RESPONSE TO CALL FOR EVIDENCE

Opt-out collective actions regime review

Background

CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.

Opt-out collective actions affect a wide range of businesses across the economy, and have implications for consumers as legal action raises costs and deters innovation. This submission will focus on the impacts upon communications and technology firms, reflecting CCIA's membership, but most of the issues discussed affect the wider economy beyond the sector.

Scope and certification of cases

Q8. Is the current scope of the regime appropriate?

No.

Many cases are being brought, which reflect features of the market where a claimant believes that changes in behaviour might have increased competition. For example: whether or not logistics services should be combined as part of a wider e-commerce proposition; or whether or not a company collected as much data as it should have.[1]

These are speculative contentions about how markets should work. Right or wrong, and unlike more clear cut cases such as cartels, they are not allegations that companies have breached a well-understood and predictable law.

In significant part, these speculative and novel contentions are articulated in the form of an alleged abuse of a dominant position. Class representatives here rely on: (a) the conduct which constitutes an 'abuse' being an open list; and (b) the general irrelevance of merits at the certification stage. They ask the court to exercise a quasi-legislative, quasi-regulatory function (i.e. creating new rules of conduct, ex post facto).

Illustrating this problem: the Digital Markets, Competition and Consumers (DMCC) Act 2024, empowers the Competition and Markets Authority (CMA) to create new conduct requirements. Even at this early stage, many of the proposed conduct requirements cover similar ground to certified opt out collective actions. If the creation of new rules by the CMA is required, it is hard to argue that there was an evident and predictable set of rules that governed this behaviour beforehand, such that retroactive enforcement in relation to that behaviour, by way of the collective action regime, is appropriate. For the same reason,

[1] Dnes, S. (2025) gives Stephan vs Amazon and Gormsen and Meta as examples of this phenomenon. https://iea.org.uk/wp-content/uploads/2025/09/IEA_DP141_Refocusing-class-actions_v3-Digital.pdf

the CAT should await the outcome of regulatory enforcement, as discussed in response to Q10 below.

The regime's unpredictability means that the deterrent value of these cases is likely to be limited, as companies cannot know what behaviour they are meant to avoid. At the same time, the wider costs for businesses and consumers will be greater, as there is a general increase in the risk of developing new services in the UK; collective actions certified will constrain and distract from investments in innovation; and harm to the UK's wider reputation as a destination for investment (undermining wider Government policy). The impact on firms is significant, as recent research confirms:[2]

> *"Even if you think a claim is meritless, billions in potential damages hanging over you is hugely distracting. It takes executive time, worries shareholders, and weighs on risk management."*

Interventions in digital multi-sided markets,[3] in particular, will have a high risk of creating unintended consequences. Other stakeholders, including consumers, in those multi-sided markets can lose out either because of the overall effects on innovation and quality described above, or because litigation risk from other sides of the market reshapes those markets in ways that undermine their interests. Even in a regulatory context, it can be challenging for other parties that are affected, often less directly, to ensure that they are not collateral damage when the policies of the markets in which they operate are constrained.[4] An adversarial public collective action claim is poorly suited to avoiding these unintended consequences.

Claims should only be certified in cases such as cartels where there is a clear breach of well-understood competition law (consistent with the European courts' approach to "by object" infringements),[5] not based on external claims about how services should behave or should have behaved by retrospectively deeming such conduct as abusive.

To address these issues, claims premised on allegations of abuse of dominance should either be excluded entirely from the opt-out regime, or at a minimum limited to follow-on claims only. This would remove the most speculative and problematic claims.

Q9. How are cases which cut across multiple areas (for example, environmental protection or data) dealt with?

No response.

[2] https://kendaladvisory.com/wp-content/uploads/2025/10/Kendal-Class-Actions-Report-2025.pdf
[3] Many digital services are multi-sided markets, i.e. their function is to connect other parties, e.g. advertisers, consumers and content creators.
[4] For example, airlines have recently engaged with the CMA's SMS investigation into Google Search, arguing that its Flights functionality plays an positive role for their sector, complaints from specialist search engines notwithstanding, and action by the CMA which constrained Google Flights would hurt their sector.
[5] See, e.g., Case C-67/13 P Groupement des cartes bancaires v Commission, EU:C:2014:2204.

Q10. What approach should be taken if the same issues are concurrently being investigated by the CMA and brought before the CAT?

Generally speaking, simultaneous private enforcement will be disruptive of the CMA process, particularly the more open and collaborative approach envisioned for the DMCC.

Claims (including opt-in claims) should therefore be automatically stayed where regulatory investigation / enforcement is ongoing. This would:

- Allow regulatory bodies to conduct investigations without duplicative, parallel legislation.
- Prevent inconsistent outcomes and ensure integrity of both the CMA investigation and litigation before the CAT.
- Avoid prejudicing parties, notable defendants', rights of defence.

Many existing opt-out cases relate to companies for which the CMA has already proposed SMS designation(s), or where it is plausible that they will do so in the future.

This will risk regulatory incoherence, where a court says one thing and a regulator another. The threat of an opt-out collective action will also be a significant deterrent to any engagement with the SMS designation and conduct requirements process which might encourage legal action. For example, sharing information with the CMA (which is often then published) that might be used as a rationale (however thin) for a collective action could risk significant disruption for the regulated company. Any agreement with the CMA that could be construed as an admission of guilt could lead to follow-on claims.

At the same time, SMS conduct requirements can directly achieve the behavioural change that might be hoped for from the deterrent effect of a collective action regime. This means that collective actions end up largely serving as a means to transfer money from companies operating digital services mostly to litigation funders. The direct costs and economic uncertainty created by the regime is not justified by a behavioural outcome that would otherwise be unrealised.

If some companies operate services subject to SMS designation under the DMCC, the rationale for private enforcement as a means to fill gaps in CMA enforcement is further weakened. Regulated companies would be required to fund the Digital Markets Unit (DMU), a dedicated unit within the CMA intended to address the issues raised in many opt-out collective actions. It is disproportionate that the same companies would be expected to pay both the significant costs of funding this unit (and complying with the DMU's monitoring and interventions) and the costs of resourcing litigation funders and other stakeholders seeking to bring parallel private actions ostensibly to police the same behaviour. It is also implausible that over the medium-term DMU will be unable to supervise the relatively small number of relevant companies (which are themselves obliged to comply with DMU's powers of investigation and monitoring, under threat of penalty) thus necessitating a separate role for private enforcement.

CMA should be notified ahead of any cases brought to the courts and there should be a presumption of a stay to ensure alignment and minimise the risk of regulatory incoherence.

Generally speaking, services proposed for SMS designation, or subject to SMS designation, should not be subject to an opt out collective action prior to designation and the imposition of conduct requirements. If the CMA wishes to go ahead with SMS designation while there are outstanding cases, those cases should be stayed in favour of allowing the CMA's investigation to take its course.

Q11. Do you consider that there is currently sufficient certainty for businesses in relation to the level of liability they face under the opt-out collective actions regime?

Costs are highly uncertain as many cases relate to very large numbers of users, very small per capita damages and indirect commercial relationships in complex multi-sided markets.

The value of claims often appears to be inflated. By way of illustration, the *Merricks* claim – which was initially valued at £14bn – settled for £200m. That is a significant difference which is indicative of the inflated claim values which businesses face. [6]

There should be provision for regular reassessment of claim values as claims progress by the CAT. Inflated claim values – which do not serve the interests of justice or class members – are not only destabilising to businesses, but also present a significant barrier to settlement (which, in turn, unnecessarily prolongs litigation).

Q12. Are there circumstances where it would be appropriate to provide protection to businesses from liability?

As noted above, where services are subject to DMCC regulation or have made CMA commitments, businesses should be protected from liability, as the need for a deterrent is no longer relevant and the potential for disruption of innovation and regulatory oversight is greatest.

Q13. Should there be specific requirements in order to be eligible to act as a class representative?

No response.

Q14. Do you feel the current rules for class representatives are clear enough regarding the relationship between the class, class representative and funder and how to manage potential conflicts of interest?

No response.

[6] Dnes (2025) recommends that "Funders should be required to commit to an estimate of damage and to pay it out to a portion of the class (e.g., 5% of the class) before the Tribunal grants the right to continue to pursue a collective lawsuit".https://iea.org.uk/wp-content/uploads/2025/09/IEA_Class-Act.pdf

Q15. Should there be more defined rules on what cases can be certified as opt-out proceedings?

Yes. If the objectives of the opt-out regime are to obtain access to justice, fulfil a deterrence function, and fulfil a compensatory function, in a way that does not unduly disrupt markets and businesses, then several specific reforms are needed. The proper and fair administration of an opt-out regime that achieves the foregoing requires at least the following reforms:

1. Limit opt-out claims to clear breaches of established competition law principles: This is discussed at Q8.
2. Meaningful certification threshold: The bar is too low. It invites speculative claims, which are not appropriate for certification on an opt-out basis. The certification would be made more meaningful by reform in one or all of the following ways:
    a. Reversing Merricks – it is not appropriate that any claim pass the suitability test merely if it is 'more suitable' than individual proceedings: collective proceedings should be suitable in and of themselves. In addition, Merricks (and the Court of Appeal in judgments which followed Merricks) has left the CAT unable to meaningfully address methodological issues at certification – thereby debasing the "plausible and credible" methodology requirement that came out of Pro-Sys v Microsoft.
    b. Cost-benefit analysis – this is rarely engaged and, where it has, it has not been enough to prevent certification on an opt-out basis: in Gutmann, the cost-benefit analysis weighed against certification, but certification was still granted.
    c. Lack of common issues as a bar – it is perverse that a class may contain: (i) individuals who did not suffer any loss at all; (ii) individuals who suffered de minimis losses; or (iii) individuals who suffered varying degrees of loss because they have different preferences in selecting products or would have made different product choices. Lack of common issues amongst a class ought to be a bar to certification.
3. Indirect claims prohibition: given the prevalence of speculative and/or economically inefficient claims, there needs to be a prohibition of indirect claims, a form of indirect purchase rule. This would require claims to be consolidated at a more appropriate point closer to the alleged harmful behaviour. It would prevent significant wasted legal costs being incurred by both sides earlier in the process.
4. Demonstrate genuine class interest: Low take-up of compensation in opt-out proceedings is illustrative of the opt-out regime failing to achieve its compensatory functions and expand access to justice. The reality is that many claims are being brought on behalf of people who have limited interest in achieving high levels of distribution (if any), and are run in significant part for the benefit of law firms and litigation funders. A requirement that a class representative must demonstrate a degree of class interest in the claim (for instance, by requiring a percentage of class members to opt-in before a case is certified on an opt-out basis) would allow the opt-out regime to more efficiently achieve the goal of access to justice.
5. No second chances: The CAT has generally stayed applications for opt-out proceedings that are unsuccessful at the certification (or carriage) stage, rather than dismissing them – effectively giving class representatives a 'second chance' to reformulate their claim. One such example is Gormsen v Meta (Gormsen's

methodology required a "root-and-branch re-evaluation" to be certified on an opt-out basis). This is unsatisfactory – particularly where these claims already relate to novel and speculative allegations – and generates considerable uncertainty for businesses subject to these claims. While it will always be open to a fresh PCR to seek to advance the same claims on a different basis, where a PCR has advanced a claim that is uncertifiable in its current form, the CAT should be slow to accommodate that same PCR's attempts to certify one way or another.

Distribution of funds

Q27. How are funds distributed among consumers?

No response.

Q28. Are consumers made sufficiently aware of proceedings/their right to claim their share of damages by current notice requirements?

There has, to date, been an obvious failure of the opt-out regime to achieve its compensatory function (with only around 2% of class members claiming sums in the Gutmann case). There should be a clear incentive on class representatives to communicate rights to claim to class members, based on returning any funds not distributed to the defendant.

Q29. The quantum of damages can vary from case to case. For example, out of the recent Merricks settlement of £200 million, £100 million was set aside for class members. Of this, individual class members can expect to receive approximately £45 each and no more than £70. To what extent do you consider that this return is meaningful for individual class members?

It is important to note that many of the cases currently being raised in digital markets, in particular, involve much smaller per capita damages, which are almost certainly not meaningful for individual class members. This, in turn, affects take-up and undermines the compensatory function of the opt-out regime.

Q30. What should happen to unclaimed or residual damages?

These should be returned to the defendant, particularly if no change is made to protect against cases that don't clearly breach pre-existing rules.