

International Comparative Legal Guides

Competition Litigation 2027

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19th Edition

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Digital Edition Chapter

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Abuse of Dominance Claims Transcending Competition Law: The Revival of Exploitative Abuse

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Introduction

For decades, the EU and UK competition law prohibitions of abuse of dominance centred around exclusionary abuse, understood as conduct whereby a dominant undertaking forecloses competitors and distorts the competitive structure of markets. Exploitative abuse, by contrast, concerns harm directly caused to consumers or trading partners by a dominant undertaking, for example, through unfair prices or other unfair trading conditions. Despite being enshrined in Article 102 of the Treaty on the Functioning of the European Union (“**Article 102**”) and Chapter II of the UK Competition Act 1998 (“**Chapter II**”), exploitative abuse was a concept rarely invoked in practice and remained largely confined to the statute book.¹

Recent years have witnessed a revival of this claim, however, as the EU Commission (the “**Commission**”), national competition authorities (“**NCA**s”), and private claimants increasingly deploy allegations of “exploitative” conduct such as “unfair trading conditions” as a vehicle through which fairness-based theories of harm are applied to establish abuse. The attraction of such framing for claimants is clear; there is no requirement to prove exclusionary or anticompetitive effects on competition, and it is particularly well-suited to digital markets where harmful conduct may be perceived to cause harm to consumers and/or trading partners without foreclosing rivals.

The increasing appeal of the concept of exploitative abuse can be situated within three broader trends. The first is the convergence of competition law and consumer protection, which has accelerated in the UK following the introduction of the competition opt-out regime. The Government has noted that the opt-out regime was “*created to provide a route to redress for consumers*”,² although the extent to which it has achieved that aim so far is debateable. The Government is currently both consulting on reforms to the opt-out regime and considering introducing a dedicated class action regime for consumer harms.³ The second trend is the growing primacy of non-price markets as the principal arena for exploitative abuse enforcement in the digital age, a shift that will shape the boundaries of the prohibition of abuse of dominance and its interplay with other regulatory frameworks. The third trend is a potential move away from an effects-based approach back to a more form-based approach in the application of Article 102, as demonstrated by, for example, the Commission’s Draft Guidelines on Article 102.⁴

Against that background, this chapter analyses the recent increase in actions targeting alleged “exploitative” conduct, in particular “unfair trading conditions”, from both public and private enforcement perspectives. The chapter begins by discussing cases in which the alleged abuse is argued on purely exploitative grounds, examining the Commission’s decisions in

*Apple Music Streaming*⁵ and *Facebook Marketplace*,⁶ the German Bundeskartellamt’s (the “**Bundeskartellamt**”) intervention in *Meta Data Collection*,⁷ and the proceedings before the UK Competition Appeal Tribunal (“**CAT**”) in *Gormsen*.⁸ It then considers other recent judgments of and proceedings before the CAT, where exploitation theories of harm have not succeeded, *Water*⁹ and *Boundary Fares*,¹⁰ before turning to cases in which the alleged abuse covers both exploitative and exclusionary grounds, namely *Kent*¹¹ and *ValueLicensing*.¹² The chapter concludes by considering whether competition law is the most appropriate instrument for addressing purported “exploitative” consumer or customer harms, or whether doing so risks distorting a discipline whose core purpose remains maintaining free and competitive markets. In doing so, the chapter examines the extent to which sector-specific regulation including the Digital Markets Act (“**DMA**”) ¹³ and a dedicated consumer class action regime may offer more targeted and proportionate alternatives.

Exploitation to Exclusion in Recent Decisional Practice

Apple Music Streaming

The Commission’s decision in *Apple Music Streaming* clearly illustrates its renewed willingness to rely on exploitative abuse – in particular, unfair trading conditions – under Article 102 to penalise the conduct of a dominant undertaking. The Commission found that the anti-steering rules embedded in Apple’s terms and conditions with music streaming apps constituted unfair trading conditions *vis-à-vis* iPhone and iPad users (“**iOS Users**”).¹⁴ Apple charged developers an annual fee to distribute their apps on the App Store, required developers to use Apple’s payment mechanisms for in-app purchases (charging a 30% commission fee on each purchase), and prohibited developers from providing links to external payment mechanisms.¹⁵ In reaching its decision, the Commission proposed, for the first time in its decisional practice, a legal test for determining whether trading conditions are abusive. It held a trading condition would be unfair if it were: “(i) imposed by a dominant undertaking on its trading partners, (ii) unfavourable or detrimental to the interests of that undertaking’s trading partners or of third parties, including consumers, that are affected by the trading conditions imposed by the dominant undertaking, and (iii) not necessary for the achievement of a legitimate objective or in any event not proportionate for that purpose, in that they go beyond what is strictly necessary to achieve it”.¹⁶ The Commission concluded that: Apple’s anti-steering provisions

were neither necessary nor proportionate for the protection of Apple’s commercial interests; the conduct had ultimately led to a degraded user experience; and it may have caused users to pay higher prices for music streaming subscriptions.¹⁷ Notably, according to the Commission, no causal link was necessary between Apple’s dominant position in the market for the distribution of music streaming apps and the unfair trading conditions to establish an abuse.¹⁸

Although the decision was framed as a consumer-side exploitative abuse predicated on a reduction in consumer choice and experience, it can be argued that the anti-steering rules fit more neatly into an exclusionary framework, which would necessitate demonstrating anti-competitive effects on the music streaming market. Indeed, the investigation was initially focused on Spotify’s competitive position, suggesting an exclusionary theory of harm as the underlying concern, but was ultimately based on purely exploitative grounds.¹⁹ The Commission dismissed foreclosure as a relevant consideration for unfair trading conditions on the basis that “[f]oreclosure effects can only relate to undertakings that are competing in the market, not to conducts harming consumers who are not undertakings and therefore do not compete in any market”²⁰ and intentionally refocused the investigation on iOS Users, thereby avoiding the need to demonstrate anti-competitive effects on the market.

Facebook Marketplace

The Commission rearticulated and applied the test for unfair trading conditions formulated in *Apple Music Streaming* some months later in *Facebook Marketplace*.²¹ It concluded that Meta’s terms and conditions were abusive insofar as they did not prohibit Meta’s use, for the benefit of Facebook Marketplace, of data derived from or provided by Online Classified Ads Service (“OCAS”) providers when those providers used Meta’s online display advertising services.²² According to the Commission, the abuse lay in the absence of any contractual restriction on Meta’s use of data belonging to its advertising customers to strengthen its own competing position on the separate OCAS market. It was sufficient that the terms and conditions were merely *capable* of harm to trading partners, and it was not necessary for Meta to have actually used trading partners’ data to benefit its own operations.²³ Notably, the abuse was found on the display advertising market (where Meta was found to be dominant) and not on the OCAS market.²⁴ Yet, exclusion rather than exploitation might have been a more suitable theory of harm on the facts: under this theory, the Commission would have had to establish that the use of trading partners’ data to strengthen one’s own offering could arguably pose a disadvantage to competing providers’ ability to compete; such an effect is more characteristic of foreclosure than exploitation and would require a demonstration of exclusionary effects (e.g., on competing OCAS providers) for proof. The Commission rejected this exclusionary abuse framing, however.²⁵ Consistent with the exploitative framing of the abuse, the Commission did not require any proof of anticompetitive effects.

Meta Data Collection

The *Bundeskartellamt*’s 2019 decision against Meta is perhaps the most conceptually ambitious attempt by an NCA to deploy the concept of “exploitative” conduct as a tool for addressing consumer harm in digital markets. Notably, the decision was exclusively in national competition law rather than Article 102.²⁶ Having established Meta’s purported dominance in the

German social networking market,²⁷ the *Bundeskartellamt* took issue with the terms on which Facebook obtained user data from users’ activity on the Facebook platform, from Facebook-owned services and the broad network of third-party websites using Facebook’s Business Tools. According to the authority, together these data streams fed into user profiles that facilitated Meta’s advertising business. Rather than characterising the conduct as excessive pricing since the data could not straightforwardly be analogised to a monetary price, the *Bundeskartellamt* found Facebook’s terms to be unfair on the grounds that they were incompatible with the EU General Data Protection Regulation (“GDPR”)²⁸ stating that “*terms and conditions that violate the legal principles of data protection laws, and also conditions that are inappropriate under the legal principles of provisions on unfair contract terms, constitute an abuse of a dominant position under Section 19(1) GWB [Competition Act] where a sufficient degree of market power is involved*”.²⁹ The authority further dispensed with strict causal proof, adopting a theory of “*normative causality*” on the basis that Facebook’s purported dominance was itself a material factor in assessing the validity of user consent under the GDPR.³⁰ Consistent with the exploitative framing seen in *Apple Music Streaming* and *Facebook Marketplace*, the *Bundeskartellamt* did not require any showing that the conduct was liable to foreclose competitors; the harm identified was the alleged direct detriment to users flowing from the data processing terms, rather than any effect on the competitive structure of the market.

The decision was widely debated, with critics questioning whether competition law was the appropriate instrument for what was, in substance, an alleged data protection failure.³¹ Some commentators argued that the purported market failure arose from information asymmetry not market power, and that it was far from certain that Facebook would have imposed different terms in a competitive market.³² Thus, competition law was not the correct forum and amending contract law rules instead would avoid “*Herculean interpretations of competition law that go against a broadly supported ‘more economic approach’*”.³³ Conversely, others argued that strict separation of both policies was no longer feasible and a more collaborative policy approach for data protection and competition law might be necessary.³⁴ This debate underscores the need to answer the more fundamental question, namely whether the exploitative abuse framework in competition law is the best vehicle for policing these fairness-based harms, or whether a standalone consumer class action route or a bespoke regulatory regime would serve that function better.³⁵

Gormsen

Whilst still at an early stage, and based on factual arguments similar to those in *Meta Data Collection*, *Gormsen* is a striking example of the CAT’s willingness to entertain claims for infringements of the Chapter II prohibition brought “*in an unfamiliar and novel context, namely data or information abuse on or involving Facebook*”.³⁶

The class representative’s case is that Meta allegedly abused its dominant position by making access to Facebook conditional upon users giving up access to certain personal data concerning their off-Facebook activities without receiving a transfer of value in return. Interestingly, this “abuse” is presented as the imposition of an unfair trading condition (because the use of so-called “Off-Facebook Data” formed a “take-it-or-leave-it” offer) and/or as an unfair price; however, it is alleged by the class representative that they are, in practice, two sides of the same coin and mutually reinforce one another.

In its certification judgment in *Gormsen*, the CAT accepted the two forms of pleaded abuse as arguable and triable despite their novelties,³⁷ and subsequently permitted the class representative to amend her claim to seek the remedy of “user damages”, being damages for the loss of the exercise of the users’ right to control the collection and use of their Off-Facebook Data.³⁸ The proposed amendments arose because Meta was expected to contend at trial that it would not ever have paid for Off-Facebook Data, in which case the class would have suffered no loss on conventional principles. Faced with the proposed amendments, Meta contended that a claim for “user damages” must fail as a matter of law, because such damages are not recoverable for breaches of competition law.

The CAT held that it was not possible to conclude on the authorities that user damages are unavailable for the tort of breach of statutory duty in Chapter II.³⁹ The CAT’s decision has been upheld on appeal, with the Court of Appeal concluding that “competition law is a prime candidate where a court or the CAT might consider that it should order such a remedy, if needs be, to ensure that an abuse was adequately and effectively redressed”.⁴⁰ The judicial willingness to allow the pleading amendments notwithstanding the absence of any precedent awarding user damages for a Chapter II breach reflects the rapidly developing contexts in which competition law is being applied – most notably, as the Court of Appeal put it, in a “new and vastly important world where data is rapidly becoming a proxy for money”.⁴¹ This may prove significant for claimants in future consumer–competition actions involving the extraction of data or other non-monetary “prices”, particularly in an ever-evolving digital market. Similar to the decisions of the Commission and the *Bundeskartellamt* discussed thus far, there is no allegation of any exclusionary abuse or anticompetitive effects on the relevant market in *Gormsen*.

Water

Whilst competition law has proved capable of accommodating arguments regarding alleged misuse of data, that is not to say that every claimed consumer wrong can be successfully litigated as an alleged exploitative abuse. The CAT’s decision in *Water* demonstrates that, even in circumstances where the structural conditions for dominance – indeed, monopoly – are undisputed and there has been consumer grievance that can be conceived as “exploitation” on a large scale, a competition law claim may still not be available.

Professor Roberts sought opt-out Collective Proceedings Orders (“CPOs”) on behalf of several million household customers of six statutory water monopolies, alleging that each had significantly under-reported pollution incidents, thereby causing Ofwat to set “Revenue Allowances” at a higher level than would otherwise have been permitted, enabling the water companies to charge correspondingly higher prices – an alleged abuse of a dominant position contrary to the Chapter II prohibition. The CAT refused to certify this claim due to a statutory exclusion in the Water Industry Act 1991 (“WIA 1991”), which governs the appointment of the relevant water companies. Section 18 of the WIA 1991 limits remedies for breaches of reporting provisions to those expressly provided for by statute, or those available at common law independent of the statutory contravention.

The CAT concluded that the abuse alleged by Professor Roberts could not be maintained as a claim independently of the regulatory breach. The loss claimed arose not from the misreported pollution incidents themselves but from the price control mechanism derived from the WIA 1991 – the class members’ damages

being calculable only by reference to the Revenue Allowance that Ofwat would have imposed had accurate pollution incident data been provided. As such, the failure to supply accurate information for the statutory price-control regime under the WIA 1991 was an “essential ingredient” of the claims.⁴² Crucially, the CAT noted that the claim was not one of excessive pricing assessed by any independent standard; there was no allegation that the prices charged were objectively unfair if divorced from the regulatory regime, and damages were sought solely by reference to Ofwat’s price control mechanism.⁴³ The claims therefore fell within the scope of the statutory exclusion of other remedies in Section 18 of the WIA 1991. The Court of Appeal upheld the CAT’s conclusion, although it refined the reasoning followed.⁴⁴

Strikingly, the CAT held that, had the claims not been excluded, it would have granted the CPO.⁴⁵ As such, whilst *Water* is, in one view, a cautionary tale about the use of competition law as a vehicle for a regulatory complaint, there is no doubt that the CAT left the door open for similar claims not subject to a statutory exemption. In particular, the CAT rejected the argument that competition law does not apply to entities operating under statutory monopolies,⁴⁶ and reiterated that one of the basic purposes of competition law is to protect consumers.⁴⁷ It therefore remains to be seen whether further claims attempt to broaden the scope of collective proceedings beyond traditional competition law claims, pending the introduction of a potential opt out regime for consumer claims more generally.

Boundary Fares

A further demonstration of the outer limits of competition law is provided by the CAT in *Boundary Fares*. In this case, the CAT cited the *Bundeskartellamt*’s decision in *Meta Data Collection* as illustrative of the ability of the Chapter II prohibition to challenge a wide range of consumer harms.⁴⁸ Indeed, in certifying the class representative’s claim relating to “boundary fare” train tickets, the CAT found that “the categories of abuse are not closed”,⁴⁹ whilst the Court of Appeal, in upholding the certification judgment, highlighted the important intersection between the law on abuse and consumer harm because “when an undertaking is dominant it is, by definition, freed from the competitive shackles which otherwise incentivise and discipline it to maximise consumer welfare and benefit”.⁵⁰ The Court of Appeal also emphasised the breadth of the concept of abuse in competition law, including where the abuse is predicated upon the breach of another legal framework (similar to *Meta Data Collection*), together with the ways in which the law protects consumers against unfair intrusions into their rights as well as against price-based abuses.⁵¹ Following trial, however, the claim was dismissed, with the CAT finding that the conduct of the defendant train operators did not amount to abuse as a matter of competition law. The CAT’s ruling sets an important precedent illuminating the boundaries of abuse of dominance cases entailing consumer harm and “exploitative” abuse.

The class representative’s case was that the defendants had allegedly abused their dominant position in relation to “boundary fares” (a type of train ticket that can be used by London travelcard holders to travel beyond the zone of validity of their travelcard). Mr Gutmann argued that the “abuse” comprised the defendants’ failures to: (i) make boundary fares sufficiently available for sale; and/or (ii) use their best endeavours to ensure that there was general awareness among customers of the existence of boundary fares. As regards availability, for example, the CAT considered that the overall picture was not abusive as, even if the defendants’ selling systems

might have been improved, boundary fares could nonetheless be bought through key sales channels such as ticket offices.⁵² As for awareness, the CAT held that a dominant company has no active duty to “*promote or advertise a product that will benefit some of its customers so as to increase their awareness of that product [...] nothing in the jurisprudence on abuse of dominance supports such a proposition*”.⁵³

The CAT’s final judgment in *Boundary Fares* is a frank articulation of what competition law cannot do. The CAT emphasised that abuse findings are findings of unlawfulness of a quasi-criminal character, requiring “*strong and compelling evidence*”;⁵⁴ in the circumstances, the CAT found the evidence relied upon in support of the allegation that there was insufficient awareness of boundary fares among rail passengers to be “*wholly unsatisfactory*”.⁵⁵ The CAT further emphasised that, whilst abuse may be a broad concept capable of developing to reflect new patterns of commerce, it is not unlimited and “*competition law is not a general law of consumer protection*”.⁵⁶ *Boundary Fares* thus draws a boundary for the concept of exploitative abuse as a means of remedying perceived consumer harm; the fact that a dominant company could have carried out its business in a different way that would have benefitted consumers does not mean that the conduct crosses the line to constitute abuse. Consequently, the case demonstrates that not every type of potentially exploitative conduct by a dominant undertaking falls within the remit of competition law.

Kent

Kent is a landmark decision of the CAT, where exclusionary and exploitative abuse arise hand in hand. In *Kent*, a class representative found success for the first time in opt-out collective proceedings, which were brought on behalf of iOS Users. In a judgment handed down in October 2025, the CAT found that Apple had abused its dominant position by its App Store practices, with the abuse in question taking the form of: (i) the imposition of exclusionary practices (exclusive dealing and tying) in the markets for iOS app distribution services and iOS in-app payment services;⁵⁷ and (ii) the charging of an excessive and unfair price in the form of the commission charged to app developers for these services, with those prices in turn resulting in higher prices for users of Apple devices who made payments relating to the apps.⁵⁸ The CAT awarded the class c. £1.5 billion in damages and interest, although that decision is subject to appeal.

Foundational to the CAT’s judgment was its acceptance of Dr Kent’s definition of the relevant markets (of iOS app distribution services and iOS in-app payment services). The CAT found that each focal product constituted a distinct market, rejecting Apple’s case for a single, broader “systems” market in which it faced competition from the likes of Google.⁵⁹ Having established Apple’s dominance, the CAT found that Apple had abused that position, foreclosing competition on both of the relevant markets by requiring that iOS apps can only be distributed through the App Store (exclusive dealing) and requiring that iOS app and in-app purchases must use Apple’s payment systems (tying). Building on its market definition findings, the CAT rejected Apple’s “competition on the merits” defence by reference to device-market rivalry, finding that “*as a matter of principle, Apple cannot rely on competition in a different market to excuse exclusionary conduct in the separate iOS app distribution services or iOS in-app payment services markets*”.⁶⁰ The CAT’s analysis shows a focused application of the principles of exclusionary abuse; as the CAT put it, a “*class of consumer that is essentially captive in an aftermarket is clearly disadvantaged by*

abusive behaviour in that market, however beneficial it might be to consumers participating in the primary market”.⁶¹

The CAT further found that Apple’s 30% commission rate was an excessive and unfair price, on an application of the two-limb *United Brands* test. For its limb 1 (excessiveness) analysis, the CAT accepted the expert evidence adduced by the class representative as to the profitability of the App Store, notwithstanding Apple’s arguments as to the difficulty of allocating operating expenses such that no meaningful profitability analysis could be carried out.⁶² For its limb 2 (unfairness) analysis, the CAT found the 30% commission rate to be unfair in itself and by reference to comparators,⁶³ and was not satisfied that the rate was justified by the value provided to developers through the App Store.⁶⁴

The importance of *Kent* for the purposes of this chapter is that the underlying theory of harm that combines exclusionary and exploitative conduct provides a more solid – and less controversial – case for the application of competition law than those cases where exploitative abuse is argued with no concomitant exclusionary effects or harm to competition.

ValueLicensing

Similarly, although still at early stages before the CAT, *ValueLicensing* involves a combination of alleged exclusionary and exploitative concerns. The claim relates to Microsoft’s alleged efforts to suppress the secondary market for pre-owned perpetual software licences.⁶⁵ The claimant, JJH, operated as a reseller of such licences and alleges that, from approximately 2011, Microsoft sought to migrate customers to its subscription service, Microsoft 365, through the imposition of licensing terms purportedly designed to undermine the commercial viability of perpetual licence resale. JJH’s case identifies two principal categories of challenged conduct: first, custom anti-resale terms (the “**CAR Terms**”) applied to certain large customers; and second, an amendment to Microsoft’s global licensing terms introducing a new condition that required enterprise customers to retain their legacy perpetual licences as a condition of eligibility for discounted subscription pricing (the “**New Form SA Condition**”, together with the CAR Terms, the “**Challenged Terms**”).

The claim is brought on both alleged exclusionary and exploitative grounds. On an exclusionary analysis, the Challenged Terms are alleged to have foreclosed the secondary market for pre-owned licences by making it financially unattractive for customers to surrender or resell them, thereby stifling competition from resellers such as JJH. On an exploitative analysis, the Challenged Terms are characterised as unfair trading conditions imposed on customers, conditioning access to discounted pricing on the retention of licences with no legitimate commercial justification. Microsoft is alleged to hold dominant positions in the proposed markets for desktop operating systems and office productivity suites, and the claim is brought under both Article 101 and Article 102 and equivalent domestic provisions.

Microsoft’s defence is that the Challenged Terms were objectively justified as necessary, reasonable, and proportionate to: (i) protect its intellectual property rights; (ii) ensure appropriate remuneration for discounted access to its works; (iii) address the practical difficulties of guaranteeing that customers deactivate their own copies upon resale; and (iv) reflect the costs of providing ongoing services to qualifying customers.

The CAT rejected Microsoft’s jurisdiction challenge in May 2025 and, in a subsequent preliminary issues judgment, held that exhaustion under Article 4(2) of the Software Directive permits the subdivision and resale of Microsoft’s volume licences

notwithstanding its contractual restrictions. Whilst the Court of Appeal dismissed Microsoft's appeals against both rulings in July 2026,⁶⁶ proceedings remain stayed pending further appeals. Nevertheless, the claim provides a further example of where alleged unfair trading conditions and exploitation are challenged alongside an alleged exclusionary abuse; again, a more traditional potential application of competition law than in the exploitative conduct framework.

Beyond Article 102: Alternative Frameworks for Consumer Redress

Some of the cases examined above mark a departure from conventional competition law decisional practice, which primarily focuses on exclusion. Several of these cases deploy exploitative abuse as a standalone instrument for addressing consumer or customer harm, without any demonstrated potential effect on "competition" or the competitive structure of the market. This distinction is significant: it pushes the boundaries of Article 102 and Chapter II beyond their traditional concern with competitive harm and into territory perhaps more naturally associated with consumer protection law or other regulatory fields. If/when coupled with a general move away from an effects-based approach to the prohibition of abuse of a dominant position, violation findings based purely on a demonstrated exploitation of consumers/customers in the absence of any exclusionary effects can mark an important shift away from an economically informed, modern competition law that primarily concerns itself with the protection of undistorted competition in a market. In the UK, the CAT's response to these actions – illuminated in the final judgment in *Boundary Fares* and the earlier certification stage in *Gormsen* and *Water* – reflects an alertness to this tension. It reveals both a willingness to engage with well-constructed actions that are capable of affording redress to consumers, and yet, equally, an attentiveness to the risk of competition law being invoked as a remedy for commercial grievances that do not clearly fall to be addressed in a competition context, perhaps indicating that there is a drive towards separating genuine competition harm from consumer or customer dissatisfaction dressed in competition language.

There is no doubt that, based on the relevant legal provisions, exploitation is prohibited as an abuse of a dominant position in EU and UK competition law.⁶⁷ Further, from an economics perspective, "[e]xploitation of consumers is the textbook abuse by a monopolist or dominant firm", especially in the form of high prices.⁶⁸ Thus, exploitation is a competitive harm that can result from the use of market power. However, the issue with purely "exploitative" cases being pursued as an abuse of a dominant position is that mere exploitation does not, of itself, demonstrate harm to competition; it demonstrates harm to consumers or customers, and the two are not the same.⁶⁹ This is because exploitation may be the outcome of distorted competition in a market, but need not be.⁷⁰ This distinction raises a fundamental question of when competition law is the most appropriate vehicle for addressing exploitative conduct. This is because, in the absence of conduct that harms competition, alleged exploitation of consumers or customers may signify a violation of consumer protection law, contract law, data protection law and so on, rather than competition law.⁷¹

Each of the CAT cases considered above, bar *ValueLicensing*, was brought on an opt-out basis on behalf of a large class of consumers.⁷² In *Kent*, those consumers were an approximate 36 million iOS Users who made payments relating to apps; in *Boundary Fares*, the class comprised persons who had purchased certain rail fares in certain circumstances; *Water*

involves household consumers of certain water and sewerage undertakers; and in *Gormsen*, the class comprises users of the social network Facebook. Spanning a breadth of industries, these cases are united in their attempt to correct a perceived consumer wrong by reference to the alleged abuse of a dominant position, with the abuse in question taking different forms. At their core, each purely exploitative case discussed above involves a form of "abuse by analogy", in the sense that conduct that may violate consumer protection law or data protection law is simultaneously characterised as an abuse of a dominant position. Together, these cases reflect a marked rise in creative and expansive theories of exploitative abuse.

A certain unease with the ever-expanding boundaries of the prohibition of abuse of a dominant position is already noticeable at judicial level. In *Boundary Fares*, the CAT declined to turn competition law into an extension of consumer protection law.⁷³ In the first *Gormsen* CPO judgment declining certification, the CAT commented that the unfair terms allegations "*seem to us not to be competition law infringements at all, but rather some other – possibly consumer protection based – claim*",⁷⁴ indicating a limit to the extent to which such claims can or should be "pigeonholed" as abuse of dominance claims.

The question of whether competition law is the right instrument to address these alleged harms is sharpened by the existence of alternative regulatory frameworks arguably better tailored to address them. In digital markets specifically, regulatory regimes such as the DMA, GDPR and Digital Markets, Competition and Consumers Act 2024 ("**DMCCA**") offer a more targeted mechanism for addressing the same underlying conduct, without the conceptual strain of fitting pure consumer harm into a competition law framework. The Commission's recent imposition of significant fines under the DMA is a timely illustration of the growing enforcement reach of sector-specific regulation in the markets where exploitative abuse has most frequently been alleged, namely digital markets.⁷⁵

The overlap between competition law and other regulatory schemes is perhaps most clearly illustrated by the *Facebook Marketplace* decision. Conduct regarding the use of data of business users is now directly addressed by the DMA for designated gatekeeper platforms.⁷⁶ The same logic applies, with comparable force, to data protection law. Indeed, the conduct at issue in *Meta Data Collection* is now also regulated directly under the DMA, in addition to the GDPR.⁷⁷ Where dedicated regulation is available and capable of providing an adequate remedy, the deployment of competition law as a parallel instrument can raise legitimate questions of institutional design and proportionality: whether it adds analytical clarity, or merely complexity and cost.

The interplay between competition law and other areas of law has since migrated into the policy arena. In 2025, the Government ran a call for evidence on the opt-out collective action regime for competition law. One area of concern respondents highlighted was that consumer protection claims were being "*repackaged*" as competition law claims simply to access the collective proceedings mechanism. Respondents suggested that expanding the collective action regime to cover other causes of action, such as "*data protection, environmental, and wider consumer protection*" would offer "*a simpler and more cost-effective way of bringing some cases that currently can only be brought as a competition claim under the regime*".⁷⁸ The Government's subsequent report decided not to expand the scope of potential claims but noted that the question was being considered by the Law Commission.⁷⁹

At the time of writing, the Law Commission is considering whether a dedicated consumer class action regime should be introduced in the UK.⁸⁰ The terms of reference, published in April 2026, expressly noted the Government's conclusions on

the collective action regime and, in particular, the “[e]vidence of pent-up demand for opt-out consumer protection claims”.⁸¹

At least in the UK, there is a growing sense that the *status quo* may not be sustainable. Rooting consumer protection and other regulatory claims through a competition law lens adds significant complexity and cost with little obvious benefit. Whether the Law Commission – and ultimately the Government – conclude that this warrants the creation of a dedicated consumer protection class action regime remains to be seen. In the meantime, it is perhaps down to specialist courts such as the CAT to hold the line for competition law.

Acknowledgment

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Endnotes

- 1 Notable exceptions include: Case 127-73 *BRT v SABAM*, EU:C:1974:25; Case 247/86 *Alsatel v Novasam*, EU:1988:469; *Tetra Pak II* (Case IV/31043) Commission Decision 92/163/EEC [1992] OJ L72/1; *Trans-Atlantic Conference Agreement* (Case IV/35.134) Commission Decision 1999/243/EC [1999] OJ L95/1; and 1998 *Football World Cup* (Case IV/36.888) Commission Decision 2000/12/EC [2000] OJ L 5/55.
- 2 Department for Business, Innovation, Science and Trade and Department for Business and Trade, “Swifter and simpler competition redress, regulatory appeals, and competition enforcement”, (Consultation Paper, 17 July 2026), para. 114.
- 3 Department for Business and Trade, “Opt-out collective actions regime review: summary of call for evidence responses” (17 July 2026), available at <https://www.gov.uk/government/calls-for-evidence/opt-out-collective-actions-regime-review-call-for-evidence/outcome/opt-out-collective-actions-regime-review-summary-of-call-for-evidence-responses>, and the Law Commission, “Consumer class actions: terms of reference” (20 April 2026), available at <https://lawcom.gov.uk/publication/consumer-class-actions-terms-of-reference>
- 4 European Commission, “Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings” (Draft) (1 August 2024), available at https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en. For a discussion of the approach of the draft Guidelines, see P Akman, C Fumagalli and M Motta, “The European Commission’s draft guidelines on exclusionary abuses: a law and economics critique and recommendations” (2025) 16(4) *Journal of European Competition Law and Practice* 234.
- 5 *Apple – App Store Practices (music streaming)* (Case AT.40437) Commission Decision C(2024) 1307 [2024] OJ C, C/2024/3554 (currently under appeal in Case T-260/24 *Apple and Apple Distribution International v Commission*, pending) (“**Apple Music Streaming**”).
- 6 *Facebook Marketplace* (Case AT.40684) Commission Decision of 14 November 2024 (“**Facebook Marketplace**”).
- 7 *Bundeskartellamt* Decision B6-22/16 (6 February 2019) (“*Facebook, Exploitative business terms pursuant to Section 19(1) GWB*”) (“**Meta Data Collection**”).
- 8 *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc and Others* (CPO) [2024] CAT 11 (Case 1433/7/22) (“**Gormsen**”).
- 9 *Professor Carolyn Roberts v Severn Trent Water Ltd and Others* [2025] CAT 17 (“**Water**”).
- 10 *Justin Gutmann v Govia Thameslink Railway and Others* [2025] CAT 64 (“**Boundary Fares**”).

- 11 *Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd* [2025] CAT 67 (“**Kent**”).
- 12 (T) *JJH Enterprises Limited (trading as ValueLicensing) v Microsoft Corporation and Others* (Case 1570/5/7/22) (“**ValueLicensing**”).
- 13 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.
- 14 *Apple Music Streaming*, paras 568, 825–827.
- 15 *Apple Music Streaming*, paras 112–140.
- 16 *Apple Music Streaming*, para. 529. The Court of Appeal has a similar understanding of “unfairness” as requiring an “analysis of (i) whether the disputed term serves a legitimate purpose and if so (ii) whether it is proportionate relative to that purpose”; *London & South Eastern Railway Limited, First MTR South Western Trains Limited & Stagecoach South Western Trains Limited v Justin Gutmann* [2022] EWCA Civ 1077, [93]. Subsequent NCA decisions have adopted the test for unfair trading conditions established in *Apple Music Streaming*. For example, in March 2025, the French *Autorité de la concurrence* fined Apple €150 million for imposing unfair trading conditions on third-party app developers through its App Tracking Transparency framework (Decision 25-D-02 of 31 March 2025 regarding practices implemented in the sector for mobile application advertising on iOS devices).
- 17 *Apple Music Streaming*, paras 775–827.
- 18 *Apple Music Streaming*, para. 546.
- 19 European Commission Press Release, “Antitrust: Commission opens investigations into Apple’s App Store Rules” (16 June 2020), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073
- 20 *Apple Music Streaming*, para. 547.
- 21 The decision is currently on appeal (Case T-66/25 *Meta Platforms and Meta Platforms Ireland v European Commission*).
- 22 *Facebook Marketplace*, paras 729, 1366–1376.
- 23 *Facebook Marketplace*, paras 738, 1082–1093.
- 24 *Facebook Marketplace*, paras 728, 1366–1376.
- 25 *Facebook Marketplace*, paras 996–1000.
- 26 *Meta Data Collection*, paras 163–164.
- 27 *Meta Data Collection*, para. 374.
- 28 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.
- 29 *Meta Data Collection*, paras 526–534.
- 30 *Meta Data Collection*, paras 873–875. For a more detailed discussion of normative causality see A Witt, “Excessive Data Collection as Anticompetitive Conduct – The German Facebook Case” (2021) 66(2) *Antitrust Bulletin* 276.
- 31 For detailed discussions of this decision, see: Witt, *ibid.*; and M Botta and K Wiedemann, “The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey” (2019) 64 (3) *Antitrust Bulletin* 428.
- 32 R Van den Bergh and F Weber, “The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law?” (2021) 44(1) *World Competition* 29.
- 33 Van den Bergh and Weber, *ibid.*
- 34 W Kerber and K Zolna, “The German Facebook case: the law and economics of the relationship between competition and data protection law” (2022) 54 *European Journal of Law and Economics* 217. See also I Graef, “The European Court of Justice in Meta

Platforms leaves competition and data protection authorities with an assignment” *European Law Blog* (19 July 2023), available at <https://www.europeanlawblog.eu/the-european-court-of-justice-in-meta-platforms-leaves-competition-and-data-protection-authorities-with-an-assignment>

- 35 The Court of Justice of the European Union (“CJEU”) established important principles on the relationship between competition and data protection law in the preliminary reference ruling on the matter, but did not address the interpretation of Article 102(a), as that question had not been referred; *Case C-252/21 Meta Platforms and Others* EU:C:2023:537.
- 36 *Gormsen*, CPO, para. 9.
- 37 *Gormsen*, CPO, para. 26. Note that the Tribunal considered the two abuses as self-standing allegations (see [25]). In relation to the unfair trading condition form of abuse, the Tribunal expressed some hesitation about the prospect of contending that any dominant undertaking that offers products on standard form conditions that it declines to vary (i.e., take it or leave it) is abusing its dominance. However, on careful consideration, the Tribunal did not find the class representative to be advancing so extreme a case.
- 38 *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc and Others (Pleading Amendments)* [2025] CAT 55.
- 39 *Gormsen*, CAT Pleading Amendments, para. 44.
- 40 *Meta Platforms Inc and Others v Dr Liza Lovdahl Gormsen* [2026] EWCA Civ 993, para. 67.
- 41 *Gormsen*, Court of Appeal, para. 67.
- 42 *Water*, CAT, para. 43.
- 43 *Water*, CAT, para. 44.
- 44 *Professor Carolyn Roberts v Severn Trent Water Limited and Others* [2026] EWCA Civ 222. The judgment is now on appeal before the Supreme Court in *Roberts (Appellant) v Severn Trent Water Limited and Severn Trent PLC and 8 others (Respondents)*, Case ID: UKSC/2026/0042.
- 45 *Water*, CAT, para. 115(b).
- 46 *Water*, CAT, para. 78.
- 47 *Water*, CAT, para. 75.
- 48 *Boundary Fares*, para. 79.
- 49 *Justin Gutmann v First MTR South Western, Stagecoach South Western and London & South Eastern Railway (CPO Application Judgment)* [2021] CAT 31, [60].
- 50 *London & South Eastern Railway Limited, First MTR South Western Trains Limited & Stagecoach South Western Trains Limited v Justin Gutmann* [2022] EWCA Civ 1077, para. 93.
- 51 *London & South Eastern Railway Limited, First MTR South Western Trains Limited & Stagecoach South Western Trains Limited v Justin Gutmann* [2022] EWCA Civ 1077, paras 94–102.
- 52 *Boundary Fares*, para. 138.
- 53 *Boundary Fares*, para. 105.
- 54 *Boundary Fares*, para. 80.
- 55 *Boundary Fares*, para. 96.
- 56 *Boundary Fares*, para. 79.
- 57 *Kent*, paras 501 and 523.
- 58 *Kent*, para. 681.
- 59 *Kent*, para. 308.
- 60 *Kent*, para. 496.

- 61 *Kent*, para. 497.
- 62 *Kent*, paras 600–602.
- 63 *Kent*, para. 681.
- 64 *Kent*, para. 673.
- 65 A market whose legality had been confirmed by the CJEU in *Case C-128/11 UsedSoft GmbH v Oracle International Corp* ECLI:EU:C:2012:407.
- 66 *Microsoft Corporation and Ors (Appellants/Defendants) v JJH Enterprises Limited (trading as ValueLicensing) (Respondents/Claimants)* [2026] EWCA Civ 872.
- 67 In fact, any doubt relates/related to whether Article 102/Chapter II prohibits “exclusionary” abuse; see *Case 6/72 Europemballage Corporation and Continental Can Company Inc v EC Commission* ECLI:EU:C:1973:22, paras 20–26. See also *Boundary Fares*, Court of Appeal, para. 93.
- 68 B Lyons, “The Paradox of the Exclusion of Exploitative Abuse” in *The Pros and Cons of High Prices*, Swedish Competition Authority (*Konkurrensverket*) (2007), 66, 68, available at https://ueaeprints.uea.ac.uk/id/eprint/28804/1/rap_pros_and_cons_high_prices.pdf
- 69 See P Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart, 2012) 307–309.
- 70 Akman, *ibid.*, 303.
- 71 See Akman *ibid.* for the discussion.
- 72 The procedural vehicle for these claims is the CAT’s collective proceedings jurisdiction, established by section 47B of the Competition Act 1998 as amended by the Consumer Rights Act 2015, which enables a class representative to bring opt-in or opt-out proceedings on behalf of a defined class of persons who share common issues; 47B of the Competition Act 1998 as amended by the Consumer Rights Act 2015.
- 73 See *Boundary Fares*, para. 79.
- 74 *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc and Others* [2023] CAT 10, para 30(1).
- 75 In the same vein, see Botta on whether sector regulation renders competition law enforcement “redundant”; M Botta “Exploitative Abuses: Recent Trends and Comparative Perspectives” in P Akman, O Brook and K Stylianou (eds) *Research Handbook on Abuse of Dominance and Monopolization* (Edward Elgar, 2023) 118.
- 76 DMA Article 6(2).
- 77 DMA Article 5(2).
- 78 Department for Business and Trade, “Opt-out collective actions regime review: summary of call for evidence responses” (17 July 2026), available at <https://www.gov.uk/government/calls-for-evidence/opt-out-collective-actions-regime-review-call-for-evidence/outcome/opt-out-collective-actions-regime-review-summary-of-call-for-evidence-responses>
- 79 Department for Business, Innovation, Science and Trade and Department for Business and Trade, “Swifter and simpler competition redress, regulatory appeals, and competition enforcement”, (Consultation Paper, 17 July 2026), para. 11.
- 80 Law Commission, “Consumer class actions: Considering the introduction of a consumer class actions regime”, available at <https://lawcom.gov.uk/project/consumer-class-actions/#4-Documents>
- 81 Law Commission, “Consumer class actions: terms of reference” (20 April 2026), para. 1.3(d), available at <https://lawcom.gov.uk/publication/consumer-class-actions-terms-of-reference>



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