

ILFA responds to the opt-out collective actions regime review call for evidence

ILFA has responded to the UK Government's call for evidence [\[LINK\]](#), seeking feedback on access to, and the operation of, the opt-out collective actions regime for competition law claims.

The full submission can be read here [\[LINK\]](#), but we have summarised our contribution here:

1. Our starting point is that a review at this stage is premature, as the regime is still at an early stage of development.

The majority of the 59 opt-out cases issued since 2015 haven't progressed past the collective proceedings order stage. Just one has gone to a judgment and three have reached settlements. There is not enough evidence yet for the Government to draw reliable conclusions, and as this is a precedent-based system, the regime needs time to bed in.

2. The opt-out collective redress mechanism is achieving its original policy intent of empowering consumers and businesses to seek redress for harm suffered and to maintain competitive markets to promote growth

In 2015, the Government wanted simpler routes to compensatory redress that complement public enforcement by increasing expected liability while deterring bad business practices.

Those objectives remain valid today. The growth - still a small number - in cases pre-PACCAR is an indicator of the success of the regime, while the CAT plays a gatekeeper role that enshrines safeguards in the system.

3. There is no principled justification for not expanding the CAT beyond competition law to encompass other claims and causes of action.

The current system only creates satellite arguments around the threshold and as claimants are forced to analyse their claim through a competition lens in order to access the process. Class actions that benefit businesses which may face anti-competitive practices.

4. Greater certainty is needed on funders' returns to ensure cases can continue in the CAT. Ending uncertainty about the enforceability of litigation funding agreements and agreeing terms earlier in the process could provide much-needed reassurance.

As the CJC recommended, the Government should reverse the effects of PACCAR with urgent legislation. Bringing forward the approval of funding terms to the COP stage so there is an assumption that the funding terms will stand unless there is good reason to depart from could provide greater certainty for investors in the CAT.

5. While consumers, SMEs and public bodies are using the opt-out regime - with all cases backed by funding - the high cost of litigation prevents smaller claims from being pursued.

Costs in the CAT tend to be high as a result of the nature and complexity of proceedings, the resources of defendants, the size of legal teams, and the challenges at every step of the process. These high absolute costs and investor uncertainty - for instance if the CAT cuts a funder's return at the conclusion of a case, could affect whether funders are sufficiently confident to invest. Cost budgeting, as recommended by the Civil Justice Council, cost capping, and introducing strict procedural steps are ways of managing costs. But that needs to be done without themselves inflating costs.

6. Defendants should, in certain circumstances, be liable for funding cost on top of damages.

The CAT should be able to order the defendant to pay the funding costs rather than this coming from undistributed damages. This would modify defendant behaviour by incentivising defendants not to run up costs and encouraging earlier settlement. As much of the pot should go to class members as possible, provided the other stakeholders are reimbursed in accordance with agreements. However, where there are undistributed damages that could be allocated separately between the defendant, the Access to Justice Foundation or another charity.

7. Class representatives could benefit from better support structures and guidance

Such guidance could cover the responsibilities of the representative and their team, how they can obtain independent advice on funding arrangements, appropriate governance structures for collective proceedings, and managing conflicts between parties. They could also benefit from access to advisory boards to provide oversight and guidance throughout the case.