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Which? Response to the Consumer Class Actions Initial Scoping Questionnaire

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Introduction

Which? welcomes Government's attention on the important matter of consumer law enforcement, and its request that the Law Commission assess whether the way consumer laws are enforced could be strengthened through the introduction of a consumer class actions regime. As explained below in our response to the Law Commission's Questionnaire, Which? considers the answer to Government's question is a resounding 'yes'. But that a consumer regime requires careful design and implementation, so as to ensure that it delivers against its objectives.

As stated by the Law Commission on its Consumer class actions project page, "*Consumer laws play a vital role in ensuring that consumers are treated fairly. Their effective enforcement can address persistent consumer harms and deter infringements, thereby reducing unfair business practices and promoting fair competition.*" Which? agrees. However, there exists a significant enforcement gap that erodes consumer confidence, undermines trust in markets, and hampers the ability of responsible businesses to compete on the merits. A consumer class action regime (also referred to as the consumer regime in this response) provides a solution to help close that gap and create fairer and more competitive markets where both consumers and businesses win.

Summary of Which?'s position

As a not-for-profit charity that exists to advance UK consumer's interests and reduce consumer harm, Which? has been a long term advocate for the introduction of a consumer class actions regime.[1] Indeed, Which? contributed to the Civil Justice Council's (CJC) work that resulted in its 2008 report and recommendation for the implementation of a generic collective actions regime.[2] We were a key proponent for the introduction of the opt-out competition collective action regime (which we refer to as the competition regime) in

[1] Which? is the trading name of the Consumers' Association charity, whose objects include to *'uphold and promote compliance with consumer laws, regulations and public policies… for the benefit or protection of the rights of consumers'.*
[2] *Improving Access to Justice through Collective Actions*, November 2008, Recommendation 1, p5.

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2015, having been the only entity authorised to bring claims under the predecessor opt-in regime.[3] Since 2015, we have also been a participant in the competition regime, having been certified to act as class representative (CR) in *Consumers' Association v Qualcomm*[4] (which settled post-trial) and are the CR in *Consumers' Association v Apple*.[5] Which? was also a driving force behind consumer law reform in the Digital Markets Competition and Consumers Act 2024 (DMCCA), as well as in other areas like the Online Safety Act 2023 and the Product Regulation and Metrology Act 2025. More recently, Which? has been engaging with the Department of Business, Innovation, Science and Trade (DBIST) on its competition collective actions consultation.[6]

Through these experiences and our engagement with consumers, business and policy makers more generally, Which? has expertise and a unique perspective from which to support the Law Commission's project. Drawing on that experience, Which?'s response to the Questionnaire highlights:

- **The scale of consumer harm:** The scale of harm suffered annually by UK consumers is astonishing, quantified most recently by the *2024 Consumer Detriment Survey* at £71.2 billion.[7] All too often this harm goes unaddressed. Current mechanisms of public and private enforcement are insufficient or ineffectual at ensuring compliance and delivering redress when harm is suffered.
- **Multiple benefits of a consumer class actions regime:** We think potential benefits are clear, and that these form the principles around which the regime should be designed and implemented, being:
    - Increased access to justice.
    - A more efficient mechanism for redress where large groups of consumers have suffered the same or similar harms (compared to existing routes for consumers to enforce their rights, whether individually or on a group basis).
    - Promotes compliance with consumer law and deters infringements.
    - Complements regulators' work (public enforcement).
    - Supports better functioning and fairer markets, benefiting consumers and businesses.
- **Risks associated with a consumer class actions regime can be managed, and in any event do not outweigh the benefits:** Which? is alive to the risks of a consumer class actions regime, including that it should not unduly burden law-abiding

[3] It was only used once by Which? in the 15 year period that it existed in the so-called '*replica football shirts*' case.
[4] Case No: 1382/7/7/21.
[5] Case No: 1689/7/7/24.
[6] See our responses to the Opt-out collective actions: call for evidence here (**CfE Response**) and the Swifter and Simpler competition redress, regulatory appeals and competition enforcement consultation here (**Consultation Response**).
[7] Consumer Detriment Survey 2024, 27 March 2025, p8.

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businesses with spurious or speculative claims. Through careful design and implementation, risks can be managed. But in any event, risks need to be weighed against the perverse outcome that absent enforcement, businesses who infringe consumer law are likely to retain the benefits of the infringements.

- **Careful regime design is required:** A consumer class actions regime should not simply extend or replicate the competition regime, though much can be learnt from experiences with the competition regime. Guided by the principles on which a consumer class actions regime should be based, the design should:
    - **Define scope through an adaptable statutory schedule:** Use a defined legislative schedule of in-scope consumer infringements supplemented by an executive power to update the list via secondary legislation and a mandatory implementation review clause.
    - **Reflect the full spectrum of consumer harms**: Encompass broad causes of action such unfair commercial practices, product liability, Consumer Rights Act goods and services and tort claims (aligning with mature class action frameworks in Australia and Canada), while accommodating both follow-on and vital stand-alone claims to plug the significant enforcement gap.
    - **Adopt a rebuttable presumption of opt-out:** Recognise that consumer claims - unlike mixed business/sophisticated class claims in the competition regime - involve dispersed, low value losses that make an opt-in approach impracticable and likely exclusionary.
    - **Empower a diverse pool of class representatives:** Ensure varied consumer champions can step forward, while applying clear and effective authorisation requirements to confirm representatives and their legal advisers have the requisite capability and resources.
    - **Statutorily embed aggregate damages**: Provide an express statutory provision to award aggregate damages without requiring individual assessment of loss, therefore overcoming existing barriers in common law representative actions.[8]
    - **Drive down litigation costs and rebalance structural asymmetries:** Lower the cost of proceedings through greater use of cost control powers such as fixed or capped costs and strict judicial oversight; establishing early judicial guidance on ATE adequacy and sanctions against parties for attrition tactics; and allowing for percentage-based litigation funding and Damages Based Agreements (DBAs) to help make moderate-value claims commercially viable.
    - **Mandate defendant cooperation on distribution and adapt to real-world uptake:** Establish clear legal obligations requiring defendants to actively

[8] See *Lloyd v Google* [2021] UKSC 50.

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facilitate distribution, including by using their own customer records, account data, etc where possible; provide procedural flexibility so that distribution strategies can reflect case-specific market dynamics rather than rigid uptake targets; and utilise merging empirical data from ongoing distributions in claims on foot in the Competition Appeals Tribunal (Tribunal) to establish an evidence-based approach from the outset.

- **Cy-près distribution and broader public interest objectives**: Ensure certification and settlement assessments factor in the full range of benefits, including indirect consumer benefits, deterrent effects, and the future value of better functioning and fairer markets, rather than narrow direct take-up estimates alone.

- **Prevent speculative and unmeritorious claims through proportionate judicial gatekeeping without encouraging mini-trials:** Implement robust safeguards to protect against the risk of spurious or speculative claims that are without merit, including: an early certification/admissibility filter focused on CR competence and suitability of the claim (but avoiding a merits mini-trial); strict judicial oversight of funding and adverse costs insurance to eliminate improper funder control and conflicts of interest; mandatory judicial approval of settlements or discontinuance to verify terms are just and reasonable for absent class members; and active case management to resolve strategic threshold challenges early.

- **Ensure adequate forum resourcing and judicial specialisation:** Situate the regime within an adequately resourced court (such as the specialised list within the High Court King's Bench Division) with dedicated case management tools and processes to prevent backlogs and judicial overstretch.

Which? looks forward to working with Government, the Law Commission and stakeholders on this important and impactful project.

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Full response to Initial Scoping Questionnaire

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.

Unmet need: the astonishing scale of consumer harm

Consumers are, as Which? explained in its manifesto prior to the last general election, the engine of growth.[9] Their spending makes up approximately 60% of the UK economy.[10] But, "*too often their everyday problems are overlooked and left unaddressed. Dodgy traders, unscrupulous businesses and broken markets blight the lives of the consumers who use them*".[11]

At the time Which? cited evidence from the 2022 *Consumer Protection Study*[12] that "*36 million people experienced a problem with a product or service in a single year, with an economic cost of more than £54bn. They spent upwards of 1.5 billion hours trying to resolve these problems, creating stress and worry.*"[13] In more recent data published in the *Consumer Detriment Survey 2024* commissioned by the Competition and Markets Authority (CMA),[14] the position has not improved. If anything, it has worsened, finding that:[15]

> *In the 12 months to April/May 2024, an estimated 72% of consumers in the UK experienced consumer detriment. This translates to approximately 38.5 million consumers experiencing at least one problem with a product they bought or used during that period, which caused them stress, cost them money, or took up their time. The incidence of detriment has increased slightly since 2021, when the proportion of UK consumers experiencing detriment was 69%.*
>
> …
>
> *The total monetised harm or loss experienced by consumers, defined here as net monetised detriment, was estimated at £71.2 billion to UK consumers between April/May 2023 and April/May 2024.*

Only 75% of consumers took action to address detriment, and when considered together with those consumers who did not, 52% of experiences of detriment ended in a positive resolution.[16] Meaning approximately 48% ended negatively.

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[9] *A Consumer Agenda for Government: Consumers as the engine of growth*, June 2024.
[10] *User guide to consumer trends,* Office for National Statistics, August 2026.
[11] *A Consumer Agenda for Government: Consumers as the engine of growth*, June 2024, p2.
[12] *Consumer Protection Study, 2022, Understanding the impacts and resolutions of consumer problems*, BEIS Research Paper Number 2022/005, pp7-8.
[13] *A Consumer Agenda for Government: Consumers as the engine of growth*, June 2024, p2
[14] Consumer Detriment Survey 2024, 27 March 2025.
[15] Consumer Detriment Survey 2024, 27 March 2025, pp7-8.
[16] Consumer Detriment Survey 2024, 27 March 2025, pp9.

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The scale of harm is astonishing. Combined with the current cost of living crisis, it is perhaps unsurprising consumer confidence in the UK's market economy is deteriorating, where:[17]

> *Half of UK adults feel like the UK economy does not work for people like them, leading to profound disillusionment:*
>
> *82% of UK adults feel they are constantly paying more but getting less*
> *74% of UK adults feel big businesses take advantage of ordinary people*
> *68% of UK adults say they are fed up with being ripped off*
> *56% of UK adults don't think everyday products and services are priced fairly*

These statistics are felt by consumers everyday, and observed by Which? in the multitude of ways that we see consumers being ripped-off and taken advantage of in our day-to-day work, whether that be reporting businesses to the CMA or the Advertising Standards Authority for misleading pricing practices, reporting on pressure selling tactics and misleading claims about supplements, seeking legislative change to stop exploitative practices in the secondary ticketing market, highlighting the consumer harm caused by subscription traps, misleading online choice architecture and greenwashing, or exposing practices such as drip pricing that can result in millions of consumers each suffering relatively small losses. These are precisely the types of widespread harms for which individual litigation is rarely a realistic option.

A lack of enforcement compounds the problem

The scale of harm is compounded by the lack of enforcement. Publicly, consumers are required to rely on the CMA, Trading Standards or sectoral regulators to enforce their consumer rights. But all have limited resources and cannot meet the level of need,[18] as demonstrated by data from the CMA's *Impact Assessment 2024 to 2025*, where for "*the financial years 2022 to 2023 and 2024 to 2025, the aggregate consumer benefit from relevant consumer enforcement work is estimated to be £495.0 million, giving an average of £165.0 million per year.*"[19] That is no criticism of the CMA, and not all of the detriment identified above from the *Consumer Detriment Survey 2024* will necessarily give rise to an infringement, but £165 million as compared to £71.2 billion is in any event a stark indication of the consumer enforcement gap.[20]

New direct enforcement powers granted to the CMA in the Digital Market's Competition and Consumers Act 2024 (DMCCA) should help to address this, and it has been positive to see the CMA use these. However, the CMA's recent enforcement actions also demonstrate the limitations, given its understandable prioritisation of certain banned practices, leaving

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[17] *A manifesto to support consumers with the cost of living*, April 2026, p9.
[18] As recognised by the CMA in its 2021 response to Government's Consultation *Reforming Competition and Consumer Policy – Driving Growth and Delivering Competitive Markets That Work for Consumers*, p69.
[19] *CMA Impact Assessment 2024 to 2025*, 10 July 2025.
[20] Which? is also working actively to reform Trading Standards, see *Trading Standards in Crisis: rebuilding an effective and accountable consumer enforcement system*, August 2025.

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other more complex infringements less likely to be enforced against. Even with enhanced powers, public enforcement will always involve prioritisation decisions. No regulator, however effective, can investigate every infringement or secure redress for every affected consumer.

This gap fundamentally undermines deterrence: if the prospects of public enforcement are low, and if voluntary settlement of enforcement actions is the preferred outcome, businesses may take a calculated gamble not to prioritise compliance, or be prepared to push over the boundary of illegality, confident that if they become a target for public enforcement they will be given a chance to amend practices and agree a heavily discounted settlement.

Privately, consumers fare no better. Faced with the prospect of having to enforce their rights directly, some consumers may have access to ADR schemes or an ombudsman, which may provide important routes to redress in some sectors. However, coverage remains uneven, and many consumers are ultimately left reliant on an overburdened county court. Yet for low or moderate-value consumer disputes, court action is often unrealistic. The costs, delays, complexity and practical burden of bringing a claim mean that many consumers abandon legitimate complaints altogether, allowing harm to go unremedied and reducing the deterrent effect of consumer law.

In the EU, the introduction of the EU Representative Actions Directive (RAD) recognised that individual enforcement is ineffective where large numbers of consumers suffer low-value losses and it seeks to ensure that consumers have access to collective mechanisms capable of securing both injunctive relief and redress. While implementation of the RAD remains relatively recent and experience varies across EU jurisdictions, under the RAD a number of consumer organisations have now sought to challenge alleged infringements and obtain compensation for affected consumers in circumstances that would otherwise have been difficult to pursue through individual consumer claims. The European experience further demonstrates a growing recognition that collective redress forms an important part of a modern consumer protection framework, rather than an exceptional mechanism.[21]

In the UK, other group or collective mechanisms cannot address the enforcement problem. While there can be some overlap, consumer law infringements cannot be brought under the competition regime: limitations of the CPR 19.8 mechanism (i.e. the unavailability of an aggregate award of damages and requirement to prove individualised harm) articulated by the Supreme Court in *Lloyd v Google* mean this is not a viable solution; group litigation orders (GLOs) have been infrequent and shown to be cumbersome and costly. The economics of GLOs, being opt-in claims with high costs to 'acquire' claimants, only make sense for high-value individual claims, likely needing to be in the thousands of pounds (like the 'Pan-NOx' group litigation) and therefore will not be an option for most consumer

[21] Consider also the existence of opt-out regimes allowing consumer class actions in Canada, Australia, Israel and the United States. Through judicial innovation, New Zealand permits opt-out claims via representative actions under High Court Rule 4.24, rather than a bespoke, statutory regime.

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harms.[22] Outsourcing resolution to claims management companies also has significant limitations, again around the scope of matters they are likely to take on and well documented concerns about industry culture and practices.[23]

A consumer class action regime provides a solution

The result of a lack of enforcement is that deterrence is ineffectual and those responsible for infringing consumers' rights will regularly be left to profit from it. But it is not just consumers that are harmed. Businesses that are trying to do the right thing will find it more difficult to compete on the merits when competitors are not playing by the rules. That environment erodes consumer confidence and undermines trust in markets, creating conditions for a race to the bottom.

The UK should have higher aspirations for its economy; compliance with consumer rights should not be optional, nor can it legitimately be argued that this is anti-growth.

A consumer class actions regime provides a powerful mechanism to help address unmet consumer harm by:

- **Increasing access to justice:** As demonstrated by the *Consumer Detriment Survey 2024*, the net monetised detriment to individual consumers from an instance of harm is often low,[24] but the harm may be widespread due to a business's scale and number of customers, or as a result of practices systemic in an industry. Like competition law infringements where an opt-out collective actions regime has been implemented, the disaggregated loss creates a barrier to redress as the individual cost (both in terms of an individual's time and financial cost) of litigation vastly outweighs any individual recovery, making standard civil claims unviable and leaving individual rights unvindicated.[25] Indeed, this was a key rationale behind the CJC's 2008 recommendation for a generic collective actions regime, finding that there "*is overwhelming evidence that meritorious claims, which could be brought are currently not being pursued.*"[26]

  A properly designed and implemented consumer class actions regime would significantly increase access to justice by providing a mechanism for small, individual claims to be grouped together, (i) enabling consumers to seek and obtain redress not viable on an individual basis; and (ii) ensuring that unlawfully obtained benefits are disgorged.

  But access to justice should not simply be viewed as an individual's ability to seek and obtain redress when their rights have been infringed. That is too narrow and

[22] The Consumer Detriment Survey 2024, 27 March 2025, at p8 found that the average (median) loss per incident was £32. See also Figure 11 at p40, showing the distribution of values of net monetised detriment. Opt-in claims are almost certainly not going to be economically viable at that level.
[23] See for example, joint statements from the FCA and SRA warning claims management companies and law firms involved in motor finance claims (see here and here).
[24] Consumer Detriment Survey 2024, 27 March 2025, p8.
[25] *Merricks v Mastercard* [2020] UKSC 51.
[26] *Improving Access to Justice through Collective Actions*, November 2008, Key Finding 3, p17.

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focuses too much on remediation. True access to justice is about ensuring systems, markets and institutions are structured so as to deliver just outcomes, such that it should not regularly be necessary to have to assert one's rights. A consumer class actions regime that helps level the playing field for businesses to compete on the merits also delivers justice for those businesses seeking to do the right thing but being undermined by others who obtain a commercial advantage by being prepared to, or reckless as to whether they, infringe consumer law.

- **Creating a more efficient mechanism for redress:** Resolving potentially thousands, even millions, of claims in a single claim will clearly be more efficient than resolving each individually. This is particularly important given individual claims are likely to be brought in a county court system already under pressure, under-resourced and under-performing, as documented by The House of Commons Justice Committee in its July 2025 report titled *Work of the County Court*.[27]

  Where consumer claims have been able to be brought collectively through a GLO, this mechanism has demonstrated itself to be less cost-efficient than competition collective actions (even taking into account the extraordinarily high cost of the latter). By way of example, in the 'Pan-NOx' group litigation brought on behalf of more than 1.5 million claimants, the original claimants' costs budget exceeded £300m. Despite budgets being slashed in a July 2024 judgment, future claimant costs (i.e. in addition to incurred costs) were still £52m.[28] That is significantly more than CRs's budgets for the entirety of a competition collective action (typically between £20m - £30m), where class sizes regularly exceed ten million UK consumers.

- **Promoting compliance and deterring unlawful practices:** As explained above, a consumer class actions regime that creates a comprehensive enforcement environment will better promote compliance with consumer law and deter unlawful practices. It does this by shifting the incentives for compliance through:

  - Increased prevalence of enforcement and therefore lower likelihood of retaining benefits generated through unlawful conduct. This is particularly important in consumer markets where firms may otherwise conclude that low individual losses, consumer inertia, and practical barriers to successfully claiming redress enable risk appetites that include infringing consumer law.

  - Increased financial consequences of non-compliance given claims can be brought for entire classes of consumers.

  - Increased reputational consequences of non-compliance given the likely publicity and press attention generated by an infringement finding on a class-wide basis. That is much more likely to constitute a news story and

[27] Work of the County Court, July 2025.
[28] *Pan NOx Emissions Litigations* [2024] EWHC 1728 (KB), as explained by The Global Legal Post in *High Court slashes 'staggering' £343m claimants' costs budget in dieselgate litigation*, 8 July 2024.

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therefore gain publicity than an individual and small number of separate county court infringement decisions (which as discussed below, are not systematically made publicly available).

Parliament recognised this deterrent effect for competition law infringements when it brought in the competition collective actions regime in 2015.[29] There, as currently with consumer law infringements, public enforcement alone was insufficient to deter infringements and the opt-out regime strengthened private enforcement. There is no compelling policy justification for consumers having access to weaker redress mechanisms if they suffer harm from a consumer law infringement instead of a competition law infringement. Indeed, some competition law infringements may also be characterised as consumer law infringements and vice versa.

Consumer class actions may have an even stronger deterrent effect than competition claims due to the nature of the infringements. Collective competition cases typically involve complex economic concepts and analysis, the alleged infringements may appear intangible and difficult to understand to a lay consumer, and engaging with consumers on these claims has proved challenging.[30] By contrast, many (but not all[31]) consumer claims will be more relatable and better understood by consumers as they involve more straightforward allegations reflecting individual consumers' experiences (for example, misleading practices, unfair contractual terms, unlawful charges, fake reviews, subscription traps or failures to comply with statutory consumer rights). For example, if a consumer has been misled into taking an action by buying a product or service, they will have first hand experience of that interaction. Whereas if a consumer has paid an elevated price for a product or service due to the passing on of an unlawful upstream overcharge for a component of the product or service resulting from an abuse of dominance, the consumer may not even be aware that the component is incorporated in the product or service.

There is also evidence that the public increasingly views class actions as a mechanism for holding businesses accountable, rather than simply obtaining compensation. Research published by Portland Communications' *Reputation and Accountability Report 2025* found that willingness to participate in class actions is primarily driven by a desire for access to justice and accountability, with 42% of respondents stating that they would join a class action where a company had done

[29] BIS Impact Assessment: Private actions in competition law: a consultation on options for reforms, (April 2012).
[30] As demonstrated by the very low consumer uptake of the settlement award in *Gutmann v Southwest Trains* [2025] CAT 72.
[31] For example, some consumer law infringements when being advanced on a class-wide basis may require or benefit from expert evidence, including in the areas of behavioural economics, industry practice and quantification (consider, for example, establishing that a digital dark pattern amounts to an infringement and quantifying loss in the counterfactual).

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something wrong or acted unlawfully.[32] The same research found growing public awareness of collective actions and increasing willingness to participate in them.[33]

- **Complementing regulators' work:** Regulators play a vital role in identifying unlawful conduct, investigating markets, securing compliance and, where appropriate, imposing sanctions. However, even with enhanced powers under the DMCCA and additional resources, regulators necessarily have to prioritise the most serious or strategically important cases. Many infringements that cause widespread consumer harm are therefore unlikely to result in direct consumer redress through regulatory action alone.

  A consumer class action regime would complement regulators' public enforcement by:

  - helping address the enforcement gap through follow-on claims where public enforcement identifies an infringement but does not deliver compensation for consumers or a redress scheme.
  - creating a more complete and comprehensive enforcement environment within which there is significantly greater scrutiny of consumer law infringements (i.e. through stand-alone claims). That in turn will better promote compliance and create a greater deterrent effect than if enforcement is left to public regulators alone.
  - developing consumer law precedents to guide and support public enforcement.

  The CMA has endorsed the complementary nature of public and private enforcement in the context of the competition regime.[34] The same rationale applies to a consumer regime.

- **Support better functioning and fairer markets:** By incentivising compliance and disincentivising unlawful practices, a properly designed and implemented consumer class actions regime would support better functioning and fairer markets by levelling the playing field for businesses and encouraging competition on the merits. This formed part of Key Finding 5 of the CJC's 2008 *Improving Access to Justice through Collective Actions* report, which states:[35]

  > *Effective collective actions promote competition and market efficiency, consistent with the Government's economic principles and objectives, benefiting individual citizens, businesses and society as a whole. Equally they are effective mechanisms through which individual rights can be upheld.*

[32] Reputation and Accountability: Class Actions, ESG and Values-Driven Litigation, 2025, p5.
[33] Reputation and Accountability: Class Actions, ESG and Values-Driven Litigation, 2025, p4.
[34] *Private actions and public enforcement*, speech by Sarah Cardell, CEO of the CMA, at the Competition Appeal Tribunal's 20th Anniversary conference on 4 May 2023.
[35] Improving Access to Justice through Collective Actions, November 2008, Key Finding 5, p18.

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> Where businesses know that unlawful conduct may result in meaningful enforcement action and collective redress, they are less likely to engage in practices that harm consumers. In turn, this helps create market conditions in which businesses are rewarded by consumers for innovation, quality, value and efficiency, rather than non-compliance. Conversely, weak enforcement can generate a "race to the bottom", where businesses can obtain a commercial advantage through misleading practices, unfair contract terms, hidden charges or other consumer law infringements. Competitors may feel or be commercially compelled to adopt similar practices so as to compete.
>
> Robust enforcement of consumer law addresses this imbalance, helping to ensure that the costs of non-compliance are borne by the infringing business rather than by consumers or compliant competitors. However, historically UK consumer law has been chronically under-enforced. A consumer class actions regime would go a long way to addressing that, and would build on the momentum being generated by the CMA's recent enforcement actions utilising its new direct enforcement powers under the DMCCA.
>
> The consequence of more competitive, better functioning and fairer markets is that consumers are more likely to engage confidently in those markets and make purchasing decisions. This in turn drives economic growth.[36]

These benefits will be maximised by a consumer class actions regime that allows for the full range of consumer claims to be brought within it.

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.

Despite Which?'s strong and long term support for the introduction of a consumer class actions regime, we are also alive to the potential risks. These risks, identified below, can be managed through the careful design and implementation of the regime, and in response to Questions 3 to 5 below we have explained important design features, drawing on our experience of the competition regime and as a consumer advocate for over 60 years.

Which? therefore cautions against giving weight to alarmist views that reflect the self-interests of those who would otherwise face greater scrutiny under a consumer class actions regime. In particular, and based on experience in the competition regime, a healthy scepticism should be adopted if presented with purported research that concludes that consumer class actions would harm the UK economy.

[36] *A Consumer Agenda for Government: Consumers as the engine of growth*, June 2024.

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Risks to be mitigated:

- **Delay:** The time required to resolve claims is likely to be longer than the median time - 41 weeks - taken for small claims in the county court to go to trial.[37] As a result consumers may experience the harm for a longer period, or the harm be exacerbated by the delay in obtaining redress. It is crucial that the regime is designed to minimise delay and deliver outcomes in a timely manner.

- **Excessive costs:** Litigating in the UK is expensive, often prohibitively so, and Which?'s experience of the competition regime is that the enormous litigation costs create barriers to bringing claims, as well as challenges to running claims. Likewise, access to a consumer regime will be restricted if the costs of bringing claims are too high, or if claims requiring commercial litigation funding (likely to be the vast majority, based on experience of the competition regime and international examples of consumer regimes like Australia's) are uneconomic. The asymmetry of funded claimant costs as compared to the ability of large defendants to self-fund litigation costs also enables costs to be weaponised against claimants. Such tactics must be prevented to as great an extent as possible.

- **Spurious or speculative claims:** Equally, law-abiding businesses should not have to incur potentially significant costs defending a spurious or speculative claim that is without merit. As expanded on in response to Question 5 below, the regime must be designed in a way that disincentivises such claims, while also providing a mechanism, or mechanisms, that enable such claims to be filtered out at an early stage (in the unlikely event that they are able to attract funding to be brought in the first place). These protections should be viewed alongside existing professional regulatory obligations. Solicitors acting in collective proceedings remain subject to the requirements of the Solicitors Regulation Authority (SRA), which has undertaken significant work in relation to mass claims and group litigation, including concerns around claim vetting, client acquisition practices and the responsible conduct of large-scale claimant actions. Appropriate regulatory oversight, combined with judicial supervision, provides an important safeguard against the pursuit of weak or improperly prepared claims.

- **Conflicts of interest:** The absence of class members, combined with the interests of the various claimant-side stakeholders creates risk that conflicts of interest will arise (or be perceived to arise) which damage, or have the potential to damage, the interests of the class. The competition regime has sought to manage this through transparency, requirements on class representatives (CRs), specific terms in funding agreements and the exercise of the Tribunal's supervisory role. Similar mechanisms can be adopted in a consumer class actions regime.

- **Burden on court resources:** Class actions are significant pieces of litigation, requiring substantial court resources. A consumer regime is therefore likely to increase demand on court resources by opening a new route to redress, rather than

[37] Civil Justice Statistics Quarterly: April to June 2026, published 3 September 2026.

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simply transposing claims from one forum or process into another. That could lead to delay or require diverting resources from other areas, leading to issues in those areas. The regime therefore needs to be properly resourced from the outset, and designed in a way that resourcing expands with the growth of the regime.

Experience from the competition regime is that once certification was addressed by the Supreme Court in *Merricks v Mastercard,*[38] claims were brought at a steady stream, rather than a flood. That provides the closest analogy to what might occur with a new consumer class actions regime, albeit that the potential for smaller and geographically discrete claims may create a different dynamic leading to a higher frequency of claims. In any event, an implementation period should be assumed where the new regime is tested and questions of principle are required to be resolved at the appellate level.

- **Successful claims fail to compensate class members:** A consumer class actions regime must be centred around the delivery of justice to consumers. So while advisers, funders and insurers deserve to be compensated for the value they contribute, the regime will not be working properly if successful claims (whether through settlements or final awards) are not resulting in compensation for class members. Preferably that would be direct compensation - money back in class members' pockets. But well documented experience of US class actions is that uptake is low. As with the UK's competition regime, we should have higher expectations for the UK's consumer regime, but expecting near perfect direct distribution would be unreasonable and naive.

  The regime must therefore be designed to facilitate direct distribution, as well as to enable and recognise indirect distribution (whereby class members or consumers generally or indirectly benefit from the application of settlement or award funds by a designated charity or charities) as a legitimate means of compensation.

- **Individual rights are disproportionately compromised:** Opt-out class actions necessarily do not involve the individual class members until they are requested to come forward and claim a share of an award when a claim is successful. Although some compromise is likely to be necessary so as to bring claims on a collective basis (for example, an aggregate award of damages and distribution process may result in an individual award that is less than what could have be obtained in a successful individual claim), the absence of individuals' involvement creates risk that in the litigation process their rights are disproportionately compromised. A claimant's obligations and the court's powers are important mechanisms to ensure that this does not happen. For example, the competition regime rightly requires the Tribunal to approve the just and reasonableness of collective settlements.

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

[38] [2020] UKSC 51.

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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.

While some of Which?'s suggestions draw heavily on lessons learned from the competition regime, our objective is not simply to replicate it. The competition framework has proved slow in delivering meaningful redress. Instead, we use those experiences as a baseline to propose design features of a consumer class actions regime that works effectively from day one - incorporating reforms that we believe would equally make the competition regime work.

Jurisdictional and substantive scope

- **Scope of consumer regime should reflect the breadth of consumer harms:** An opt-out consumer class action regime should reflect the full breadth of harms suffered by UK consumers, encompassing areas such as unfair commercial practices, product liability, Consumer Rights Act goods and services and tort claims. Without this, the regime would not be comprehensive, which will undermine its ability to achieve the significant benefits explained above in response to Question 1. The areas mentioned are illustrative rather than exhaustive.

  The claims within scope could either be established by reference to a designated schedule of consumer infringements (following the model of the RAD[39]) or through a broadly worded scoping clause. Both approaches have their pros and cons. A defined legislative schedule offers upfront legal certainty (which is likely to reduce satellite disputes on whether a claim is in or out of scope at the certification stage) but it may be rigid and will require periodic review and updates to keep pace with emerging consumer harms. A broadly worded clause has flexibility, but may create legal uncertainty which would increase the likelihood of satellite litigation as to whether a claim is within or outside scope. Our experience from the competition regime is that satellite litigation can result in significant delays and increased costs and is to be avoided (or at least minimised) where possible (see our response to Questions 4 and 5 below). We therefore favour a statutory schedule of in-scope consumer infringements which is capable of being updated via secondary legislation. This would provide certainty while retaining sufficient flexibility to respond to emerging forms of consumer harm and changes in consumer markets.

  The legislative vehicle for the consumer regime could also add an implementation review clause, so that there is a scheduled procedure to evaluate the progress, performance, and efficacy of the regime after a certain period of time.

[39] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L1828 (see Annex 1).

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- **Follow-on and stand-alone claims:** A consumer class actions regime should accommodate follow-on claims (which rely on prior regulatory infringement decisions), stand-alone claims (brought in the absence of a prior finding), and hybrid claims. Follow-on claims enable consumer redress where there has been an infringement finding (and may result in more swift and cost effective consumer compensation as liability is already established). Stand-alone claims are essential to plug the enforcement gap discussed above in response to Question 1. Indeed, as is evidenced in the competition regime, the majority of claims on foot have been brought on a stand-alone basis; this is perhaps a reflection of the limited public enforcement of UK competition law in recent years. While we have seen an uptick in enforcement of consumer law following on from the DMCCA, for the reasons highlighted above, this has not resulted in more complex infringements being addressed and cannot be comprehensive.

Access and procedural mechanisms

- **Opt-out mechanism:** The availability of an opt-out mechanism is crucial for ensuring those who suffer loss have the opportunity to access redress for the reasons already noted in response to Question 1 above. Given the nature of claims being contemplated - consumer claims - there should be a rebuttable presumption that claims proceed on an opt-out basis. This would be different to the competition regime which also includes business classes and sophisticated class members who can have very significant and valuable claims. In *Evans v Barclays*, the Tribunal noted the following when considering the class: "*...we see no reason why it is not practicable for the putative class to join on an opt-in basis, given all the circumstances and in particular given the general sophistication of the putative class, the class knowledge, and the potential size of the claim…*".[40]

- **Class representatives (range):** As part of our response to Question 5 below, it is right that CRs should meet certain requirements like in the competition regime, but the role of a CR should not be limited to a specific category or organisation or individual, and should not operate on the basis of 'qualified entities' like in some European jurisdictions. This would limit the pool of CRs which would in turn limit access to justice by limiting the number of claims that can be brought. Which? would like to see a varied and diverse group taking on the role of CR as it believes that this would support a wider variety of consumer claims and build credibility in the consumer class action regime. From Which? 's experience as CR in *Consumers' Association v Qualcomm* (which settled post-trial) and currently in *Consumers' Association v Apple*, we know firsthand the immense dedication, time, and resources required to fulfil this statutory function, therefore, concentration of the CR role should be avoided.

[40] [2022] CAT 16, paragraph 381(9).

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- **Judicial supervision:** For a consumer regime to deliver genuine access to redress, the court must retain a robust supervisory role which is designed to protect the interests of class members not present. Drawing on the competition regime, judicial oversight - including approving settlements or discontinuance, determining carriage disputes, and scrutinising funding arrangements (whether via third party funding or DBAs) - is essential to prevent excessive deductions and ensure that fair and adequate redress actually reaches consumers.

Financial viability and structural asymmetries

- **Viability of commercial funding/DBAs**: Funding will play a critical enabling role, therefore the design of the regime should encourage the availability of third party commercial funding (for example, through allowing percentage based remuneration and stakeholders to be paid out prior to distribution to the class), while also restricting defendants' ability to weaponise resolvable funding issues against the class (see more on this in our response to Question 4).

  Further, the design of a consumer class actions regime should allow for meritorious claims with smaller values to be bought. DBAs are likely to provide an important alternative to third party funding, particularly for claims with lower estimated aggregate damages. DBAs have the potential to enable a more diverse range of cases to be brought under the proposed regime, expanding access to justice and therefore redress to consumers. For claims with smaller values, a fast track mechanism could be explored which aims to resolve claims with moderate values more swiftly. It is also worth exploring whether a public fund could be established to facilitate smaller claims which, despite having strong merits, are unlikely to attract commercial litigation funding.

- **Features to mitigate information asymmetry:** There is a marked information asymmetry between CRs and defendants in competition claims. The same is likely to be the case in consumer claims. For example, prospective defendants will typically hold access to critical data, including pricing models, sales figures, and inventory records. This asymmetry should be borne in mind when designing the regime and more specifically any certification or admissibility criteria. To address any imbalances and avoid unjust outcomes, mechanisms for early disclosure and/or defendant witness and expert evidence should be explored as part of the design. We address cost asymmetries between CRs and defendants in our response to Question 4 below (under 'Fair costs arrangements').

Maximising meaningful redress

- **Aggregate award of damages:** As with the competition regime, the availability of an aggregate award of damages is imperative to enable claims to be successful as they eliminate the need to calculate and prove financial loss on an individual basis. Without that, a consumer class actions regime is unlikely to be effective, and so

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will fail to deliver increased access to justice and efficiency. This approach varies the common law position of damages being specific to each individual loss (and is a reason why representative claims under CPR 19.8 such as *Lloyd v Google* have failed).

- **Availability of remedies:** In addition to remedies already available for individual infringements (including damages, injunctive relief, declaratory relief), enhanced consumer measures (like online interface orders) should also be available so as to ensure redress is appropriate and effective. Availability of restitutionary remedies should also be considered.

- **Distribution**: The consumer regime will not fully achieve its aims unless consumers receive redress. The experience to date in the competition collective actions regime has been disappointing, with only one distribution at the time of writing which saw very low take-up rates and returns to the class. However, as future upcoming distributions in *McLaren v Mol*[41], *Merricks v MasterCard*[42] and (provided it is upheld on appeal) *Kent v Apple*[43] take place, they will generate useful qualitative and quantitative data to inform an evidenced based approach which can be utilised to inform effective distribution in a consumer regime (and the competition regime).

  In the meantime, we consider the following features should be included in the design of the consumer regime:

  - **Defendants having a role**: Defendants should assist with maximising distribution, particularly where they hold information that would facilitate distribution. For example, where they hold consumer class members' contact details or account information. This is regardless of whether the claim has settled or been determined by a judgment following trial. Where a defendant has been found to have infringed consumer law and caused harm to consumers, it is right that it takes steps to see that harm is redressed.

  - **Rules to facilitate distribution:** The court too should have an important role, ensuring that defendants facilitate distribution. Accordingly, the court should be given the right powers to do so.

  - **Simpler, clearer communications:** In Which? 's experience in its role as a media organisation, engaging consumers through public communication campaigns can be difficult. This difficulty is compounded in competition collective proceedings where noticing requirements can be overly legalistic and formulaic, resulting in lengthy and complex communications. Accordingly, any noticing requirements in a consumer class action regime should not simply transpose the same noticing requirements as in the

[41] Case No: 1339/7/7/20.
[42] Case No: 1266/7/7/16.
[43] Case No: 1403/7/7/21.

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competition regime; we consider that noticing should be simple, clear and engaging. It should meet consumers where they are and allow for flexibility.

- **Flexibility in distribution:** Distribution strategies are likely to be non-uniform and depend on case-specific factors, such as the level of defendant cooperation (if any) (see above) and the nature of the market where the harm occurred and the consumers who suffered the harm. It is therefore counterproductive to set unrealistic expectations around potential uptake. A degree of flexibility should be afforded in the design of distribution.

In our response to Question 5, we address safeguards to ensure that any returns paid to legal representatives and funders prior to class members are subject to limitations to ensure that there is fair and adequate redress to the class.

- **Wide benefits and purpose of the regime are baked into decision making:** If there is to be a similar cost/benefit analysis in the consumer regime when deciding whether a claim should be certified/admissible, or for some other purpose, this analysis should extend beyond estimated (or actual) individual take-up. As Which? explained in its Consultation Response, in addition to direct financial benefits to a consumer class, the following should be taken into account: (i) indirect benefits - in the form of undistributed damages or settlement funds which go to charity and are then applied to reduce consumer harms and improve consumer outcomes; (ii) deterrence - the precedent effect and signal a successful claim sends to the market to deter participants from engaging in infringing behaviour; and (iii) future benefits - fairer, better functioning and more competitive consumer markets where claims successfully address infringing practices and level the playing field for law-abiding businesses.[44] The court should adopt an overriding objective which is to ensure that justice is done.

Transparency and access to court data

To provide an authoritative record of claims and to improve visibility over the breadth and number of claims (and transparency more generally), a public register listing all consumer class action claims should be implemented (as is the case in the Netherlands, Germany and Canada, and as in the UK for GLOs).

More broadly, as part of considering how consumer law enforcement can be strengthened, the Law Commission should identify opportunities to improve the transparency of consumer disputes. At present, very little information about consumer claims resolved through the county court small claims track is publicly accessible in a searchable format. This limits the ability of consumers, consumer organisations, regulators and policymakers to identify recurring patterns of harm, understand how consumer law is being applied in

[44] Consultation Response, Question 5, page 8.

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practice, and assess whether particular businesses or industries are repeatedly the subject of successful consumer claims.

In this way, better access to searchable information on consumer claims could help inform enforcement priorities and support evidence-based policymaking. While this issue extends beyond consumer class actions, the Law Commission's review presents a valuable opportunity to introduce greater transparency to the civil justice system. An effective consumer redress framework depends not only on mechanisms for collective action, but also on the availability of information that enables recurring harms to be identified and addressed.

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.

One of our main concerns with the competition regime is its current inefficiency and high level of costs; therefore, the Law Commission is right to explore how a consumer class action regime could be designed to promote efficient conduct of litigation at proportionate cost. Getting this balance right would be for the benefit of all parties: claimants, defendants, and the court.

We would highlight the following design features, drawing from our experience from the competition regime:

- **Certification/admissibility:** As set out in our response to Question 5 below, robust judicial gatekeeping is essential at an early stage to prevent unmeritorious claims from proceeding past certification. So whilst we are supportive of safeguards, the competition regime experience shows that certification is heavily contested, costly and often drawn out. In this regard, the Law Commission should consider the following proposals as part of the design:
    - **Approval of funding arrangements on an ex-parte basis:** The consumer regime can draw from the Tribunal's significant experience having reviewed many funding arrangements under the competition regime. Many of the issues raised at certification (for example, funder returns, control or distribution of returns) have either been resolved in previous claims or are capable of being resolved. This process would reduce costs of certification or minimise satellite disputes about funding in consumer claims.
    - **Clear and effective authorisation requirements on consumer CRs**: As we explain in Question 5, there should be a robust process on the authorisation of CRs, however a layering of additional requirements should be avoided. This has been the experience in the competition regime where tactics are

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employed to derail certification (and which are not done with the interests of a consumer class in mind). This increases costs for CRs who have finite budgets and introduces uncertainty, including the possibility of defendants re-opening matters from certification because a subsequent Tribunal decision is seen to vary CR requirements. CRs should be able to understand from the outset, with a reasonable degree of certainty, what will be required to obtain and retain authorisation as a claim progresses. Unlike in individual proceedings, CRs do not act for personal gain; they act in the interests of the class, seeking to vindicate the rights of the class. The design of the regime should also reflect this reality and protect CRs against personal exposure.

- **Clear process for carriage disputes:** In our view, the breadth of a consumer regime may increase the risk of carriage disputes - where multiple CRs seek to bring the same or overlapping claims - as compared to the competition regime. This is because the identifiability of claims and barriers to developing a claim may be lower (which we also address in response to Question 5 when addressing the need to avoid unmeritorious claims). To avoid costly satellite litigation and delays, the regime should establish a clear and cost effective process for resolving carriage disputes at the earliest stage possible. To ensure this does not derail timely redress, a process could be designed which reflects the following principles: establish an early determination window for carriage disputes (before any certification hearing), define clear procedural criteria in rules (i.e. class definition, funding transparency, litigation budget, and the capability of the CR and its advisers), and incentivise early consolidation or coordination before a contested hearing (for example, in the Ad Tech *Collective Action LLP v Google*[45] claim the 'competing' proposed CRs made an application to consolidate their claims prior to certification, and for Ad Tech Collective Action LLP to act as the CR).

- **Certification costs:** Our experience as a CR in the competition regime has highlighted that certification is costly. The Law Commission should explore whether certification costs could be capped at predetermined levels, or whether guidance on the level of recoverable costs at this stage could be introduced to provide greater certainty for all parties.

- **Fair costs arrangements:** Legal costs in the UK are extremely high and create a significant barrier to accessing justice. There needs to be a concerted effort to bring these down. Having lower legal costs and certainty of costs plays a key factor in the funding of cases and budgets. Because claims in the competition regime depend almost entirely on third party funding, funders naturally prioritise high value claims often worth hundreds of millions or billions, so as to absorb the substantial legal costs and provide sufficient 'upside' on their investment.

[45] Case Nos: 1572/7/7/22 and 1582/7/7/23.

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However, we would like to see the consumer regime handle smaller claims as well, including because we expect that consumer infringements will regularly have smaller classes and quantum than competition infringements, particularly when compared against abuse of dominance cases, which by their definition, involve businesses with a substantial portion of a particular market.

We note that the Government is considering the Civil Justice Council's recommendations in relation to costs in funded proceedings, however, this should not preclude the Law Commission from progressing meaningful proposals on costs as part of designing an opt-out consumer class actions regime. It is an opportunity to set an example of efficient conduct of litigation at a proportionate level of costs. In this regard the Law Commission should consider the following design features:

- **Greater availability of costs orders:** Courts have wide, discretionary powers in relation to costs, however, there appears to be a lack of readiness to use the greater variety of cost orders available. Extremely high litigation costs could be controlled and/or reduced via fixed costs per stage, greater use of costs capping, and costs shifting. These could operate as standard default positions unless a party can demonstrate why there needs to be a departure.

  There should also be an emphasis on strict judicial costs control, for example, by close monitoring of claimant and defendant budgets. Further, a more proactive approach to resolve interlocutory disputes as they arise, rather than deferring these to set piece case management conferences (CMCs) where parties often delay concessions until the hearing. In our experience, this dynamic creates high volumes of correspondence and generates unnecessary costs.

- **Asymmetric cost positions:** CRs and defendants (in most cases) operate from fundamentally unequal financial positions. A CR will have entered into funding and adverse cost arrangements, and will have a finite budget. A CR's ability to accept, reject or propose a counter-settlement offer will often be constrained by the terms of its arrangements, whereas well-resourced defendants facing high-stake claims face little real downside in rejecting reasonable offers or making low-ball ones - the threat of indemnity costs is trivial compared to their overall exposure. It follows that a case-by-case assessment will be required as not every defendant will be deep-pocketed in a consumer regime, and (if designed appropriately) not all cases will be in the hundreds of millions or billions of pounds. However, the design of the consumer regime must account for these structural asymmetries. It should embed robust safeguards, such as deferring offer consequences until later stages of a claim, imposing heightened cost

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sanctions beyond standard indemnity costs on unreasonable defendants, or disapplying automatic penalties where equity or justice requires.

- **After-the-event insurance (ATE):** linked to the proposals on fair cost arrangement outlined above, effectively addressing disproportionate legal costs within the consumer regime would potentially lower premiums and expand the availability of ATE - which has become a vital litigation risk management tool to address cost-shifting (i.e. the 'loser' pays rule). In this regard, courts should provide an early indication on the sufficiency of a CR's level of adverse costs - in combination with proposals to meaningfully reduce costs, including defendant costs budgeting - as this would provide crucial certainty, enabling CRs to proceed with confidence that, if unsuccessful, they will not be personally exposed to an adverse costs award if there is a shortfall in their costs cover. In addition, it will prevent CRs from having to obtain top-up ATE cover during proceedings (potentially due to a defendant's unrestrained spending), which can be difficult to obtain, and becomes increasingly expensive as trial approaches.

- **Forum, expertise and resourcing:** Forum: in our CfE Response and Consultation Response, Which? has advocated increased resourcing for the Tribunal to help address the length of time and delays in resolving claims. For this reason, and others raised below, Which? considers that it may be advisable for the High Court to be the appropriate forum for the consumer regime. In particular, we note that the King's Bench Division (KBD) already handles multiple claims including breach of contract, breach of statutory duty, libel, slander and other torts. The High Court (primarily through the KBD), maintains a list of GLOs, and the KBD contains a number of specialist courts within their own individual areas of work (i.e. the administrative court, the commercial court etc).[46]

  Expertise: whatever the forum, there should be additional resourcing and judicial training for judges who may be presiding on consumer class action cases. In this regard, we note that the Judicial College is directly responsible for training full and part-time judges in the courts in England and Wales. Further, we note that some of the Tribunal's Chairs are supplemented by specified judges of the High Courts of England and Wales.[47]

  Resourcing: we have seen the resourcing constraints of the Tribunal which can make obtaining hearing dates challenging, which in turn causes delay and pushes up costs. Based on this, and although we do not have visibility on judicial capacity, we expect the Tribunal to be currently operating close to or at capacity. The forum for a consumer regime will need additional resources, and for those resources to be appropriate, so that cases can be resolved and redress delivered

[46] https://www.gov.uk/courts-tribunals/kings-bench-division-of-the-high-court.
[47] https://www.catribunal.org.uk/about.

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swifty. It may be worth exploring how case management processes can potentially ease resourcing pressures and increase judicial efficiency from the outset. For example, certain issues may not need a fully constituted panel (if the consumer regime proceeds on such a basis), interlocutory disputes could be resolved as they arise rather than waiting for a CMC, and some issues will be appropriate to resolve on the papers.

- **Public and private enforcement:** The relationship between public and private enforcement should be carefully factored in the design so that the two mechanisms reinforce, rather than undermine, one another. Courts should retain responsibility for managing any overlap between regulatory investigations and consumer class actions. This would help ensure that consumer class actions are not unnecessarily delayed or run inefficiently whilst still allowing appropriate regard to be given to ongoing regulatory activity. Existing mechanisms in the competition regime could be transposed to the consumer regime, for example, sending the claim form and other relevant documents (such as a defence or reply) to the relevant regulator on the filing of a claim, as well as the ability for regulators to intervene by submitting written or oral submissions to the court on issues. We consider these existing mechanisms are sufficient to address any potential overlap.

- **Greater use of standard precedents:** The consumer regime should incorporate greater use of precedents as this would streamline decision making processes and reduce the scope for satellite disputes, thereby increasing certainty and reducing costs and delays. For example, precedents (or precedent terms) could be used for confidentiality rings, litigation funding agreements and DBAs.

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.

It does not serve consumers, businesses or those who participate in the consumer regime if it were to allow speculative claims without merit - it is an unnecessary drain on the time and resources of both the parties and the court. However, we note that this has not been the experience of the competition regime to date, as made clear by Hodge Malek KC in the *Consumers' Association v Qualcomm* settlement judgment where he said: *"The Tribunal has not, in its experience, encountered wholly unmeritorious claims being advanced by funders seeking to extract settlements from defendants. This has not been a feature of the cases that have become before it".*[48]

If the consumer regime is properly designed, the risk of speculative claims should be low. Key design features to discourage speculative, meritless claims:

[48] CSAO Application Judgment [2026] CAT 50, paragraph 87.

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- **Certification/admissibility:** Robust safeguards should be adopted to protect against unmeritorious claims, therefore a certification stage (like in the competition regime in the UK, and in class action regimes in Canada and the US) is a necessary safeguard. As is the case in the competition regime, similar concepts of the court having to approve a consumer CR and assessing whether a claim is suitable for opt-out collective proceedings should form part of the consumer regime. Certification of proceedings provides an opportunity for defendants to strike out or obtain a summary judgment, and certification can subsequently be challenged as a claim progresses (as the conditions on which a claim is certified are ongoing). That said, any certification/admissibility test should not require a full merits assessment at certification, and if a high threshold is to be adopted (i.e. above a strike out/summary judgment assessment), it should also address any procedural imbalances between the parties at certification (see more in Question 3 above).

  As for the authorisation of consumer CRs, clear and effective requirements should be imposed on CRs, including requirements to make sure a consumer CR is not a mere figurehead. As part of a consumer CR's authorisation, the court should scrutinise the capabilities of a CR's advisers to ensure that they have the necessary competence and capacity to manage the litigation, ensuring the representation serves the class's best interests. While this oversight already exists in the competition regime, the sheer breadth of consumer law is likely to attract a wider pool of prospective CRs and practitioners, making robust judicial scrutiny of these parties and arrangements essential. Avoiding the sorts of issues highlighted by the SRA and Financial Conduct Authority in their work on high-volume consumer claims should be part of the regime design.[49]

- **Funding and insurance:** There is a role for the court to approve funding and insurance arrangements in order to make sure they are not improper. As we have noted above, the consumer regime can draw from the Tribunal's significant experience having reviewed many funding arrangements under the competition regime. Many of the issues raised at certification (for example, level of funder returns or distribution of returns) have either been resolved in previous claims or are capable of being resolved. In addition, and as established in the competition regime, funders have been precluded from directing or controlling proceedings and there are clear and transparent mechanisms for CRs to challenge funder decisions. Further, transparency will be necessary so as to identify interests and manage conflicts or potential conflicts. Collectively, these will remain important factors in order to ensure unfair or perverse outcomes do not manifest in a consumer regime.

- **Settlement approval:** The supervisory role of the court should also extend to approving settlements (or discontinuance), as this is a check and balance in

[49] See for example, the SRA's 22 August 2025 *High-volume consumer claims thematic review* and 4 February 2026 *News Release FCA and SRA issue joint warning to firms representing motor finance commission claims*.

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circumstances where there might be a conflict of interest/differences between the different stakeholders, in particular a funder and a CR (and its legal representatives), and where members of the class are not present. The court should determine whether the terms of a settlement are just and reasonable (as with the competition regime), so that there is an independent assessment of the terms of the settlement, as well as a judgment on the reasonableness of terms.

- **Judicial control/discretion:** On a more general note, the primary safeguard to prevent unmeritorious claims is strong judicial control and discretion (which ought to be reflected in the way the rules are drafted). This should be combined with proactive case management so that decisions are not only left to CMCs, as well as encouraging the resolution of strategic issues early (see our response to Question 4 above).

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Which? is the UK's consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We're the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we're not for profit and all for making consumers more powerful.

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