# CAT-led law: What does the exponential growth of private enforcement mean for public enforcement?[1]

## 1 Introduction

In the 20 years since the Competition Appeal Tribunal (the "**CAT**") was established, competition litigation in the UK has developed at pace. The CAT is now the natural forum for such claims, which in recent years have grown in number and scope to include multi-billion pound opt-out class actions, many brought without any parallel regulatory investigation, in some cases alleging highly novel breaches of competition law.

As such, on its 20th birthday, the CAT finds itself in the midst of a significant paradigm shift in the development of competition law. Historically, competition enforcement in the UK has been primarily driven by the public enforcement priorities of the Competition and Markets Authority (the "**CMA**") and its predecessor authorities, as well as the European Commission exercising jurisdiction over the UK prior to Brexit. The CAT has played a critical role in the evolution of the law, but this has occurred to date primarily through its review of CMA decisions. Looking ahead, the CAT is set to find itself determining novel claims that have been brought on a standalone basis.

In this paper, we examine how this paradigm shift can and should influence public enforcement, and whether it is likely to endure.

We first outline the background to the ongoing paradigm shift and then consider (i) what options the CMA has to influence CAT-led law, and when and why the CMA might exert this influence; and (ii) how the CAT's growing role in the evolution and enforcement of competition law might influence the CMA's administrative priorities in deciding which cases to pursue through public enforcement.

We conclude that the CMA will – rightly – continue to play a critical role in both public and private enforcement. While the shifting balance in terms of where the law is developed may well influence how the CMA expends public resources in enforcement, private actions may not be a reliable means of filling enforcement gaps where the current legislative regime arguably falls short (notably in the digital and consumer spheres), and, given commercial incentives driving funder-led private enforcement, may well not align with issues of fundamental importance from a competition policy perspective. As a result, public enforcement should, and we have no doubt will, continue to be a key driver in the development of jurisprudence, regulation and public policy across the spectrum of competition law. The publication of the long-awaited Digital Markets, Competition and Consumers ("**DMCC**") Bill marked a significant step in this regard, albeit that implementation and eventual enforcement of the legislation remains some way off.

## 2 Background – the rise in standalone private actions in the CAT

Over the last decade, there has been a significant evolution of the UK's competition litigation landscape. In 2015, the Consumer Rights Act (the "**CRA 2015**") introduced sweeping changes which:

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(i) granted the CAT jurisdiction to hear "standalone" claims for breaches of competition law; and

(ii) introduced the collective proceedings regime to allow standalone collective actions for damages for alleged competition law breaches on an opt-out basis.[2]

It is difficult to exaggerate the practical impact of these reforms. Before the reforms were introduced in 2015, standalone claims were seen by claimants as a significant financial risk, given the lack of a collective mechanism with which to aggregate claims that, individually, were not commercially viable, and the limited availability of external funding for such claims. As a result, regulators generally set the competition law agenda in terms of both (i) which cases to prioritise; and (ii) the framework used for arriving at infringement findings, and claimants followed their lead with standalone private enforcement cases being very much the exception to the rule: the number of standalone actions brought in the CAT in the five years prior to the CRA 2015 was in single digits, whereas since 2015, over 20 standalone actions have been commenced alongside over 15 collective actions (many of which are also standalone), with the majority of the collective actions filed in the last two years.

The phenomenon of enforcement being driven by regulators is the norm in Europe and in contrast to the US, where, due to both the prospect of treble damages and the prosecutorial model, the courts have always had a leading role.

Together with the growth of the litigation funding industry in England, the reforms have led to a dramatic increase in the volume of private competition litigation in relation to both standalone and collective actions. While classic "follow-on" cases are still being litigated (and will doubtless remain an important piece in the competition litigation landscape), there is an increasing appetite amongst claimants and class representatives to bring more complex and novel standalone claims.

As the abovementioned numbers illustrate, the Collective Proceedings Order ("**CPO**") regime is gaining momentum – and the UK is becoming known as a fast developing, relatively claimant-friendly jurisdiction. Since *Merricks*,[3] we have seen a number of certification decisions in favour of opt-out claims[4] and only a few decisions refusing certification. These developments have buoyed claimant firms and funders, with the scale of potential rewards available in CPOs, particularly with some of the large class sizes concerned (for example, the 45 million potential class members in the *Gormsen v Meta* case) increasing claimants' and class representatives' appetite to push the boundaries with more novel competition actions.[5] In both *Gormsen v Meta* and the recently announced Water and Sewerage claims, there are interesting examples of more creative applications of competition law within the CPO regime. In *Gormsen*, the proposed class representative's claim of abuse of dominance is based on conduct that would have traditionally been considered the realm of consumer or data protection law. In the Water and Sewerage actions, the proposed class representative alleges that claims arise from the water companies' alleged unlawful discharges of untreated sewage and wastewater into waterways, in parallel with ongoing Ofwat and Environment Agency investigations into the

[2] Previously, the regime allowed for specified consumer groups to bring damages claims on behalf of at least two individuals, on a follow-on, "opt in" only basis. That regime saw little use.

[3] *Mastercard Inc v Merricks* [2021] All E.R. 285.

[4] For example: *Justin Gutmann v First MTR South Western Trains Limited and Another, Justin Gutmann v London & South Eastern Railway Limited* [2021] CAT 31; *David Courtney Boyle and Edward John Vermeer v Govia Thameslink Railway Limited and Others* [2022] CAT 35; and *Justin Le Patourel v BT Group PLC and Another* [2021] CAT 30.

[5] Case no. 1433/7/7/22: *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*.

alleged practices.[6] If these claims proceed, they will see the CAT considering the application of competition law in areas that have not traditionally been considered vulnerable to challenge on competition grounds, and without the framework of a CMA infringement finding.

The changes outlined have fundamentally changed the CAT's role in the development of the law: in follow-on damages actions, there is no need for the CAT to make findings of infringement, and even in appeals of CMA decisions, the CAT has, at least as a starting point, considered the framework settled on by the authority (arrived at following an administrative process, often lasting many years). The growth in the number of cases, including highly novel cases, in which the CAT itself will be determining the law from the output of the adversarial process raises two key questions: first, what role should the CMA (and other regulatory authorities) have in these private actions, and second, what influence should these private actions have on public enforcement? We address each of these questions in sections 3 and 4 below respectively.

## 3 What role is there for the CMA in private actions?

In this section, we outline what routes are available to the CMA to exert influence in these cases and examine the CMA's practice to date.

### 3.1 Obligations to share documents with the CMA

The CMA benefits from a requirement for parties to private competition actions to serve their pleadings on the CMA (Rules 33(7), 35(6), 36(4), and 76(6) of the CAT Rules 2015). This gives the CMA important insights into the emerging landscape of private enforcement and the legal framing of competition claims, and allows it to consider whether it should seek to intervene or separately investigate the facts and allegations raised in competition claims. The CMA also has the ability to request other documents in the case from the parties directly (although the parties are obviously at liberty to refuse such requests if they have good grounds for doing so).

The general rule is that the CMA may use any information it obtains during cases for the purposes of facilitating the exercise of any of its statutory functions.[7] However, if the CMA is an intervener in a case, then it will generally be a member of any confidentiality ring, and therefore subject to a confidentiality order which may place restrictions on its use of information disclosed into the ring.

### 3.2 Parallel proceedings: the relationship between ongoing investigations and private proceedings

In practice, the distinction between standalone and follow-on claims is not always binary. Standalone claims may also be premised upon the findings of other regulators.[8] It is also possible – and in fact increasingly common – that standalone actions may be initiated while there is a CMA investigation on foot considering the same or related underlying facts, as is

[6] 'Litigation funding secured for opt-out competition claims against UK water and sewerage companies', https://www.leighday.co.uk/news/news/2022-news/litigation-funding-secured-for-opt-out-competition-claims-against-uk-water-and-sewerage-companies/ (accessed 27 April 2023).

[7] 'Transparency and disclosure: Statement of the CMA's policy and approach' (January 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270249/CMA6_Transparency_Statement.pdf, para. 41.7 (accessed 27 April 2023).

[8] Case no. 1381/7/7/21: *Justin Le Patourel v BT Group PLC* is an interesting example, as the claim arises out of preliminary conclusions reached by Ofcom that BT abused its market position to impose prices above the competitive level. The claim is "standalone" as Ofcom's findings are not binding on the CAT. This raises interesting questions as to whether the CAT will diverge from Ofcom's decision.

the case for several of the pending actions in the CAT.[9] While (in theory) these proceedings and investigations exist separately to one another, interaction between the parallel processes is inevitable.

The traditional framework for parallel proceedings was found in ECJ (as it then was) caselaw. In *Masterfoods* (Case C-344/98), the ECJ held that where the courts of Member States are asked to adjudicate a potential infringement of Art. 101 or 102 TFEU that has already been the subject of a European Commission decision, they cannot reach conclusions that run counter to the Commission's decision. In practice, this has meant that where regulatory proceedings (and subsequent appeals) are afoot, the courts cannot make a final ruling until the regulatory decision is final, to avoid any conflict with the Commission's decision (but they can progress private proceedings otherwise). The English courts have historically taken this to mean that they can progress proceedings as far as possible up to the final trial (i.e. pleadings, disclosure and exchange of evidence), but cannot decide upon the merits of the claim until the regulatory process is concluded. Depending on the timings of proceedings relative to the UK's departure from the EU, this authority may no longer be binding in current UK cases, though it remains to be seen whether in practice the courts may have regard to it – we consider it likely that the English courts, including the CAT, will continue to follow this practice.

The obvious path for defendants facing parallel proceedings is to seek a stay of the private action pending the outcome of these regulatory investigations. This was certainly the approach envisaged by the ECJ in *Masterfoods*. Managing parallel regulatory investigations and litigation is a challenge for defendants, particularly given the different obligations owed across those two processes (for example, regarding the provision of information to regulators and claimants/class representatives). However, defendants often have little choice, particularly given the reluctance of the English courts and the CAT to stay proceedings until a final trial of the merits despite parallel regulatory investigations. There can however be advantages for defendants in running parallel proceedings, in particular because it heightens the risk for the claimants/class representative, and their funders, while the regulatory process (and any appeals) remain afoot.

Of the CPOs currently before the CAT, the CMA has publicly-known parallel investigations in relation to at least four, being the Apple App Store case, the Google Play Store case, the Amazon Buy Box case and the Google AdTech case. In such instances, if the CMA were to make a positive finding of infringement, then the CAT would have to approach this finding as conclusive (pending any appeal by the defendants). But if the CMA were to make no finding in the investigation, then the CAT would have jurisdiction to rule on the question of infringement. Consider a case where the CMA had dropped an investigation entirely (perhaps for reasons of administrative priority) and the CAT subsequently found that there had been an infringement of competition law; this is a theoretical possibility in at least the Google Play Store case, in which the CMA recently announced provisional acceptance of commitments, which address only one of the four exclusionary practices alleged in the claim.

[9] For example, the CMA commenced its investigation into the Apple App Store on 3 March 2021 and an application for a CPO against Apple in relation to the same underlying facts was made on 11 May 2021, just over two months later. An application for a CPO against Alphabet in relation to the Google Play Store was made on 29 July 2021. The CMA commenced its investigation into the Google Play Store on 10 June 2022, just under a year later.

### 3.3 Procedure and practice for facilitating CMA involvement in the CAT

Where the CMA wants to participate directly in a case before the CAT, intervention is the traditional method for it to influence proceedings in private actions.

#### 3.3.1 Rules governing intervention

Under Rule 50 of the CAT Rules 2015, the CMA "*may submit written observations to the Tribunal on issues relating to the application of Article 101 or 102 of the TFEU or Chapter I or II of Part 1 of the 1998 Act and, with the permission of the Tribunal, submit oral observations to the Tribunal*".

As an intervener, the CMA becomes a party to the proceedings. Under Rule 16 of the CAT Rules 2015, the CAT may make any consequential directions it considers necessary on intervention. This may include requiring the parties to serve documents lodged with the Registrar on the CMA, allowing the CMA to file a statement of intervention, and allowing the principal parties to file a response to this statement of intervention and any objections to the admission of the intervener's evidence. Therefore, intervention offers the CMA the opportunity to make substantive contributions to proceedings, but can also require significant resources.

Of course, intervention is not a question for the CMA alone. The recent certification hearing in the *Gormsen v Meta* case presents an interesting case study of the CAT's attitude towards CMA intervention.[10] At the certification hearing on 1 February 2023, the CAT President noted that the CMA's right to intervene in private litigation is a "*terrain that is largely uncharted*"[11] and that intervention is "*an unexplored area of collective proceedings*".[12] In relation to the *Gormsen* case, he noted that if the CMA saw a benefit in the CPO proceeding to certification, it might be helpful for it to articulate this in communications to the parties and to the CAT.[13]

The CAT considered (but ultimately decided against) issuing a non-binding, non-obligatory invitation to the CMA to say something about the cost-benefit analysis stage of the certification hearing. Counsel for Meta noted the desire to avoid a "cottage industry" of asking for the CMA's reaction to certain points on certification when it was not a party to proceedings as an intervener. For example, if the CMA responded that it would be helpful for a CPO to go ahead, the defendants would want to know more about the interaction between the CPO and the CMA's own investigations.[14]

The CAT has also recently grappled with the question of intervention more generally, beyond any potential role for the CMA, notably in the Rail Fares litigation. In *Boyle v Govia Thameslink Railway Limited & Others*,[15] the Secretary of State for Transport (who exercises a quasi-regulatory role in the rail sector and acts as the financial backstop for rail franchises) applied both to object to certification and, if the CPO was certified, to intervene in the proceedings going forward. The objection application was refused, but the CAT granted the Secretary of State permission to intervene post-certification. The CAT noted that at certain stages the Secretary of State would have to play an "*aggressive*" role of intervention, and

[10] [2023] CAT 10.

[11] Case no. 1433/7/7/22: *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*, Transcript of CPO Application Hearing dated 1 February 2023, p.28.

[12] Ibid., p.25.

[13] Ibid., p.28.

[14] Ibid., p.29.

[15] Case no. 1404/7/7/21: *David Courtney Boyle v Govia Thameslink Railway Limited & Others*.

that "*this is a case where (at certain stages of the trial process, however it is broken up) the Secretary of State for Transport needs to be before the Tribunal*".[16]

Shortly afterwards, in *Gutmann v First MTR South Western Trains Limited and Ors*,[17] the CAT rejected an application by the Secretary of State for similar intervention. Mr Justice Roth held that the CAT would only permit the Secretary for State to file written submissions in relation to the relevant regulatory framework to assist the CAT's understanding, but that this must be done in a "neutral" manner, noting the complexity that interventions can add.[18] The differences in the CAT's approach were driven by the quite different facts in *Gutmann* and *Boyle*, and in particular that in *Boyle,* the Secretary of State had a heavier hand in directing aspects of the behaviours complained of. Together, the approaches indicate an appreciation by the CAT that regulatory intervention will be necessary and appropriate in certain cases, but that the CAT will not feel reluctant to shut out regulatory intervention where it feels this is not the case, in particular with a view to minimising the risk of unnecessary disruption or disproportionate expansion of a case.[19] While its own position as the competition regulator is unique (and this was specifically acknowledged by the CAT in *Gutmann*[20]), the CMA will take a keen interest in the CAT's developing approach to intervention by public bodies and will doubtless be taking account of these decisions.

While the CMA is in a unique position among potential interveners because of Rule 50 of the CAT Rules, it must also be mindful of the CAT's established jurisprudence on the parameters of interventions. Like the courts, the CAT has had to consider when intervention will best assist it in resolving the proceedings. A potential intervener must show not only that it has a sufficient interest in the proceedings, but also that allowing an intervention would be consistent with the "*just, expeditious and economical conduct*" of the case.[21] The focus is less on the interests and position of the intervener, and more on what it can do to assist the CAT. This assessment of their potential contribution is highly case-specific (as seen in the Rail Fares litigation above). In the interests of efficiency, the CAT will also tend against permitting an intervention where the intervener's position is already adequately represented by one of the principal parties.[22] Even if the potential intervener can present a different perspective, it must demonstrate how that perspective would affect the case and result in arguments that differ from those of the two main parties.[23] The CAT has also previously taken into account the cost implications of intervention.[24]

In all, the message from the CAT is clear – an intervener must focus not just on the impact on their own position, but also on how they can most effectively (and efficiently) assist the CAT. These cases contain important lessons for the CMA on how to present an application for intervention to assist the CAT. In recent remarks, the President of the CAT noted that standalone actions should come to trial, and be determined, as swiftly as possible. This impacts the role of regulator involvement – while there is provision for such involvement, the

[16] *David Courtney Boyle v Govia Thameslink Railway Limited & Others* [2022] CAT 46.

[17] *Gutmann v First MTR South Western Trains Limited and Ors* [2023] CAT 23 ("***Gutmann***").

[18] *Gutmann* at [35].

[19] *Gutmann* at [32], [35].

[20] *Gutmann* at [36].

[21] *British Sky Broadcasting Limited and TalkTalk Telecom Group PLC v Office of Communications, British Telecommunications PLC v Office of Communications* [2012] CAT 18 [5].

[22] *B&M European Value Retail S.A. v CMA* [2019] CAT 8 [16] - [17].

[23] *Sabre Corporation v CMA* [2020] CAT 8 [16].

[24] *B&M European Value Retail S.A. v CMA* [2019] CAT 8 [14] and *Flynn Pharma Limited and Flynn Pharma (Holdings Limited) v CMA and Pfizer Inc. and Pfizer Limited v CMA* [2019] CAT 2 [15].

CAT President noted that "*it seems to me that involvement ought generally to be less rather than more*". If the CMA did want to intervene, "*the answer would be "yes", not "no": but I would want to understand the basis of that interest*".[25]

### 3.4 The CMA's practice to date

In deciding whether to intervene in proceedings, the CMA's guidance indicates that it "*considers when it can contribute to the proceedings in addition to how the case is presented by the existing parties to the action and in doing so assist the CAT*".[26] Any decision to intervene will be taken in line with the CMA's prioritisation principles,[27] taking account of the impact, strategic significance, risks and resources involved in any potential action. In particular, as noted at principle 3.5, the CMA will take into account whether it is best placed to act, or if there are alternatives. The Senior Director of Litigation at the CMA has indicated that the agency's power to submit oral or written observations under the CAT Rules is particularly important where claims raise policy or legal issues that could affect the CMA's own decisions.[28]

To date, the CMA has intervened in four private actions before the CAT:[29]

- *Kent v Apple and Apple Distribution International Ltd*:[30] an opt-out CPO against Apple for abuse of dominant position in relation to the App Store;
- *Coll v Alphabet Inc. and Others*:[31] an opt-out CPO against Alphabet for abuse of dominant position in relation to the Google Play Store;
- *Justin Le Patourel v BT Group PLC*:[32] an opt-out CPO against BT alleging BT has charged excessive prices for certain landline services; and
- *Epic Games, Inc. and Others v Alphabet Inc., Google LLC and Others*:[33] a claim alleging abuse of dominant position by Google in relation to Android and the Google Play Store.

Three out of four of these cases are collective actions, and all of them are in line with one of the CMA's key areas of focus for 2023-2024, ensuring digital markets are competitive.[34] It notably includes both of the certified cases in which the CMA has its own parallel Competition

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[25] 'Private Enforcement of Competition Law, Judges' Roundtable, Remarks of Sir Marcus Smith (President, UK Competition Appeal Tribunal) (7 February 2023)', https://www.catribunal.org.uk/sites/cat/files/2023-02/2023_PRIVATE%20ENFORCEMENT%20OF%20COMPETITION%20LAW%202023.pdf (accessed 27 April 2023).

[26] 'Service of documents on the CMA in court proceedings relating to competition law', https://www.gov.uk/government/publications/competition-law-court-proceedings-serving-documents-on-the-cma/service-of-documents-on-the-cma-in-court-proceedings-relating-to-competition-law (accessed 27 April 2023).

[27] 'Prioritisation principles for the CMA', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885956/prioritisation_principles_accessible_v.pdf (accessed 27 April 2023).

[28] Global Competition Review: CMA likely to intervene in private competition claims says official (30 September 2021).

[29] See the 'Register of cases in which the CMA has intervened' at https://www.gov.uk/government/publications/competition-law-court-proceedings-serving-documents-on-the-cma/service-of-documents-on-the-cma-in-court-proceedings-relating-to-competition-law#register-of-cases-in-which-the-cma-has-intervened (accessed 27 April 2023). Although *Gormsen v Meta* is listed here, it is understood that the CMA has not formally intervened in this case to date.

[30] Case no. 1403/7/7/21: *Dr Rachael Kent v Apple Inc. and Apple Distribution International Ltd*.

[31] Case no. 1408/7/7/21: *Elizabeth Helen Coll v Alphabet Inc. and Others*.

[32] Case no. 1381/7/7/21: *Justin Le Patourel v BT Group PLC*.

[33] Case no. 1378/5/7/20: *Epic Games, Inc. and Others v Alphabet Inc., Google LLC and Others*.

[34] 'Competition and Markets Authority Annual Plan 2023/24', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1146961/A_CMA_ANNUAL_PLAN_2023-2024_.pdf (accessed 27 April 2023).

Act 1998 ("**CA98**") investigation (indeed, all interventions have come following the certification stage).

It also appears likely that the CMA may in future intervene where a case raises particularly novel issues of competition law. The *Gormsen* action against Meta raises privacy and consumer protection issues (and the CAT made remarks to this effect with regard to several of the allegations in its certification judgment). Similarly, the *Gutmann* action against Apple in relation to iPhone battery life is in many ways more akin to a product liability action, rather than an abuse of dominance claim. The Water CPOs are also novel as the first "environmental" CPOs. The precise abuse of dominance alleged by the class representative has not yet been publicly announced and there is no established form of abuse which neatly fits the allegations. The CMA has a clear interest in influencing the development of competition law in these novel areas.

The CMA's involvement in private actions may not always require full-bodied intervention in proceedings, particularly at the early stages. In *Gormsen*, the CAT President noted that he wanted to put on the record that the CMA is very welcome to "*put in its two penny worth*" without intervening, and that the costs of intervention should not have to be incurred for that to happen.[35] This may present a lighter touch alternative for the CMA in cases where it does not wish to formally intervene – for example, to avoid expending significant resources where a CPO may not even be certified by the CAT.

In the *Gormsen* CPO, it appears that the CMA had indicated in correspondence that it did not intend to intervene at the certification stage (in line with its previous interventions, which all occurred post-certification as detailed below), but that it had asked for and received key documents in the case, and was taking an active interest in the proceedings.

In addition, the CAT noted in the *B&M European Value Retail v CMA* decision that it did not object to an unsuccessful would-be intervener supplying information to a party and/or assisting with the presentation of that party's case – in appropriate cases, the CMA may well consider whether this type of co-operative approach presents another option in a private action in which it has a potential interest.[36]

## 4 How should the growth of private enforcement shape the CMA's own administrative priorities in enforcing CA98?

As the previous section demonstrates, there is an important role for the CMA to participate both formally and informally in cases before the CAT and a clear route to do so. We now turn to consider what the growing role of the CAT in the development of competition law means for the exercise of the CMA's discretion in deciding what cases to investigate itself.

The CMA's mission is to make markets work well in the interests of consumers, businesses and the economy. The CMA's Prioritisation Principles make clear that it focuses its efforts and resources on deterring and influencing behaviour that poses the greatest threat to consumer welfare and intervenes to protect consumer welfare.[37]

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[35] Case no. 1433/7/7/22: *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*, Transcript of CPO Application Hearing dated 1 February 2023, p. 78.

[36] *B&M European Value Retail S.A. v CMA* [2019] CAT 8 [16].

[37] 'Prioritisation principles for the CMA', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885956/prioritisation_principles_accessible_v.pdf (accessed 27 April 2023).

The CMA has four Prioritisation Principles it considers in deciding which cases to pursue, being (i) impact (on consumer welfare and any additional economic impact on efficiency, productivity and the wider economy); (ii) strategic significance (i.e. whether it is in line with the CMA's strategy and other objectives, and whether the CMA is best placed to act); (iii) risks (of an unsuccessful outcome); and (iv) resources. The growth of CPOs is of clear relevance when considering whether the CMA is best placed to act and what the available / likely alternatives to CMA action would be.

## 4.1 Potential availability of litigation funding as a relevant factor in prioritisation decisions

Considerations around whether the CMA is best placed to act have generally militated *against* the CMA taking action in disputes between large companies, as the CMA's view is that such companies should in general have sufficient resources to bring their own actions in court. The corollary of this is a presumption that individuals or smaller businesses may not have the means to pursue potential infringements of competition law privately. But the growth of litigation funding and its availability for CPOs covering consumers mean private damages actions through the CPO regime are now viable where they were not previously. We believe this important change in availability of funding for litigation should be a consideration for the CMA in assessing whether it should take any action and, if so, what action it should take.

The growth of CPOs post-*Merricks* has, in large part, been directly driven by litigation funders, who naturally seek to maximise the return on their investment in claims. This profit motive has the potential to skew the private enforcement market to focus on claims with the highest possible reward from the most deep-pocketed defendants, as opposed to the most legally and factually meritorious claims. As an illustration of the rewards sought, the damages sought in some claims (for example, over £13 billion in one of the claims against Google relating to AdTech) could dwarf the largest regulatory fines ever imposed not only by a single authority in the UK, but globally. While the CMA has the power to impose fines of up to 10% of worldwide turnover, the damages in CPOs are calculated partly by reference to class size. Even modest sums (such as £50 per head in the *Gormsen* class action) are significant when applied to enormous class sizes (with a class size of c. 45 million UK Facebook users, the *Gormsen* action may be worth up to £2.2 billion).

The CMA has a different role to play, focusing instead on significant tangible outcomes for UK consumers more broadly.

Additionally, the CMA may choose not to spend public resources on cases that could be privately litigated at the expense of litigation funders. In the case of particularly novel claims, while the CMA will have a legitimate interest in influencing development of the law, we believe the CMA should consider whether it is best placed to carry out its own investigations, or to allow such claims to be primarily pursued by private claimants/class representatives (who will bear the cost and risk, likely with support from funders and insurers) and instead intervene in these cases only where essential.

## 4.2 Beyond funding considerations: other cases where the CMA would be "best placed" to act

Putting funding considerations to one side, the CMA retains a number of significant advantages over private claimants/class representatives which should also be considered in prioritisation decisions. We outline these below.

### 4.2.1 A significant information advantage for non-public infringements

The CMA has significant information gathering powers, including the power to conduct dawn raids. It can require a person to produce any document or information it considers relates to any matter relevant to its investigation. In conducting dawn raids, the CMA can enter premises and obtain documents. The CMA can use these powers of investigation whenever it has reasonable grounds for suspecting that there has been a breach of UK competition law.

By contrast, private litigants are often at a significant disadvantage in terms of access to information to substantiate their claim. Absent a regulatory decision to ground a follow-on action, or the possibility of pre-action disclosure (which is notoriously hard to obtain), a private litigant must prepare (and, crucially, fund) its claim and plead it before it can receive disclosure from the defendant. For proposed class representatives seeking a CPO, they must succeed on certification before they can enter the disclosure stage. In *Gormsen*, the CAT noted that proposed class representatives often argue that "*the answer to this particular problem will emerge on disclosure*" (the CAT's response to this complaint was that the disclosure request should be articulated by the class representative at the certification stage).[38] The information asymmetry between potential defendants and claimants/class representatives is a frequent complaint among those who wish to bring private actions before the CAT.

The CMA may therefore take the view that it is in the best interests of consumers to focus its resources on investigating conduct where a private litigant would struggle to access the information needed to plead a claim (an obvious example being an undercover cartel). On the other hand, where the relevant conduct is publicly observable and information more readily available, and it is clear that potential claimants and class representatives (such as consumer rights activists) are contemplating action, the CMA may take the view that regulatory intervention is not an immediate priority.

#### 4.2.2 Where issues are cross-regulatory and there is a benefit to coordination between regulators

The CMA may also have a significant advantage over private litigants in some cases because of its close relationship with other regulators. For example, in digital markets the CMA works with the Information Commissioner's Office, Ofcom and the Financial Conduct Authority as part of the Digital Regulation Cooperation Forum to drive greater regulatory co-operation and deliver a coherent approach to digital regulation. The CMA is able to work closely with other regulators on the regulatory overlap and potential clashes in their different jurisdictions and might be particularly well-placed in cases raising cross-cutting regulatory issues.

#### 4.2.3 Cases requiring intervention beyond fines

The CMA's toolkit is more flexible than the CAT's in that it allows the CMA to make orders about conduct, either prior to infringement (via interim measures), following an infringement finding or through settlements or commitments. The CMA can require binding commitments to be given by the undertaking. Similarly, the markets regime (soon to be supplemented for large tech companies by the Strategic Market Status regime proposed in the DMCC Bill) gives the CMA power to address structural issues both at a market-wide level and at a business model level.

#### 4.2.4 Cases where there is an interest in individual deterrence

[38] *Gormsen v Meta* [2023] CAT 10 [40(3)(i)].

While collective proceedings in the CAT are generally targeted at corporates, the CMA also has the power to enforce competition law against individuals – both through the criminal cartel offence and also through director disqualification orders where a company breaches competition law and the director's conduct makes them unfit to be concerned in the management of a company (s. 9A, Company Directors Disqualification Act 1986).

Criminal cartel cases are rare, but the CMA has pursued (and secured) a large number of disqualifications in focus areas such as the pharmaceutical and construction sectors in recent years[39] and the personal liability of senior individuals in the context of enforcement is an important consideration in the context of leniency and settlement. The evidence the CMA gathers during its administrative process is typically critical to being able to take action against individuals. The enforcement of competition law in cases of individual wrongdoing is an important aspect of the CMA's role which cannot be replicated by private enforcement.

#### 4.2.5 Cases which fall within the CMA's soon to be significant consumer law powers

Many of the current crop of CPO claims appear to be, as indicated above, more in the nature of consumer protection claims than conventional competition law claims. One explanation for the significant degree of private litigation is the absence of consumer protection powers with bite. This lacuna will be addressed with the DMCC Bill. Accordingly, greater enforcement by the CMA using its consumer protection powers may lessen the current volume of consumer class claims.

## 5 Conclusions

As this article has explored, the CAT sits at a potential inflection point in the evolution (and intersection) of private and public competition law enforcement. This raises important policy considerations for the CMA, both in terms of how it participates in private damages processes, but also how it prioritises its own investigations.

While the CMA does have some scope to intervene and influence proceedings once on foot, self-evidently neither the CAT nor the CMA is able directly to influence the nature or number of private claims that may be lodged. The incentives of claimants/class representatives and litigation funders are, in many cases, unlikely to be driven by a desire to achieve the coherent development of competition law, but instead primarily by a desire to maximise the damages that may be obtained.

It is also worth noting that while many of the certified collective proceedings that are currently on foot remain at a very early stage, it is likely that the parties in many cases will ultimately choose to settle proceedings before judgment is delivered. It is therefore quite possible that some, if not many, of the claims before the CAT will remain effectively undecided from a jurisprudential perspective. While settlements may have a useful deterrent effect, we would ultimately caution against a view that the CMA could consider effectively delegating certain

[39] See: 'Supply of construction services: director disqualification - GOV.UK (www.gov.uk)', https://www.gov.uk/cma-cases/supply-of-construction-services-director-disqualification (accessed 27 April 2023); 'Nortriptyline investigation: director disqualification - GOV.UK (www.gov.uk)', https://www.gov.uk/cma-cases/suppliers-of-antidepressants-director-disqualification (accessed 27 April 2023); 'Fludrocortisone acetate tablets: director disqualification - GOV.UK (www.gov.uk)', https://www.gov.uk/cma-cases/fludrocortisone-acetate-tablets-director-disqualification (accessed 27 April 2023); 'Supply of precast concrete drainage products: director disqualification - GOV.UK (www.gov.uk)', https://www.gov.uk/cma-cases/supply-of-precast-concrete-drainage-products-director-disqualification (accessed 27 April 2023); and 'Pharmaceuticals: anti-competitive agreements – GOV.UK (www.gov.uk)', https://www.gov.uk/cma-cases/pharmaceuticals-suspected-anti-competitive-agreements#court-proceedings-seeking-director-disqualification (accessed 27 April 2023).

issues for judicial clarification via private enforcement (even if it is clear that claimants/class representatives and funding are likely to be forthcoming).

In terms of the broader development of competition law and the role of private enforcement, it is notable that a number of the collective actions that have been brought recently concern conduct that does not at first blush appear to fit neatly into the established framework for competition law infringement. It remains to be seen whether these claims represent the dawn of an era of private competition claims that effectively extend the boundaries of enforcement, or whether these are to some extent a by-product of perceived lacunae in the current public and private enforcement regime that will ultimately be addressed by legislative changes.

Such legislative changes may in time include provision for opt-out collective actions for non-competition claims, in addition to changes to the CMA's powers. It has long been a source of frustration for consumer rights advocates (and the CMA itself) that the only enforcement mechanism available to the CMA for consumer law infringements was to bring court proceedings, which were lengthy in practice and a weak deterrent (and the only avenue available when court orders were not complied with was to bring further contempt proceedings[40]). The CMA's lack of teeth to take effective action in this area may have galvanised some claimants and class representatives to pursue private recourse. This "gap" in public enforcement is a key focus in the DMCC Bill, which proposes enhanced powers for the CMA to investigate consumer protection infringements and issue financial penalties of up to 10% of worldwide turnover for breaches, thus putting its consumer protection powers on an equal footing with its Competition Act powers. The CMA is already making a concerted effort to promote behavioural change in this sector in the meantime, for example via its public "The Online Rip Off Tip Off" campaign.

As is evident from the above discussion, another core area of focus for private claimants and class representatives concerns the digital sector, which is also the subject of future reform via the DMCC Bill. It remains to be seen which entities will be accorded Strategic Market Status and thus subject to the additional enforcement powers, and doubtless a flow of private claims will continue. It is arguable, however, that public policy goals will be better served via *ex ante* regulation of the type envisaged by the DMCC Bill rather than via private enforcement (particularly given the complex issues that are already evident at the certification stage in such actions).

In the interim, our expectation is that the CMA's role in private enforcement actions will grow as the current actions proceed and new claims are lodged, and the CMA will doubtless have useful contributions to make whether as a formal intervener or via more ad hoc submissions. There would seem to be a clear benefit for all interested stakeholders (whether claimant/class representative, defendant or other interested third party) in pursuing legal certainty and consistent approaches and outcomes wherever possible, and the CMA will clearly have an important role to play in that aim.

In terms of its own enforcement decisions, post-Brexit and given its expanded role in relation to, for example, subsidies, the CMA faces ever greater competing demands on its resources. It continues to apply its prioritisation criteria, which we consider remain a sound basis for deciding whether or not to proceed with a formal investigation, or to take an intermediate step (for example an advisory or warning letter). As we have outlined, there will likely remain

[40] See for example the *Secondary Ticketing* case, in which the CMA opened an enforcement investigation into suspected breaches of consumer protection law in the online secondary tickets market in December 2016. It took almost two years to secure a court order against Viagogo requiring compliance with the relevant legislation, and a further threat of contempt proceedings before satisfactory compliance was finally achieved in September 2019.

a range of cases in which the CMA remains better placed to take enforcement action. In our view, whether a private claimant/class representative or funder is (or is not) likely to pursue a claim should be a relevant but certainly not a decisive consideration in any prioritisation assessment: the CMA's role in this context should not be to take the cases that a funder is not interested in taking, but to pursue the enforcement actions that it considers will have the greatest impact in achieving its overall aims for the benefit of UK consumers more broadly. These parallel tracks will doubtless require careful consideration by both the CMA and the CAT in relation to the scope of inconsistent outcomes and the risk of collision, but we believe the role of private and public enforcement as complements should continue as we move into this next era of competition policy development.