CASE ASSOCIATES

CASENOTE

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A More Balanced View of UK Opt-out Class Actions

The Consumer Rights Act 2015 created the opt-out collective proceedings (or class action), only available for competition cases. These are designed to give consumers greater access to justice and to deter firms from engaging in anti-competitive conduct. After a fitful start, consumers are suing firms for billions in compensation. It would seem mission accomplished.

Not so say recent commentaries. These paint a picture of '*predatory litigation'* for the benefit of funders and lawyers, harassing British businesses with unmeritorious claims, which are '*jeopardising*' economic growth and '*chilling … global businesses who want to invest in Britain'*.

Most of these criticisms pander to the UK Government's economic growth strategy and recently announced Review of opt-out class actions. There is no hard or anecdotal evidence that class stifle economic growth, investment and innovation. Nor do they mention that the illegal actions of those businesses being sued have already impaired the competitiveness and growth prospects of the British economy. But yes, there are concerns over the effectiveness and costs of opt-out class actions. This Casenote offers a more balanced view.

Is a lot of class actions evidence of failure?

Much has been made of a few headline figures claiming that opt-out class actions will cost British industry £95bn in compensation payments as they are sued by UK citizens who each are unknowingly embroiled in an average of 10 complex class actions (CMS European Class Action Report 2025).

These statistics, while correct, are misleading. They are taken from the certification (CPO) applications required to obtain the Competition Appeal Tribunal's (CAT) approval for a proposed class action to proceed to trial. They are not cases or compensation payouts but unverified initial estimates of the compensation sought.

A closer look at these figures paints a different picture. By the end of 2024, there were 52 pending, approved or abandoned opt-out certification applications. Of these:

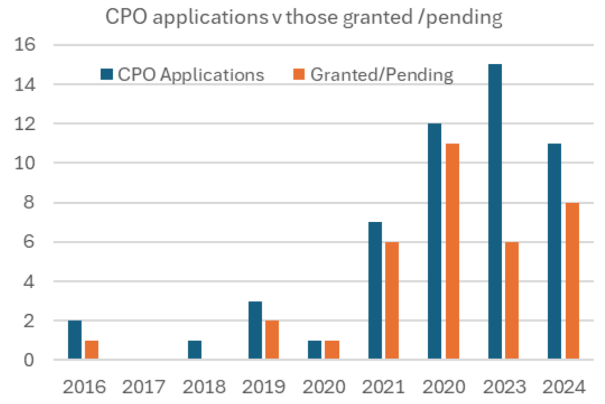
- 25 had been approved.
- 17 rejected, stayed or abandoned.
- 10 awaiting certification.
- Of those approved, 2 have gone to full trial (one failed; the other awaits judgment); 3 have been fully or partially settled (*Merricks*, *Gutman* and *McLaren*).

Thus, 17 of the 42 or 40% of the certification applications that had so far been processed or withdrawn, will not go to trial. Even these figures understate the attrition rate, as several claims, such as the four *Scalia* electronic music instruments claims, have languished and look unlikely to proceed to certification.

Key Points

- There is no evidence that class actions stifle economic growth
- Industry's compensation bill will be a fraction of the headline £95b in claims taken from certification applications
- 40% of the processed certification applications have been rejected or abandoned
- The actual compensation so far paid by industry has been circa £150m or a mere 0.00001% of the £18.5b claimed
- Consumers will received only 1%-4% of actual compensation payouts
- Industry's litigation costs will not be £18b but more like £600m
- Opt-out class actions are a costly and ineffective means of consumer compensation
- Litigation funders are not making money and face strong headwinds.
- Lawyers, experts and claims administrators are the main gainers
- The large number of opt-out standalone actions is plugging a gap left by the CMA's under-enforcement. Whether they have a deterrent effect is unknown

Next, it is said that the number of opt-out class actions is exploding, with new claims being made monthly if not weekly. This is untrue. One would expect the number of certification applications of the new regime to grow as it taps into a pent-up supply of cases. But this did not happen in the first five years as lawyers and funders waited to see how the new regime would operate. In 2017, they got their answer when the CAT rejected the overly ambitious *Merricks'* certification application. During the period from 2017 to the end of 2020, the CAT suspended consideration of CPO applications. This resumed after the Supreme Court decision in December 2020 confirmed a more permissive threshold for certification, which allowed *Merricks* to be certified five years after its original application. This released the backlog of stalled applications, serving to exaggerate the CAT's annual caseloads after 2020 (see figure). But again, this is not the relevant statistic, as less than half of these were certified by the CAT (orange column) and the number of certified opt-out collective actions in 2023 and thereafter has declined.



British industry is said to be facing a £95bn compensation bill. This untrue. Industry will pay nothing like this amount if the recent settlements are to go by. The £18.5bn in claims from the 17 abandoned certifications (£7.5bn) plus the *Merricks* and other settlements and the failed *La Patourel* case (£11bn) resulted in a mere £150m (or 0.00001%) in compensation payouts by the firms being sued. If future case outcomes are anything like these, the industry's compensation bill will be more like £60m rather than the remaining £60bn in claims, and payouts to consumers even less.

Unmeritorious cases

The critics say that opt-out class actions encourage weak or, to put it more politely, unmeritorious claims. It is hard to fathom why a litigation funder would systematically fund weak cases, especially in the early years of the regime, where there are many sound cases with large claims. The reality is that litigation funders reject between 98% to 96% of the thousands of cases pitched at them (Mulheron 2024; Veljanovski 2012). Of the small number that are funded, the CAT has rejected a significant proportion at the certification stage and will fail many that go to full trial.

What is true is that law firms have cheekily shoehorned consumer, environmental and contract disputes into the competition opt-out collective regime, e.g. the *Guttman* trains claim which the CAT said was a weak case which would probably fail at trial; the *Roberts'* actions against the six water companies for failing to report sewage spills and environmental law breaches; *Rowntree's* absurd claim which saw the members of a royalty collection society suing themselves; and the novel data abuse claims against Big Tech. These have not had an easy ride in the CAT, which refused to certify the *Roberts* and *Rowntree* cases, resulting in the claimant/funder paying most of the defendants' legal costs.

Costs of Litigation

Class actions are expensive and time-consuming. The CAT often expresses concerns over the size of legal and experts' fees and the over-lawyering on even straightforward procedural matters. Funders also complain about the inability of lawyers to stick to agreed budgets and their weak cost controls. On the other hand, trials have unanticipated legal costs as defendants stall, oppose and appeal the CAT's decisions at every turn, to force settlement or the abandonment of the case.

There are no credible estimates of the litigation costs of the opt-out regime. Yet the widely cited EPICE report says that UK industry faces litigation expenses of between £6bn and £18bn, with another £11bn from lost corporate innovation. These are large numbers that warrant closer inspection.

The EPICE report is described as a '*rigorous economic assessment',* but it is nothing of the sort. It is a highly speculative 'scenario analysis' based on questionable US data and assumptions.

Briefly, EPICE estimates industry litigation costs based on one consultant's report of the US tort system (mainly automobile accident and general negligence claims) commissioned by the American Chamber of Commerce Legal Reform Institute, a business lobby group hostile to class actions. The ACC's consultants' report estimates that total litigation plus compensation costs in the form of liability insurance premiums added up to 2.1% of US GDP in 2020. EPICE takes 10% to 30% of this percentage and applies it to UK GDP in 2024 to claim that the legal costs of UK class actions will be between £6b to £18b. This is not a credible attempt to estimate actual UK litigation costs. US tort litigation operates in a very different legal environment, and the lower percentages for the UK are arbitrary and unexplained, generating such wildly different hypothetical cost scenarios as to be meaningless. It is not even clear whether these are annual costs or for all UK class actions in the pipeline.

Adopting EPICE's low statistical standards a quick back-of-the-envelope calculation (which I do not stand by) suggests that defendants' litigation expenses for all UK opt-out class actions at the end of 2024 would be about £500m to £600m (total not annually), taking into account failed cases, settlements and the loser pays costs rule, which does not exist in the USA. Assuming it takes an average of five years to judgment, this works out to an annual cost of give or take £100m. And this does not take into account the CAT's continuing efforts to bear down on the costs of opt-out actions by refusing unreasonable adverse costs.

As a 'sanity check' on my highly speculative estimate, consider the *Merricks* settlement. This took 9 litigation-heavy years and cost the claimant (actually the funder) $45m in legal and other fees, which, when averaged out, would have seen annual drawdowns of £5m in fees. The defendants would have spent more, but even if they spent 25% more, that would give an average of £6m annually per case. Multiply this by the 25 certified cases in the pipeline at the end of 2024, and it puts the UK industry's litigation costs at £125m annually or to settlement/judgment, a total of £625m. This is 4% of EPICE's £18bn estimate.

Access to justice but little compensation.

Class actions are said to give consumers greater access to justice. The consumer is not out of pocket because all fees and expenses are paid by litigation funders on a no-win no no-fee basis. Since they would not have otherwise sued, they can only gain, irrespective of the size of the eventual settlement. Yet the slow pace of litigation, large legal and other fees, low settlement amounts, and, most disappointingly, the indifference of consumers to making a claim, mean consumers receive very little compensation. In short, opt-out class actions are a costly and ineffective means of compensation.

Consider the *Guttman* settlement. This was 'for up' to £25m plus £4.75m for the class representative's legal costs, fees, or disbursements, and a £750,000 contribution to the costs of distribution. Less than £216,000 will be paid to the consumers represented by Guttman; less than 1% of the £25m settlement and less than the costs of administering the payouts. The class representatives' legal costs were over £11m, the defendant's legal costs likely more. It does not make sense to pay lawyers and other advisers £25m to secure £216k in compensation unless, of course, the settlement reaps other benefits.

The same low payout is likely in the *Merricks* settlement. *Merrick's* original claim was for £14bn rising to £17bn on behalf of every man, woman and youth dead or alive in the UK. It settled for £200m, again less than 1% of the original claim. £100m was earmarked for compensation, £45m legal and other fees, and £55m to the funder. If all those entitled to compensation applied, they would get £4.50 (compared to the £300 compensation originally touted in the certification application); if 5% apply, they will get £45, with individual payouts capped at £70. Since less than 5% will make a claim, the settlement, to quote the Tribunal, was '*very far from a success for a class of some 44 million claimants*.' Other settlements have similar low recoveries and payouts, e.g. *McClaren* settled for 1.7% of the original claim; *La Patourel's* £445m claim against BT resulted in nothing. So far, the chief beneficiaries have been the lawyers, experts, advisers and claims administrators.

Litigation Funding

The growth of litigation funding has been a game-changer - without third-party litigation funding (TPLF), there would be no opt-out class actions.

Yet while there is widespread support for third-party funding, it has attracted criticism for the high funders' fees of 3x to 15x committed or drawn down funds. Since the funding is given on a no-win no-fee (non-recourse) basis, the successful cases must make up for the losses on those that fail. While true, this begs the question of whether the terms of the litigation funding agreements are reasonable.

There are reasons to believe that they are not because of the misaligned incentives and interests of funders, law firms and consumers. An opt-out class action is created without the consent and knowledge of consumers on terms negotiated between the funder and typically a sponsoring law firm. The law firm may agree to very favourable terms with the funder to commence proceedings to generate substantial upfront fees, irrespective of whether the case is successful or not. As the CAT has commented, the terms of some funding agreements appear overly generous to lawyers and funders, who both have an interest in limiting the payouts to consumers. It is the role of the class representative and CAT to protect the interests of the consumer.

On the other hand, litigation funders have not made the high returns that a superficial reading of the litigation funding agreements would suggest. It is debatable whether, as an industry, they will. The settlements to date have been small, the *PICCAR* decision unexpectantly banned damage-based fees, and the CAT has made it clear that it will reduce the funders' fees when it deems they are not 'fair and reasonable' to the class members. If the present trends continue, one can expect many funders to pull out of funding competition class actions.

Deterrence

Opt-out class actions are supposed to deter anticompetitive practices by increasing the costs and reputational harm to those firms which break the law. They are intended to complement the public enforcement efforts of the Competition & Markets Authority (CMA). Unfortunately, there is no hard evidence that either the CMA or suing for compensation has a deterrent effect. The CMA believes it does, but this is doubtful given its small budget, low prosecution rate and low fines (see Veljanovski). In 2024/24, the CMA's competition enforcement budget was a mere £12.52m, which funded three cartel prosecutions that were fined £125m, and two continuing Chapter II prohibition investigations. Clearly, the CMA under-enforces the law, which was one of the reasons the then government backed the introduction of opt-out collective proceedings.

The growth and predominance of standalone actions – those that do not draw on an infringement decision of the CMA – was unanticipated. Certification applications for standalone outnumber follow-on actions 4 to 1. They appear to be plugging a gap left by the CMA, and because of their number and of size, may have a deterrent effect. What the size of this effect is and whether it is worth the costs is an open question, but one crucial to the case for opt-out class actions.

This Casenote expresses the personal opinions of the author, who has not been paid or sponsored by any third party either directly or indirectly. The author was an expert for the PCR in Merricks CPO application (but not the trial) and is an expert witness in opt-out and other actions before the CAT acting for both claimants and defendants.