

Neutral citation [2026] CAT 84

Case No: 1644/7/7/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10 November 2026

Before:

SIR PETER ROTH
(Chair)
CHARLES BANKES
KEITH DERBYSHIRE

Sitting as a Tribunal in England and Wales

BETWEEN:

PROFESSOR ANDREAS STEPHAN

Class Representative

- v -

(1) AMAZON.COM, INC.
(2) AMAZON EUROPE CORE S.À.R.L.
(3) AMAZON EU S.À.R.L.
(4) AMAZON UK SERVICES LTD
(5) AMAZON PAYMENTS UK LIMITED

Defendants

Heard at Salisbury Square House on 7-8 September 2026

JUDGMENT (CPO VARIATION)

APPEARANCES

Kieron Beal KC and Christopher Monaghan (instructed by Geradin Partners) appeared on behalf of the Class Representative

Daniel Piccinin KC and Kristina Lukacova (instructed by Covington & Burling LLP) appeared on behalf of the Defendants

Note: Figures in this Judgment which have been replaced with a range (marked in square brackets "[ ]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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A. INTRODUCTION

1. By a judgment issued on 24 July 2025, the Tribunal decided pursuant to s. 47B of the Competition Act 1998 (**CA**) to grant the application by Prof Stephan, as the class representative (**CR**), to bring collective proceedings on an opt-out basis alleging abuse of a dominant position against five defendants in the Amazon group (**Amazon**) on behalf of a large class of merchants who sell products on the well-known Amazon electronic marketplace in the UK (the **UK Amazon Marketplace**): [2025] CAT 42, [2025] Bus LR 2281 (the **CPO Judgment**). The claims are those arising in the period of six years (or five years insofar as the claims are governed by Scots law) ending on 26 June 2024 (the date when the claim form was issued) (**the Relevant Period**), although the losses alleged to have been caused extend beyond the end of that period.

2. By the same judgment, the Tribunal determined that an application to bring collective proceedings against Amazon[1] for abuse of dominance should also be granted to Mr Hammond, as the CR, for a class of consumers who had purchased products on the UK Amazon Marketplace. The allegations in the proceedings brought by Mr Hammond (**the Hammond Action**) in part overlap with the allegations in the proceedings brought by Prof Stephan (**the Stephan Action**), since they do not cover all of the alleged grounds of abuse in the latter, and in both proceedings the claims are for aggregate damages for the class.

3. A collective proceedings order (**CPO**) on an opt-out basis was made in the Stephan Action on 27 November 2025. The period for opting out expired on 27 February 2026 and only two members of the large class of merchants have opted out. A CPO in the Hammond Action, also on an opt-out basis, was similarly made on 27 November 2025.

4. The Stephan Action and the Hammond Action are being case managed together. Having considered the parties' proposals, on 15 July 2026 the Tribunal directed

[1] One of the Amazon companies that is a defendant in the Stephan Action is not a defendant in the Hammond Action, but nothing turns on that distinction for present purposes.

that there should be a split trial, whereby Trial 1 would cover the issues of, in particular, market definition, dominance and abuse (on which the interests of the classes in the two actions are aligned). A subsequent Trial 2 would address causation and quantum of loss, and pass-on as between merchants and consumers. Trial 1 is fixed to commence on 25 April 2028, with a provisional time estimate of eight weeks.

5. Following the judgment of the Supreme Court in *Evans v Barclays Bank plc* [2025] UKSC 48, [2026] Bus LR 328 (***Evans SC***), Amazon applied for the CPO in the Stephan Action to be varied to exclude from the opt-out class all merchants with "Gross Merchandise Sales" of over £10 million over the Relevant Period (**Excluded Merchants**). Amazon accepted that the claims of those Excluded Merchants could be pursued by collective proceedings but contended that those claims should be on an opt-in basis. Thus, Amazon effectively argued for an outcome whereby these proceedings would have a hybrid character, being opt-out for all but the Excluded Merchants and opt-in for the Excluded Merchants. However, it was common ground that the Tribunal could not vary the CPO on such a basis now, as the litigation funding agreement (**LFA**) and ATE insurance policy considered in the application for certification determined in the CPO Judgment covered only opt-out proceedings. Certification on a hybrid basis would require consideration of an amended or supplementary LFA and revised ATE insurance to cover the opt-in claims.

6. The Tribunal heard oral argument on Amazon's application (**the Application**) on 7-8 September 2026. At the conclusion of the argument, the Tribunal announced that the Application would be refused, for reasons to be given in writing. This judgment sets out our reasons.

B. BACKGROUND

7. A much fuller description of the basis of the proceedings and the allegations of abuse of dominance is set out in the CPO Judgment. We give here only an abbreviated summary.

8. As well as operating the UK Amazon Marketplace, through which purchasers can buy a very wide range of products, Amazon itself acts as a retailer selling many products on that marketplace, and that aspect of Amazon's business is referred to as "Amazon Retail." Therefore, Amazon both supplies merchants with listing and payment services on the UK Amazon Marketplace and competes with many of those merchants in the sale of many products. In addition, Amazon offers merchants the option to use its logistics and delivery services to fulfil customer orders. The supply to customers of products using this service is referred to as fulfilment by Amazon (**FBA**), in contrast with fulfilment by merchant (**FBM**) where a merchant instead uses its own or other logistics and delivery arrangements.

9. Amazon Prime (**Prime**) is an option given to consumers, for a subscription fee, for which they receive a range of benefits, including fast delivery on a wide range of Prime products at no additional cost and free returns. Amazon gives merchants the option to fulfil their offers under the "Prime" label, which will then be displayed alongside their offers on the UK Amazon Marketplace. Prime customers account for the great majority of purchases on the UK Amazon Marketplace.

10. For any given product page on the UK Amazon Marketplace, Amazon prominently displays one particular offer in the so-called "Buy Box", through which the product can be purchased with a one-click option. A large majority of purchases on the UK Amazon Marketplace are made via the Buy Box, so having their offer highlighted as the "Featured Offer" is said to be of considerable benefit to merchants.

11. Prof Stephan alleges that Amazon holds a dominant position which it is abusing under five heads. In brief summary:

    (1) Use of the non-public seller data which Amazon obtains under its agreement with merchants selling on the UK Amazon Marketplace, to inform the business decisions of Amazon Retail, such as when to start selling certain products and to negotiate more effectively with suppliers, thereby gaining an advantage over competing merchants.

(2) Self-preferencing of Amazon Retail (as compared to third-party merchants) in the selection of the Featured Offer that appears in the Buy Box.

(3) Self-preferencing of offers using FBA (as compared to offers using FBM) in the selection of the Featured Offer in the Buy Box. Unlike abuse (2), this is alleged to harm competition in the market for logistics and fulfilment services as between Amazon and third parties offering those services.

(4) Conditioning access for a product to Prime on the use of FBA. The theory of competitive harm is similar for this to abuse (3).

(5) "Anti-discounting practices": Amazon is alleged to apply, or threaten to apply, sanctions on merchants who sell their products elsewhere at lower prices than they charge on the UK Amazon Marketplace.

12. Prof Stephan's application for certification of the proceedings relied on previous commitments decisions of the Competition and Markets Authority (**CMA**) and the EU Commission (**Commission**) and on the infringement decision of the Italian Competition Authority (**AGCM**). The decision was upheld on appeal (save that the fine was reduced) by the Lazio Regional Administrative Court. A further appeal to the Council of State is pending:

(1) the CMA decision of 3 November 2023 under s. 31A CA to accept binding commitments from Amazon following an investigation into suspected infringement of the Chapter II prohibition under the CA (**the CMA Decision**). The competition concerns identified in the CMA Decision, with an explanation of the potential competitive harm, correspond to abuses (1), (2), (3) and an aspect of abuse (4);

(2) the Commission decision of 20 December 2022 under Art 9 of Regulation 1/2003 accepting commitments from Amazon covering the French, German and Spanish markets (**the Commission Decision**). This detailed decision set out the Commission's preliminary view that

Amazon held a dominant position in each of those national markets and its "preliminary competition concerns" that Amazon was abusing its position on the basis of conduct which corresponds to abuses (1), (2), (3) and (4).

(3) The AGCM decision of 9 December 2021 whereby Amazon was fined €1.13 billion for abuse of its position on the Italian market (**the AGCM Decision**). The abuse addressed in the AGCM Decision was the favouring of FBA sellers in selection as the Featured Offer for the Buy Box and for access to the Prime label and corresponds to abuses (3) and (4).

13. Prof Stephan also relied on the proceedings brought in the US by the Federal Trade Commission and 19 State Attorneys General alleging that Amazon is a monopolist that seeks to restrict competition by using anti-discounting tactics to discipline sellers who offer their products at lower prices elsewhere than on Amazon, and also that Amazon preferences products offered using FBA in the eligibility for Prime status (**the US proceedings**). The allegations in the US proceedings, which concern only the US market, therefore correspond to abuses (4) and (5).

14. With its certification application, Prof Stephan served a lengthy expert report from his economist, Dr George Houpis, setting out his methods for estimating harm under each of the five heads of abuse, resulting from three kinds of harm flowing from the impugned conduct: (a) loss of sales by independent merchants on the UK Amazon Marketplace; (b) increase in logistics/fulfilment fees due to distortion of competition in the fulfilment market; and (c) increase in marketplace/commission fees charged by Amazon due to reduced competition from other online marketplaces. These theories of harm reflect those put forward by the competition authorities in their decisions referred to above. Amazon's appointed expert, Mr Derek Holt, produced a report criticising various aspects of Dr Houpis' methodology, to which Dr Houpis produced a further report in reply. At the request of the Tribunal, both experts further produced 20 page summary reports.

15. In the CPO Judgment, we considered and addressed the various criticisms by Mr Holt of Dr Houpis' report. We observed that Dr Houpis' main report was comprehensive and very detailed, and we rejected most of the criticisms from Amazon of Dr Houpis' approach, noting that even where the criticism had some force it did not fundamentally undermine his approach. The theories of harm flowing from the impugned conduct were clear, and though there might be some debate as to how some of that harm could be effectively estimated, Dr Houpis' proposed methods passed the *Microsoft* test and provided an adequate blueprint to trial: CPO Judgment at [85]-[112]. We further rejected Amazon's objection that there was a fundamental conflict of interest within the class as regards abuses (3) and (4), as between merchants who sold predominantly or exclusively using FBA and those who sold predominantly or exclusively using FBM.

16. At the certification hearing, Amazon further argued that if a CPO were to be granted, it should be on an opt-in basis, and not opt-out as sought in the application. Amazon emphasised that all the potential class members (**PCMs**) were businesses (unlike the Hammond Action, which was for a class of consumers) and submitted that this was a highly diverse class of sellers who "have different interests and would have different views on the allegations made by Stephan purportedly on their behalf [in] this litigation, if they turned their minds to it": CPO Judgment at [151]. And Amazon added:

> "…. there is also a very small number of class members with much larger (theoretical) claim values, who must cumulatively account for a significant bulk of the claim value. It is striking that none of them have chosen to bring their own claims."

17. Amazon's submission that certification should be on an opt-in basis was rejected. It is appropriate to set out the reasoning in the CPO Judgment at [153]:

> "…the mere fact that the PCMs are businesses, not consumers, who could potentially be contacted individually with the assistance expressly offered by Amazon to provide Professor Stephan with their contact details, does not mean that it is necessarily practicable to proceed by way of opt-in proceedings. Here, other relevant factors are, in our judgment:
>
> (1) the very large number of PCMs. Dr Houpis' estimate, without any information from Amazon, is that the class numbers about 211,000. Amazon has not sought to contest that figure or suggest that it is exaggerated; cp. the *Trucks* case, where the class size was about 18,000. For the PCR to contact

> each of 211,000 undertakings individually, and then administer these proceedings on an opt-in basis, potentially involving regular communications with them, would be very burdensome and inefficient. And unlike the Road Haulage Association which is the class representative in *Trucks*, there is no trade association or representative body which has regular interaction with many of the class members.
>
> (2) Although a minority of the PCMs are large merchants, most are small ones. Dr Houpis estimates that only about 2% have monthly sales over $250,000.
>
> (3) This is not a case where the individual claims are for loss on the sale or purchase of a few items involving a large capital outlay, which in behavioural terms would provide an incentive for PCMs to join in the action and expose themselves to potential disclosure requests. Dr Houpis estimates that the average loss per PCM is around £13,000, and the damages arise from the continuing accumulation of small losses. As the Court of Appeal said in *Le Patourel* at [73], after citing from the judgments in the Supreme Court in *Lloyd v Google Inc* [2021] UKSC 50, [2022] A.C. 1217, and *Merricks SC*:[2]
>
> > "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."
>
> (4) Professor Stephan submitted that since many PCMs need to continue to sell on the UK Amazon Marketplace, they may be intimidated to take active steps to identify themselves in litigation against an essential trading partner. We are in no position to evaluate this concern, but we accept that it is not fanciful."

18. Taking all these factors into account, we held that it was appropriate for the Stephan Action to proceed on an opt-out basis.

19. Amazon sought to appeal the certification of the Stephan Action (and also, on different grounds, the Hammond Action). Its application for permission to appeal was dismissed by the Court of Appeal on 26 February 2026: [2026] EWCA Civ 183. But Amazon had not sought to appeal the decision to certify on an opt-out, as opposed to opt-in, basis.

20. However, at the time when certification was being argued before the Tribunal, the basis for a decision as between opt-in and opt-out was the subject of a pending judgment of the Supreme Court in *Evans SC.* As recorded in the CPO Judgment at [155], Amazon accordingly reserved its right to make further submissions after the Supreme Court judgment. We there noted that we could

[2] *Merricks v Mastercard Inc* [2020] UKSC 51, [2021] Bus LR 25.

if necessary vary the CPO under rule 85(1) of the Competition Appeal Tribunal Rules 2015 (**CAT Rules**).[3] That is precisely what Amazon sought to do by the Application.

C. CERTIFICATION AS OPT-OUT OR OPT-IN: RULE 79

21. The determination of whether proceedings should be certified on an opt-in or an opt-out basis is governed by rule 79(3), which incorporates reference to rule 79(2). Those provisions are as follows:

> "(2) 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.
>
> (3) 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".

D. *EVANS v BARCLAYS BANK PLC*

22. The Supreme Court issued its judgment in *Evans SC* on 18 December 2025. As it is central to the Application, it is appropriate to consider that judgment in some detail.

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[3] All references to rules in this judgment are to the CAT Rules, unless otherwise stated.

23. In *Evans*, the proposed class representative applied for a CPO on an opt-out basis following two settlement decisions of the Commission holding that various major banking groups had infringed Art. 101 of the Treaty on the Functioning of the European Union (**TFEU**) by reason of the exchange of commercially sensitive information between participating traders engaged in foreign exchange (**FX**) spot trading. The traders were in nearly daily communication through chatrooms and agreed to exchange information on an extensive and recurrent basis. The Commission found that in each case there was a single and continuous infringement over several years although only one of the undertakings participated in the exchanges over the whole period; others joined and left at different times.

24. The Commission found that this was a 'by object' infringement of Art. 101 and the decisions therefore did not assess the effect of the conduct on competition in the relevant markets. Nonetheless, as set out in *Evans SC* at [18]:

> "… the Commission found that the exchange of information:
>
> (i) enabled participating traders trading on behalf of competing undertakings to engage in occasional co-ordination of their trading activities in specified ways …;
>
> (ii) may have facilitated occasional tacit co-ordination of those traders' spreads, thereby tightening or widening the spread quote in that specific situation …; and
>
> (iii) led to the traders occasionally co-ordinating their actions or refraining from action in order to help a member of the chatroom "with higher stakes at play" …."

25. Mr Evans sought to bring collective proceedings on behalf of two classes. Class A, estimated to have between 14,201 and 42,015 members, comprised persons who entered into transactions with the proposed defendants during the period when the Commission found they had participated in the infringements. That was not confined to customers who entered into specific transactions for which traders quoted wider bid-ask spreads, but assumed that:

> "anyone who entered into a spot transaction with the bank that employed a participating trader to exchange any G10 currency pair at any time during the period when an employee of the bank was participating in any of the chatrooms was quoted a wider bid-ask spread than would have been the case in the absence of the infringing conduct and lost money as a result. A further assumption is that this occurred "irrespective of the method by which FX

> trading took place": in particular, that it applied to electronic trading that operated automatically, even though the Commission decisions were confined to "voice trading" conducted by telephone." (*Evans SC* at [50]).

26. Class B was estimated to number between 27,814 and 42,015 persons, and it was accepted that there was overlap in the membership of Class A and Class B (such that 42,015 was the upper bound for both combined). Class B comprised persons who dealt with banks other than the proposed defendants, on the basis that the competitive pressure on those banks was reduced by the infringing conduct, thereby enabling them in turn to charge widened spreads to their FX customers – what in competition law is referred to as the potential "umbrella effect" of an infringement.

27. The Tribunal (Marcus Smith J, Prof Neuberger and Paul Lomas) held that the claims were suitable for collective proceedings, but by a majority (Mr Lomas dissenting) decided that this could only be as opt-in proceedings. As regards the strength of the case, the Tribunal found that the case on how the infringements caused the alleged loss was theoretical and so weak that the claims deserved to be struck out; and although it declined to take that course and considered that Mr Evans should be given an opportunity to reformulate his case, it considered that the prospects of him succeeding were very low. As regards Class A, the case did not explain how the majority of transactions which were not the subject of an unlawful information exchange were affected; and as regards Class B, since there was no allegation of market-wide harm there was no proper justification as to how harm to a segment of the market would affect transactions outside that segment where the products were fungible and readily substitutable.

28. As regards practicability, the Tribunal found that the proposed class members included a group of financial institutions and fairly large commercial entities that had allegedly suffered significant losses, which accounted for the majority of the total claim.[4] Members of that group were likely to be sophisticated potential litigants who would be in a position to bring claims on an opt-in basis.

[4] By way of illustration, the figures in an annex to *Evans CA* that was placed before us shows that of the sub-group of 18,154 financial institutions, 680 (i.e. 3.75%) accounted for 79% of that sub-group's total claim of over £2.4 bn (including interest). See also *Evans SC* at [131] regarding this table.

The rest of the class was made up of a very large number of individuals and smaller entities whose individual loss was very small, and in aggregate a tiny fraction of the aggregate claim. Although the Tribunal accepted that it was not practicable for the latter group to bring proceedings other than on an opt-out basis, because of the low value of their claims and their individual characteristics, the majority held that this should not affect the overall assessment of practicability as that would be "to allow the tail to wag the dog."

29. Although the Tribunal recognised, on the evidence before it, that there was no realistic prospect of the proceedings going ahead on an opt-in basis, since the large proposed class members had shown no interest in bringing the proceedings, the majority held that certification should be refused on an opt-out basis.

30. The Court of Appeal reversed the Tribunal's decision: [2023] EWCA Civ 876, [2024] Bus LR 366 (***Evans CoA***). Among the grounds for the decision, the Court of Appeal took the view that the strength of the case is generally a neutral factor in the choice as between opt-in and opt-out, and disagreed with the inferences drawn by the Tribunal from the evidence as to the number and size of individual claims such that the Tribunal should have found that opt-in proceedings were impracticable. The Court of Appeal further held that the Tribunal should have given much more weight to the objectives of facilitating the vindication of rights and deterring future wrongdoers, in a case where there would be no proceedings other than on an opt-out basis.

31. The Supreme Court reversed *Evans CoA* and restored the Tribunal's decision. The Court held that the Court of Appeal had been wrong to interfere with the evaluative judgment of the Tribunal, which had not gone beyond the ambit open to it. And the Court approved the Tribunal's analysis of the weakness of the Evans claims. However, the Supreme Court went further and gave general guidance regarding the approach to be taken in applying rule 79(3) and deciding as between opt-out and opt-in.

32. The Court emphasised that the collective proceedings regime was intended to strike a balance between facilitating claims for redress and protecting businesses

from unmeritorious but burdensome litigation. While access to justice was an important policy objective, that applied to defendants as well as to claimants. The Court noted that while opt-out proceedings are a powerful means of seeking redress, they "carry the risk that defendants may be driven to settle unmeritorious claims by their sheer size and the heavy costs of defending them" (at [3]). The Court re-emphasised this point at the conclusion of its criticism of the approach taken by *Evans CoA*:

> "141. The sophistication of the collective proceedings regime shows that it was not intended simply to provide a stick with which anyone who claims, however implausibly, to have suffered loss can beat infringing undertakings into paying them substantial damages. That does not enhance the proper enforcement of the competition rules. If clearly unmeritorious claims are allowed to proceed on an opt-out basis which involves an unjustified leverage advantage for claimants of the kind we have described, the result will not be due enforcement of the competition rules but over-enforcement, contrary to the public interest."

33. The Court stated (at [138]) that under the statutory scheme:

> "the starting point is one of neutrality and that there is no presumption or predisposition in favour of either of opt-in or of opt-out proceedings."

34. The Court explained the relevance of the strength of the claims, identified in rule 79(3)(a), to the decision as between opt-in and opt-out proceedings. The judgment states:

> "90. In the present case the Tribunal in its judgment spelt out in detail the "leveraging" effect of opt-out collective proceedings, explaining the incentives which the opt-out procedure creates to settle even weak claims for more than merely "nuisance value" and hence to bring weak claims as opt-out claims: see para 88(3). This "leverage" includes, in particular, the fact that, if claims proceed to judgment, damages are awarded in respect of the whole class even though it is well understood that not all of the class members will come forward to claim their entitlement.
>
> 91. If the merits of a claim are very weak, as the Tribunal assessed them to be in this case, it is unlikely that the Tribunal will be justified in conferring on the proposed class of claimants the significant leveraging advantage associated with opt-out proceedings. To allow such a claim to go forward on that basis would be unlikely to be fair, as between claimants and defendants, and would tend to be contrary to the obligation on the Tribunal under rule 4(1) to deal with the case "justly", both as a general matter and by reference to the individual elements of that overriding objective specifically identified in rule 4(2) ….
>
> …

> 94. To sum up, if the claim is very weak it is likely to be more difficult to justify resort to the opt-out procedure as striking a fair procedural balance between the claimants and the defendant(s). It is also likely to be difficult to justify resort to the opt-out procedure as a proportionate way of providing access to the Tribunal for the vindication of such a claim.
>
> 95. The assessment involved is not all or nothing. 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. Contrary to the conclusion of the Court of Appeal …, it is indeed appropriate, in our view, to view the strength of the claim in terms of a sliding scale."

35. The Supreme Court recognised that there will be cases where the Tribunal finds that it cannot form a view as to the merits at the certification stage, in which case no weight can be placed on that factor. But the Court continued, at [104]:

> "We would expect that by the time of the certification hearing the Tribunal will be able in many, if not most, cases to form a view (even if provisional) of the merits of the claim and, where it is able to do so, the merits should not be a neutral factor for the reasons we have given."

36. As regards the other factor expressly identified in rule 79(3), practicability, the Court stated:

> "112. The implication of rule 79(3)(b) is that, if it is practicable for the proceedings to be brought as opt-in proceedings, then generally speaking they should be. The principle is clear: if 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. The Tribunal noted this at para 121 of its judgment.
>
> 113. The legal significance of rule 79(3)(b) is similar to that of rule 79(3)(a). Both have to be read and applied in the context of the overriding objective of dealing with cases justly set out in rule 4 of the Tribunal Rules. There are risks of unjust outcomes on both sides. If refusing to allow opt-out proceedings means that rights are not duly enforced, that is unjust to prospective claimants. On the other hand, if allowing opt-out proceedings results in defendants paying off claims which in reality are not valid, that is unjust too. In deciding between opt-in and opt-out proceedings, the Tribunal has to seek to advance the interests of justice overall in circumstances of uncertainty."

37. The Court noted that the regime encompasses a "wide spectrum of cases", ranging between claims by a very large class of ordinary consumers, each having suffered only a small loss, for which only opt-out proceedings would be practicable, to a class comprising large commercial organisations, each having suffered loss "large enough to make it financially viable to contemplate bringing proceedings to seek recovery", in which case if it was appropriate to permit collective proceedings at all, that would be only on an opt-in basis (at [116]-[117]).

38. The Court found that the *Evans* case itself fell between those two poles. It stated:

> "119. … rule 79(3)(b) requires the Tribunal to stand back and make an objective determination by reference to the inherent likelihood of how a reasonable person in the position of a potential claimant would assess the situation.
>
> 120. This does not require the Tribunal to assume that the position of all potential claimants is the same. 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. In substance, this is the approach which the Tribunal majority adopted in this case."

39. Referring to the judgment of the Tribunal, the Court continued:

> "121. … the majority correctly points out that the class may be diverse, with claims of very different sizes or members with varying degrees of knowledge and experience. It goes on to say that, in considering practicability, it is then incumbent on the Tribunal to have regard to differences in class composition. We agree that this is the correct approach. We also agree that, as the Tribunal observed, this is a very fact sensitive question. If the Tribunal assesses that there are elements within the class which it is appropriate to view as distinct, ordinarily it should analyse each category by reference to a typical member within it. Then the Tribunal has to stand back to make an overall assessment of practicability which takes account of the features of those categories."

40. It was in this context that the Supreme Court referred to the assessment of the Tribunal majority that, given the evidence of the composition of the class and

the estimated spectrum of losses, to allow opt-out proceedings would be "to allow the tail to wag the dog": see para 28 above. This fully supported the Tribunal's overall assessment, when standing back, that it should not grant opt-out certification.

41. Reference to the broad nature of the Tribunal's evaluation was repeated in the judgment in criticism of the approach taken in *Evans CoA*. The fact that one member of the Tribunal had dissented showed that there was room for disagreement as to what inferences as to practicability could be drawn from the data about class composition and claim sizes in this particular case. But it was not for the CoA to substitute its view for that of the Tribunal when the Tribunal's assessment involved no error of law: see at [133].

E. VARIATION OF A COLLECTIVE PROCEEDINGS ORDER: RULE 85

42. Unlike *Evans,* the present application seeks the variation of an existing CPO. The legislative basis for such variation is rule 85, which provides, insofar as relevant:

> "(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; …".

F. POST-*EVANS* JURISPRUDENCE

43. Prior to the present application, in the short time since *Evans SC* there have been two cases where the Tribunal considered applications pursuant to rule 85 to vary or revoke a CPO granted on an opt-out basis: *Ennis v Apple Inc and others* [2026] CAT 55, [2026] Bus LR 1342 and *Rodger v Alphabet Inc and others*

[2026] CAT 49.[5] Furthermore, there have been two cases where the Tribunal considered *Evans SC* at the certification stage, with argument from the proposed defendants resisting certification on an opt-out basis: *Stasi v Microsoft Corp and others* [2026] CAT 34, and *Or Brook Class Representative Ltd v Alphabet Inc and others* [2026] CAT 65. It is appropriate to summarise each of these four decisions.[6]

Ennis

44. Dr Ennis as the CR brought proceedings on behalf of a class of approximately 13,200 UK app developers who sold apps and made in-app sales via the App Store's various storefronts as accessed by iOS users worldwide. Dr Ennis alleges that Apple has abused a dominant position in the iOS app distribution market by charging unfair prices in the form of commissions charged on those purchases. The Tribunal certified the proceedings on an opt-out basis for reasons set out in its judgment of 18 October 2024: [2024] CAT 58.

45. On 23 February 2026, Apple filed an application for the proceedings to be decertified in their entirety, relying on *Evans SC*. Apple relied in particular on the fact that the class comprised a relatively small number of developers with very large claims, who accounted for a very large proportion of the total damages, and a very long "tail" of developers whose losses were individually very small and who together accounted for only a small percentage of the total claim. Apple submitted that opt-out certification was, as in *Evans*, a case of the tail wagging the dog.

46. The Tribunal (James Wolffe KC, Tim Frazer and Prof Neuberger) first considered whether the application to vary the CPO properly came within rule 85, and held that the terms of the power to vary were properly engaged, in particular given the strength of the guidance of the Supreme Court in *Evans SC*

[5] The case has since settled with a payment of £260m by the defendants, approved by the Tribunal: [2026] CAT 76.
[6] At the time of this judgment, applications for permission to appeal are pending before the CoA against the decisions in *Ennis* and *Stasi* (permission having been refused by the Tribunal).

and the fact that in its certification judgment the Tribunal had expressly relied on *Evans CoA*, which the Supreme Court had overruled.

47. However, the Tribunal proceeded to dismiss Apple's application. The Tribunal rejected the "mechanistic approach" to the opt-in/opt-out issue urged by Apple and determined that "notwithstanding the relative concentration of the value of the claim, the overall balance of justice continues to favour certification of the entire class": [84]. The Tribunal had regard to the following factors:

(1) The claims arising from sales through UK/EU storefronts were "relatively, even unusually, strong", and although the claims for sales through non-UK/EU storefronts were vulnerable to arguments of foreign law and territoriality, they still had realistic prospects of success: [84(1)].

(2) The class was considered to be homogeneous, each claim being broadly proportionate to the business which the class member does through Apple, with "no obvious distinction to be drawn between the various claims, other than by reference to their size". Nor was there an obvious point at which a line could be drawn "which would not have arbitrary and potentially unfair consequences": [84(2)].

(3) Apple's application was for decertification of the class as a whole, and the vast majority of the class could not advance their claims other than on an opt-out basis. As those were relatively strong claims, "the access to justice of these claimants is a significant consideration in favour of opt-out proceedings": [84(3)].

(4) The likely consequence of decertification would be to bring these proceedings to an end as opt-in proceedings were unlikely to be feasible. While not determinative, this factor was relevant in consideration of the overall balance of justice: [84(4)].

(5) In the circumstances of the case, it did not impose an unfair litigation burden on Apple for the class to encompass the large claims which

could, on purely economic grounds, proceed on an opt-in basis, nor did those large claimants gain an unfair litigation advantage through the bundling of their claims with the many smaller claimants who 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." [84(5)].

Rodger

48. In *Rodger* the application under rule 85 was similar to the present case in that the defendants (**Google**) sought to vary the opt-out CPO so as to substitute hybrid opt-out / opt-in proceedings. The claims were similar to those in *Ennis*, but concerned Google's Android operating system as opposed to Apple's iOS system. The class was said to comprise approximately 2,200 app developers who made app sales, or in-app sales, via Google's "Play Store" (a store created by Google through which Android device users can download apps). It was alleged that Google abused a dominant position in the markets for Android app distribution and licensable smart-phone operating systems by engaging in various forms of unfair pricing and exclusionary conduct. The Tribunal granted a CPO on an opt-out basis, setting out its reasons in its judgment dated 6 August 2025, [2025] CAT 45.

49. On 27 February 2026, Google applied to the Tribunal seeking a variation of the CPO under rule 85. Google asserted that *Evans SC* had materially altered the approach to rule 79(3) and adduced evidence showing that a very large proportion of the claim value could be attributed to a small number of developers within the class. Google proposed that the proceedings should continue on an opt-in basis for the 25 developers with the highest revenues from Google in the relevant period, on the basis that these developers are "large and sophisticated entities, or part of large and sophisticated international groups, with substantial individual claims", such that it is "unfair for [Google] to face claims without the direct involvement of those developers and in particular without those developers having to evidence their losses" [7]. In the alternative,

Google proposed that the opt-in class should comprise just the five largest developers, measured by claim value. The proceedings for the remainder of the claimants would continue on an opt-out basis.

50. The Tribunal (Bacon J, Tim Frazer and Andrew Taylor) refused the application. The Tribunal held that Google had not established that it was appropriate to vary the CPO, relying on the following factors:

(1) The Tribunal had held in the certification judgment that the claims were strong. There was no basis for viewing the claims in a materially different way from the way they were viewed at certification, and Google did not suggest otherwise: [18]-[19].

(2) The fact that a substantial proportion of the claim value is concentrated amongst a small number of class members (**CMs**) was not new information. The evidence that Google sought to rely on could have been relied upon at the original certification stage, had Google chosen to do so: [21]-[22].

(3) Although *Evans SC* sets out a somewhat different approach to assessing practicability, there was nothing in *Evans CoA* which prevented Google from advancing at the original CPO hearing the practicability arguments it relied upon in its application to vary the CPO: [24].

(4) The Tribunal's original CPO decision made an overall assessment on the balance of justice on the question of opt-in/opt-out, and the basis of that assessment had not materially changed: [25].

(5) It would be difficult to split the class in a principled way: the difference in the claims of the class members was "on a sliding scale rather than representing a qualitative difference". Moreover, several of the claimants that Google proposed should proceed on an opt-in basis appear to be small or medium-sized entities: [26].

51. Moreover, at the time of hearing the application, the trial was due to commence at the end of September 2026, less than four months after Google's application was heard. If the application were granted, significant time would be required for the proposed opt-in class members to consider their position and decide whether or not to opt in, as well as for negotiation of the resulting funding and insurance issues. Further, the evidence showed that this material change would give the funder a right to terminate the existing funding agreement, and it seemed unlikely that funding would be provided for the opt-in claims. Altogether, the proximity to trial meant that excising the largest claims from the opt-out class "would fundamentally alter the viability of funding, leading to a real risk of the collapse of the *Rodger* Proceedings." That would not be in the interests of justice: [29]-[33].

52. Although not a ground for its decision, the Tribunal added a comment about hybrid proceedings generally, which it is appropriate to quote:

> "40. …if a hybrid certification is adopted in a particular case, the Tribunal must be satisfied that such an approach is both just and workable. It will need to address carefully how the division between the classes is drawn, how notice and participation are to be managed, what consequences follow if some entities opt in and others do not, and how the revised structure fits with the management of the proceedings as a whole."

Stasi

53. Dr Stasi as the proposed class representative (**PCR**) sought certification on an opt-out basis for a class of about 59,000 business claimants alleging that Microsoft had abused its dominant position by way of its licensing practices in respect of its "Windows Server" operating system and in respect of its cloud computing services, in particular its "Azure" platform. Microsoft opposed certification on various grounds, but contended that if the proceedings were to be certified, this should be only on a hybrid basis, with those customers who had an annual spend on cloud services of between $100,000 and $5 million being required to opt-in and those spending below $100,000 proceeding on an opt-out basis; those spending over $5 million should not be certified at all. Microsoft considered that its proposed opt-in class would comprise the majority of the value of the claims.

54. The hearing of the application took place before *Evans SC* was issued, but the parties, with the permission of the Tribunal, filed further written submissions on the implications of the Supreme Court judgment. The Tribunal was therefore able to take *Evans SC* fully into account.

55. The Tribunal (Adam Johnson J, John Davies and Lesley Farrell), by its judgment of 21 April 2026, granted certification on an entirely opt-out basis. As is usual on a disputed application for certification, the judgment covers many issues. But its decision to reject Microsoft's proposal of limited, hybrid certification and to approve opt-out certification for the whole class relied on the following factors:

(1) This was "an apparently viable claim with a good prospect of success": it comfortably crossed the hurdle of having a real prospect of success although it could not be characterised as obviously strong: [125].

(2) Microsoft accepted that it would not be practicable for smaller entities to pursue their claims on an opt-in basis. But applying the guidance in *Evans SC* at [120] (see para 38 above), the dearth of data speaking to class composition made it difficult to draw any reliable distinction between different sub-groups having different profiles. Although the class is diverse and will include small and medium-sized enterprises spanning many different business areas and with different profiles, a single metric of "annual spend" was too crude a measure from which to draw a reliable conclusion about practicability between different sub-groups of businesses. Practicability depended "on a range of other factors including their stage of development, their overall profitability, their available financial reserves and their individual claim size.": [136].

(3) Even if a cut-off point could be identified at some higher level than expenditure of $100,000 p.a., that was not determinative: it would be necessary then to stand back and make "an overall assessment of the balance of justice" having regard to the fact that there were distinct groups in a different position as regards practicability: [137].

(4) In contrast with *Evans,* this was not a case where "the leveraging effect of an opt-out certification would generate an unfair degree of pressure to settle a weak claim": [139]. And the leveraging effect "is a two-sided equation" bringing to claimants the benefit of access to funding that in part depend on their economic viability on the scale afforded by a single collective proceeding. Depending on how the class was reconstituted, there was a risk that the funding arrangements would collapse completely. Refusal to certify would therefore bring its own risk of injustice: [140]-[142].

Brook

56. The PCR sought certification on an opt-out basis for proceedings for a class of approximately 880,000 advertisers, alleging abuse of dominance by Google through a series of exclusionary practices in markets connected with mobile operating systems, app distribution, general search services and search advertising. The claims were largely follow-on claims based on the Commission's decision in Case AT.40099 *Google Android,* and in part stand-alone claims. The Tribunal said that a "small percentage" of the class accounted for the "great majority" of the claim value; and that "many" PCMs had "very small claims". It noted that a "tiny percentage" of PCMs had claims in the "millions of pounds" but that there were a "material number" of PCMs with "middling size" claims "in the tens of thousands of pounds" who account for a "significant proportion" of the claimed damages: [60]. Subject to a few minor points, Google did not oppose certification on an opt-in basis but opposed opt-out certification. It did not suggest that hybrid opt-in/opt-out certification would be appropriate.

57. In its judgment dated 5 August 2026, the Tribunal (Meade J (as he then was), John Davies and Robert Herga) certified the proceedings on an entirely opt-out basis. The Tribunal reached this conclusion having regard to the following factors:

(1) Given the size of the class, the book-building exercise required for opt-in proceedings would be a long and difficult process, with the result that

many PCMs would not join the proceedings and a significant proportion of the possible aggregate claim value being lost: [62]-[63].

(2) The effect would be significantly to delay the proceedings, probably for well over a year, which would then cause extra delay to the overlapping collective proceedings brought for a class of consumers, *Stopford v Alphabet*: [64].

(3) There might well be a general disinclination for PCMs to opt in to a dispute with a key commercial partner: [66].

(4) These were not weak claims, and Google did not seek to argue otherwise: [67(1)].

(5) If the proceedings were opt-in, there would be a risk of inconsistency with the *Stopford* proceedings, which had been certified on an opt-out basis: [67(2)]. This was on the basis, as we understand it, that there would be a mismatch between the compensation at retail level and consumer level.[7]

(6) Although certifying on an opt-out basis would increase the pressure on Google's overall exposure, the difference in the exposure arising from opt-out proceedings compared with opt-in proceedings was "modest" and "not unfair in all the circumstances": [67(3)].

58. The Tribunal concluded, at [69]:

> "Taking these factors overall, the balance is very clearly in favour of opt-out certification. Opt-in would have many practical problems, would be slow, would have an undesirable and unfair impact on the *Stopford* proceedings, and would unjustifiably reduce the size of the overall claim because of appreciable numbers of PCMs being lost. There is almost nothing to be said in favour of opt-in, by contrast. This assessment is not based on any presumption; in so far as there is a presumption in favour of opt-in, it is comfortably displaced on the facts."

[7] See the transcript of the certification hearing, p. 79.

G. THE APPLICATION

59. As noted above, Amazon applied for variation of the CPO under rule 85 so that merchants whose aggregate "Gross Merchandise Sales" (**GMS**) on the UK Amazon Marketplace over the Relevant Period was over £10 million should be excluded from the opt-out class and permitted only to opt in. GMS is defined as the price paid by customers plus the shipping amount and gift-wrap charge less any discounts. Since the Relevant Period is, as the pleadings now stand, six years (or five years for claims governed by Scots law), this amounts to £1.67 million p.a.

60. With the Application, Amazon served a witness statement from Ms Louise Freeman of its solicitors, which explained that on this basis the Excluded Merchants would be about the top 1000 merchants in terms of sales on Amazon. Ms Freeman exhibited two confidential spreadsheets listing, in order of magnitude of their GMS, the top 2000 merchants. She says that, taken together, the Excluded Merchants would account for just over 40% of the total GMS of the class.

Amazon's Submissions

61. For Amazon, Mr Piccinin KC submitted that *Evans SC* established clear principles which are binding as a matter of law. First, if opting in is practicable for a significant part of the class, that is a powerful reason in favour of ordering opt-in for that part of the class even if the claim is relatively strong. Secondly, when assessing practicability, the Tribunal should distinguish between larger and smaller class members, even if there is no significant difference between those who fall just on one side of the line and just on the other. And thirdly, if the strength of the claims is to be taken into account as a factor in favour of opt-out, the Tribunal must make "a much more precise" and a "much more positive" assessment of strength than simply finding that the case gets over the threshold for [reverse] summary judgment. When assessing strength, Mr Piccinin argued that there were three categories: a weak case (although above the summary judgment threshold); a range where the strength is positive, which he explained as meaning that the claimants have the better of the argument; and a middle

ground where the position was neutral, in which case this factor carries no weight in the determination as between opt-in and opt-out.

62. As for the four post-*Evans* cases discussed above, Mr Piccinin submitted that although the actual decision in each of those cases was not necessarily wrong, their characterisation and interpretation of *Evans SC* were either wrong or incomplete to a material extent.

63. In the present case, he contended that it was clearly practicable for merchants with a high value of sales on Amazon to bring their claims on an opt-in basis. The approximately 1000 Excluded Merchants were a small section of the around 214,000 class members, yet as noted above they accounted for about 40% of the total GMS and therefore of the aggregate loss claimed in the proceedings. Some of those merchants were very large companies or belonged to large corporate groups. They were sophisticated enterprises, well able to decide for themselves whether they wished to opt in.

64. Although Amazon recognised that the figure of £10 million GMS was a somewhat arbitrary dividing line, the same could be said of any case where a line had to be drawn: there would always be class members just on one side of the line and just on the other.

65. Therefore, since it was practicable for this part of the class to opt in, Mr Piccinin submitted that the strength of the case was immaterial. He expressly did not suggest that this was a weak case, but said that it could not be considered a strong case either, and he referred to all the matters pleaded by Amazon in its Defence.

66. As for delay, it was clear that in this case the funding for the opt-out proceedings would continue, and accordingly there was no reason why the procedural steps in those proceedings could not continue over the following months. Even allowing a generous period for opt-in certification and then the opt-in period, there was no realistic threat to the trial date of April 2028.

67. Amazon made no secret of its reason for seeking to vary the certification. Mr Piccinin stated at the outset of his submissions:

> "Amazon's position is that it has a good relationship with sellers and that many of them would be unlikely to be participating in this claim if they were aware of its existence, particularly if they were required to give it active consideration and to make a decision one way or the other."

And he contended that it was unfair for Amazon to face claims that have been "inflated" by the inclusion of claims that class members would not have chosen to pursue if they had been required to choose. Amazon clearly hopes that if its Application is granted, many of the Excluded Merchants will not opt in.

The CR's Submissions

68. Mr Beal KC, for the CR, took a preliminary objection to the Application contending that it was an abuse of process, since the arguments Amazon sought to advance could have been advanced at the certification hearing. He referred to the well-known governing principles for such an abuse, summarised in *Koza Ltd v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1018, [2021] 1 WLR 170 at [30]-[40], and the statement by Popplewell LJ at [42] that these principles apply to interlocutory hearings as much as to final hearings.

69. Here, Amazon had argued at the certification hearing against certification on an opt-out basis. The evidence now put forward of the sales on Amazon of the top 2000 class members could have been produced at that hearing. It would have been open to Amazon to submit then, as it did now, that if certified at all the proceedings should be on a hybrid opt-in/opt-out basis. Mr Beal pointed out that the defendants in *Stasi* had advanced that argument before the Supreme Court issued its judgment in *Evans*: it was not dependent on *Evans SC.* And *Evans SC* has not fundamentally changed the law, which rested on the application of the statutory test in rule 79(3).

70. If the Tribunal nonetheless allowed Amazon to advance their Application, then Mr Beal submitted that in terms of rule 79(3)(a) this was a strong case, where the allegations reflected the provisional views of the CMA and the Commission, and the legal conclusion of abuse in the AGCM Decision.

71. As to practicability, Amazon accepted that it was not practicable for the approximately 200,000 members of the class to opt in. Unlike *Evans*, the merchants whom Amazon sought to confine to opt-in did not account for the majority of the total claim, but only for 40% of the total estimated damages. And Mr Beal disputed the assertion that the approximately 1000 Excluded Merchants were all large and sophisticated enterprises. He said that GMS of £1.67 million p.a. does not necessarily mean that the seller is large company, in particular if it is a re-seller making a small margin. He said that many will be SMEs and he referred to the approach of the Tribunal in *Stasi*: para 55(2) above. Moreover, the suggested division between opt-out and opt-in at the level of £10 million GMS was entirely arbitrary: there was no substantive difference between merchants making sales a little above and a little below this dividing line.

72. Mr Beal submitted that Amazon's argument based on *Evans SC* was mistaken. The Supreme Court emphasised the danger of opt-out proceedings being used to obtain unfair leveraging on a defendant. That did not apply here, where in any event opt-out proceedings with an estimated claim of £1.6 billion would continue, and the issues which Amazon faced at Trial 1 of dominance and the various forms of alleged abuse were not affected by the presence or absence of the Excluded Merchants.

73. Furthermore, to convert a part of the proceedings at this stage into potential opt-in proceedings would cause substantial delay. It was common ground that for the proposed new opt-in class a new LFA would have to be arranged, and the approach of funders to opt-in proceedings was that they expected to see a substantial body of PCMs committed to opt in before they would assess and commit to funding. Accordingly, there would have to be a book-building exercise with approaches to 1000 merchants, then negotiation of a LFA, and then recertification followed by an opt-in period. Mr Beal said that the book-building and funding stage alone would take 12-18 months, and that an effective opt-in period of at least nine months would be required. Altogether, the process would inevitably threaten the trial date.

H. DISCUSSION

74. Rule 85 expressly allows for an application to vary or revoke a CPO. In general terms, such an application has to be justified by a change in circumstances: see rule 85(2)(a)-(b). As the Tribunal stated in *Ennis,* at [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."

Amazon expressly accepted that this was the correct approach.

75. We recognise that just because a subsequent judgment of a higher court adopts a different interpretation of the law, that does not in itself amount to a sufficient change in circumstances when it had been open to the defendant to argue for that interpretation at the original certification hearing. Here, nothing has changed in the underlying facts and, as Amazon had to accept, the evidence placed before the Tribunal on the present Application could have been adduced at that earlier stage. Moreover, this is not a case, unlike *Ennis*, where reliance had been placed in argument at the certification stage on *Evans CoA* which was subsequently overruled by the Supreme Court.

76. However, it is clear that the Tribunal has a continuing gatekeeper function as regards the operation of collective proceedings. In respectful agreement with the Tribunal in *Ennis* at [62(1)], we recognise that there may be circumstances where a subsequent appellate judgment mandates such a fundamental interpretation that rule 85 is engaged. But we do not think it is necessary to reach a firm view on whether that is the case here. In the present case, the parties were well aware at the time of the certification hearing that the appeal to the Supreme Court in *Evans* was pending. As recorded in the CPO Judgment at [155], Amazon expressly reserved the right to make further submissions on the

opt-in/opt-out question once the Supreme Court issued its judgment. In our view, that was an entirely sensible and proportionate approach, instead of Amazon having sought to canvass before us at that time the arguments which had been made to the Supreme Court.[8] In those circumstances, we do not see how it can be an abuse of process, such as to bring the law into disrepute, when Amazon seeks to do just what it had sensibly reserved the right to do.

77. We would emphasise that the Tribunal should be astute to resist strategic applications to vary a CPO, which lead to satellite litigation that increases still further the very substantial expense of collective proceedings and draws down on the CR's funding. However, for the reason just given, we do not consider that this is such a case.

78. Accordingly, we reject the objection raised by the CR that the Application is an abuse of process. However, we stress that this applies only insofar as the submissions are based on *Evans SC* (and the Tribunal's post-*Evans* jurisprudence). Amazon is not otherwise entitled to re-run arguments which it had advanced unsuccessfully at the certification hearing in the hope of a more favourable outcome. That would indeed be to allow Amazon a 'second bite of the cherry' and constitute an abuse.

79. We therefore turn to the substance of the Application and *Evans SC*. It was the foundation of the Application and Mr Piccinin devoted the substantial part of his submissions to a close analysis of the Supreme Court's judgment.

80. The critical legislative provision is rule 79(3), which we repeat here for convenience:

> "(3) 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."

[8] The hearing before the Supreme Court took place on 1-2 April 2025. The certification hearing in the present case was on 6-8 May 2025.

81. The Supreme Court noted that this provides for a broad evaluative assessment by the Tribunal, which is expressly not confined to the two identified factors. But as those factors are identified, they are clearly significant and the Supreme Court addressed them separately.

82. As regards, first, the strength of the claims, we agree with Mr Piccinin that the fact that the action is above the threshold for reverse summary judgment (or striking out) is not determinative, and that a case may be regarded as weak even if it is not so weak as to be susceptible to summary dismissal: see *Evans SC* at [102]. However, we do not accept his submission that the Supreme Court set out or even suggested the three-tiered categorisation which he put forward: para 61 above. On the contrary, we consider that the concept of the strength of the case involves a spectrum. As the Supreme Court stated at [95]:

> "… it is indeed appropriate, in our view, to view the strength of the claim in terms of a sliding scale."

83. The point being made by the Supreme Court is that the weaker the case, the more that factor weighs in favour of opt-in certification because of the degree to which that renders the leverage effect of opt-out proceedings unfair. Equally, the stronger the case, the less that leveraging is unfair, having regard to the objective of collective proceedings in enabling access to justice. Far from "the strength of the claims" being disregarded when it is neither weak nor strong, so that it effectively drops out of the equation, we consider that the approach of the Supreme Court, reflecting rule 79, is that the Tribunal should pay regard to this factor in every case (save only when the Tribunal is unable to reach even a provisional view of the merits). Where the merits are neither particularly strong nor particularly weak, that nonetheless is relevant in the overall evaluation as between opt-in and opt-out. Hence in *Stasi*, the Tribunal characterised the claim as neither weak nor strong but as "an apparently viable claim with a good prospect of success" ([125]); and on that basis determined that it was not a case where the leveraging effect of an opt-out certification would operate unfairly: see at [139]. We consider, with respect, that this approach was an entirely appropriate application of *Evans SC*.

84. As regards practicability, we reject Amazon's contention that the Supreme Court was setting out a principle of law that when it is practicable (on an objective basis) for class members to opt in, then irrespective of the merits the proceedings should normally not be certified on an opt-out basis. For that proposition, Mr Piccinin relied strongly on the first two sentences of para [112] of *Evans SC*: see at para 36 above. However, rule 79(3) does not prescribe impracticability of opt-in as a condition or requirement for opt-out certification; the rule states that this is one factor which the Tribunal "may take into account", along with the strength of the claims and any other matters "it thinks fit" to consider. The Supreme Court was obviously not seeking to set out an approach that was inconsistent with the legislation. Indeed, the more nuanced approach of the Supreme Court is apparent from para [112] read as a whole and the immediately following para [113]: see at para 36 above.

85. As we observed in the CPO Judgment, almost all non-consumer classes will include some large businesses along with many smaller ones. If the approach urged on behalf of Amazon were correct, in none of those cases would opt-out certification for the whole class be permissible: they would either have to be opt-in or, as Amazon argued here, a hybrid form of collective proceedings which we consider further below. We do not accept that the regime is supposed to operate in such a straitjacket. On the contrary, the Tribunal's determination under rule 79(3) is multi-factorial and very dependent on all the circumstances of the particular case.

86. Thus, addressing the nature of the Tribunal's assessment of practicability, the Supreme Court stated, at [114]:

> "The open-textured nature of the question, the difficulties of assessment and the range of cases in which it arises mean that the Tribunal has a wide case-management power of evaluation and discretion in making its decision. In addition, the Tribunal has expertise in making relevant economic assessments and practical experience in managing collective proceedings which mean that it is well placed to understand and balance the risks of unjust outcomes associated with this sort of complex litigation and to make the required overall assessment of how the interests of justice are best served."

Altogether, we reject what we consider to be the rather mechanistic approach to the opt-in/opt-out decision that was urged on behalf of Amazon. We think that the Supreme Court emphasised that this was a matter for broad, evaluative

judgment by the Tribunal, in which the two factors identified in rule 79(3), as explained in the judgment, were very important and to be given significant weight.

87. The particular concern, which resonates through *Evans SC*, is the potentially unfair leveraging advantage given to claimants by opt-out proceedings, where the value of the claim is concentrated in a minority of larger class members who could readily opt in, but the majority of class members had small claims which would only be advanced on an opt-out basis and which together accounted for a minor share of the aggregate total, and indeed may be so small individually that many would not even come forward to claim their share of an eventual award: see at [123]-[124].

88. The Supreme Court did not specifically address the possibility of hybrid certification, as put forward by the defendants in *Stasi* and now by Amazon in the present case. However, the Court said that the Tribunal was not required to assume that the position of all potential claimants was the same. We repeat our quotation of [120] of the judgment:

> "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. In substance, this is the approach which the Tribunal majority adopted in this case."

We do not consider that in referring to claimants with "distinct profiles" the Court was suggesting that this is to be considered by simply drawing a line based on the size of claim or size of claimant since that could be done in almost every case involving a non-consumer class and, unless there was some break in the continuum, the result would be arbitrary. The Court clearly had in mind the facts of *Evans* itself, where there was a group of financial institutions and large commercial entities that had allegedly suffered significant losses which accounted for the major part of the aggregate claim, and a very large number of

individuals and smaller entities that had allegedly suffered losses but only in very small amounts and accounted in total for a tiny fraction of the aggregate claim: see para 28 above and *Evans SC* at [122]-[124]. Those circumstances supported the Tribunal's assessment to refuse opt-out certification. However, the Supreme Court notably proceeded to set out a contrasting set of circumstances:

> "126. One could also imagine a case where the profile of the claims was different, with the main core of the value of the class action consisting in a mass of small claims by consumers equivalent to those in *Merricks* but with a small rump of bigger claims. It would be open to the Tribunal to decide that the entire set of claims should be grouped together and be brought in one set of proceedings on an opt-out basis and that the incidental advantage the claimants in the rump might thereby gain did not significantly distort the balance of procedural advantage as between the claimants and the defendant. This counter-example serves to emphasise the importance of the role of the Tribunal in exercising its discretion, and making the evaluative judgments required, in carrying out its function as gatekeeper in relation to collective proceedings."

89. On the basis of the above analysis of *Evans SC*, we proceed to consider its application to the present case.

90. As regards the strength of the claims, our assessment is necessarily made on a very provisional basis. Moreover, we consider that it should be based on the CR's pleaded case and initial expert report filed with its CPO application. We do not accept that we need to consider also Amazon's pleaded defence (and then, presumably, the CR's reply). Consideration of the strength of the claims at the certification stage, including any application to vary a CPO, must not turn into a mini-trial (see *Merricks SC* at [113]), and the assessment under rule 79(3) is normally carried out on the application for a CPO, before there is any pleaded defence. To take a different approach would be an invitation for defendants to ask the Tribunal to change opt-out certification to opt-in certification after service of a defence or potentially after service of evidence, and a catalyst for strategic disruption of the proceedings.

91. Amazon accepted that the claims here cannot be regarded as weak but submitted that they should be regarded as 'neutral': para 65 above. Here, for four of the five heads of abuse alleged, we disagree: in our judgment, those claims are strongly arguable with a reasonably good prospect of success, although we

cannot reach a view at this stage as to the likely quantum of damages. For the purpose of this assessment, which is of course very different from reaching a judgment on the claims, we think it is reasonable to refer to the three competition authority decisions: the CMA Decision, the Commission Decision and the AGCM Decision (para 12 above). Those decisions are not admissible for any findings of fact, which will be for this Tribunal to determine on the evidence before it at trial. But as regards the AGCM decision finding infringement of Art 102 TFEU by Amazon, Mr Piccinin very properly accepted that it is admissible on questions of law; and the AGCM there held that conduct equivalent to the third and fourth heads of abuse alleged here constituted abuse of a dominant position. The Tribunal of course regularly refers to, and relies on, decisions and judgments in other cases as informative as to what conduct constitutes an abuse of dominance: that is how the jurisprudence on abuse has evolved. Here, the AGCM effectively considered the same conduct as alleged in the present case, carried out by the same enterprise. The Italian decision is obviously not binding but it is very relevant.

92. The CMA Decision and the Commission Decision were both commitments decisions which therefore reached no conclusion on infringement but involved a provisional assessment, following investigation, as to whether the conduct by Amazon raised real competition law concerns. In Case C-547/16, *Gasorba SL v Repsol Comercial de Productos Petroliferos SA*, EU:C:2017:891 (cited in the CPO Judgment at fn 11), the Court of Justice of the European Union (**CJEU**) considered the relevance of a commitments decision by the Commission for national court proceedings. The CJEU stated, at para 29:

> "… national courts cannot overlook that type of decision. Such acts are, in any event, in the nature of a decision. In addition, both the principle of sincere cooperation laid down in Article 4(3) TEU and the objective of applying EU competition law effectively and uniformly require the national court to take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not prima facie evidence, of the anticompetitive nature of the agreement at issue in the light of Article 101(1) TFEU."

93. *Gasorba* is a pre-Brexit[9] decision and so falls within the consistency principle set out in s. 60A(2) CA. We recognise that in its reasoning it may have less force after Brexit, and the Commission Decision concerning Amazon is a post-Brexit decision. It is questionable to what extent the *Gasorba* ruling applies in the UK to post-Brexit decisions. For present purposes, we think it is unnecessary to reach a firm view on that question. In any event, pursuant to s. 6(2) of the European Union (Withdrawal) Act 2018, the Tribunal may have regard to a post-Brexit decision of the Commission "so far as it is relevant" to any matter before us. We therefore find that the Commission Decision adopted concerning equivalent conduct by the same undertaking as is the defendant in these proceedings is admissible for the purpose of this provisional assessment to show that Amazon's conduct raised sufficient competition law concern in the Commission for it to initiate proceedings and then adopt a detailed decision setting out the basis for that concern and accepting formal commitments. If that approach applies to the Commission Decision, we think it applies no less to the CMA Decision which concerns Amazon's conduct on the UK market. Moreover, the findings in those decisions may be relied on to show that evidence exists of Amazon's practice and its effects which can reasonably be expected to be available at trial: *Evans SC* at [159]. As noted above, the Commission Decision and the CMA Decision correspond to alleged abuses 1-4 in the Stephan Action.

94. We consider that the position is different as regards alleged abuse 5: "Anti-discounting practices". The CR alleges that Amazon adopts a practice or policy in the UK market equivalent to operating a price parity clause, whereas Amazon denies this. That is a factual dispute, and although similar allegations to those by the CR are made by the claimants in the US proceedings (see the CPO Judgment at [20]), those are only allegations and, in any event, concern a very different geographical market where Amazon may adopt a different approach. Accordingly we are unable to reach even a provisional view as to the strength of the claims under that head at this stage.

[9] We use "Brexit" as convenient shorthand for IP completion day (31 December 2020), when EU law ceased to be incorporated into the law of the UK.

95. In *Evans*, the weakness of the claims resulted from the far-fetched theory of harm, i.e. the allegations of causation and loss to the class as a whole, most of whom did not engage in the impugned transactions and many of whom did not even conduct trades with the banks that committed the infringement: see paras 25-27 above. That is in sharp contrast with the present case: if the conduct alleged constitutes an abuse, the alleged effect on merchants selling on Amazon appears to us very plausible and the CR puts forward an orthodox and relatively straightforward theory of harm. And in the CPO Judgment we scrutinised in some detail the methodologies put forward by the CR's expert, Dr Houpis, in the light of searching criticism by Amazon, and concluded that he has well-developed methods for seeking to estimate the loss resulting from the various heads of alleged abuse.

96. Turning to practicability, we do not accept that, just because a merchant's GMS on Amazon over a six year period was at least £10 million (or on average £1.67 million p.a.), that means that it was practicable for that merchant to opt in. We agree with Mr Beal that many such merchants may be relatively small companies. And we respectfully agree with the (differently constituted) Tribunal in *Stasi*, which dismissed a similar argument based purely on the level of spend, stating (at [136]):

> "Practicability would depend on a range of other factors including their stage of development, their overall profitability, their available financial reserves and their individual claim size."

97. In our judgment, it is not reasonably practicable for many merchants among the 1000 in Amazon's schedule of Excluded Merchants to make an informed decision whether to participate in this complex claim, involving several different allegations of abuse that require significant explanation, against one of the largest corporations in the world.

98. Moreover, we agree with Mr Beal that the proposed £10 million cut-off is entirely arbitrary. The point is not simply about there being CMs close to this dividing line: i.e. that a company with a GMS on Amazon of £9.9 million is not in a materially different position from one with a GMS of £10.1 million. As Mr Piccinin remarked, that may be the case with almost any dividing line. The

point here is more fundamental. There is no principled basis for saying that a company with GMS of £5 million would be in a materially different position, or that the dividing line should be at £10 million rather than £15 million. That is because once one gets beyond the top 10 merchants selling on Amazon, the spread of companies measured by GMS is very flat, as shown by the two graphs below, prepared by the CR's expert, Dr Houpis: figure 1 shows the GMS of the top 2000 merchants over the relevant six year period, and figure 2 is a more detailed breakdown of the top 50 of those merchants.[10]

Figure 1: top 2000 sellers by GMS on Amazon, June 2018 – June 2024

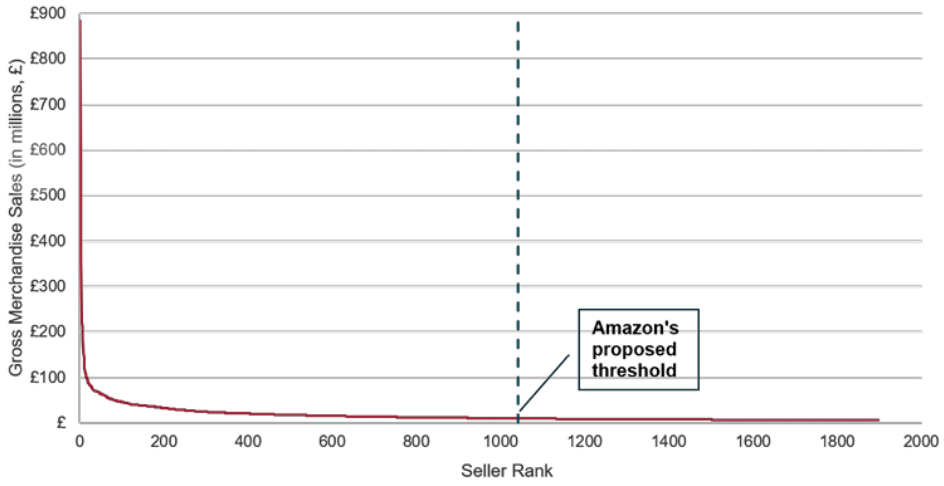
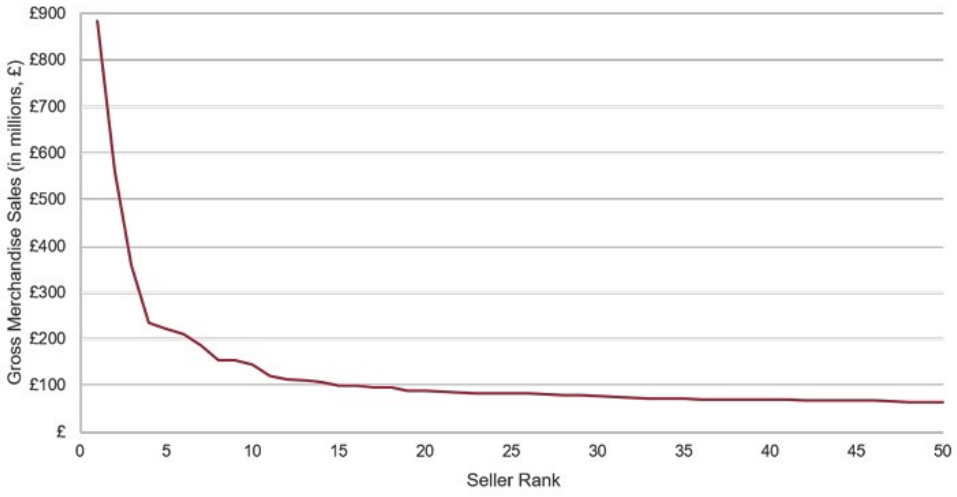


Figure 2: top 50 sellers in Figure 1



[10] The data is based on the spreadsheets exhibited by Ms Freeman: para 60 above.

99. Accordingly, we think that it cannot sensibly be said, on the basis of their GMS, that the top 1000 merchants, or for that matter the top 500 or the top 1500, have a "distinct profile" from the rest. If one wished to consider a distinct profile based purely on GMS, this could in our view apply to the top 6 or perhaps the top 10 merchants, each of whom have sales with a relatively high value whereas the rest comprise a long stretch of very gradually declining value. Therefore, as Amazon expressly accepted, this is not a case like *Evans* where the major share of the total claim value is concentrated in a small number of large companies, with a very long tail accounting for a small share. Even adopting the £10 million cut-off for Excluded Merchants proposed by Amazon, about 60% of the total claim would remain accounted for by the remaining opt-out class. Realistically, the position in the present case seems to us analogous to the situation envisaged by the Supreme Court in *Evans SC* at [126], albeit here not in the context of a consumer claim: the main core value of the claim lies in the mass of more modest claims not in a small number of very large claims: see para 88 above.

100. Furthermore, there are three additional factors which we think are relevant to our evaluation:

(1) The question before us of "hybrid certification" does not arise at the outset, at the time when the proceedings are being certified. This action has been proceeding on an opt-out basis since late November 2025. A variation of the CPO at this stage, with a view to a new application for certification of proceedings for a separate or sub-class comprising the Excluded Merchants on an opt-in basis, would cause disruption and, in our view, significant delay. Mr Beal explained that the process of seeking funding for an opt-in class is complex. A funder will not commit until there is a commitment to opt in from a critical proportion of the proposed opt-in class, so time would be needed for this 'book-building' exercise before the CR could conclude a new LFA for the opt-in part of the proceedings. There would then need to be an application for certification to the Tribunal; and, assuming that this was successful, a subsequent opt-in period, which Mr Beal said would require at least 9 months because of the need to deal with queries from the individual

solicitors to some 1000 potential class members. Although we think that Mr Beal's estimates, amounting to 21-27 months for the total process, were unduly pessimistic, we accept that well over a year would be required. Thereafter, Amazon might well seek disclosure from some of those merchants: it has made clear that it wishes to approach some of the larger CMs for disclosure without delay, but it obviously could not do so from Excluded Merchants if they drop out of the action. In light of this, there was no satisfactory explanation as to why Amazon took until early May to make its application following *Evans SC*. In *Ennis*, the application to revoke the CPO was made on 23 February 2026; in *Rodger*, it was made on 27 February 2026. We were not impressed by Mr Piccinin's explanation that Amazon required over four months to compile a list of its 2000 largest customers by sales value on its UK platform. If Amazon had made the Application in February or March, it could have been heard and determined well before the summer. But we think that to have granted the Application in September 2026 would almost inevitably have led to a postponement of the date of Trial 1.

(2) The Stephan Action does not stand on its own. The Hammond Action, which was launched in June 2023, has already been significantly delayed so that it could be heard with the Stephan Action. A delay in the Stephan Action would cause yet further delay to the Hammond Action, which we think would be very unfair to the consumer class that Mr Hammond represents. See the somewhat analogous consideration of this factor in *Brook*: para 57(2) above.

(3) Our decision in the CPO Judgment that the proceedings should be opt-out rested in part on a concern that independent merchants may feel intimidated from putting their heads above the parapet to engage directly in litigation against Amazon: CPO Judgment at [153(4)]. It is not open to Amazon to revisit that matter, which is in no way affected by *Evans SC*. We do not regard it as less likely to apply if the opt-in were limited to the 1000 Excluded Merchants. The critical factor in this regard is not the size of a merchant's sales on Amazon, but how dependent the

merchant is upon Amazon for its sales: i.e. what proportion of its overall sales are made on Amazon.

101. We should add that we were not impressed by Mr Piccinin's opening submission that Amazon has such a good relationship with its merchants that many of them would be unlikely to be participating in this claim if they were aware of its existence: para 67 above. Not only is that pure speculation on Amazon's part, but it is striking that only two merchants out of the many thousands have chosen to opt out and both appear to be relatively small companies: one is around [250th to 400th] by value of its sales on Amazon and the other is not even in the list of the top 2000 merchants by GMS. As a matter of common sense, since those two companies evidently became aware of these proceedings, we would have thought that at least a significant number of the larger merchants, with in-house lawyers or sophisticated commercial departments likely to keep abreast of developments, would also have become aware of them. However, none of those undertakings has chosen to opt out.

I. CONCLUSION

102. In reaching our conclusion, we stand back and consider whether, in all the particular circumstances of this case, it is appropriate and just to vary the CPO in the manner sought by Amazon. No single factor among those set out above is, in our view, decisive and some are obviously of greater weight than others. However, having regard to all of them, in our evaluation of "how the interests of justice are best served" we are clearly satisfied that the Application should be refused.

103. We have also considered whether, as a matter of our own assessment, this should become a hybrid case with the dividing line between opt-out and opt-in set at a different value of GMS from the £10 million put forward by Amazon. For the reasons set out above, we think that the only appropriate dividing line as between categories with distinct profiles would be at a much higher level of sales, at either £200 million (the top 6 merchants) or £140 million (the top 10 merchants). But in either of those situations, where there is a small rump of CMs who together account for only a very small proportion of the total claim

value,[11] we think that, to adopt the language of the Supreme Court in *Evans SC*, the incidental advantage these claimants in the rump might gain from being part of the opt-out class does not significantly distort the balance of procedural advantage as between the claimants and Amazon. In our opinion, the interests of justice are better served by allowing the proceedings to continue on an opt-out basis for the whole class rather than segmenting this small group of CMs.

104. Finally, we should state that we reached our conclusion without considering the difficulties to which hybrid proceedings could give rise, as mentioned by the Tribunal in *Rodger*: para 52 above. Those were not explored in argument, but we do not accept Mr Piccinin's submission that this would be straightforward, or that we do not need to be concerned about such practical difficulties because Trial 1 is not concerned with damages. We do not see that this action can proceed on a hybrid basis for the liability trial but then transform into an entirely opt-out case for the subsequent damages trial. We have to consider the proceedings as a whole. In a claim for aggregate damages where a hybrid class has a single class representative (as Amazon appeared to suggest here), we can anticipate significant practical problems over such matters as the allocation of costs (since CMs opting in would generally be on at least partial damages-based agreements with the same solicitors whereas such agreements are not permitted for opt-out proceedings) and regarding questions of settlement (when some of the opt-in CMs might view any proposals differently from their own perspective to the CR who has to consider the interests of the class as a whole, and a settlement of opt-in proceedings does not require approval by the Tribunal, whereas such approval is required for opt-out proceedings when the Tribunal can consider whether the share proposed for the funder is appropriate). We think that the practical difficulties such as these will require careful consideration in a case where, unlike the present, the overall evaluation would otherwise justify certification on a hybrid basis.

105. This judgment is unanimous.

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[11] It is clear from the schedules which Amazon produced in support of the Application that this small number of large merchants do not account for "a significant bulk" of the claim value: cp para 16 above.

Sir Peter Roth (Chair) | Charles Bankes | Keith Derbyshire

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

Date: 10 November 2026