



**Informing Progress - Shaping the Future**

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### **The Proliferation of Class Actions in the UK**

Recent years have seen a growing trend of claimants coming together to bring claims against a common entity believed to have caused loss to all claimants in the same or similar way. Commonly known as class actions, claims feature a class representative authorised to initiate proceedings on behalf of multiple consumers or businesses seeking aggregate damages without needing their active participation.

These proceedings can be structured on either an opt-in or opt-out basis; in opt-in cases, claimants actively choose to join the collective action, whereas, in opt-out cases, all potential claimants are included by default unless they actively opt out. Claims presented may also be categorised as either follow-on or standalone. Follow-on claims are predicated on an existing determination by a regulator that a breach of competition law has occurred. In contrast, standalone claims are initiated independently, without reliance on a prior infringement decision.

#### **UK Landscape**

Prior to the introduction of the UK collective proceedings regime (UK CPO) for breaches of competition law via the Consumer Rights Act 2015, the UK lacked a defined class action system like the one which exists in the US. While the UK CPO has several key differences from its US equivalent, the introduction of opt-out collective action enabled representatives to sue on behalf of an entire class without needing the active participation of its members.

Claims are heard by the Competition Appeal Tribunal (CAT), and in its early stages, the UK CPO regime raised fundamental questions, particularly regarding the level of scrutiny the CAT should apply during the certification stage when proposed claims are validated.

Further development of the UK CPO regime was limited until the Supreme Court issued its landmark ruling in *Merricks v Mastercard* [2020] UKSC 51 in December 2020. The CAT's initial finding that the claim was not appropriate for the UK CPO regime was altered by the Supreme Court, who ruled the CAT's reasons for refusing certification were not valid. This established a low threshold for certification and indicated applications would likely be favourably looked upon by the CAT in the future.

The *Merricks* judgment has indeed provided momentum, with the UK seeing a dramatic increase in the number of high-value claims filed and becoming one of the most popular jurisdictions in which to bring class actions. Increased availability of third-party litigation funding, legal reform, and increased consumer awareness are among the factors fuelling this growth. Whilst no claims have yet seen the award of aggregate damages, an increasing number have passed the certification stage, and there are no signs of the pace slowing.

In the matter of *Justin Le Patourel v BT Group plc* ([2024] CAT 76), the CAT recently issued its judgment that BT had not breached competition law. This is the first opt-out class action tried in the UK and a watershed ruling as the first under the UK CPO regime. The £1.3 billion claim included 3 million BT customers, each of whom would have received up to £400 in compensation if the CAT had found BT to be in breach. The case serves as an indication that, even though cases pass the certification stage, the success of claims still has a long way to go.

Further uncertainty surrounding class actions arose from the ruling in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* ([2023] UKSC 28). The Court was asked to determine whether litigation funding agreements that allow funders to receive a percentage of any damages awarded to claimants qualify as Damages-based Agreements (DBAs), which are subject to regulation under existing legislation.

The Supreme Court ruled that these agreements fall under the definition of DBAs, meaning they had to follow the Damages-Based Agreement Regulations 2013 to be enforceable. Previously, the general belief was that litigation funding agreements were not DBAs, therefore exempting them from regulatory compliance. This ruling called into question the enforceability of some funding agreements and left many funders revising the terms of their litigation funding agreements and litigation lawyers facing the prospect of losing an important funding source.

### **Class Action Benefits**

Pursuing claims collectively brings economies of scale, allowing individuals to bring actions they perhaps may otherwise be unable to do. By pooling resources and sharing legal costs,

class actions empower claimants to challenge powerful corporations or institutions where financial disparity may otherwise prove prohibitive.

From a procedural perspective, class actions streamline the litigation process and promote judicial efficiency. Consolidating multiple claims into a single action avoids burdening courts with numerous individual claims that stem from the same issue. This approach can help conserve judicial resources and foster greater speed and consistency in outcomes.

In addition, class actions serve as a potent deterrent against corporate misconduct and a powerful tool for holding corporations accountable for breaches of competition law. The prospect of facing significant financial liability and reputational damage encourages businesses to adhere to higher standards of conduct and pursue ethical standards.

### **Class Action Drawbacks**

Critics argue that increased proliferation may lead to a litigation culture, fostering an environment where claims are pursued aggressively, regardless of their merit. The potential for profit-driven litigation may encourage some firms to pursue cases that lack substantial evidence, leading to an increase in unmeritorious claims being brought. This can undermine the credibility of legitimate claims and place undue pressure on businesses, leading to costly settlements irrespective of the strength of the claims.

Another concern lies in the distribution of compensation to class members and the potential for lower payouts. In many opt-out proceedings, a low number of individual claimants come forward to claim damages and those that do often receive relatively modest payouts, with a significant portion of settlements allocated to legal fees and administrative costs. This raises questions on whether the mechanism serves the interests of the affected individuals or whether they would be better served pursuing claims independently.

The complexity of managing class actions can result in protracted litigation and delays in resolving claims. Individual claimants may have limited control over the litigation process and are reliant on decisions taken by law firms. Such a lack of autonomy may not suit individual claimants who have specific interests or may rely on timely redress.

### **Role of Law Firms**

Firms specialising in group litigation face substantial opportunities from the proliferation of class actions, with the prevalence of high-value claims offering the potential to recover costs and secure substantial success fees. The rise of class actions has also created increased competition among law firms, prompting them to innovate and improve their services to secure a share of this growing market, where the ability for significant financial rewards makes cases particularly attractive.

Class actions also enable firms to build their reputations as champions of consumer rights and enhance their standing in the market. The development of Group Litigation Orders (GLOs) and the growing use of litigation funding have further incentivised firms to pursue

these cases, as they help mitigate financial risks and enhance the feasibility of large-scale claims.

Defendant firms can benefit from this trend, too, as they are engaged to represent corporate clients facing class action lawsuits, cases often requiring extensive resources and expertise and representing a steady stream of high-value work. Law firms can also benefit from the economies of scale that class actions provide by consolidating resources and efforts across multiple claims. This allows firms to reduce costs and improve their overall efficiency, leading some to actively promote class actions as a viable option to realise the potential cost savings on offer.

### **Impact on Consumers**

For consumers, class actions empower individuals to seek redress against corporate malpractice, offering a pathway to address grievances that might otherwise remain unresolved. Each class action also raises awareness of consumer rights and furthers knowledge among consumers, fostering a more informed and assertive public. Consumers can collectively challenge corporate wrongdoing and potentially drive significant positive changes in responsible behaviour and practices.

However, the effectiveness of class actions in delivering meaningful compensation to consumers remains a subject of debate. The distribution of settlements often leaves individual claimants with relatively small financial benefits, leading to concerns about the fairness of the process. Additionally, the reliance on litigation funding and third-party investors adds complexity, as these stakeholders may prioritise financial returns over the interests of claimants.

This point leads to one notable impact of class actions on consumers, namely the incessant and intrusive contact from third-party companies engaged in recruiting claimants. These firms often employ aggressive outreach tactics to meet their commission targets, resulting in unwanted communications that can overwhelm potential claimants. Such persistence may undermine the process and create feelings of coercion, as consumers might feel pressured to join claims they may not fully understand or wish to pursue.

### **Future Outlook**

The proliferation of class actions in the UK has far-reaching implications for individuals, businesses, and the justice system. As this area of law evolves, striking a balance between enabling access to justice and protecting consumers against potential abuses will be critical. Although the potential level of damages awarded has yet to be seen, these will undoubtedly influence the availability of third-party funding available for future claims.

As the CAT approves a growing number of claims through the certification stage, the distribution of damages to class members will be an increasing focus. There is a growing concern that the greatest beneficiaries of this trend might not be claimants but specialist law firms and litigation funders.

The UK CPO regime is currently restricted to breaches of competition law, but some claims appear to suggest principal links to other areas of law currently outside these restrictions. Increased emphasis on environmental, social, and governance (ESG), for example, has led to growing interest in initiating group claims for disputes of alleged greenwashing or regulatory non-compliance. Given the potential financial incentives available to law firms and funders in bringing class actions, claims for alleged breaches under consumer protection law is a further area expected to receive greater scrutiny in future.

Reports put the value of class action claims in the UK at approximately £125 billion in 2023, with actions filed for 540 million class members since 2015. The feeling is this culture of excessive claims and the low threshold level indicated by the CAT's previous certifications might be damaging to UK businesses and insurers as they need to take greater steps to insulate themselves from exposure to large-scale litigation.

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