UK Finance

Group Procedure

UK Finance response to the Scottish Civil Justice Council's Call for Evidence

January | 2026

Introduction

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Sent via email to: SCJC@scotcourts.gov.uk

UK Finance is the collective voice for the banking and finance industry. Representing around 300 firms across the industry, we act to enhance competitiveness, support customers and facilitate innovation.

We welcome the opportunity to respond to this consultation and given the subject matter, have consulted widely across our membership to attain views from a broad range of firms, with different business models and customer bases.

Our high-level views and responses to the consultation questions are set out below and we would be happy to discuss this submission in more detail if that would be useful. Please contact Daniel.ryall@ukfinance.org.uk in the first instance to discuss further.

Executive Summary

Members do not support the introduction of opt-out group proceedings in Scotland at this stage. In their view, the case for opt-out has not been made and the available evidence points in the opposite direction.

Scotland's existing opt-in group procedure remains largely untested. No opt-in group action has yet reached determination of substantive issues and the Scottish Civil Justice Council is still reviewing the operation of the current regime. Introducing opt-out now would risk redesigning the system before there is a sufficient domestic evidence base to assess whether existing mechanisms are ineffective or require replacement.

Experience from the only UK opt-out regime currently in operation—the Competition Appeal Tribunal's collective proceedings framework—does not demonstrate that opt-out delivers meaningful consumer redress in practice. Take-up at the distribution stage has been consistently low, with only a small proportion of eligible class members ultimately receiving compensation. By the time awards are distributed, outcomes are frequently diluted by litigation costs, funding returns and delay, calling into question whether opt-out achieves its stated access-to-justice objectives.

Opt-out proceedings also create structural incentives that distort litigation behaviour. The need to make claims commercially fundable encourages inflated quantum and

favours cases of sufficient scale to generate funder returns, while excluding smaller but potentially meritorious claims. In practice, litigation funders and claimant lawyers often capture a disproportionate share of value, weakening the alignment between collective actions and genuine consumer harm.

The introduction of opt-out would also impose significant cost, risk and uncertainty on businesses, with limited corresponding benefit to consumers. UK experience shows that opt-out proceedings frequently become dominated by procedural and interlocutory disputes—particularly in relation to certification, funding, representation and settlement—often running for years before any consideration of the merits. Defence costs can be substantial even at early stages, and recovery of those costs is uncertain even where claims fail.

Members are further concerned about the wider economic and institutional consequences of opt-out litigation. Many litigation funders and claimant firms operating in this space are overseas-owned, meaning that a significant proportion of settlement or award value risks flowing out of the UK economy. More broadly, a litigation-heavy environment may discourage investment, reduce innovation and place additional strain on court resources, while delivering limited net benefit to consumers.

Alternative and more proportionate routes to consumer redress are already available. Ombudsman schemes, regulatory interventions and voluntary redress mechanisms can deliver compensation more quickly, at lower cost and with greater consumer engagement than mass funded litigation. Strengthening and prioritising these routes is, in members' view, a more effective way to enhance access to justice.

For those reasons, members recommend retaining opt-in group procedure and strengthening existing tools. If opt-out is nevertheless pursued, it should be introduced only on a tightly constrained, evidence-led basis and accompanied by robust safeguards on certification, funding, costs, notice, distribution and defender protection.

Consultation questions

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

   - Members do not support introducing an opt-out regime at this stage. They consider Scotland's existing opt-in framework and other collective procedural tools to be sufficient and better aligned with informed consent, client autonomy and due process. Experience in other jurisdictions, including within the UK, demonstrates that opt-out is not an effective or efficient mechanism for delivering consumer redress and can abstract value from the national economy

for the benefit of overseas litigation interests, with potential adverse effects on inward investment and innovation.

- Members also consider that the premise of an 'access to justice crisis' underpinning the proposal for opt-out proceedings is flawed. Experience in England and Wales indicates that there is no genuine access to justice gap in areas where collective mechanisms already operate. Instead, the opt-out regime in the Competition Appeal Tribunal (CAT) has contributed to an over-proliferation of speculative, funder-driven claims, which has been widely criticised for stifling economic growth and increasing burdens on the business environment. Multiple current reform consultations at UK level reflect this concern.
- Members note that the Scottish Civil Justice Council is still considering the results of its review of the current opt-in procedure. To date, that review has focused on a targeted consultation with law firms involved in existing proceedings. Members suggest that a fuller and more balanced assessment would benefit from engagement with both pursuers and defenders and, critically, from experience of cases reaching substantive determination. No opt-in group action in Scotland has yet reached that stage, meaning that any review at this point is necessarily limited.
- Members also note that the Department of Business and Trade is currently conducting a review of the rules governing the CATs opt-out collective proceedings regime, which is the only operational example of opt-out litigation within the UK. In members' view, it would be prudent for the Council to await both the outcome of a comprehensive review of Scotland's opt-in framework and the conclusions of the UK Government's review of the CAT opt-out regime before progressing proposals to introduce opt-out group proceedings in Scotland.
- There is significant concern that an opt-out regime in Scotland would replicate many of the difficulties that have arisen in CAT proceedings. UK experience indicates that opt-out has failed to deliver meaningful access to justice or effective consumer redress, while imposing substantial cost and uncertainty on businesses with little corresponding benefit to consumers[1]. Certification

[1] A June 2025 report by the European Centre for International Political Economy estimates that if UK litigation costs increase – as expected – in line with US levels, the economic impact of collective actions in the UK alone could approach £18 billion, with a potential £11 billion reduction in the market capitalisation of the UK's most innovation firms.

thresholds have been permissive, contributing to a proliferation of unmeritorious claims driven by litigation funders and claimant law firms rather than genuine consumer grievances, while litigation costs can be very substantial even before certification.[2],[3] In parallel, persistent concerns remain about inadequate safeguards preventing disproportionate returns for litigation funders and claimant lawyers, with funding arrangements that prioritise commercial returns at the expense of consumer outcomes.[4]

- Consumer engagement and take-up rates have also been persistently low under opt-out models. Even where claims or settlements appear large in headline terms, only a small fraction of eligible class members ultimately claim compensation. Experience in more recent cases better illustrates this concern. In *Gutmann v. Stagecoach South Western Trains Ltd (SSWT) collective settlement*, fewer than 1% of eligible class members came forward to claim compensation.[5]
- Members further note that the need to make claims commercially fundable can lead to inflated quantum and the exclusion of smaller or more narrowly defined claimant groups whose claims may be meritorious but do not offer sufficient returns to attract third-party funding. This distorts the types of collective claims pursued and risks crowding out genuine consumer redress.
- There are also concerns about the lack of transparency and formal regulation of litigation funders operating in the opt-out context. Many funders are overseas entities, with non-UK investors whose identities are often unclear, and they are not subject to capital adequacy requirements or mandatory anti-money laundering controls. This creates a risk that litigation funding could be used as a

[2] The regime's permissive certification decisions have led to a proliferation of unmeritorious claims, often driven by litigation funders and claimant law firms rather than genuine consumer grievances. Approximately 95% of claims that have reached certification stage have been certified to proceed to a full trial (either immediately or on a second attempt, excluding carriage disputes where only one claim is certified)

[3] Legal fees of £1.5 – £2 million per party just to reach certification are not uncommon, with full defence costs much higher. For example, Justin Le Patourel v BT Group PLC [2024] CAT 12, Order (Costs), 13 February 2024, para 1(i). The Tribunal noted BT's total claimed costs of £26,246,133.22 in its successful defence of the collective action

[4] *Bates v Post Office Ltd* [2019] EWHC 3408 (QB). The settlement of £57.75m resulted in class members receiving approximately £11m (c. 20%) after litigation funders' success fees and legal costs were deducted

[5] Out of an estimated 1.4 million class members, only 7,290 valid claims were submitted by the January 2025 deadline. This represents an uptake rate of less than 1%, far below the 10% to 20% originally projected by the class representative.

route to launder criminal proceeds. The code of conduct to which funders may agree is voluntary and offers limited protection: it specifies no minimum content for litigation funding agreements, places no obligation on funders to use clear and unambiguous language, is silent on the conflicts of interest that may arise in a funding relationship and imposes no requirement for funders to act honestly and transparently or to monitor and mitigate conflicts of interest. Moreover, the distribution process is often delegated to the class representative's law firm, as supported by the litigation funder, giving rise to an inherent conflict of interest given that unclaimed funds can reduce their exposure or increase their returns.

- Members also highlight deficiencies in consumer awareness and distribution mechanisms under opt-out models. Claimant classes are often unaware of, or uninterested in, their entitlements, meaning that only a tiny fraction—in some cases less than 1%—of damages awarded or agreed in a settlement are ultimately taken up by consumers. This is striking when compared to the sums paid to lawyers and litigation funders, and further undermines confidence that opt-out proceedings deliver meaningful consumer redress in practice.
- The challenges observed elsewhere also raise broader issues concerning compliance with Equality Act 2010 obligations. In opt-out proceedings, legal representatives are not required to identify class members, assess their individual characteristics, understand their needs or obtain instructions. This creates an inherent risk that important protected-characteristic considerations are overlooked entirely. The experience in England and Wales shows that, in practice, class members' interests can become secondary to the commercial incentives of litigation funders and claimant representatives. Settlement and distribution outcomes in several cases have illustrated how class members risk being treated as an afterthought, reinforcing concerns that opt-out actions do not advance—and may actively undermine—the access to justice objective identified by the Council.
- Taken together, these features raise fundamental questions about whether opt-out can ever provide the most proportionate or effective mechanism for resolving collective disputes, given the incentives it creates and the outcomes it produces. The same or better outcomes are already being achieved through existing mechanisms more quickly and at lower cost.
- If the Council is nevertheless minded to pursue opt-out, members strongly urge that it be approached with caution and on a limited, evidence-led basis. While one theoretical option would be a tightly confined pilot in a discrete area of law with no specialist court or existing redress scheme, members emphasise that this would remain a "least worst" option and should not be interpreted as

industry support for introducing opt-out proceedings in any form. Any such pilot would require stringent safeguards and clear evidence of necessity.

- Members also recognise the importance of collective mechanisms that allow consumers to pursue claims at no cost and with minimal ongoing involvement. However, they consider that some form of positive engagement—such as registering an interest—should nonetheless be required to maintain a focus on genuine consumer harm and mitigate the risk of claims being manufactured primarily for commercial advantage.

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

- Members recommend that certain areas should be excluded from any opt-out regime. As set out elsewhere in this response, they do not consider that opt-out group proceedings are capable of properly providing access to justice, and they consider that this concern is particularly acute in certain types of claim.
- Members note that some categories of dispute are inherently unsuitable for opt-out treatment, particularly where the law requires highly individualised, fact-specific assessment.
- Most notably, members highlight claims brought under section 140A of the Consumer Credit Act 1974. Courts have repeatedly stressed that the statutory "unfair relationship" test under sections 140A–140B requires a wide-ranging and borrower-specific examination of all matters relevant to the individual creditor–debtor relationship[6],[7].
- Given the current litigation landscape and the increasing interest from claimant firms in advancing s.140A claims on a collective basis, members consider that these claims present a material and immediate risk in the context of opt-out group proceedings and should therefore be expressly exempted.
- Members also note that other categories of claim are similarly unsuitable for opt-out proceedings, including those that depend on highly individualised facts, personal circumstances or reputational considerations. By way of example,

[6] *Self v Santander Cards UK Ltd* [2024] EWCA Civ 1106 at [56], where the Court of Appeal held that the application of sections 140A–140B is "bound to be fact-sensitive" and that "no single pre-determined criterion will always determine the question of unfairness; nor will one size of remedy fit all cases.

[7] *Abernethy & Others v Barclays Bank & Others* [2025] EWCC 1, at [46]–[48], where the court applied *Self* and concluded that section 140A claims could not give rise to common issues suitable for group litigation because the statutory test requires individualised assessment.

family law disputes and defamation claims typically require case-specific assessment and raise inherent risks when aggregated. Commercial lending, development finance and high-net-worth borrower disputes are likewise inappropriate, as these involve bespoke loan terms, individual valuations and borrower-specific circumstances, resulting in weak commonality and the need for individual assessment. These categories should also be expressly exempted.

- Members further emphasise that, in some areas of law, preferable and more proportionate forms of redress already exist. Where an ombudsman scheme or other free-to-consumer redress mechanism is available, they consider that collective litigation—particularly on an opt-out basis—is unlikely to represent the most effective or efficient route to resolving disputes. In those circumstances, opt-out risks duplicating or undermining established redress structures that are designed to deliver timely, accessible and low-cost outcomes for consumers.
- On that basis, members recommend that any consideration of opt-out group proceedings should, at a minimum, exclude categories of claim that are unsuited to collective determination or where alternative redress mechanisms already provide appropriate protection for consumers.

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

- Members do not support extending group procedure to judicial review in Scotland. They consider that this would sit uneasily with the underlying purpose of judicial review, which is to assess the legality of decisions taken by public bodies, rather than to determine liability or award compensation.
- Judicial review is inherently suited to challenge by a single claimant, whose case is sufficient to test and, where appropriate, overturn an unlawful decision. Remedies are typically declaratory or quashing in nature, and compensation does not ordinarily form part of judicial review proceedings. Introducing group procedure in this context would therefore be a poor fit with both the function of judicial review and the relief available.
- Members also note that where a public body's decision is quashed and that outcome affects a wider group of individuals who may wish to seek compensation, there are already established routes by which such claims can be pursued. In those circumstances, individuals may bring separate collective claims grounded in causes of action such as breach of statutory duty, tort, or under the Human Rights Act 1998, where the legal and evidential framework is better suited to the assessment of loss and remedy.

- For those reasons, members consider that extending group procedure to judicial review would go beyond its appropriate scope, introduce unnecessary complexity into public law proceedings and risk imposing disproportionate burdens on public authorities and the public purse.

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

- Members remain opposed in principle to the introduction of opt-out group proceedings. However, if such a procedure is nevertheless introduced, they consider that court procedures would need to differ materially from those applying to opt-in actions in order to mitigate the significant risks identified elsewhere in this response.
- In particular, members emphasise the importance of a robust, evidence-based certification stage. Courts should require reliable and proportionate evidence demonstrating commonality of issues across the proposed class, a credible and evidence-based articulation of class composition and size, the merits of the claims advanced, and a clear justification for why an opt-out mechanism is necessary to secure access to justice rather than less intrusive procedural alternatives.
- Members also stress the need for enhanced notice and communication requirements. Because opt-out proceedings bind individuals unless they actively exclude themselves, courts should mandate detailed, multi-channel notification protocols. Notices should clearly explain the nature of the proceedings, affected individuals' rights, relevant deadlines and the practical consequences of remaining in or opting out of the class. Effective notification is essential to safeguarding due process and improving awareness and participation, particularly given very low engagement levels observed in existing opt-out proceedings.
- Effective early case management would also be critical. Members consider that courts should actively manage opt-out proceedings from the outset and be equipped with clear powers to strike out weak, unmeritorious or time-barred claims at an early stage. Without such powers, parties may be exposed to substantial and unnecessary cost on claims that lack legal or evidential foundation.
- Judicial oversight of funding arrangements, settlement terms and distribution mechanisms would likewise be essential. Mandatory disclosure of litigation funding and insurance arrangements should be required, and courts should scrutinise settlement structures and proposed distributions at the certification stage to ensure proportionality and protect the interests of absent class

members. Such oversight is necessary to address misaligned incentives and maintain confidence in the integrity of any opt-out regime.

- Courts should also be required, at an early stage, to assess whether alternative and more cost-effective redress mechanisms are more appropriate in the circumstances. Where ombudsman schemes, sectoral redress programmes or other free-to-consumer mechanisms exist, opt-out litigation is unlikely to represent the most proportionate or effective route to resolving disputes.

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

- Members consider that the primary purpose of certification should be to act as an effective filter for unmeritorious or disproportionate claims. The certification process should therefore be robust and evidence-based, and not treated as a low or purely procedural threshold.
- Courts should require credible and reliable evidence demonstrating that there are genuinely common issues across the proposed class such that collective determination is appropriate. Courts should also be satisfied that the proposed class is clearly and accurately defined and that the size and composition of the class are supported by evidence rather than broad or speculative assumptions.
- Members also emphasise the importance of realism and proportionality at the certification stage. Courts should scrutinise credible evidence of the likely value of the claim, including what any successful outcome would mean for recovery at an individual class member level, together with the proposed litigation funding arrangements. Courts should assess whether the overall economics of the proceedings are proportionate, taking into account funder returns and legal costs alongside the redress likely to be delivered to the class. Where anticipated per-person recovery is minimal, or costs and funding returns are excessive relative to consumer outcomes, the court should be prepared to refuse certification.
- Members further stress the importance of the adequacy of the proposed class representative. Courts should be satisfied that the representative is suitable, independent and capable of acting in the best interests of the class as a whole, rather than being unduly influenced by the commercial priorities of funders or legal advisers.

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)?**

- Members consider that the fact that many individuals included within a claimant class may be unaware of the proceedings, or may not wish to pursue a claim at all, is itself a powerful reason for not introducing an opt-out procedure. If such a mechanism is nevertheless introduced, it will require robust and carefully designed safeguards to protect the rights of absent class members.
- In addition to the need for a robust certification regime and close scrutiny of litigation funding arrangements, clear, accessible and effective notice obligations are essential. Courts should mandate comprehensive, multi-channel notification protocols designed to inform potential class members of the nature of the claim, the criteria for inclusion, their right to opt out and the practical consequences of remaining within the class. Notices should be drafted in clear, plain language with the objective of maximising awareness and informed participation.
- Members also emphasise the importance of simple and practical opt-out mechanisms. Individuals should be able to exercise their right to opt out easily and without cost or complexity, for example through straightforward online processes or freepost options. Opt-out should not be frustrated by procedural or administrative barriers.
- Judicial oversight of governance arrangements is also critical. Proposed class representatives should be required to satisfy the court that appropriate governance structures are in place to protect the interests of class members throughout the proceedings, including in relation to decision-making, conflicts of interest and engagement with funders and legal advisers.
- Members further consider that all settlements and distribution plans must be subject to judicial approval. Courts should scrutinise proposed settlements and distribution schemes to ensure fairness and proportionality, protect the interests of absent class members and guard against outcomes in which a disproportionate share of any award is absorbed by costs or funding returns.
- Finally, members stress the importance of judicial oversight of the proposed class representative. Given the limited ability of class members to challenge representative appointments, courts should consider specific eligibility requirements relating to suitability, independence, experience or track record, to ensure that representatives are capable of acting in the best interests of the class as a whole.

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)

- Members consider that, if opt-out group proceedings are introduced, appropriate measures must be in place to protect defenders while preserving access to justice. Without such safeguards, opt-out proceedings risk creating significant cost, uncertainty and settlement pressure for respondents regardless of the merits of the underlying claim.
- Members emphasise the importance of demonstrable adverse costs protection at the certification stage. Proposed class representatives should be required to evidence adequate after-the-event insurance or equivalent adverse costs cover capable of meeting realistic defence costs, including disclosure and expert evidence. Courts should be empowered to refuse or condition certification where such cover is absent or inadequate.
- Robust funding transparency and capital adequacy requirements are also essential. Courts should require full disclosure of key litigation funding terms, including returns, priorities of payment, termination rights and sources of funding, and should be satisfied that funders meet appropriate case-specific capital adequacy standards. This information is critical both to the court's assessment of proportionality and to defenders' ability to evaluate settlement and cost-recovery risk. Where funding arrangements are materially imbalanced or conceal key information, certification should be refused.
- Where adverse costs protection is uncertain, or where funders are offshore entities or special purpose vehicles, courts should retain the ability to order security for costs and, where appropriate, to make non-party costs orders against funders. These mechanisms are established features of collective and competition litigation and help ensure that defendants are not left unable to recover costs where claims fail.
- Members also consider that funding arrangements should safeguard consumer outcomes. Interim payments to litigation funders out of settlement proceeds should be prohibited ahead of court-approved distribution, save in exceptional circumstances approved by the court.
- Effective early and ongoing case management is critical to controlling defence costs. Courts should have strong powers to strike out weak, unmeritorious or time-barred claims at an early stage, to ensure disclosure and expert evidence are proportionate, and to impose active cost budgeting to prevent escalation in complex multi-party proceedings. Defendants should not be left with poorly founded claims hanging over them for prolonged periods.
- Members further consider that opt-out proceedings should not cut across or duplicate existing statutory or regulatory redress mechanisms. Where regulator-mandated redress schemes are underway, or where large volumes of

related complaints are being handled by an ombudsman or similar body, collective proceedings should be presumptively stayed or sisted to avoid premature litigation costs and duplication.

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?**

- Members strongly support the introduction of pre-action protocols for group proceedings in Scotland. They consider such protocols to be essential to promoting early engagement between the parties, narrowing issues, encouraging proportionate resolution and reducing unnecessary cost and delay in complex collective litigation.
- Members consider that pre-action protocols should be compulsory rather than voluntary. Experience elsewhere demonstrates that voluntary protocols are often treated as optional and can be exploited tactically. In England and Wales, the Civil Justice Council has recommended mandatory pre-action protocols for all multi-track business cases to enhance cost efficiency and reduce procedural gamesmanship. Scotland already operates compulsory pre-action protocols in personal injury proceedings, demonstrating both practical viability and clear benefits.
- Members consider that any group pre-action protocol should include core elements designed to support early clarity and proportionality. These should include the early exchange of clear and concise information setting out the basis of the claim, the facts relied upon, the proposed remedy and supporting evidence, together with early disclosure of relevant documents and data, particularly in cases involving large numbers of potential claimants.
- Pre-action protocols should also encourage the use of alternative dispute resolution, including mediation or other appropriate mechanisms, before litigation is commenced. Following disclosure and any ADR engagement, the parties should be required to narrow and refine the matters genuinely in dispute with a view to streamlining any subsequent proceedings.
- Members further consider that pre-action protocols should include an express requirement for a prospective claimant to state whether any alternative, out-of-court redress mechanism is available, whether it has been pursued and, if not, the reasons why. This would help reduce inappropriate or duplicative litigation where free or specialist redress mechanisms already exist and may provide a more proportionate route to resolution.

- Effective sanctions for non-compliance are essential. Members consider that courts should have clear powers to impose adverse cost consequences for failure to comply with pre-action protocols, including reducing recoverable costs or awarding expenses against defaulting parties. Courts should also have the power to stay or strike out funded collective claims where claimants have unreasonably failed to consider or engage with available out-of-court redress mechanisms.

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?

- Members consider that the court should play a central and active role in approving the distribution of any award in opt-out group proceedings. Given the number of individuals who may be bound by the proceedings without having taken an active role, robust judicial oversight of distribution is essential to safeguarding consumer interests and maintaining confidence in the regime.
- Experience in the collective actions regime in England and Wales demonstrates that, without effective judicial scrutiny, there is a significant risk that settlement sums or damages awards disproportionately benefit litigation funders and claimant lawyers, with little meaningful recovery for class members. This risk is heightened by low engagement and take-up rates at the distribution stage.
- Members therefore consider that courts should be empowered to scrutinise the proportion of any award allocated to class members, the mechanisms proposed for identifying, notifying and paying eligible claimants, and the treatment of unclaimed sums. Distribution plans should be required to demonstrate that they are fair, proportionate and designed to maximise consumer take-up, rather than defaulting to outcomes that primarily benefit commercial participants in the litigation.

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

- Members consider that the court should exercise robust and active oversight when approving settlements in opt-out group proceedings. Judicial approval should be directed at ensuring that settlements are fair, proportionate and genuinely deliver consumer redress, particularly in circumstances where absent class members are bound by the outcome.
- Members emphasise that courts should scrutinise the proportion of any settlement allocated to group members, the mechanisms proposed for identifying, notifying and paying eligible claimants, and the treatment of unclaimed funds. Approval should be granted only where the settlement avoids

delivering disproportionate benefit to litigation funders or claimant lawyers and where the structure of the settlement is demonstrably aligned with consumer outcomes.

- Members consider that enhanced judicial scrutiny at the settlement stage is critical to maintaining the integrity of any opt-out regime and sustaining public confidence in collective proceedings

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

- Members consider that unclaimed damages awards or settlement sums in opt-out group proceedings should, in principle, revert to the defender rather than being allocated to litigation funders, claimant lawyers or third-party recipients through cy-près or similar mechanisms.
- This approach is consistent with the compensatory principle underpinning civil litigation, which is intended to restore claimants to the position they would have been in but for the alleged wrongdoing, rather than to generate windfall recoveries for parties with no underlying loss. Where collective proceedings are genuinely brought in the interests of class members and reasonable opportunity has been afforded for those members to claim compensation, there is no justification for unclaimed sums to be redistributed to others.
- Members therefore consider that the court should be slow to approve distribution arrangements that divert unclaimed funds away from defenders. Reversion of unclaimed sums to defenders helps ensure that opt-out proceedings remain focused on consumer redress rather than operating as a vehicle for cross-subsidisation of funders, lawyers or unrelated third parties at the defender's expense. This approach also reinforces discipline at earlier stages of the proceedings by strengthening incentives to design realistic classes, effective notice mechanisms and proportionate funding arrangements.

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

- Members consider that the funding of group proceedings gives rise to a number of significant and inter-related concerns. Group proceedings are extremely expensive to prosecute and defend, with costs often running into millions of pounds even before trial. As a practical matter, this makes reliance on third-party litigation funding unavoidable in many cases. That reliance increases the risk profile of claims and drives the level of returns demanded by funders, reducing the proportion of any damages or settlement ultimately available to class members.

- Members are also concerned that the economics of litigation funding limit access to collective redress and distort the types of claims that are brought. Because funders typically require claims to reach a sufficiently large scale to justify their investment, this can lead to inflated quantum being pleaded to ensure "fundability" and to the exclusion of smaller, but potentially meritorious, claims that do not meet funding thresholds. The result is that the regime is not affordable or accessible for a broad range of claimant classes.
- These dynamics are compounded by the weak correlation observed between aggregate damages recovered and the redress actually received by class members. In practice, litigation funders and claimant lawyers are often the primary financial beneficiaries of collective proceedings, with class members receiving only a small proportion of any settlement or award. Such outcomes undermine the core objective of opt-out actions, which is to deliver meaningful consumer redress.
- Members further note the lack of competition and transparency in the litigation funding market. Negotiating power typically lies with funders rather than with claimants or class representatives, and funding agreements are often opaque, with limited visibility for class members and defenders as to their key terms. This creates a risk of unfair or disproportionate arrangements that cannot be properly scrutinised.
- There are also concerns about the absence of effective regulation. Litigation funders operate, in substance, as lenders but are not subject to capital adequacy requirements or ongoing regulatory supervision. This exposes both claimants and defenders to the risk of under-funded or opportunistic claims and increases uncertainty around the ability of funders to meet adverse costs or other liabilities.
- Finally, members highlight the risk of conflicts of interest inherent in opt-out proceedings. The traditional lawyer–client relationship is often attenuated or absent, with claimant lawyers and class representatives frequently having a closer working relationship with funders than with the individuals whose interests they are said to represent. Conflicts between funders, representatives and lawyers can arise and risk generating costly satellite disputes that further erode the value of any eventual settlement or award. The experience in Merricks v Mastercard illustrates the seriousness of these risks: in that case, the funder opposed and actively sought to block a settlement that the class representative considered to be in the best interests of class members, going so far as to pressure the class representative to reject it by attempting to dismiss the representative's law firm, threatening to withdraw funding, and initiating legal action against the class representative personally. This

demonstrates how insufficient regulation of funder involvement can enable funders to exert undue influence over litigation strategy and settlement decisions—to the detriment of both class members and defendants.

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?**

- Members note proposals made elsewhere, including by the Civil Justice Council, for the creation of an Access to Justice Fund to support meritorious but under-funded claims. In principle, a model that combines limited public funding for early-stage case development with private funding for litigation could help improve access to justice for claims that may not otherwise attract commercial funding.
- However, members caution that any alternative or public funding model would require careful design to avoid unintended consequences. Public or hybrid funding mechanisms risk incentivising litigation without sufficient merit unless accompanied by robust safeguards, including effective merit screening and appropriate cost-recovery mechanisms. Without such controls, there is a risk that funding availability, rather than legal merit, becomes the primary driver of claims.
- In the absence of such a fund, members accept that third-party litigation funding is likely to continue to play a role in collective proceedings, but only if subject to appropriate guardrails. Transparency and judicial oversight are essential. Litigation funding agreements should be disclosed in full, with only minimal redaction, to the court and, where appropriate, to class members. Courts should have the power to scrutinise funding terms at the certification stage and to refuse certification where arrangements are materially imbalanced or unfair.
- Members also consider that greater standardisation of funding arrangements could assist in protecting class members. One option would be for courts to identify or codify acceptable baseline funding terms, for example through the use of a standard-form litigation funding agreement. Claims subject to funding terms that depart significantly from such standards should be subject to enhanced scrutiny.
- Limits should also be placed on funder influence over the conduct and outcome of proceedings. Funding arrangements should not permit funders to obstruct reasonable attempts to settle or otherwise exercise control in a manner that prioritises commercial returns over the interests of class members. Effective mechanisms should also be in place to resolve disputes between funders, class

representatives and class members, so that litigation value is not eroded by satellite disputes.

- Finally, members consider that protection against excessive funder returns is essential in any opt-out regime. Courts should have the power to cap funder returns and ensure that the majority of any award or settlement is distributed to class members rather than absorbed by funding returns or legal fees. Adequate adverse costs protection, whether through insurance or other guarantees, should also be required to protect both class members and defendants if a claim fails.

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)?

- Members consider that transparency around litigation funding arrangements is essential to the integrity and fairness of group proceedings, whether conducted on an opt-in or opt-out basis. Experience in recent collective actions demonstrates that funding agreements can have a significant influence on the conduct and outcome of proceedings, the distribution of damages and settlements, and the extent to which the interests of class members are properly protected.
- Members therefore consider that meaningful disclosure and judicial oversight of funding arrangements are critical safeguards. As set out elsewhere in this response, courts should have visibility of the key terms of litigation funding and insurance arrangements and be able to scrutinise their impact on proportionality, incentives and consumer outcomes, while balancing transparency against any legitimate confidentiality concerns.

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)?

- Members consider that, if opt-out group proceedings are introduced, it would be critical to strengthen cost-management processes at the earliest possible stage of litigation. In particular, cost budgets should be required and approved by the court at an early stage in order to enable active judicial management of anticipated expenditure and ensure that costs remain proportionate throughout the proceedings.
- This is especially important in group actions, where individual class members do not have the same opportunity to challenge costs as parties in non-group proceedings. Without effective early cost control, there is a heightened risk that litigation costs escalate and are later recovered out of settlement payments or

judgment sums, reducing the proportion of any award ultimately available to class members.

- Members further consider that any assessment of proportionality must be grounded in a realistic estimate of the damages that are likely to be payable in practice. Experience in other jurisdictions shows that take-up rates at the distribution stage are often significantly lower than the projections advanced at the outset of proceedings. Cost budgeting and taxation should therefore take account not only of headline claim values, but also of likely consumer participation and uptake.
- Failure to robustly manage costs would materially exacerbate the issues identified elsewhere in this response, including the risk of disproportionate legal fees, diluted consumer redress and incentives for claims to be structured around cost recovery rather than genuine outcomes for class members.

16. Are there any aspects of substantive law which could be a barrier to group proceedings working effectively?

- *Members did not provide specific feedback on this 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?

- Members consider that the design of any opt-out regime requires careful consideration of its broader economic, institutional and policy implications, as well as its procedural mechanics. Experience in England and Wales highlights a number of systemic risks that should be addressed before any decision is taken to adopt a similar model in Scotland.
- In particular, members caution that the growth of third-party funded opt-out collective actions can have significant economic consequences. Many of the major litigation funders operating in the UK are owned or controlled by entities incorporated overseas, with capital provided by non-UK investors. A number of claimant law firms active in this space are also affiliates of overseas, and in particular US-based, firms. As a result, when funded collective actions conclude—whether by settlement or award—a substantial proportion of the proceeds risk flowing out of the UK economy, diverting resources away from domestic reinvestment and adversely affecting economic growth and competitiveness.
- Members also highlight the wider consequences for UK businesses and society. Large-scale settlements or damages awards, particularly where only a

limited proportion of funds ultimately reach consumers, can have knock-on effects including reduced returns to shareholders, increased prices for consumers, lower remuneration for employees and diminished capacity for charitable or community contributions by major corporates. More broadly, a litigation-heavy environment can discourage investment[8], particularly where mobile capital may be redirected to jurisdictions perceived as presenting lower litigation risk and can reduce corporate risk appetite in ways that inhibit innovation and responsible risk-taking.

- Members further observe that alternative routes for delivering consumer redress are available and may mitigate many of these risks. Voluntary redress schemes introduced under the Consumer Rights Act 2015 allow businesses to establish CMA-approved arrangements to compensate affected consumers without recourse to litigation. Expanding or strengthening regulatory powers, including the ability of regulators to mandate or direct redress in appropriate cases, could further enhance access to redress while avoiding many of the systemic costs associated with mass funded litigation.
- In addition, experience in other jurisdictions suggests that opt-out collective actions can place considerable demands on court resources. Additional procedural layers, frequent interim applications and complex case management can absorb significant judicial time and administrative capacity, potentially diverting resources away from other priority areas of the justice system while delivering limited net benefit to consumers.
- Taken together, these considerations underscore the need for a cautious approach. There is a risk that Scotland could replicate a model that channels settlement value overseas, discourages investment and innovation, strains court resources and fails to deliver meaningful consumer benefit.

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[8] *Recent analysis shows that the UK now has the highest volume of mass litigation in Europe, with 47 collective actions filed in 2024—more than any other European jurisdiction. The same report warns that the rapid expansion of mass litigation introduces regulatory uncertainty and increased perceived risk for firms, especially in innovation-critical sectors. This uncertainty can deter both domestic and international investment, prompting mobile capital to shift towards jurisdictions viewed as having lower litigation risk. See: ECIPE, "The Impact of Increased Mass Litigation in the UK" (2025), https://ecipe.org/publications/impact-of-increased-mass-litigation-in-the-uk*