Linklaters

30 October 2026

Linklaters LLP's response to the Law Commission's Initial Scoping Questionnaire on Consumer Class Actions

Linklaters LLP ("**Linklaters**") welcomes the opportunity to respond to the Law Commission's initial scoping questionnaire about the introduction of a consumer class actions regime.

Linklaters is a leading international law firm. This response has been prepared by London-based members of our consumer litigation practice who advise many of the world's most prominent consumer-facing companies. We have deep experience helping clients navigate their consumer obligations and in existing class action and mass claim procedures. In particular, we have extensive experience acting on mass litigation in the High Court and regularly appear before the Competition Appeal Tribunal (the "**Tribunal**") in claims brought under the existing competition collective actions regime.

We primarily act for defendants and, while we also act for claimants and interveners in certain circumstances, we do not act for class representatives in collective proceedings before the Tribunal.

Our response reflects our knowledge and experience of UK consumer law and collective/class actions, in particular the recently adopted enforcement powers of the UK Competition and Markets Authority ("**CMA**") in the Digital Markets, Competition and Consumers Act 2024 ("**DMCCA**").

In our response we refer to: the government's "*Swifter and simpler competition redress, regulatory appeals and competition enforcement*" consultation dated 17 July 2026 (the "**Competition Policy Consultation**"); our response to the Competition Policy Consultation dated 25 September 2026 (the "**Linklaters Competition Policy Response**"); and our response of 14 October 2025 to the government's earlier call for evidence about the opt-out collective actions regime (the "**Linklaters CfE Response**").

Q1: What would be the benefits associated with the introduction of an opt-out consumer class actions regime?

While there is a *prima facie* argument that a consumer class actions regime could, in principle, be of societal value by aggregating low-value claims that might not otherwise be brought, for the reasons given in our response to Q2, the likely risks of a consumer class actions regime far outweigh the potential benefits.

Q2: What would be the risks associated with the introduction of an opt-out consumer class actions regime?

The introduction of consumer class actions would carry considerable risks of creating a regime which:

(i) Disrupts the development of the nascent consumer law regime.

(ii) Encroaches on industry-specific regulatory regimes.

(iii) Creates a disproportionate burden for courts and businesses.

(iv) Imposes a certification threshold which the court is unable to operate.

(v) Provides limited benefit to consumers.

(vi) Is unstable and requires ongoing amendments.

We expand on each of these risks below.

(i) Nascent consumer law regime

The changes which the DMCCA made to consumer law enforcement, and the introduction of the substantive unfair trading regime in Part 4 Chapter 1, only came into force in April 2025. The government has also announced that Part 4 Chapter 2 on subscription contracts, another key aspect of the substantive consumer law changes in the DMCCA, will come into force in January 2027. The CMA is, accordingly, still in the process of testing the scope of its enforcement powers and the substantive law itself.

In that regard, the CMA has said that, in the first 18 months of the DMCCA regime, it opened investigations into 20 businesses and settled with 7, imposed fines totalling £11.8 million and ordered that a total of £2.3 million be refunded to consumers.[1] It has also said that it has been targeting drip pricing, fake reviews and online choice architecture and deliberately casting a "*wide net*". By its own description, the CMA is "*just getting started*".[2]

Before the DMCCA, the CMA and other regulatory bodies had the power to accept undertakings under s.219 Enterprise Act 2002 where respondent businesses were willing to give them. Otherwise, s.215 Enterprise Act 2002 enabled them to apply to court to obtain enforcement orders. The lack of direct enforcement powers meant that there was limited domestic case law about the operation of consumer protection law and, accordingly, the extent and limitations of the legal regime had not been properly tested. Now that Part 3 Chapter 4 of the DMCCA has introduced direct enforcement powers which the CMA can wield without obtaining the agreement of respondent businesses, more disputes are very likely to emerge between the CMA and businesses as to the exercise of those powers and the boundaries of the substantive law. The recent changes to the enforcement regime can, therefore, be expected to give rise to significant developments in consumer protection law in due course.

Although the introduction of a consumer class actions regime would not preclude the CMA from taking enforcement action and, as such, would not entirely prevent disputes between the CMA and respondent businesses arising in this way, the existence of a parallel class actions regime would nonetheless stymie the development of the consumer law regime to some extent. In particular:

(a) The existence of a private enforcement regime would risk acting as a distraction for the CMA, which would have to monitor and intervene in private actions: (I) to ensure that it influences the development of the law, and (II) where there are concurrent public enforcement proceedings, to seek to mitigate the risk of inconsistent outcomes.

(b) The clash between private and public enforcement is also likely to impact the willingness of defendants to settle promptly and cooperatively with the CMA. A similar effect has been observed in competition law since the growth in popularity of the competition class actions regime: as we said in the Linklaters Competition Policy Response (Q28), the UK has seen a stall in cartel leniency applications in recent years which can, at least in part, be attributed to the introduction and growth of the opt-out class actions regime. An analogous development in respect of cooperation in the consumer enforcement context would be very significant and add further pressure on the CMA's resources, in particular because all of the CMA's DMCCA consumer cases which have been concluded to date have utilised the settlement process.

[1] Direct consumer enforcement: 18 months on – Competition and Markets Authority (14 October 2026).

[2] Direct consumer enforcement: one year on – Competition and Markets Authority (17 April 2026).

(c) If private parties were allowed to dictate the direction of future legal developments, including because the introduction of a class actions regime led to resource pressure on the CMA, they would very likely distort the development of the consumer law regime. In particular:

- The CMA has said that its approach to consumer enforcement will be in line with its "4Ps" framework which seeks to ensure that the CMA's work follows four key principles: pace, predictability, proportionality and process. In light of the CMA's focus on "*proportionality*", in particular, the CMA has said that it intends its enforcement of consumer law to be targeted at conduct which is most harmful to consumers and which represents a clear infringement of the law.[3]

- By contrast, private class actions are normally initiated by lawyers rather than the proposed class representatives themselves and can only be pursued if lawyers and third-party litigation funders expect a sufficient return from them. Experience from the competition class actions regime suggests that private parties are likely to use consumer class actions in unanticipated ways. For instance, before the introduction of the class actions regime, competition enforcement tended to focus on restriction of competition infringements (Chapter 1 Competition Act 1998). When the competition class actions regime was introduced, the government also said that it expected the majority of cases to follow-on from prior regulatory findings. As we said in the Linklaters CfE Response (Q1), however, the competition class actions that appear to be able to attract funding are those which allege abusive behaviour by businesses with strong market positions under Chapter 2 Competition Act 1998 (most often tech companies) and are brought on a standalone basis.

(ii) Encroachment on industry-specific regulatory regimes

In addition to the CMA's direct enforcement powers in Part 3 Chapter 4 of the DMCCA, Part 3 Chapter 3 enables various regulators to apply to court for enforcement orders (including the CMA itself, along with the Gas and Electricity Markets Authority, Office of Road and Rail, Secretary of State and Water Services Regulation Authority). Some of these other regulators oversee complex regulatory regimes which include price control and other detailed regulation of consumer interactions with the relevant businesses. For example, in *Gutmann v First MTR* (in which we acted for the Secretary of State for Transport as intervener) the Tribunal's trial judgment recorded examples of the Department for Transport's granular quasi-regulatory involvement in train operating companies' services (including requiring one train operating company to install ticket vending machines at 13 specified stations).[4]

The systems of regulation in these heavily regulated industries are carefully calibrated to balance the interests of consumers with a variety of other potentially applicable public interests (including public expenditure, infrastructure development, national security and sovereign capability). Any class actions which are permitted to encroach on these regulated regimes would, accordingly, carry a significant risk of disturbing the careful balance put in place by the relevant regulators. As a result of this risk, relevant public bodies have intervened in the three sets of competition class actions which have been brought in heavily regulated industries:

- The Water Services Regulation Authority (Ofwat) intervened in proceedings against six water and sewerage undertakers (in which we acted for Anglian Water) because of the interaction between those proceedings and the relevant regulatory regime as well as the interaction

[3] The CMA's approach to consumer protection (April 2025), pp. 3, 7 and 12-14.

[4] *Gutmann v First MTR* [2025] CAT 64 at [36] and [47].

with ongoing investigations.[5] Although the Tribunal and the Court of Appeal held that these particular claims were excluded by statute under s.18(8) Water Industry Act 1991, which stipulated that the only remedies for a breach of the relevant regulatory provisions were remedies created by statute, many other regulatory regimes do not contain similar provisions.[6]

- The Secretary of State for Transport has intervened in two separate sets of collective proceedings (*Boyle v Govia Thameslink* and *Gutmann v First MTR, Gutmann v London & South Eastern, Gutmann v Govia Thameslink*), as part of the quasi-regulatory role it performs (acting through the Department for Transport), as well as (among other reasons) because of the potential risk the public purse might have been required to fund any ultimate liability and the costs of the proceedings.[7] In this context, the Secretary of State for Transport's quasi-regulatory role included (for example) its powers to set and regulate fares – the very subject of the collective proceedings – in order to balance the interests of taxpayers and passengers.

(iii) Burden on the courts and businesses

Class actions are very expensive to litigate and use a significant amount of judicial time and resources, notwithstanding that some of them are perceived as having relatively low prospects of success. As the Supreme Court has recognised, opt-out class actions (in particular) also impose significant commercial pressures on defendant businesses, including because of the administrative burden and litigation costs required to fight them.[8]

Whilst it has been recognised (including by the Competition Policy Consultation) that competition class actions place substantial burdens on businesses and the Tribunal, there are reasons to expect that the scale of consumer class actions (and, accordingly, the burden they impose) could be much greater:

- Substantive consumer protection law has been developed through a series of legislative iterations, the latest of which are contained in Part 4 of the DMCCA. The result is a wide range of prohibitions across a multitude of legal instruments, including the Consumer Rights Act 2015, DMCCA, the Consumer Credit Act 1974, the UK GDPR and Data Protection Act 2018 as well as sector-specific regulation. Each iteration has been developed with the clear intention that it will be enforced by the CMA or a similar public regulatory body which has to make prioritisation and resourcing decisions (including based on proportionality considerations). The relevant prohibitions were, therefore, not designed to be enforced by private parties who can seek to prosecute any instance of a potential breach regardless of proportionality, culpability or other mitigating factors. The breadth of the substantive law means that a consumer class actions regime could impose an enormous burden on the courts and defendant businesses unless its scope was tightly and clearly defined.

- Even if its scope was well-defined, it is likely that a very significant volume of consumer class actions would be issued in any event. As we said in the Linklaters CfE Response (Q1), the claims that tend to attract funding under the competition class actions regime appear to be those which seek small amounts of money per class member but have large class sizes and, therefore, have very large headline damages estimates. Since consumer law issues will

[5] *Roberts v Severn Trent* [2024] CAT 19 at [8].

[6] An appeal before the Supreme Court is currently pending.

[7] *Boyle v Govia Thameslink* [2022] CAT 46 at [3]; *Gutmann v First MTR* [2023] CAT 23 at [4] and [12-16].

[8] *Evans v Barclays* [2025] UKSC 48 at [89]-[91] and [112]; *Merricks v Mastercard* [2020] UKSC 51 at [98] and [118] (minority judgment).

often have potential effects which have a broad reach, it is likely that there will be a large volume of claims which are capable of being funded.

- The likely scale of consumer class actions is borne out by the experience of the US class actions market where more than 12,000 US federal class actions were filed in 2025, nearly 50% (6,000) of which were consumer protection claims.[9] There is a clear contrast between class actions on this scale and the relatively modest 5 competition class actions which were brought in the UK in 2025 (down from a peak of 18 in 2023).

The absence of a developed consumer law jurisprudence also means that it is likely that a significant proportion of consumer class actions would be novel or speculative. Unless they can be dismissed at an interim stage (which we discuss below), these types of claims are generally more complex (and, therefore, more burdensome) than claims which rely on more well-established legal foundations.

(iv) Unsuitability of consumer litigation for class action certification threshold

As discussed above, a key problem in the competition class actions regime is the burden which novel and unmeritorious claims place on the Tribunal and defendant businesses. As we said in the Linklaters Competition Policy Response (Q4), novel claims can currently be more difficult to strike out because case law says that novel or difficult issues of law are best resolved once facts have been ascertained at trial rather than on the basis of pleadings and assumed facts at an interim stage. Whilst that justification may provide a rationale for allowing novel claims to continue to trial in individual proceedings, there are countervailing considerations in a class actions context because of the additional administrative burdens, litigation costs and leveraging effects which class actions bring.

In the Competition Policy Consultation, the government has consulted on reforms to the competition class action certification process which are intended "*to provide a meaningful safeguard against novel and unmeritorious claims*". In the Linklaters Competition Policy Response (Q4), we suggested that factors are added to the list of matters which the Tribunal is required to take into account as part of its "*suitability*" assessment at the certification stage (i.e. when deciding if a class action should be allowed to continue) which would require the Tribunal to consider:

- "*the nature of the alleged infringement and theory of harm, including whether they are of an established type or novel*"
- "*whether evidence can reasonably be expected to be available to prove the essential elements of the claim at trial*"
- "*the likelihood of the claims succeeding at trial*"

In a competition class actions context, these changes should provide good protection against speculative litigation and the significant pressures it puts on the judiciary and defendants. However, the relative novelty of the entire consumer protection regime, and the lack of available precedent so far, mean that there is currently no realistic prospect of a court accurately assessing a consumer claim's novelty or prospects of success or, indeed, what evidence will be necessary to prove the essential elements of the claim at trial. Accordingly, it is unlikely that equivalent provisions would provide an effective safeguard in a consumer class actions regime.

[9] Legal 500, 'United States: Class Actions", Country Comparative Guides, 2026.

(v) Limited consumer benefit

As the Tribunal has recognised in the context of competition class actions, many class actions are initiated by lawyers and offer enormous potential benefits to lawyers and funders and limited benefits to class members.[10] In this regard, the level of take up by class members was less than 1% in the only competition class action to have completed its distribution stage so far (*Gutmann v First MTR*).

Partly in response to the outcome in *Gutmann*, the Tribunal and policymakers have sought to adapt the competition class actions regime to seek to ensure that (relative to their costs) claims provide a proportionate level of benefit to class members. In particular:

- The Tribunal in *Waterside v Mowi* [2026] CAT 32 at [46]-[49] refused to certify a proposed claim because it was concerned that the proposed legal costs outweighed the anticipated return to the class. In doing so, it remarked that the decision which the Tribunal had taken to certify the claim in *Gutmann v MTR* may not have been reached again "*given the subsequent experience of the Tribunal in class actions*".
- In approving a collective settlement in *Mclaren v MOL* [2026] CAT 6 at [152], the Tribunal warned the parties that the amounts actually claimed by class members would be taken into account when it determines the costs, fees and disbursements claimed by lawyers, funders and insurers.
- In the Competition Policy Consultation, the government has proposed giving greater weight to the Tribunal's assessment of the costs and benefits of class actions by making the cost-benefit analysis part of the statutory certification threshold test. We supported that proposal in the Linklaters Competition Policy Response (Q5).

In a similar way to the other reforms proposed by the Competition Policy Consultation (see below), it will take time before the Tribunal and policymakers can determine whether these changes have been effective in ensuring that competition class actions deliver proportionate benefits to class members. It will, in turn, only be possible to assess whether a consumer class action regime could deliver significant benefits to consumers once it has been demonstrated that the competition class actions regime can do so.

(vi) Unstable class actions regime

Tribunal users and stakeholders have identified several problems with the existing competition class actions regime. The regime is, accordingly, due to undergo significant transformations which seek to address those issues, including changes in respect of:

(a) the requirements for class representatives in respect of consultative/ advisory panels, costs specialists, evidence about steps taken to secure funding and funding transparency (Q1-3 of the Competition Policy Consultation and Linklaters Competition Policy Response);

(b) as discussed above, the Tribunal's assessment of the "*suitability*" of claims for collective proceedings (Q4 of the Competition Policy Consultation and Linklaters Competition Policy Response);

(c) as discussed above, the Tribunal's assessment of the costs and benefits of collective proceedings and the impact of that assessment on its certification decision (Q5 of the Competition Policy Consultation and Linklaters Competition Policy Response);

[10] *Waterside v Mowi* [2026] CAT 32 at [48]; *Rowntree v PRS* [2025] CAT 49 at [87].

(d) the permissibility of Damages Based Agreements in opt-out collective proceedings (Q7-9 of the Competition Policy Consultation and Linklaters Competition Policy Response);

(e) the Tribunal's assessment of the reasonableness of litigation funders' returns at certification (Q10 and Q12 of the Competition Policy Consultation and Linklaters Competition Policy Response);

(f) the time when litigation funders receive their returns (Q11-12 of the Competition Policy Consultation and Linklaters Competition Policy Response);

(g) the designated charity for undistributed sums (Q37 of the Competition Policy Consultation and Linklaters Competition Policy Response); and

(h) filing fees for class actions (Q38-40 of the Competition Policy Consultation and Linklaters Competition Policy Response).

The problems and prospective changes listed above relate to general collective redress aspects of the competition regime (as opposed to specific competition law aspects) and, accordingly, would also affect any consumer class actions regime which is modelled on the competition regime.

Whilst the government has recently consulted on its proposed changes to the competition class actions regime, it will take some time for legislative changes arising from the Competition Policy Consultation to be implemented and for relevant legal and procedural points which arise from those changes to come up in practice, be tested in the Tribunal and appeal courts and for settled practice to begin to emerge following the relevant judicial decisions. Tribunal users and policymakers will not be able properly to assess the effectiveness of any implemented changes (and whether any further changes are necessary) until that settled practice has emerged. If a consumer class actions regime were introduced now (and modelled on the competition class actions regime) it would have to be introduced in a provisional form until policymakers settle on a form of UK class actions which produces the correct balance between different policy objectives. It seems clear that there would be significant advantages to waiting until there is a properly functioning competition class actions regime in place that can serve as a model before introducing a consumer class actions regime.

Q3: What features should be included within the design of an opt-out consumer class actions regime to improve access to redress for consumers, including by ensuring that compensation is distributed to affected class members?

As discussed in Q2, the competition class actions regime is currently undergoing significant transformations to address the issues which have been identified with it (including in respect of the benefits which claims deliver to class members). If, notwithstanding our conclusions in Q2 above, a consumer class actions regime were to be introduced and modelled on the competition class actions regime, it should also reflect the cost-benefit changes being made to the competition class actions regime (as discussed in Q2).

Q4: What features should be included within the design of an opt-out consumer class actions regime to ensure that it promotes the efficient conduct of litigation at proportionate cost?

As discussed in Q2 above, the competition class actions regime is currently undergoing significant transformations to address the issues which have been identified with it (including in respect of the proportionality of litigation under the regime).

If, notwithstanding our conclusions in Q2 above, a consumer class actions regime were to be introduced and modelled on the competition class action regime, it should also reflect the changes made to the competition class actions regime in the interests of proportionality. In particular the changes in respect of:

(a) the requirements for class representatives in respect of consultative/ advisory panels and costs specialists (Q1-3 of the Competition Policy Consultation and Linklaters Competition Policy Response);

(b) the assessment of the costs and benefits of collective proceedings and the impact of that assessment on the certification decision (Q5 of the Competition Policy Consultation and Linklaters Competition Policy Response);

(c) the assessment of the reasonableness of litigation funders' returns at certification (Q10 and Q12 of the Competition Policy Consultation and Linklaters Competition Policy Response); and

(d) filing fees for class actions (Q38-40 of the Competition Policy Consultation and Linklaters Competition Policy Response), although the High Court already has filing fees, these do not scale in a way which works for class actions as explained in the Linklaters Competition Policy Response.

Q5: What features should be included within the design of an opt-out consumer class actions regime to ensure that it does not promote speculative claims that are without merit?

As discussed in Q2 above, in the Competition Policy Consultation the government has proposed reforms to the certification process which are intended to safeguard against novel and unmeritorious claims. If, notwithstanding our conclusions in Q2 above, a consumer class actions regime were to be introduced and modelled on the competition class actions regime, it should also reflect these changes being made to the competition class actions regime to provide protection against speculative litigation (see Q4-5 of the Competition Policy Consultation and Linklaters Competition Policy Response).

As discussed in Q2 above, the scope of any consumer class actions regime should also be tightly and clearly defined to avoid the prospect of a class actions regime which covers a broad and comprehensive range of consumer law prohibitions. Any regime which is introduced should also exclude heavily regulated industries to avoid disrupting the delicate balances which regulators of those industries strike between consumer and public interests.