

September 28, 2021

Consumer and Competition Policy Directorate  
Department for Business, Energy, and Industrial Strategy  
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RE: Reforming Competition and Consumer Policy (Collective Redress)

To Whom It May Concern:

I write to make brief submissions on the subject of the reform of competition and consumer policy in the United Kingdom, and particularly in the area of collective redress. I am an Assistant Professor of Law at Western University in London, Ontario, Canada, and was previously a Lecturer in Law at Oriel College, University of Oxford. I am currently completing my doctorate at Oxford in the area of collective redress in England and Canada, and have written and presented extensively on the subject in both countries. The views reflected in this submission are my own.

My submission responds to the following two questions, posed at page 127 of the consultation document:

Q72. To what extent do you consider it necessary to open up further routes to collective consumer redress in the UK to help consumers resolve disputes?

Q73. What impact would allowing private organisations and consumer organisations to bring collective redress cases in addition to public enforcers have on (a) consumers, and (b) businesses?

I will address each of these questions in turn.

### Q72

There is a clear and compelling need to open up further routes to collective consumer redress in the UK to facilitate the enforcement of consumer law by individuals. Current routes for collective redress outside of the area of competition law are restricted to Group Litigation Orders (GLOs) and representative actions. The

latter are available only in very limited circumstances (although the UK Supreme Court's pending judgment in *Lloyd v Google* may change this). GLOs are available only on an 'opt-in' basis, meaning that each consumer must take active steps to pursue their own individual claim. The current system does not work well for group actions involving low-value claims (as consumer claims inevitably are). Yet it is highly unlikely that individuals will pursue compensation for such claims by way of unitary actions because, as the Supreme Court recently heard in the *Lloyd v Google* case, "only a lunatic or a fanatic sues for \$30" (or £30, as the case may be).

The UK's previous experience with collective redress shows that any mechanism that requires consumers to opt-in will be largely ineffective. This is due to:

1. The high front-end costs of signing up claimants. For example, the Volkswagen Diesel Emissions GLO involved the expenditure of a disproportionate amount of costs due to the book-building required by an opt-in regime. Numerous lawyers that I have interviewed for my research have cited this GLO as an example of the kind of case that would benefit from the opt-out class action approach.
2. The difficulties in forming a large enough class that will
  - (a) attract third party litigation funding, and
  - (b) require defendants to pay substantial damages and thereby form a deterrent to future breaches of consumer rights.

These same issues plagued the collective redress scheme ushered in by the Enterprise Act 2002, which introduced section 47B into the Competition Act 1998 and enabled organisations to represent groups of consumers in the Competition Appeal Tribunal (CAT). It was the failure of this scheme, as demonstrated by the JJB Sports replica football shirts case, that prompted the creation of the current opt-out (or opt-in) mechanism in the CAT.

The development of further routes to collective consumer redress in the UK would also track with developments in Europe, and in particular the Directive on Representative Actions published in December 2020. This allows Qualified Entities (consumer interest organisations that comply with certain requirements) to bring claims on behalf of consumers in areas such as data protection, financial services, travel and tourism, telecommunications, and the environment. While this Directive is obviously not binding on the UK, it is persuasive, as are developments on collective consumer redress in other jurisdictions (for example, Scotland's Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 that came into force on 31 July 2020, which introduces a generic collective proceedings regime).

Q73

Private organisations and consumer organisations can fulfil functions for which public enforcers are ill-suited and ill-equipped. Breaches of consumer rights cannot be addressed solely by the regulator because, as the consultation document itself states, “[t]he CMA and the economic regulators do not have the powers to act quickly and decisively to seek solutions to aid the collective interests of consumer in markets, and there are only weak sanctions available to them to deter breaches of the law” (p 18). While regulators are able to secure compensation for consumers, the consultation document notes that “because currently there are no civil fines for breaches, consumer rip-offs can go unpunished, thereby undermining trust in the system” (p 103). The compensatory function is better fulfilled by private collective redress mechanisms.

Restricting a private collective redress mechanism to certain entities, however, will render that mechanism under-used. The previous framework under the Enterprise Act 2002 (referred to above) was cumbersome not only because of its opt-in requirement, but also because only ‘specified bodies’ were permitted to act as representatives under s 47B of the Competition Act 1998. The only body ever permitted to do so was the Consumers Association (Which?). Even where entities are permitted to represent consumers, they will be subject to the same concerns regarding the allocation of time and resources as regulators are. Individual representatives that are able to attract third party funding will be much more effective in representing consumer interests and, as demonstrated by the experience with competition law class actions, there is no evidence to date that they will abuse such a mechanism.

Those are my submissions. Thank you for providing the opportunity to provide input on this important development in the area of consumer rights. Should the government decide to open up further routes to collective consumer redress in the UK, I would be happy to make further submissions on the form such routes might take, or render any other assistance that may be required.

Respectfully submitted,



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