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Insights

SWIFTER AND SIMPLER: THE GOVERNMENT'S VISION FOR COMPETITION REDRESS IN DBT'S JULY 2026 CONSULTATION

Spotlight on the Proposals for the Opt-Out Collective Actions Regime

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Introduction: Reforming the Opt-Out Collective Actions Regime

On 17 July 2026, the Department for Business and Trade ("**DBT**") launched a wide-ranging consultation on reforms to make the UK's opt-out collective actions regime, regulatory appeals and competition enforcement 'swifter and simpler'. A decade since the introduction of the opt-out collective actions regime, this consultation proposes an ambitious review of the UK's competition litigation and enforcement landscape. The government has sought responses by 25 September 2026 on proposals spanning three chapters: 'Opt-Out Collective Actions', 'Simplifying the Regulatory Appeals Framework', and 'More Efficient CA98 Enforcement'. Together, these reflect the government's broader policy objective of delivering more effective consumer compensation, strengthening deterrence against anti-competitive conduct, and reducing the burden of weak or unmeritorious claims on businesses.

This insight analyses the key proposals for the opt-out regime, their relationship with case law developments in recent years and the initial reactions to the government's proposals.

Delineating the Scope of the Regime

Much as expected, at this stage, the government has proposed neither to expand the regime beyond competition claims, nor to narrow it. The government noted the theme in earlier feedback that claims not obviously rooted in competition were being brought "*dressed up*" as abuse of dominance claims and stated that this adds "*another, unhelpful, layer of complexity to proceedings*". However, faced with conflicting feedback on the regime, with some stakeholders advocating for its dissolution or a narrowing of scope and others calling for its expansion, the government has taken the view that the regime offers a beneficial route to redress but that *"more time is needed to get the current regime right"* before contemplating significant changes to its scope.

The government does however stress that private redress for consumers deserves careful consideration and makes reference to the Law Commission's current review of a possible consumer law class action regime (as we discussed in our insight in April).

Raising the Certification Threshold and Clarifying the Role of the Class Representatives

Whilst the government has chosen not to narrow the scope of the collective actions regime for the time being, it acknowledges the burden that novel and unmeritorious claims place on businesses. Its view is that "*the threshold for certification is too low*" and this is "*weakening the filter effect intended to guard against speculative claims*." To address that issue, the government proposes to more clearly define the safeguarding function of certification in statute, to ensure that only suitable claims proceed to trial.

In particular, the consultation proposes that at certification stage the Competition Appeal Tribunal ("**CAT**") should: (i) assess suitability of an opt out claim in 'absolute terms' (rather than relative to an individual claim) which will include consideration of a claim's merits; (ii) give greater weight to the cost-benefit analysis; and (iii) consider whether there appears sufficient evidence for assessment of damages on aggregate basis.

These proposals reflect the trend in recent case law, notably:

- The 2025 Supreme Court judgment in *Evans v Barclays* has already gone some way towards recalibrating the approach to certification for opt-out collective proceedings – emphasising the importance of considering the merits of a claim when determining if it should be permitted to proceed on an opt-out (rather than opt-in) basis. Absent a parallel strike-out application, up until *Evans v Barclays Bank*, the assessment of the merits has played a minimal role in certification ever since the Supreme Court held in *Mastercard v Merricks* (2020) that "*the certification process is not about, and does not involve, a merits test*". Following *Evans v Barclays Bank*, Defendants in some claims have been seeking to "decertify" opt-out collective proceedings by arguing that the claims should only progress on an opt-in basis. The government's proposals to allow defendants/proposed defendants to challenge certification on the merits in absolute terms would open up a route to challenge for defendants/proposed defendants in claims which are not plausibly suited to being brought on an opt-in basis (i.e. those brought predominantly on behalf of consumers).

- The balance of costs and benefits is already becoming a focus area for certification hearings. Earlier this year, the CAT recognised the cost-benefit analysis as a potentially decisive factor for refusing certification, when rejecting Waterside Class Limited's application for certification. Like the CAT in *Waterside*, the government appears concerned to address the risk of an imbalance between the likely take-up by the class against the costs and returns to other stakeholders. Concerns around this issue are driven in part by the experience in the first collective action settlement to proceed to active distribution (*Gutmann v SSWT)*, in which only approximately £216,000 went to the underlying class compared with more than £10 million going to stakeholders.

The government has also made proposals to clarify what is expected from class representatives following cases such as: (i) *Riefa v Apple,* where the proposed class representative ("**PCR**") failed to meet the authorisation condition for certification due to concerns around the PCR's ability to demonstrate: "*a strong understanding of the arrangements they had entered into*" or "*sufficient independence*"; and (ii) *Rowntree v PRS for Music,* where the PCR was criticised for failing to scrutinise that the financial benefits of the litigation disproportionately went to other stakeholders rather than to the class. Rather than introducing new statutory duties, the government has suggested amendments to the CAT Rules and guidance to clarify: (i) the PCR's involvement in and knowledge of funding arrangements; (ii) the use of costs lawyers to assist in scrutinising costs arrangements and fees; and (iii) the role of consultative panels in supporting PCRs.

These are pragmatic proposals which reflect the lessons learned from various certification decisions and should help to provide necessary clarity.

Litigation Funding: DBAs and Funder Returns

The government has made a package of proposals focused around DBAs (a form of contingency agreement under which stakeholders receive an agreed percentage of damages/any settlement sum if the client wins), funder returns and the mechanics of payments to funders.

The government's proposals on DBAs are a direct response to the uncertainty generated by *PACCAR* and are amongst its most significant. Currently, DBAs are not permitted in the CAT's opt-out regime and post-*PACCAR* (in which the Supreme Court ruled that a litigation funding agreement ("**LFA**") amounted to a DBA)*,* the enforceability of many LFAs before the CAT have come into question. This in turn, has led funders to increasingly operate on a (capped) multiples basis, which many stakeholders have argued can lead to misalignment between the interests of the class and the funder as funder returns are more closely linked to the scale and cost of proceedings than the merits. This is a concern as it is widely recognised that collective proceedings are lengthy and expensive, often having budgets exceeding £20 million.

The government has therefore proposed to lift the prohibition on DBAs in opt-out collective proceedings in the expectation that DBAs may promote competition in funding claims, drive down costs and promote access to justice for lower value claims. The consultation notes the government's broader commitment to legislate to mitigate the effect of PACCAR more generally on funded litigation and stresses that the proposals in the consultation concern the CAT only.

The government recognises concerns raised in earlier consultations that permitting DBAs may "*increase the risk of speculative litigation and a litigation culture"*. However, it notes that under the

DBA model, lawyers do not get paid unless a claim is successful and therefore take on significant risk. It further notes that its proposals to revise the certification threshold will further guard against this risk.

In another funder friendly proposal, the government has proposed that the CAT should give an indication of the reasonableness of the funder's return at the point of certification, based on a damages award or a settlement sum similar to that in the claim filing. These proposals seek to address ongoing uncertainty regarding funding returns which have emerged in high-profile collective actions such as *Merricks V Mastercard*, in which the class representative's funder (Innsworth), intervened in the settlement process and subsequently launched a judicial review claim, broadly arguing that the CAT had not given sufficient weight to the terms of the LFA in reaching its decision on distribution and had misunderstood the level of return implied by the sums to be paid to Innsworth.

This proposal has been welcomed by funders and other stakeholders however it remains to be seen how it will work in practice. The proposal that the reasonableness of a funder's return should be considered by reference to a sum similar to that in the claim filing has obvious limitations. As *Merricks v Mastercard* made clear, a settlement sum can be wildly different from claim value and in order to provide meaningful certainty to funders it may be necessary for the CAT to consider the reasonableness of the funder's return under a range of different recovery scenarios. We are aware that this is in fact something the CAT is already doing on a number of live cases.

In a similar vein the government proposes that consideration should be given at certification stage as to whether a funder could receive payment after settlement/a damages award but before distribution. More than that, the government goes further and proposes to introduce a presumption into the CAT Rules that funders should receive their return at the point of a damages award being ordered or a settlement sum being approved, without needing to wait for the outcome of distribution.

The combination of litigation funding proposals has been welcomed by funders and is expected to meaningfully reinvigorate the funding market. Businesses at risk from collective claims may however take comfort in the fact that the tightened certification threshold is expected to reduce the risk of a flood of unmeritorious claims.

CMA Redress and Leniency

Two further proposed reforms that are likely to have a significant effect on both the public and private enforcement landscape concern proposals to: (i) empower the CMA to require (or accept undertakings from) businesses to compensate affected persons through an approved redress scheme; and (ii) change the scope of leniency protection by granting full immunity from civil litigation to "type A" leniency applicants.[1]

Specifically, the government has proposed a bold set of reforms to empower the CMA to accept binding undertakings to provide redress, empower the CMA to direct businesses to establish a mandatory redress scheme, set an assumed level of overcharge to create a presumption for calculating appropriate redress, simplify the Competition Act 1998 (Redress Scheme) Regulations 2015, and to further protect against duplicative damages liability, for example by including a waiver for further actions for those that accept redress).

If used heavily by the CMA, redress schemes have the potential to lead to a reduction in the number of follow-on claims that may otherwise be brought. Under its new consumer protection enforcement powers under the Digital Markets, Competition and Consumers Act 2024, the CMA has already been active in ordering redress in drip pricing cases (e.g. *AA Driving School/BSM Driving School*). However, in those cases the level of pernicious hidden fees/cost identified by the CMA provides a ready proxy for an overcharge and consumer harm arises by a more direct route. There are also a number of reasons why the introduction of mandatory redress schemes in the way the government envisages may not lead to a significant reduction in the number of collective actions being brought. Most collective actions to date have been abuse of dominance, stand-alone claims where liability needs to be established as part of the claim and where a redress scheme would not, therefore, be appropriate. In addition, the quantification of follow -on and stand-alone competition claims is frequently complex and work on a redress scheme for a competition claim could result in a significant diversion of CMA resources (this is why the CMA has not previously been given this power). There appears to be some recognition of this in the government's comment that it would expect redress would: *"tend to be used in straightforward cases, such as where the range of those impacted by the infringement can be established relatively clearly*". The government appears to view redress schemes primarily as a way to "*potentially increase the number of cases in which redress would be available in respect of competition infringements*" rather than a way of reducing the number or type of claims currently being brought in the CAT. If implemented, these reforms accordingly appear most likely to be deployed in cases where collective litigation would not otherwise have been brought for reasons of proportionality or practicality.

The government's proposal to introduce a presumed level of overcharge from businesses to consumers for use in redress schemes and appropriate cases is also eye catching. The reform is designed to simplify the often complex task of quantifying harm. However, much thought will need to be given around the risk of over or under-compensation such a presumption could create. These risks are likely to be more acute if the assumption is "one size fits all" rather than being affected by product/market/time period.

It is notable that the consultation does not similarly propose a presumption to apply in respect of pass on by businesses to consumers. In fact, the proposals do not appear to grapple with the prospect of indirect claims. Clarification from the CMA as to how a redress scheme might work (if at all) in the context of indirect claims where complex supply chains exist would be welcome.

Also of significance, the consultation seeks views on whether "Type A" leniency applicants (i.e. the first applicant to report and provide evidence of a cartel, where there is no pre-existing investigation) should receive full immunity from civil damages claims. While intended to encourage cartel reporting, such a reform could be controversial given its potential to relieve a leniency applicant from millions of pounds of liability and the inherent risk of a reduction in compensation to consumers. The government recognises the latter risk and proposes that such an immunity should be set aside if damages are unrecoverable from remaining undertakings involved in the cartel (for example, if co-cartelists are insolvent). However, it is unclear whether such proposals would resolve the issue, as despite joint and several liability, most claimants choose as a practical matter to sue counterparties with whom they would generally have a better prospect of entering into settlement discussions at an early stage. Immunity applicants may also still play a part in claims through third party disclosure requests – particularly if claims against the other defendants are made in respect of sales made by the immunity applicants.

Other Reforms

The consultation contains several other competition litigation reform proposals focused around distribution, ADR and CAT resourcing and efficiency.

Concerns around distribution are heightened following *Gutmann v SSWT*, where there was less than one per cent take-up by the class. In an effort to improve rates of uptake by bolstering consumer trust, the government proposes solutions including: (i) a new page on the CAT website that provides links to live claim websites to enable class members to confirm their legitimacy; and (ii) involvement by the defendants at the distribution stage in communicating and paying eligible consumers due to easily accessible contact and payment details for their customers.

The government is also consulting on whether undistributed damages should flow to Which? as well as or in addition to the Access to Justice Foundation ("**AtJF**"). The consultation responses recognise the importance of the AtJF but note its lack of competition focus or direct relevance to class members.

Other proposed changes designed to encourage cost control and assist with CAT resourcing include proposals for: (i) both parties to file costs budget following certification; (ii) the potential introduction of court fees in the CAT; and (iii) increased flexibility to allow the CAT to sit as a tribunal of two where appropriate.

Conclusion

The DBT consultation represents an ambitious and systemic review of reforms to the UK's competition litigation and enforcement landscape. The proposals in relation to the CAT's opt-out regime are broadly reflective of the trends in recent case law and seek to balance competing objectives of promoting access to justice and redress for consumers with shielding defendants from unmeritorious claims. The success or otherwise of the proposals in making competition redress swifter and simpler' and increasing certainty for stakeholders will ultimately depend on how legislative drafting resolves the competing considerations identified in the consultation and the practical challenges they raise. The consultation provides a valuable opportunity for businesses and other stakeholders to have a say on important issues which will have a meaningful impact on the future shape of the regime.

The consultation remains open until 25 September 2026. If you would like to discuss the proposals or provide input on any aspect of the consultation that our firm may consider including in its response, please contact a member of our Antitrust & Competition team. The link to the consultation page is here.

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[1] Under the CMA's leniency regime, there are three categories of leniency applicants (Type A, B and C). Type A leniency applicants are the first applicants to report and provide evidence of a cartel, where there is no pre-existing investigation and they receive the highest protection from financial penalties.

Related Capabilities

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