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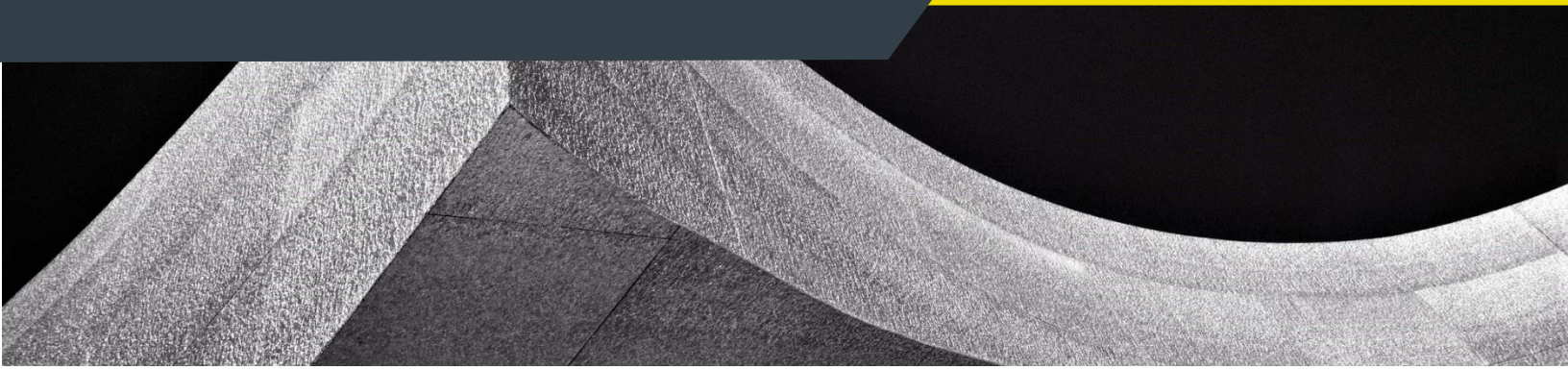
COLLECTIVE REDRESS NEWSLETTER
YEAR IN REVIEW 2024



As the UK's collective actions regime begins to mature, there is no diminution in the number of claims being brought. At the time of writing, 2024 saw nine new collective claims filed in respect of Big Tech defendants, as well as in varied markets such as the distribution of PC games, salmon production, the administration of performing right royalties, and water services.

In a milestone for the regime, 2024 also saw the first collective proceeding go to trial, with Le Patourel v BT being heard early in the year, and the Merchant Interchange Fee Umbrella Proceedings – including the Merricks collective proceedings as a host case – commencing its trial 2 on pass-on in November. Likewise, 2024 also saw the Competition Appeal Tribunal (the "Tribunal") approving the settlement and distribution scheme in the Trains proceedings, in the second ever collective settlement approval order.

In this retrospective, we consider how the Tribunal has sought to exercise its gatekeeper function in the face of defendant challenges at the certification stage, and deployed its case management powers to consider claims raising similar or related issues. We further touch on a few key themes emerging from the Tribunal's jurisprudence before considering the landscape of the regime heading into 2025.

NEW CLAIMS FILED

2024 saw the filing of nine new claims, further continuing the trend of standalone claims against Big Tech: two claims were filed against Amazon (*BIRA v Amazon*[1]; *Andreas Stephan v*

[1] *BIRA Trading Limited v (1) Amazon.com, Inc., (2) Amazon Europe Core S.À.R.L., (3) Amazon EU S.À.R.L, (4) Amazon Services Europe S.À.R.L, (5) Amazon U.K. Services Ltd. and (6) Amazon Payments U.K. Limited* 1641/7/7/24

Amazon[2]), and one against Google (*Barry Rodger v Alphabet*[3]). Claims have also been announced against Apple (*Which? v Apple*[4]) and Microsoft (*Alexander Wolfson v Microsoft*), although at the time of writing the latter has not yet been registered with the Tribunal. Claims have also been brought against UK water companies for underreporting pollution incidents to Ofwat (*Carolyn Roberts v Thames Water/Kemble Water*[5]); against Valve Corporation, the owner of video game platform Steam, for excessive pricing and anti-competitive behaviour in the PC gaming market (*Vicki Shotbolt v Valve Corporation*[6]); against Royal Mail further to an Ofcom infringement decision finding discriminatory pricing in relation to the supply of bulk mail delivery services (*Bulk Mail Claim Limited v International Distribution Services Plc*[7]); and against the Performing Right Society for allegedly abusing its dominant position in the administration of performing right royalties to songwriters and publishers in the UK (*Rowntree v the Performing Rights Society & Ors*[8]).

Of particular note is that many of the above claims are being brought on behalf of retailers or businesses (*BIRA v Amazon*; *Andreas Stephan v Amazon*; *Bulk Mail Claim*; *Barry Rodgers v Alphabet; Alexander Wolfson v Microsoft*), demonstrating that the collective actions regime serves also to protect the rights of businesses who have suffered loss.

CERTIFICATIONS

The Tribunal has continued to exercise its gatekeeper function at the certification stage, by requiring proposed class representatives ("PCRs") to revisit the formulation of their claims and has considered various challenges to the PCRs' claims and proposed methodologies.

In March 2024, the Court of Appeal confirmed the Tribunal's broad case management powers, including at the certification stage, in its refusal of Mastercard and Visa's applications for permission to appeal the Tribunal's decision in *CICC*.[9] The Tribunal in that case had originally refused the certification of claims by certain merchants against Mastercard and Visa, among other reasons because the proposed class representative ("PCR") had not enabled the Tribunal to determine whether the claims were suitable for collective proceedings. The Tribunal however considered that the class members might have a claim that was more suited to collective proceedings, rather than individual claims, and the PCR was invited to present a revised proposal. Mastercard and Visa argued that the Tribunal had erred in law by holding that

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[2] *Professor Andreas Stephan v Amazon.com, Inc.; Amazon Europe Core S.À.R.L.; Amazon Services Europe S.À.R.L; Amazon EU S.À.R.L; Amazon U.K. Services Ltd; Amazon Payments U.K. Limited* 1644/7/7/24
[3] *Professor Barry Rodger v (1) Alphabet Inc; (2) Google LLC; (3) Google Ireland Limited; (4) Google Asia Pacific Pte Limited; (5) Google Commerce Limited; (6) Google Payment Limited; and (7) Google UK Limited* 1673/7/7/24
[4] *Consumers' Association ("Which?") v Apple Inc, Apple Distribution International Limited, Apple Europe Limited & Apple Retail UK Limited* 1689/7/7/24
[5] *Professor Carolyn Roberts v (1) Thames Water Utilities Limited and (2) Kemble Water Holdings Limited* 1635/7/7/24
[6] *Vicki Shotbolt Class Representative v Valve Corporation* 1640/7/7/24
[7] *Bulk Mail Claim Limited v International Distribution Services Plc (formerly Royal Mail Plc)* 1639/7/7/24
[8] *Mr David Alexander de Horne Rowntree v (1) the Performing Right Society Limited and (2) PRS For Music Limited* 1634/7/7/24
[9] *Visa Inc and Others v Commercial and Interregional Card Claims I Limited & Commercial and Interregional Card Claims II Limited; and Mastercard Incorporated and Others v Commercial and Interregional Card Claims I Limited & Commercial and Interregional Card Claims II Limited;* [2024] EWCA Civ 218

collective claims were more suitable than individual ones. The Court of Appeal, in refusing permission to appeal, determined that the Tribunal had acted within its discretion. The Court of Appeal noted that the Tribunal's case management decisions are exercises in pragmatism concerning complex litigation with which the Court of Appeal would be slow to interfere given the Tribunal's highly specialised body of experience. Further to a revised application, the claims were ultimately certified by the Tribunal in August 2024.

In *Gormsen*, the Tribunal likewise afforded the PCR an opportunity to reformulate its claim. In its claim against Meta, the PCR alleges that Meta exploited its dominant position by forcing Facebook users to provide valuable personal data on a take-it-or-leave it basis in order to access its services. In February 2023, having found significant problems with the pleaded claims, the Tribunal stayed the PCR's application for certification for 6 months so that she could file additional evidence, including on the methodology to assess compensation owing to the class.[10] In February 2024, the Tribunal certified the claim on the basis of the PCR's revised application.[11]

In *Spottiswoode* the Tribunal decided to consider the PCR's damages distribution methodology of its own motion.[12] The Tribunal did not consider it premature to consider distribution at the certification stage, as it went to the fundamental question of whether the proposed collective proceedings offer a real prospect of benefit to members of the class, noting that "*the absence of an effective method of distribution to the Class would call into question the suitability of the claims to be brought in collective proceedings*". The Tribunal further noted that it would be unsatisfactory to defer the issue of distribution until an award has been made because by then the majority of the litigation costs will already have been incurred.

In a number of proceedings, the Tribunal also heard strike-out challenges from defendants in respect of the as-efficient competitor ("AEC") principle, jurisdiction and mitigation - both prior to and in the course of considering certification. As outlined below, the defendants' challenges failed to prevent certification in all cases.

In *Nikki Stopford v Google*, Google had argued, amongst other things, that the PCR's allegations of abuse in relation to the iOS conduct (which concerned Google's agreements with Apple for exclusive default search engine status on Safari) ought to be struck out or that summary judgment ought to be given in Google's favour and that the counterfactuals put forward by the PCR were similarly deficient that the claim ought not to be certified. In its judgment granting certification, the Tribunal found that, contrary to Google's arguments, neither the AEC principle nor the AEC test needs to be applied in all cases. In relation to the issue of counterfactuals, the judgment clarified the extent to which the PCR should specify counterfactuals in the pleadings stage. In particular, the Tribunal noted that, as the PCR's

[10] *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others* 1433/7/7/22 [2023] CAT 10
[11] *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others* 1433/7/7/22 [2024] CAT 11
[12] *Clare Mary Joan Spottiswoode CBE v Nexans France S.A.S. & Others* 1440/7/7/22 [2024] CAT 31

counterfactual was sufficiently articulated, the PCR did not have to anticipate Google's factual objections as these are matters for evidence on the merits in due course.[13]

In *Ennis v Apple*, the Tribunal refused Apple's pre-certification application for a partial strike-out on jurisdictional grounds.[14] The PCR's claim concerns the commission fees charged by Apple to UK-domiciled app developers. Apple had challenged the Tribunal's jurisdiction in respect of the part of the case relating to commission charged on transactions effected through non-UK App Stores. However, the Tribunal decided that the PCR had a realistic prospect of establishing that the claim was governed by EU/UK law and that the Tribunal was the appropriate forum for the trial of the claim. The Tribunal proceeded to certify the claim in October 2024.[15]

In *BSV Claims*[16] – a claim brought on behalf of UK-based holders of the cryptocurrency Bitcoin Satoshi Vision ("BSV") – one of the defendants, Binance, issued an application for strike out and/or reverse summary judgment in respect of the PCR's proposed loss claim in respect of a "forgone growth effect". The PCR argued that, as a result of the defendant cryptocurrency exchanges' decision to delist BSV, BSV lost the chance of becoming a major cryptocurrency like Bitcoin.

Binance sought to strike out the "forgone growth" claim, on the ground that (i) relevant class members should have mitigated their future losses by selling BSV and purchasing other cryptocurrencies and (ii) the PCR's forgone growth claim cannot fall within the loss of a chance doctrine.

While the Tribunal did strike out the PCR's loss of a chance claim as a matter of legal principle, it was not able to summarily dismiss the foregone growth claim on the basis of mitigation. This was because there was at least the prospect that some BSV holders had been reasonably unaware of Binance's delisting of BSV during the relevant period, and that further evidence was required to determine the question. While the claim was narrowly certified, the Tribunal indicated that it may be appropriate to order a preliminary issue trial to determine the extent to which the forgone growth effect can be maintained.

Significant developments also took place in the landmark *FX*[17] collective action in 2024. Following the Court of Appeal judgment in 2023, which ruled that the collective action brought by Phillip Evans against six banking groups over alleged foreign exchange manipulation, can proceed as 'opt out' collective proceedings, the banks secured permission to appeal to the Supreme Court in April 2024.

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[13] *Nikki Stopford v (1) Alphabet Inc.; (2) Google LLC; (3) Google Ireland Limited; and (4) Google UK Limited* 1606/7/7/23 [2024] CAT 67
[14] *Dr Sean Ennis v Apple Inc and Others* 1601/7/7/23 [2024] CAT 23
[15] *Dr Sean Ennis v Apple Inc and Others* 1601/7/7/23 [2024] CAT 58
[16] *BSV Claims Limited v Bittylicious Limited & Others* 1523/7/7/22
[17] *Mr Phillip Evans v Barclays Bank PLC and Others* 1336/7/7/19

The Supreme Court hearing, in April 2025, will address two fundamental issues for UK collective actions:

- Opt-in versus opt-out: the appropriate framework for determining opt-in versus opt-out certification, including the role of the strength of the claims in certification decisions, and assessing the practicability of opt-in proceedings.
- Admissibility of regulatory decisions: Whether the European Commission's Sterling Lads decision against Credit Suisse can inform the Tribunal's assessment of the claims against non-addressee banks.

In February, Mr Evans expanded the claim to include the Sterling Lads chatroom conduct, adding HSBC and Credit Suisse as defendants. This strategic expansion means the claims now incorporate all four European Commission decisions arising from anticompetitive conduct in the FX market.

POST-CERTIFICATION CASE MANAGEMENT AND PRELIMINARY ISSUES JUDGMENTS

With an increasing number of collective claims wending their way to trial, the Tribunal is increasingly called on to exercise its case management powers and rule on preliminary issues in respect of costs, confidentiality, and limitation.

Case management of common issues arising in different proceedings

The Tribunal has continued to make use of, and provide guidance on, its case management tool, the Umbrella Proceeding Order, in the course of its managing of the *Merchant Interchange Fee Umbrella* proceedings. Notably, in May 2024, the Tribunal ruled that the *Merricks* collective proceedings could participate in Trial 2 of the Umbrella Proceeding, so that consumer pass-on questions could be determined alongside retailer claims.

Nevertheless, in a November 2024 ruling[18] in respect of the *Kent* and *Ennis* collective proceedings against Apple concerning App Store Commission fees, the Tribunal ruled that while it would strive to avoid inconsistency of outcomes by ensuring that common issues are tried together, including through umbrella proceeding orders, that principle is not an absolute one. The Tribunal ruled that the principle may need to yield to the aim of dealing with cases expeditiously, and that it may not be possible in practice to determine common issues jointly, for example when one set of proceedings is significantly more advanced than another (as is the case with the *Kent* and *Ennis* proceedings since the latter was only certified in October 2024). The Tribunal accordingly determined that the more advanced *Kent* proceedings should proceed to trial in early January 2025 in accordance with its existing timetable, independently of the *Ennis* proceedings.

[18] *Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd* 1403/7/7/21 [2024] CAT 64

In respect of costs, the Tribunal provided "non-binding guidance" in the context of the *Merchant Interchange Fee Umbrella* proceedings on the sharing of costs liability in proceedings that are being managed according to the Issues-Based Approach.[19] The guidance notes that, where possible, costs will be assessed on a phase-by-phase basis rather than at the end of the proceedings and that it may be appropriate to make a costs order at the end of each phase.

Management of confidential information

Mindful of the increasing complexity of managing confidential information within confidentiality rings, the Tribunal also issued a Practice Direction on the management of Confidential Information.[20] The Practice Direction reminds parties that under Rule 102 of the Tribunal Rules, documents received in disclosure should not be used for collateral purposes. This effectively creates an outer confidentiality restriction although the Tribunal will be prepared to bolster this if necessary where the material is likely to be sensitive.

Although not prescriptive, the Tribunal indicated that, for example, data that is more than 5 years old would not normally be considered sensitive. Parties are also encouraged to give early consideration to confidentiality and, if needed, agree a protocol before the first case management conference. Parties should also keep confidentiality under review as trial approaches.

Limitation

The question of limitation in the *Merricks* proceedings continued to generate judgments by the Tribunal and the Court of Appeal, with the Tribunal finding that the first five years of the Merricks claim were time-barred under the Limitation Act 1980 ("LA 1980").[21]

The Tribunal rejected Merricks' contentions that the operation of the six-year limitation period provided by the LA 1980 had been suspended as a result of deliberate concealment of facts by Mastercard, ruling that no relevant facts had been deliberately concealed by Mastercard. The Tribunal likewise rejected Merricks' alternative argument that the EU principle of effectiveness meant that the limitation period should not start to run if the relevant facts could not reasonably be discovered by the claimant, finding that the EU principle did not modify the usual limitation rules under English law.

In a separate but related judgment on limitation, the Court of Appeal upheld the Tribunal's first preliminary issues judgment in *Merricks.* The judgment confirmed that Mastercard can rely on a limitation defence for the first 5 years of the claim, and that the application of the LA 1980 was not precluded by the introduction of new limitation rules under the competition regime.[22]

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[19] *Merchant Interchange Fee Umbrella Proceedings* 1517/11/7/22 (UM) [2024] CAT 12
[20] Practice Direction 1/2024 (Disclosure – Management of Confidential Information) issued on 4 January 2024
[21] *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* 1266/7/7/16 [2024] CAT 41
[22] *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2024] EWCA Civ 759

In its ruling, the Court of Appeal made clear that, while the limitation provisions under the competition regime are "*confused and confusing*", it was inherently unlikely that Parliament intended for claims that had become time-barred to be revived when the 2015 Rules came into force as that would be "*highly surprising and illogical*".

FIRST TRIALS

In a notable 'first' for the collective proceedings regime, the Tribunal in January 2024 heard its first trial of an opt-out collective action in *Le Patourel v BT*.[23] The claim has been brought on behalf of over 2 million purchasers of services from BT and alleges that BT abused a dominant position by charging excessive and unfair pricing. The judgment, which remains reserved, is expected to provide substantive guidance on the meaning of excessive pricing, and to clarify the Tribunal's approach to damages and distribution in collective actions. This year also saw the commencement of trials 1 and 2 in the *Merchant Interchange Fee Umbrella* Proceedings. Trial 1 on liability, which will determine whether the interchange fee arrangements infringed Article 101 TFEU, was heard in early 2024, while trial 2 on pass-on commenced on 11 November 2024 with closing submissions to be heard in March 2025.

Settlement

In *Trains*,[24] the Tribunal approved the distribution plan and the amount paid in settlement to the class members in the second ever collective settlement approval order. While recognising a public interest in encouraging settlements, the Tribunal added that it would have no issue in rejecting a settlement proposal which it does not consider appropriate, even if the parties' representatives have negotiated what they consider to be a reasonable settlement.

The Tribunal also focused on the proposed distribution plan because it was structured as an "up to £25 million" settlement, rather than a fixed sum. The Tribunal noted that in future applications for "up to" settlements, it will expect parties to provide information - such as a properly reasoned estimates of the likely take up by class members - from the outset, after the receipt of a settlement application.

The Tribunal echoed the concerns expressed in *Trains* when hearing the Collective Settlement Approval Application relating to proposed settlements between the class representative and the fourth defendant ("K-Line") and sixth to eleventh defendants ("WWL/EUKOR") in *McLaren* this December.[25] While the class representative had agreed its settlement proposals with K-Line and WWL/EUKOR respectively, the Tribunal expressed dissatisfaction with the absence of a proposed distribution plan which could give the Tribunal a better indication of the sum likely to be paid out to class members. The Tribunal then issued a ruling approving the proposed settlements with some modifications, including that no payment of costs will be allowed without a separate application to the Tribunal supported by a detailed distribution plan.

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[23] *Justin Le Patourel v BT Group PLC* 1381/7/7/21

[24] *Justin Gutmann v First MTR South Western Trains Limited and Another* 1304/7/7/19 [2024] CAT 32

[25] *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* 1339/7/7/20

While provisionally approving the proposed allocation of costs and damages, the Tribunal also retained the discretion to reallocate costs towards class members or a charity if the guaranteed damages prove insufficient to compensate the class.

At the time of writing, it was also announced in December 2024 that a proposed collective settlement had been agreed in *Merricks*, reportedly for £200m. If accepted by the Tribunal, this settlement would bring to a close, after nine years of litigation, the first collective case to be certified.

FUNDING

Following the Supreme Court's judgment in *PACCAR*, which had held that litigation funding agreements including a return based upon a percentage of damages recovered were damages-based agreements ("DBA") and therefore unenforceable, the Litigation Funding Agreements (Enforceability) Bill was introduced to address the judgment. However, the Bill was not included in the parliamentary 'wash up' prior to the dissolution of parliament in May 2024 and consequently the Bill was not passed. Rather than re-introduce the Bill, the Government has stated that it will await the Civil Justice Council's report on third party litigation funding, which is expected in summer 2025.

In the meantime, the Tribunal has issued a number of post-*PACCAR* judgments on funding. In *CICC* and *Kent* the Tribunal confirmed that a litigation funding agreement will not be considered a DBA where the funder's return is payable out of the available proceeds based on a multiple of the funder's outlay – even where the funder's fee is capped by reference to the amount of the proceeds recovered.[26] The Tribunal granted permission to appeal to the defendants in both claims.

In *Gutmann v Apple*, the Tribunal concluded that it had the power in principle to make an order that a funder's fee be paid out of damages awarded, enabling the funder's fee to take priority over damages to class members, provided that it is approved by the Tribunal.[27] The Tribunal granted Apple permission to appeal to the Court of Appeal.

In *McLaren* the Tribunal was asked to determine an application by the class representative for an order that costs and part of the damages paid to it in settlement by one of the defendants be used to cover part of the class representative's costs and disbursements in the proceedings.[28] While the Tribunal concluded that it had the power to make such an order, it considered that it would not be appropriate to exercise its discretion in the circumstances, with trial due to commence in January 2025, as it would not be appropriate to assess what sums should be paid to funders before the outcome of the proceedings is known.

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[26] *Commercial and Interregional Card Claims I Limited ("CICC I") v Mastercard Incorporated & Others* 1441/7/7/22 [2024] CAT 3 and *Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd* 1403/7/7/21 [2024] CAT 5
[27] *Mr Justin Gutmann v Apple Inc., Apple Distribution International Limited, and Apple Retail UK Limited Gutmann v Apple Inc* 1468/7/7/22 [2024] CAT 18
[28] *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* [2024] CAT 47

LOOKING FORWARD TO 2025

The regime will be off to a quick start, with January 2025 set to be a busy month in the Tribunal. The *McLaren* trial is scheduled to start on 13 January, with a provisional time estimate of 10 weeks. Following the Tribunal's approval in late 2023 of the first proposed collective settlement in *McLaren* in respect of one of the defendants,[29] it was announced in November 2024 that the class representative had reached settlements (as discussed above) with (i) K-Line, for £12.75 million and (ii) WWL/EUKOR, for £24 million. As both settlements are now approved by the Tribunal, the *McLaren* case will proceed to trial against two defendant groups (MOL and NYK).

Kent will be the second collective action to proceed to a full trial, also in January 2025. Dr Kent alleges that the tech behemoth has abused its dominance by engaging in exclusionary and exploitative conduct to charge a 30% commission for apps downloaded from the App Store and in-app purchases within iOS apps. A significant question for determination is whether Apple's commission rate is excessive and/or unfair in itself or in relation to appropriate comparators, with Apple claiming that 30% represents the market's quantification of the enormous economic value it has created and continues to provide both to developers and to mobile device users through its own innovation.

The parties and their respective economic and industry experts are also preparing to clash over whether Apple's conduct can be objectively justified on security and privacy grounds (among others) and the extent to which any unlawful overcharge found to have been imposed by Apple was borne by mobile device users rather than app developers.

The CMA too will have an important role in the trial as intervenor to provide guidance to the Tribunal on relevant legal principles, including the correct approach to market definition, the assessment of unfairly high pricing and the use of counterfactual analysis in the context of abuse of dominance claims.

Bookending 2025 will be two further trials, with October marking the start of the *Qualcomm* trial 1, with a provisional time estimate of 5 weeks. Likewise, the *Coll (Google Play Store*[30]*)* claim continues to gather pace as it moves toward a landmark nine-week trial, also commencing in October 2025.

Between the yearly growth of claims filed with the Tribunal, the much-anticipated judgment in *Le Patourel*, and the bumper crop of cases heading to trial at the time of writing and into 2025, the coming year is set to be another landmark one for the now rapidly maturing collectives regime, and we look forward to reviewing the events of next year in due course.

If you would like to discuss anything in this newsletter, please contact Scott Campbell, Head of Competition Disputes, or your usual Hausfeld contact.

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[29] *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* [2023] CAT 75
[30] *Elizabeth Helen Coll v Alphabet Inc. and Others* 1408/7/7/21

This Year in Review has been authored by Scott Campbell, Giulia Trojano and Michael Zymler.

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The firm operates at the cutting edge of optout class actions including, not just competition law, but also in the emerging area of opt-out representative actions under CPR 19.8. The firm has a uniquely talented team in this sector. Head and shoulders above the competition."
Legal 500 UK, 2025

Hausfeld is a major force in collective proceedings in the Competition Appeal Tribunal. It's a really great firm full of really great lawyers."
Chambers UK, 2024