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**SCOTTISH CIVIL JUSTICE COUNCIL  
GROUP PROCEDURE WORKING GROUP  
CALL FOR EVIDENCE  
RESPONSE HAUSFELD & CO. LLP**

## **ABOUT HAUSFELD**

Hausfeld is a leading law firm specialising in dispute resolution, with significant expertise in all aspects of collective redress and group claims, including in England & Wales, the United States, the Netherlands, and Germany. The individuals who have contributed to this response have extensive experience in particular in litigating opt-out collective claims before the UK Competition Appeal Tribunal (UK CAT).

For further questions and/or information about the response, please contact:

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## GENERAL QUESTIONS

### **Question 1 - What are your views on the introduction of opt-out group proceedings in accordance with Part 4 of the Act?**

The introduction of an appropriate and well-controlled opt-out group proceeding regime will improve access to justice for SMEs, consumers, and public organisations. It will allow these individuals and entities to enforce their rights and to obtain redress when victimised by dispersed, low-value, but widespread harms for which individual or opt-in actions are impractical. It restores cash to the pockets of consumers, businesses and others who have been the victims of unlawful conduct by otherwise unaccountable and often powerful entities.

A successful opt-out regime will complement public enforcement and contribute to increased detection and deterrence of unlawful conduct – changing the incentives of potential infringers who might have hoped to profit from wrongdoing and thereby ultimately promoting legal compliance.

In the converse, the absence of an opt-out group proceedings regime results in no (or at most extremely limited) private enforcement of mass harms, such as can arise in almost any arena – including the sale of defective goods, the mis-selling of financial products, breaches of data privacy, environmental damage, and labour market wrong-doing. Opt-in mechanisms are not, in practice, sufficient to plug this enforcement gap. Opt-in claims require victims to individually register to pursue their claims. This often leaves many affected persons – who may be vulnerable, intimidated, unsophisticated or otherwise unaware of their options – without any practical route to compensation or vindication of their rights.

In short, opt out actions provide access to justice, vindicate rights for individuals and small businesses, incentivise proper corporate behaviour and respect the rule of law.

### **Question 2 - Are there areas of litigation which should be exempted from opt-out group proceedings, in your view?**

We are not aware of any reason to exempt entire areas of litigation from the possibility of opt-out group proceedings.

It is appropriate, however, to ensure that the regime benefits from a well-designed certification stage to operate as a safeguard so that claims brought as opt-out group proceedings are subject to judicial scrutiny at this early stage.

A Scottish opt-out regime will be well placed to deliver redress for non-competition mass harms. The SCJC may also want to consider whether, in order to maintain the benefit of the specialist Tribunal, it should require opt-out actions for damages arising from a breach of competition law to be brought in the UK CAT where possible/appropriate.

### **Question 3 - Should group procedure (whether opt-in or opt-out) apply to judicial reviews in Scotland?**

Please see the response to question 2, above.

## QUESTIONS OF PROCEDURE

### **Question 4 - How should court procedures for opt-out proceedings differ from those which already apply to opt-in actions?**

We are not experts in Scottish law, but note that opt-out proceedings require additional safeguards and case management tools that are not always necessary in opt-in claims. In particular, given the practical difficulties in consulting with the members of an opt-out group, consideration should be given to whether it is appropriate to make settlement of an opt-out action subject to judicial oversight to ensure that the terms of the settlement are just and reasonable<sup>1</sup>.

### **Question 5 - How do you think the certification process for opt-out group proceedings should operate?**

Again, we are not experts in Scottish law but we are aware of no reason why the certification process for opt-out group proceedings should be subject to additional requirements over and above the existing process for the grant of permission to bring opt-in group proceedings.

### **Question 6 - What procedural steps are required to protect the rights of the group members in opt-out group proceedings (many of whom may not know that they are part of group proceedings)?**

It is important that opt-out class members can access information about the claim in which they are represented, and have meaningful opportunities to exercise a right to opt out and/or to raise objections. This is facilitated by requiring meaningful notice of the opt-out proceedings to be given in a manner likely to reach potential group members at appropriate junctures (for example, after permission is granted to bring the group action, after any judgment in the proceedings, upon application for permission to settle the proceedings, etc). There is a public policy need to ensure public awareness, communication and the efficient administration and distribution of awards. The notice should be in plain and easily understood language and contain a straightforward summary of the options available to group members and their consequences.

In addition, opt-out group members should benefit from judicial supervision of their representation, funding and any settlement and distribution.

### **Question 7 - Are there any particular measures that should apply to opt-out group procedure for the protection of defenders or respondents, in your view (e.g. in relation to the ability of a group representative to meet adverse awards of expenses)?**

In our view, based in particular on our experience of litigating opt-out collective proceedings in the UK CAT, the procedural protections for defenders/respondents are primarily secured via the test which makes up the certification process, coupled with the Tribunal's continuing case

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<sup>1</sup> The approach to judicial approval of UK CAT collective settlements in opt-out proceedings, which must be 'just and reasonable', is set out in the UK Competition Appeal Tribunal Rules 2015 (SI 2015 No. 1648), at Rule 94.

management oversight. The Competition collective experience has been that the protections built into the regime have allowed Defendants to proceed to – and win at – trial.

In our view, the existing process for the grant of permission to bring an opt-in group proceeding (together with continued case management oversight by the courts) is liable to achieve this aim for defendants/respondents in opt-out group proceedings in Scotland.

We note, in particular, that the current procedures for group proceedings already require an applicant to demonstrate that they have the financial resources to meet any future expense award as part of the assessment of whether they are a suitable person to act as a representative party in group proceedings.

**Question 8 - Should pre-action protocols be a requirement in group proceedings (opt-in or opt-out). If so, should these be voluntary or compulsory, and what should happen if they are not complied with?**

Pre-action engagement can be beneficial in narrowing issues, preserving evidence and promoting early resolution. However, overly rigid protocols can create delay and front-loaded cost in precisely the categories of dispersed claims where access to justice is most fragile. As a general matter, any protocol expectations should be proportionate and should allow the court to take a flexible approach in light of the scale and nature of the proposed group, the availability of information and the urgency of protective steps.

## **QUESTIONS ABOUT SETTLEMENT AND DISTRIBUTION**

**Question 9 - If the case is resolved by a decision of the court, what role should the court have in approving the distribution of the award?**

Court supervision is an important safeguard in opt-out cases, both to protect class members and to ensure public confidence in the regime. In our experience in the UK CAT, a practical approach is for the court to approve (and, where necessary, refine) a distribution plan that is fair, transparent and proportionate, including the use of claims administrators where appropriate.

**Question 10 - If the case is resolved by a settlement, what role should the court have in approving the settlement amount and its distribution?**

A settlement approval process should enable the court to assess whether the settlement is fair and reasonable for the class as a whole, including any proposed deductions for costs, fees, funding returns and administration, and the proposed distribution methodology. Court approval is therefore a core safeguard.

**Question 11 - Do you have any views on how unclaimed damages awards or settlement sums should be distributed?**

Unclaimed sums should not ordinarily revert to the wrongdoer, as that risks undermining the compensatory and deterrent objectives of the opt-out regime. In opt-out regimes, mechanisms such as further distribution rounds, pro rata adjustment, or a *cy-près* style distribution to an appropriate public interest recipient can reduce the risk of windfalls while supporting access

to justice objectives. In opt-out collective proceedings in the UK CAT, the Access to Justice Foundation charity is designated to receive undistributed damages.

## QUESTIONS ABOUT FUNDING

### **Question 12 - What do you regard as being the main issues for the funding of group proceedings in Scotland (whether opt-in or opt-out)?**

We do not comment on Scottish funding rules as such. As a matter of practical reality, group proceedings (whether opt-in or opt-out) typically require access to substantial external funding and without access to funding for such proceedings, access to justice is therefore unlikely to be achieved. From experience in funded collective proceedings before the UK CAT, the key issues are availability of funding, certainty as to enforceability of funding arrangements, transparency and ensuring appropriate court oversight, and the alignment of incentives between the representative, funders and the class. While the Scottish rules may be crafted to reflect the particular conditions in the jurisdiction, it is equally important for the two regimes to bear common features and to be informed by each other's successes and shortcomings.

### **Question 13 - How do you think that opt-out group proceedings should be funded and what protection measures should be put in place for group members regarding those funding arrangements, in your view?**

In collective proceedings in the UK CAT (whether opt-in or opt-out), claimants seeking certification are required to disclose to the CAT funding arrangements (subject to confidentiality safeguards, as discussed in Question 14 below), which examines them as part of the certification decision.

As the UK CAT has recognised, a funder's interests will be aligned with those of the class when a funder's return is a percentage of the damages recovered<sup>2</sup>. This can potentially involve stepped caps based on the level of damages recovered.

### **Question 14 - What are your views on disclosure of funding arrangements and confidentiality around funding documents which are lodged with the court (whether opt-out or opt-in)?**

Funding agreements can be transparent to the court and, subject to safeguards, to class members, without all terms being fully disclosed to defendants where that would give an unfair tactical advantage. In the UK CAT, there is a presumption of transparency in respect of funding agreements in collective proceedings (whether opt-in or opt-out), but the CAT may refuse disclosure of a funding document where disclosure would give the defendant an unfair tactical advantage. Class members may be able to inspect funding agreements with minimum redactions upon giving appropriate confidentiality undertakings.

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<sup>2</sup> *Walter Hugh Mericks CBE v Mastercard Incorporated and Others (CSAO Application)* [2025] CAT 28, para. 185.

## QUESTIONS ABOUT EXPENSES

### **Question 15 - Do you have any views on whether there should be changes to the Taxation of Judicial Expenses Rules 2019 for group proceedings (opt-in or opt-out)?**

We do not comment on Scottish taxation of expenses rules as such. We would, however, emphasise the importance of predictable and proportionate costs outcomes in group proceedings.

## GENERAL QUESTIONS

### **Question 16 - Are there any aspects of substantive law which could be a barrier to group proceedings working effectively?**

From a general perspective, barriers can arise to group proceedings where legal tests require highly individualised proof (for example, individual reliance or individualised loss), or where damages quantification is thought to require claimant-by-claimant assessment. Opt-out regimes can mitigate these barriers through tools such as determination of common issues, the use of aggregate damages methodologies, and court-approved distribution plans that address individual variations at the distribution stage rather than at liability trial.

### **Question 17 - Are there any other points which you feel are relevant to the procedures relating to the current opt-in regime, or may inform and shape a potential opt-out regime in Scotland?**

We highlight three final points of policy relevance:

- Opt-out group procedure is the only realistic pathway to redress for dispersed, low-value but widespread harms. Opt-in mechanisms can work for some claims, but they often depend on costly and imperfect claimant recruitment, which can materially reduce redress, particularly for consumers, SMEs, and public organisations. Absent such procedures, and with the collapse of civil legal aid, consumers and SMEs simply do not have access to justice, nor do corporates have sufficient incentives to abide by the law.
- Interoperability within the UK landscape matters. The UK CAT already provides a court-supervised opt-out mechanism for competition law harms across the UK (including Scotland). A Scottish opt-out regime would therefore most clearly fill the remaining gap for non-competition mass harms. Data breach is a particular example.
- Private enforcement complements public enforcement, creating a more comprehensive system of oversight. This reduces the burden on public resources and increases detection and deterrence of unlawful conduct, thereby supporting fair markets, consumer confidence and responsible long-term investment, in turn sustaining a healthy economy.