Neutral citation [2026] CAT 55

Case No: 1601/7/7/23

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

25 June 2026

Before:

JAMES WOLFFE KC
(Chair)
TIM FRAZER
ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

DR SEAN ENNIS

Class Representative

- v -

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED
(3) APPLE CANADA INC.
(4) APPLE PTY LIMITED
(5) APPLE SERVICES LATAM LLC
(6) ITUNES K.K.
(7) APPLE (UK) LIMITED
(8) APPLE EUROPE LIMITED

Defendants

Heard at Salisbury Square House on 22 April 2026

JUDGMENT

APPEARANCES

Robert O'Donoghue KC and Daniel Carall-Green (instructed by Scott + Scott UK LLP) appeared on behalf of the Class Representative.

Marie Demetriou KC and Crawford Jamieson (instructed by Gibson Dunn & Crutcher UK LLP) appeared on behalf of the Defendants.

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002

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A. INTRODUCTION

1. Apple is the creator of devices such as the iPhone, the iPad and the proprietary operating system (iOS) used on iOS devices. Apple is also the creator of the App Store, which is an app pre-installed on iOS devices. Users of iOS devices can search for and download apps created by third party app developers for iOS through the App Store and may purchase digital goods and services within iOS apps. Apple charges a commission on paid downloads through the App Store of iOS apps and on purchases of digital goods and services purchased within an iOS app.

2. The Class Representative (the **CR**) alleges that the level of commission amounts to an abuse of a dominant position in the form of unfair and excessive pricing contrary to s. 18 of the Competition Act 1998 (**CA98**) and Article 102 TFEU. Apple denies that it holds a dominant position or that its commission constitutes unfair and excessive pricing. In 2023, the CR applied to bring opt-out collective proceedings under s. 47B of CA98 on behalf of all UK-domiciled app developers that have been charged commission via the App Store's various storefronts, as accessed by iOS device users worldwide. The proceedings are directed against a number of Defendant companies, collectively described in this judgment as **Apple**.

3. The Tribunal granted the CR's application for certification for the reasons set out in its judgment of 18 October 2024: [2024] CAT 58. Apple now applies for decertification of the proceedings. It contends that in light of the decision of the UK Supreme Court in *Evans v. Barclays Bank plc* [2025] UKSC 48 (***Evans***), issued on 18 December 2025, we should now hold that the conditions for certification on an opt-out basis are not met and that, accordingly, the Tribunal should revoke the collective proceedings order (the **CPO**). We accordingly have before us an application for decertification of the class as a whole (the **Application**).

4. For the reasons set out below, we refuse this Application. This is the unanimous judgment of the Tribunal.

B. THE CLAIM

5. The claim form alleges that Apple is dominant (indeed a 100% monopolist) on the iOS app distribution market. It alleges that Apple has abused its dominance by charging prices (in the form of commission charged on purchases of apps and on in-app purchases) which are: (i) excessive and unfair in their own right (the rate of commission typically being 30%); and (ii) unfair and abusive as a system of pricing (the commission being effectively inescapable and failing to reflect the true economic value contributed by app developers or of the services that Apple provides, and the burden of commission falling on 16% of app developers). The CR relies on Article 102(a) TFEU and s. 18(2)(a) CA98, which expressly prohibit "*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*".

6. The CR alleges that Apple enjoys an extraordinary and excessive profit margin in respect of its app distribution operations. According to the preliminary analysis undertaken by his expert, Mr Perkins, Apple's return on sales for App Store app distribution services, calculated on the basis of gross margin, was 79% in 2017 and 87% in 2022. Taking account of all costs, the return on sales was 66% in 2017 and 77% in 2022. The profitability of the App Store app distribution services, calculated on the basis of return on capital employed has always been above 100% during the relevant period, and was 333% in 2022. Its return on sales and profitability increased substantially from 2017 to 2022. Mr Perkins has expressed the view that Apple's profits were excessive throughout the relevant period.

7. The CR makes the following allegations in respect of its contention that the commission charged is unfair in itself, namely that: payment of the commission is effectively inescapable; Apple is not subject to any relevant competitive pressure; Apple enjoys an extraordinary and excessive profit margin; the level of commission fails to take into account the value brought by third-party app developers; Apple monetises the App Store through other lucrative sources of revenue; the commission does not reflect the true economic value of the App Store; the commission is not linked to any defined or discernible service or

benefit; and the commission is due irrespective of whether the third-party app developer receives payment.

8. The claim is for damages quantified, in the first instance (and subject to any arguments in respect of pass-on), by reference to the difference between the commission in fact paid by the class and the commission which the class would have paid in the absence of the alleged overcharge. As at March 2023, the CR estimated the aggregate award (including compound interest and subject to the level of pass-on) in the region of £630 million to £785 million. In his Second Supplemental Report dated 20 August 2024, Mr Perkins updated his estimate of the aggregate losses sustained by the members of the class between 1 July 2017 and 31 March 2023 to be between £745 million and £927 million (excluding interest) depending on the assumed counterfactual commission rate.

9. Apple disputes all of the key elements of the claim. It denies the allegation of dominance, taking issue with the CR's definition of the relevant market and contending that it is subject to strong constraints from competitors, developers and customers in each relevant market. It denies that any commission which it has charged is excessive or unfair. It contends that the CR's case fails to account for demand-side factors when assessing the value of Apple's product and fails to measure the real economic value that third-party app developers derive from the App Store and the wider iOS ecosystem. It takes issue with Mr Perkins' profitability analysis and denies the various allegations upon which the CR bases his contention that the price is unfair in itself. It denies that the comparables relied on by the CR are relevant and contends that many other digital platforms charge a headline commission rate of 30%.

C. THE STATUTORY PROVISIONS

10. Section 47B CA98 sets out the requirements which must be met before the Tribunal may make a CPO. We summarise those as follows.

    (1) The Tribunal must be satisfied that the entity bringing the proceedings can be authorised as the proposed class representative: CA98 ss. 47B(5)(a), 47B(8). Rule 78 of the Competition Appeal Tribunal Rules

2015 (the **Tribunal Rules**) makes further provision in respect of this authorisation condition.

(2) The claims must be eligible for inclusion in collective proceedings: CA98 s. 47B(5)(b). By virtue of CA98 s. 47B(6) and r. 79(1) of the Tribunal Rules, this eligibility condition comprises the following three cumulative requirements.

(i) The proposed claims are brought on behalf of an identifiable class of persons: r. 79(1)(a) of the Tribunal Rules.

(ii) The proposed claims raise common issues: CA98 s. 47B(6) and r. 79(1)(b) of the Tribunal Rules.

(iii) The proposed claims are suitable to be brought in collective proceedings: CA98 s. 47B(6); r. 79(1)(c) and r. 79(2) of the Tribunal Rules.

11. As regards the last of these requirements, r. 79(2) of the Tribunal Rules provides as follows.

> "In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—
>
> (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
>
> (b) the costs and the benefits of continuing the collective proceedings;
>
> (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
>
> (d) the size and the nature of the class;
>
> (e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
>
> (f) whether the claims are suitable for an aggregate award of damages; and
>
> (g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise."

12. If the conditions set out above are met, the Tribunal must decide whether the collective proceedings should be opt-in or opt-out. Rule 79(3) of the Tribunal Rules provides as follows.

> "In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—
>
> (a) the strength of the claims; and
>
> (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

13. Section 47B(9) CA98 gives the Tribunal power to vary or revoke a CPO in the following terms.

> "The Tribunal may vary or revoke a collective proceedings order at any time."

Rule 85 of the Tribunal Rules makes further provision as follows:

> "(1) The Tribunal may at any time, either of its own initiative or on the application of the class representative, a represented person or a defendant, make an order for the variation or revocation of the collective proceedings order, or for the stay or sist of collective proceedings.
>
> (2) In deciding whether to vary or revoke a collective proceedings order, the Tribunal shall take account of all the relevant circumstances, including in particular –
>
> (a) whether the criteria for certification of claims set out in rule 79 still apply or apply in the same way as when the order was made; and
>
> (b) whether the class representative continues to satisfy the criteria for authorisation set out in rule 78 and if not, whether a suitable alternative class representative can be authorised;
>
> (c) whether the Tribunal has granted the class representative permission to withdraw in accordance with rule 87 and it will not be substituted.
>
> (3) If the Tribunal makes an order under paragraph (1), the order may also make further provision including –
>
> (a) that the proceedings should be discontinued in whole or in part or continue between different parties and, for that purpose, the Tribunal may–
>
> (i) order the addition, removal or substitution of parties; or
>
> (ii) order the amendment of the collective proceedings claim form;

> (b) that there be substituted as the class representative another person who satisfies the criteria for approval in rule 78;
>
> (c) as regards costs."

We will comment further on this provision in the context of our discussion of the Application.

D. *EVANS*

14. The decision of the UK Supreme Court in *Evans* was central to the debate before us. *Evans* concerned an application for a CPO on an opt-out basis in respect of follow-on claims for damages. The infringements found by the Commission, which provided the basis for the proceedings, concerned the exchange of information relating to spot trading of currencies by a small number of individuals over a short period. The claim was for damages, including in respect of unrelated transactions, allegedly suffered not only by customers of banks for whom those traders worked but also by customers of many other banks across a range of foreign exchange deals – so-called "*market effects*". This prompted two claims for certification before the CAT, one brought by Mr Evans, the other by Michael O'Higgins FX Class Representative Ltd.

15. In a judgment issued on 31 March 2022, the majority of the Tribunal (Sir Marcus Smith and Professor Neuberger; Mr Lomas dissenting) declined to certify these proceedings as suitable to proceed on an opt-out basis: [2022] CAT 16. They concluded that the difficulties with causation and the proposed theory of harm were such that the claims, as pleaded, were liable to be struck out. Although they decided not to exercise the Tribunal's jurisdiction to strike out the claims at the stage of certification, they concluded that the weakness of the claims was a powerful reason against certifying on an opt-out basis. They also concluded that there was no reason why it was not practicable for the members of the putative class, given their relative sophistication, to join opt-in proceedings. They inferred that the reason why a book-building exercise, about which they had evidence, had been unsuccessful was that the class members had chosen not to opt in. This too weighed strongly against certifying on an opt-out basis.

16. The majority recognised that there was a wider group of potential claimants with very small claims, who would be in a different position. These were not members of the proposed class but in any event the Tribunal did not consider that the existence of these potential class members should alter their conclusion on practicability. They took the view that, although it would not be practicable for these potential class members to opt in, "*we should not allow a sub-class of persons, whose total claims will be a tiny fraction of those of the whole class, to cause what is a clear-cut conclusion on practicability to change. That would be to allow the tail to wag the dog*": §381(10). The majority acknowledged that the practical choice was between opt-out proceedings and no proceedings at all. Whilst this particular consideration pointed strongly in favour of certifying on an opt-out basis, it was outweighed in the circumstances by the conclusions which the majority had reached about the strength of the claims and the practicability of opt-in proceedings.

17. In a judgment issued on 9 November 2023, the Court of Appeal reversed the Tribunal's decision: [2023] EWCA Civ 876 (Green LJ, Flaux C and Snowden LJ concurring). The Court of Appeal considered that the Tribunal had been wrong, having declined to strike out the claims, to give the strength of the case more or less decisive weight against opt-out proceedings knowing that this would bring the claim to an end. The Court also took the view, disagreeing with the Tribunal's reading of the evidence, that opt-in proceedings would be impracticable. The Court noted a Commission decision (the *Sterling Lads* decision), published after the date of the Tribunal's decision, and considered that this was both admissible and relevant and had substantial "*probative value*" in support of the Court's conclusion.

18. The UK Supreme Court, in turn, reversed the Court of Appeal. The Supreme Court set out its main conclusions at §§168–169.

> "168. On the issues of principle raised on this appeal, we can summarise our main conclusions as follows:
>
> (i) The weakness of the claim as assessed by the Tribunal – and the conclusion that no plausible case on causation had been articulated – was properly regarded by the Tribunal as a factor weighing strongly against opt-out proceedings. The merits of the claim are

not a neutral factor. In the present case, this factor indicated that affording the claimants the procedural advantages and exposing the defendants to the additional burdens and 'leveraging effect' of opt-out proceedings was not justified by the perceived merits of the claim.

(ii) The Tribunal was entitled to take the view that, although opt-in proceedings would not in fact be brought, this was because a significant number of large and sophisticated financial institutions which stood to recover substantial sums of money if the claim succeeded were not interested in opting in to a collective action; and that in these circumstances, although it was not practicable for smaller entities and individuals to opt in, looking at the matter overall it could not be said that it was not practicable to bring opt-in proceedings.

(iii) The policy of facilitating the vindication of rights and deterring future wrongdoers is not a strong factor pointing in favour of opt-out rather than opt-in proceedings. Case management by the Tribunal, in particular choosing between opt-in and opt-out proceedings, requires a balance to be struck between assisting claimants to obtain redress and protecting defendants from oppressive litigation. The proper starting point in making the determination is one of neutrality without any presumption or predisposition in favour of either opt-out, or opt-in, proceedings.

(iv) A decision of the Commission containing findings of infringement against a third party is not admissible and those findings do not have probative value in these proceedings.

169. The Tribunal carried out a thorough analysis of all the factors listed in the Tribunal Rules as relevant in determining whether opt-out collective proceedings were appropriate. The exercise of weighing up the various factors relevant to the choice of opt-in or opt-out collective proceedings is essentially an exercise of judgment in respect of facts and evidence by an expert, specialist body. The Tribunal has a broad discretion when making the relevant judgments. The Court of Appeal should not interfere simply because it might have arrived at a different conclusion if it had been conducting the exercise. No grounds have been identified which justified the Court of Appeal in reversing the judgments and overall determination made by the Tribunal in this case."

19. We will discuss *Evans* further, when addressing the arguments in the present case.

E. PROCEDURAL HISTORY

20. In the present case, the CR filed his Collective Proceedings Claim Form (**CPCF**) on 25 July 2023. The proposed class was all UK-domiciled app developers that have been charged commission via the App Store's various

storefronts, as accessed by iOS device users worldwide. Apple applied for an order striking out the proceedings, or for reverse summary judgment, in so far as the proceedings concern commission charged on transactions carried out via storefronts outside the UK or, prior to 1 January 2021, outside the EU. In effect, Apple sought to confine the case to commission charged on transactions carried out via storefronts in the UK or, prior to 1 January 2021, in the EU.

21. Apple's application was made on the basis of arguments that: (i) the law applicable to the transactions in question is the law of the country in which the relevant storefront operates and is therefore (so it is said) outside the jurisdiction of the Tribunal; and (ii) the charging of commissions on transactions taking place through the non-EU/UK storefronts is conduct which falls outside the territorial scope of s. 18 CA98 and/or Article 102 TFEU.

22. Following a hearing on 23 and 24 January 2024, the Tribunal issued a judgment in April 2024 dismissing Apple's applications: [2024] CAT 23. On the applicable law question, the Tribunal concluded (§89) that the CR has a "*realistic prospect"* of successfully establishing that the claim is governed by UK law pursuant to Article 6(3)(a) of the Rome II Regulation. Although the Tribunal identified, at §69, a number of objections to the CR's approach to market definition (an approach which the Tribunal characterised, at §73, as "*novel and questionable*"), it was unable to hold (§74, §77) that the CR's case is "*doomed to fail"* or "*hopeless".* On the territoriality question, the Tribunal concluded, at §114, that "*despite the cogent arguments advanced by Apple",* the CR has a realistic prospect of establishing that Apple's conduct was either implemented in the EU/UK or that it was foreseeable that it would have an immediate and substantial effect in the EU/UK.

23. The CPO Application was heard on 16 September 2024. On 18 September 2024, the Tribunal intimated to the parties that it would grant the application. It issued a judgment setting out its reasons for deciding to certify the proceedings on an opt-out basis on 18 October 2024: [2024] CAT 58 (the **Certification Judgment**). At the time when this decision was made, the Tribunal had before it the decision of the Court of Appeal in *Evans* (which the Tribunal called "*O'Higgins FX"*).

24. The Tribunal dealt with the opt-in/opt-out question at paragraphs §§46–56 of the Certification Judgment. At paragraphs §§46–49, the Tribunal stated:

> "46. The following principles were common ground:
>
> (1) Section 47B CA 1998 recognises that collective proceedings can be opt-in or opt-out but neither s 47B CA 1998 nor the Tribunal Rules indicate any sort of a policy or legal preference or predisposition either towards or against opt-in or opt-out.
>
> (2) The Tribunal has an unfettered discretion to choose between opt-in and opt-out proceedings. The Tribunal is not bound to accept the choice made by the class representative. In exercising its discretion, the Tribunal may take into account all matters it thinks fit, including the non-exhaustive list of considerations in Tribunal Rule 79 paragraphs (2) and (3).
>
> (3) In considering 'practicability', the Tribunal must consider not only 'do-ability' but also whether it would also be 'reasonable, proportionate, expedient, sensible, cost effective, efficient etc' for proceedings to be brought on an opt-in basis: *Le Patourel v. BT Group* [2022] EWCA Civ 593 ('*Le Patourel*') at §83.
>
> 47. The fact that the proposed class comprises a group of several thousand members of which the large majority suffered small losses is, in this case as in others, a strong indicator that opt-in proceedings would not be practicable and that the proceedings should therefore be on an opt-out basis. As noted by Green LJ in *Le Patourel* after referring to the judgments of the Supreme Court in *Lloyd v. Google LLC* [2021] UKSC 50 and *Merricks*:
>
> > '[73] … Both judgments demonstrate that the practicalities of collectively organised litigation might favour an opt-out solution where there are large numbers of potentially affected parties and relatively small sums at stake which might otherwise deter the take up of opt-in proceedings.'
>
> 48. In *Le Patourel*, the Court of Appeal agreed with the Tribunal that class members, even if they could be identified and contacted at the outset, would be more likely to opt-in after a favourable damages award than at the outset and that this was a relevant factor in favour of opt-out proceedings. By maximising take-up by potentially affected parties, opt-out proceedings are conducive to the underlying purpose of the collective action regime:
>
> > '[29] Pulling the threads together, the principal object of the collective action regime is to facilitate access to justice for those (in particular consumers) who would otherwise not be able to access legal redress. Embraced within this broad description is the proposition that the scheme exists to facilitate the vindication but not the impeding of rights. Also included is the proposition that a scheme which facilitates access to redress will increase ex ante incentives of those subject to the law to secure early compliance; prevention being better than cure. Finally emphasis is laid on the

> benefits to judicial efficiency brought about by the ability to aggregate claims.'
>
> 49. In *O'Higgins FX* the represented class was estimated to include 42,015 members of which 18,154 were financial institutions and 23,861 non-financial institutions with more than 49 employees. The class was described by the Tribunal as made up of only fairly large and inferentially sophisticated institutions ([2022] CAT 16, [381(2)]). A book-building exercise had started and some 321 firms had been contacted but it had not proved possible to assemble a large enough group to make a group action economically feasible. The Tribunal inferred that the class members were large and sophisticated entities that could afford to bring proceedings and that if they did not do so this was due to a deliberate decision on their part that they did not 'want' to litigate. As such, the majority concluded, there was no access to justice deficit; it was practicable for them join [*sic*] an opt-in class. The Court of Appeal disagreed. Relative to costs, the scale of typical claims was modest and the size of the typical claimant was not large. Furthermore, the principle that the collective action regime was intended to facilitate the vindication of rights and the principle that unlawful anticompetitive conduct should be restrained also pointed in favour of opt-out proceedings."

25. The Tribunal then narrated the parties' contentions. Both parties drew support from the dissenting judgment of Mr Lomas in *Evans* on the issue of practicability (which Green LJ, in the Court of Appeal, had described as largely chiming with his own judgment). The Tribunal set out its conclusion at §56:

> "In the Tribunal's judgment, the fact that the proceedings might be financially viable on an opt-in basis, because of the number of large PCMs with substantial claims, as Apple contends, would not overcome the impracticability of opt-in proceedings *vis a vis* the majority of the PCMs with relatively modest claims. The process of identifying and contacting many thousands of App Developers would be costly and time-consuming. Even if they could be contacted and identified the opt-in rate would probably be very low because of the small sums involved in the majority of claims. An opt-in basis would not be in the interests of the PCMs as a whole. Consistently with the principles set out in *Le Patourel* and *O'Higgins FX*, the opt-out basis is therefore to be preferred."

26. Apple applied for permission to appeal the Certification Judgment. The Tribunal refused permission in a reasoned order made on 26 November 2024 and made the CPO on 29 November 2024. Apple renewed its application for permission to appeal in the Court of Appeal, and this was refused by the Chancellor (Sir Julian Flaux) on 17 February 2025.

27. On 21 February 2025, Apple filed its Defence. In very brief summary, Apple takes issue with the CR's definition of the market. It denies that it has exercised dominance in relation to the alleged market and contends that it is subject to

strong competitive constraints. It denies that any commission which it has charged is excessive or unfair. It adheres to its position on applicable law and territoriality in respect of sales through non-EU/UK storefronts.

28. Following a case management conference in April 2025, the Tribunal issued procedural directions with a view to a trial being listed from the first available date on or after 7 February 2028. It gave directions in respect of disclosure and the exchange of information about expert and survey evidence. It directed a further case management conference to be listed for the first available date after 12 January 2026, with a provisional agenda to include any further disclosure and any necessary directions as to expert and survey evidence. The Tribunal gave directions for the service of witness evidence later in 2026 and expert evidence in 2027. In a ruling of 31 October 2025, the Tribunal dismissed Apple's application for a trial of the applicable law and territoriality points as preliminary issues: [2025] CAT 70. At the joint request of the parties made in January 2026, the Tribunal agreed to defer the case management conference envisaged in that month to 6 May 2026. Whilst a trial has not yet been fixed, a pre-trial review has been fixed for the week beginning 13 December 2027.

F. *KENT V. APPLE (KENT)*

29. In separate collective proceedings, Dr Kent, the authorised representative of a class of approximately 20 million UK consumers who made purchases using the UK version of the App Store from 1 October 2015 onwards, alleges that Apple charges developers excessive and unfair prices in the form of commission payments which are ultimately paid by the device users. This is the same allegation which founds the basis of the CR's claim on behalf of app developers in the present case. Dr Kent also alleges certain exclusionary abuses which are not at issue in the present case. Dr Kent's claim form was filed on 11 May 2021, the CPO made on 29 June 2022 and a trial fixed for January 2025.

30. On 23 September 2024, the Tribunal held a joint case management conference in *Kent* and the present case to consider the interaction between them. The CR in these proceedings contended that there was a significant overlap between the two claims, and that a joint trial was the only way to achieve both finality and

legal certainty. Apple agreed with his position. Dr Kent's position was that it was too late for the present proceedings to catch up with the *Kent* proceedings, in which a trial had already been fixed for January 2025. In a ruling dated 8 November 2024 [2024] CAT 64, the Tribunal concluded at §29 that, whilst there were significant differences between the *Kent* proceedings and the present proceedings, they also "*raise[d] a number of similar if not identical common issues as to market definition, dominance, overcharge and pass-on*". The Tribunal recognised the risk of inconsistent judgments if the two cases proceeded separately but concluded that, given the comparatively advanced state of *Kent*, it should continue in accordance with its existing timetable and these proceedings would be managed separately.

31. *Kent* proceeded to trial. The Tribunal issued its judgment on 23 October 2025: [2025] CAT 67. The Tribunal reached the following conclusions, among others: (i) Apple held a dominant position in the relevant markets during the Claim Period; and (ii) Apple had infringed Chapter II of CA98 for the whole of the Claim Period, and Article 102 TFEU from the commencement of the Claim Period until 31 December 2020 in abusing its dominant position by charging excessive and unfair prices in the form of the commission which it charges developers for iOS app distribution services and iOS in-app payment services. The Tribunal identified the overcharge suffered by developers as a result of that abuse and exclusionary abuses which it also found established and assessed the rate of pass-on by developers to consumers at 50% (rejecting Apple's position that there was no pass-on by developers). On 13 November 2025, the Tribunal refused Apple's application for permission to appeal this judgment. Apple has since applied to the Court of Appeal for permission to appeal; this application remains pending. We understand that the Court of Appeal has appointed the cases to be dealt with at a rolled-up hearing which will consider both the application for permission and, if permission is granted, the appeal itself.

32. There is an issue between the parties about the extent to which the Tribunal may, in the context of the present Application for de-certification, take the Tribunal's judgment in *Kent* into account. We record the conclusions in that judgment at this stage simply to set the scene for our discussion of that issue at a later point in this judgment.

G. COMPOSITION OF THE CLASS

33. In his Second Supplemental Report, Mr Perkins estimated that there are at least 13,206 UK-domiciled app developers in the proposed class. He provided the following estimates of the distribution of losses amongst those developers.

(1) Between [✂] and [✂] developers have claims worth under £10

(2) Between [✂] and [✂] developers have claims worth between £10 and £100

(3) Between [✂] and [✂] developers have claims worth between £100 and £1000

(4) Between [✂] and [✂] developers have claims worth between £1000 and £10,000

(5) Between [✂] and [✂] developers have claims worth between £10,000 and £100,000

(6) Between [✂] and [✂] developers have claims worth between £100,000 and £1 million

(7) Between [✂] and [✂] developers have claims worth over £1 million.

Apple has relied on this analysis for the purposes of the present Application.

34. We also have before us Mr Perkins' Third Supplementary Report, dated 2 April 2025. That report considers the impact of alternative counterfactual commission rates ranging from 0% to 15% and provides estimates of loss suffered by UK app developers when calculated for sales across all storefronts and when restricted to UK/EEA storefronts. His updated estimate of loss worldwide (excluding China) and before accounting for any interest is [✂] to [✂]. His estimate of loss for sales through UK/EEA storefronts is [✂] to [✂]. Assuming a counterfactual commission rate of 12% to 15%, Mr Perkins estimates the loss for sales through UK/EEA storefronts at [✂] to [✂].

H. WITNESS EVIDENCE

35. The parties have placed a number of witness statements before the Tribunal for the purposes of this Application. Some of these were new witness statements prepared specifically in connection with this Application, whilst others had been prepared at earlier stages in these proceedings but were referred to in the context of this Application.

(1) Damien Auguste Geradin. Mr Geradin is a solicitor who previously acted for the CR in these proceedings. In a witness statement originally prepared for the first CMC in this case, he made the following statements, among others.

(i) iOS app developers are entirely dependent on Apple for their route to market. App Store is the only available channel for distributing third-party apps to iOS device users. Before developers can distribute their apps through the App Store, they must submit their apps to Apple for review. The CMA has found that it is not a credible option for iOS app developers to forego the App Store.

(ii) Apple has various mechanisms that it can use to put pressure on iOS app developers should it be minded to do so, including the use of its review process to reject apps; steering users away from particular apps and offering incentives to specific app developers. Mr Geradin notes, for example, that the CMA has recorded app developers as describing the app review process as "*obscure*", "*arbitrary*", "*capricious*" and "*Kafkaesque*". He further notes that the CMA has found that Apple has the ability, through the search mechanisms of the App Store, to influence the apps which consumers discover, download and use, and has the power selectively to increase the discoverability of certain apps.

(iii) App developers of various sizes have given accounts of Apple retaliating when they have acted contrary to Apple's wishes. Mr Geradin quotes allegations to that effect made by the Coalition for App Fairness, the CMA, Spotify and a former Senior Director of App Store Review.

(iv) App developers have also expressed fears of possible retaliation by Apple. Mr Geradin quotes a number of examples. He notes that the CMA, the US House Judiciary Committee and the Chair of the US Senate Judiciary Subcommittee on Competition Policy, Antitrust and Consumer Rights have recorded the expression of such fears. He observes that similar concerns have been noted in several news publications, including the New York Times and the Washington Post.

(2) Douglas James Watson. Mr Watson is a solicitor who acts for Apple in these proceedings. Two witness statements from Mr Watson have been placed before the Tribunal for the purposes of this Application.

(i) In his second witness statement, Mr Watson provides information, most of which is confidential, summarising aspects of Apple's transaction data. He specifically refers to two developers, both within the largest [✂] class members. He records that one of these generated £415 million from digital advertising revenue in 2023, and the other had a turnover of approximately £18.5 million in 2022, of which approximately £9.6 million was derived from online advertising revenue. He notes that - whilst Apple's standard commission rate is 30% - it offers different rates on certain transactions. He also notes that, in other proceedings, it had been claimed that there could be a pass-on rate of 100% (albeit that Apple disputes that).

(ii) In his third witness statement, Mr Watson identifies nineteen companies from amongst the developers with the [✂] claims, each of which is part of a substantial corporate group. Nine of

these groups had revenues in excess of USD 1 billion. He states that a substantial number of developers of varying scale have commenced and/or participated in proceedings challenging and/or complaining to regulators and legislators concerning aspects of Apple's App Stores in several jurisdictions including the UK. Spotify is a large developer which has done so. Dark Ice is a smaller developer which has done so. He states that the fact of such public action demonstrates that these developers are not deterred because of some fear of alleged retaliation by Apple.

(3) Oliver Way. Mr Way is the Senior Director of Legal Finance of Harbour. Harbour Fund V, L.P entered into a litigation funding agreement with the CR to support these proceedings. He states that the funding agreement is expressly contingent on the case being certified on an opt-out basis. Had the CR chosen to pursue the proceedings on an opt-in basis, Harbour would not have recommended that he be offered funding on the same terms and Mr Way expresses the personal view that it is highly unlikely that the CR would have been able to obtain funding for the claim.

(4) Cian Mansfield. Mr Mansfield is a solicitor acting for the CR in these proceedings. His statement includes the following.

(i) Mr Mansfield sets out the procedural history of these proceedings and describes certain features of the proceedings.

(ii) He gives evidence about the practicalities of opt-in collective proceedings. He notes that opting into collective proceedings involves class members "*placing their heads 'above the parapet'*." He describes the process of bookbuilding – i.e. identifying a group of class members who are prepared to opt into proceedings. Under reference to his own experience in two other cases, he characterises bookbuilding as a "*lengthy and resource intensive process*".

(iii) He states that whether or not a bookbuild could have been achieved prior to the proceedings being commenced, if it is suggested that the bookbuilding required for an opt-in approach should take place now, this would almost certainly lead to adjournment of the trial.

(iv) He confirms that the CR's funding arrangement is expressly contingent on these being opt-out proceedings. He states his expectation that the funder would withdraw funding if the proceedings ceased to be opt-out. This would, he states, likely spell the end of these proceedings. He states that this accords with his own experience of dealing with litigation funders and ATE insurers. He states that a change to opt-in proceedings mid-proceedings would, "*in the context of the risk-based analysis that litigation funders and ATE insurers take towards protecting their investments, seismic*". He states that the litigation funder has already funded in the region of £7.4 million (excluding ATE insurance *premia*). A change to an opt-in approach would, he contends, meant that a significant proportion of those costs would be wasted.

(v) Mr Mansfield states that "*it … should not be assumed that funding for an opt-in case could be obtained*". Larger developers might choose not to opt in with a view to free-riding on a case brought on behalf of smaller developers. It assumes that smaller developers would opt in despite the practical challenges and barriers which Mr Mansfield describes elsewhere in his statement. Mr Mansfield states that it is "*far from certain*" that an opt-in case with none of the larger developers would be economically viable, and that it is "*highly plausible*" that no opt-in proceedings would get off the ground.

(vi) Mr Mansfield describes a number of barriers to class members opting in or bringing their own proceedings. He describes the dependence of app developers on Apple. He refers to evidence

by the CEO of a UK app developer to the UK Parliament and an anonymous respondent quoted by the CMA, as well as the CMA's description of Apple as having "*substantial and entrenched market power*". He also makes the point that Apple is one of the three largest companies by size in the world. No single class member has equivalent resources. There is, he says, "*a profoundly asymmetric relationship in which Apple's financial dominance affords it a level of control and bargaining power which developers cannot realistically counterbalance*".

(vii) Mr Mansfield goes on to refer to material in the public domain which gives reasons as to why developers would be fearful of pursuing litigation against Apple. He states that the barriers to bringing claims against Apple are evidenced by the fact that, so far as he is aware, only one app developer (Epic Games) has ever engaged in material private litigation with Apple on matters engaging the subject-matter of the present proceedings. He states that when Epic introduced an alternative in-app payment option, Apple removed Epic Games app from the App Store. He explains why Epic Games, as one of the largest developers globally, was not typical of other app developers. He suggests that the incident reveals the leverage which Apple has over developers.

(viii) Mr Mansfield states, on the basis of this, that there is a wealth of material indicating why class members would have "*very real reservations about actively litigating against Apple*".

(5) Simon John Newman. Mr Newman is the Chief Executive Officer of the Online Dating and Discovery Association, a membership organisation including app developers of varying sizes and specialisms operating in the dating and social discovery sector. Across its membership, most services are app-based and rely on Apple's App Store or Google's Play Store for distribution. He states that ODDA's members have a highly asymmetric relationship with Apple, relying on the App Store as a core distribution channel and possessing little bargaining power. The

asymmetry is reinforced by members' economic dependence on Apple. Members, he says, feel they have no realistic option but to accept Apple's commission although they consider it to be disproportionately high. He is confident that members would be aware of the high-profile litigation involving Epic Games and Epic's exclusion from the App Store. He states that, from discussion with his membership, there is a "*deep-seated fear of retaliation*" from Apple if members raise concerns, challenge its policies or speak publicly about negative experiences. As a result, he says, "*members generally avoid voicing concerns directly to Apple, and almost none are willing to be named publicly or quoted in any context relating to potential disputes, investigations or regulatory submissions*". He states that although the fear is particularly acute for small developers even larger developers "*are often highly risk-averse when it comes to public confrontation with Apple*". This means that, though members may privately express strong concerns about Apple, they are "*generally unwilling to participate openly in legal or regulatory processes that might help address those issues, solely because they fear potential consequences from Apple*" and "*very reluctant to be publicly associated with any litigation against Apple or to take active steps to participate in such litigation*". He considers this to be consistent with view of the broader developer community, from what he has heard from participants in other sectors.

I. APPLE'S POSITION

36. Ms Demetriou KC, for Apple, invites us to take the view that the Tribunal has a continuing duty under r. 85 of the Tribunal Rules to consider whether certification remains appropriate under the criteria in r. 79. In the context of that duty, considerations such as finality are, she says, inapposite. Whilst she acknowledges that in practice a defendant seeking decertification would have to show that "*something's changed",* a material change of circumstances is not, she says, a legal precondition for the exercise of the power.

37. Ms Demetriou argues that the Certification Judgment, which relied expressly on the Court of Appeal judgment in the *FX* proceedings, is inconsistent with the

Supreme Court's decision in *Evans.* On uncontested evidence, the class in the present case comprises a relatively small number of developers who have very large claims, accounting for a very large proportion of the value of the total claim, and a very long "*tail*" of developers, who constitute the bulk of the class by number. The latter claims are individually very small and in aggregate comprise only a small percentage of the total commission paid.

38. The Tribunal's assessment of practicability in the Certification Judgment was, Apple says, determined by the position of those small value claims. This was precisely the approach, she contends, which the Tribunal in *Evans* characterised as allowing "*the tail to wag the dog*". The *Evans* Tribunal's analysis had been endorsed in the Supreme Court. Whilst at §126 of *Evans,* the Supreme Court acknowledged that the position might be different if the main core of the value consisted in a mass of small claims, with a rump of larger claims, here the position was the reverse. Ms Demetriou invited us to take the view that, in the assessment of practicability, we should focus on the claims which form the main value of the action, not those which are most numerous.

39. Further, the Certification Judgment identified the purpose of the collective action regime as being to facilitate the vindication of rights and to restrain unlawful anticompetitive behaviour, without referring to the requirement, emphasised by the Supreme Court in *Evans,* as the need to safeguard the rights of defendants and to provide fair access to justice for both parties. The Tribunal in the present case did not structure its analysis of practicability in the manner explained by the Supreme Court. It reasoned that because opt-in proceedings would be impractical for the majority of class members with smaller claims, it follows that opt-in proceedings would not be in the interests of the class as a whole. It lost sight of the practicability of bringing these proceedings on an opt-in basis because the vast majority of the claim value is concentrated in a small number of developers.

40. Ms Demetriou invites us to revisit the question of practicability. We should, she says, conclude that opt-in proceedings would be practicable for the relatively small number of large developers with significant claims, who make up the bulk of the value. [✂] developers account for some [✂] of the claim value and [✂]

for [✂] of the claim value. Amongst the [✂] developers are class members which are members of significant corporate groups (with annual revenues measured in billions). Objectively viewed, it would be practicable for developers with the largest claims to opt in to collective proceedings if they wished to do so.

41. Apple invites the Tribunal to reject the CR's contention that opt-in proceedings would be impractical for any portion of the class. But even if opt-in proceedings would be impractical for the small value claims, their existence should not change the overall assessment because their value is a small proportion of the claim. Ms Demetriou invites the Tribunal to reach an overall conclusion of the balance of justice, to the effect that opt-in proceedings would be practicable. She relies on the statement of principle, at §112 of *Evans,* that "*if it is practicable for the proceedings to be brought as opt-in proceedings, then generally speaking they should be*".

42. Addressing the CR's witness evidence, Apple observes that the CR had made no attempt at bookbuilding in this case. The available information suggests that bookbuilding would be unusually straightforward, given the concentration of the claim value in a handful of developers, the identity of whom is known to the CR. Further, the Tribunal should reject the contention that developers are so afraid of retaliation that opt-in would be impracticable. Mr Newman's evidence is hearsay. The alleged subjective views of class members are irrelevant to the objective assessment of practicability. Apple has produced evidence from Mr Watson that developers have, in fact, sued or complained about Apple to regulators. Whilst the CR has produced evidence about the current funding arrangement and the likelihood of the current funder supporting opt-in proceedings, it has not put forward any evidence as to whether an opt-in action could be funded by other means. There is, says Apple, no evidential basis for the assertion that opt-in proceedings are unlikely to be attractive to funders generally. In any event, even if the proceedings could only proceed on an opt-out basis, that does not operate as a trump card: the regime is not intended to insulate litigants from commercial factors bearing on funding.

43. On the strength of the claims, Ms Demetriou contends that the *Kent* judgment, on which the CR relies, is inadmissible in these proceedings. Whilst it would be permissible to rely on that judgment for the purposes of identifying the evidence likely to be available at trial, we should not rely on the outcome of *Kent.* The difficulty in deciding what weight to give to *Kent* is particularly acute, she says, because Apple has applied for permission to appeal and the Court of Appeal has directed a rolled-up hearing.

44. In any event, Apple contends that the claims in these proceedings face challenges concerning applicable law and jurisdiction which did not apply in the *Kent* proceedings. In light of the relative weakness of the CR's position on that issue, Ms Demetriou argues that an assessment of the strength of the claim weighs against opt-out certification or is, at best, a neutral factor. At the oral hearing she made it clear that Apple's position is that, on the footing that opt-in proceedings would be practicable, certification on an opt-out basis should be refused regardless of the strength of the claim.

45. Ms Demetriou accepts that the procedural stage at which this Application comes forward is a relevant consideration but invites us to take the view that these proceedings are, in substance, at an early stage. In any event, she characterises the reliance placed by the CR on the work already done and the sums already expended as reflecting the "*'sunk cost fallacy*". She invites us to take the view that, if significant sums have already been spent on these proceedings, that reinforces the desirability of bringing them to an end now if the criteria for certification on an opt-out basis are not met.

46. The Application is for decertification. Ms Demetriou's position was that, if the Application should be successful, it would be a matter for the CR to consider whether to seek certification on an alternative basis.

J. THE CR'S RESPONSE

47. Mr O'Donoghue KC, for the CR, argues that there is a "*threshold legal question about whether the Tribunal can revisit its decision to grant a CPO without a material change of circumstance*". He contends that it is a "*basic principle of*

fairness that if the circumstances have not changed, a court's or tribunal's treatment of those circumstances should not change". He relies on the analysis which the Court of Appeal applied to CPR r. 3.1(7) in *Tibbles v. SIG plc* [2012] 1 WLR 2591. He notes that the principle was applied by the Tribunal, in the context of a renewed strike-out application, in *Ad Tech Collective Action LLP v. Alphabet Inc* [2026] CAT 12 (***Ad Tech***) at §§23–25.

48. Mr O'Donoghue observes that the argument which Apple advances before us has been advanced and rejected three times (by this Tribunal following the original certification hearing, and in the refusal of permission to appeal by the Tribunal and by the Court of Appeal). He notes that Apple advances no new factual basis for concluding, contrary to the finding of the Tribunal in the Certification Judgment, that opt-in proceedings would be practicable. He argues that Apple has identified nothing in *Evans* which undermined the Tribunal's original certification decision.

49. The CR contends that it would not be consistent with the Tribunal's governing principles for the Tribunal to make a CPO and then reverse that order 18 months later when, as he characterised it, nothing has changed. He says that "*given the advanced stage of the proceedings and strength of the claims, it is undesirable for substantial time and money to be thrown away*" and that this ought to be a material factor in the Tribunal's decision-making. The CR has already spent £7.4 million, and contends that, as time has gone on, the claims have in fact become stronger and the justification for investment of time and money in the collective proceedings has grown.

50. Mr O'Donoghue argues that the claims here were always strong but that in light of the Tribunal's judgment in *Kent*, "*they enjoy the kind of prospects that few if any cases in this Tribunal ever enjoy at the certification stage*". He argues that the Supreme Court in *Evans* endorsed the permissibility of relying on findings made by another decision-maker for the purpose of demonstrating the strength of the claims at an interlocutory stage; and that we may accordingly rely on the judgment in *Kent* when assessing the strength of the present claim. Mr O'Donoghue maintains that the CR's position on applicable law and territoriality is correct. In any event, he argues that success for Apple on the

point would still leave a very significant claim - one worth, on Mr Perkins' estimate, between [✂] and [✂]. Extending the claim to late 2028 (when it may be anticipated that judgment may be handed down) would suggest a claim worth even more – between [✂] and [✂] – even if Apple is right on applicable law and territoriality.

51. Mr O'Donoghue argues that the ratio of *Evans*, on the question of practicability, was simply to reinforce the limitations on the power of the Court of Appeal to overturn an evaluative assessment made by the Tribunal. He contends that in the Certification Judgment, the Tribunal considered the practicability of opt-in proceedings for the sub-class of large developers as well as for the sub-class of small developers. The conclusion it reached that the potential viability of opt-in proceedings for large developers did not "*overcome*" the impracticability of such proceedings for small developers remains valid. These comprise some 98.5% of the claimants in the class. The large number of class members with small claims favours opt-out.

52. In any event, in *Evans*, the long "*tail*" of small claimants, which the Tribunal considered should not "*wag the dog*" had in fact been excluded from the class. The constituency for which opt-out would have been appropriate was a mix of individuals and businesses, unknown in number and most of whom probably had no claim at all. By contrast, in the present case, the constituency for which opt-out is "*obviously the only viable route*" is a set of homogeneous businesses, clearly defined and identifiable, all of whom have claims which are susceptible to reasonable estimation.

53. He argues that there is no basis in the present case, as there was in *Evans*, for concluding that opt-in is practicable for the class as a whole. By contrast with the position in *Evans*, where certain class members had previously advanced claims and attempts to build a book of claims indicated that interest was low, there are, in the present case, no individual proceedings and there is no evidence that developers do not want to participate in these proceedings. There is objective evidence that bookbuilding is difficult. Other factors, such as the fear of retaliation, suggest that opt-in would not be practicable even for larger

developers. Even on Apple's case, only a small proportion of class members could participate on an opt-in basis.

54. The CR contends that there are additional factors which favour opt-out proceedings in the present case. The class is highly homogeneous. There is no non-arbitrary way of drawing a line between claims for which opt-in is said to be practicable and other claims. The lawfulness of Apple's pricing ought to be addressed in a way which brings certainty and consistency across a broad cross-section of the market. Funding is, he says, likely to be available only on opt-out terms. It would be unfair to allow the presence of a small number of larger claims within the class to deprive the smaller claimants of their ability to claim.

55. The reality of the position, says the CR, is that this Application seeks to bring these proceedings to an end notwithstanding all the work which has already been done. This would, contends the CR, be contrary to the interests of justice, given the strength of the claims, evidenced by *Kent*.

K. DISCUSSION

(1) The Tribunal's power to vary or revoke the CPO

56. In *Evans*, the Supreme Court observed, at §2, that the statutory regime for collective proceedings gives the Tribunal "*an important gatekeeper function to ensure that the new procedure is used in appropriate circumstances*". The Supreme Court noted two aspects of that function: the decision whether to make a collective proceedings order; and the decision whether the collective proceedings are to be "opt-out" rather than "opt-in". It explained the context for these aspects of the Tribunal's gatekeeper function at §3:

> "Opt-out collective proceedings are an especially powerful vehicle for seeking redress from alleged wrongdoers because they enable damages to be claimed on behalf of what may be thousands or millions of people who have not made any positive choice to sue and may not even be aware of the litigation. But they also carry the risk that defendants may be driven to settle unmeritorious claims by their sheer size and the heavy costs of defending them."

57. This Application concerns a third feature of the Tribunal's gatekeeper function, namely its power to vary or revoke a collective proceedings order. That power has the following features.

(1) It is a power to "*vary or revoke*" an existing order: CA98, s. 47B(9); Tribunal Rules, r. 85(1).

(2) It is a power which may be exercised "*at any time*": CA98, s. 47B(9); Tribunal Rules, r. 85(1).

(3) It is a power which the Tribunal may exercise "*of its own initiative*", as well as on the application of any of the class representative, a represented person or a defendant: Tribunal Rules, r. 85(1).

(4) It is a discretionary power, which the Tribunal "*may*" exercise: CA98, s. 47B(9); Tribunal Rules, r. 85(1).

(5) The Tribunal is expressly enjoined, in deciding whether to vary or revoke the CPO, to "*take account of all the relevant circumstances*": Tribunal Rules, r. 85(2).

(6) The Tribunal is however required, under Tribunal Rules, r. 85(2), to take into account, "*in particular*", three matters, namely:

> "(a) whether the criteria for certification of claims set out in rule 79 still apply or apply in the same way as when the order was made; and
>
> (b) whether the class representative continues to satisfy the criteria for authorisation set out in rule 78 and if not, whether a suitable alternative class representative can be authorised.
>
> (c) whether the Tribunal has granted the class representative permission to withdraw in accordance with rule 87 and it will not be substituted."

(7) The language of subparagraphs (a) and (b) – notably the words "*still*" and "*continues to*" – suggests that the Tribunal should consider, in particular, whether there has been a change in circumstances which means that the criteria for certification of the claim no longer apply or

no longer apply "*in the same way*" or that the class representative no longer satisfies the criteria for authorisation. We read "*in the same way*" as referring to, or at least including, the question of certification on an opt-out or opt-in basis.

58. We agree with Ms Demetriou that the Tribunal's gatekeeping role is a continuing one. The power to vary or revoke the CPO is, as a matter of primary legislation, one which may be exercised "*at any time*". It is a power which the Tribunal may exercise on its own initiative as well as on the application of one of the parties referred to in r. 85(1). The context for that ongoing proactive responsibility is the potential, discussed by the Supreme Court in *Evans* in the passages to which we have referred, for collective proceedings, particularly if brought on an opt-out basis, to impose an unfair burden on defendants.

59. That said, we are concerned with a power to "*vary or revoke"* an order which the Tribunal has already made. Considerations of consistency, legal certainty and finality dictate that something must have occurred – some change of circumstances relevant to the question of certification – which justifies the Tribunal in varying or revoking the order which it previously made. As we have observed, that is implicit in the language of r. 85(2) which enjoins the Tribunal to consider, in particular, whether the criteria for the certification of claims "*still*" apply or "*still*" apply "*in the same way as when the order was made"* and whether the class representative "*continues*" to satisfy the criteria for authorisation.

60. The decision to make a CPO and the decision whether to certify the proceedings on an opt-out basis involve evaluative judgments. It plainly could not justify the variation or revocation of a CPO that the Tribunal has simply changed its mind or would now balance the relevant considerations differently from the Tribunal which made the CPO. Further, the Tribunal must exercise the power to vary or revoke a CPO in light of the governing principles set out in r. 4 of the Tribunal Rules. It would not be consistent with those governing principles for a CPO to be constantly re-litigated in light of developments which may be regarded as ordinary incidents of the litigation. The change must be of such a character as justifies the Tribunal, recognising the importance of its gatekeeping

responsibility, in considering varying or revoking the order which it has previously made.

61. In *Stasi v. Microsoft Corporation* [2026] CAT 34 (***Stasi***), the Tribunal observed (at §114) that in considering whether to make a CPO, the Tribunal "*must strive to achieve an outcome which is fair and proportionate between the parties, consistent with the overall obligation in Rule 4(1) to deal with cases justly and at proportionate cost*". This is no less true when the Tribunal is considering whether to vary or revoke a CPO which has already been made. Further, in such a case, as Ms Demetriou accepted, the Tribunal is entitled to take into account the fact that work has already been undertaken and costs incurred. We agree with her that the weight to be attached to that consideration will depend on the circumstances, including the stage which the proceedings have reached.

(2) The basis for considering whether or not to revoke the CPO in the present case

62. In the present case, Apple invites us to revoke the CPO. The development upon which Apple relies is the decision of the Supreme Court in *Evans.* Clarification of the law in an appellate judgment will not necessarily, or even generally, justify revisiting a CPO made in another case. The power to vary or revoke the CPO is not a substitute for a timely appeal. But even though r. 85(2)(a) may be taken to refer, implicitly, to a change in the factual circumstances since the CPO was made, we are enjoined, when considering varying or revoking a CPO, to take into account "*all the relevant circumstances*" and, for the following reasons, we have concluded that, in the particular circumstances of this case, we should consider, in light of the Supreme Court's decision in *Evans,* whether to exercise our power to revoke the CPO.

(1) Mr O'Donoghue, in our view rightly, has not suggested that a change in or clarification of the law could never justify the Tribunal in considering whether to exercise the power to vary or revoke the CPO, although he emphasises that the change in circumstances must be a material one. Indeed, *Ad Tech,* upon which Mr O'Donoghue relies, is a case where the Tribunal took the view (at §28) that the law had been "*sufficiently*

clarified", in particular by a supervening Court of Appeal decision, to justify the Tribunal reconsidering an earlier decision, in that case concerning strike out.

(2) Whether or not the Supreme Court's detailed discussion of the approach to be taken to the practicability of opt-in proceedings is technically part of the ratio of the decision, it is a powerfully reasoned analysis which authoritatively articulates the correct approach to be taken to that issue. We do not accept Mr O'Donoghue's contention that all that *Evans* stands for, on the practicability of opt-in proceedings, is the principle that the Court of Appeal cannot properly interfere with an evaluative judgment which was reasonably open to the Tribunal.

(3) The arguments about practicability before the Tribunal at the CPO hearing in the present case were resonant of the positions of the majority and the minority views on the Tribunal in *Evans*. The Defendants relied on the extent to which the claim is accounted for by a small number of developers for whom opt-in proceedings would be viable; whilst the CR relied on Mr Lomas' dissent in *Evans*, which had, in effect, been approved by the Court of Appeal. In the Certification Judgment, the Tribunal expressly relied on the Court of Appeal's judgment in *Evans*. In these circumstances, the reversal by the UK Supreme Court of the Court of Appeal and the terms of the Supreme Court's judgment invite reconsideration of the CPO.

(4) Our power to "*vary or revoke*" the CPO is an original jurisdiction, to be exercised in light of the circumstances as they now present themselves to the Tribunal, not a review of the Certification Judgment such as might have been undertaken had permission to appeal been granted. However, it materially strengthens the case for considering whether or not to "*vary or revoke*" the CPO that the Defendants are able to point to features of the Certification Judgment which do not, on the face of it, accord with the Supreme Court's analysis in *Evans*. For example, the Tribunal referred (at §46, §47 and §48) to what it described as the "*underlying purpose*" (in the singular) of the collective action regime to facilitate access to justice. At no point did the Tribunal mention the competing

policy consideration of protecting defendants from being subject to proceedings which can, depending on the circumstances, give an unfair procedural advantage to the claimants.

63. It is no objection that the argument which the Defendants advance has been rejected three times. The Defendants' argument was rejected in the Certification Judgment, and in the decisions refusing permission to appeal. But all of these predated the Supreme Court decision in *Evans.* If that decision justifies us in now considering whether or not to vary or revoke the CPO, it matters not that the argument has previously been rejected on the basis of the Court of Appeal decision which the Supreme Court's judgment has superseded.

(3) Should we revoke the CPO in this case? General considerations

64. The Application which we have before us is an application to decertify the entire class – i.e. to revoke the CPO. We are required to address that Application in light of all of the relevant circumstances of this case. For the reasons which we have set out above, we propose to assess whether, in light of the analysis in *Evans,* the continuation of these proceedings on an opt-out basis is justified. That being so, we must consider, in particular, the strength of the claims and the practicability of opt-in proceedings. We do so, keeping in mind the competing objectives of the regime as those were identified and discussed by the Supreme Court in *Evans* and our responsibility to strike a balance between "*assisting claimants to obtain redress and protecting defendants from oppressive litigation*".

65. On the one hand, the collective actions regime is designed to provide access to justice in a new way for certain types of claim and certain types of litigant. At §115, the Supreme Court observed that:

> "What the regime seeks to provide is a reasonable opportunity, not available previously, for a group of claimants to club together (or, in the case of opt-out proceedings, to be grouped together by a claims entrepreneur) to vindicate their rights in a way which would not be practicable or cost-effective if they had to proceed individually".

66. At the same time, the Tribunal must be alert to the potential for certification on an opt-out basis to operate unfairly towards Defendants, by reason of the "*significant leveraging advantage*" associated with such proceedings: *Evans* at §91. As the Tribunal observed in *Stasi,* at §115, it is apparent from *Evans* that:

> "By this is meant principally the incentive to settle even weak claims for more than merely nuisance value, if they are consolidated together in a single proceeding with all the practical effects that gives rise to, including the fact that, if the claims proceed to judgment, damages will be awarded in respect of the whole class even though not all class members are likely to come forward to claim their entitlement."

67. The focus on the unfair leveraging effect of opt-out proceedings where the claim is weak or unmeritorious appears throughout the Supreme Court judgment in *Evans.* In the Court's discussion of the development of the collective proceedings regime, there are references to the need for mechanisms to protect defendants against "*vexatious or unmeritorious claims*" (see §26, §28, §30, §31, §32). In the Supreme Court's own analysis at §§90–94, it explained why, if the claims are "*very weak*", it is unlikely that the Tribunal would be justified in conferring on the proposed class the significant leveraging advantage associated with opt-out proceedings.

68. *Evans* was a case where the Tribunal had held the claim was so intrinsically weak that it failed the strike out test, albeit that the Tribunal declined to strike it out at the certification stage. But the Supreme Court also made clear that the assessment is not all or nothing. At §95, it observed that the "*detriments and potential unfairness to a defendant of an opt-out procedure are real, and do not drop out of the picture just because the claimants have claims which might have some merit. The less the Tribunal has confidence about that, the harder it is to conclude that imposing those additional detriments on the defendant is fair and a price worth paying in the overall interests of justice […] it is indeed appropriate […] to view the strength of the claim in terms of a sliding scale."*

(4) The strength of the claims

69. Mr O'Donoghue relies on the Tribunal's judgment in *Kent* as providing support for the CR's contention that the present case is a strong one. The CR's case relies on the very same alleged abuse of a dominant position which was at issue

in *Kent.* In *Kent,* the claim (which was successful) was advanced on behalf of consumers, on the footing that app developers who had been charged unfair commissions would have passed those costs on. The present case is advanced on behalf of the app developers. Ms Demetriou, for her part, relies on *Evans* to support her submission that it would be for this Tribunal to make its own assessment of the evidence, and that, even at this stage, we may look at *Kent* only for limited purposes. We must address that issue as a preliminary to considering the strength of the claims in the present case.

70. In *Evans,* the Supreme Court endorsed the application to Competition Appeal Tribunal proceedings of the rule in *Hollington v. Hewthorn.* In respect of interlocutory proceedings, the Supreme Court stated at §§158 –159:

> "158. The argument that counsel for Mr Evans put at the forefront of their submissions on admissibility is that, even if the rule in *Hollington v. Hewthorn* or the principle underlying it would apply at a trial of proceedings before the Tribunal, it does not (and would not in the High Court) preclude reliance on findings made by another decision-maker for the purpose of defeating a strike-out or summary judgment application or otherwise demonstrating the strength of claims at an interlocutory stage. In support of this argument, reliance was placed on cases holding that a party could rely on findings of another court for the purpose of demonstrating that there was a serious issue to be tried: see J*SC Aeroflot Russian Airlines v. Berezovsky* [2013] EWCA Civ 784; [2013] 2 Lloyd's Rep 242, paras 115-116; *Sabbagh v. Khoury* [2014] EWHC 3233 (Comm), paras 202-207; *Tulip Trading Ltd v. Bitcoin Association for BSV* [2023] EWHC 2437 (Ch), paras 17-57. In the last of these cases, at para 40, Mellor J concluded from the earlier authorities that:
>
> > 'there is a limited exception to the rule in *Hollington v. Hewthorn* which is applicable in situations where the case is at a preparatory stage yet the court has to consider what evidence at trial there might be […] [M]aterial (inadmissible at trial) can assist in identifying the evidence which can reasonably be expected to be available at trial, to which a court is entitled to have regard at the interlocutory stage.'
>
> 159. We endorse this analysis save only to observe that reliance on findings of another decision-maker for the purpose of identifying evidence which can reasonably be expected to be available at trial is not inconsistent with the rule in *Hollington v. Hewthorn* and is therefore not strictly an exception to it. Likewise, it is not inconsistent with the principle underlying that case to rely on prior judgments or reports in so far as they record evidence of relevant facts: see eg *Rogers v Hoyle*, p 307, para 49. It is only in so far as such material contains opinions on matters of fact (as opposed to recording evidence) that the material is inadmissible (unless it qualifies as expert evidence)."

71. The parties disagree about what "*analysis*" is referred to in the phrase "*this analysis*" in the first sentence of §159 - and what "*analysis*" the Supreme Court

therefore endorsed. Ms Demetriou contends that this sentence refers only to the analysis of Mellor J quoted at the end of §158. Mr O'Donoghue argues that it refers generally to the proposition that *Hollington v. Hewthorn* does not "*preclude reliance on findings made by another decision-maker for the purpose of defeating a strike-out or summary judgment application or otherwise demonstrating the strength of claims at an interlocutory stage*". He points out that the passage which commences "*save only to observe*" contains a specific correction of the comment made by Mellor J and infers that the "*analysis*" which is endorsed is accordingly the wider proposition which the Supreme Court had stated earlier in §158.

72. We recognise that, at any trial of these proceedings, we would require to address the evidence in the case before us and to reach our own conclusions on the basis of that evidence. The Tribunal's judgment explaining its decision not to conjoin this case with *Kent* explicitly acknowledged the potential for inconsistent judgments. We also recognise that an application for permission to appeal *Kent* is before the Court of Appeal and that Court has directed a rolled-up hearing. At the same time, the issue before us is an interlocutory issue in respect of which the strength of the claim is a relevant consideration. Even if we were to have no regard to the Tribunal's judgment in *Kent,* the claim in the present proceedings, so far as concerned with sales through the UK/EU storefronts, may be regarded as a viable claim with good prospects of success, which presents an orthodox and straightforward theory of harm. Even without the support of the judgment in *Kent*, these claims may be regarded, in the context of certification, as relatively strong claims.

73. Further, it seems to us that we can take the following, at least, from the judgment in *Kent,* namely that there is evidence which can be put before the Tribunal in support of each step in the CR's case. Whilst we recognise that Apple will advance competing evidence and make no assumption that the CR's evidence will ultimately be preferred, we consider that we can also take from *Kent* that the evidence has sufficient cogency and weight to constitute at least a serious case to answer. In the context of a decision about certification, that consideration reinforces the intrinsic strength of the claim, at least so far as concerned with UK/EU storefronts, which may accordingly be regarded as relatively, even

unusually, strong. The CR projects that this part of the claim will be worth a very significant sum – between [✂] and [✂] – by late 2028 (the projected date for judgment) depending on the counterfactual fair commission. In these circumstances, we do not require to seek to resolve the dispute between the parties about the correct interpretation of the Supreme Court's comments on *Hollington v. Hewthorn.*

74. Ms Demetriou relied on the inclusion within the claims of the UK-based app developers advanced in these proceedings of sales through non-UK/non-EU storefronts. Even without these latter sales, the claim remains a significant one. The CR projects its value to be very significant – between [✂] and [✂] – by late 2028 (the projected date of judgment), depending on the counterfactual fair commission. The claims in respect of sales through non-UK/EU storefronts are presented on the same basis as the claims in respect of UK/EU storefronts and accordingly have the same intrinsic apparent strength, but unlike the latter, are vulnerable to the applicable law and territoriality arguments advanced by the Defendants. The questions and potential difficulties which arise in relation to this element of the claims were identified by the Tribunal in its strike out judgment, but notwithstanding those concerns, the Tribunal concluded that these claims nevertheless satisfy the "*realistic prospect*" test and rejected the Defendants' strike out application.

75. The claims in the present case, accordingly, contrast markedly with the claims which were before the Supreme Court in *Evans* which the Tribunal had concluded would fail the strike out test. This is not a case like *Evans* where the weakness of the claims is a reason against certifying on an opt-out basis.

(5) The practicability of opt-out proceedings

76. In *Evans,* the Supreme Court recognised, at §112, that the implication of r. 79(3)(b) is that:

> "[I]f it is practicable for the proceedings to be brought as opt-in proceedings, then generally speaking they should be. […] [I]f it is practicable for claimants to bring opt-in proceedings, it is unlikely to be proportionate to confer upon them the additional advantages associated with the opt-out procedure and unlikely to be reasonable to expect the defendants to have to face the additional

> commercial pressures to settle the claims regardless of their true merit which that would involve. As with the strength of the claim, this is only one factor (though clearly, since it is singled out in the rule, potentially an important one) which feeds into the overall evaluation which the Tribunal has to make. Its weight may vary from case to case, depending on just how difficult it might be for the claimants to bring their claims on an opt-in basis."

77. The Supreme Court acknowledged, at §116, that the regime is designed to accommodate a wide spectrum of cases, with different features. It illustrated the point by contrasting, on the one hand, a large class of ordinary consumers affected by a breach of competition law, where each claim is for a small sum such that it would be economically unviable for any individual case to be pursued in isolation, and, on the other, claimants who are large commercial organisations, well capable of looking after their own interests, where the sums involved are large enough to make it financially viable for those organisations to pursue them, either individually or by way of collective opt-in proceedings.

78. The Court went on to give guidance as to how the Tribunal should approach the analysis in more complex cases. The key passage is at §120:

> "It is relevant to consider the composition of the proposed class and whether it is relatively homogeneous or comprises potential claimants of different types and with different sizes of potential claim. The identification of distinct groups of claimants is a matter for evaluative assessment by the Tribunal depending on the particular facts, and is one in relation to which it again has a wide discretion. In our view, where the Tribunal identifies groups of claimants with distinct profiles relevant to the assessment to be made, it should consider the practicability of bringing an opt-in claim for each group separately; and if this yields a different conclusion for each group, it should then stand back and make an overall assessment of the balance of justice having regard to those underlying assessments."

79. We observe that where the class comprises different groups, and the Tribunal concludes that the practicability of bringing an opt-in claim differs as between those groups, the Tribunal must then stand back and "*make an overall assessment of the balance of justice*" having regard to those underlying assessments. If there is a group of claimants for whom opt-in proceedings are practicable and a group of claimants for whom opt-in proceedings would not be practicable, it would follow, simply as a matter of logic, that the "*proceedings*" as a whole (i.e. comprising the whole of the class) would not be practicable on an opt-in basis. But what we require to do, recognising that the positions of the different groups of claimants as regards the practicability of opt-in proceedings

are different, is to "*stand back and make an overall assessment of the balance of justice*".

80. We have set out the data about the class composition in the present case above. The class comprises developers with very large claims and developers with relatively small claims, some of them very small. A very small number of developers have very large claims; and a large number of developers have very small claims. At least some of the developers with very large claims are themselves part of large corporate groups. Apple tells us that [✂] developers account for some [✂] of the claim value and [✂] developers account for some [✂] of the claim value. On the other hand, the CR points out that up to 98.5% of the class members (between [✂] and [✂] developers) have claims worth less than £100,000 and that between [✂] and [✂] developers have claims worth less than £10,000.

81. Looking purely at the economics of litigation, there is a very small number of large claims within the class which could plainly be pursued on an opt-in basis, or as standalone claims. On the other hand, there is a very large number of smaller claims which could not realistically be pursued other than on an opt-out basis. In response to a question from the Tribunal, Ms Demetriou declined to identify where she would place the line between the sub-class of claims which could be pursued on an opt-in basis and the sub-class which could only be pursued on an opt-out basis. Her disinclination to do so tends to suggest that there is no obvious point at which the line could be drawn.

82. There is a very significant group of over [✂] developers with claims worth between £10 and £10,000, over [✂] of whom have claims worth between £100 and £10,000. These are claims which are collectively worth pursuing. There are claims in this cohort which, for an individual app developer, would be well worth claiming, and depending on the mechanism put in place for distribution even quite small claims may be taken up. It is unlikely that these claims could reasonably be pursued other than collectively and on an opt-out basis. At least another [✂] claimants have claims worth between £10,000 and £100,000, which likewise may be unlikely to be pursued other than collectively and on an opt-out basis.

83. We consider that in assessing the practicability of opt-in proceedings, we are not confined to economic considerations. Whilst we do not prejudge the substantive issues about market definition and dominance which will be for trial, developers of apps for use on iOS systems are on the face of it dependent on the Defendants for access to those systems. There is before the Tribunal substantial evidence of concerns being expressed in the public domain about retaliation, or the risk of retaliation, by the Defendants against developers who challenge them. We make no finding as to whether those concerns are or are not well-founded. We also recognise that some developers have raised proceedings against Apple and that some of the class members are sufficiently substantial organisations that concerns about retaliation by Apple might not be a deterrent for them. But the very fact that such concerns have been expressed in the public domain, and the apparent prevalence of such concerns, is a feature of the environment (in our view, an objective feature of the environment) which is capable of affecting the behaviour of reasonable developers, whether large or small, and which bears on the practicability of opt-in proceedings being brought by members of the class as a whole.

84. Relying on §124 and §126 of *Evans,* Apple invites us to take a mechanistic approach, in which our decision as to practicability should be driven primarily, if not exclusively, by an analysis of whether the bulk of the value of the claim lies in relatively large claims which could be pursued on an opt-in basis, or in the cohort of smaller claims which could not. Whilst we acknowledge the materiality of that factor, and have taken it into account, when making our "*overall assessment of the balance of justice*" it seems to us that we can and should set that consideration alongside the other relevant circumstances of this particular case. There are features of this case which lead us to conclude that, notwithstanding the relative concentration of the value of the claim, the overall balance of justice continues to favour certification of the entire class.

(1) The claims, so far as arising from sales through UK/EU storefronts are, as we have observed, relatively, even unusually, strong. Whilst the claims, so far as they are concerned with sales through non-UK/EU storefronts, are vulnerable to the applicable law and territoriality arguments, that part of the claim still has "*realistic prospects*" and, on

that ground, has not been struck out. We are dealing with claims which are quite different, as regards strength, from those at issue in *Evans.*

(2) The class is homogeneous. All of its members have entered into substantially the same contract with Apple. All of them have been subject to the same system of pricing. On the face of it, if the claims are well-founded, the size of each claim will be broadly proportionate to the business which the claimant does through Apple. There is no obvious distinction to be drawn between the various claims, other than by reference to their size. Nor is there an obvious point at which the line between claims in respect of which opt-in proceedings would be practicable and those which are not should be drawn or could be drawn in a manner which would not have arbitrary and potentially unfair consequences.

(3) The Application is for decertification of the class as a whole. Whilst it is possible that a small number of the claims could continue to be pursued, on an opt-in or standalone basis, the overwhelming majority, in number, of the class members could not reasonably advance their claims other than on an opt-out basis. This is a significant cohort, a large number of whom have claims which, though relatively small (say, less than £10,000 or even £100,000) are nevertheless not trivial particularly for a small app developer. Those claims are, as we have observed, at their core, relatively strong claims. The access to justice of these claimants is a significant consideration in favour of opt-out proceedings.

(4) We accept the CR's submission that the likely consequence of decertification would be that these proceedings would come to an end. We accept the evidence of Mr Mansfield that it is "*highly plausible that no opt-in proceedings would ever get off the ground*". Even if opt-in proceedings were to eventuate, that would not assist the large cohort of claimants to which we have already referred. We do not regard the potential collapse of the case as a 'trump card' in favour of retaining opt-out proceedings, but it has led us to consider carefully the strength of the claims, the practicability of opt-in proceedings and where, in light of these considerations, the overall balance of justice lies.

(5) The real question is whether, when the overwhelmingly greater number of the class members could not reasonably pursue their claims other than on an opt-out basis, it imposes an unfair litigation burden on Apple for the class to encompass also the large claims which could, at least on purely economic grounds, proceed on an opt-in basis. We do not consider that it does, in the circumstances of this case. These are not, on the face of it, unmeritorious claims although they are of course seriously contested. Nor is this a case such as that postulated by the Supreme Court in *Evans* at §124 where the larger operators are being given an unfair litigation advantage by bundling their claim with smaller entities which are unlikely to come forward to claim a share of any award. Rather, it is a case where the certification of this class as a whole (including those with larger claims) secures access to justice for the numerically large cohort of claimants, with viable and serious claims, which could not proceed in any other way.

85. For these reasons, we have concluded that, tested against the analysis in *Evans,* this case continues to satisfy the criteria for certification "*in the same way*" – i.e. on an opt-out basis.

(6) Concluding observations

86. There are additional reasons why, in the present case, it would not, in any event, be consistent with the governing principles to revoke the CPO. Funding was secured on the footing that these would be opt-out proceedings and on the basis of the class as certified. The proceedings have continued on that basis for some three years, the case has been pleaded, 1.7 million documents have been disclosed, and a timetable fixed with a view to a trial in early 2028. To revoke the CPO now would result in that procedure being wasted, unless the CR should be able to revive the proceedings on an opt-in basis. The CR's current funder would not support opt-in proceedings. Whilst some large claims could be pursued on an opt-in or individualised basis, there is no evidence before us that funding would be available to support these proceedings as a whole on an opt-in basis. At the very least, there would require to be a significant pause whilst the CR investigated whether or not any alternative basis for the proceedings

could be identified. Even if such an alternative basis could be identified, it would be unlikely to benefit the numerically large number of claimants with claims of relatively lower value (even up to £10,000 or £100,000).

87. If we had concluded that the continuation of these proceedings would truly be oppressive to the Defendants or impose on them unfair pressures of the sort described by the Supreme Court in *Evans*, the stage which the proceedings have reached would not have deterred us from revoking the CPO. But, for the reasons we have explained, that is not the position in this case. These are claims which, though seriously contested, have reasonable prospects and, in the context of certification, may be regarded as relatively strong. Apple is a very substantial organisation – we were told the third largest corporation in the world – and has the resources to resist the claim on its merits. On the other hand, we accept the CR's position that decertification would likely bring these proceedings to an end. The upshot would be that a very large number of claimants, with non-trivial and serious claims which could not reasonably proceed other than through opt-out collective proceedings, would likely be deprived of access to justice.

88. Since the hearing of the Application the Tribunal has issued its judgment on an application to vary the CPO in *Rodger v. Alphabet Inc and Others* [2026] CAT 49. The judgment in the present case was already well advanced by the time that the judgment in *Rodger* was issued. We note the observations of the Tribunal in that judgment at §39 to §41 about the possibility of certification of proceedings on a hybrid basis. At §40 and §41, the Tribunal explains the considerations which would require to be addressed in respect of any application for hybrid certification and notes that "*the definition of the relevant classes and the management of the proceedings in such cases are likely to be complex matters that require very careful consideration*". It suffices to observe that in the present case the only application before the Tribunal was for decertification of the class as a whole. For all the reasons we have set out above, we refuse that Application.

James Wolffe KC (Chair)

Tim Frazer

Anthony Neuberger

Charles Dhanowa C.B.E., K.C. (*Hon*)
Registrar

Date: 25 June 2026