SLAUGHTER AND MAY/

NEWSLETTER

17 DECEMBER 2025 - 13 JANUARY 2026

ISSUE 1

COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS

FX collective proceedings: UK Supreme Court judgment

On 18 December 2025, the UK Supreme Court (UKSC) handed down its judgment in the long-running foreign exchange (FX) collective proceedings (*Evans v Barclays Bank plc & others*). The judgment represents a landmark decision for the competition law collective proceedings regime. The UKSC has provided important clarification on the test to be applied by the Competition Appeal Tribunal (CAT) when determining whether collective proceedings may be certified on an opt-out basis - such that class members will automatically be included in the claim without needing to take any active steps - or on an opt-in basis, which would require class members proactively to sign up to the relevant claim.

Background

The FX collective proceedings stem from the European Commission's decisions relating to anti-competitive conduct in the FX spot trading market for G10 currencies between 2007 and 2013.

In the UK, the Commission's decisions led to the commencement of collective proceedings in the CAT against several major international banks (i.e. Barclays, Citigroup, JPMorgan, NatWest, UBS and MUFG). The proposed class representative sought the CAT's permission to bring claims on an opt-out basis on behalf of a large class of claimants, many of whom were sophisticated financial institutions. The proceedings sought damages for harm allegedly caused to class members by the widening of bid-ask spreads (the difference between the price at which the banks bought and sold different currencies).

The CAT initially refused to certify the FX claim on an opt-out basis, finding that: (i) the claim was too weak to justify opt-out proceedings; and (ii) opt-in proceedings were practicable given the sophisticated nature of the overall class. The CAT reached this conclusion notwithstanding its acceptance that opt-in proceedings would in fact likely not proceed because the claimant firm behind the claim had previously tried and failed to 'build a book' of opt-in claimants.

The CAT's decision was subsequently overturned by the Court of Appeal (UKCA), which found that the CAT had erred in its approach to weighing up the strength of the claims and the practicability of opt-in proceedings. It therefore held that the claims should be certified on an opt-out basis.

The banks appealed the UKCA's decision, and the UKSC heard the appeals in April 2025.

The UKSC's decision

The UKSC allowed the banks' appeals and reinstated the CAT's initial decision to refuse opt-out certification.

It found that the CAT had been entitled to conclude that the claims were not strong enough to justify the additional risks and settlement pressure associated with opt-out proceedings and that, when considering the overall composition of the claimant class, it

For further information on any EU or UK Competition related matter, please contact the Competition Group or your usual Slaughter and May contact.

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

was practicable for the claims to proceed on an opt-in basis. The UKSC emphasised that the CAT, as a specialist tribunal, has broad discretion in these matters and that appellate courts should not interfere unless there is a clear legal error.

Overall, the decision now sets a higher bar for opt-out collective actions, particularly where the proposed class consists of institutional or sophisticated claimants. It provides corporates with greater certainty that speculative or weak claims are less likely to proceed automatically, and that the CAT's discretion in managing collective proceedings will be respected by appellate courts.

The UKSC also considered the admissibility of findings of other decision makers (e.g. regulators) in prior proceedings or investigations. The specific question that arose was whether the findings addressed to a non-defendant bank in the Commission's "Sterling Lads" decision (which related to a separate, but similar, infringement of competition law) could be admitted as evidence against the defendants in the collective proceedings before the CAT.

The UKSC held that the principle that factual findings of other decision-makers (e.g. those made in regulatory or enforcement decisions) are not admissible as evidence, which is well-established in English court proceedings following the UKCA's judgment in *Hollington v Hewthorn* [1943] KB 587, also applies in CAT proceedings. As such, the CAT must base its findings on the evidence presented in the proceedings before it, rather than importing factual conclusions from separate decisions. Further, it found that the rule applies in "*what may be called its strong form*" because the banks were not parties to the procedure which led to the Sterling Lads decision and "*[it] would in those circumstances be fundamentally unfair to admit the findings made by the Commission as evidence against the [banks]*".

Key takeaways

The UKSC's judgment has broad implications for corporates facing (potential) collective proceedings in the CAT. In particular:

- The UKSC has confirmed that the CAT may closely scrutinise the strength of claims when assessing whether to certify on an opt-in or opt-out basis. Weak or speculative claims are less likely to be certified on an opt-out basis. This may in turn reduce the scope for claimant firms (and their funders) to use the prospect of a potential aggregate damages award as a stick to pressure defendants to these claims into early settlements.
- The CAT will also be entitled to assess the composition of the claimant class as a whole when considering the basis of certification, with opt-in proceedings to be favoured where the class consists of sophisticated institutions capable of bringing their own claims. This reaffirms that the opt-out mechanism is intended primarily for claims where opt-in proceedings would not be practicable, e.g. where there is a large class of affected people with relatively small individual claims. Whilst the analysis will necessarily turn on the particular composition of the proposed class in question, the judgment will likely reduce the scope for smaller classes with larger individual claims to pursue them on an opt-out basis.
- The UKSC emphasised that there is no presumption in favour of either opt-in or opt-out proceedings. The starting point is neutrality, and the CAT must strike a balance between facilitating access to justice for claimants and protecting defendants from unmeritorious or oppressive litigation, without any bias in favour of opt-out (or opt-in) proceedings. This marks a shift away from previous UKCA jurisprudence, which had pointed to claimant-friendly policy justifications such as "*facilitating the vindication of rights*", deterring future wrongdoers and access to justice, as often requiring certification on an opt-out basis.

- These findings may reduce the appetite of litigation funders to support opt-out class action claims at the more speculative end of the spectrum, particularly where the relevant class comprises institutional or sophisticated claimants who have the resources to bring their own claims.
- While the UKSC has provided welcome clarity on the relevant factors for determining when certification of collective proceedings on an opt-out basis may be appropriate, it remains to be seen how the CAT will approach the certification of other cases involving mixed classes (e.g. both consumers and institutions) or claims brought on behalf of consumers which have weak underlying merits.
- The UKSC clarified that findings in regulatory decisions addressed to third parties are not admissible as evidence in subsequent CAT proceedings against other defendants. This will potentially limit the risk of adverse findings in parallel proceedings and regulatory investigations being used as the primary basis for collective proceedings and/or as evidence of wrongdoing or harm in such claims (except where otherwise permitted by law, e.g. in follow-on claims).

While it remains to be seen how the judgment is interpreted and applied by the CAT going forward, it is a setback for claimant law firms and funders looking to expand the outer bounds of the collective proceedings regime.

Slaughter and May act for JPMorgan in relation to these proceedings and led the appeal.

OTHER DEVELOPMENTS

MERGER CONTROL

CMA finalises merger remedies and jurisdictional and procedure guidance

On 19 December 2025, the UK Competition and Markets Authority (CMA) published its final revised merger remedies guidance (Remedies Guidance), following a consultation on draft guidance published in October 2025 (as covered in our briefing). Publication of the final guidance marks the end of a lengthy review process first launched in March 2025 with the CMA's call for evidence (as reported in a previous edition of this newsletter). Together with the finalised Remedies Guidance, the CMA also published an updated version of its guidance on jurisdiction and procedure which reflects procedural changes to the merger remedies process, so updating the guidance published just a few months ago in October 2025 as part of the CMA's on-going work to support the government's "pro-growth" agenda by implementing the "4Ps" framework of pace, predictability, proportionality and process.

The final Remedies Guidance is not substantially different from the draft consulted on in October, covered in detail here and here. Consistent with that, it formalises the CMA's newly softened stance on behavioural remedies by introducing "*remedies to secure merger-specific rivalry-enhancing efficiencies*" as a category of enabling behavioural remedies, and removing the presumption against behavioural remedies at Phase 1. In terms of procedure, the guidance encourages discussions on remedies to take place as early as pre-notification on a "*without privilege*" and "*informal*" basis to increase the chances of success.

Although the publication of these final guidance documents mark the completion of a significant portion of the CMA's work to implement the "4Ps" across its functions, further reforms lie ahead. The CMA has announced a review into how it assesses merging parties' efficiency claims, to kick off with a call for evidence expected in the coming weeks. The government's proposals to revamp the UK merger control regime by reforming the jurisdictional tests to provide more certainty to businesses, first previewed in March 2025, are also expected shortly. 2026 is thus expected to be another year of significant developments for UK merger control.

ANTITRUST

European Commission issues €72 million fine to automative starter battery manufacturers and a trade association for cartel participation

On 15 December 2025, the European Commission announced that it had fined three automative starter battery manufacturers, as well as a trade association representing battery producers in Europe, a total of around €72 million for participating between 2005 and 2017 in a cartel relating to the sale of automotive starter batteries to original equipment manufacturers (OEMs) in the EEA.

The Commission began its investigation on 26 September 2017 following an application under the Commission's 2006 Leniency Notice by one of the manufacturers. On 30 November 2023, the Commission opened formal proceedings and announced that it had sent a Statement of Objections to five automative starter battery manufacturers, as well as a trade association and its service provider. This set out the Commission's provisional view that they had infringed Article 101 TFEU by colluding to increase the price of a component used in automative starter batteries sold to car producers. After assessing the responses to the Statement of Objections and holding an oral hearing, the Commission closed proceedings against one of the manufacturers and the service provider.

In its decision, the Commission found that between 2005 and 2017, four manufacturers, assisted by the trade association, entered into anti-competitive arrangements and engaged in concerted practices relating to the sale of automative starter batteries to automative OEMs in the EEA. The Commission found that they agreed to create and publish premiums calculated based on their purchasing price of lead (an important input material and cost factor for the batteries) in an industry publication. The Commission also argued that they agreed to use these premiums in price negotiations with customers.

The Commission imposed a fine of a total of around €72 million on three automotive starter battery manufacturers as well as the trade association, which was fined for its role as facilitator. A fourth manufacturer which participated in the cartel revealed the cartel to the Commission under the leniency programme, and was therefore granted full immunity and did not receive a fine. Two manufacturers also cooperated with the Commission under the leniency programme and received reductions of their fines of 50 per cent and 30 per cent respectively. One company was granted a reduction of the fine on the basis of "inability to pay" under point 35 of the Commission's Fining Guidelines.

When announcing the decision Executive Vice-President of the Commission Teresa Ribera emphasised that the Commission has "*zero tolerance for price-fixing or any type of cartel*" and reminded trade associations "*that they should not use their position as representatives of the industry to facilitate collusion among their members*".

GENERAL COMPETITION

SAMR releases antitrust guidance on non-horizontal merger review and vertical agreements

China's State Administration for Market Regulation (SAMR) concluded 2025 with two notable developments: (i) the release of its first standalone framework for assessing non-horizontal mergers; and (ii) the adoption of "safe harbour" thresholds for vertical agreements.

Guidelines on the Review of Non-Horizontal Concentration of Undertakings

On 16 December 2025, SAMR published its Guidelines on the Review of Non-Horizontal Concentration of Undertakings (the Guidelines), which took effect the same day. Closely aligned with its consultation draft of 27 June 2025 (see further details in a previous edition of our newsletter), the Guidelines cover two types of non-horizontal transactions, namely vertical and conglomerate mergers. The Guidelines identify the key competitive concerns SAMR will typically consider in such reviews, such as input foreclosure, access to competitively sensitive information, etc., and includes 34 illustrative cases demonstrating how these factors are to be assessed in practice. While the Guidelines are not binding, they are expected to serve as an important reference point for businesses assessing merger risks.

Adoption of safe harbour thresholds for vertical agreements

Separately, on 19 December 2025, SAMR issued its amended Provisions on Prohibiting Monopoly Agreements (the Provisions), which will take effect on 1 February 2026. This marks the first time SAMR has set specific market share safe harbour thresholds for vertical agreements. Under the Provisions, vertical agreements that do not involve resale price maintenance (RPM) (i.e., fixed or minimum resale prices) fall within the safe harbour if each party's market share is below 15 per cent. By contrast, the safe harbour for RPM agreements contains an additional turnover threshold: RPM agreements can only benefit from the safe harbour if each party's: (i) market share remains below 5 per cent throughout the agreement period, and (ii) annual turnover falls below RMB 100 million (approximately £10.5 million).

Notably, the Provisions do not include the previously proposed RMB 300 million (approximately £32 million) turnover cap for non-price vertical agreements set out in SAMR's consultation draft (see a previous edition of our newsletter), easing the compliance burden for some high-turnover businesses. That said, the 15 per cent market share threshold for non-RPM agreements remains significantly more stringent than the 30 per cent market share threshold applicable in both the EU and the UK. This signals SAMR's continued readiness to closely scrutinise vertical agreements in China.

CONSUMER PROTECTION

European Commission publishes responses to Digital Fairness Act consultation

On 19 December 2025, the European Commission published a summary report of the responses to its consultation on the Digital Fairness Act (DFA), which ended on 24 October 2025. The Commission aimed to gather opinions from stakeholders on how to ensure fairness for consumers and businesses in business-to-consumer transactions in the digital single market, improve legal certainty, ensure effective enforcement and prevent market fragmentation. There were 3,341 responses to the consultation - the large majority of which were from consumers (followed by business associations and large companies). Further details of the Commission consultation are available on our Lens Blog Post of 27 July 2025.

The key themes of the consultation responses are set out below:

1. **Dark patterns** (online designs that mislead or pressure consumers into making decisions they would not otherwise take, such as false urgency claims): Respondents largely were in favour of new rules to address dark patterns. Most consumers supported action on all practices listed as constituting dark patterns, such as "false impression of choice" or "click fatigue", while larger companies were less supportive.

2. **Addictive design** (features of online platforms that may encourage excessive use or spending, such as infinite scrolling, autoplay and content that disappears quickly): 70 per cent of respondents were in favour of new binding rules to address addictive design features in digital products, of which a majority supported most of the measures proposed in the consultation. The majority found that addictive design features should be switched off by default for everyone, leaving consumers the choice to opt-in if they wish. 31 per cent agreed that certain addictive design features should be prohibited for minors.

3. **New rules for certain digital products, such as video games:** Respondents were largely in favour of introducing new rules for specific features in digital products such as video games, with a large majority supporting measures such as restrictions on in-game currencies and increased transparency on the success

rate of pay-to-win mechanisms. However, only 36 per cent of respondents who believe action is required were supportive of prohibiting certain digital product features for minors.

4. **Unfair personalisation practices:** Respondents also strongly supported new rules to restrict unfair personalisation. The following four measures received support from at least 77 per cent of the respondents who supported the need for action: (i) consumers should have more control over personalised advertising; (ii) personalised advertising using information about vulnerabilities should be restricted; (iii) personalised advertising that targets minors should be prohibited; and (iv) personalised pricing based on the personal data/profiling of particular consumers should be restricted in general.

5. **Influencer marketing practices:** Around two thirds of respondents supported new rules to tackle harmful practices by social media influencers, such as failure to disclose advertising. The responses indicate that there is strong support for influencers to disclose advertising clearly; and for brands and agencies to take measures to ensure that influencers comply with legal obligations. Consumers also raised concerns about harmful or false content, the promotion of harmful products, and scams.

6. **Unfair pricing-related marketing:** A quarter of respondents said new binding rules are needed concerning unfair marketing related to pricing. Of the respondents who supported the need for action, the majority supported a prohibition of drip pricing (79 per cent), restricting the use of "starting from" prices (70 per cent), and restrictions on the use of price comparisons (61 per cent). 25 per cent of respondents who believe action is needed also saw a need for increased pricing transparency, and a ban of dynamic pricing.

7. **Digital contracts:** Only 27 per cent of respondents supported the need for new binding rules, whereas 7 per cent thought that no action was needed. Actions which received most support included easy cancellations of subscriptions, increased transparency on auto-renewals or free trials being converted into paid subscriptions, increased control over termination of contracts, and the right to request to communicate with a person and not only with a chatbot.

The responses will be used to generate the Commission's impact assessment and inform the legislative proposal on the DFA, which the Commission aims to adopt in late 2026.

London
T +44 (0)20 7600 1200
F +44(0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650