Exton Advisors

Opt?Out Collective Actions Regime: Analysis of Responses to DBT’s Call for Evidence

Lucy Glyn · Monday, October 27th, 2025

Introduction

Those respondents who, like us, have a generally pro-regime, claimant-aligned perspective share a core position: the regime should be preserved and refined, not curtailed. Responses focus on a number of key points.

A decade on from its introduction, the Department for Business and Trade has commenced a review of the opt-out collective action regime in the Competition Appeal Tribunal. With the deadline for responses to the DBT’s call for evidence having now closed, a number of respondents have been publicising their submissions. These range across law firms and members of the bar, class representative and consumer bodies, litigation funders, legal think tanks, charitable organisations and business aligned advocacy groups. This article analyses key themes and some differing perspectives emerging from the submissions we have reviewed (see index below).

Executive Summary

Those respondents who, like us, have a generally pro-regime, claimant-aligned perspective share a core position: the regime should be preserved and refined, not curtailed. Responses focus on a number of key points.

The majority of responses are broadly supportive of the regime, which is viewed as an essential mechanism for access to justice that complements public enforcement, for the benefit of both consumers and SMEs. Although inevitably there are points of divergence, there is a general consensus that the regime remains relatively young and is only now starting to generate the jurisprudence and outcomes that are needed to allow sensible assessment of its performance. As such, most respondents caution against structural curtailment at this stage and instead favour targeted refinements with a view to stabilising funder appetite, improving procedural efficiency and reducing costs.

One universal theme is commercial litigation funding, which respondents overwhelmingly regard as indispensable to the viability of the opt-out regime. However, pricing restrictions imposed by *PACCAR* have impacted funding appetite, whilst cost pressures are pushing meritorious but lower value claims out of the market. Although views differ, respondents generally emphasise the need for greater predictability around funder returns, robust but flexible CAT oversight of funding arrangements and pragmatic measures to widen funding options, such as a potential "Access to Justice Fund" and removing the prohibition on damages-based agreements.

Business-aligned commentaries that are more sceptical of the regime focus on its potential economic costs and perceived funding issues, urging stronger regulatory guardrails for funders. One defence-side firm provides factual observations and proposes changes designed to improve predictability, such as early indications on funder returns and more realistic early damages valuations.

The claimant perspective

Those respondents who, like us, have a generally pro-regime, claimant-aligned perspective share a core position: the regime should be preserved and refined, not curtailed. Responses focus on a number of key points.

Redress

The regime is delivering meaningful private enforcement that complements limited public enforcement capacity. The deterrence and behavioural?change value of collective actions should not be underestimated. Narrowing scope or imposing new merits hurdles now would be premature and risks chilling an ecosystem that is still maturing. The regime may in theory be 10 years old, but in practice it is only since the Supreme Court's December 2020 decision in *Merricks* reframing the bar for certification that collective proceedings have gained any real traction.

Litigation funding

As the CAT itself has repeatedly acknowledged, litigation funding is critical for high cost, expert-heavy collective proceedings. Respondents urge legislative measures to restore the pricing flexibility removed by *PACCAR*, alongside light?touch regulation focused on transparency, independence and capital adequacy.

On funders' returns, oversight by the CAT is accepted by many as necessary to prioritise class recovery, but respondents warn that overly rigid caps would deter investment. Predictability of stakeholder returns is generally acknowledged to be vital if commercial investment is to be attracted moving forward.

There is support for the CAT's trajectory toward greater funding transparency – including publication of non?confidential LFAs, plain?English summaries and disclosure of funder identity – so long as it is tempered by the need to avoid conferring tactical advantage or compromising privilege/confidentiality.

Respondents highlight that, in line with evolving jurisprudence, modern funding agreements vest strategic control in the class representative, often supported by an advisory committee, and include binding KC determination mechanisms for settlement disputes. The CAT's ultimate discretion as to the approval of settlements agreed and the distribution of any proceeds to claim stakeholders (whether before or after distribution to the class) serve as important backstops.

Funding alternatives

Several respondents are supportive of an "Access to Justice Fund" (potentially capitalised from undistributed damages rather than via a funder levy) and permitting, with appropriate safeguards, damages-based agreements for claimant-side solicitors in opt?out claims. In circumstances where funders require a range of criteria to be satisfied before investing in a case, including a standard requirement that the expected damages from a claim should exceed the estimated cost by a ratio of at least 10:1, these alternatives are viewed as ways to complement, not replace, commercial funding where quantum or other risk factors are a deterrent.

Efficiencies

Case costs are higher than ever. Our internal data suggests that average claim budgets have risen from £10-15m to £20-25m (with some in excess of £30m) over the last 5 years. This has been driven by a number of factors including cost inflation, increasing expert fees (in part driven by complex economics and expert-led disclosure) and higher ATE insurance premia driven by defendant spending.

Respondents advocate targeted cost management (e.g. budgeting/capping for defendants and fast?track variants for suitable follow?on matters) as a way to increase funding appetite for lower value but nevertheless meritorious claims. Granting the CAT discretion to allow certain funding costs to be recoverable from defendants may also discourage disproportionate defence spending in appropriate circumstances. Improving procedural efficiency is also viewed by many as vital.

A government-hosted information portal is identified as an option to help improve public awareness and, crucially, distribution rates.

Scope

Rather than contraction, some respondents favour an ultimate expansion of the opt?out mechanism beyond competition to other mass?harm areas such as consumer protection.

The defence perspective

Linklaters offers data-driven observations, noting the predominance of large, standalone abuse of dominance claims and the small per?capita damages involved. The data provided shows, amongst other things, that approximately 72% of collective proceedings have been brought on a standalone basis and 63% have alleged an abuse of dominance.

On funding, potential mismatches between funder recovery and class recovery in some settlements are highlighted. It proposes non?binding indications from the CAT at certification as to a reasonable return range for different outcomes, as well as mechanisms to encourage realistic early damages estimates (e.g. court fees linked to claim value) and a pre?action protocol to foster earlier engagement and potential settlement. It also canvasses certification refinements including stricter merits thresholds and elevating the cost-benefit analysis.

Business-aligned advocacy group Fair Civil Justice calls for statutory regulation of funders focused on transparency, capital adequacy, and minimum claimant protections. CCIA, a trade association representing technology firms, argues for limiting or excluding standalone abuse of dominance claims from the opt?out regime. Also proposed are stays where CMA/DMCC processes are underway, tighter certification requirements (including a class-interest threshold and reversing the Supreme Court's relative suitability approach in *Merricks*), regular reassessment of headline damages and stronger incentives to maximise distribution (including reversion of undistributed sums to defendants).

Outlook

The weight of evidence we have reviewed favours patience, continuity and targeted refinement rather than overhaul. Whilst there is clearly work to be done, more data is required before any sensible conclusion can be reached on the success or otherwise of this regime. The majority of submissions support our view that modifications should focus on stabilising return expectations for funders (including reversing *PACCAR*), broadening financing options, implementing much-needed procedural improvements and codifying the CAT's emerging practice together with the latest industry standards on key funding issues.

Much of this territory has already been traversed by the Civil Justice Council in its Final Report on litigation funding published in June, the recommendations of which are yet to be taken up. Nevertheless, these steps would go a long way to preserving investor appetite, promoting access to justice and maintaining the UK's position as a competitive forum for fair and efficient collective redress.

Index of responses reviewed

Access to Justice Foundation
Computer & Communications Industry Association
Charles Lyndon
Class Representatives Network
Competition and Markets Authority
Exton Advisors
Fair Civil Justice
General Council of the Bar of England and Wales
Geradin Partners
Hausfeld & Co LLP
International Legal Finance Association
Linklaters LLP
Milberg London
Mishcon de Reya LLP
Society of Labour Lawyers
Stephenson Harwood LLP
Stewarts
Which?

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