CCIA response to Initial Scoping Questionnaire

Consumer Class Actions

Question 1: What would be the benefits associated with the introduction of an opt-out consumer class actions regime? Please explain the basis for your views. If your views are informed by the operation of another class actions regime or regimes, either in this jurisdiction or elsewhere, please provide relevant details.

The traditional case for private enforcement rests on the idea that there is a set of cases that public enforcement is unable or unwilling to address on a reasonable timescale. Public enforcement agencies might have limited scope and resources. They might make a strategic decision to focus on cases with broad social, economic or political relevance.

The Digital Markets, Competition and Consumers (DMCC) Act regime is intended to address precisely these concerns and has only been in place for 18 months. The Competition and Markets Authority (CMA) has used its new powers quickly. It opened investigations into 14 businesses in the first year and issued 157 advisory and warning letters. In the first of those decisions, it imposed a £4.2m penalty and secured more than £760,000 in refunds for over 80,000 customers.[1] Those refunds were paid automatically to the card used for the purchase, or by cheque, without customers needing to take any action.

The scale of these cases individually is modest, but it is exactly these kinds of lower-value, higher-volume cases that an opt out regime might otherwise be intended to address. Given more time, CMA enforcement is likely to grow to address even more of these cases. To the extent that private enforcement addresses higher-value, lower-volume cases, that is by its nature a better fit for an opt in approach. In addition, the Civil Justice Council's 2025 recommendation to increase the availability and use of regulatory and consumer redress schemes offer a more direct route to the Law Commission's objectives than opt-out litigation. There is no evident gap that an opt out consumer regime is appropriate to fill.

The incentive for litigation funders and law firms in an opt-out collective action regime (reflected in the cases brought under the existing competition regime) is to pursue large, speculative claims. Large claims have a greater potential return and are therefore more attractive to litigation funders (evidence to the Government consultation on the competition regime suggests the threshold for a viable claim might be £500m in value). Speculative claims, based on assertions about how markets or consumer services should work, do not require the labour-intensive evidentiary work that comes with challenging breaches of well-understood laws.

The track record of the opt-out regime as it exists reflects this incentive, with few claims reflecting a breach of a well-understood law and most reflecting assertions about how

1 https://competitionandmarkets.blog.gov.uk/2026/04/17/direct-consumer-enforcement-one-year-on/

markets should function, which are better addressed by the CMA as a regulator. At the same time, the vast majority of cases concern large global technology companies, a segment for which gaps in public enforcement are particularly unlikely with the CMA operating a dedicated Digital Markets Unit. This kind of duplication is likely in the event of a consumer regime whose scope overlaps with the work of the CMA and other regulators, such as Ofcom on online safety and the ICO on data protection.

Question 2: What would be the risks associated with the introduction of an opt-out consumer class actions regime? Please explain the basis for your views. If your views are informed by the operation of another class actions regime or regimes, either in this jurisdiction or elsewhere, please provide relevant details.

There are multiple risks associated with these proposals, which would significantly broaden the scope of an evidently dysfunctional competition opt out collective actions regime, which the Government acknowledges requires changes. Recent research by the US Chamber of Commerce Institute for Legal Reform confirms that tort costs as a percentage of GDP are growing faster in the UK than anywhere else in the world, putting the UK on a trajectory to rival or exceed the United States in litigation exposure.[2] Crucially they would do so without that regime being reformed, before any of the changes proposed by the Government are shown to have resulted in a regime which reflects the interests of harmed parties or the UK's wider economic interests.

Undermining business and growth. The competition opt out collective action regime imposes large costs on business, with rapid growth in the number and reported scale of claims. The lopsided risks associated with inflated claims create an incentive for companies to settle even where claims clearly are not meritorious ("blackmail settlements"), creating a transfer from productive businesses to litigation funders and law firms. This was illustrated in Gutmann v Stagecoach South Western Trains where one company settled for many millions, while the remaining defendants fought the claims to trial and were vindicated in the CAT. Lawsuits are also a protracted distraction for those businesses' employees, customers, and business partners. All of this undermines the ability of those companies to invest and grow. The European Centre for International Political Economy found that the cost of mass litigation to the UK economy could reach close to £18 billion.[3] Extending this to consumer claims would likely increase the scale of the risk and the number of businesses affected.

Undermining innovation. Most competition opt out collective action cases by value have been directed at global technology companies. This does not reflect the consumer experience. In its review of mobile ecosystems, for example, the CMA acknowledged that many consumers reported they do not switch providers because they were satisfied with their mobile operating system in its consumer survey. Rather, it reflects that these markets

[2] https://www.uschamber.com/lawsuits/international-tort-costs
[3] https://ecipe.org/publications/impact-of-increased-mass-litigation-in-the-uk/

are novel and complex and therefore the scope for speculative claims is high without the rigour of a discerning regulatory process.

The same is likely to be true if the regime is extended to consumer law. Digital services are likely to face a particular threat of lawsuits as it is easier for litigation funders and their lawyers to devise plausible-sounding consumer harms. The growth of those digital services (generating large consumer benefits) will mean that the potential gains from such a lawsuit are large. A consumer regime may be particularly harmful to innovation as it could also affect early-stage businesses without the same commercial scope required for competition cases to be credible. Such businesses also lack the resources to contest even meritless litigation, granting even greater leverage to litigation funders and law firms bringing speculative claims.

Undermining regulatory efforts. The UK has generally pursued a regulatory model that emphasises flexibility, engagement and regulatory discretion. This can be seen, for example, in the contrast between the EU Digital Services Act and the UK Online Safety Act, and the EU Digital Markets Act vs the UK DMCC Act. In both cases, the EU laws contain much more prescriptive sets of requirements and prohibitions, whereas the UK laws provide broad powers to the relevant regulator (albeit within important legal bounds, reflecting other priorities such as investor confidence and free speech). This means that it is important for regulators and regulated companies to be able to maintain an open, collaborative and, where appropriate, transparent engagement over how the regulations are being implemented and how the regulator should use its discretion. Combining this with a legal regime where any such engagement could lead to speculative legal action will chill regulatory engagement; reduce the quality of information upon which decisions are based; ultimately worsen outcomes for the consumers these cases purport to represent; and have harmful wider economic effects that, unlike regulators, litigation funders will have little reason to consider.

Undermining the reputation of the legal system among the public. The extremely low recovery rates seen in opt out claims thus far are an obvious risk to the reputation of the legal system. The regime has already seen both extremely low recovery rates (under 2% in Merricks vs Mastercard; under 1% in Gutmann v Stagecoach South Western Trains) and disputes between class representatives and litigation funders (between Walter Merricks and the funders of Merricks vs Mastercard). Expertise, information and power in consumer claims are far from equal between litigation funders and law firms on one hand, and the represented classes on the other. Thus, a failure with severe consequences for the reputation of the wider legal system seems almost inevitable if the regime is not improved.

Undermining the reputation of the legal system among businesses. The reputation of the UK as a centre for commercial law would also be undermined to the extent that the country became known as a venue for speculative and extractive legal threats. Which? vs Qualcomm, for example, saw the parties incurring £77.4m in costs before Which? abandoned the claim and conceded it had no foundation: that Qualcomm had committed no breaches of competition law and had not engaged in practices that raised consumer prices.[4]

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https://www.brickcourt.co.uk/news/detail/consumers-association-which-applies-to-withdraw-480m-collective-action-against-qualcomm-following-trial

This would in turn undermine what has traditionally been a source of strength in attracting investment and trade to the UK.

Question 3: What features should be included within the design of an opt-out consumer class actions regime to improve access to redress for consumers, including by ensuring that compensation is distributed to affected class members? Please explain the basis for your views. If your views are informed by the operation of another class actions regime or regimes, either in this jurisdiction or elsewhere, please provide relevant details.

If the Law Commission were to recommend the creation of such a regime, despite the lack of apparent need and significant risks, any new regime should aim to avoid a situation where opt out claims are generally the most attractive avenue for claimants, versus other means that are more likely to secure consumer redress without the same wider costs. This should include excluding claims at the certification stage where the CMA is better placed to act using its public enforcement powers. In addition, any claims should only be certified on the basis that they are sufficiently small that the CMA is not able to address them. It should also include expecting at the certification stage that opt-in claims should at least be the norm. Opt-in claims generally provide better potential for maximising class distribution over returns to funders and lawyers, and reduce pressure to settle weaker claims.

Where claims do go ahead, the share of returns that litigation funders and claimant law firms are entitled to receive from a successful judgment or settlement should be capped. Germany imposes such a cap at 10% and the Netherlands at 25%, for example.

Question 4: What features should be included within the design of an opt-out consumer class actions regime to ensure that it promotes the efficient conduct of litigation at proportionate cost? Please explain the basis for your views. If your views are informed by the operation of another class actions regime or regimes, either in this jurisdiction or elsewhere, please provide relevant details.

If the Law Commission were to recommend the creation of such a regime, despite the lack of apparent need and significant risks, any regime should include mechanisms to reduce costs for cases proceeding.

This could include, for example, giving the courts the discretion to order costs budgeting where appropriate, which should operate as it currently does in the High Court: as a framework for recoverability of costs, not a cap on actual expenditure that would prevent

parties from fully pursuing or defending claims. To avoid the need for costs budgeting, the court could more frequently order transparency about costs on an informal basis. Generally speaking, defendants (spending their own money) do not warrant the same kind of scrutiny as class representatives (spending money that would otherwise go to the class they claim to represent).

Question 5: What features should be included within the design of an opt-out consumer class actions regime to ensure that it does not promote speculative claims that are without merit? Please explain the basis for your views. If your views are informed by the operation of another class actions regime or regimes, either in this jurisdiction or elsewhere, please provide relevant details.

If the Law Commission were to recommend the creation of such a regime, despite the lack of apparent need and significant risks, it should learn from the acknowledged weaknesses in certification under the competition regime. The courts should generally be expected to consider, as part of a rigorous test of merits (and of costs against benefits), before any claim can proceed, at least:

- Full anticipated costs of proceedings.
- Success fees.
- Funder returns.
- Anticipated distribution fees.
- Whether an alleged problem is better addressed through the CMA's consumer powers.
- Whether an opt-in claim would be more appropriate, as such claims generally provide better potential for maximising class distribution over returns to funders and lawyers and reduce pressure to settle weaker claims.
- Whether the case would duplicate public regulatory regimes, e.g. other regulators, whether they relate to alleged privacy, security or online safety harms addressed by Ofcom; or the FCA for claims relating to financial services. There should be no risk of double recovery and inconsistent outcomes where public redress and private proceedings concern the same loss.

The EU Representative Actions Directive provides a useful example of a more controlled model. For cross-border actions, designated independent, non-profit qualified entities bring proceedings, with transparency about funding and safeguards against conflicts of interest. Notably, although the Directive left the choice of opt-in or opt-out to each Member State,

the overwhelming majority chose opt-in. Only the Netherlands and Portugal operate opt-out regimes, and these are not without their challenges. Adopting a consumer opt-out model would place England and Wales as an outlier among comparable European jurisdictions.