to have occurred via a fine: 'The firm takes on claims only when the essential facts are not in dispute'[8]. A stronger societal justification would be to develop proof of *new* hardcore cartels and to pursue claims against them.

Rather than getting into the weeds of how investors and law firms interact – interesting though some of the statistics are – the wisest course may be simply to consider how the funding regime can be used to encourage cost control. If successful, the Gramercy/Pogust Goodhead dispute raising concerns about costs would then be a private capital allocation dispute.

8 M. Cross, 'Meet the claims firm boss who owes $1bn', *Law Society Gazette*, 27 November 2023 (**https://www.lawgazette.co.uk/news-focus/news-focus-meet-the-claims-firm-boss-who-owes-1bn/5118020.article**).

Is the funding regime achieving cost control?

The major episode is, again, *Merricks*. As noted in the introduction, this settled in June 2025 for £200 million, split so that approximately £100 million would go to claimants, approximately £45 million in costs, and £55 million in funding return. On the basis that the claim was originally for £14 billion, later upped to £17 billion, one can understand the Tribunal's position that this was 'very far from a success for a class of some 44m claimants' (*Merricks* settlement review [82]).

Depending on how many take up the compensation, a range of £35 to £70 per claimant will be available. The major reason why the *Merricks* settlement seems so unsatisfactory is not just its relative parsimony, nor its extreme delay at 9 years. Rather, it is the dynamic between the class, the class representative and the funder.

The reason why Merricks had to accept such a (relatively) small settlement is that Merricks lost the causation trial. In particular, an assumption that UK fees would reflect a temporary diminution of *cross-border* fees following EC enforcement drew criticism. As noted above, effectively a zero fee was used as a benchmark. While this was econometrically simplifying, it was also a serious abstraction: there may be systems without a specific interchange fee, but in no scenario is payment processing a charity.

Thus, the certification victory in the Supreme Court proved to be false. The same underlying issue arose again, namely the difficulty in proving a link to a problematic overcharge.

Faced with essentially a malinvestment, what happened next was both remarkable and predictable: everyone fell out. The funder, Innsworth Capital, so disliked the idea of settlement

that it threatened to bring arbitration proceedings against its own class representative (Mr Merricks). Mr Merricks was not insured against this possibility. Therefore, Mastercard offered to indemnify him as part of the settlement – strictly, introducing a conflict of interest since at the margin this depresses claimant returns, but one which the Tribunal ultimately countenanced ([103-4]).

What came next raises so many questions about the role of at least some third-party funders that some reform seems inevitable.

The 48p settlement attempt

On 20 May 2025, the Competition Appeal Tribunal approved the settlement in *Merricks* mentioned above. There is always uncertainty based on how many claimants actually come forward to claim, and this affects aspects of returns to investment. It is not as though the money is just left out in the street outside the Tribunal if it is not timely claimed.

At one point, the litigation funder argued that it should be able to claim £179 million – apparently an internal number based on a termination provision in a contract – leaving just £21 million for the class. It would have followed that, if all claiming, the 44 million claimant class would have obtained 48p each. The Tribunal was quick to spot this and rejected it in favour of the £100m/£55m/£45m split between claimant recovery, funder return and costs, implying recovery in the range of £35-£70 per consumer.

Mr Merricks himself defended the settlement on the basis that it was an early claim with high costs of proof, although this seems to relate more to the legal costs than to the proven *harm*, whose shortfall was the real issue. The simple point was that the causation trial had failed, and it had failed because of the great difficulty in proving a relevant economic loss.

The Tribunal settlement review provided significant insights:

- **Current settlement dynamics risk reward for delay**: By the time of settlement, the 9-year *Merricks* saga featured a 'Re-Re-Re-Re-Re-Amended Reply' based on a 'Re-Re-

> Amended Claim form' (*Merricks* settlement review [17]). Funding dynamics drive this. The major reason is that funding increases over time. In *Merricks*, the uplift on return increased sharply at particular dates:
>
> - *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
>
> (*Merricks* settlement review, [133])

A settlement just before September 2025 may, therefore, have been rather unwelcome. Other agreements include the same uplift escalation by date, e.g., *Stephan v Amazon*, which awards costs plus*:*

> - £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.
>
> (Hammond and Stephan v *Amazon,* CPO review, [57])

While the *Stephan* agreement creates *some* incentive to settle, there remain significant returns from delay in all scenarios. In both cases, returns increase substantially for protracted litigation.

From an economic perspective, the carrying cost of capital should be internalised into the funder based on risk-adjusted

cost. Suppose the risk-adjusted cost of capital is £50 million. In such a case, settlement on day 1, or day 1000, ought to cost the class £50 million, for that is the risk-adjusted financial cost of the claim.

This ought not to increase with time any more than a consumer would expect to pay more for a flight delay. There is a time-cost of capital, of course, but it is simply irrelevant to the wronged purchaser, who only wants payment from the lawsuit. The time-cost of capital is just an input into this. Quite why funders have been allowed to charge uplift just for delay is not apparently justified, and it ought to stop.

It may be that the concern is that an early settlement will otherwise create a windfall gain for funders. But as Molot (2014) persuasively noted, that is not relevant. The relevant question is not funder returns, but whether money is moving towards meritorious claims. So, a windfall for speedy resolution of a strong claim ought to be celebrated – and not micro-managed.

There are also some indications of rent seeking:

- **Current settlement dynamics promote rent seeking at the expense of the class:** Following *PACCAR*, the Tribunal is prohibited from allowing funder participation in damages. It remains to be seen whether this is *stricto sensu* a fixed return, but post-*PACCAR* funding agreements do seem to contemplate defined returns. If this is a regime based on regulated returns to capital, then familiar incentives to increase costs arise. This is a classic and well-known regulatory failure, namely, rate packing (Kahn 1988: 53).

- **Current settlement dynamics encourage investment into claims that are already on shaky economic ground:**

When Mr Merricks sought settlement, Innsworth Capital invested into undermining the settlement. Not only did Innsworth trigger arbitration proceedings against Mr Merricks, but they also invested a *further* £300,000 in legal fees. The Tribunal commented that the report was not assistive nor valuable, considering the loss on causation.

The Innsworth thesis seemed to be that it was not rational to accept a settlement before the possibility of appealing the loss of the causation trial had passed. This lawyer's argument – in the worst sense – essentially recommended *more lawyering*. It did not engage in the core question, which is whether it is *economically* rational to continue to litigate considering the societal costs and benefits and not only those of the parties, especially if funded by third parties (Molot 1998).

Innsworth's subsequent attempt to seek judicial review of the Tribunal (Rose 2025) seems to miss the point again. There is no clear articulation of why pursuing an apparently weak claim, even to the point of incurring further judicial review costs, is economically efficient from the societal point of view.

- **Weak legal cost control:** *Merricks* was initially represented by different lawyers. The CAT notes that Merricks was approached by them 'rather than the other way around'. The recent CJC Report (Civil Justice Committee 2025) recommends disclosure of this, not unlike the no-solicitation marketing restriction applied by some US bars, which sometimes prohibits some active marketing by attorneys. Ultimately, a marketing prohibition is a weak recommendation because it will always be a second-order concern to the quality of the underlying lawsuit. Just as one

> would want to hear about a *good* lawyer, one would want to hear about a *good* class action claim – and vice versa.
>
> There is some evidence in *Merricks* that legal costs are weakly controlled, probably, because lawyer incentives do not strongly align to damages and because they are effectively paid out of settlements. There was evidence of weak cost control in the case: *Merricks* [2022] CAT 27 at [26]; [2023] CAT 53 at [11].

The Tribunal noted that its role is not to 'decide the best negotiating strategy but to determine whether the settlement itself is just and reasonable' (*Merricks* settlement review [107]). For its part, the Association of Litigation Funders declined to intervene and said that comments about it by Innsworth were 'unfortunate and misleading' (Rose 2025).

When even the trade association is disowning the funder of the leading case under a new jurisdiction, a great deal is awry.

What other approaches are there to litigation funding?

It is easy to state problems. How might they be improved? A comparative analysis of claims helps to identify areas of good practice.

Jurisdiction	Class action funding dynamics
UK	Third-party funding is allowed. Lawyers can *defer* fees, effectively sharing in success, but without uplift from damages beyond the fee. Neither the lawyer nor the funder can share in damages (*PACCAR*). The funder must show a reasonable return on capital. Consumers only get paid after the case. There are adverse cost risks – the losing party must pay the legal costs.
Evaluation	The UK market has grown but may have struggled to differentiate good cases from bad ones. Cases are not getting much money even in strong cases.
Canada	Similar to the UK. Canada was a close model for the UK. Several key characteristics come from the Canadian model, especially the ease of class certification relative to the US model (*preferable procedure* rather than *class similarity predominance*).
Evaluation	The Canadian model may have proven too alluring to UK policy makers. If unduly easy class certification has been a problem in the UK, which the above case studies support, then this is an inheritance of the ease of class action certification in Canada.

Germany	A mass claims collection model is emerging in which claimants assign their claims to a legal services provider (*Inkassozession*)[9]. The assignment model is used to overcome the lack of an express opt-out regime. Formally, Germany only authorises certain bodies to bring representative claims (*Musterfeststellungsklage* = model action for declaratory judgment). There are also new devices for declaratory judgment following *Dieselgate* and the implementation of the EU Collective Redress Directive. To get around this, claims managers attempt to buy claims ex ante and to consolidate them. In the claim assignment model, claim collectors may require a debt collection licence (*Trucks* – Munich 2020). The assignment model is still developing and faces further legal tests. However, the Federal Court of Justice had no issue with the implicit contingency fee nor the assignment of the right to settle (*Air Berlin* insolvency 2021).
Evaluation	There are many differences between common law systems such as that of England and Wales and civil law ones such as the German, but in principle, the claims assignment model by which claims are bought out early on is of wider application. A requirement to buy out a portion of the claims, e.g., 5%, prior to class certification draws inspiration from the German assignment model. Although this model is at an early stage, there is no reason why the principle of *some* ex-ante payment could not be adopted in England and Wales. By rewarding early robust evaluation, this would help to prevent speculative claims.

9 J. Grothaus and M. Erb, 'German Federal Court of Justice facilitates bundling of claims' *Linking Collective Redress*, Linklaters LLP, 9 August 2021 (**https://www.linklaters.com/en/insights/blogs/linkingcollectiveredress/2021/august/german-federal-court-of-justice-facilitates-bundling-of-claims**)

US	Many states allow third-party funding, but an increasing number are seeking to regulate it. In federal antitrust claims, loss is consolidated to the first purchaser to keep things simple (although the states differ). Effectively, class consolidation under Rule 23 FRCP allows a lawyer to create a market in claims. Provided that the class is certified, attorneys can build books of claims and participate in the upside of damages. Notice works as the main limiting factor: the costs of notice are a very real risk in cases of loss. For instance, as part of *In re Payment Card Interchange Fee Merch Disc Antitrust Litigation ('Interchange Fees')*, 36.1 million notices were posted, and 1.5 billion online adverts had to be bought. Unlike England and Wales, there is very limited/no adverse cost risk in most cases. This may encourage speculative claims to prompt settlement for less than the associated legal fees.
Evaluation	The worst excesses of the US system are driven by the lack of adverse cost risk. As this is absent from the English system, which does impose adverse cost risk on litigants, the concerns about US excesses may well be overstated. There is a tendency towards caricature rather than study of the specifics of the US system. Notice works as a rough and ready metering device to weed out the very weakest cases, as it requires upfront sunk costs in the millions (Yeazell 1997: 698-699). This is an important reminder that requiring attorneys and funders to invest upfront is often sensible. Purchasers get paid large amounts if the law is broken. The upside to lawyers is large, but it is arguably also merited. • In *Interchange Fees*, Judge Gleeson awarded attorneys' fees equal to 10% of damages, thereby uplifting attorney fees from $160 million to $544.8 million.

- However, merchants got $5.6 billion in damages. So, while there was investment, it was *efficient* investment (assuming that the case outcome is correct).

This is a strongly favourable outcome to the (rejected) attempt to settle *Merricks* for 48p per UK consumer at an asserted cost of £179 million. *Merricks* almost seems like the Poundland version.

Therefore, consolidation of claims into the direct purchaser layer seems to generate significant economies and to bring meaningful and effective relief without duplicative claims down the supply chain.

The three underlying concerns from the start of the paper are:

> (1) Cases are not getting much money, even against hardcore cartels;
>
> (2) Some low-quality cases have crept in, but they are mixed up with stronger ones, which ought not to be undermined by reform;
>
> (3) Cases are very slow.

By far the most interesting point from the comparative survey is that an ex-ante payment to *some* consumers could be required, on the German model. This would help to address all three points:

- **Money to cases:** The early payment in the German model is particularly attractive because requiring the early identification of a subset of claimants (e.g. 5%) proves that there is a good prospect of the remaining 95% claiming in cases of success – so only those cases for which people would actually claim move forward. Fewer but stronger cases would result.

Even litigation funding surveys seem to suggest that c.£50 is required for more than 20% of people to claim, perhaps irrationally dropping to 12% if they know that the claim is large (Thorndon Partners 2025: 9). But some claims are much smaller: £35-70 in Merricks; just £2-£10 for salmon. Are such claims worthwhile? The requirement for seed payment would prove it before any court time is taken up. This addresses the very real debate about whether consumers will claim, even if cases are successful.

- **Case quality:** An ex-ante payment on the German model would help to focus litigation on high-quality cases, as the costs of early payment fall disproportionately on weak cases. Strong cases should not have any issue with upfront payments. Further, requiring prior payment to some (not all) of the class will prove that people claim, i.e., that there is a point in bringing the litigation.

- **Delay and capital management:** Both the US and German models encourage efficient approaches to capital management by the funder because they are not rewarded for delay. The very sharpest criticism of the UK model is that it seems to pit *funders* against classes (*Merricks*). Inevitably, there must be some reform here, as a class action regime can hardly tolerate funders looking to trigger arbitration proceedings against *claimants*. Importantly, if funders are required to make a public offer of their estimate of loss, then there is no need to supervise the costs incurred by them: competition will discipline this, as another funder could outbid the funder by offering more to claimants (while assuming prior costs).

On this approach, litigation funders would have to prove that a minimum viable scale will claim *before* incurring the substantial societal costs of litigation.

This sharply corrects the current rent-seeking risk by which lawyers and funders get paid at least a portion of their fees from relatively low settlements. The fact that few claimants will claim in such a case is not a problem for the lawyers and funders, as they still get paid.

Against this it will be said that this embraces elements of opting in, which failed before. However, only a portion of the class need be paid (e.g., 5%) – and even in an opt-out, they must be identified eventually (to be paid). If the claim cannot identify at least 5% of the affected people and get them to sign up for free money, then that is an indication that the claim ought not to be brought. It is, on those facts, a hopeless and wasteful exercise.

Further, vague cases such as 'self-preference' would carry real risks. The proposal essentially puts the onus on a claimant such as Professor Stephan to pay the merchants something before coming to court, rather than just asserting that they have been treated unfairly. If there truly is over £2 billion in damage, as the claim alleges, then some ex-ante payment – even in the millions – is not much for the court to ask.

Speed would also increase. Once the funder commits to and pays its estimate of damages to a subset of claimants, it has much less incentive towards delay, as that capital is irredeemably committed.

A regulator tasked with oversight might need to consider:

1. **A non-discrimination rule in damages such that *all* consumers get the same amount.** Thus, the funder would choose, e.g., £100 per consumer and would then be committed to that number, with the *rest* of the consumers able to claim if the funder wins the case. As this collectivisation of loss

estimate is the essence of a class action, the rule is hardly objectionable, but it is essential to prevent abuse based on transaction costs within the class, which otherwise might encourage low payments later on.

2. **Advertising.** As funders retain the balance of undistributed damages, there is a need to ensure that successful class actions are promoted. Under this paper's proposal of minimum book size before litigation, cases would anyway have to refocus on fewer larger claims. So, this aspect is somewhat self-correcting, as the advertising requirement decreases commensurately in larger and more worthwhile claims.

Ultimately, funders would have to evaluate losses and take a position. If they manage the case well or prove more damage than they have paid, then they would be able to keep a return to that entrepreneurship. This answers the point from Coffee (1986, 2015), Molot (2009, 2014), Yeazell (2018) and Maton[10] that entrepreneurship has a role here: yes, but only if the return reflects proven competitive harm and not just incurring costs.

The Tribunal could continue to focus on distinguishing economically sound claims from those without such a basis.

Carriage disputes – disputes as to which representative leads the case – would also move from being beauty parades. This heeds an important warning from Coase (1959). The Tribunal would not need to determine carriage disputes based on unreliable perceptions of claimant sophistication. It could simply allow

10 A. Maton, 'Warnings about an unchecked rise in mass litigation are simply wrong', *Global Legal Post*, 22 July 2025 (https://www.globallegalpost.com/news/warnings-about-an-unchecked-rise-in-mass-litigation-are-simply-wrong-611764308).

funders to bid against each other over how much they will pay the claimant class.

This is an important dynamic because it means that the possible exploitation of the class action transaction costs would be corrected: underpayment by funder A would prompt a buyout by funder B who, by promising more to consumers, will make a margin; just less. The early funder would be paid off, covering their costs, and the consumer would get more damages, with the new funder keeping any margin between the old estimates and the new ones after those payoffs. Competition would therefore come to competition law claims.

Finally, the adverse selection dynamic driving speculative claims would be corrected (Akerlof 1970). If there is an incentive towards complexity to justify costs and away from simple large claims to avoid perceived excesses in returns, then that would no longer arise because the return would simply be the damage, minus the payment to claimants.

How much money the funders make would not be relevant, as indeed it is not from a public policy perspective. Provided that payments to purchasers are maximised by competition between funders, how much the funder gets as a return does not then affect purchaser welfare. So, the payment to the wronged purchaser, and not the return to the funder, would quite rightly be the primary focus.

The single best aspect of a requirement for ex-ante damages payment to a portion of the class is that it puts the focus squarely back where it belongs: on the purchaser with the strong claim.

Conclusion

This paper has shown several shortcomings in the UK class action system. These are no more than are to be expected in a new regime, but they also require attention:

1. Cases are not getting sufficient payment in strong claims;

2. Many economically weak claims are filed;

3. Cases are slow and seem to encourage cost overruns.

It is debatable whether these are regulatory or market failures. In any event, no strong market in *claims* has emerged in the UK because it is unclear who owns them. The crucial information failure is that it is very hard to trade over how much claimants will be paid at a sufficiently early stage.

There is a simple solution which addresses all three problems. It is to get funders to put their money where their mouth is by buying a portion of claims for a publicly disclosed amount before class certification.

There is no reason why the Tribunal could not insist on a minimum viable scale of seed payout before class certification. This could not be applied to all claimants – or it is not a class action – but a threshold rule that a minimum payment must pass to purchasers (e.g., 5% of them) before class certification could have a powerful role.

This also provides crucial information to the market about the valuation of the claims, enabling stronger competition between funders for them. This is clearest with an example. If it truly is the case that claimants lost £2.6 billion as alleged in *Stephan v Amazon* or the £17 billion peak damages estimate in *Merricks*, then it is not asking much for a funder to buy a minimum number of claims for a public amount before proceeding to class certification and thus a real live lawsuit.

The funder would simply have to estimate the loss using professional advice. It would then be committed to that loss number. It would face strong incentives to control legal costs, which would no longer need to be supervised by the court, as the funder would want to minimise them both to maximise its returns and to minimise the risk of buyout by a more efficient funder. This aligns funder and claimant incentives on legal fees.

Moreover, the Tribunal would no longer have to supervise returns on capital. That would simply be a matter for the funder, having committed to the damages estimate at the certification stage. This:

1. Puts money into the pocket of purchasers rather than lawyers from day 1.

2. Sharpens incentives to bring only meritorious claims, such as hardcore cartels, and not adventuresome and economically unsound claims like *Boundary Fares*.

3. Speeds up justice, as the funder must bear the time-cost of the payment.

In summary, then, the paper recommends the following policy options for consideration as policy makers consider the right direction for the next ten years of the regime:

1. **Prior purchase of some claims.** As above, funders could be required to purchase, e.g., 5% of claims before class certification. This increases the focus onto the stronger claims, as the risk impact is greater in weaker cases. It also ensures that there is enough money in the case for purchasers to claim, i.e., that it is worthwhile, *before* it begins.

2. **A market for claims.** Because funders would have to show the price of purchase, it then becomes possible for a market in claims to emerge. If another funder thought that it could offer more, it could simply buy out the claims.

3. **More muscular class certification to distinguish strong cases from weak ones.** Some relatively weak classes have been certified, which essentially argue that markets *might* have worked better. There is much promise in recent Tribunal cases which have differentiated more sharply between strong and weak cases. There is still work to do. Some cases have rightly been discerning (*PRS*), but others have played along with allegations, essentially, that *markets might have been better*, as distinct from alleging concrete harm to competition (*Amazon*). Claimants should more openly identify how they promote economic efficiency by specific articulation of how they attenuate deadweight loss. If parties have innovated, i.e., decreasing deadweight loss, then they should not be challenged on precisely how they did so, as this can inadvertently penalise innovation. Most of this lies with the Tribunal, but an innovator's defence could be considered in legislation.

4. **Consolidation of loss.** Some of the most difficult chapters have involved attempts to prove the distribution of loss down a supply chain. From an economic perspective, the point is to deter harmful activity. That can be done using just one consolidated lawsuit, provided that it is large enough. This is simple and practical. It is also possible to change the framework now, because the underlying requirement to consider losses throughout supply chains is derived from EU, and not UK, legislation.

5. **Internalisation of cost management via public statement of damages estimate.** If *PACCAR* is reformed, then it will be possible for funders to take more risk and reward again. This is preferable to sliding into rate-of-return regulation, which can encourage cost inflation and weak claims (so as to justify costs of proof). This dynamic is much to be avoided, especially if there is to be regulation of the sector. Instead, the appropriate regulation would be market-based, reflecting the requirement to state an estimate of damages early on as part of the seed payment to a portion of claimants (e.g., 5% of claimants). Once the funder makes its public offer, it would then be bound to it by a non-discrimination rule to avoid exploitation of the claimant class. Costs management would then fall to the funder and not to courts or the regulator, except perhaps as to ensuring that advertising of any wins to potential later claimants is adequate. Divergent interests between funders and claimants would be addressed through competition, as funders could outbid one another in damages terms for the right to pursue the claim and thereby profit from it.

These recommendations would help to focus the regime onto the strongest cases, as was always its intention.

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The Institute of Economic Affairs
2 Lord North Street
London SW1P 3LB
Tel 020 7799 8900
email iea@iea.org.uk