

2022 UK Competition Collective Actions Report

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Executive Summary

There has been a marked growth in applications for Collective Proceedings Orders (CPOs) during 2021, with six claims registered under Section 47(B) of the Competition Act 1998 (CA98) at the Competition Appeals Tribunal (CAT). This compares to 2020, when a single claim was filed, and an average of only 1.8 per annum over the previous five-year period.

Number of claims has increased, with disparate law firm activity on the claimant and defence sides

Claims have been launched by several different law firms. On the claimant side, Hausfeld and Scott & Scott stand out as each having led more than one CPO application. Hausfeld stands out in particular, having registered seven applications for CPOs with the CAT between 2016 and 2021. On the defence side, the most active firms over the period include Slaughter and May, Freshfields Bruckhaus Deringer (Freshfields), Dentons, and Quinn Emanuel Urquhart & Sullivan (Quinn Emanuel).

Compared to the previous five years, 2021 saw a rise in applications involving the Information and Communication sector, with applications for CPOs launched against both Google and Apple's app stores.

The average value of damages claimed for anticompetitive agreements is ten times larger than for abuse of dominance claims

The average potential class size is similar for CPO applications in relation to both anticompetitive agreements (Article 101 of the Treaty on the Functioning of the European Union (TFEU) or Chapter 1 CA98) and abuse of dominance (Article 102 TFEU or Chapter 2 CA98), although the average for the former is heavily skewed upwards by Walter Merricks' claim against Mastercard (46.2 million potential class members). However, on average, the value of damages claimed in CPO applications involving anticompetitive agreements

is approximately *ten times* the size of the average abuse of dominance claim registered over the 2016–2021 period.

Most frequently raised 'common issue:' Whether or not the conduct alleged infringed the relevant competition law provision

In terms of the substance of applications, the CAT's summary of collective proceedings is issued at the start of the application process and ordinarily reports a list of the common issues alleged by the claimant. The systematic recording of common issues highlights that those reported vary significantly in scope and number across applications. Perhaps unsurprisingly, whether or not the conduct alleged did infringe the relevant competition law provision is most frequently claimed as a common issue during the 2016–2021 period.

CPO applications were heard more quickly in 2021 than during the previous five years

Procedurally, it is noteworthy that the time period between first registering the claim with the CAT and the CPO hearing fell to an average of 0.8 years (9.5 months) in 2021. This compares to an average of 1.8 years for the previous five years, 2016–2020.

New funders have entered the arena

On the funding front, 2021 has seen a significant number of additional funders register their first competition collective actions. Specifically, Augusta Ventures, Harbour Litigation Funding (Harbour), and Litigation Capital Management each funded one registered claim, while Vannin Capital funded two registered claims (Vannin was acquired by Fortress in 2021). Over the 2016–2021 period, Woodsford Litigation Funding, Vannin Capital, and Therium are the three funders who have each funded more than one registered collective proceeding. The largest cases (*Forex* and *Trucks*) are now attracting funding of nearly £50 million or more when measured by including the funding potentially available to cover adverse costs.

Introduction

The Consumer Rights Act (2015) amended the Competition Act 1998 (CA98) to provide a statutory basis for opt-out collective proceedings in UK competition matters. Competition law remains the only area of law where there is currently such a statutory basis for opt-out collective proceedings in the UK. It is useful to understand and track this emerging area of law for a number of reasons.

First, this can be useful as a case study to understand whether the experience in competition law supports the expansion of opt-out collective proceedings to other areas, particularly to consumer protection actions such as product liability as well as in data protection cases following data breach or data misuse.

Second, competition collective proceedings can follow-on from a public enforcement decision or, alternatively, proceed as a stand-alone private action.¹ The ability to take stand-alone private actions has the potential to introduce markedly new dynamics in competition enforcement because (i) agency resources and preferences no longer constrain activity and (ii) stand-alone private actions for end-user markets become feasible (the damages per user may be too small in end-user markets to justify the costs and risks of individuals taking legal action even if the aggregate harm were large).

The combined effect of the pandemic and the delays associated with the appeals of the Competition Appeals Tribunal's (CAT's) decision in Mastercard (*Merricks*) meant that 2020 saw just a single filing. However, the UK Supreme Court handed down its judgment in Mastercard on 11 December 2020 and there has been a marked growth in Collective Proceedings Order (CPO) actions during 2021. Specifically, six claims under Section 47(B) of CA98 were registered at the CAT in 2021. This compares to an average of only 1.8 per annum over the previous five-year period.

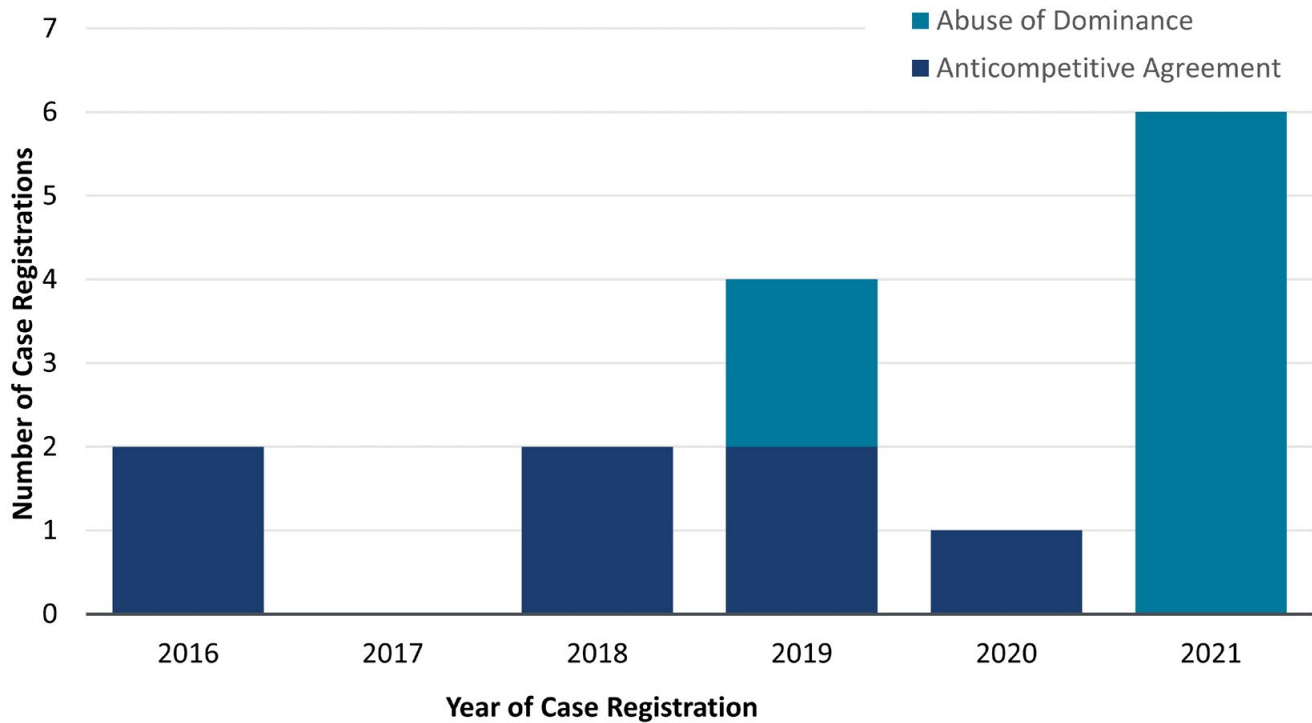
As **FIGURE 1** shows, the significantly larger number of CPO applications filed in 2021 is also of interest because it reflects a ubiquitous focus on abuse of dominance cases. Remarkably, all six cases in 2021 were stand-alone abuse of dominance cases, two of which were in the tech sector. In comparison, the CMA opened only three abuse of dominance investigations during 2021. This suggests that, arguably, the balance of enforcement for abuse of dominance tipped dramatically from public enforcement by the CMA to private enforcement through collective proceedings in 2021.

There is some overlap between the public enforcement cases opened by the CMA and the private enforcement cases brought in the CAT, particularly in the tech sector; the Apple App Store, for example, is currently the subject of both an open CMA investigation and a CAT case. However, as of 1 January 2022, the overlap is incomplete:

- The CMA's Google-related investigation is into the tech giant's Privacy Sandbox (which replaces cookies on the Google Chrome web browser with proprietary technology), whereas the collective action targets Google's app store, Google Play.
- No claim was registered in the CAT during 2021 against Facebook, while the CMA launched its investigation into whether Facebook might be abusing a dominant position in the social media or digital advertising market through its collection and use of advertising and single sign-on (SSO) data. The CMA's investigation is focused on whether Facebook has – through how it gathers and uses certain data – gained an unfair advantage over competitors in providing services for online classified ads (Facebook Marketplace) and online dating (Facebook Dating).

¹ Follow-on actions can follow infringement decisions made by the CMA, European Commission, or a UK regulatory agency with competition powers such as the Financial Conduct Authority or Ofcom.

FIGURE 1: REGISTRATIONS OF UK COLLECTIVE PROCEEDINGS, 2016–2021



Law Firm Activity

On the claimant side, Hausfeld and Scott & Scott are the only two law firms to have launched more than one CPO application over the period 2016–2021. While Scott & Scott have launched two CPO applications (*Maritime Car Carriers* and Michael O’Higgins’ *Foreign Exchange (Forex)* claim), Hausfeld has surged ahead of other law firms in terms of the raw number of claims launched by starting seven cases (although the extent of the lead reported involves counting the Boundary Fares cases as three separate matters).²

On the defence side, Slaughter and May, Freshfields, and Dentons are responding to Justin Gutmann’s three Boundary Fares cases. In addition, Slaughter and May are engaged in defending against the two CPO applications in each of the *Forex* and *Trucks* cases.³ Freshfields is also defending Mastercard against Mr. Merricks’ application. Quinn Emanuel has been engaged on both defence and claimant sides of CPO applications. Following high-profile partner moves, Willkie Farr & Gallagher (Willkie) will take on the claimant side of the Merricks case.

² The Boundary Fares claims relate to allegations that train companies operating around London double-charged customers who were travelling from central London to a destination outside the city and were charged full fares when they already had a “Transport for London” Zone 1–6 Travelcard, so, instead, should have been charged a boundary fare.

³ Defence counsel for the third Boundary Fares case were not yet announced at the time of publication (given the claim was registered only on 24 November 2021). For the purposes of this report, I have adopted the assumption that the third Boundary Fares case will be responded to by the same law firms as the other two Boundary Fares claims.

FIGURE 2: NUMBER OF CPO APPLICATIONS ON CLAIMANT SIDE BY LAW FIRM, 2016–2021

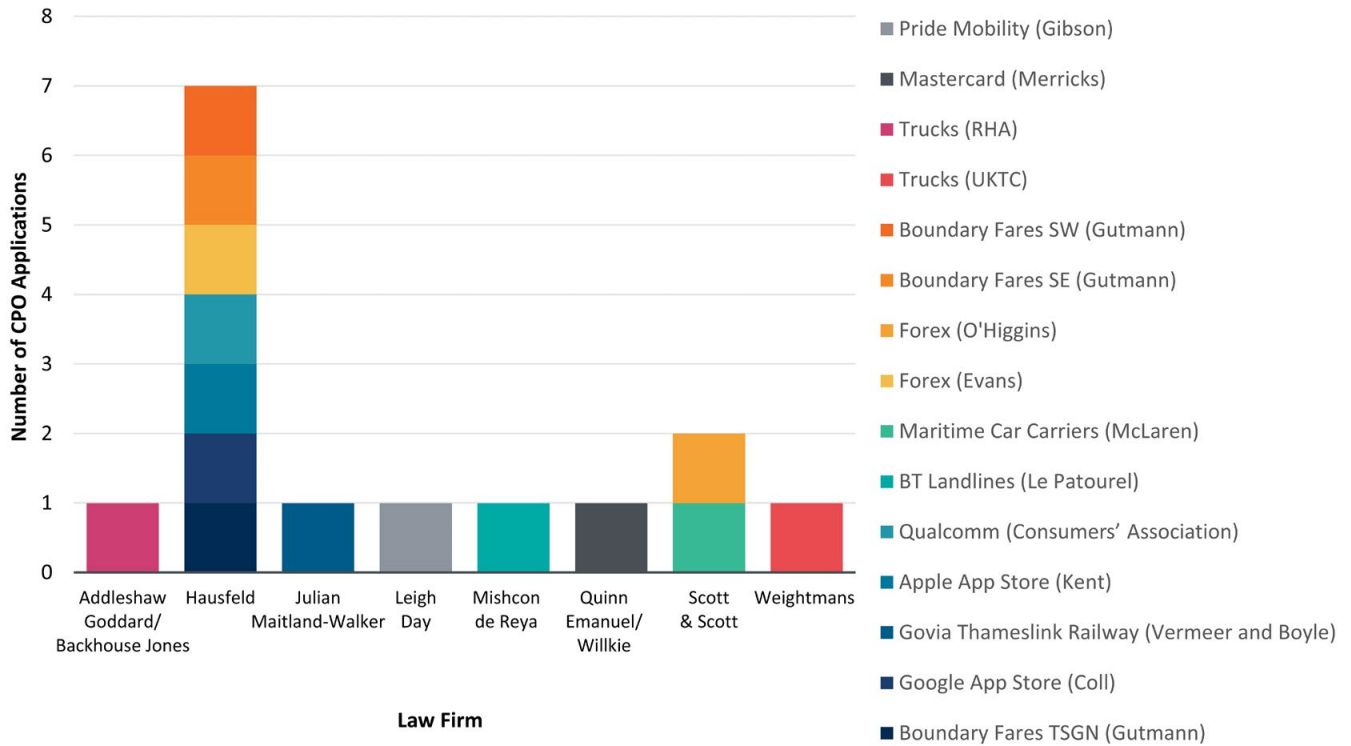
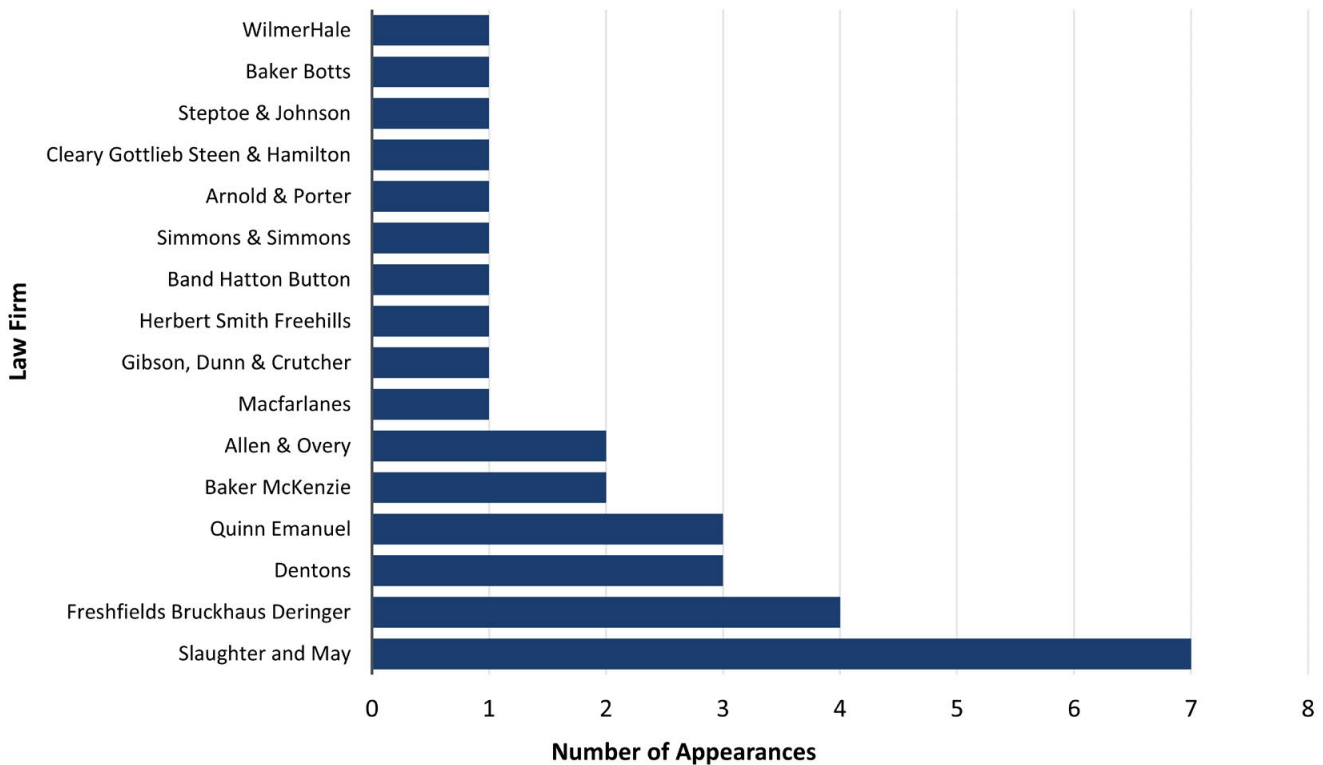
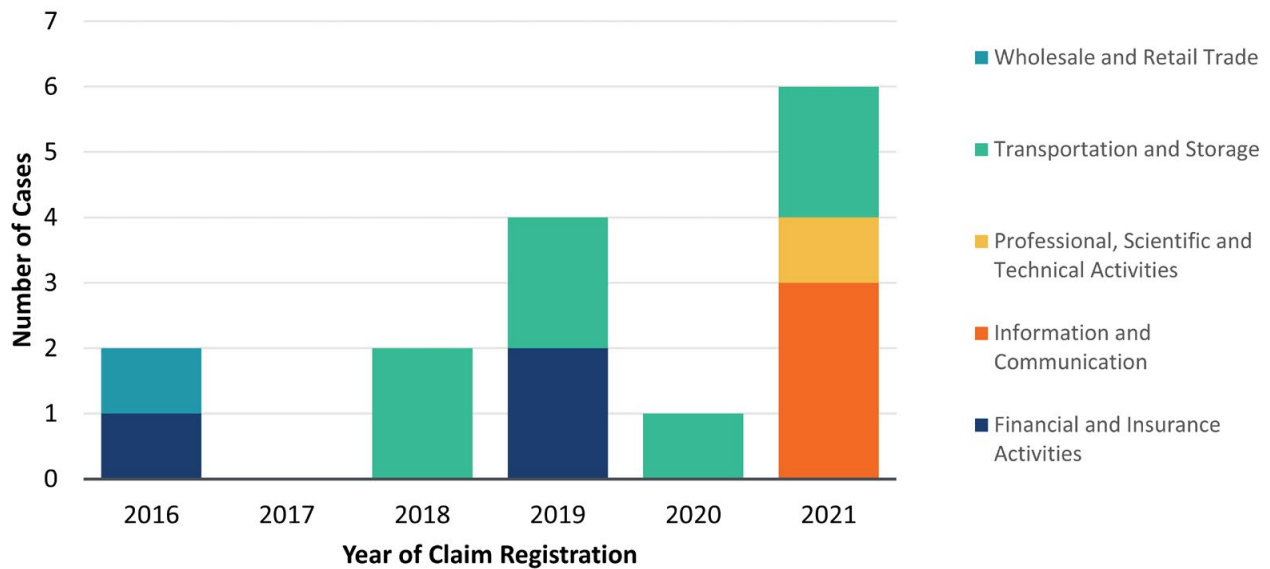


FIGURE 3: NUMBER OF CPO APPLICATIONS ON DEFENCE SIDE BY FIRM, 2016–2021



Notes: [1] This includes only instructions in cases that were filed at the CAT over the period 2016–2021. Other CPO applications are in development and, if defendants have instructed counsel, such instructions are not counted in these figures.

FIGURE 4: NUMBER OF CPO APPLICATIONS BY SECTOR, 2016–2021



Cases by Sector

Compared to the previous five years, 2021 saw a rise in cases in the Standard Industrial Classification (SIC) hierarchy’s Information and Communication sector, with cases against Google and Apple. In addition, the case against Qualcomm saw the introduction of the first case in the Professional,

Scientific and Technical Activities SIC sector. Meanwhile, cases in the Transportation sector continued to play a significant role, with two separate new CPO applications launched against Govia Thameslink Railway.

Size and Value of Claims

Measured by the value of the damages sought by claimant’s counsel, the largest claim by some order of magnitude is Mr. Merricks’ claim against Mastercard, which follows on from a number of infringement decisions by the European Commission.⁴ The second largest claim is UKTC’s *Trucks* claim, which is, perhaps notably, for a larger amount than the RHA’s *Trucks* claim. These *Trucks* cases would each follow-on from the infringement decision by the European Commission.⁵

On average, anticompetitive agreements (Article 101 TFEU or Chapter 1 CA98) claims are ten times the size of the average abuse of dominance (Article 102 TFEU or Chapter 2 CA98) claim, although that is driven significantly by the size of the Mastercard claim, with a whopping 46.2 million people in the class.

⁴ Specifically, Mr. Merricks’ claim against Mastercard combines follow-on actions for damages arising from a decision of the European Commission of 19 December 2007 (COMP/34.579 MasterCard, COMP/36.518 EuroCommerce, and COMP/38.580 Commercial Cards).

⁵ Specifically, the RHA and UKTC cases would each combine follow-on actions for damages arising from a decision of the European Commission (the Commission) of 19 July 2016 (Case AT.39824 - *Trucks*) relating to a proceeding under Article 101 TFEU and Article 53(1) of the Agreement on the European Economic Area (EEA) (the Decision).

FIGURE 5: ESTIMATED CLASS AND CLAIM SIZE (WHERE INFORMATION IS AVAILABLE), 2016–2021

	Estimated Class Size (millions)	Claimant's Estimated Damages for Art. 101 cases (GBP Million)	Claimant's Estimated Damages for Art. 102 cases (GBP Million)
Article 101 TFEU or Chapter 1 CA98 claims			
Mastercard (Merricks)	46.20	£14,100	
Trucks (UKTC)	0.65	£12,960	
Trucks (RHA)	0.25	£1,500	
Maritime Car Carriers (McLaren)	2.50	£150	
Pride Mobility (Gibson)	0.03	£3	
Forex (Evans)	0.06	–	
Forex (O'Higgins)	0.00	–	
Average	8.28	£5,743	
Article 102 TFEU or Chapter 2 CA98 claims			
Apple App Store (Kent)	19.60		£1,500
Google App Store (Coll)	19.50		£920
BT Landlines (Le Patourel)	2.31		£600
Qualcomm (Consumers' Association)	29.00		£480
Govia Thameslink Railway (Vermeer and Boyle)	3.20		£73
Boundary Fares SW (Gutmann)	0.89		£36
Boundary Fares SE (Gutmann)	2.08		£57
Average	10.94		£524

Notes: [1] Information is not always available. Information on the value of the claim in the *Forex* cases is not available in the public domain.

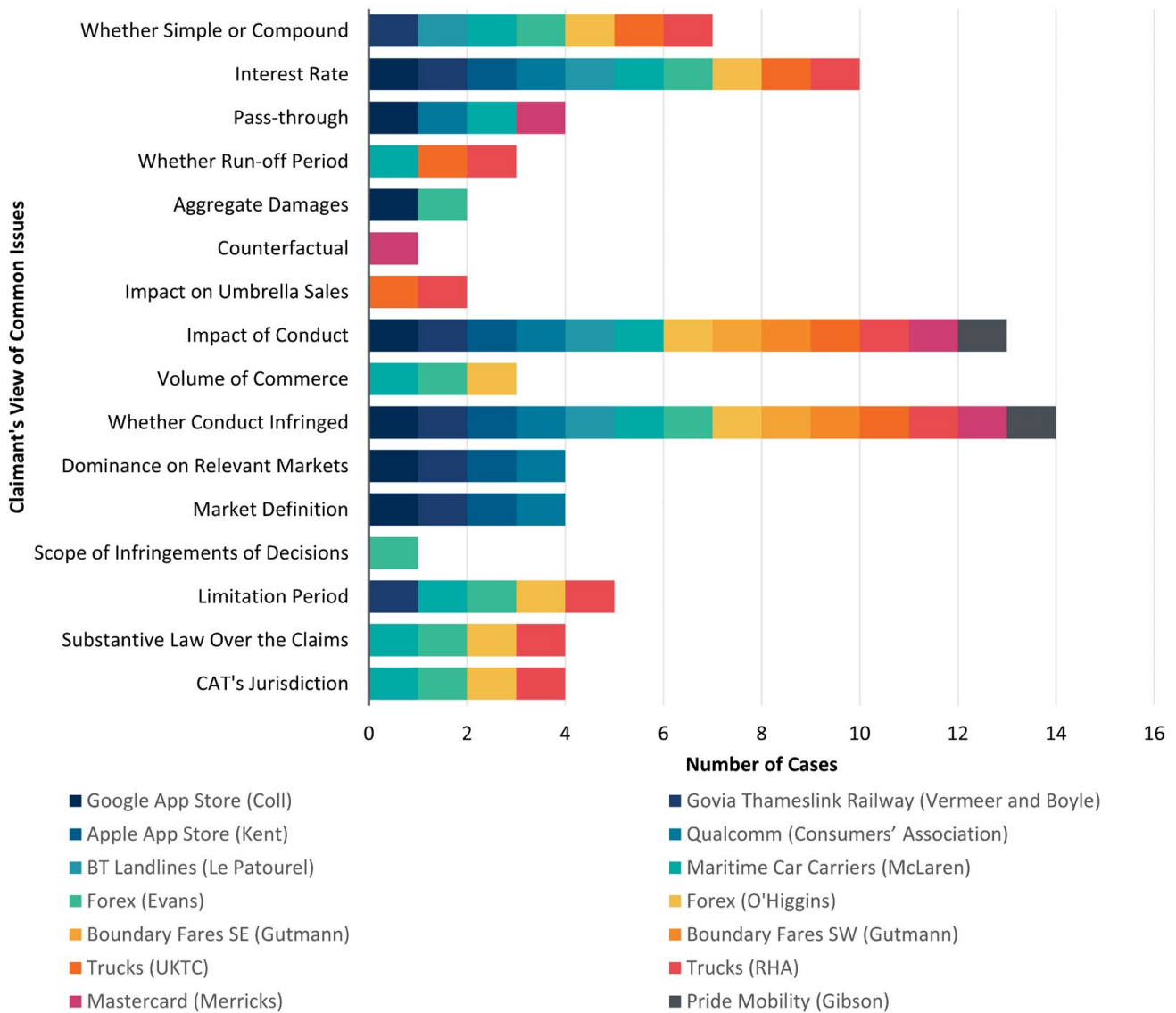
Common Issues

For a CPO application to be approved, a claimant must establish to the CAT's satisfaction that the claim raises issues that are the "same, similar, or related issues of fact or law." That is, the claim must raise "common issues."⁶ The data show that there is significant variation across cases in the number and types of issues claimed to be common (as described in

the summary of collective proceedings claim forms published for each registered case on the CAT's website). Perhaps unsurprisingly, whether the conduct infringed competition law is the common issue most frequently expressly identified in the summary of the collective proceedings claim form issued by the CAT.

⁶ Rule 79(1)(b) and 73(2) CAT Rules.

FIGURE 6: COMMON ISSUES IDENTIFIED IN SUMMARIES OF CLAIMS, 2016–2021

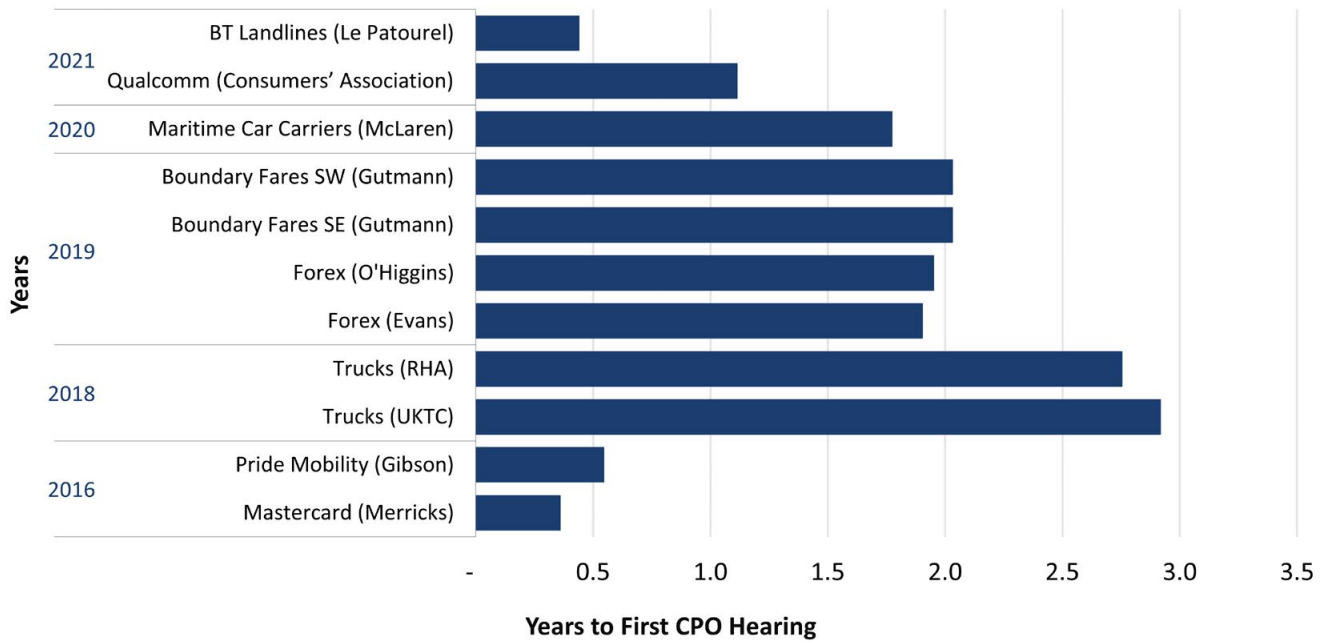


Process

The time period between registering a claim and the CPO hearing has fallen to an average of 0.8 years (9.5 months) in 2021, compared to the average of 1.8 years for the five previous years, 2016 to 2020. The high average has, in significant part, resulted from the stasis that followed Mr. Merricks' case against Mastercard being appealed to the Supreme Court. For example, the *Trucks* cases took a particularly long time to reach a full CPO hearing as a result of the delays from careful judicial consideration of the Merricks case.

After the CPO hearing, the parties must wait for the CPO judgment. The judgments handed down in 2021 took between three and seven months for the CAT to write after the CPO hearing. Notably, however, at the time of writing, several significant judgments are still being awaited for cases that began in 2018 (*Trucks*), 2019 (*Forex*), and 2020 (*Maritime Car Carriers*). The CAT heard the *Trucks*' CPO applications during a joint hearing held virtually in April 2021 so, at the time of writing, eight months have passed without a judgment.

FIGURE 7: DURATION FROM CLAIM REGISTRATION TO FIRST CPO HEARING BY DATE OF REGISTRATION, 2016–2021



Notes: [1] The time to first CPO hearing is measured from the date of registration to a main CPO hearing. On occasion, and in particular in the *Trucks* case, the CAT did consider a preliminary issue related to funding. The judgment on that aspect of the case was issued in October 2019. The main CPO hearing took place in April 2021.

FIGURE 8: DURATION FROM CPO HEARING TO FIRST CPO JUDGMENT BY DATE OF REGISTRATION, 2016–2021

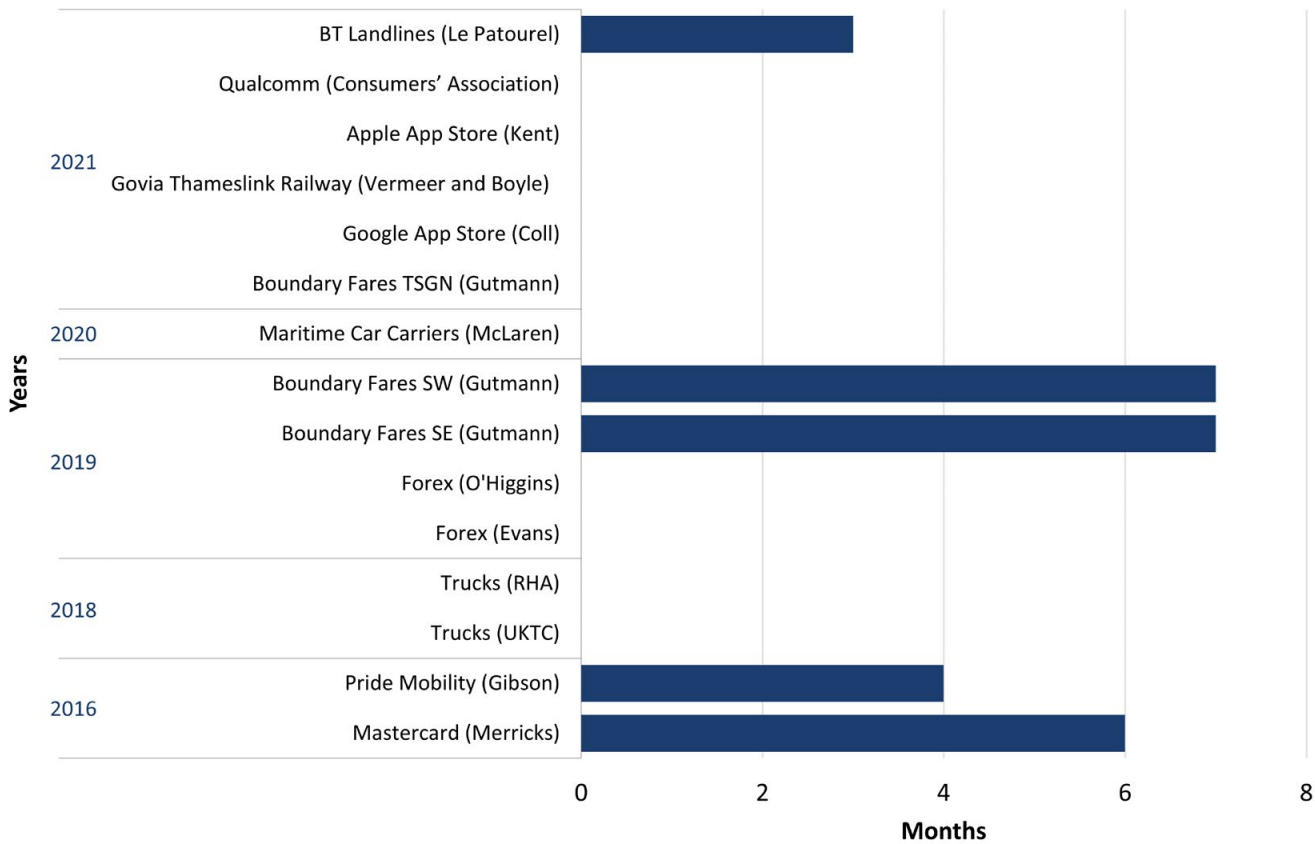
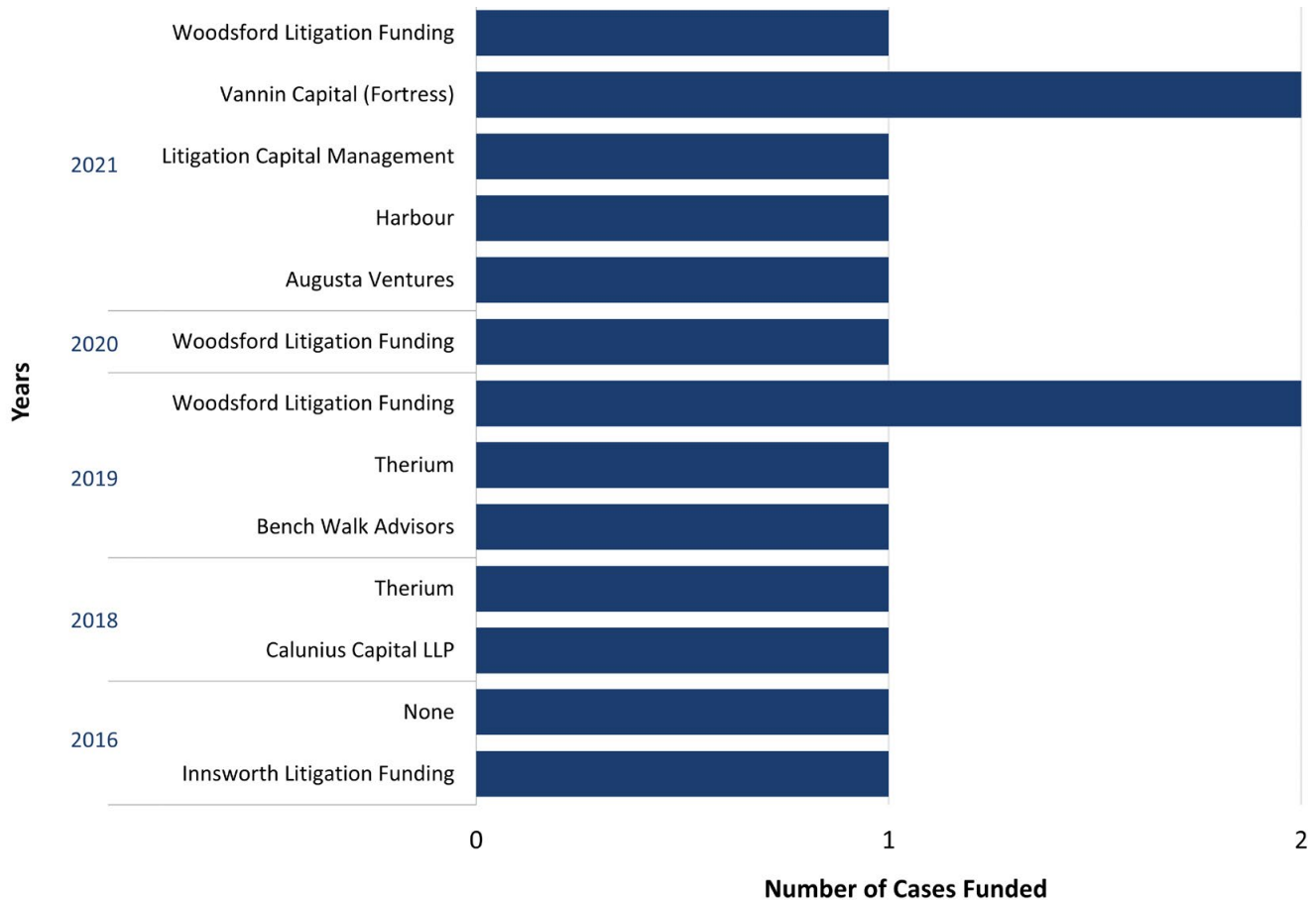


FIGURE 9: NUMBER OF FUNDED CASES BY LITIGATION FUNDER BY YEAR, 2016–2021



Notes: [1] In 2016, the Pride Mobility Scooters claim was funded by the law firm Leigh Day. Hence, the case is shown with funder designated as 'None' in 2016. [2] The Merricks case against Mastercard was originally funded by Burford Capital.

In terms of appeals, Mr. Merricks' claim against Mastercard was subject to an appeal, first to the Court of Appeal (CoA) and subsequently to the Supreme Court, with the judgment handed down on 20 December 2020. In 2021, both applications for a CPO where a judgment was issued by the CAT have been subject to applications for appeal. Specifically:

- British Telecom applied to appeal the CAT's judgment in Mr. Le Patourel's application for a CPO. Permission to appeal was denied by the CAT in a judgment dated 25

October 2021. An application to the CoA was then made by British Telecom, and the CoA decided to grant British Telecom permission to appeal.

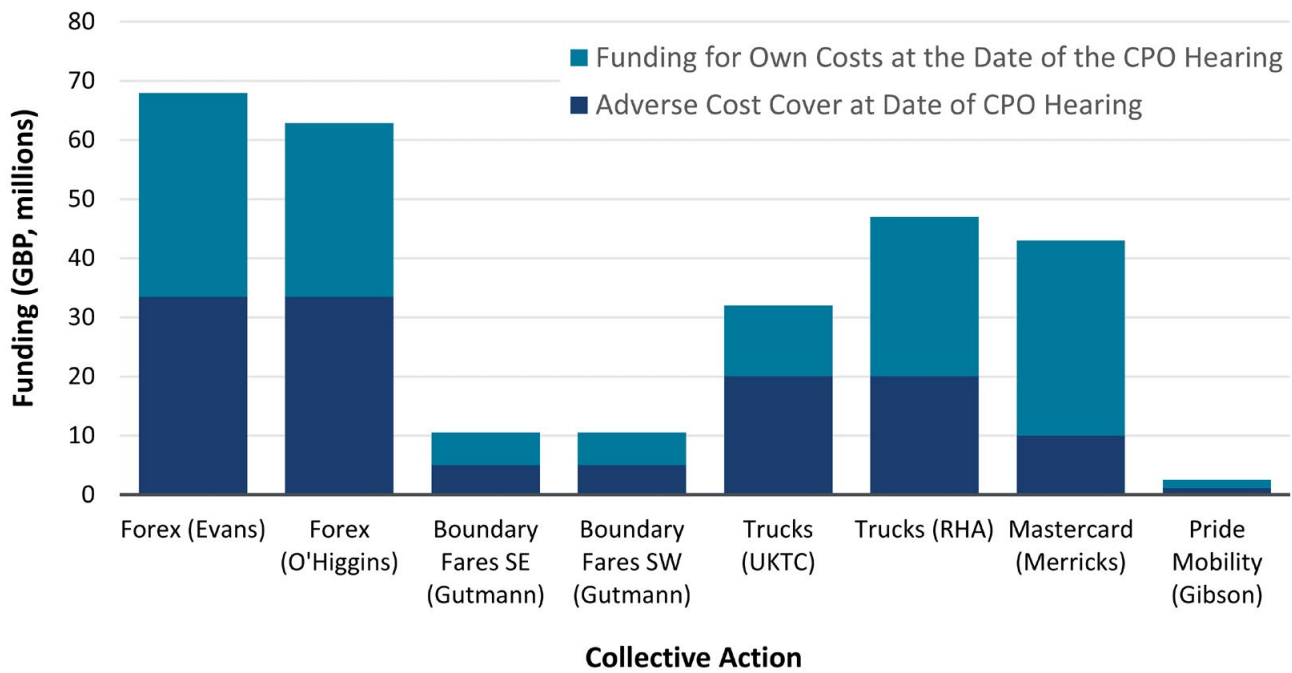
- All three respondents in the two Boundary Fares cases filed by Mr. Gutmann in 2019 applied to the CAT for permission to appeal the CAT's CPO judgment. It was turned down in a ruling dated 3 December 2021, and we await to see whether the defendants will now apply for permission to appeal to the CoA.

Funding

Over the period from 2016 to 2021, Woodsford Litigation Funding, Vannin Capital, and Therium are the three funders

who have each funded more than one registered CPO claim under Section 47(B) of CA98.

FIGURE 10: FUNDING FOR CLAIMANT’S OWN AND POTENTIAL ADVERSE COSTS AT DATE OF CPO HEARING, 2016–2021



- Woodsford has been particularly active, funding a total of four claims, although three of those are closely related claims with the same representative, Mr. Gutmann. They are also funding the Maritime Car Carriers claim.
- Therium funded both the Road Haulage Association’s claim and the *Forex* claim represented by Mr. O’Higgins.
- Vannin Capital (now acquired by Fortress) funded two claims, one against Apple and one against Google, both in 2021.

A significant number of additional funders registered their first claims during 2021. Specifically, Augusta Ventures,

Harbour, and Litigation Capital Management each funded one claim that was filed, while – as previously highlighted – Vannin Capital funded two registered claims.

As one might expect, the funding available for claims varies significantly across the cases, with the largest amount of funding in *Mastercard*, *Forex*, and *Trucks*. It will be interesting to see whether, over time, competition between potential class representatives manifests itself in greater protection for defendants against adverse costs risk in cases where there is a carriage dispute (*Forex* and *Trucks*).

Conclusion

Compared to the previous five years, there were several marked changes among CPO claims registered with CAT in 2021. Four changes stand out particularly. First, the increased number of claims registered overall. Second, the notable rise in stand-alone abuse of dominance cases, particularly in the tech sector. Third, the significant number of funders

launching competition claims in the UK for the first time. And, fourth, the speed-up of the process reflected in a notable drop in the average time between registering a claim and the CPO hearing. Looking forward, a larger number of active funders and a speedier process in the CAT may indicate that the year ahead will be an active one.

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