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Response to Opt-out collective actions regime: call for evidence

Submitted on behalf of Dentons UK & Middle East LLP

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Introduction

Dentons welcomes the opportunity to provide its views on the UK's opt-out collective actions regime.

Dentons advises clients on complex competition disputes and has direct experience of advising parties in opt-out collective proceedings before the Competition Appeal Tribunal (**CAT**). Our responses to this consultation are informed by our involvement in *Justin Gutmann v First MTR South Western Trains Limited and Another* (*Boundary Fares*)[1] — one of the first opt-out collective claims brought in the UK — in which Dentons represented the settling defendant in the first substantive settlement achieved in an opt-out collective action and the first distribution of a settlement.

Drawing on this experience, we have responded to select questions to highlight practical insights into how the regime operates in practice, the challenges encountered by both proposed class representatives and defendants, and areas where greater clarity and procedural refinement could enhance fairness, efficiency, and access to justice.

We would be pleased to discuss any part of our response further with the Government.

Scope and certification

8 Is the current scope of the regime appropriate?

As is well known, claims can currently only be brought under the opt-out collective actions regime for breaches of competition law.

A feature of opt-out collective competition actions is the availability of aggregate damages. This makes the regime particularly attractive as it avoids the challenges faced in other opt-out group litigation, such as representative actions under CPR 19.8, of proving individual loss. As a result, claimants have been encouraged to bring proceedings as claims for breaches of competition law even where those claims cut across other areas such as consumer protection, data protection or environmental protection. Such claims are typically brought as standalone abuse of dominance claims with claimants seeking to reframe issues which may be more properly addressed under other doctrines. This adds a layer of complexity to the claim as the claimant needs to identify the correct market in which the abuse is alleged to have occurred, prove the defendant is dominant in that market or a related one and prove that the conduct amounts to an abuse.

In our view, the scope of the collective actions regime should be expanded beyond competition law infringements for a number of reasons. First, there is no principled distinction between competition law infringements and others. All the arguments that can be advanced in support of collective actions for competition (access to justice, reducing burden on regulators etc.) apply equally to consumer law, data protection and environmental law, as do all the arguments against such a regime (excessive burden on defendants, funder-led litigation etc.). Secondly, limiting the regime to competition law infringements means that, potentially meritorious claims for breach of consumer law, data protection and environmental law must

[1] Case No. 1304/7/7/19

be repackaged as unmeritorious claims for breach of competition law. This is damaging for the regime more broadly and is not in the interests of consumers or businesses. Finally, expanding the regime to other disciplines would avoid there being a distortion between the availability of redress to consumers and businesses harmed by competition law infringements and those affected by beaches of other laws and it would balance the availability of redress and a defendant's rights of defence by allowing the defendant's conduct to be tested within the proper legal framework, which may not be competition law. For certain cases it may also mean that redress is available more quickly and more cheaply because claimants would not be required to prove all the facets of a competition law claim. This would be to the advantage of claimants and defendants.

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

There is a tension in the current regime between being able to properly assess these infringements against their proper legal framework and needing to reframe such alleged breaches as competition law infringements in order for claimants to take advantage of the opt-out collective regime (see the response to question 8 above).

Until very recently, a number of such claims have been certified by the CAT as a result of the low bar for certification. These include, for example, *Boundary Fares.* The limited scrutiny of the merits of the claim at the certification stage (the class representative (**CR**) need only show that the claim is legally arguable) means that the process has become back-ended, with no substantive judgment following trial in any of these claims which examines the proper boundaries of the competition framework. This is creating uncertainty as to the types of claims that may be pursued.

The exceptions are Professor Roberts' claims against numerous water companies and Mr Dave Rowntree's claim against the PRS, both of which failed at certification on the basis that the CR had failed to allege a breach of competition law.[2] In each case, certification was refused on the basis of the way in which the claim was put, rather than because it was a multi-disciplinary claim. Indeed, the CAT acknowledged that Professor Roberts could have pleaded the claims as excessive pricing claims (a recognised abuse of dominance).

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

Private and public enforcement need to be balanced. That the same or similar issue is under consideration by both the CAT and the CMA (or other regulatory body) should not preclude the existence of the private proceedings, nor necessarily impede those proceedings.

However, collective claims are complex and cause significant disruption to businesses. Where issues can be dealt with upfront to afford certainty to businesses (e.g. through a CMA investigation, preliminary issue hearing, or split trial), they should be.

The CAT's active case management powers can be used to determine whether it would be more efficient to conclude the regulatory processes before proceeding with litigation. It is appropriate that such decisions remain at the CAT's discretion, having regard to factors including the likely duration of the regulatory processes and degree of overlap with the private

[2] See for instance, *Professor Carolyn Roberts v (1) Severn Trent Water Limited and (2) Severn Trent PLC* [2025] CAT 17 and *Mr David Alexander de Horne Rowntree v (1) the Performing Right Society Limited and (2) PRS For Music Limited* [2025] CAT 49

proceedings, as appropriate.

The CMA presently has discretion to intervene in private proceedings and has indicated it may intervene for reasons including managing the potential for diverging positions and avoiding the inefficient and duplicative use of public resources. This discretion should be retained. It will not be appropriate for the CMA to intervene in every proceeding in which the same or similar issue is (or may be) under consideration by the CMA, not least because the CMA's consideration of that issue may be confidential. The nature of the CMA's intervention can be managed by the CAT's case management powers as necessary and ought to be managed to promote consistency between public and private enforcement (insofar as possible) and certainty to businesses.

11 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?

Claim values in opt-out collective actions are significant with many CRs seeking damages in the hundreds of millions or billions. However, to date there has not been judgment in a claim where damages have been awarded and claims which have settled have done so for amounts significantly lower than the alleged damages amount. For instance, in *Merricks*, the CAT approved a settlement of £200 million whereas the initial claim was allegedly valued at around £14 billion. In the only case in which there has been a distribution to the class, take up by the class was extremely low as compared to the settlement amount. In the settled *Boundary Fares* claim, £25 million was available to be claimed by the class. However, the class claimed a maximum of £216,724.91.[3] The settlement was structured such that the CR could apply for his costs out of any unclaimed settlement monies up to £10.2 million. This was known as the 'Non-Ringfenced Costs Limit'. Any unclaimed settlement monies in excess of the Non-Ringfenced Costs Limit and up to £25 million would revert to the settling defendant. During the stakeholder hearing to determine the CR's costs application, it was agreed that in consideration of the low level of take-up, a payment of £4 million, less the amount distributed to class members (which will be no more than £216,724.91) should be made to charity, to the Access to Justice Foundation.[4] Therefore, the class will receive £4 million, either directly or as a 'cy-près distribution.

A consequence of the high damages amounts being claimed is that opt-out collective actions are difficult to settle at an early stage of the proceedings. Opt-out settlements must be approved by the CAT, who must be satisfied that the settlement is 'just and reasonable'[5]. To assist with this assessment, the CAT has stated that it will require opinions from the settling parties' counsel of this fact. Such an opinion will likely be very difficult to provide, particularly for the CR's counsel, where the proposed settlement amount is significantly lower than the damages claimed, unless parts of the claim have been knocked out during the proceedings. Consequently, there is a high bar for settlement of opt-out collective proceedings.

For all of these reasons, at this juncture in the regime, the true level of liability for businesses faced with an opt-out collective action claim is difficult to assess.

However, what is certain is that opt-out collective actions are incredibly expensive for both

[3] Payment of the settlement monies to class members who has submitted a valid claim is on-going as a number of claimants are still to provide valid bank details.
[4] £4m is roughly equivalent to the sum that was anticipated to have been distributed to class members if take-up had been around 7% (please see [2024] CAT 32 paragraph 78).
[5] Competition Appeal Tribunal Rule 94(8) (SI 2015/1648)

claimants and defendants and significant costs are being incurred on both sides. This is likely due to a combination of factors, including: the complexity of the claims, particularly those which are being brought on a standalone basis (i.e. where there is no prior regulatory finding); the detailed expert evidence required including in the case of standalone abuse of dominance claims to assess market definition, dominance, sometimes multiple theories of abuse, as well as quantum - the expert evidence may not be limited to economic expert evidence but may also include industry evidence and behavioural economic evidence; and the long-running nature of the proceedings, which stems in turn from the complexity of the claims. For example, the CR's costs attributable to the proceedings against one of the defendants in *Boundary Fares* was £18,785,316.[6] The claimant-side costs in *Merricks* were around £45m.[7] These amounts are striking.

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

The current competition law regime has tended to attract claims against larger corporations given the framing of claims as abuse of dominance claims. If the regime is expanded to include other disciplines, it is possible more claims will be brought against SMEs. In these circumstances, it may be appropriate to offer some level of protection from liability.

Further, this question raises an important discussion point as to what should be the interaction between the public and private enforcement of competition law. It may be appropriate to introduce provisions similar to those introduced by the Damages Directive[8] which would limit the damages exposure for a company that has co-operated with the competition agency e.g. as an immunity applicant, to its own direct participation in the infringement, rather than exposing that company to joint and several liability for the entire cartel.

Within the current regime, settlements may be agreed and approved on a no liability basis, particularly where a claim has been brought on a standalone basis. In those circumstances, it may be appropriate to provide for a greater reversion of any unclaimed settlement monies to the settling defendant as opposed to requiring a cy-près distribution of settlement monies where take-up by the class is low. These claims could be distinguished from follow-on claims in which there is a prior finding of liability.

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

A framework or guidance setting out authorisation criteria for CRs would be welcome — both from the perspective of claimants and defendants. Such a framework could provide greater clarity and consistency, helping to assess whether a CR is acting in the best interests of the class and ensuring that claims are brought by appropriately qualified and independent representatives.

However, this needs to be balanced against the risk of over-layering the current regime, this is particularly so where the CRs in the claims filed to date are often highly regarded and experienced individuals within their respective fields. Introducing overly prescriptive requirements could increase procedural complexity, lengthen the certification process, and

[6] CR's (Non-Confidential) Skeleton Argument (dated 5 September 2025) for the Stakeholder Hearing paragraph 22.
[7] Excluding costs recovered from the defendants (please see [2025] CAT 28 paragraph 148).
[8] Directive 2014/104/EU

raise litigation costs, thereby reducing accessibility to the regime and undermining its effectiveness.

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

It would be beneficial for Litigation Funding Agreements **(LFA)** and Notice and Administration **(N&A)** plans to be subject to more detailed scrutiny at an earlier stage of proceedings.

A more rigorous examination at the certification stage should include a careful assessment of who the class is and the practical ability to distribute redress effectively. N&A plans should demonstrate that class members can be identified and compensated in a fair and efficient manner, including any safeguards that need to be in place to achieve this (e.g. putting class members on notice to preserve any evidence that can be used to prove claims at the distribution stage). Similarly, LFAs should be reviewed to ensure that the funders' share of any settlement or damages award is fair and proportionate, taking into account the returns due to the class given that one of the principal motivations of the opt-out regime is to improve access to justice / redress for class members. We note that this approach aligns with Recommendation 20 of the CJC's Final Report on the Review of Litigation Funding which calls for the court to consider whether the funder's return is fair, just and reasonable.

ADR, settlement and damages

17 Voluntary redress schemes were introduced by way of amendments to the Competition Act 1998 through the Consumer Rights Act 2015. They offer an avenue for redress by way of schemes voluntarily set up by businesses and approved by the CMA.

Are you aware of the option of voluntary redress schemes and under what circumstances a voluntary redress scheme could be used?

Other jurisdictions with more established class action regimes, such as Canada, have made effective use of mechanisms similar to voluntary redress schemes **(VRS)** to resolve disputes outside of litigation. In the UK, Rule 79(2)(g) of the CAT Rules 2015 expressly recognises the availability of VRS as a factor in assessing whether claims are suitable for collective proceedings. Likewise, Rule 85, which governs revocation of collective proceedings, refers back to Rule 79. This suggests that a VRS could, in principle, be relied upon both to prevent certification of collective proceedings and to revoke certification if appropriate redress has already been provided to the class.

That said, the use of VRS to resolve collective claims remains untested, and there is currently limited certainty as to their legal consequences. In particular, it is unclear whether implementing a VRS that provides adequate redress to the class would bring collective proceedings automatically to an end. Greater clarity is needed to provide certainty to both claimants and defendants.

One possible approach could be for the CAT to approve a VRS that aligns with the CMA's Guidance on the Approval of VRS for Infringements of Competition Law as appropriate, potentially in conjunction with an application for a stay, similar to a collective settlement approval order application. This would provide greater predictability for defendants and could encourage the use of VRS as a pragmatic, fair, and efficient means of achieving redress.

18 Do you consider that additional alternative routes for redress could reduce the need for litigation? For example, could empowering the CMA to issue directions for redress reduce the need for private action?

Empowering the CMA to issue binding redress directions would be unlikely to reduce litigation in practice, given the complexity of quantifying harm in competition cases and the diversity of stand-alone claims. Determining individual or class-wide loss would require detailed economic analysis and could invite appeals to the CAT, effectively replicating litigation and diverting the CMA from its core public enforcement role.

A more proportionate and efficient alternative would be for the CMA and government to issue clear guidance on when a VRS may justify refusal or revocation of a collective proceedings order. A properly designed VRS can deliver compensation efficiently, without admission of liability, and with judicial oversight ensuring fairness. This approach would incentivise early, voluntary resolution by defendants while maintaining effective provision of redress and procedural integrity.

Such guidance would provide certainty to businesses and the CAT, aligning incentives across enforcement and private redress. It would encourage defendants to self-compensate through accessible, independently verified schemes rather than protracted litigation, achieving quicker outcomes without over-extending the CMA's remit or resources.

19 What barriers do you consider there are to pursuing alternative routes to redress, such as ADR, voluntary redress schemes, or similar potential options outside of, or prior to, litigation?

The main barrier to pursuing alternative routes to redress, such as VRS, appears to be the lack of certainty regarding their legal and practical outcomes. In particular, it remains unclear whether introducing such mechanisms would bring ongoing litigation to an end or how they would interact with existing or potential collective proceedings. This uncertainty, coupled with the costs associated with establishing and administering these mechanisms, makes them less attractive in practice.

Moreover, damages claims arising from competition infringements are inherently complex, often involving intricate issues such as pass-on and quantification of loss. Without clear guidance on how to design and implement compliant redress schemes — and without CAT approval mechanisms confirming the scope and effect of a VRS — defendants are unlikely to pursue these routes with confidence.

In cartel or multi-party cases, additional barriers arise due to joint and several liability. Even if one infringer were to offer redress voluntarily, there remains a risk of follow-on litigation or contribution claims from co-defendants. Coordinating among multiple infringers to agree on a common redress scheme can therefore be complex, costly, and prone to hold-out behaviour.

Overall, while ADR and VRS have potential to provide efficient redress, greater clarity, guidance, and procedural certainty are required before they can become viable alternatives to formal collective proceedings.

20 Do direct financial, rather than cy-pres, damages deliver justice effectively?

At this early stage of the regime, at which time there has only been one distribution of money to the class, this largely remains to be seen but will depend on the number of class members that make a claim as well as how cy-près damages are used. There is further a need to

balance the length and cost of proceedings against the amounts being claimed by class members. Cy-près 'damages' are not a direct substitute for returning money directly to class members, they are by definition the best alterative in the circumstances. If the majority of claims require a substantial cy-près distribution, this would indicate that the regime is not delivering justice effectively, including taking into account a defendant's rights of defence and the burden of litigation.

See also the responses to questions 27 and 28 on distribution.

24 What factors might incentivise you to settle or advise settlement rather than continuing to judgment before the CAT?

The decision to settle or to advise settlement requires balancing the risk, time and cost of continuing to trial, the outcome of which will be more uncertain, against the amount that a defendant will need to pay to achieve the certain settled outcome and end the litigation. In addition, under the current regime, a settlement may be structured so that any settlement sums which are not claimed by the class revert to the settling defendant. This is an attractive feature of settlement.

It is important that even within the opt-out competition collective actions regime, businesses can achieve commercial settlements that achieve finality in litigation. This is particularly important where the merits of a case may not be particularly strong because, for example, the claim is a standalone claim, the claim is based on a novel theory of harm and/or there has been no admission or finding of liability.

25 To what extent do you think it would be beneficial for the CAT to have increased oversight of settlement/a stronger role in approving settlement agreements between parties?

Under the current regime, the CAT already has a supervisory role in the approval of opt-out collective settlement agreements and must be satisfied that a settlement is 'just and reasonable'[9]. In the settlement judgments to date, the CAT has identified the evidence that will be required for it to be satisfied that a settlement meets this standard. This includes a report by an independent expert (such an economist) report and/or an opinion by Counsel as to the merits of the proposed settlement.[10] Accordingly, the CAT has already set a high bar for settling parties.

However, it is well established that certification is not a merits test. It is imperative that the CAT remains open to approving settlements on commercial terms in appropriate cases.

It could be useful in certain cases for parties to be able to approach the CAT for an indicative view on the proposed structure and terms of a settlement and for the CAT to set out at an early stage the additional information, if any, it is likely to require to approve a settlement on the proposed terms. This could be at the stage that provisional heads of terms have been reached by the parties.

The CAT should also have oversight of the distribution process. Whilst as part of a settlement

[9] Competition Appeal Tribunal Rule 94(8) (SI 2015/1648)
[10] CAT Guide to proceedings 2015 paragraph 6.98; although the CAT Guide refers to “an opinion by Counsel”, the parties preferred to support their applications with independent expert reports in collective settlement applications so far. The CAT noted in *Merricks* that they will expect the CR to provide a comprehensive opinion from its counsel (please see [2025] CAT 28 paragraph 212).

agreement, the CAT will approve a notice and distribution plan, there should be a means to ensure that that plan is effectively implemented. This may be achieved, for example, by reporting throughout the distribution period. Creating this feedback loop would also help to inform parties and the CAT of most effective settlement structures in terms of getting settlement monies to the class in future cases.

26 What should happen to unclaimed funds from a settlement agreement?

There are a number of possibilities and it may be appropriate to provide for different outcomes in different claims. For instance, it may be appropriate to draw a distinction between follow-on claims in which liability has been established by a prior competition authority decision and standalone claims and/ or those claims where the merits are strongly in favour of the class and those where they are not, because, for example, they are based on novel theories of harm.

A key feature of opt-out collective settlements is the possibility that any unclaimed funds from a settlement agreement may revert to the settling defendant. Not only does this encourage settlement in the first place but the possibility of a reversion may also mean a defendant is prepared to make a large amount of money available for the class, even in the case of a no liability settlement, in the knowledge that if the class does not claim the settlement funds, that money will be returned to it. Whether a reversion should be available and the amount of that reversion should be assessed on a case-by-case basis considering the particular features of a given claim. In some cases, for example standalone cases based on a novel theory of harm in which there has been no finding of liability, it may be that the possibility of a significant reversion strikes an appropriate balance between access to justice for claimants and achieving a fair outcome for defendants. In other cases, it may be appropriate to provide that any unclaimed funds are paid to charity or some other cy-près distribution is provided for.

In all cases, it is important that consideration is given in advance to this question and it is provided for in the settlement agreement between the parties and approved by the CAT such that the settlement provides certainty and finality for settling defendants.

Distribution of funds

27 How are funds distributed among consumers?

Notwithstanding that the regime has been in place for approximately 10 years, public awareness remains low, particularly regarding how to claim redress. This limited awareness can hinder fair and efficient distribution.

That said, fraud is a real concern, and it is the CR’s obligation to ensure that redress is distributed only to genuine claimants. Appropriate safeguards should therefore be built into the distribution process to filter out fraudulent claims as far as possible.

In parallel, increasing public awareness and confidence in the regime is key to encouraging eligible claimants to come forward. This could be achieved by building trust in the legitimacy of the process — whether through a dedicated body, the CAT, or other public-facing mechanisms. One practical issue is that many consumers are reluctant to provide personal or banking details when they are unfamiliar with the regime or the specific claim. Alternative mechanisms to cash payments, such as vouchers or credit options, could therefore be considered where appropriate to encourage participation and ensure effective distribution.

Finally, there should be greater obligations on CRs to prepare the class for the distribution

stage, which ties into the earlier scrutiny of the N&A plan as mentioned in the response to question 15 above. For example, class members could be put on notice early regarding the preservation of evidence they may need to substantiate their entitlement to redress once distribution begins.

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

The take-up level in the *Boundary Fares* claim and the expected take-up in *Merricks* suggest that consumers are not currently sufficiently aware of proceedings or of their right to claim their share of settlement amounts, or that they are not able (because they lack the requisite evidence) or willing to do so.

A potential solution would be to strengthen the scrutiny of N&A plans at an early stage and to keep them under review throughout the proceedings. This would help ensure that class members are not only notified at the beginning and the end of a case — which may take several years to resolve — but are instead kept informed throughout the proceedings.

The CAT could require the CR to take proactive steps on certification to prepare the class for distribution, including increasing awareness of the claim and explaining clearly what claimants need to do to recover compensation if the claim is successful, including preservation of any relevant evidence that may be required when submitting a claim.

30 What should happen to unclaimed or residual damages?

It is understandable that unclaimed damages should not revert to defendants following trial where the CR succeeds in their claim. It is appropriate in those circumstances that additional funds may be used to pay the CR's costs of bringing the claim and/or for there to be a payment of any residual amount to charity. Depending on the level of take up by class members, it may be appropriate to combine payment to class members with a cy-près distribution which is closely connected with the subject matter of the claim to ensure that a minimum amount of the damages reaches class members as directly as possible, with any additional amount (that is not paid in costs) being paid to the nominated charity, currently the Access to Justice Foundation. The order of distribution should be considered on a case-by-case basis.

It is appropriate to draw a distinction between claims which proceed to trial and those which settle. As to what should happen to unclaimed settlement funds, see the response to question 26.

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