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VBB on Competition Law

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FOREIGN DIRECT INVESTMENT

European Union level

Parliament and Council adopt revised EU Foreign Investment Screening Regulation

On 19 May and 8 June 2026, the European Parliament and the Council of the European Union, respectively, adopted the proposed revision of the EU foreign investment screening regulation ("Revised FISR"). The Revised FISR harmonises various aspects of foreign direct investment ("FDI") screening in the Union (See, VBB on Competition Law, Volume 2026, No. 2).

The Revised FISR provides for a transitional period of 18 months following publication. As a result, it seems likely that the Revised FISR will apply from the beginning of 2028. In the meantime, Regulation (EU) 2019/452 on the screening of foreign investments in the Union will continue to apply to FDI.

FOREIGN DIRECT INVESTMENT

National level

THE NETHERLANDS

Dutch FDI screening authorities block U.S. acquisition in digital sector

On 25 May 2026, the Dutch State Secretary for Digital Economy and Sovereignty issued a decision prohibiting the envisaged acquisition of Solvinity Group B.V. ("Solvinity") by Kyndryl Holdings, Inc. ("Kyndryl"), a US company (the "Prohibition Decision").

The Dutch competition authorities had previously unconditionally cleared the envisaged acquisition on 26 February 2026.

Background

Solvinity is a Dutch supplier of secured cloud and infrastructure services which is majority-owned by UK private equity firm Vitruvian Partners. It provides the underlying infrastructure platform on which DigiD operates (DigiD is the Netherlands' primary digital identification platform enabling Dutch citizens to log in to government services). The platform itself is managed by Logius, an agency of the Dutch State. Solvinity also hosts the Dutch government's messaging inbox of the citizen portal, and operates a cybersecurity platform used for the exchange of data between Dutch government agencies and external bodies. Kyndryl is an IT infrastructure services provider which was spun off from IBM in 2021 as a separate and independent listed entity.

The Dutch State Secretary's decision is based on the advice of the Dutch foreign direct investment ("FDI") screening authorities ("Bureau Toetsing Investeringen", or "BTI"), under the Dutch Telecommunications Act. This Act includes sector specific FDI screening requirements for acquisitions in data and telecom sectors, to be distinguished from the Vifo Act, i.e. the Dutch non-sector specific FDI screening legislation. According to the BTI's recently published 2025 annual report, of the 76 FDI screening procedures closed in 2025, 72 were conducted under the Vifo Act, with only three under the Telecommunications Act (and one under the Electricity Act).

Substantial public and political opposition

On 5 November 2025, Kyndryl announced its envisaged acquisition of Solvinity, which on 21 November 2025 was notified to the BTI under the Telecommunications Act. Quickly thereafter, the announcement resulted in public and political opposition.

For instance, following a request by a Dutch Member of Parliament and a letter by the Dutch State Secretary for Internal and Royal Affairs in November/December 2025, the Dutch Parliament held a plenary debate, lasting nearly six hours, on 11 February 2026. During the debate, various Members of Parliament expressed distrust of the US and its current administration specifically. Apart from digital dependency, a concern was that an acquisition by Kyndryl would bring Solvinity within reach of US legislation such as the CLOUD Act, FISA and Executive Order 12333, which enable US authorities to access data held by European subsidiaries of US companies, even if stored on servers outside the US. Ultimately, most political parties called on the government to block the transaction.

On 27 March 2026, the Dutch government decided to renew the DigiD contract (due to expire in August 2026) with Solvinity until August 2028. Subsequently, the Dutch Parliament passed nearly unanimously a motion calling on the Dutch State to refuse renewal of Solvinity's DigiD contract in 2028 if the acquisition by Kyndryl were to proceed. On 6 May 2026, the Dutch State Secretary for Internal and Royal Affairs, in response to Parliamentary questions, justified the renewal by stating that (i) it was not possible to migrate to another provider before August 2026 without endangering the continuity and security of DigiD and other government services; and (ii) Logius lacked the knowledge and capacity to take over management itself.

FOREIGN DIRECT INVESTMENT

National level

On 4 May 2026, private citizens brought summary proceedings against the Dutch State seeking to prevent renewal of the DigiD contract (due to expire in August 2026) with Solvinity in the event that the acquisition proceeded. The Hague District Court rejected those claims, ruling that the court could only intervene in the case of (impending) unlawful conduct, and no such conduct was demonstrated. Interestingly, the Court added that the Dutch State could not be prohibited from continuing its relation with Solvinity, despite the potential risk of intervention by the US government following the envisaged acquisition, because it was not feasible to find a successor for Solvinity at short notice without unacceptable risks.

A further separate action was reportedly brought by an investigative journalism platform and certain technology experts seeking to block the acquisition. These proceedings were withdrawn following the Prohibition Decision. Finally, a public petition calling on the government to block the acquisition gathered more than 200,000 signatures.

Prohibition Decision

While Solvinity and Kyndryl had reportedly been engaged in negotiations on mitigating measures to address data security, control and continuity risks, the BTI ultimately advised prohibiting the transaction. The US Embassy's reaction to the decision expresses disappointment with these failed negotiations, indicating that they "believe additional time for dialogue should have allowed for the identification of a path that would address legitimate concerns". Their response can also be interpreted as a warning: "[s]trong partnerships require rules of the road that are clear, fair, and reciprocal" and "create an environment that attracts US investments rather than turning them away". Kyndryl's response also expresses disappointment with the politicisation of the process.

Interestingly, in a letter informing the Dutch Parliament of the Prohibition Decision, the Dutch government emphasises that FDI screening by the BTI under the Telecommunications Act is objective, proportionate, risk-based, country-neutral and aims to prevent risks to the public interest. While concerns about legislation enabling access to data may be country neutral, the surrounding public and political debate was nevertheless focused on distrust of the current US administration. Despite this, the government letter insists that the Netherlands attaches great importance to the presence of foreign, and in particular US, tech companies and their contribution to the Dutch economy and digital infrastructure.

ABUSE OF DOMINANT POSITION

National level

ITALY

Alleged anticompetitive bundling of multiple sclerosis treatment & diagnostic — Italian Competition Authority investigates Biogen

On 27 May 2026, the Italian competition authority ("AGCM") announced inspections and a formal investigation of Biogen following a complaint from a biosimilar competitor. The AGCM is investigating allegations that Biogen abused its dominant position by bundling its multiple sclerosis ("MS") treatment and related diagnostic test in a manner that harmed competition from Sandoz's biosimilar MS treatment.

This case will be very important for pharmaceutical companies offering medicines together with diagnostics, as it addresses whether the diagnostics must be made available for use with competing treatments (including biosimilars and generics), or may be limited solely for use with the company's own medicines.

Factual background

Biogen's MS treatment and diagnostic: Biogen's MS treatment Tysabri (natalizumab – "NZB") has been marketed in Italy since February 2007. As patients treated with NZB must be regularly tested for the risk of developing progressive multifocal leukoencephalopathy ("PML"), Biogen developed the Stratify diagnostic (offered through the Unilabs laboratory network) and provided it free of charge to patients receiving Biogen's Tysabri.

Sandoz's entry with a biosimilar MS treatment and a diagnostic: In 2024, after expiry of Biogen's patent for Tysabri, Sandoz launched a competing biosimilar Tyruko, at a list price approximately 20% lower than Tysabri. Sandoz also supplies a diagnostic, ImmunoWell, to patients free of charge to test for risk of PML.

Limited uptake of Sandoz's MS treatment: Since entry, Sandoz has successfully won procurement tenders in Italy covering approximately 75% of national NZB demand by volume. However, Sandoz's actual sales of Tyruko have been significantly lower, apparently because healthcare professionals prefer Biogen's Stratify diagnostic (developed based on more than 15 years of data) over Sandoz's ImmunoWell (for which more limited data is available).

Alleged anticompetitive bundling

According to the AGCM's decision opening the investigation, Biogen has conditioned the supply and use of the Stratify diagnostic solely for patients treated with Biogen's Tysabri, and has refused to supply Stratify to Sandoz. Healthcare facilities seeking to obtain the Stratify test for use with patients treated with Sandoz's Tyruko receive the following automated refusal:

"*We regret to inform you that the request for the Stratify JCV test for this patient cannot be processed. The JCV testing service is fully funded by Biogen for patients who are being evaluated for or have been prescribed TYSABRI. Biogen does not have clinical data on the risk of PML associated with products other than TYSABRI and therefore cannot provide guidance on mitigating the risk of PML with products other than TYSABRI.*"

The AGCM suspects that such bundling allows Biogen to leverage its market power from its Stratify diagnostic to protect its sales of Tysabri and hinder competition from Sandoz's Tyruko. The AGCM decision also states that Biogen has filed applications for divisional patents aimed at tying Stratify with Tysabri (several of which were subsequently annulled) and that Biogen appears to have issued misleading communications indicating that Stratify had been developed exclusively in the context of the supply of Tysabri, thus excluding its use for patients treated with other medicines.

ABUSE OF DOMINANT POSITION

National level

Key issues in this case

Are diagnostics separate products from the MS treatments? For a finding of anticompetitive bundling, the AGCM must establish that Biogen has bundled two distinct products for which there is separate customer demand. Biogen is likely to argue that, in this case, the relevant diagnostics do not constitute separate products, particularly as both Biogen and Sandoz provide the diagnostics free of charge. Further, while the AGCM cites Biogen's patent as evidence that the relevant diagnostics could potentially be supplied separately for other purposes, the data in the AGCM's market definition section acknowledges that, in practice, such diagnostics are solely supplied for MS patients treated with Tysabri or Tyruko.

Obligation to provide access to a competitor? Especially as Sandoz has access to its own diagnostic, Biogen will question why it would be obliged to share access to its Stratify diagnostic for use with Sandoz's Tyruko. The figures provided by the AGCM indicate that Sandoz has not been excluded from the market, and that Tyruko and ImmunoWell are used by approximately 30% of patients. In this context, Biogen may argue that Sandoz should similarly be required to invest in the further collection of data to demonstrate the quality of its ImmunoWell diagnostic, rather than asking the competition authority to intervene and force Biogen to share its proprietary diagnostic.

Objective clinical justification? As Biogen's PML risk probability table was built exclusively on Tysabri/Stratify patient data, Biogen will also likely argue that it has an objective justification to prevent the use of Stratify to predict risks arising for patients receiving different treatments.

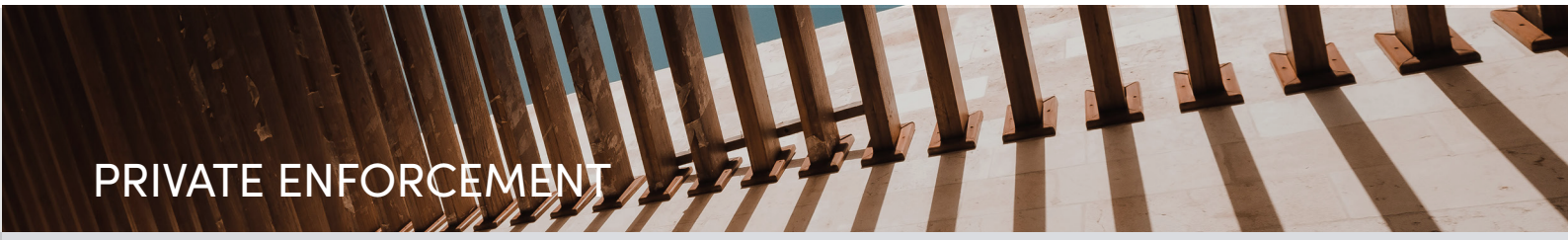
Key takeaways

Pharmaceutical companies supplying treatments alongside diagnostics should proactively review the competition law implications of any strategy that conditions access to a proprietary diagnostic on use of the company's own treatment. The Biogen investigation illustrates that competitors may raise complaints and competition authorities may conduct inspections and investigations, particularly if there is potential impact on the public health system.

That said, this case does not mean that innovative pharmaceutical companies must always make diagnostics available for use with competing treatments. As noted above, there are several issues that the AGCM would have to address in order to establish an infringement.

Companies evaluating whether to supply diagnostics to competitors must also consider the competition law risks of the alternatives. Had Biogen supplied the Stratify diagnostic for use with Tyruko, it would have presumably set a high price for Stratify (rather than providing it for free), and might instead have faced competition law claims by Sandoz of excessive pricing.

Ultimately, whether innovative pharmaceutical companies are required to make diagnostics available for use with competing treatments is a question that will depend on the specific facts and market conditions. Companies should ensure that any commercial strategy involving diagnostics is subject to competition law review before implementation, and that internal strategy documents support the legitimacy of the strategy in the event of later challenge.



PRIVATE ENFORCEMENT

National level

GERMANY

German Federal Court of Justice rules on proportionality limits to the bundling of assignment-based cartel damages claims

On 12 May 2026, the German Federal Court of Justice (*Bundesgerichtshof*, the "BGH") handed down its judgment in Case KZR 6/24, annulling the ruling of the Higher Regional Court of Munich (*Oberlandesgericht München*, the "OLG Munich") and remitting the case with guidance. It addresses: (1) the validity of grouped actions based on the assignment of rights (*Sammelklage-Inkasso*) brought by registered debt-collection service providers in cartel damages proceedings; and (2) the conditions under which highly bundled claims constitute an abuse of process.

Background

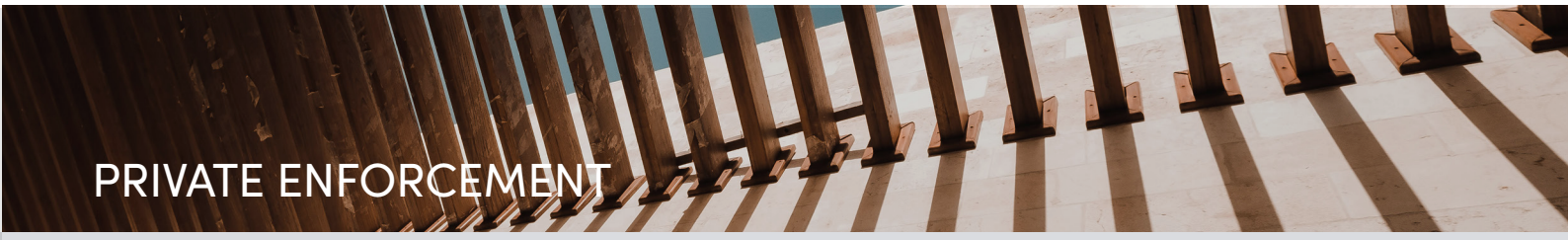
The collective action damages claim via assignment of rights was filed as a follow-on claim to the European Commission's cartel decision of 19 July 2016 (VBB on Competition Law, Volume 2016, No. 7). That decision found that several major truck manufacturers had colluded on pricing and the passing-on of emissions technology costs across the EEA, in breach of Article 101 TFEU and Article 53 EEA, resulting in fines of approximately € 2.93 billion. The registered German debt collection company "Financialright Claims GmbH" acquired damages claims from more than 3,000 truck purchasers across 21 countries and brought a single collective action against the cartelists, seeking approximately €500 million in damages. The claim was financed by an external litigation funder.

The Regional Court of Munich dismissed the claim in 2020, finding that the assignment of cartel damages claims to the debt collector breached the German Legal Services Act (*Rechtsdienstleistungsgesetz*, the "RDG") and was therefore void. In 2024, the OLG Munich overturned that ruling, holding that no breach of the RDG had occurred, *inter alia* on the ground that the presence of an external litigation funder did not give rise to a structural conflict of interest capable of rendering the assignment of claims void and, consequently, the claim itself void. The BGH has now annulled that ruling on two grounds.

The BGH's Reasoning

First, the BGH held that the OLG Munich should have ordered production of the litigation funding agreement and examined whether the contractual rights granted to the external litigation funder under that agreement (in particular, the funder's ability to block settlements that would impair its financial position) gave rise to a structural conflict of interest under § 4 RDG, already at the time the assignment agreements were concluded. If such a conflict is established, the assignments are void under § 134 BGB read together with § 4 RDG, and the debt collector lacks standing to bring any of the bundled claims.

Second, the BGH reaffirmed that the Sammelklage-Inkasso model – the bundling of large numbers of individual claims for collective enforcement in court by a registered debt collection company after the assignment of rights – remains in principle permissible. However, it introduced a proportionality test: where the way in which claims are bundled makes it practically impossible for the civil courts to provide effective judicial protection, the debt collector abuses its statutory powers by prioritising its own economic interest over its shared responsibility for a functioning justice system. In such exceptional cases, the court may, under the civil procedure code, order the debt collector to restructure and separate the bundled proceedings within a period of no more than six months, failing which the action will be dismissed as inadmissible for abuse of process. This request to restructure and separate the claims is, of course, not without additional costs. Under the German court fee system, court fees are calculated on the basis of the total value in dispute, with a degressive fee structure when multiple claims are



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National level

combined in a single proceeding. As a result, the marginal court fee attributable to each additional claim decreases progressively as further claims are added. If the party is required to split the claims into separate proceedings, this economic benefit is lost. Each proceeding is then subject to its own fee calculation, resulting in higher overall court costs than would have been incurred had the claims remained consolidated.

The BGH found in the present case that the quantity, heterogeneity, and unstructured manner of presentation of the bundled claims meant that it was impossible for a single judicial panel to adjudicate all bundled claims in a proper and timely manner. In ordering the separation of proceedings, the Court considers it necessary that account is taken of the differing prospects of success and risks of conflicts of interest. Furthermore, it should be avoided to join cedents at different supply-chain levels in the same claim.

Key Takeaways

This judgment does not prohibit grouped litigation based on the assignment of rights to enforce cartel damages claims in Germany, the Sammelklage-Inkasso model remains available in principle. What has changed is that defendants now have a structured procedural argument, grounded in the BGH's reasoning, to challenge the admissibility of collective actions that cross the practical impossibility threshold. For defence counsel, the judgment provides a concrete checklist of relevant markers, like the volume and heterogeneity of claims, the geographic spread of claimants, the duration of the infringement period, and the disorganisation of pleadings. For claimants and their advisors, the judgment means that it must be carefully assessed which influence to give to litigation funders and how to structure and potentially sub-divide the claim to meet the proportionality test.

As noted in our article in VBB on Competition Law, Volume 2025, No. 2, the ECJ had already signalled that EU law does not shield assignment-based collective actions from national rules designed to prevent conflicts of interest and abusive procedural conduct. The BGH has now given those limits concrete procedural content.

UNITED KINGDOM

Competition Appeal Tribunal declines to strike out collective abuse of dominance claim based on foregone consumer surplus theory, with majority overruling Tribunal Chair

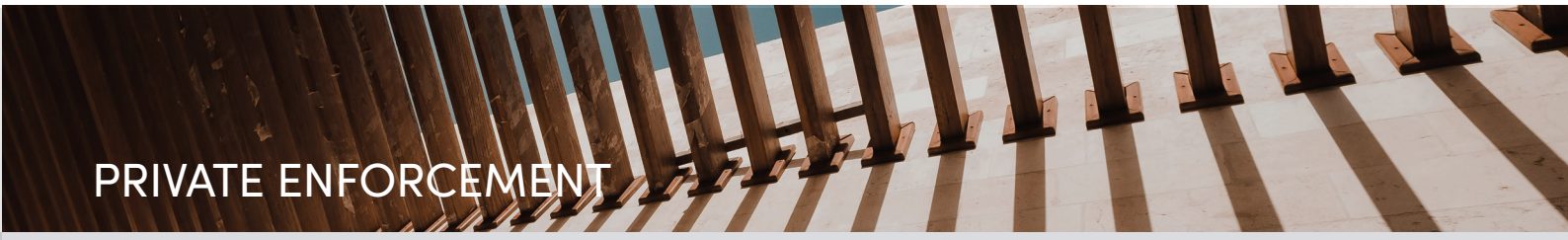
On 6 May 2026, the UK's specialist Competition Appeal Tribunal ("CAT") handed down a judgment refusing Apple's application to strike out part of a collective claim brought against it by a UK consumer body for abuse of dominance, contrary to EU and UK competition law (in *Consumers' Association ("Which?") v Apple Inc, Apple Distribution International Limited, Apple Europe Limited & Apple Retail UK Limited*).

The case raises a novel issue in English law: can foregone consumer surplus - something that is, by its very nature, a subjective measure - qualify as a recoverable head of loss that is recognised in competition law and which can be aggregated across a class of individuals? While the Tribunal Chair, Mr Justice Waksman, concluded that the claim had no basis in law and should be struck out, the other two members of the Tribunal disagreed, holding that there was an arguable case that should proceed to trial. Since this was sufficient to overrule the Chair, the claim was not struck out and the case continues.

Background

The claim was brought by the Consumers' Association, trading as Which?, on 8 November 2024, when it filed a claim for a collective proceedings order ("CPO") at the CAT, on an opt-out basis for abuse of dominance, seeking damages of almost £5 billion. Which? is acting as the Proposed Class Representative in the case, representing a class of around 38.5 million persons who have used an iOS device and/or have used Apple's iCloud services.

The claims are brought on a standalone basis and allege that, by favouring its own cloud storage product, iCloud, to the exclusion of actual and potential competitors, Apple abused its dominant position in respect of its operating system for Apple devices (iOS). The particular forms of abuse that Which? allege include that:



PRIVATE ENFORCEMENT

National level

- Apple deployed a set of technical restrictions that prevented Apple iOS users from storing certain file types on any cloud storage service other than iCloud, resulting in users being limited to using iCloud if they wanted a comprehensive backup of their iOS devices; and

- Apple deploying unfair choice architecture options, resulting in iOS users being steered towards using and purchasing iCloud, rather than alternative cloud storage services, thereby limiting consumer choice and disadvantaging rivals.

The CAT granted a Collective Proceedings Order in April 2026, concluding that the claims were suitable for opt-out collective proceedings and that Which? was a suitable class representative.

The class in this case is split into two sub-classes: Purchasing Customers and Non-Purchasing Customers. The former group are those who paid for additional iCloud storage (above what was provided to them by Apple free of charge) and who, Which? allege, paid more than they would have done, if it were not for Apple's abusive conduct. The latter group consists of customers who, whilst they did not pay for additional iCloud storage, Which? allege would have been willing to pay a lower price for iCloud, and hence benefited from use of the paid service, in a counterfactual scenario where the abuse had not happened.

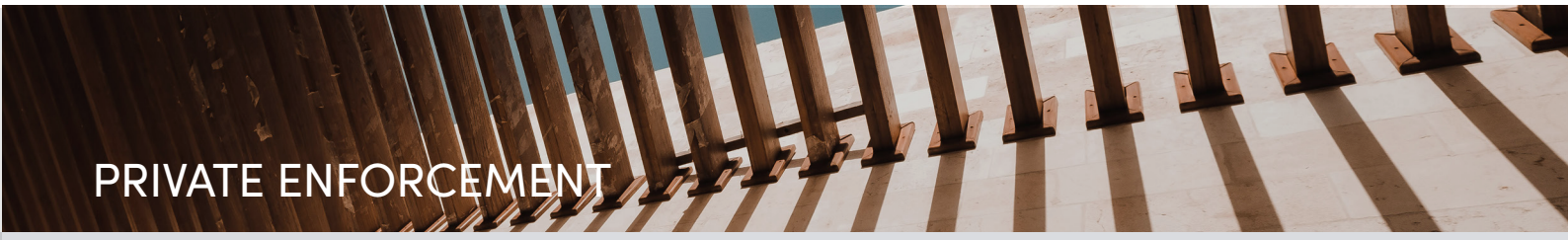
The CAT's judgment

Apple's strike-out application focused on the claim as far as it concerned Non-Purchasing Customers. Apple contended that Which?'s claim in relation to the Non-Purchasing Customers amounted to a claim for foregone consumer surplus, which is essentially the additional value consumers who did not pay for iCloud services would have received, had Apple not abused its dominant position. Apple argued that, due to the subjective nature of the claim, it could not be considered as either a pecuniary or non-pecuniary loss under English law and was therefore not recoverable in law. Since individual Non-Purchasing Customers could not bring individual claims in their own right as a result, the claims could not be aggregated under the collective proceedings regime.

The CAT dismissed Apple's strike-out application, by a two to one majority. Although the majority (Michael Cutting and Professor Alasdair Smith) accepted that an individual Non-Purchasing Customer would not be able to bring a claim for foregone consumer surplus as a pecuniary loss in normal proceedings, because it cannot be objectively evidenced, they considered that this issue is eradicated in collective proceedings. Instead of trying to determine what value an individual Non-Purchasing Customer would have attributed to iCloud services, the aggregation of individual consumers within the class allows the Tribunal instead to consider the level of aggregate consumer surplus that was lost by the class as a whole when establishing loss arising from an abuse.

The majority also determined that, even if foregone consumer surplus could not amount to a pecuniary loss, there was recognition in case law that damages could be awarded for non-pecuniary loss, in circumstances where an injured party has been deprived of something of value but the damages cannot be precisely quantified in the ordinary way.

As noted above, the Tribunal Chair Mr Justice Waksman dissented, concluding that there was no viable claim in English law for foregone consumer surplus, whether as pecuniary or non-pecuniary loss. He considered that it cannot be objectively established and so therefore does not constitute a loss in English law. He also concluded that, as no Non-Purchasing Customer would be able to bring a claim for such loss individually, the claims could not be aggregated under the collective proceedings regime. Nevertheless, he conceded that he was in a minority, so would not prevail.



PRIVATE ENFORCEMENT

National level

Key takeaways

The judgment serves as a reminder of the creativity that is currently being deployed by claimants and their funders under the UK collective proceedings regime, in order to bring claims against deep-pocketed defendants by aggregating sufficient claims to reach a level of potential damages that makes funding such claims attractive. Whilst Apple's challenge to the terms of the litigation funding arrangement and to the appropriateness of the funder were unsuccessful here, the CAT's inspection of the arrangement reflects an ongoing scrutiny into litigation funding and the collective proceedings model more generally. Such cases are extremely expensive to bring and defend and involve vast quantities of expert evidence. For example, this case has already involved experts in competition economics, behavioural economics and computer science. To the extent that such cases have been concluded, they tend to lead to little or no compensation being received by class members. Unsurprisingly, the UK Government is currently reviewing the regime to establish whether it has gone too far in favouring such claims.

This judgment also shows that the threshold for surviving a strike-out application in the CAT is a low one, even when the claimant raises novel theories as the basis for its damages calculation. The CAT is required only to consider whether the claim is arguable or is bound to fail, as opposed to whether it is likely to succeed at trial. While generally a strength of the UK regime, the mixed composition of CAT Tribunals, including economic experts, may contribute to Tribunals being more willing to entertain such claims than the High Court, where cases are heard by a single judge.

Finally, the judgment also proved for the first time that it is a real possibility that a CAT Chair is overruled by a Tribunal's two wing members, despite the original expectation that such members would play a relatively subordinate role, compared with that of the Chair (all of whom are High Court judges). This again may reflect the background of such members, who include respected competition law solicitors and expert economists, who may be more prepared to assert their views against those of the chairing judge.

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