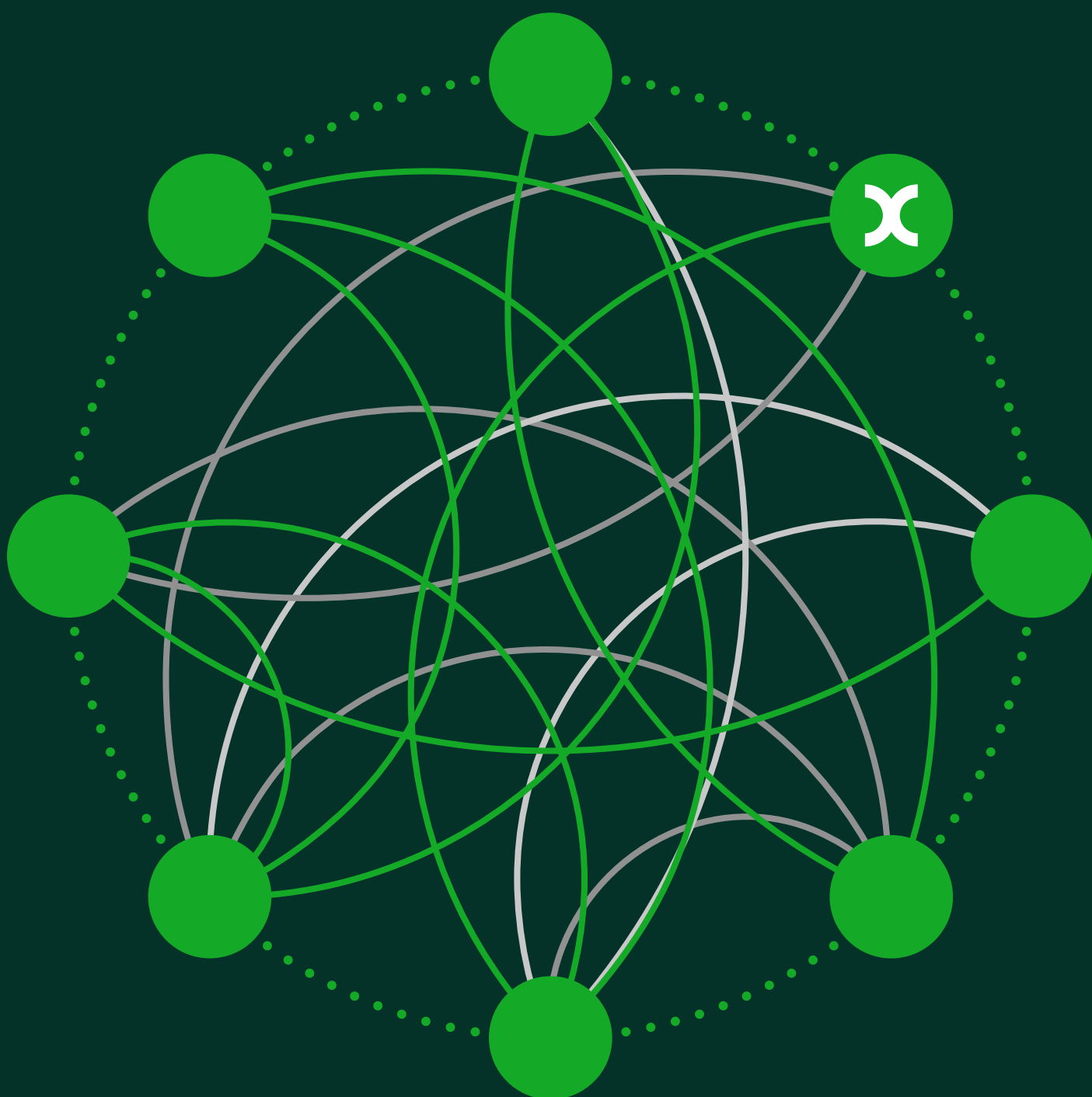


Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement



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Oxera's response to the DBT's consultation

25 September 2026



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Defined Terms

Term	Definition
ATE	After-the-event
CAT	Competition Appeal Tribunal
CBA	Cost–benefit analysis
Consultation Document	DBT (2026), ' Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement ', 17 July.
CPO	Collective Proceeding Order
CPR	Civil Procedure Rules
DBT	Department for Business and Trade
DfT TAG	Department for Transport Transport Analysis Guidance
FCA	Financial Conduct Authority
GCR	Global Competition Review
GLO	Group Litigation Orders
IO	Industrial Organisation

Introduction

In July 2026, the then Department for Business and Trade (DBT) launched a consultation concerning a series of proposed reforms to the legal framework surrounding competition redress, enforcement and regulatory appeals in the UK.^{1 2} The consultation aims to make these processes swifter and simpler, to the benefit of both businesses and consumers.³

At Oxera, our purpose is to use economics to allow for better, more informed decision making, and we are delighted to have the chance to lend an economic perspective to these important questions. Oxera is one of Europe's foremost economic consultancies. Founded in 1982 as economic advisers on regulation and privatisation in network and utility industries, Oxera now uses economics, finance and data science to inspire better decisions across a range of sectors and areas of policy and law, including competition law.

We provide services in the context of many of the processes referred to in the DBT's document, including in particular opt-out collective action and regulatory appeals (as well as initial determinations). Examples of our work include:

- Acting as economic experts in litigation cases (including opt-out collective actions), where we assess whether any damages are likely to have been caused by alleged breaches of competition law, and if so what the level of these is. We act for both claimants and defendants.
- Advising governments and regulators on the optimal design of regulatory frameworks.
- Advising and supporting regulated entities concerning their submissions to regulatory determinations (and appeals of these).

¹ We note that the DBT has subsequently been reorganised as the Department for Business, Innovation, Science and Trade. As this reorganisation superseded the launch of the consultation, we continue to refer to the DBT for the purposes of this document.

² DBT (2026), '[Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement](#)', 17 July. We henceforth refer to this as the 'Consultation Document.'

³ Consultation Document, page 7.

As economic experts, we respond to the DBT's consultation to seek to contribute to the policy debate. We have identified a number of questions posed by the DBT where we believe that an economic lens—combined with our practical experience working on the issues concerned—can provide valuable input to the DBT. In particular, these questions are organised into four themes:

- 1 The proposals in relation to changes to the certification standard for opt-out collective actions ('Topic 1'), where we respond to [questions 4, 5 and 6](#);
- 2 Proposals on alternative routes to redress ('Topic 2'), where we respond to [questions 22, 23 and 24](#);
- 3 The interaction of private litigation with public enforcement ('Topic 3'), where we respond to [questions 28 and 29](#); and
- 4 Proposed changes to the regulatory appeals framework ('Topic 4'), where we respond to [questions 47, 53 and 64](#).

Topic 1: Proposals on changes to the certification stage of collective actions



Question 4: Do you agree that specifying that 'suitability' should relate to absolute suitability and that this will ensure merits are considered as part of the certification threshold, providing a more meaningful filter? [Yes / No / Not sure]
Please explain your views.

We disagree with this statement as presented.

We consider this to be an overly simplified characterisation of the certification process. Refinements to the certification criteria may well be merited based on concerns identified by the DBT, but specific changes to the CAT Rules in respect of the criteria for certification will need to be considered carefully to avoid the risk of unintended consequences.

The Consultation's framing of 'absolute' suitability does not provide sufficient clarity as to the changes in standards applied that are proposed. The government may consider clarifying to what extent relative suitability should still be taken into account, and what an increased emphasis on the merits would imply at certification stage. With regard to whether a more thorough assessment of the merits of a claim at certification would be a meaningful way to increase the efficiency of the process, we would note that the government should consider the following.

- Claims already undergo a rigorous review with regard to their merits by litigation funders and after-the-event (ATE) insurers before committing capital to a claim.
- Whether costs are actually lowered or just incurred earlier in the process through a thorough assessment of the merits at the Collective Proceeding Order (CPO) stage.
- Whether current CAT case management discretion may already provide alternative ways of addressing the DBT's concerns.

We expand on these points in our response below.

The distinction between 'absolute' and 'relative' suitability was explored explicitly by the Supreme Court in *Merricks*. Lord Briggs, in the majority judgment, noted that suitability could mean suitability 'in the abstract', or suitability relative to the alternative of individual proceedings, and placed considerable weight on the latter interpretation given the purpose of the collective proceedings regime. In particular, it was explained that a difficulty in estimating loss should not necessarily prevent certification where essentially the same difficulty would arise in an individual claim.⁴ By contrast, the minority placed greater emphasis on whether the proposed methodology offered a sufficiently robust basis for estimating class-wide loss, including whether it could reasonably and fairly be applied across the class.⁵

The test in question is of course a legal one, but frequently rests on the extent to which the issues raised by the claim can be fairly and proportionately resolved through an economic methodology, and indeed, it was the discussion of the class representative's proposed pass-on methodology that motivated the Supreme Court's discussion in *Merricks*. Against that background, the proposed question, in Oxera's view, oversimplifies the issue and abstracts from the economic nuance presented in the *Merricks* judgment.

'Absolute' versus 'relative' suitability does not map neatly onto the extent to which economic merits will or should be tested at certification. Rather, while the point was discussed with reference to an absolute/relative suitability distinction, our understanding of what *Merricks* sought to achieve (and a filter that makes sense economically) was a test that reflects a balance between examining whether the economic methodology provides a workable basis for collective assessment and avoiding turning certification into an early determination of the substantive merits of the claim.

In this sense, presenting the question in the abstract, as a binary choice between 'absolute' and 'relative' suitability does not accurately capture the policy problem or the appropriate solution.

⁴ *Merricks* [2020] UKSC 51, paras 55–57.

⁵ *Ibid.*, paras 152–55.

The Consultation does not appropriately define an 'absolute' suitability standard and what it would imply for a merits test

Imposing an 'absolute' standard as a new development immediately begs the question of the precise standard to be applied if the test is not going to be entirely abstract or uncertain.

Simply recasting the test as one of 'absolute' suitability may not be, in our view, the most coherent or effective means of achieving a more meaningful filter if one is needed. For a filter to be 'meaningful' in the economics sense, it should not be judged simply by whether it would result in more cases being blocked, but whether it allows for faster or more efficient identification of the economically strongest cases. The consultation document implies that a focus on absolute suitability standards will lead to earlier consideration of a case's strength and merits, but it is ambiguous what additional 'merits tests' proposed collective proceedings will be subject to.⁶

In particular, the Consultation states:

[the] test should not stop at whether it is suitable for a claim to be brought as a collective, rather than individual, proceeding. It should include [sic – consider whether?] it is proportionate for a claim to be brought using the opt-out collective proceeding mechanism. This will lock in consideration of merits as part of the threshold as laid out in statute.⁷

This appears to allude to a separate 'proportionality' test to be introduced, but it gives no indication of how this will differ from the existing cost–benefit consideration. The reference to 'as laid out in statute' is opaque, as it fails to identify the relevant statute. If the government's aim is, as stated, to provide 'greater predictability for all than evolution via case law', it should be explicit and consult appropriately on the precise merits standard to be introduced. If any standard is to be introduced through changes to the CAT Rules, consideration should be given to the implications for existing cases and the regime as a whole; new or changed criteria, particularly with a low

⁶ Suitability is, in essence, defined by rule 79(2) of the 2015 CAT rules. These do not include, at least directly, any consideration of the merits or strengths of the claims. These are instead identified in 79(3) specifically with respect to the question of Opt-in vs Opt-out, the application of which has recently been clarified in *Evans v Barclays* as the consultation correctly point out at para. 24. The DBT's view of the effect of applying 79(2) under an absolute standard (if this is the suggestion), the implications for the merits test to be applied over and above the *Evans* precedents, and the evidence expected at certification, is unclear.

⁷ Consultation Document, para. 19.

degree of specificity, are likely to result in referrals from the CAT to higher courts, resulting in delays and uncertainty across existing cases while those matters are resolved.

In any event, as set out in more detail in the subsection 'Merits testing is not free' of this response, any such test should be realistic about the extent of economic and factual evidence likely to be available at the start of the proceedings, and recognise that antitrust litigation (be that class based or not) frequently raises novel questions, complex analyses and gives rise to the need for the application of previously untested methods.

A test which effectively allows information asymmetries or the requirement for novel methods to become a barrier to certification, even if precisely the same issues would arise in any individual proceedings on the same matter, is likely to result in material consumer harms remaining unredressed and curtail the effectiveness of private competition law enforcement in the UK.⁸

Relative suitability would remain a relevant consideration even under an 'absolute' standard

Focusing on the question as applied to economic methodology, we broadly agree, as suggested in para. 29 of the Consultation, that suitability should not be reduced to the narrow question of whether opt-out proceedings are preferable to the same matter being brought as individual claims (which could number in the millions for a wide class). For competition-related harms relating to consumers, this will nearly always be the case. The economic methodologies applied are complex and frequently require market level data, such that a series of individual claims would generally be wasteful and duplicative.⁹

However, this is not to suggest that relative suitability should not, practically speaking, be considered by the CAT at the certification stage. Even under an 'absolute' standard, the availability of alternative modes of redress, such as proceedings constituted around a differently defined class, will still be relevant considerations for the effective resolution of the economic issues. A tribunal applying an absolute test

⁸ We also note that para. 27 of the Consultation Document states that the 'original intent was for the certification process to provide a meaningful safeguard against novel or unmeritorious claims'. We would stress that while safeguarding against unmeritorious claims is important, the regime must be open to novel claims to be effective, given fast changing natures of business models and consumer behaviour.

⁹ We note the same may not be true of other types of claim, such as product liability.

cannot, as a matter of logic, ignore the existence of a clearly superior alternative configuration.

In particular, there may be situations where a class claim is 'relatively unsuitable' even when it is more suitable than individual claims. For example, bringing separate class claims for consumers in different sectors of the economy may provide a more proportionate and viable methodological basis for resolving a claim than a single 'economy wide' claim. The CAT should have regard to the meaningful practical alternatives available to the proposed claimants when considering suitability, not just the alternative of individual claims.

Significant merits testing takes place before any claim is brought

In considering any changes to the standards to be applied at the certification stage, the government should also take into account that the majority of claims typically undergo a rigorous review with regard to their merits before they are brought.

First, litigation funders and ATE insurers conduct extensive due diligence before committing capital to a claim. Research regarding litigation funding in England and Wales prepared for the Legal Services Board in March 2024 found that funders typically accept only 3–5% of all cases pitched to them, with funders' investment committees, which frequently include experienced silks, providing a further layer of scrutiny.¹⁰ These are not perfunctory commercial assessments. They involve detailed analysis of the merits of the substantive law, the strength of factual and expert evidence, and the prospects of defending against likely counterclaims.

Specialist economic consultancies, including Oxera, are sometimes engaged by funders to assist in such early stage assessments of potential claims, providing both a review of the strength of the economic arguments relied upon and early stage assessments of the magnitude of potential damages. These analyses receive considerable scrutiny from funders and influence their decision of whether to proceed in funding a claim or not.

This important aspect of how claims are filtered was not, in our view, given sufficient weight in the Consultation discussion. A substantial volume of cases never reaches certification because funders and

¹⁰ Mulheron, R. (2024), '[A Review of Litigation Funding in England and Wales](#)', p. 33 (last accessed 14 September 2026).

insurers have already filtered them out on merits grounds. The Consultation does not appear to have engaged with this pre-certification layer, and this represents a gap in the evidence base underlying the proposal.

Second, expert economists who produce the reports presented to the CAT alongside certification applications exercise their own professional judgement as to whether a claim is sufficiently meritorious to warrant their endorsement. Expert witnesses put their name to a CPO report and have a professional duty of independence: cases where the estimated harm does not exceed the margin of noise in the analysis are effectively filtered out at this stage too. In our experience, proposed claims frequently fail to proceed following a 'negative' opinion from an economic perspective, and in our experience experts are independent and rigorous in scrutinising any cases in which their opinion is sought.

Mechanisms are in place to maintain such standards. An expert's ongoing participation in antitrust litigation is critically linked to the trust put in them by courts to provide their independent and well-founded opinion. In the longer run, an expert's integrity and credibility will be questioned if they endorse any claims and arguments that are weak on the economic merits. In addition, the CAT Practice Direction has emphasised the high burden on experts to be transparent in their conduct.¹¹

It is important that any new legislation takes account of this wider context and the numerous stages and stakeholders involved in the merits screening of potential claims.

Merits testing is not free: the trade-off with certification costs

A core point to consider in the context of this proposal is that raising the merits bar at certification does not eliminate the costs of merits assessment. Instead, it moves them earlier in the process.

All cases will eventually be subject to a full assessment of liability, causation, and quantum, whether at the certification stage, at a preliminary issues hearing, or at trial. The question is therefore not whether to conduct this assessment, but when. There is a genuine policy choice to be made between:

¹¹ CAT (2025), '[Practice Direction 3/2025. Expert Evidence](#)', paras 5–11 (last accessed 14 September 2026).

- a light-touch certification with a heavier subsequent process (the broadly prevailing current model);
- a more rigorous certification front-loaded with more detailed evidence and potentially longer hearings, potentially allowing for a more straightforward process at subsequent stages.

Neither approach is inherently superior, but it is important to be explicit about this trade-off.

In this context, it is worth keeping in mind the limitations of the evidence available to claimants at the class certification stage, which may prevent them from providing the appropriate evidence for a thorough merits assessment at that point. Typically, class actions involve groups of consumers from whom the Class Representative cannot easily compel information, with much of the relevant information available only to the defendants. This information asymmetry constitutes a significant hurdle for claimants in competition litigation, as acknowledged for instance in Recitals 14–15 of Directive 2014/104/EU (the EU Damages Directive).

Disclosure is the process by which this gap is addressed and is often necessary for claimants to evidence their case. Any legislation considered should keep this issue in mind to avoid meritorious claims failing to be certified because of a tension between the timing of disclosure (which would not usually take place prior to certification), and significant emphasis on the merits of a case at certification.

The proposal thus appears to sit in tension with an objective of short, efficient certification hearings of limited scope and without pre-action disclosure. If 'absolute suitability' is to carry genuine analytical content, it will require more substantial reports, more disclosure, and longer hearings. It is not possible to have both a rigorous merits filter and a low-cost certification hearing. Any policy proposal should be clear about which objective it is designed to prioritise, and explain how the trade-offs should be managed.

Making the most of CAT case management discretion

It should be emphasised in considering any change to the certification process that the CAT already has extensive discretion over case management to allow for efficient resolution of class claims. In particular, the CAT has in the past made use of preliminary issues trials and split trials, which can function as an effective merits filter in

practice.¹² The advantage of this approach over a heightened certification merits test is that it allows the case to be narrowed to the specific issues that are genuinely in dispute, after at least some disclosure has taken place and the parties have had an opportunity to understand each other's positions. This avoids the problem of asking a tribunal to conduct a rigorous merits assessment in an evidential vacuum.

The government may consider encouraging the tribunal to make wider use of this discretion to identify critical issues within claims that can be effectively and promptly decided. For example, it could issue guidance to emphasise that preliminary issues hearings that reduce costs to the first substantive judgment should be favourably considered, even when they extend case timetables as a whole. In practice, determinations of preliminary issues are likely to have wider positive effects, encouraging settlements within a given claim and providing legal and economic clarity for claims that concern analogous issues. By contrast, a case that takes all issues to full trial, only to settle at the point, provides no such wider benefit.



Question 5: Do you agree that making the cost benefit analysis part of the statutory certification threshold test will guard against the risk of claims being brought that carry disproportionate cost when compared to the benefit delivered to the underlying class? [Yes / No / Not sure] Please explain your views.

We agree cost benefit analysis at the certification stage is a valuable exercise, but only if applied in a practical and robust manner.

Costs and benefits of proceedings are already considered by the CAT during the certification process. The proposal of greater emphasis on cost–benefit analysis (CBA) as part of the certification threshold as framed raises a number of important questions about how ‘costs’ and

¹² See, for example, *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* (Causation Judgment) [2024] CAT 14, determining a preliminary ‘pass-on’ issue within the Merchant Interchange Fee Umbrella Proceedings; and *Spottiswoode v Nexans France SAS and others* [2025] CAT 68, determining a preliminary ‘pass-on’ issue heard jointly with the related London Array proceedings.

'benefits' are to be interpreted by the CAT. A CBA is most useful when put on a clear conceptual footing with regard to the question it is trying to answer and the trade-offs it is asked to consider in any particular case. Specifically, in the context of a litigation, it would lead to different outcomes depending on whether it is used to evaluate the costs and benefits of that claim to society, to the claimants or any other group. Lessons can be drawn from established economic practice as to how CBAs can be most effectively applied.

Cost–benefit analysis in public policy

CBA is a well-established tool in UK public policy, used by government departments to appraise the value for money of proposed interventions before they are adopted. Its use is governed by HM Treasury's Green Book,¹³ the UK government's mandatory guidance on appraisal, which is also the basis for the regulatory impact assessments that must accompany new legislation. Under this framework, the object of a CBA is not typically a specific financial return, but the wider 'social value' of a proposal for residents of the UK, encompassing monetisable and unmonetisable costs and benefits, distributional effects on different groups in society, and risk and uncertainty.¹⁴ As an organisation, Oxera has extensive experience as practitioners conducting CBAs in the UK and elsewhere in line with government guidance. Oxera has also contributed to UK guidance including HM Treasury's Green Book, DfT TAG (Department for Transport Transport Analysis Guidance) and Financial Conduct Authority (FCA) CBA.

CBA is generally a useful and important tool for decision-making, as it provides a consistent framework for evaluating options (against one another or in isolation). CBA analyses can be adapted to focus on only specific costs and benefits, making them a flexible tool for evaluating decisions, including cases where the decision is made with a specific objective in mind. In principle, it could be beneficial to apply this framework in the context of class certification. However, a CBA is only meaningful when put on a clear conceptual footing with regard to the question it is trying to answer and the trade-offs it is asked to consider. The Consultation remains vague about this, as explained below.

¹³ HM Treasury (2026), '[The Green Book. UK Government Guidance on Appraisal](#)', (last accessed 16 September 2026).

¹⁴ HM Treasury (2026), '[The Green Book. UK Government Guidance on Appraisal](#)', (last accessed 16 September 2026), paras 2.4–2.6.

Under the proposed scope of the CBA, the 'costs' and 'benefits' to be considered are not clearly set out

The DBT proposes that the CAT should put more emphasis on the question of whether claims carry disproportionate costs when compared with the benefit delivered to the underlying class, and that take-up by the class should be a factor in this assessment.¹⁵

The concern that some certified proceedings have generated very substantial returns for advisers and funders while delivering limited compensation to class members is a legitimate policy problem, and the existing framework may not have provided sufficient tools to address it. However, the proposal's central terms 'cost', 'benefit' and 'underlying class' are not defined in the consultation, and the choice of definitions will determine which cases are admitted or excluded by the threshold. It would be informative, and minimise uncertainty for claimants and defendants, to be explicit in any forthcoming legislation or guidance about the scope of each of these terms, since different reasonable choices lead to materially different outcomes.

For instance, it appears that in mentioning the 'returns for class members' and 'costs of hiring lawyers and economic experts', the consultation proposal considers a CBA from the perspective of the direct impact on the class. This is of course an important consideration given the context of the regime, and also been the CAT's practice in past applications of Rule 79(2)(b). For example, in *Waterside*, as well as *Rowntree v PRS*, it would appear that the CAT considers the benefit to the class to be defined narrowly as the amounts of damages actually claimed by (i.e. distributed to) the class. Benefit is then measured against what goes to 'stakeholders' (lawyers and funders), which the CAT treats as costs, not a form of benefit.¹⁶

More broadly however, it should be noted that a CBA assessment at the societal level would look very different. From a societal perspective, the costs of the claim are the process costs associated with the claim (which would include any process costs on the defendants' side, for any third parties, and in respect of the CAT). However, the societal benefits of a claim would then constitute broader and potentially more indirect

¹⁵ Consultation Document, para. 29.

¹⁶ *Waterside Class Limited v* (1) Mowi ASA, (2) Mowi Holding AS, (3) Grieg Seafood ASA, (4) SalMar ASA, (5) Lerøy Seafood Group ASA, (6) Scottish Sea Farms Limited [2026] CAT 32; *Rowntree v Performing Right Society Ltd* [2025] CAT 49 (full case name: Mr David Alexander de Horne Rowntree v (1) The Performing Right Society Limited and (2) PRS For Music Limited).

benefits, such as the deterrence value of a claim which would lead to fewer breaches of competition law in the future.

In the following, we set out a range of benefits and costs that the government may wish to consider in any guidance on the interpretation and scope of a CBA in the context of a class certification.

'Benefits' of proceedings could go beyond financial compensation received by the class

The consultation's framing of benefits as those 'delivered to the underlying class' implies that the only relevant benefit is the financial compensation received by identified class members. Defined in this way, the benefits side of the CBA may disregard elements of the social value of many proceedings. We would consider that the following categories of benefit may be relevant to the assessment, and the government may wish to include them in any explicit guidance for the CAT to consider in the context of a CBA.

Indirect compensation to class members, including through cy-près distributions

Where sums cannot be distributed directly to class members, for example because individual claim values are too small to make distribution practicable, or because class members cannot be identified, distributions to cy-près beneficiaries or to bodies such as the Access to Justice Foundation represent a genuine social benefit even if it may carry less weight than direct transfers to the class. In addition, class members may benefit indirectly from distributions to these beneficiaries through their work.

In some cases the overlap may be substantial. For example, a damages award for users of a bus network could be used to establish a fund to reduce fares or improve quality of that network for a given period to the benefit of passengers (who are likely to be the same passengers who suffered the earlier overcharge), even if the size of the award and/or class members' lack of access to digital tools limited traditional distribution. From an economic point of view, a 'hard to reach' class expected to receive few direct distributions should not be deprived of an effective indirect or cy-près means of address such as this (assuming one is available) simply because the mechanism is not a direct cash transfer.

Direct deterrence benefits and prevention of ongoing harm

Private enforcement of competition law generates benefits that extend beyond the compensation recovered by the class. A successful action can deter the defendant, and others, from continuing or repeating the infringing conduct, generating ongoing benefits for the class and potentially consumers who may not be parties to the proceedings at all. Deterrence effects of competition claims can be direct, in the sense that a successful claim may end an ongoing infringement, thereby benefitting ongoing and future customers who will not suffer the same harm.

Such benefits will not always apply. In a follow-on case where the conduct has already ceased, there is no direct incremental incentive benefit to consumers. However, where conduct is ongoing and having an allegedly material effect on consumers, it would seem illogical to exclude such benefits from consideration. Consider a case where the conduct has only recently started. From an efficiency point of view, the best outcome would be that a claim is brought quickly to allow the conduct to be addressed, and all consumers protected. It would be economically incoherent if a class representative was in effect required to wait until the historical harm from the conduct had built up to a level such that the retrospective damages distribution was sufficient to justify the (now likely greater) costs of bringing the case.

Indirect deterrence benefits

In addition, active private enforcement may deter other companies from anticompetitive conduct, or incentivise them to safeguard against it. This point is particularly important in the current enforcement landscape: as the volume of private enforcement cases before the CAT has grown, private actions are increasingly performing a deterrence function that complements for public enforcement by the CMA. Where either direct or indirect deterrence effects are likely significant, this may be a dimension that the CAT could take into account. Such effects would seem particularly relevant where there conduct in question has not been subject to a competition authority fine in the UK, such that the private action represents the only deterrent response the infringer will face for the conduct at issue.

Value of legal clarification and precedent

Many competition claims raise novel legal questions in a fast evolving business environment. A claim that allows the CAT to consider and provide legal precedent for some of these novel questions in competition law can benefit the understanding of future matters, and as such provide a wider benefit.

The social value of a given sum of money may not be uniform across all recipients. In particular, some groups of people may derive higher benefit from a given sum, either because it is more relative to what they already have, or because they are otherwise financially vulnerable or disadvantaged. It may be meaningful for the CAT to take this dimension into account, where it is relevant, and consider whether such benefits need to be given greater weight than others.

In addition to the various types of potential benefits, it should also be noted that the Green Book makes explicit provision to account for any risk and uncertainty inherent to potential benefits. Any estimate for the compensation due to class members is necessarily preliminary and uncertain at the CPO stage, before defendant data and disclosure is made available. As such, where the benefits side of the CBA rests on a preliminary damages figure, the CAT may wish to consider the range of plausible outcomes implied by the claimant's methodology, rather than placing too much weight on any single point estimate. A claim that appears borderline on a preliminary figure may look rather different once disclosure has taken place.

'Cost' should be assessed on realistic and proportionate assumptions

On the costs side, the proposal raises several questions that the government may wish to address explicitly.

First, consideration might be given to whether the defendant's costs and business disruption should form part of the social cost calculation, not only the claimant's legal fees. A CBA that counts only claimant-side costs against claimant-side benefits would risk presenting an incomplete picture of the social welfare calculus. Conversely, it is noted that declining to certify a claim based on projections of the defendant's legal costs may risk undermining the effectiveness of the regime, particularly for any smaller claims where the projected costs for the claimants may be materially smaller than those of the defendants. We also note the claimant's ATE insurance premia, while not a direct cost measure in the economic sense, could, if included, proxy for such costs, as they in part reflect the expected cost exposure to the defendants in the event of a loss.

Second, it may be worth clarifying in any legislation or guidance that the CAT could assess costs across the realistic range of outcomes, rather than treating worst-case costs-to-trial as the only relevant benchmark. In practice, many certified cases settle before trial, at substantially

lower total cost. An approach that weights costs by the realistic range of outcomes, including the possibility of early settlement, may therefore give a more accurate picture than one that projects automatically to a full trial. Equally, the CAT will need to be cognisant of potential optimism bias in early stage budgets or damages estimates and be prepared to critically consider the potential for costs overrunning or awards declining.

Third, there may be merit in providing that the CBA should be conducted on the basis of costs that would be incurred under proportionate and reasonable conduct by both parties. Where either side makes strategic choices that inflate the cost of proceedings, it would seem undesirable for those inflated costs to become the measure against which the benefits of the claim are assessed. Guidance or legislation might usefully empower the CAT to form a view on reasonable costs and to take into account any evidence that costs have been driven up by deliberate tactical decisions.

Fourth, and in line with the considerations on social benefits of litigation discussed above, it is also worth considering if there are social costs to litigation. As mentioned in the context of costs to the defendants, litigation typically diverts resources within a business. This may chill legitimate business activity and ultimately lead to wider economic costs. This may be a particularly relevant consideration for smaller, nascent defendants, for whom the relative incremental cost of managing litigation is substantial.

Finally, the CAT should recognise that the returns received by funders (currently normally determined as a multiple of costs) in the event of a successful claim do not reflect economic cost of that funding. Funders will provide financing for a portfolio of claims, some of which will not succeed, resulting in the loss of the funders investment in those cases and the effective 'cross subsidisation' of such cases from successful claims. The cost of funding on the assumption of success is therefore an upward biased estimate of the overall economic cost of litigation funding, which would more coherently be measured with reference to the opportunity cost of that funding (i.e. the investors' notional cost of capital).

Any threshold should be applied flexibly, not as a rigid pass/fail test

The proposal as framed implies a binary outcome: either the benefit to the class outweighs the cost, in which case the claim proceeds, or it does not. We would caution against this interpretation and indeed the Green Book does not recommend making judgements based on benefit–

cost thresholds.¹⁷ A rigid pass/fail approach would fail to capture the range of circumstances in which the case for certification is genuinely more nuanced.

In particular, in the presence of benefits that are not easily measurable, such as where a class is composed of vulnerable consumers, where the infringement is particularly serious, or where the primary purpose of the proceedings is to modify ongoing unlawful conduct rather than to recover historical losses, there may be good reasons to proceed even where a narrow accounting of direct financial compensation does not exceed projected legal costs. Conversely, where the CBA is clearly and substantially negative even on the broadest definition of benefits, that is a strong indicator that the opt-out mechanism is not the appropriate vehicle and that alternative routes, such as regulatory action or ombudsman schemes, may be better suited to delivering redress efficiently.

Any legislation or guidance should therefore allow the CAT to exercise genuine judgement in weighing costs and benefits, rather than applying a formulaic test. This would ensure that the regime is proportionate and purposeful, while preserving the flexibility to address the full range of cases that may come before it.



Question 6: Do you agree that the Tribunal should consider whether there is sufficient evidence for aggregate damages as one of the factors relevant to certification? [Yes / No / Not sure] Please explain your views.

We disagree with the statement as written. An economically plausible method and an effective means of evidence gathering are more relevant considerations than the immediate availability of evidence.

The proposal does not specify what would constitute 'sufficient evidence' for the assessment of damages on an aggregate basis at the

¹⁷ HM Treasury (2026), '[The Green Book – UK Government Guidance on Appraisal](#)', para. 6.96 (last accessed 15 September 2026).

CPO stage of a claim, and how this would practically alter their existing assessment of the suitability for aggregate damages already captured by Rule 79(2) of the CAT rules. The Consultation does not specify whether sufficient evidence should exist at the CPO stage of a claim, or whether the proposal considers that the CAT should undertake a forward-looking assessment about whether sufficient evidence is likely to be obtainable in the fullness of time.

As explained in our response to Question 4, a fundamental issue with the certification stage of a claim is that the evidence and data required for an aggregate damages assessment (such as transactional records, pricing information, cost data, internal documents) is, in competition cases, often held by the defendant. Prior to disclosure, a claimant's expert is working from publicly available sources that will rarely be sufficient to support a precise or detailed estimate and may, indeed seem 'insufficient'. However, treating the evidence as such would ultimately penalise claimants for a gap that is not of their making.

Alternatively, we would interpret the proposal as requiring the CAT to consider whether, as the proceedings progress, sufficient evidence is likely to become available to enable the assessment of damages on an aggregate basis.

Economic experts are frequently asked to estimate the magnitude of figures that cannot be measured with certainty. The methods used for this purpose are varied and are adapted to the data and information actually available. For example, in the absence of quantitative data, economic modelling drawing on market-level information is commonly used. In the absence of transaction-level data, aggregate data can be used instead. Data gaps can be filled with extrapolation based on reasonable assumptions.

'Sufficient' information, in the sense of a complete or ideal dataset, is not the norm in this kind of assessment. The normal task is to work with the gaps in the available evidence and to produce as precise an estimate as the circumstances allow. Where information is scarce, the resulting estimate may carry more uncertainty, and this can be reflected and accounted for in the analysis. It is rare, however, for an expert to be unable to find any information capable of supporting a damages estimate.

Given this, we would consider that the appropriate standard is one of methodological plausibility: whether the claimant has set out a credible approach to calculating damages, applicable to the information that is

likely to become available, rather than a requirement for complete or sufficient evidence at the outset.

Topic 2: Alternative routes to redress



Question 22: Do you agree that the simpler approach outlined in relation to assessing quantum is likely to make the use of redress schemes less burdensome? [Yes / No / Not sure]
Please explain your answer.

We agree that simplified approaches will be pragmatic in many cases, but should never undermine the case-specific nature of the exercise.

Oxera agrees that in many circumstances a simpler approach to assessing quantum could reduce the burden associated with redress schemes. Clearly, any scheme will need to be based on a realistic assessment of the degree of precision that is achievable and proportionate, given the available data and the value and scope of commerce involved. These considerations will also apply to an expert's quantum assessment in any private redress or litigation setting.

However, we consider that the proposal to apply an assumed (or presumed) level of overcharge—with possible sources for the setting of the level based on OECD guidance of academic studies—is unlikely to prove effective or practicable in many cases.

In general, fair redress means that consumers or businesses harmed by infringements of competition law should receive compensation reflecting the loss they have suffered, seeking to minimise either under- or overcompensation. This is the standard under which private redress is determined through the courts, and a redress scheme overseen by the CMA would need to apply the same standard to avoid material inconsistencies between public and private awards redress arising. It is anticipated that any simplification of the approach to assessing quantum will therefore aim to preserve, and not compromise, the objective of awarding compensation that reflects the harm suffered.

We set out our concerns with this proposal below, followed by some recommendations on alternative approaches.

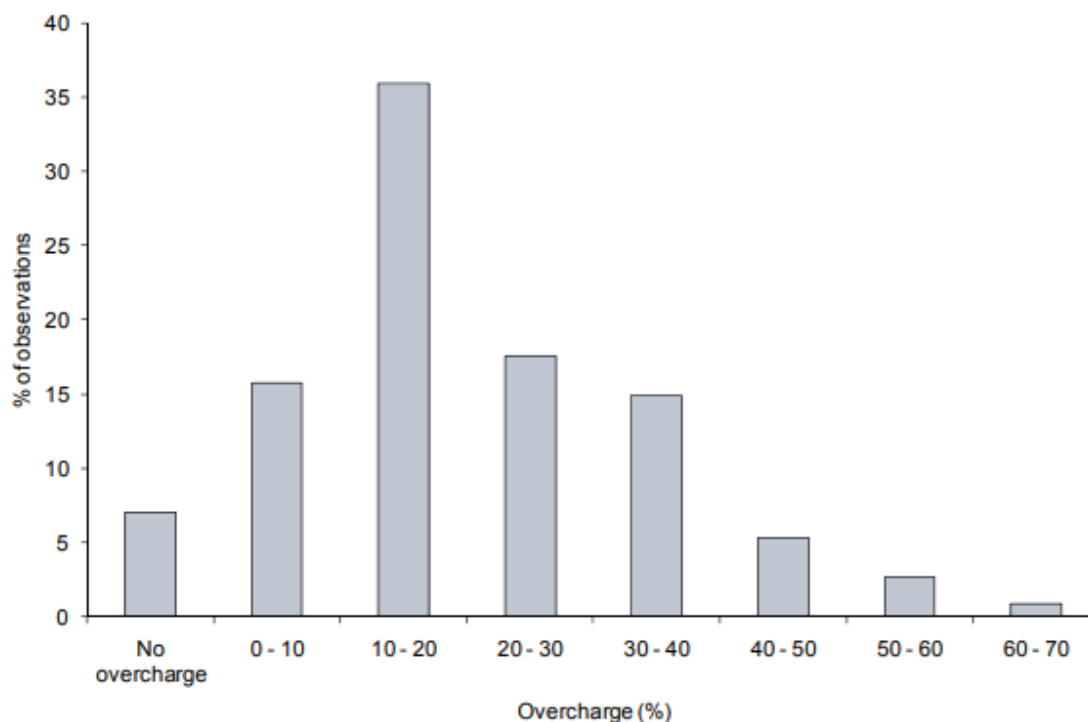
Overcharges and counterfactuals are varied even in cartel cases

Competition infringements, and the markets in which they occur, vary substantially. The archetypal (and perhaps most conceptually straightforward) example of a competition infringement is that of a cartel. In these cases, assessing the non-infringement counterfactual is relatively straightforward: it is assumed that there is no cartel and that competition functions normally in the market.

However, the range of conduct that can fall under the 'label' of cartel activity is diverse, and different types of infringing behaviour and market contexts can give rise to materially different economic effects. It is well established that there is wide variation in the level of overcharge brought about. This is shown in Figure 1 below, reproduced from the Oxera 2009 paper which set the economic framework for the quantification of antitrust damages.¹⁸

¹⁸ Oxera et al. (2009), '[Quantifying antitrust damages: Towards non-binding guidance for courts](#)'.

Figure 1 Distribution of cartel overcharges in empirical studies of past cartels



Source: Oxera et al. (2009), [‘Quantifying antitrust damages: Towards non-binding guidance for courts’](#), p. 91. This was based upon the dataset compiled in John M. Connor and Robert H. Lande [2008], ‘Cartel Overcharges and Optimal Cartel Fines’, *Issues in Competition Law and Policy*, Volume 3.

This paper found a median cartel overcharge of 18%, and a mean of 20%. However, it also clearly demonstrated a large degree of heterogeneity in the level of overcharges associated with cartels. For instance, inspection of the above figure shows that while the 10–20% group represented the single largest category into which overcharges fell, it still accounted for only just over one-third of observations.

This wide dispersion in cartel overcharges is a finding consistently reached by other studies. For instance, the DBT specifically cites an OECD paper as a source of a possible level of presumed overcharge.¹⁹ This paper proposes that competition authorities assume a 10% price effect in the case of cartels, in specific circumstances, and further suggests that empirical evidence from four meta studies finds the

¹⁹ Consultation Document, p. 40.

median cartel overcharge falls between 16% and 23%.²⁰ The underlying data to these meta studies also show substantial variation in overcharge estimates. For example, Boyer and Kotchoni report that, in their study of 1,119 cartels, approximately 70% of observations fall within the range of 0–49%, indicating significant dispersion.²¹ While Connor (2024) reports a median overcharge of 23%, the mean is 121%, driven by a significant 'long-tail' of high overcharges, while remaining the case that half of overcharges in that study were below 23%.²²

In other words, using the median to estimate the overcharge in any given cartel within the study creates a risk of significantly overestimating or underestimating the true overcharge.

Non-cartel infringements pose even bigger challenges

The challenges associated with a presumed quantum are greater when the counterfactual is uncertain. As noted above, cartels represent the most straightforward form of competition law for this purpose, because the likely conduct absent the infringement is often relatively simple to identify.

The counterfactual may be more complex for other infringements, particularly alleged abuses of dominance under Chapter II, as well as other potential Chapter I infringements, such as vertical agreements. In those cases, the appropriate counterfactual will depend on the nature of the conduct and its effects.

This means that, in order to reach any sensible approximation of the impact of anti-competitive behaviour, one must have regard to potentially many other factors, such as how the conduct may have affected the market structure that would otherwise have prevailed, including the products available, the identify of purchaser or purchasers, and their purchasing decisions.

In some cases, there may be some indication of this: for instance where a competition authority has conducted an 'effects based' analysis in order to demonstrate an infringement. However, these exercises are not ordinarily conducted with a view to being sufficiently accurate to inform

²⁰ Organisation for Economic Co-operation and Development (2025), '[Assessing the impact of competition authorities' activities](#)', p. 21. The circumstances in which a 10% presumption is recommended are those in which a competition authority is seeking to assess the effect of an intervention to prevent a cartel, where no case-specific data is available.

²¹ Boyer, M. and Kotchoni, R. (2015), '[How much do cartels overcharge?](#)', Figure 1.

²² Connor, J.M. (2024), '[Price-Fixing Overcharges: Revised 4th Edition](#)', 8 June.

a damages calculation exercise. In other cases—for instance, ‘by object’ infringements where a competition authority chooses not to perform an effects-based analysis—there may be little, if any, evidence as to the counterfactual on which to base a damages assessment at all.

As such, it would not necessarily be possible to go from an infringement decision to an appropriately defined redress scheme without further work to specify the precise nature of the counterfactual, even under a simplified approach to quantum. Even if the CMA was able to undertake this analysis, claimants may dispute the counterfactual (particularly where different groups of claimants exist, potentially at different layers of a supply chain), negating the benefits of the redress scheme.

Other considerations

We also note that an approach to pass-on may need to be specified as part of any simplified quantum methodology where the infringement may impact multiple layers of a supply chain, and in practice, any approach is likely to be challenged by one or more groups of claimants as the rate of pass-on determines the level of damages owed to any individual claimant or claimant group.

A simplified approach to quantum may have limited take-up or distort incentives

A single assumed overcharge for any given infringement type is therefore unlikely to provide a meaningful or equitable measure of harm across all cases. Depending on the infringement and market concerned, it may result in consumers being either overcompensated or undercompensated.

Both outcomes are detrimental.

- If the ‘average value’ applied is too high for the specific infringement (overcompensation), it is likely to be challenged by the parties under investigation, potentially delaying the investigation or driving costly appeals. In the longer run, an observed tendency by the CMA to apply to schemes is likely to have a chilling effect on the degree of cooperation shown by firms, and in particular on their incentives to apply for leniency, particularly as such high values could become reference points for claimants bringing private damages claims in the UK or elsewhere.
- If the ‘average value’ applied is too low for the specific infringement, resulting in under-compensation, harmed parties

are more likely to seek redress separately through litigation, thereby negating the cost-saving benefits. Even leaving this dynamic aside, while such 'understated' values are likely to be attractive to alleged infringers, potentially driving cooperation and settlement with such parties (which may also make them attractive to a competition authority that is resource pressured), such under-compensation will by definition leave the harmed parties without full redress, and in the long run diminishing the effectiveness of the competition regime.

Recommendations

Given the above issues, we do not consider that adoption of an assumed (or presumed) level of overcharge is desirable in the context of redress schemes.

However, there are some cases where a simplified approach to quantum may be appropriate. For instance, where the aggregate value of the likely harm is too small to support the costs and risks of opt-out collective proceedings, accepting a proportionately lower degree of precision may be preferable to providing no redress at all.

This does not, however, mean that a standard assumed overcharge is necessarily the best approach in these specific cases. Rather, the assessment should remain specific to the infringement and market concerned. For example, it may be possible to use less resource-intensive methods, such as industrial organisation (IO) models or analysis based on public data, instead of detailed economic analysis requiring extensive disclosure. Although such methods may produce a less-precise estimate, they would retain a relationship between the estimated quantum and particular conduct, market conditions and available evidence.

The case for such an approach is strongest where the infringement and its effects are relatively straightforward, the affected parties can be identified with reasonable confidence, and issues such as pass-on and volume effects have limited impact. Simplification would therefore concern the proportionality and evidential intensity of the assessment, rather than substituting a general presumption for case-specific analysis.



Question 23: What changes to the Competition Act 1998 (Redress Scheme) Regulations 2015 could be made to simplify requirements for redress schemes?

The degree of uptake of such schemes is likely to be a commercial decision, made by businesses following consultations with their advisers. While recognising that the existing provision for such schemes has not been successful in achieving uptake, which suggests that there may be some benefits to simplification, we consider that certain elements are important to preserve.

In particular, as noted in response to Question 22 above, we do not consider that widespread adoption of a presumed level of overcharge is likely to be desirable (or even practicable) in the vast majority of cases. We therefore consider that reforms to the requirements for redress schemes should maintain a provision for the level of harm to be determined for the specific infringement, in an appropriate and proportionate way consistent with the principle set out in response to question 22 above.

In this regard, we note that the current requirements for voluntary redress schemes contain requirements for the involvement (on the scheme's board) of both an independent economist and an individual well-suited to represent the interests of potential claimants.²³ We would expect that these (or similar provisions) would be capable of being preserved—ensuring an appropriate degree of economic expertise and claimant interest is represented, and guiding an appropriate degree of case-specific analysis.²⁴

In this regard, we consider that determination of the level of overcharge (and other parameters affecting overall damage) is a role which is best performed by an external/third-party individual or body; rather than (for instance) the CMA itself. This is because the CMA's primary role is to

²³ Competition and Markets Authority (2015), '[Guidance on the approval of voluntary redress schemes for infringements of competition law](#)', para. 2.45.

²⁴ For instance, we note that the existing provisions acknowledge the possible use of external economic experts where necessary to provide input on particular issues, but suggest that this degree of involvement should overall be significantly less than in many private litigation cases. See Competition and Markets Authority (2015), '[Guidance on the approval of voluntary redress schemes for infringements of competition law](#)', para. 2.63.

investigate and establish infringements. Determining the compensation due to affected parties is likely to require a different analysis, including a more precise assessment of the counterfactual, the effects on different groups of purchasers and, where relevant, the extent of pass-on.

Introducing this role to the CMA would increase its administrative burden, and could (for instance) add significant complexity to many of its processes—for instance, infringing firms may see proposed findings by the CMA in this regard as contrary to their future interests (whether through litigation or redress schemes), and so seek to rebut such findings particularly aggressively.



Question 24: Do you consider that the protection from duplicative damages liability outlined is sufficient to incentivise use of redress schemes where an infringement of competition law has been found? [Yes / No / Not sure] Please explain your answer.

Unclear: the incentive effects are uncertain and depend on wider context.

In practice, we do not consider that protection from duplicative damages liability is the only incentive for the use of redress schemes where an infringement has been found. Other incentives are likely to be material, including the extent to which the redress scheme reduces the cost, time and uncertainty associated with litigation for defendants and claimants. This, in turn, depends on the specific design of the redress scheme.

Topic 3: Interaction with public enforcement



Question 28: Do you agree that it is necessary to intervene to support public enforcement work on cartels at this time? [Yes / No / Not sure] Please explain your answer.

We agree that on the balance of available evidence that there is potentially substantial benefit in providing further support to public cartel enforcement in the UK.

The effectiveness of the CMA's public enforcement work

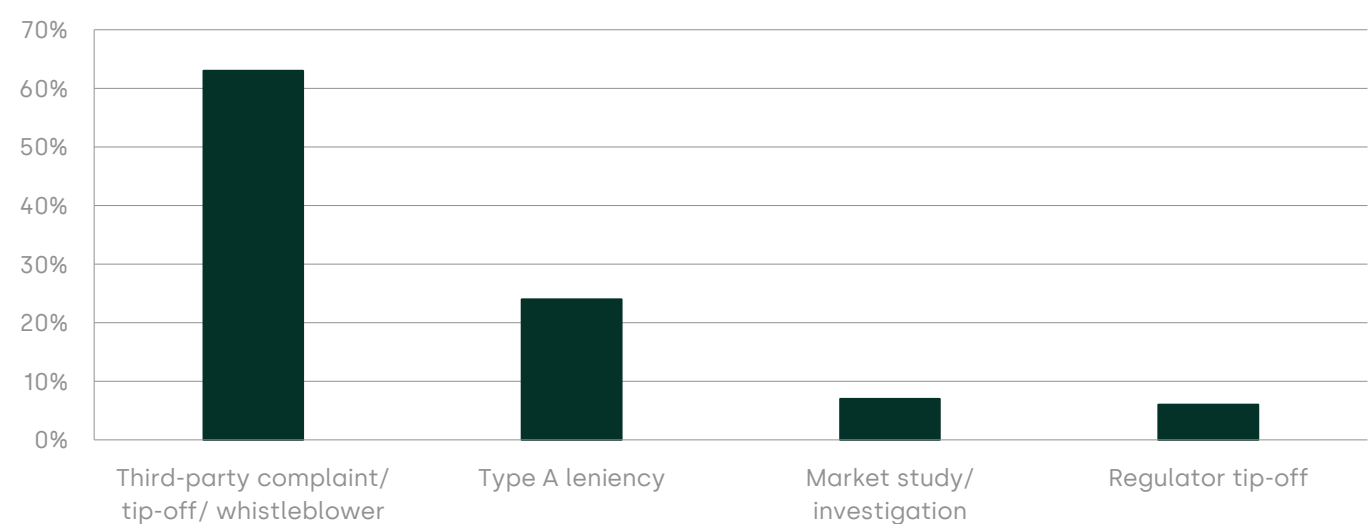
The CMA deploys a broad toolkit of investigative powers, legal sanctions, and cooperation schemes for cartel enforcement:²⁵

- market intelligence and data analysis to identify suspicious patterns of conduct and market anomalies in the context of ex officio investigations;
- cooperative mechanisms through which parties or individuals may come forward, include whistleblowing mechanisms and leniency programs;
- investigative powers include dawn raids on business premises and searches of the homes of implicated companies' officers or staff;
- imposition of corporate and civil penalties against cartel participants, and criminal sanctions may also be brought against implicated individuals.

In practice, the cooperative mechanisms offered by the CMA has led to the largest number of investigations initiated in recent years (see Figure 2 below, which is drawn from analysis carried out by the law firm CMS).

²⁵ Competition and Markets Authority (2019), '[How the CMA investigates cartels](#)' (last accessed 4 September 2026); and Slaughter and May (2025), '[Navigating the new cartel enforcement landscape](#)' (last accessed 4 September 2026).

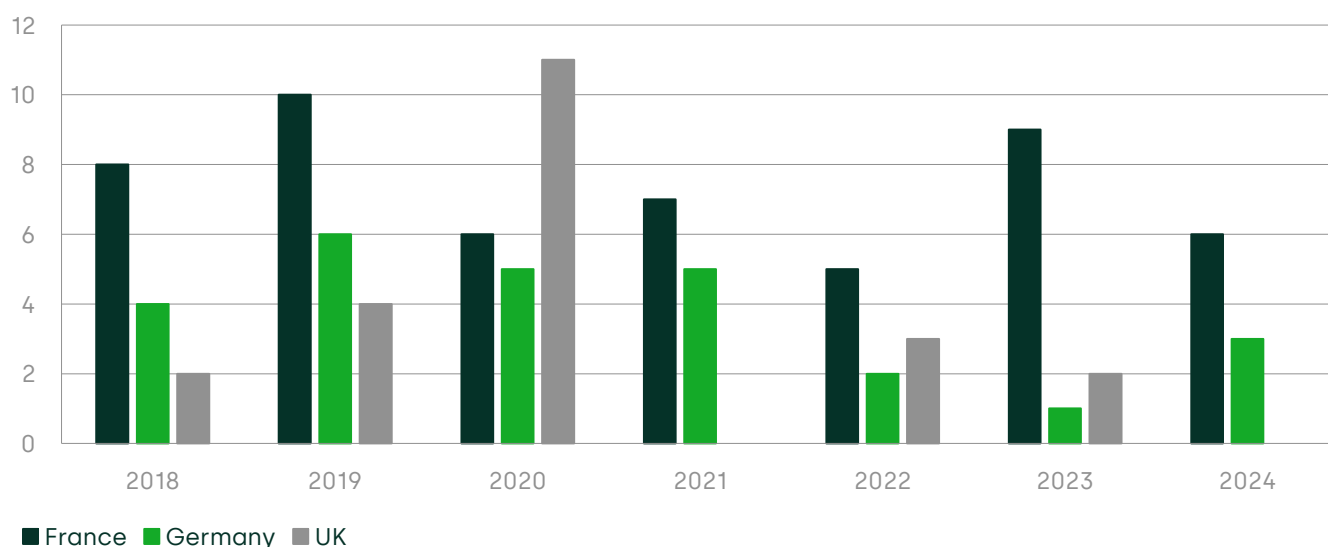
Figure 2 Reasons for initiation of investigations from the period March 2000 to 31 May 2024



Source: Oxera analysis of CMS (2024), '[UK competition law enforcement – Decoding the CMA and CAT's decisions](#)', 24 September (last accessed 4 September 2026).

In recent years, concerns have been raised about the comparatively limited scale of public competition enforcement in the UK. Following Brexit, there was an expectation that UK public enforcement might increase as the CMA assumed responsibility for cases previously dealt with at the EU level. This has not materialised—indeed, as Figure 3 shows, over the period 2018–24, the number of cartel decisions involving a fine in the UK was substantially lower in the UK than in France, with the exception of 2020, and was also lower than in Germany for most of the period.

Figure 3 Total number of cartel decisions imposing fines



Note: the CMA adopted no cartel decisions in 2021 and 2024.

Source: Autorité de la Concurrence (2026), '[Rapports d'activité](#)' (last accessed 15 September 2026); Competition and Markets Authority (2026), '[Competition Act public register of decisions](#)' (last accessed 15 September 2026); and Wegner, A.C., Janssen, H. and Janka, S. (2025), '[Germany: FCO tightens grip on cartels with increasing number of dawn raids and court proceedings](#)', *Global Competition Review*, 16 June (last accessed 14 September 2026).

Given the important role of public enforcement in detecting and sanctioning anticompetitive conduct, these developments may warrant additional support for public enforcement on work on cartels. In the context of this consultation, we focus specifically on the UK leniency regime and the extent to which private enforcement actions may undermine the effectiveness of the leniency policy.

UK leniency applications: disincentives from follow-on damages actions

While third-party complaints and tip-offs are the main trigger for investigations, leniency programmes remain a relevant source (see Figure 2 above).²⁶

This role is well-grounded in the economic literature. The theoretical literature has established that leniency programmes can significantly

²⁶ As the CMA's Interim Executive Director for Competition Enforcement noted in December 2024, around half of the CMA's cartel cases have originated from leniency applicants, with the other half stemming from the CMA's own detection activity, including its informant and whistleblower reward programme.

enhance enforcement effectiveness. By creating a prisoner's dilemma among cartel members, as formalised in Harrington's game-theoretic framework, leniency programmes undermine cartel stability: since any participant may report the cartel to the authority in exchange for a reduction in sanctions, the mutual trust necessary for collusion to persist is eroded.²⁷ This theoretical conclusion has been corroborated by subsequent empirical work, which has shown that well-designed leniency programmes increase detection rates and deter the formation of new cartels.²⁸

Nevertheless, there is evidence of a decline in leniency applications in the UK in recent years.

- According to the CMA, the number of Type A leniency declined from an average of 21 Type A leniency applications per year between 2014 and 2016, to eight per year between 2022 and 2024.²⁹
- Global Competition Review (GCR) enforcement data further shows that the average number of reported UK leniency applications declined from 19 per year between 2014 and 2016 to 15.5 per year between 2022 and 2023.³⁰

We note a similar trend in the EU, where the number of applications initially increased, reaching a peak of 60 in 2011 before declining substantially thereafter to 13 in 2022 (see Figure 4).

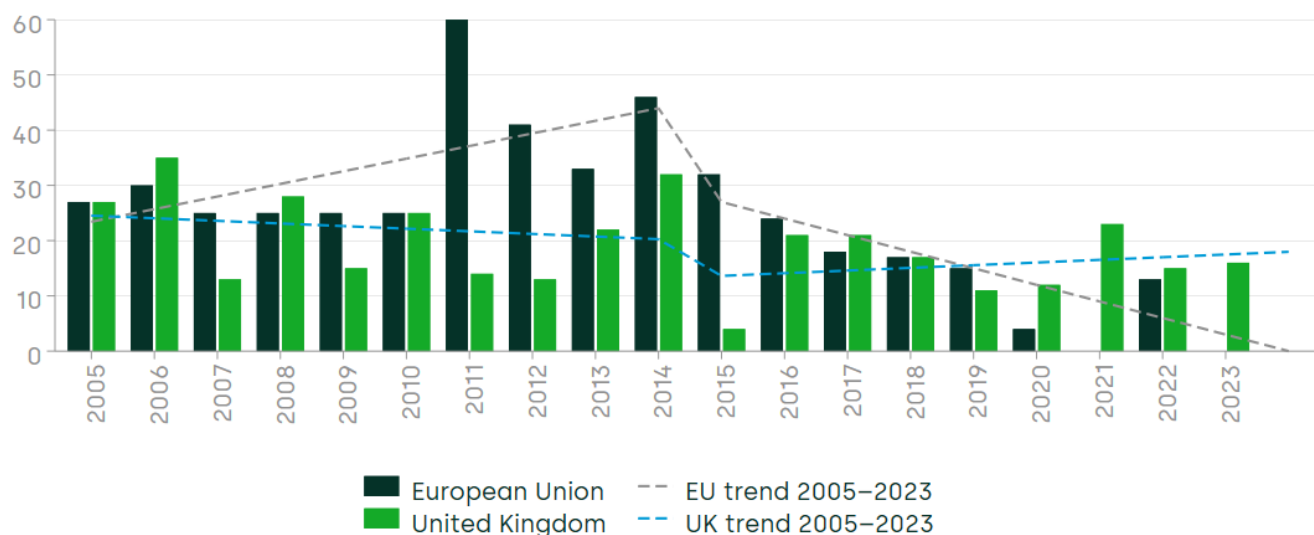
²⁷ Harrington, J. (2008), '[Optimal Corporate Leniency Programs](#)', *The Journal of Industrial Economics*, **56**:2, June, pp. 215–46; and Motta, M. and Polo, M. (2003), '[Leniency programs and cartel prosecution](#)', *International Journal of Industrial Organization*, **21**:3, March, pp. 347–79.

²⁸ Miller, N.H. (2009), '[Strategic Leniency and Cartel Enforcement](#)', *American Economic Review*, **99**:3, pp. 750–68; and Borrell, J-R., García, C., Jiménez, J.L. and Ordóñez-de-Haro, J.M. (2024), '[Short and Long Run Effects of Leniency Programs on Cartel Stability and Prosecution](#)', *Journal of Competition Law & Economics*, **20**:3, September, pp. 181–205.

²⁹ Department for Business and Trade (2026), '[Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement](#)', Public Consultation, 17 July (last accessed 4 September 2026), p. 44, para. 104.

³⁰ We note that the two sources do not seem directly comparable to each other. In particular, we consider that the GCR data may cover other types of leniency applications and is likely to differ in scope and methodology to the CMA data. Both data sources corroborate the same over trend, of lower levels of leniency activity in recent years than in earlier periods. Global Competition Review (2026), '[Enforcement Index](#)' (last accessed on 7 September 2026).

Figure 4 Number of EU and UK leniency applications



Source: Oxera analysis of Global Competition Review (2026), '[Enforcement Index](#)' (last accessed on 7 September 2026).

One positive explanation for decline in leniency applications is that leniency programmes have themselves contributed to a reduction in cartel activity. This is because, as mentioned previously, effective leniency programmes may destabilise existing cartels and deter their formation in the first place.³¹

However, survey and empirical evidence point to a further explanation: the increasing exposure of leniency applicants to private damages actions may weaken firms' incentives to seek leniency.³² As mentioned in this consultation, existing leniency programmes in the UK reduce or eliminate an applicant's exposure to public fines, but do not eliminate its liability towards parties harmed by the cartel.³³ Indeed, by disclosing an infringement and providing evidence to the competition authority, a leniency applicant may facilitate subsequent private damages claims.

This creates a trade-off in the decision to apply for leniency: the expected benefit from avoiding or reducing a public fine must be weighed against the expected costs associated with private

³¹ Motta M. and Polo M. (2003), 'Leniency Programs and Cartel Prosecution', *12:3, International Journal of Industrial Organization*, pp. 347–79.

³² Ysewyn, J. (2020), '[Immunity and Leniency Survey 2019/2020](#)' (last accessed 7 September 2026).

³³ Department for Business and Trade (2026), '[Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement](#)', Public Consultation, 17 July (last accessed 7 September 2026), pp. 41–45, paras 96–105.

enforcement. As the expected exposure to private damages increases, the net benefit of applying for leniency may therefore fall. This may not only reduce applications once a cartel has been formed, but also weaken the destabilising effect of leniency on cartels.³⁴ Consistent with this, survey evidence indicates that around 70% of respondents expected EU leniency to become less effective with the 2014 Damages Directive, with most attributing this to follow-on damages legislation.³⁵

The interaction between public and private enforcement therefore seems to depend on the design of a leniency policy: limiting the private damages exposure of the first applicant could strengthen the incentive to report early and, by increasing uncertainty among cartel members as to who will report first, make cartels less stable and potentially more difficult to form.³⁶

We note that the CMA published updated enforcement guidance in October 2025, including updates to the leniency regime designed to reinforce first-mover incentives. For Type A applicants specifically, the updated guidance now reserves guaranteed immunity from financial penalties, director disqualification, and criminal prosecution exclusively for them.³⁷ It also removes the requirement to admit to cartel behaviour at the point of first disclosure, deferring that admission to a later stage of the process.³⁸

More time is needed before the impact of these changes on leniency applications can be assessed. In any case, we find that they do not address the key tension that this consultation focuses on: the exposure of leniency applicants to follow-on damages actions, whether individual or collective. We therefore consider that it would be appropriate to intervene to support public enforcement work on cartels at this time.

³⁴ Alimonti, R., Kuemmel S. and Nau, T. (2023), 'The interplay between leniency programmes and private enforcement: the economist perspective on recent policy proposals', *Competition Law Journal*, 21:4, pp. 170–79.

³⁵ Ysewyn, J. (2020), '[Immunity and Leniency Survey 2019/2020](#)' (last accessed 7 September 2026).

³⁶ Buccirossi P., Marvão C. and Spagnolo G. (2015), 'Leniency and Damages' CEPR Discussion Paper, DP10682, London: Centre for Economic Policy Research.

³⁷ Competition and Markets Authority (2025), '[Cartels: being first to apply for leniency matters more than ever](#)', 28 October (last accessed 4 September 2026).

³⁸ The remaining changes include replacing automatic fine reductions for Type B applications with purely discretionary reductions; Type B discounts are unlikely to exceed 75% and Type C discounts are unlikely to exceed 50%; and 'Leniency plus' is narrowed to Type A applicants in a second market, with discount caps to a maximum of 75%.



**Question 29: If introduced, are there additional protections you feel are necessary to ensure that the availability of immunity from civil litigation a) isn't exploited and b) doesn't frustrate avenues to seek redress? [Yes / No / Not sure]
Please explain your answer.**

We refer to the availability of immunity from civil litigation as '**extended leniency**'.

While the consultation focuses on collective actions, Oxera has interpreted immunity from civil litigation to mean immunity from private damages actions including both individual and collective actions.

If the consultation were to only refer to immunity from collective actions (or opt-out collective actions), we consider that the proposed policy would likely lead to a shift in the way claims are brought. Specifically, we would expect victims and their representatives to structure actions to fall outside the scope of the immunity, for example, by bringing opt-in collective actions, using Group Litigation Orders (GLOs), or relying on representative actions under Civil Procedure Rules (CPR)19.8. We do not discuss this possibility further in the following sections.

Part A: If introduced, are there additional protections you feel are necessary to ensure that the availability of immunity from civil litigation isn't exploited?

'Not sure' for 29a.

Oxera finds that firms could potentially exploit the proposed 'extended leniency' programme in specific circumstances. For instance, as mentioned in this consultation, some firms could maximise their pay-off from cartel participation by using the proposed policy to tip the market in their favour.³⁹

We preliminarily consider that competition authorities are able to avoid a market-tipping effect from occurring by adjusting the sanctions

³⁹ Spagnolo, G. (2004), '*Divide et Impera: Optimal Leniency programmes*', *Centre for Economic Policy Research*, discussion paper no. 4840, pp. 17–18; Consultation Document, para. 102.

employed. This requires competition authorities to estimate the impact of fines and damages on each of the cartel members in a given case. We would expect fines and damages to impact competition where, for instance, they would financially cripple smaller challenger firms.

However, our following response focuses on whether additional protections are needed to ensure that the proposed 'extended leniency' programme would be effective in destabilising cartel agreements. This is because a sufficiently effective 'extended leniency' program would prevent the formation of cartels, and would therefore avoid the exploitation of the policy altogether.⁴⁰

Our primary observations is that the effectiveness of the proposed 'extended leniency' programme depends on the cartel characteristics. In particular, its deterrent effects could be weaker for 'smaller' cartels that harm consumers and for global cartels where UK liability represents only a small share of firms' overall exposure. We do not, however, expect these gaps to allow cartel members to potentially exploit the policy, given that immunity is only offered to the first leniency applicant.

In this context, we note that this consultation is also looking at voluntary and mandatory redress. In case the proposed mandatory redress scheme was put into place, the scope of the proposed 'extended leniency' policy would need to be extended to ensure protection from mandatory redress as well.

Economic theory

An effective 'extended leniency' policy creates a deterrent effect by providing incentives to report cartels as early as possible. This requires: (i) increasing the probability of detection and prosecution of cartel members; (ii) ensuring that cartel members' costs from detection are sufficiently high.⁴¹

The probability of cartel detection depends on the following.

- **The design of the 'extended leniency' policy**—evidence on leniency programmes suggests that the deterrent effect of an 'extended leniency' policy is likely highest if: (i) leniency is only

⁴⁰ Alimonti, R., Kümmel, S. and Nau, T. (2023), 'The interplay between leniency programmes and private enforcement: the economist perspective on recent policy proposals', *Competition Law Journal*, **21**:4, p. 178.

⁴¹ Harrington, J. (2018), '[Lectures on Collusive Practices](#)', *CRESSE 2018*, pp. 238–240; Harrington, J. (2008), 'Optimal corporate leniency programs', *The Journal of Industrial Economics*, **56**:2, p. 217.

granted to the first applicant;⁴² (ii) the first applicant receives a large fine and damages reduction;⁴³ and (iii) leniency applicants have certainty over the scale of fine and damages reductions.⁴⁴

- **The competition authorities' wider enforcement regime—** evidence indicates that cartels are more likely to be detected where competition authorities have robust whistleblowing programmes in place offering individual rewards,⁴⁵ and also try to proactively detect cartels through, for instance, market intelligence tools, screening methods based on pricing data, and proactive sector inquiries.⁴⁶

As for the costs of detection, these need to be sufficiently large to make self-reporting under an 'extended leniency' programme worthwhile. Economic theory suggests that firms will most likely be deterred from forming a cartel where sanctions from getting caught, weighted by the likelihood of detection, are at least as high as the expected gains from the infringement.⁴⁷

The deterrent effect of the proposed 'extended leniency' programme in the UK

On this basis, we consider that the 'extended leniency' programme, as proposed by this consultation, mostly seems to be well-designed to trigger a deterrent effect. In particular, in line with the above framework, the proposal as described would offer immunity to the first leniency applicant with a relatively high degree of certainty (see our response to Question 29b for further discussion of this point).⁴⁸

However, we note that our findings from Question 28 suggest that the deterrent effect of the proposed policy could be weakened by an apparently lower cartel detection risk in the UK than in other

⁴² Chen, Z. and Rey, P. (2013) 'On the Design of Leniency Programs', *The Journal of Law and Economics*, **56**:4, p. 917; Harrington, J. (2008), 'Optimal corporate leniency programs', *The Journal of Industrial Economics*, **56**:2, p. 237.

⁴³ Harrington, J. (2008), 'Optimal corporate leniency programs', *The Journal of Industrial Economics*, **56**:2, p. 237; Buccirossi, P., Marvão, C. and Spagnolo, G. (2020), 'Leniency and Damages: Where Is the Conflict?', *The Journal of Legal Studies*, **49**:2, pp. 36–37.

⁴⁴ Motta, M. and Polo, M. (2003), 'Leniency Programs and Cartel Prosecution', *International Journal of Industrial Organization*, **12**:3, p. 350.

⁴⁵ Kümmel, S. (2024), 'Punishing the firm, not the individual: should former cartelists be sent to prison in the European Union?', *Journal of European Competition Law & Practice*, **15**:7, pp. 500–01.

⁴⁶ Hüschelrath, K. (2020), *Kartelle klipp & klar*, Springer Gabler, pp. 29–36.

⁴⁷ Buccirossi, P., Lorenzo, C., Tomaso, D., Spagnolo, G. and Vitale, C. (2009), 'Deterrence in Competition Law', *SFB/TR 15 Discussion Paper*, **285**, pp. 4–8.

⁴⁸ Consultation Document, para. 107.

comparable jurisdictions, such as France and Germany (see Figure 3 above).

Moreover, for some types of cartels, UK damages could be too small relative to the total expected cartel sanctions for the proposed 'extended leniency' programme to cause an additional deterrent effect. This is because: (i) consumers may not be able to bring private enforcement claims against 'smaller' cartels in the UK; (ii) for some cartels, UK exposure may represent a small proportion of the cartel's overall liability across jurisdictions. We discuss this factor in more detail below.

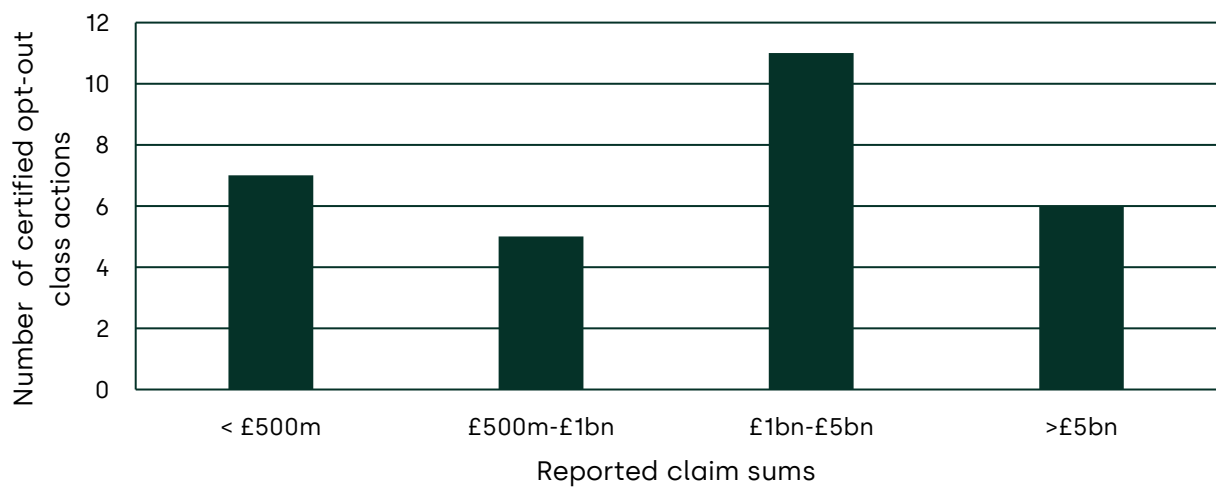
The difficulty of bringing 'smaller' opt-out class actions in the UK

As acknowledged in response to Question 22, there needs to be some degree of scale for opt-out class action claims to be brought. Accordingly, the majority of certified opt-out class actions involved substantial claim sums of over a billion pounds as of now (see Figure 5 below).⁴⁹ The alleged infringements in these proceedings have, in most cases, extended either across the entire UK, or the UK as well as other jurisdictions.⁵⁰

⁴⁹ Herbert Smith Freehills Kramer (2026), '[Certification tracker of UK competition class actions \(CPO applications\) filed at the Competition Appeal Tribunal](#)' (last accessed 15 August 2026).

⁵⁰ Herbert Smith Freehills Kramer (2026), '[Certification tracker of UK competition class actions \(CPO applications\) filed at the Competition Appeal Tribunal](#)' (last accessed 15 August 2026).

Figure 5 The reported claim sums of certified opt-out class actions in the UK as of 6 August 2026



Note: Where a range of claim sums was reported for a certified opt-out collective action, the median value of that range was used for the purposes of this figure.
Source: Oxera based on Herbert Smith Freehills Kramer (2026), '[Certification tracker of UK competition class actions \(CPO applications\) filed at the Competition Appeal Tribunal](#)' (last accessed 15 August 2026).

We therefore consider that the proposed 'extended leniency' programme would likely have a limited deterrent effect on 'smaller' cartels that harm consumers. As explained above, an 'extended leniency' programme is most likely to destabilise an existing cartel where the sanctions absent leniency are sufficiently large to make self-reporting worthwhile.⁵¹ However, 'smaller' cartels are unlikely to face any damages from opt-out class actions to begin with.

In this context, we note that the proposed mandatory redress scheme could be better placed to provide compensation to consumers harmed by these 'smaller' cartels (see Question 22). We discuss the interaction of the proposed scheme with the proposed 'extended leniency' programme further below.

The UK's share of damages represents a proportion of the total liability for international cartels

Over recent years, an increasing rate of international cartels are being discovered by competition authorities. In 2018, it was reported that around 50 international cartels were discovered by competition authorities each year.⁵²

Cartels operating across multiple jurisdictions may face sanctions across all of these jurisdictions. Depending on the geographic footprint of a cartel, damages arising in the UK may thus represent only a small proportion of its overall liability. While this will vary on a case-by-case basis depending on where affected businesses and consumers are located, we generally note that:⁵³

- **For cartels active across both the EU and the UK:** the UK's position as one of Europe's largest economies makes it more likely that the UK accounts for a substantial share of total liability for cartels active in both the EU and the UK.⁵⁴
- **For global cartels:** the UK's small share of the global economy makes it more likely that, in most cases, the total liability cartel members expect to face across jurisdictions substantially exceed damages arising in the UK.

We therefore consider that the proposed UK-only 'extended leniency' policy could have a proportionally smaller impact on cartel members' decision to self-report in the case of international cartels. By extension, the deterrent effect would also be larger for cartels active across the EU and the UK than for global cartels.

The need for additional protections to ensure the effectiveness of the 'extended leniency' programme

As mentioned above, a sufficiently effective 'extended leniency' policy deters firms from joining a cartel, as they perceive a high risk that other cartel member will 'race to the courthouse' to report the collusive

⁵² The American Antitrust Institute (2018), '[International Cartels](#)' (last accessed 8 September 2026).

⁵³ International Monetary Fund (2026), '[United Kingdom](#)', (last accessed 8 September 2026).

⁵⁴ In addition, the UK is one of few countries which has an active opt-out collective action regime, and therefore claims in the UK are likely to form a larger share of the total. However, the extent of this may change in coming years as the transposition of the Representative Action Directive (Directive (EU) 2020/1828) takes place across the EU and may enable more class and collective actions to be brought across the EU, bringing down the UK's share of such damages.

agreement.⁵⁵ Therefore, it mitigates the risk of exploitation of an ‘extended leniency’ programme altogether.

Based on the analysis above, Oxera considers that the proposed ‘extended leniency’ programme would be less effective for some types of cartels. This is because members of certain cartels: (i) are unlikely to face damages claims in the UK, i.e. smaller, consumer facing-cartels; or (ii) expect UK liability to be a small proportion of their overall liability across jurisdictions. Figure 6 provides a summary of our findings on the deterrent effect of the policy for different types of cartels in the UK.

Figure 6 Impact of ‘extended leniency’ in the UK on incentives to deviate from a cartel

		Injured parties from cartel	
		Consumers	Business
Geographic footprint of cartel	Local or regional	Low	Moderate to High
	UK (national)	High	High
	UK and EU	Moderate to High ¹	Moderate
	Global	Low	Low

Note: ¹ We consider that members of cartels active in both the UK and the EU that harmed consumers may place disproportionately greater weight on the UK enforcement regime in their decision-making, given that the UK has one of the most developed opt-out collective action regimes in the region. However, we note that the EU’s Representative Actions Directive (Directive (EU) 2020/1828) has started being transposed in many countries, which may narrow this difference over time.
Source: Oxera.

However, we do not expect that the proposed 'extended leniency' policy could be exploited by members of these types of cartels. This is because:

- For 'small' cartels that harmed consumers, the low risk of private damages actions means that firms are unlikely to consider any 'extended leniency' policy for strategic purposes.
- For international cartels with a geographic footprint largely outside the UK, the proposed restriction of immunity to Type A leniency applicants would likely limit the exploitation of the policy. This is because becoming a Type A leniency applicant would require the cartel member to proactively report the cartel, and face sanctions, in all jurisdictions in which it was active.

Accordingly, we do not consider that additional protections would be needed to increase the effectiveness of the proposed 'extended leniency program' to account for these types of cartels.

This conclusion, however, depends on the current design of the wider enforcement regime. As mentioned earlier, the wider DBT consultation is also looking at a proposed mandatory redress scheme.

We consider that the 'extended leniency' programme would need to also apply to the proposed mandatory redress scheme if it was introduced. Redress schemes generally have the objective of lower costs for cartel members than those incurred in private enforcement claims. The prospect of having to provide mandatory redress would therefore likely deter fewer leniency applications than the threat of private damages actions. Nonetheless, we consider that some firms would still refrain from self-reporting if they were not protected from the proposed mandatory redress scheme.

Part B: If introduced, are there additional protections you feel are necessary to ensure that the availability of immunity from civil litigation doesn't frustrate avenues to seek redress?

'Not sure' for 29b.

Oxera considers this ultimately to be a policy question. However, we note that any protections included in an 'extended leniency' programme should account for their impact on the policy's deterrent effect.

We find that the existing protections included in the proposed 'extended leniency' programme to ensure victims' redress, and other alternative

protections considered, may deter fewer cartels from forming than an 'extended leniency' programme offering full immunity.

From an economic perspective, the resulting trade-off can be analysed based on each policy's impact on consumer welfare. We find that an 'extended leniency' programme offering full immunity is likely to be preferable since: (i) it implies the highest deterrent effect; (ii) the protections included under the other 'extended leniency' programmes may not be needed in practice to ensure redress.

However, we recognise that the government may want to place greater weight on the distributional and fairness considerations at stake for individual victims. To inform its decision-making, we would recommend an extension of our analysis that empirically analyses the factors we identified as relevant to consumer welfare.

The interaction of 'extended leniency' policies and the right to seek redress

In theory, the design of an 'extended leniency' policy may involve a trade-off between preserving victims' ability to seek redress and increasing the policy's deterrent effect.

As set out in this consultation, an 'extended leniency' policy which offers full immunity from damages (which we refer to as **ELP1**) might risk leaving victims unable to recover their losses in full.⁵⁶ Under UK competition law, all victims of a cartel are 'entitled to seek redress including compensation from any loss [...]'.⁵⁷ Cartel members are therefore ordinarily jointly and severally liable for the whole of a victim's loss; unconditional 'extended leniency' may reduce the amount victims can ultimately recover (e.g. in situations of financial insolvency), making it more difficult for affected individuals and businesses to obtain full redress.

To deal with this tension, the 'extended leniency' programme proposed by this consultation includes a carve-out that the immunity recipient may be held liable in case redress cannot be provided otherwise (we refer to this as **ELP2**).⁵⁸ However, economic theory suggests that such a carve-out may reduce the deterrent effect of the policy. As mentioned in response to Question 29a), an 'extended leniency' programme is likely to

⁵⁶ Consultation Document, para. 108.

⁵⁷ Competition & Markets Authority (2016), '[Competition law redress: A guide to taking action for breaches of competition law](#)', report, para. 1.3.

⁵⁸ Consultation Document, para. 108.

have the highest deterrent effect when there is certainty over the reductions in sanctions it offers. Estimating cartel damages generally entails complex economic analysis relating to 'overcharge (or undercharge, in the case of buyer cartels) and factors such as pass-on, volume effects, interest, inflation and taxes.'⁵⁹ Firms could therefore be deterred from blowing the whistle under ELP2, as they might not be able to self-assess the fine reduction they would ultimately receive.

Another proposal is to facilitate redress by giving claimants full access to leniency statements under an 'extended leniency' policy (we term this **ELP3**).⁶⁰ Economic theory again suggests that this exception to the usual protection of leniency statements may reduce the deterrent effect of an 'extended leniency' policy. Some firms seem to generally refrain from applying for leniency due to: (i) the potential impact on their business relationships;⁶¹ (ii) the fear of retaliation by other cartel members.⁶² In principle, a negative impact on firms' business relationships seems likely to be even greater when the immunity recipient's information can be used in public as well as private enforcement. Firms may therefore be deterred in some cases from applying for 'extended leniency' under ELP3 due to these wider risks to their business activities.⁶³

The welfare impacts of the 'extended leniency' policies in the UK

From an economic perspective, we note that the trade-off between the 'extended leniency' policies can be examined based on their impacts on consumer welfare in the UK.

We consider that ELP1 is generally likely to lead to higher consumer welfare than the other proposed 'extended leniency' policies. This is because, as explained above, ELP1 is more likely to deter cartels from

⁵⁹ Alimonti, R., Kümmel, S. and Nau, T. (2023), 'The interplay between leniency programmes and private enforcement: the economist perspective on recent policy proposals', *Competition Law Journal*, **21**:4, p. 178; Buccirossi, P., Marvão, C. and Spagnolo, G. (2020), 'Leniency and Damages: Where Is the Conflict?', *The Journal of Legal Studies*, **49**:2, p. 35.

⁶⁰ Buccirossi, P., Marvão, C. and Spagnolo, G. (2020), 'Leniency and Damages: Where Is the Conflict?', *The Journal of Legal Studies*, **49**:2.

⁶¹ Ysewyn, J. and Kahmann, S. (2018), 'The decline and fall of the leniency programme in Europe', *Concurrences*, **1**.

⁶² Hüschelrath, K., Müller, K. and Veith, T. (2012), 'Concrete shoes for competition: The effect of the German cement cartel on market price', *Centre for European Economic Research Discussion Paper*, 12-035.

⁶³ Alimonti, R., Kümmel, S. and Nau, T. (2023), 'The interplay between leniency programmes and private enforcement: the economist perspective on recent policy proposals', *Competition Law Journal*, **21**:4, p. 179.

forming in the first place, and is therefore more likely to prevent the harm caused by the cartel from arising at all.⁶⁴

Additionally, we note that there is some evidence to suggest that the proposed carve-outs under ELP2 and ELP3 may not be needed to secure effective redress for victims in the UK. This is ultimately an empirical question, depending on: (i) the share of cartel victims' harm that is compensated; (ii) the share of those damages that can be covered by the other cartelists.⁶⁵ Estimating these variables for the UK falls outside the scope of this response. However, we note the following.

- **Victims of most types of cartels can seek compensation in the UK.** The available evidence suggests the only types of cartels for which victims may be unable to bring claims in the UK are 'smaller' cartels that harmed consumers (see Question 29a). This makes it more likely that a higher share of cartel victims can be compensated in the UK. We also note that the proposed mandatory redress scheme could provide redress for these consumers harmed by a 'small' cartel (see Question 22).
- **Antitrust damages appear to rarely cause insolvency.** In 2020, Marvão, Spagnolo and Buccirossi noted that they were 'not aware of cases, either in the USA or the EU, where a court's decision to award antitrust damages has caused the bankruptcy of a defendant.'⁶⁶ This suggests that other cartel members usually seem to be able to cover damages.
- **Redress can extend beyond the cartel members.** Where cartel members lack sufficient financial capacity, UK courts can extend the scope for redress to parent companies or successor undertakings in certain cases.⁶⁷ This is likely to further increase the share of damages that can be compensated without holding the immunity recipient liable.

We therefore consider that there is some evidence to suggest that ELP1 would likely lead to better consumer welfare outcomes than the other proposed 'extended leniency' policies. In particular, economic theory suggests that the deterrent effect is likely to be higher under ELP1; and

⁶⁴ Alimonti, R., Kümmel, S. and Nau, T. (2023), 'The interplay between leniency programmes and private enforcement: the economist perspective on recent policy proposals', *Competition Law Journal*, **21**:4, p. 178.

⁶⁵ Buccirossi, P., Marvão, C. and Spagnolo, G. (2020), 'Leniency and Damages: Where Is the Conflict?', *The Journal of Legal Studies*, **49**:2, p. 35

⁶⁶ Buccirossi, P., Marvão, C. and Spagnolo, G. (2020), 'Leniency and Damages: Where Is the Conflict?', *The Journal of Legal Studies*, **49**:2, p.52.

⁶⁷ Freund, B. (2021), 'Reshaping Liability – The Concept of Undertaking Applied to Private Enforcement of EU Competition Law', *GRUR International*, **70**:8, pp. 742–43; Warrington, G. (2020), '[UK anti-cartel laws and their enforcement](#)', *Pinsent Masons*, 5 March.

there is some indication that the proposed 'carve-out' under the alternative 'extended leniency' policies would not be needed in practice to provide effective redress in the UK.

The need for additional protections under the proposed 'extended leniency' program

Based on our previous analysis, we first note that the existing protections offered by proposed 'extended leniency' programmes may not be optimal from a consumer-welfare perspective. This indicates that the relevant question may not be whether 'additional protections' are needed to protect effective redress for consumers, but whether any protections are needed at all.

We also analysed the welfare impacts of giving claimants full access to leniency statements under an 'extended leniency' policy, as an alternative means of ensuring a higher degree of redress.⁶⁸ This carve-out nevertheless has the drawback that it likely reduces the deterrent effect of an 'extended leniency' programme, and may not be needed in practice.

Ultimately, the trade-offs between offering full immunity and introducing carve-outs under an 'extended leniency' programme is a policy question which needs to be assessed by the government. Our analysis indicates that it may be preferable for consumers if full immunity is granted since: (i) this is more likely to avoid consumer harm from occurring in the first place; (ii) additional protections may not be needed to ensure redress.

However, we recognise that, even though the probability of a victim being left without redress may be low based on our analysis, the consequences for that victim if this situation does occur could be severe. In particular, the loss suffered by the victim may be substantial, and the consumer or business may have limited ability to recover it through other means. The government may therefore decide to assign greater weight to the distributional and fairness considerations at stake for individual victims.

⁶⁸ Bucciarrossi, P., Marvão, C. and Spagnolo, G. (2020), 'Leniency and Damages: Where Is the Conflict?', *The Journal of Legal Studies*, 49:2, p. [X].

Further insight may be gained by empirically estimating the following variables for the UK: (i) the share of cartel victims' harm that is compensated; (ii) the share of those damages that can be covered by the other cartelists. While this falls outside the scope of the present report, we consider it to be a useful extension of our analysis to inform any policy decision.

Topic 4: Regulatory appeals framework



Question 47: Should Regulatory Appeals be determined in accordance with the standard of review set out in paragraph 204(a)? [Yes / No / Not sure] Please explain your views.

No. The standard of review is too narrow, limiting the scope for overturning poor regulatory decisions that lead to adverse outcomes for consumers and investors. It also assumes that a harmonised appeals framework is appropriate across sectors with different characteristics, without assessing whether the proposed changes would meet the consultation's stated objectives.⁶⁹

The proposed standard of review is too narrow

Under the government's proposal, the CAT's review would be anchored in conventional judicial review grounds (unfairness, illegality, unreasonableness), with the merits of the case brought in only as a secondary, 'due account' consideration rather than the primary basis for decision.⁷⁰ Because no cases have yet been decided under this formulation, exactly how generously or narrowly the CAT would interpret 'due account of the merits' in practice remains untested and open to question. Two consequences nonetheless follow reasonably directly from the design of the test itself, irrespective of how it is ultimately interpreted:

- 1 it would be more difficult for parties to over-turn the decisions of economic regulators;
- 2 as a result, the risk of poor regulatory decisions adversely impacting customers and investors is likely to increase.

The consultation itself accepts that regulators would be given more latitude under the new test than they currently receive.⁷¹ That is a

⁶⁹ Department for Business, Innovation, Science and Trade (2026), 'Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement', 17 July, para. 149.

⁷⁰ Department for Business, Innovation, Science and Trade (2026), 'Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement', 17 July, para. 204.

⁷¹ The government compares the new standard proposed to that applied by the CAT in relation to appeals in the telecoms sector, noting that: "the CAT does not conduct a "re-hearing" of the case.

difficult position to square with some of the high-profile regulatory failings seen in the UK in recent years, such as those identified by the Independent Water Commission in relation to Ofwat's regulation of the water sector.⁷²

What works for one sector may not port across to others

The government notes in its consultation that the current framework for regulatory appeals varies considerably across sectors. It then notes that its proposed changes (i.e. having the CAT review appeals under a consistent standard) would bring greater alignment across the regulatory appeal landscape. It argues that this will deliver multiple benefits, including 'improved clarity, legal certainty and confidence', as well as a more 'efficient and proportionate' process.⁷³

Even if the changes proposed by government were to deliver these purported benefits (and, as discussed below, this is not entirely clear), this presupposes that a standard of review developed with one sector in mind can be applied uniformly across sectors, without further consideration of whether it remains fit for purpose. This presupposition warrants closer scrutiny.

There are important differences between sectors that any appeals framework needs to take into account, particularly the extent to which a sector is characterised by realistic prospects for infrastructure competition. Natural monopoly sectors—such as water and energy networks—differ in a fundamental respect from sectors such as fixed-line broadband, where infrastructure competition can develop over time. This distinction matters, because the consequences of regulatory failure are not uniform across sectors, and a standard of review calibrated primarily around the characteristics of a competitive or potentially competitive sector may not translate well to sectors where no such self-correcting mechanisms exist.

This is best illustrated by considering a scenario involving regulatory miscalibration in a sector with realistic prospects for infrastructure competition, such as fixed-line broadband. Suppose, for example, that a

Instead, the CAT takes Ofcom's decision as a starting point and assesses whether it is materially wrong. **In doing so, the CAT allows an appropriate degree of respect for Ofcom's expert assessment.**" [emphasis added]. Department for Business, Innovation, Science and Trade (2026), 'Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement', 17 July, para. 202.

⁷²See, for example: Independent Water Commission (2025), Final Report, 21 July, paras 369 and 417.

⁷³ Department for Business, Innovation, Science and Trade (2026), 'Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement', 17 July, para. 154.

telecoms regulator sets an inappropriately high regulated tariff for an operator with market power. While higher prices would harm consumers in the short term, the scope for supernormal profits may well induce entry by alternative network providers, which would mitigate the adverse effects on consumers arising from the original regulatory miscalibration. In contrast, were prices to be set inappropriately high in a natural monopoly sector (e.g. for a regulated water network), there would be no scope for competition to 'self-correct' for the original regulatory failure.

Of course, this does not mean there is no scope for consumer harm arising from regulatory miscalibration in sectors characterised by infrastructure competition.⁷⁴ But regulatory decisions carry higher stakes where the regulated firm is the only company that can feasibly supply the market. This is a material consideration that any appeals framework—whether sector-specific or applied consistently across sectors—needs to reflect adequately.

For similar reasons, in natural monopoly sectors the adverse consequences of regulators balancing their duties inappropriately is also greater. For example, as highlighted by the Independent Water Commission, there is clear evidence that Ofwat historically placed an excessive focus on lowering customer bills at the expense of delivering long-term investment.⁷⁵ The implication is that—in addition to addressing the risk of regulatory miscalibration—an appeals system can also provide a useful check on the risk of regulators getting the balance wrong in the exercise of their affordability and investment objectives.

A single standard of review applied across all sectors is not, in itself, objectionable—but it should be designed with these sectoral differences in mind, rather than assuming that a standard which might be workable in a sector with infrastructure competition can simply be carried over, unamended, to sectors where no such competitive checks exist.

The proposed change in appeals standards will also increase uncertainty for investors and other stakeholders

⁷⁴ For instance, if a telecoms regulator set tariffs for the incumbent operator (who had already deployed their network) at too low a level, this could have the effect of deterring entry from prospective competitors where they otherwise might have rolled out a new network. To the extent that this constrained innovation within the sector, this may ultimately harm consumers in the long run.

⁷⁵ Independent Water Commission (2025), Final Report, 21 July, para. 381.

One of government's central arguments for reform is that a patchwork of different appeals regimes across sectors unsettles investors and may make the UK a less attractive destination for investment. It argues that by applying a single, consistent standard of review across sectors, this will provide greater certainty to stakeholders over time.⁷⁶

In practice, however, the transition itself carries a cost: whatever the merits of the new standard in the long run, its introduction would leave investors and other stakeholders materially less certain about how regulatory decisions will be treated on appeal, at least for a period.

Telecoms is the only sector with any live experience of a broadly comparable test,⁷⁷ but the number of appeals decided under that framework since 2017 is too small to have generated a meaningful body of precedent.^{78,79} Investors are therefore being asked to price in a standard whose real-world application is, for now, largely unknowable.

Investors will therefore perceive increased risk of poor regulatory decisions which cannot be overturned, but will have limited ability to quantify these risks. This may translate into a higher cost of capital, which will ultimately feed through to customer bills.

To understand the significance of the regulatory appeals framework for investors, it is instructive to examine the framework used by rating agencies to assess the credit quality of regulated companies.

Moody's assesses the credit quality of regulated electricity and gas utilities globally. When making its assessments, the regulatory framework accounts for 25% of the overall scorecard, with a further sub-factor also relevant to the appeals framework.⁸⁰

⁷⁶ Department for Business, Innovation, Science and Trade (2026), 'Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement', 17 July, para. 171.

⁷⁷ We say 'in theory' since—as the government notes in its consultation—under the applicable framework for telecoms appeals price control matters are remitted to the CMA (which would cease to be the case under the government's proposed reforms).

⁷⁸ This includes TalkTalk Telecom Group plc and Vodafone Limited v Office of Communications (BCMR 2019) [2020] CAT 8; CityFibre Limited v Office of Communications and British Telecommunications plc [2022] CAT 33; and Sky UK Limited v Office of Communications [2023] CAT 70 (liability) and [2024] CAT 54 (remedy).

⁷⁹ A further source of uncertainty is that the standard of appeals used in telecoms takes the merits of the case into account because it must be interpreted in line with the underlying EU legislation. As a result, there is a significant risk that even the limited number of judgments issued since the framework was introduced will be of little to no relevance for any new appeals framework.

⁸⁰ Moody's (2025), MOODY'S RATINGS. Ratings Methodology Regulated Electric and Gas Utilities, pp. 8–11.

The regulatory framework component is assessed through two equally weighted sub-factors.⁸¹

- **Legislative and judicial underpinnings of the regulatory framework**, which account for 12.5% of the overall scorecard and consider the clarity, strength and effectiveness of the legal and institutional framework.
- **Consistency and predictability of regulation**, which also accounts for 12.5% of the overall scorecard and considers the track record of regulatory decisions and interactions between the regulator and the companies it regulates.

The proposed transfer of appeals from the CMA to the CAT and the new standard of review proposed is clearly relevant to the first sub-factor, and potentially the second as well.

Taken together, the net effect of the proposed standard is likely to be the opposite of what government intends—at least in the near term.

Rather than the greater certainty which government is seeking to deliver, stakeholders would face a period of heightened uncertainty, with potential for significant knock-on costs for investors and customers alike. This uncertainty may reduce over time as case precedent builds up, but it is important for government to recognise the adverse impact these changes are likely to have, at least in the short term.



Question 53: Should the new appeal replacing Water Redeterminations be overseen by the CAT in accordance with the appeal parameters set out in paragraph 204? [Yes / No / Not sure] Please explain your views.

No. Reform of water regulation, which is long overdue, will necessarily mean greater uncertainty for investors during the transition to the new arrangements. Given ratings agencies have already downgraded the stability and predictability of the regulatory regime in water over the last two price reviews and there is uncertainty about future

⁸¹ Moody's (2025), MOODY'S RATINGS. Ratings Methodology Regulated Electric and Gas Utilities, pp. 8–11.

arrangements, efforts should be made to preserve the Redeterminations framework currently in place—at least for PR29.

Confidence in water regulation has already declined, with uncertainty regarding the reform programme continuing to dampen sentiment

We noted earlier how the changes proposed to the appeal standard are likely to adversely impact investor confidence. The risks of this outcome materialising are particularly acute in the water sector.

Investor and rating agency sentiment towards the sector has weakened markedly in recent years, with credit rating agencies downgrading their views on the stability and predictability of Ofwat's regime, in some cases by multiple notches, leading to tighter financial thresholds. As noted by Moody's in 2024:

There has been a material and sustained weakening of credit quality for nearly all companies amid continued public scrutiny and heightened political and regulatory focus. Across the sector, previous decisions, such as prioritising affordability and shareholder distributions, have contributed to underinvestment and exacerbated the sector's exposure to changing weather patterns, population growth and shifting expectations. Regulatory targets have become more demanding and penalties for those that fall short have continued to rise... We believe that the predictability and supportiveness of the regime has reduced.⁸²

Continued uncertainty surrounding water reform is exacerbating negative perceptions of the regulatory framework. Some of the changes proposed by the Independent Water Commission (later accepted by government in the Water White Paper) such as the introduction of a new 'supervisory approach' were quite radical, and largely untested in modern economic regulation: indeed, Moody's indicated in late 2025 that its default position would be to downgrade the stability and predictability of the regime to Baa until it saw evidence of how the new supervisory system works in practice.⁸³

To the extent that declines in investor confidence lead to higher financing costs, this ultimately has negative impacts on consumers.

⁸² Moody's Ratings (2024), '[Moody's Ratings downgrades Southern Water to Ba1, on review for further downgrade](#)', 13 November.

⁸³ Moody's (2025), '[UK Water 2025: Fixing Water](#)', 16 October.

The existing re-determinations framework should be maintained for PR29

This regulatory uncertainty is arriving at a particularly inopportune moment for the sector, given the considerable challenges it faces. Addressing these challenges will require unprecedented levels of investment: over the next 25 years, companies expect to invest £275bn–£300bn delivering network improvements.⁸⁴ This is on top of the additional investment needed from companies in capital maintenance, where significant increases in investment are also needed relative to historical levels.

The scale of the shortcomings identified by the Independent Water Commission leaves little doubt that the regulatory framework needs to change, and companies and investors should expect some degree of short-term instability as a result of necessary reforms being implemented. Given this context however, it is unclear why government would simultaneously seek to implement changes in the framework for regulatory appeals, which will inevitably increase perceived uncertainty among investors.

Therefore—in light of the above—we consider there is a very strong case for maintaining the current framework of regulatory redeterminations, until the ongoing uncertainty regarding the nature of the water reform programme is resolved, or at least considerably reduced. In particular, **government should provide a clear steer to companies and investors as soon as possible that the existing framework for redeterminations will be retained for the next price review (i.e. PR29).**

We set out separately in our response to Question 64 below the key characteristics that water regulatory appeals, and regulatory appeals more generally, should seek to embody in order to ensure an effective appeals process that meets the objectives stated in the consultation.⁸⁵

⁸⁴ National Audit Office (2025), 'Regulating for investment and outcomes in the water sector', 25 April, para. 1.7.

⁸⁵ Department for Business, Innovation, Science and Trade (2026), 'Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement', 17 July, para. 149.



Question 64: We welcome any further views on how to improve the effectiveness of Regulatory Appeals.

Before identifying a preferred option, the consultation should set out the extent to which each possible option would meet the stated objectives of an 'effective appeals framework'

Government frames the objective for reform in the following terms: an appeals framework is 'effective' if it 'helps to ensure fair outcomes, strengthens regulator accountability, and gives stakeholders, including regulated companies, investors and consumers, confidence that the decisions of regulators are robust and made in line with their legal duties'.⁸⁶

However, the consultation does not assess how far the proposed options would achieve these objectives. In particular, it does not provide a comparison of the options against the stated aims of ensuring fair outcomes, strengthening regulator accountability and giving stakeholders confidence that regulators' decisions are robust and consistent with their legal duties. This appears to contrast with the 2013 consultation, which was accompanied by an impact assessment of the costs and benefits of the proposal.⁸⁷

This leaves it unclear whether, and to what extent, the proposed options would deliver the effective appeals framework described in the consultation.

We consider that a well-functioning regime for regulatory appeals should do the following

- 1 **Ensure poor regulatory decisions are overturned:** this includes poor decisions stemming from inappropriate consideration of economic evidence, misinterpretation of the regulator's legal vires, or poor application of regulatory judgement.

⁸⁶ Department for Business, Innovation, Science and Trade (2026), 'Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement', 17 July, para. 149.

⁸⁷ Department for Business, Innovation and Skills (2013), 'Streamlining Competition and Regulatory Appeals: Consultation on options for reform', 19 June.

- 2 **Provide confidence in regulatory outcomes to stakeholders—including customers, companies and investors:** the latter is particularly important given the ownership model of UK utilities and the large sums of private capital needed for investment across sectors in the coming years.
- 3 **Use resources as efficiently as possible:** ensuring that the appeals body focuses on the issues that matter most, reflecting the consequences of poor regulatory decisions.
- 4 **Incentivise regulators to get it right first time:** with the knowledge that decisions will receive appropriate levels of public scrutiny and be overturned if necessary.

An assessment of the government's proposals against these criteria highlights a number of key drawbacks with the proposed reforms.

For example, it is clear that under the new standard of appeal (based predominantly on judicial review principles), it will be more difficult to overturn poor regulatory decisions driven by inappropriate consideration of economic evidence or poor regulatory judgement. This is likely to reduce stakeholders' confidence in the regulatory regime, and to weaken regulators' incentives to get decisions right the first time, safe in the knowledge that flawed reasoning is less likely to be corrected on appeal.

Based on the consultation document, it is unclear whether the government is aware of the adverse impacts noted above. We therefore strongly recommend that such a systematic assessment is undertaken and published before making any final decisions on these reforms.

Further consideration should be given to the resourcing requirements of any future appeals body

After proposing that responsibility for regulatory appeals be transferred from the CMA to the CAT, the government notes that this could have resourcing implications. Specifically, the consultation states that:

Should this reform be taken forward, the government will consider any additional resources the CAT may require to hear such appeals, for

instance through the appointment of additional Ordinary Members with sector-specific expertise.⁸⁸

This single assertion to potential future resourcing requirements understates the scale of responsibility which would be transferred from the CMA to the CAT, and the resourcing demands which would go along with this.

At present, regulatory appeals overseen by the CMA are decided by an Inquiry Group drawn from a CMA Panel of around 33 members, appointed for their experience, ability and diversity of skills in competition economics, law, finance and business.⁸⁹

The CMA's Panel is not a generalist body: it is deliberately constituted, and continually recruited, to bring specific technical disciplines to bear on regulatory and price control matters. Members are selected via public appointment for recent experience in areas including business and finance, digital and technology, competition and consumer policy and enforcement, and public or regulatory policy, with additional specialist recruitment for sectors such as utilities and payment systems.⁹⁰

Importantly, CMA Inquiry Groups do not work alone: they are supported by CMA staff case teams who prepare the evidential and analytical record over the course of a case, in an inquiry that is expressly designed as an evidence-gathering and investigatory process rather than a purely adversarial one. Notably, at the end of the 2024–25 reporting year the CMA employed 1,130 staff, with total resource expenditure of approximately £137.5m—over 90% of which was used for 'core operational activity' covering regulatory appeals, enforcement, merger control, market studies and consumer protection.⁹¹

By comparison, the CAT itself describes its standard panel composition as three members only, typically the President or a Chair sitting with two part-time Ordinary Members,⁹² without the CMA's equivalent in-

⁸⁸ Department for Business, Innovation, Science and Trade (2026), 'Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement', 17 July, para. 178.

⁸⁹ Competition and Markets Authority, '[Our governance](#)' (last accessed 22 September 2026).

⁹⁰ Competition and Markets Authority, '[Appointment details. Competition and Markets Authority Panel Members](#)' (last accessed 22 September 2026).

⁹¹ Competition and Markets Authority (2025), 'Annual Report and Accounts 2024 to 2025', 10 July.

⁹² CAT, '[About the Tribunal](#)' (last accessed 22 September 2026).

house investigatory case team. The CAT also lacks resources equivalent to those provided by the CMA staff case teams.

We recognise that wider changes may be taking place in the way that the CMA discharges its duties in the coming years—in particular, the proposal to amend the decision-making model in merger and market cases, by introducing decision-making by CMA Board sub-committees in place of inquiry-group decision-making. Depending on how such changes are implemented, this could impact the optimal approach to overseeing regulatory appeals—including whether responsibility remains with the CMA.

Nevertheless, this change alone does not justify the significant changes proposed by government in this consultation, and it is clear that government will need to give greater consideration as to how regulatory appeals will be overseen and resourced before reaching any final decision.



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A large, three-dimensional "oxera" logo is mounted on a glass wall. The letters are white with a metallic finish and are illuminated from within, casting a warm glow. The background shows a blurred view of green foliage outside the building. The logo is partially obscured by three modern, white, teardrop-shaped pendant lights hanging from the ceiling.