

20 January 2026

By email to SCJC@scotcourts.gov.uk

SCJC Call for Evidence – Group Procedure

About us

Consumer Scotland is the statutory body for consumers in Scotland. Established by the Consumer Scotland Act 2020, we are accountable to the Scottish Parliament. The Act defines consumers as individuals and small businesses that purchase, use or receive in Scotland goods or services supplied by a business, profession, not for profit enterprise, or public body.

Our purpose is to improve outcomes for current and future consumers, and our strategic objectives are:

- to enhance understanding and awareness of consumer issues by strengthening the evidence base
- to serve the needs and aspirations of current and future consumers by inspiring and influencing the public, private and third sectors
- to enable the active participation of consumers in a fairer economy by improving access to information and support

Consumer Scotland uses data, research and analysis to inform our work on the key issues facing consumers in Scotland. In conjunction with that evidence base we seek a consumer perspective through the application of the consumer principles of access, choice, safety, information, fairness, representation, sustainability and redress.

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Consumer Principles

The Consumer Principles are a set of principles developed by consumer organisations in the UK and overseas.

Consumer Scotland uses the Consumer Principles as a framework through which to analyse the evidence on markets and related issues from a consumer perspective.

The Consumer Principles are:

- Access: Can people get the goods or services they need or want?
- Choice: Is there any?
- Safety: Are the goods or services dangerous to health or welfare?
- Information: Is it available, accurate and useful?
- Fairness: Are some or all consumers unfairly discriminated against?
- Representation: Do consumers have a say in how goods or services are provided?
- Redress: If things go wrong, is there a system for making things right?
- Sustainability: Are consumers enabled to make sustainable choices?

We have identified access, information, fairness and redress as being particularly relevant to this consultation proposal.

Our response

The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act allows for Rules of Court to be developed in relation to group proceedings in the Court of Session. The Rules may provide for group proceedings to be on an opt-in basis, an opt-out basis, or on either an opt-in or opt-out basis. Rules allowing group proceedings on an opt-in basis came into force on 31 July 2020 and the Scottish Civil Justice Council (SCJC) now seeks views on whether to extend the Rules of the Court of Session to cover “opt-out” group proceedings. In such cases, everyone who meets the relevant criteria is automatically included in the claim unless they opt out. Group members do not need to take any active steps to join proceedings.

Consumer Scotland broadly supports the proposal, as opt out group proceedings may enable consumers to access justice and redress which may otherwise be out of reach.

However, in order to be effective in promoting the interests of consumers, there is a need for safeguards to be put in place for these procedures to ensure:

- **clarity and transparency for consumers**
- **the provision of appropriate information to consumers and**
- **fairness in the distribution of settlements, expenses and damages.**

General Questions

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

Recent research shows increasing consumer awareness of group proceedings in the UK. A survey of around 2000 consumers¹ found that 27% were aware of them, with awareness rates being higher amongst younger consumers. These differing awareness levels were attributed to higher rates of social media use and related news consumption by younger people. 65% of those surveyed said they would sign up to group proceedings given the opportunity, while 27% reported signing up to group proceedings previously. Portland suggest that consumers are largely motivated by seeking access to justice, with 42% saying they would join a group proceeding if a company had done something wrong or illegal. 54% of those surveyed thought that group proceedings were an effective way to hold companies, organisations and employers accountable. The sectors consumers were most likely to support taking action in were healthcare, finance, energy and technology.

Despite these increasing awareness levels, consumers have some scepticism about group proceedings, with 68% believing that they mostly make money for lawyers and funders. Portland notes that while many participants believe the system can deliver results, they remain unconvinced it currently operates primarily in the interests of the public or claimants.

The potential expansion of group claims to opt out proceedings has also been criticised by some commentators, concerned that they will result in a rise in the number of speculative claims, funded by unregulated speculators, and that this will not deliver financial redress for consumers.²

While consumers are interested in using group proceedings to obtain redress, it is clear that any new regime must address issues around transparency and fairness in order to command consumer and stakeholder confidence.

Consumer Scotland’s overriding concern is that consumers should have access to redress where detriment has occurred.

In some sectors, such as telecoms or energy, redress is provided for by compulsory access to ombudsmen schemes whose decisions providers must comply with. In others, redress provisions may be set out by legislation or by regulators (such as the delay repay schemes operating in the aviation or train transport sectors). In some regulated sectors, regulators may respond to “mass redress events” where harm has been caused to large numbers of consumers by implementing redress schemes which avoid the need for individual consumers to go to court or to an ombudsman. The Financial Conduct Authority recently implemented such an approach in relation to detriment caused by a failure to disclose motor finance commission arrangements. Consumer Scotland supports the provision of such measures which can allow consumers to access redress quickly, at no cost, using relatively simple processes.

Nonetheless, there remain some cases where consumers may need to take court action in order to establish liability for harms caused or where no other regulated solution exists.

Consumer Scotland supports measures to ensure that, where court action is necessary, it can be conducted in an efficient, financially accessible and fair way for consumers. Whilst opt-in proceedings provide one method of pursuing such claims, not all consumers will have sufficient awareness, motivation or ability to opt into proceedings, meaning that they may miss out on opportunities for redress.

Opt out group proceedings have potential to allow consumers who have suffered from similar harms to access redress in a more efficient and affordable manner than if individual legal claims were to be brought. Bringing multiple claims under group proceedings may make redress possible where individual claims alone would be too small to be economically viable to pursue.³

However, for this potential to be realised, then a number of effective consumer safeguards relating to opt out group proceedings will be required. We outline options for these safeguards in our responses to the questions below.

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

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

There are no restrictions on the type of civil claim which may proceed under the opt-in procedure under the 2018 Act, and we consider that the same approach should be taken, subject to the comments below.

These questions raise a number of issues for policy, law and practice and there are several areas which will require resolution to ensure the system works effectively for consumers:

- Case law regarding judicial review has clearly defined who has standing to bring proceedings. Close consideration should be given to how this case law meshes with group proceedings Rules would be needed if judicial review cases were to be included.
- Detailed consideration would also be needed regarding the interaction of commercial funding for group proceedings and legal aid availability for judicial review claims. For example, legal aid is available in relation to environmental public interest proceedings. There has also been recent debate around potential future legal aid reforms and the impact of Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 which currently limits the ability of individuals to work together to use legal aid to pursue public interest litigation. Calls have been made for reforms which would allow for greater use of legal aid for group actions.⁴
- Finally, in relation to personal injury cases, Qualified One-way Costs Shifting (QOCS) was introduced for all Scottish personal injury litigation in 2021. QOCS gives pursuers general protection against awards of costs against them, save for some specific circumstances. Consideration would need to be given to how the QOCS regime, and the specific personal injury regime that exists in Scotland, would mesh with any group proceedings expenses regime. We note that a review of the QOCS regime is anticipated, with some commentators viewing it as potentially unfair to defenders in the event that unmeritorious claims are pursued.⁵

Further evidence and reflection on these areas is likely to be required before a view could be reached on the appropriate extent of coverage for any opt-out regime. We recommend that the SCJC undertakes and publishes the results of this work before reaching a final view.

Questions of procedure

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

Since 2015, there has been a UK-wide class action mechanism specifically for competition disputes in the Competition Appeal Tribunal (CAT). The regime allows proceedings to be

brought on behalf of a group on an opt-in or an opt-out basis in appropriate circumstances, and some lessons can be drawn from that opt-out regime.

In particular, we note that the CAT requires proceedings to be supported by a “litigation plan” covering issues such as identification and consultation with group members, as well as requiring costs budgets and addressing issues around expenses. **We recommend that consideration be given to adopting similar plans here, with the Court being able to scrutinise information on a confidential basis where necessary. We also consider that the Court should be able to scrutinise the adequacy of proposed mechanisms for awarding redress to affected consumers.**

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

We envisage that a similar process to the 2-stage test currently used for opt-in proceedings would be required. Firstly, the Court considers whether the proposed representative party is a suitable person to take on that role. It is noteworthy that the 2018 Act provides that a person can be a representative party in group proceedings whether or not they are a member of the group on whose behalf the proceedings are brought. This suggests that it was intended to create a broad pool of potential representative parties. Ultimately, it is for the court to appoint a person as the group’s representative party having considered their suitability against the prescribed criteria. In reaching a view, the Court will consider various factors including:

- any special abilities and relevant expertise
- their own interests, and the potential benefits to them, of any proceedings
- their independence from the defenders and whether they can demonstrate that they will act fairly and reasonably and in the interests of the group as a whole
- whether they can show sufficient competence to litigate the claims properly, including financial resources to meet any expenses awards.

If the proposed representative person is authorised, the Court then considers whether the claims should proceed as a group, examining whether:

- the claims raise issues of fact or law which are the same as, or similar or related to, each other;
- there is a prima facie case with real prospects of success;
- all reasonable efforts have been made to identify and notify all potential members of the group about the proceedings and

- group proceedings would be a more efficient means of administering justice than individual claims.

This is a similar, although not identical, process to that undertaken in competition cases, where the CAT decides whether: (i) “it is just and reasonable” for the proposed representative to act on behalf of the class (the “Eligibility Criterion”); and (ii) the claims “raise the same, similar or related issues of fact or law and are suitable (the “Suitability Criterion”).⁶

Legal commentators note that recent Court of Session decisions on these aspects in relation to opt-in cases have shown that the Court of Session is likely to be reluctant to impose technical or evidential hurdles at the preliminary stage. Decisions have made clear that representative parties do not need to have specific legal expertise or qualifications. What matters is that they are willing, independent, and adequately supported by competent legal advisers and funding arrangements. These considerations will be even more important in opt-out cases where claimant groups, and hence the amounts of potential damages claimed, may be larger, and the representative may have a stronger role in instructing lawyers and determining what course of action is in the best interests of the group as a whole. This is due to there being potentially lower levels of consumer engagement in opt-out cases, as members are not required to opt-in to take part in a claim and may therefore have a more passive role.

The Court has noted the importance of access to justice and the policy aims of the 2018 Act and has interpreted procedural rules in a way that is sympathetic to those aims.⁷ We consider that the requirement for the Court to certify both the representative and the appropriateness of the use of the opt out group procedure provides sufficient ability to screen out claims that are speculative, are not in the interests of class members as a whole, or do not have a realistic prospect of success.

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)?

We recommend that the SCJC and the Court should consider what additional steps, in the form of requiring litigation plans, or issuing Practice Notes, are required.

We recommend that the SCJC and the Court should specifically consider the provision of additional guidance to spell out:

- what steps should be taken to identify potential group members,
- how the proceedings will be publicised,
- how expenses will be dealt with and how eligible consumers can obtain their share of any settlement or damages.

It has been suggested by practitioners such as Weiner that changes are required to a number of different aspects of group proceedings in order for the current CAT regime to be successful. As many individual awards may be quite small (in the region of £45-70 per consumer for some recent cases) the effort required of consumers to engage should not be disproportionate to the reward. Weiner argues that systems should be informed by consumer views and experiences, with a view to strengthening participation, reducing friction and creating user-centred systems which maximise the opportunities for effective distribution.⁸

Weiner's suggested changes include improvements to:

- **Consumer awareness** – traditional legal communications may not be effective at reaching a wider audience. A multi-channel approach, working with consumer associations, and using plain English communications will be required in order to ensure consumers can access redress.
- **Accessibility** – requirements on consumers should be as light touch and proportionate as possible, based on inclusive design and with necessary adjustments to processes for those with disabilities, language needs, or who have limited digital capacity.
- **Agility** - one size fits all approaches may not work, and systems should be informed by best practice and adapted to the needs of each claimant group
- **Assurance** – consumers must be able to trust processing systems and all data must be securely held.

It would be helpful for guidance or practice notes to draw on thinking such as this when designing systems for opt out proceedings.

Question 7 – Are there any particular measures that should apply to opt-out group procedures 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)

We recommend that any representative party should be able to demonstrate to the Court that they can meet any liability to the defender for its recoverable expenses. We do not consider it is appropriate that any liability is borne by individual group members, other than the representative party, as they may be unaware of the proceedings if they are taken on an opt-out basis. It would be fundamentally unfair for consumers who were not aware of proceedings and who had not indicated any wish to take part in them to be financially penalised.

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

The Court should be able to specify whatever protocols or practical arrangements are required for the efficient and effective management of business.

Practice Notes have been issued in relation to opt in cases, and we envisage they would also be developed for opt out cases. It may be challenging to adopt formal pre-action protocols if the proceedings have not yet been certified by the Court as being appropriate for group action and if the appointment of a group representative has not yet been approved.

Encouraging early settlement may also be challenging if liability has not yet been tested and the size of the potential group, and hence the calculation of damages, is uncertain. This suggests that the Courts will require a wide discretion to manage cases, to order necessary disclosures and to ensure that the parties co-operate to ensure the effective management of cases. We support the ability for the Court to undertake effective judicial management of such cases.

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?

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

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

We have chosen to answer these three questions together. We note that CAT Rules on opt-out proceedings require that settlements must be approved by the CAT. The CAT will only grant approval if it is satisfied that the terms are just and reasonable. **Consumer Scotland recommends that the Court be required to approve the terms of any distribution of damages or agreed settlement on a similar basis.**

The fairness and transparency of any distribution of damages or agreed settlements is crucial to the success of any opt out regime and the maintenance of consumer confidence in it. We agree with the Class Representatives Network (CRN) that even relatively small quantities of damages are of value, but note that significant improvements in public awareness of, and trust in, opt-out actions are needed in order to overcome practical barriers to distribution of awards. The CRN considers that distribution should ideally be achieved by ensuring that consumers obtain a direct financial benefit.⁹

Recent opt out cases in the CAT have demonstrated barriers that will need to be addressed. In *Merricks v Mastercard* a £200 million collective settlement was proposed, following a claim that was originally for £14 Billion. The proposed settlement (with £100m ring-fenced for class members and the remainder primarily intended for lawyers and funders) was opposed by the third-party litigation funder, on the grounds the settlement was too low and was not “just and reasonable” for all stakeholders. In approving the settlement, the CAT

made clear the importance of the regime operating in the interests of class members and not just funders and lawyers.¹⁰

In 2024, the case of *Justin Gutmann v Stagecoach South Western Trains* settled for the sum of £25m. Despite widespread publicity, only £216,000 was successfully claimed by passengers. This suggests that further work is required, at an earlier stage in the development of proceedings, to consider the likely take up of settlement amounts by class members and how any damages, including those which are unclaimed by group members, may be distributed.

Consumer Scotland highlights the importance of ensuring that any settlement or distribution is in the interests of class members and/or is in the public interest. We note that unclaimed damages in the *Gutmann* case were allocated to the Access to Justice foundation and we recommend that any future unclaimed funds are allocated to similar causes in Scotland.

We consider that the alternatives - of allowing unclaimed damages to either revert to the defenders or be claimed by funders - would lead to perverse incentives, either allowing unjust enrichment for funders or failing to ensure defenders are adequately penalised for causing harm to consumers.

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)?

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?

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)?

We have chosen to answer these three questions together.

On the basis of experience under the CAT opt out regime, there may be a need for appropriate dispute resolution procedures in the event that funders and group representatives have differing views over strategy or expenses. If the Court is to have a role in approving settlement and distribution, and in approving the appointment of representative parties, it will likely wish to be satisfied that a representative has appropriate backing, that the funding is in place and that the proposed distribution to funders - and consumer - is fair and appropriate and does not disadvantage group members. That may involve a higher degree of disclosure than is currently the case. As commercially sensitive information is likely to be involved, the Court may need the facility to examine this on a confidential basis.

It should be noted that opt-out procedures are likely to involve larger groups of consumers, and hence potentially larger sums of damages, which are likely to make such action more attractive to funders, relative to opt-in claims. We understand that this issue is also being discussed in England and Wales, with recent consultations being issued by the Department of Business and Trade. In the event that different approaches are taken, this may impact on the volume of cases being lodged in respective jurisdictions. It will also create a requirement for clear information to be provided, allowing consumers, consumer groups and funders to understand the differences between the respective regimes.

Questions about expenses

Question 15 – 17

We do not comment on these questions.

¹ Portland Communications (2025) [Reputation and Accountability: Class Actions, ESG and Values-Driven Litigation](#)

² [Fair Civil Justice](#) (2025)

³ Brodies LLP (2024) [A powerful procedure - The impact of group proceedings on Scotland's energy landscape](#)

⁴ <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-06-01-2026>

⁵ [Qualified One-way Costs Shifting needs to be reviewed soon](#)

⁶ CMS Law (2022) [Class Actions in England and Wales](#)

⁷ Brodies LLP (2025) [Class actions in Scotland](#)

⁸ [Jade Tess Weiner](#) (2025) Beyond settlements and judgments: ensuring redress actually reaches claimants

⁹ [Class Representatives Network](#) (2025) Opt-out collective actions regime review: call for evidence

¹⁰ CMS Law (2025) [European Class Action Report](#)