

BIS | Department for Business
Innovation & Skills

**PRIVATE ACTIONS IN
COMPETITION LAW: A
CONSULTATION ON OPTIONS FOR
REFORM**

APRIL 2012

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Private Actions in Competition Law

Explanation of the wider context for the consultation and what it seeks to achieve

The Government's overarching objective in seeking to encourage private-sector led challenges to anticompetitive behaviour is to complement the UK's existing world-class public competition regime in its role of securing vibrant, competitive markets, in the interests of consumers and to promote productivity, innovation and economic growth.

The Government is therefore consulting on changes to:

- **Establish the Competition Appeal Tribunal (CAT) as a major venue for competition actions in the UK**, to make it easier for businesses, especially SMEs, to challenge anti-competitive behaviour that is harming them.
- **Introduce an opt-out collective actions regime for competition law** to allow consumers and businesses to collectively bring a case to obtain redress for their losses due to anti-competitive behaviour.
- **Promote Alternative Dispute Resolution (ADR)** to ensure that the courts are the option of last resort.
- **Ensure private actions complement the public enforcement regime**, by protecting the incentives provided for companies to whistle-blow on cartels.

The Government believes these measures will allow consumers and businesses to obtain compensation for losses they have suffered as a result of anti-competitive behaviour and, by tackling anticompetitive behaviour directly, stimulate growth and innovation.

Issued	24 April 2012
Respond by	24 July 2012
Enquiries to	competition.private.actions@bis.gsi.gov.uk

This consultation is relevant to businesses of all sizes, economic regulatory bodies, consumer organizations, legal bodies, economic consultants and academics.

Foreword from the Minister of State

Competition is one of the great drivers of growth, keeping prices low for consumers and encouraging innovation, enterprise and investment.

On 15th March 2012 I announced reforms to the public competition framework that will deliver better outcomes for business, consumers and the economy. By boosting the efficiency of the regime, our proposals will enable the competition authority to take forward more high impact cases, increasing deterrence and benefiting new and innovative businesses and thus the consumer. Through these reforms we will ensure that markets are operating in a way which drives growth and innovation.



In that announcement I also set out my ambition to promote private-sector led challenges to anti-competitive behaviour, something on which I am now formally seeking views. These reforms would have two aims:

- **Increase growth**, by empowering small businesses to tackle anti-competitive behaviour that is stifling their business.
- **Promote fairness**, by enabling consumers and businesses who have suffered loss due to anti-competitive behaviour to obtain redress.

Research by the Office of Fair Trading (OFT) shows that businesses view the present approach to private actions as one of the least effective aspect of the UK competition regime. As it currently stands, challenging anti-competitive behaviour is costly and complex, well beyond the resources of many businesses, particularly SMEs. Even though the total damage caused by the behaviour may be very large, the sums involved for each individual business or consumer harmed are often small, making the expense of going to court impractical. This means that even if the perpetrators of a price-fixing scandal are caught, consumers and businesses still lose out – something that is fundamentally unjust.

We want this to change. While the public competition authorities are at the heart of the regime, they have finite resources and cannot do everything. A greater role for private actions would complement public enforcement, enhancing the benefits of the competition regime to our economy. What is needed from Government is to create the legal framework that will empower individual consumers and businesses to represent their own interests.

Our ambition is to promote growth and fairness. We are seeking to identify reforms that will bring meaningful change to small businesses and consumers. These reforms must provide appropriate safeguards against spurious or unfounded claims, but also ensure swift access to justice for those with a genuine case. I believe the proposals set out here have the potential to significantly enhance the competition regime, driving benefits for both consumers and business.

If you have views on the issues raised in this consultation document, I hope you will bring them to our attention.

1 Executive Summary

Competition creates growth and is one of the pillars of a vibrant economy. A strong competition regime ensures the most efficient and innovative businesses can thrive, allowing the best to grow and enter new markets, and gives confidence to businesses wanting to set up in the UK. It drives investment in new and better products and pushes prices down and quality up. This is good for growth and good for consumers.

The Government's Response to the Consultation on the Competition Reforms¹ set out major reforms to the public competition regime, in particular the creation of a Competition and Markets Authority (CMA) and improvement to the mergers, markets and antitrust regimes. These reforms will improve the quality of decisions, support the competition authorities in taking forward the right cases and improve speed and predictability for business.

The Government is now consulting on how to complement the public enforcement regime by promoting more private sector challenges to anti-competitive behaviour. The ambition is to enable businesses, particularly SMEs, to be better able to take direct action against anti-competitive behaviour that is stopping them grow as well as allowing both consumers and businesses to recover money that they have lost because of infringements of competition law.

The Government is consulting on proposals to:

- **Establish the Competition Appeal Tribunal (CAT) as a major venue for competition actions in the UK**, to make it easier for businesses, especially SMEs, to challenge anti-competitive behaviour that is harming them.

This will include allowing cases to be brought even when they have not first been investigated by the OFT, allowing the CAT to grant injunctions and introducing a fast track procedure for SMEs that will allow simpler cases to be dealt with much more quickly and cheaply.

- **Introduce an opt-out collective actions regime for competition law** to allow consumers and businesses to collectively bring a case to obtain redress for their losses.

Breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem, allowing consumers and businesses to get back the money that is rightfully theirs – as well as acting as a further deterrent to anyone thinking of breaking the law.

- **Promote Alternative Dispute Resolution (ADR)** to ensure that the courts are the option of last resort.

¹ <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response>

While it is essential that wrong-doers can practically be taken to court, it is also right that businesses and consumers are encouraged to resolve their differences outside of court. The use of ADR can reduce costs and allow swifter resolution for all parties. We are therefore consulting on how to ensure ADR is the default option when bringing cases in the CAT and whether to grant the OFT a power to encourage companies found to have breached competition law to provide restitution to those they have wronged. Ultimately, if ADR is to become truly embedded it must be driven by the private and third sectors, not by Government.

- **Ensure private actions complement the public enforcement regime.** In particular, we are consulting on whether there are ways we can ensure that private actions do not discourage companies from whistle-blowing on cartels, which is a vital part of the OFT's enforcement activity.

The Government believes the measures set out in this document have the potential to stimulate growth and innovation by tackling anticompetitive behaviour and to allow businesses and consumers to get a fair deal by obtaining compensation for losses they have suffered. It is seeking your views on how we can ensure our reforms make the most difference to consumers, SMEs and the economy as a whole.

2 How to respond

The consultation will begin on 24/04/2012 and will run for 3 months, closing on 24/07/2012

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation response form and, where applicable, how the views of members were assembled.

A copy of the Consultation Response form is enclosed, or available electronically at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742rf-private-actions-in-competition-law-consultation-form> (until the consultation closes). If you decide to respond this way, the form can be submitted by letter, fax or email to:

Tony Monblat
Consumer and Competition Policy
Department of Business, Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
Westminster
SW1H 0ET

Tel: 0207 215 6982
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Email : competition.private.actions@bis.gsi.gov.uk

A list of those organisations and individuals consulted is in Annex B. We would welcome suggestions of others who may wish to be involved in this consultation process.

Additional copies

You may make copies of this document without seeking permission. Further printed copies of the consultation document can be obtained from:

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Other versions of the document in Braille, other languages or audio-cassette are available on request.

Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data, that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Help with queries

Questions about the policy issues raised in the document can be addressed to Tony Monblat at the above address.

A copy of the Code of Practice on Consultation is in Annex C.

What happens next?

Following the close of the consultation period, the Government will publish all of the responses received, unless specifically notified otherwise (see data protection section above for full details).

The Government will, within 3 months of the close of the consultation, publish the consultation response. This response will take the form of decisions made in light of the consultation, a summary of the views expressed and reasons given for decisions finally taken. This document will be published on the BIS website with paper copies available on request.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Sameera De Silva,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Tel: 020 7215 2888

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3 Why Reform Private Actions?

3.1 Competition creates growth and is one of the pillars of a vibrant economy. A strong competition regime ensures the most efficient and innovative businesses can thrive, allowing the best to grow and enter new markets, and gives confidence to businesses wanting to set up in the UK. It drives investment in new and better products and pushes prices down and quality up. This is good for growth and good for consumers.

3.2 The UK's competition regime enjoys a strong reputation globally, and the UK is rightly seen as having markets which work well and which are open and fair. The Office of Fair Trading (OFT) estimates that the competition regime benefited consumers by almost £689 million in 2010/11².

3.3 However, there have also been some significant challenges to some individual aspects of the system. Following a consultation in 2011, on 15 March 2012 the Government announced a range of reforms³, including the creation of a new Competition and Markets Authority (CMA) that would build on the best aspects of both the OFT and the Competition Commission (CC). By boosting the efficiency of the regime, these proposals will, amongst other things, allow more high impact cases to be taken forward, increasing deterrence and benefiting new and innovative businesses and thus the consumer.

3.4 In its response, the Government also announced that it intended to bring forward proposals to encourage private-sector led challenges to anti-competitive behaviour⁴. The proposals to do so are set out for consultation in this document.

Aims

3.5 The Government is fully committed to maintaining the public competition authority at the heart of the enforcement regime. However, it believes that, in certain limited circumstances, private actions can complement public enforcement, enhancing the benefits of the competition regime to our economy.

3.6 The aim of these proposals is therefore two-fold:

- **Increase growth**, by empowering small businesses to tackle anti-competitive behaviour that is stifling their business.
- **Promote fairness**, by enabling consumers and businesses who have suffered loss due to anti-competitive behaviour to obtain redress.

3.7 By complementing the existing high quality public enforcement regime, private actions can contribute to maintaining a highly competitive economy, supporting growth and innovation.

² http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/OFT1354.pdf

³ <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response>

⁴ Throughout this submission, 'anti-competitive behaviour' and 'competition law' refers to the anti-trust prohibitions in the Competition Act and the corresponding EU prohibitions, not to the markets or mergers regimes.

3.8 The primary purpose of the public competition enforcement regime is, and should continue to be, deterrence. Whilst there may be a case for the competition authority to have a small role in facilitating redress, the detection, enforcement and deterrence regime must not be compromised by an undue diversion of resources into facilitating redress. Anticompetitive activity has a negative effect on the economy as a whole, typically leading to lower output and higher prices of goods and services. These costs are not confined to transfers between the infringer and the harmed party but include costs to society as a whole arising from productive and allocative inefficiency, such as reduced choice for consumers, sub-optimal allocation of resources and reduced innovation.

3.9 However, consumers and businesses also have a fundamental right to seek redress for themselves for damages that they have suffered. In some circumstances, private actors may be better placed to know where anticompetitive behaviour is causing them harm and are best placed to weigh up the relative costs and rewards to them of pursuing an action⁵. SMEs in particular may be vulnerable to being harmed by cases which would not be significant on the scale of the entire economy, but which are harmful or fatal to them as individual businesses.

3.10 The primary need from government is to create a framework whereby individuals and businesses can represent their own interests, rather than to extend its own involvement in competition law. Empowering and enabling businesses and consumers to take direct action against anticompetitive behaviour will be essential to establishing a private actions regime that complements public enforcement.

Why is reform needed?

3.11 The OFT's 2007 and 2011 reports⁶ highlight research⁷ which confirms that companies and their advisers view private actions as they currently stand as the least effective aspect of the competition regime in achieving compliance. In responses received by the OFT, a large number of respondents agreed that the effectiveness of private actions was a key area for improvement. Discussions with stakeholders during and since BIS's recent consultation on the Reform of the Competition Regime⁸ have confirmed that there is wide recognition of the need to improve access to redress and dispute resolution.

3.12 Currently it is rare for consumers and SMEs to obtain redress from those who have breached competition law, and it can be difficult and expensive for them to go to court to halt anti-competitive behaviour. Between 2005 and 2008, there were only 41 competition cases of any kind which came before the courts and where judgments were delivered.⁹ Out-of-court settlements can be a major source of resolution in some areas of law, but a

⁵ 'Private v Public enforcement' (2008), McAfee et al, suggests that victims of anti-competitive behaviour understand the infringement better due to specialised market awareness

⁶ http://www.of.gov.uk/shared_of/reports/comp_policy/oft916resp.pdf and http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft1391.pdf

⁷ The deterrent effect of competition enforcement by the OFT, -OFT962 and OFT963, November 2007 available at www.of.gov.uk/advice_and_resources/publications/consultations/open-consultations/oft962

⁸ <http://www.bis.gov.uk/Consultations/competition-regime-for-growth?cat=closedawaitingresponse>

⁹ 'Competition law litigation in the UK courts: a study of all cases 2005-2008 Part I and Part II' (2009) B. Rodger

survey of legal practitioners estimated that there were only 43 out-of-court settlements between 2000 and 2005 relating to anticompetitive practices¹⁰.

3.13 A further difficulty is that competition cases may involve large sums but be divided across many businesses or consumers, each of whom has lost only a small amount. This means that a major case, with aggregate losses in the millions or tens of millions of pounds, can nevertheless lack any one individual for whom pursuing costs makes economic sense.

3.14 Existing legal mechanisms to address the situation do not appear to be adequate:

- The right for consumers to bring collective actions for breach of competition law¹¹. There has been only one case in almost ten years. This case was brought by Which? after an OFT investigation which resulted in JJB being fined £6.7 million for fixing the prices of replica football shirts. Despite widespread publicity, only 130 claimants signed up, fewer than 0.1% of those affected.
- The representative action rule in the Civil Procedure Rules¹². The 2010 decision by the Court of Appeal in *Emerald Supplies Ltd v. British Airways plc.*, rejecting the representative action against British Airways seeking money damages for the alleged global air fuel surcharges cartel, indicates that attempts to use this clause for breaches of competition law are likely to be extremely limited¹³.
- The ability of the CAT to only hear follow-on cases. In *Enron v. EWS (I)* [2009], the Court of Appeal ruled that the scope for the CAT to go beyond the findings of the initial infringement is extremely limited. This makes it harder for cases to be brought before the CAT¹⁴.

3.15 There are many cases where it would be inappropriate for the OFT, the sectoral regulators or the European Commission¹⁵ to take action. In prioritising its work, the OFT considers a range of factors, including impact, strategic significance, risks and resources¹⁶. This prioritisation allows the OFT to focus on cases which cause the most significant detriment to the UK economy as a whole or involve the most important deterrent effect (or both). However, it leaves a number of cases where it would be an inefficient use of public resource to bring the full force of an investigation to bear. Furthermore, even in cases where the OFT does find a breach of competition law, although a fine is imposed, there is no specific provision to make redress to those who have suffered loss.

¹⁰ "Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the UK, 2000–2005" (2008) E.C.L.R. 96, B. Rodger

¹¹ Under Section 47B of the Competition Act (1998)

¹² Section 19.6 <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/parts/part19.htm#IDAIHKCC>

¹³ A Missed Gem Of An Opportunity For The Representative Rule (2011), Rachael Mulheron

¹⁴ This was also considered and applied by the CAT in *Emerson IV* [2011] CAT 4.

¹⁵ The European Commission may only take action in cases where there is a European Union interest.

¹⁶ See www.of.gov.uk/shared_of/press_release_attachments/compcriteria.pdf and www.of.gov.uk/shared_of/consultations/oft953.pdf

Impact

- 3.16 The Office of Fair Trading (OFT) estimates that the competition regime benefited consumers by almost £689 million in 2010/11, including direct savings for consumers of around £83 million.¹⁷ Our Impact Assessment estimates that the total benefit to the economy of introducing an effective private actions regime could be worth a further £66.1m, as well as providing an average of £26.2m of redress each year to businesses and consumers that have suffered loss.
- 3.17 Ensuring that those affected by anti-competitive behaviour can obtain redress adds to the deterrent effect of the enforcement regime. A requirement to compensate reduces the possibility of unjust enrichment from overcharging or exclusion and increases the risk from engaging in anti-competitive behaviour.
- 3.18 Private actions need not be limited to damages but can also be of importance in cases where an injunction being sought. Quite frequently the most important thing for a business is simply for the anti-competitive behaviour to stop, in order for them to continue trading and competing in a fair market.
- 3.19 The Government also recognises the importance of ensuring that any changes to the regime do not create a disproportionate risk of exposing business to vexatious or spurious claims, or unwittingly foster a compensation culture. Potential defendants should not be burdened with time-consuming processes and legal costs unless it is clear that there is a case for them to answer. The measures set out in this consultation have therefore been carefully designed to ensure appropriate safeguards are in place against those who may bring spurious or unfounded claims, while ensuring swift access to justice for those with a genuine case.

Proposals

- 3.20 The Government is bringing forward proposals in four key areas:
- **Establish the Competition Appeal Tribunal (CAT) as a major venue for competition actions in the UK**, to make it easier for businesses, especially SMEs, to challenge anti-competitive behaviour that is harming them.
 - **Introduce an opt-out collective actions regime for competition law** to allow consumers and businesses to collectively bring a case to obtain redress for their losses.
 - **Promote Alternative Dispute Resolution (ADR)** to ensure that the courts are the option of last resort.
 - **Ensure private actions complement the public enforcement regime**, by protecting the incentives provided for companies to whistle-blow on cartels

¹⁷ http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/OFT1354.pdf

3.21 These proposals could be combined in a variety of ways. In the Impact Assessment we present four possibilities for reform, including the 'Do Nothing' case:

- **Option 1:** Do nothing – collective actions would remain restricted to opt-in follow-on consumer cases and stand-alone cases would have to be heard in the High Court or the Court of Session in Scotland¹⁸, rather than the CAT.
- **Option 2:** Reforms to court jurisdictions, encouragement of Alternative Dispute Resolution (ADR) and protection of public enforcement.
- **Option 3 (preferred option):** Allowing private opt-out collective actions in competition law, along with all the reforms outlined in Option 2. Collective actions could include both follow-on actions to pursue redress, and stand-alone actions which would also establish infringement.
- **Option 4:** Allowing the Office of Fair Trading to take follow-on opt-out collective actions on competition cases, along with the reforms outlined in Option 2.

3.22 These options are broken down into their core components in this consultation document, which approaches the reforms thematically.

Wider context

3.23 The issue of private actions in competition law has been the subject of a great deal of attention in recent years. In 2007, the OFT published a report on private actions in 2007¹⁹; the Civil Justice Council submitted a final report on *Improving Access to Justice Through Collective Actions*²⁰ in 2008 and the topic has been discussed by numerous academic and legal experts, as will be made apparent in this document and the associated Impact Assessment. In 2008, the European Commission published a White Paper on Private Actions²¹.

3.24 Furthermore, in 2011 the European Commission carried out a public consultation on collective redress²², considering the merits of introducing a collective action across all areas of law. The UK Government submitted a response to this consultation²³, stating its position that it is opposed to the introduction of a generic collective redress mechanism covering all sectors either in its domestic jurisdiction or at EU level, but instead favours an approach based on minimum standards of access to justice and an ability to combine individual claims with initiatives targeted at specific sectors, for example in competition law, on the basis of robust assessment of need. On 2 February 2012 the European Parliament adopted an 'own initiative report' on collective redress in the EU calling for a legally binding horizontal framework and safeguards to apply across all sectors. The

¹⁸ The complexity of competition cases means that they are barred by Rules of Procedure from being heard in the county courts in England and Wales, and are not generally heard in the sheriff courts in Scotland.

¹⁹ http://www.of.gov.uk/shared_of/reports/comp_policy/oft916resp.pdf

²⁰ <http://www.judiciary.gov.uk/NR/rdonlyres/0C2D2070-5C52-4FAB-8C12-C0A6C128C3F8/0/CJCImprovingAccessToJusticethroughCollectiveActions.pdf>

²¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF>

²² Towards a Coherent European Approach on Collective Redress
http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html

²³ http://ec.europa.eu/competition/consultations/2011_collective_redress/uk_en.pdf

European Commission are now expected to bring forward an 'initiative' on collective redress later this year.

3.25 On a related matter, in November 2011 the European Commission published proposals on enhancing ADR for consumer to business disputes in Europe²⁴. The proposals would require Member States to make quality ADR available for contractual disputes arising from the sale of goods or provision of services by a trader established in the European Union to a consumer resident in the European Union. These proposals are now subject to negotiation but in their current form they would not affect competition cases, as these would not be considered contractual disputes. The European Commission is aiming to have the proposals adopted by the end of 2012. BIS recently launched a Call for Evidence²⁵ on these ADR proposals and continues to welcome stakeholder input.

²⁴ http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm

²⁵ <http://www.bis.gov.uk/Consultations/call-for-evidence-eu-proposals-dispute-resolution?cat=closedawaitingresponse>

4 The Role of the Competition Appeal Tribunal (CAT)

The Government considers that the CAT's expertise in competition law, combined with its system of active case management and the cross-disciplinary expertise of its membership, means that it is well suited to handling complex competition litigation. The Government is therefore proposing to make the CAT a major venue for competition actions in the UK.

Furthermore, the Government is consulting on creating a 'fast track' mechanism in the CAT to facilitate access to justice for SMEs who currently find it too costly to seek remedies for competition matters through the courts. It is further consulting on whether the process of calculating losses caused by anti-competitive behaviour could be simplified.

The Government is seeking views on:

- Whether to activate Section 16 of the Enterprise Act to enable the courts to transfer competition law cases to the CAT.
- Whether to amend the Competition Act to allow the CAT to hear stand-alone as well as follow-on cases.
- Whether to allow the CAT to grant injunctions.
- Whether to introduce a Fast Track procedure in the CAT to allow SMEs to resolve simpler cases more quickly and at lower cost.
- Whether to introduce a rebuttable presumption of loss for cartel cases
- Whether there is a case for directly addressing the passing-on defence in legislation.

What are private actions?

- 4.1 Private actions refer to circumstances in which one or more parties – for example an individual, a business or a charitable organisation – take another to court over a matter of competition law. The remedies sought will vary, but might commonly include one or more of damages, an injunction²⁶, or avoidance of a contract or other legal document.
- 4.2 Access to redress is recognised in the UK, as well as in the EU and beyond, as an important part of a well-functioning competition regime. Through EU Law, there has been a right of action for damages since the UK joined the EU in 1973, and confirmed in numerous cases including *Courage Ltd v. Crehan*, *Manfredi v. Lloyd Adriatico Assicurazioni SpA*²⁷ and the House of Lords decision in *Garden Cottage Foods Ltd v. Milk Marketing Board*.

²⁶ Or in Scotland an interdict or order for specific performance

²⁷ As discussed in 'Collective Redress For Breach Of Competition Law – A Case For Reform?' (2011), Sir Gerald Barling

4.3 In competition law, there are two main types of action:

- **Follow-on cases**, where an infringement of competition law has already been found by a competition authority. In such a case, all that the claimant must show is how it relates to their own case (for example, quantification of damages and causation).
- **Stand-alone cases**, where such an infringement has not been found by the competition authority. The claimant is therefore obliged to first show that a breach of competition law has occurred and, if this established, may then attempt to show how it relates to their case and to seek specific remedies (such as damages or an injunction).

4.4 Currently, all stand-alone claims arising in England and Wales pleading a breach of EU or UK competition law must be issued in or transferred to the High Court²⁸, with similar cases in Scotland heard in the Court of Session. Follow-on claims; that is, claims relating solely to issues in which a prior finding of infringement has been made by a competition authority, may be issued in the CAT²⁹.

4.5 The Court of Appeal has ruled³⁰ that, even for a follow-on case, the scope to go beyond the findings of the initial infringement are extremely limited and that all aspects of evidence and argumentation must relate to issues found in the initial infringement decision. In practice, this severely limits the scope of cases that the CAT can consider.

4.6 Between 2005 and 2008 there were a total of 41 judgments in competition litigation cases in the UK, of which 9 (22%) were before the CAT³¹.

Framing the situation

4.7 A company which wants redress for a competition issue that has not yet been investigated by a competition authority has two choices: (a) bring a private action; or (b) lobby the competition authority to launch an investigation and then – if the investigation finds an infringement – bring a follow-on action. The latter is potentially easier but may take longer, as the company must first wait for the public investigation to happen, and there is also no certainty that the competition authority will decide to bring a case.

4.8 Taking a private action for a stand-alone case will always be challenging: it is intrinsically difficult to prove a breach of competition law due to the legal threshold required, the complex economic factors that may underlie a case and the difficulties of obtaining the necessary information. However, making it easier to bring more stand-

²⁸ They are assigned to the Chancery Division, unless they come within the scope of Rule 58.1(2) of the CPR, in which case they are assigned to the Commercial Court.

²⁹ Under section 47A of the Competition Act. Under section 47B of the Competition Act (inserted by section 19 of the Enterprise Act), claims under section 47A may be brought by certain specified bodies on behalf of consumers. Under section 16(1) of the EA02, the Lord Chancellor may by regulations make provision enabling the court to transfer to the CAT for its determination so much of any proceedings before the court as relates to an 'infringement issue' and to give effect to the determination of that issue by the CAT.

³⁰ *Enron v. EWS* (2011)

³¹ 'Competition Law Litigation: UK Court Cases 2005–2008: PART I': [2009] G.C.L.R., Barry Rodger

alone cases is essential if private actions are to complement the work of the public competition authority and help tackle anti-competitive behaviour.

- 4.9 Given the difficulty in proving a breach of competition law, the key to encouraging more stand-alone actions is to do one or both of (a) allowing for the possibility of higher than actual damages, as is the case in the US; or (b) making private actions easier, simpler and quicker.
- 4.10 Allowing for higher than actual damages can distort the grounds to settle, meaning that it is in a defendant's best interest to settle even if the balance of probability is that it has committed no wrong. This matter is discussed further in Chapter 5, on collective actions. The Government therefore believes the more appropriate option is to make it easier, simpler and quicker to bring private actions, particularly for SMEs.

Expanding the Role of the CAT

- 4.11 Since its creation, the CAT has built up its expertise in competition cases and has become familiar with competition litigation. There is now a substantial body of CAT case law on many aspects of substance and procedure in this field. The concept of a specialist competition tribunal or court is recognised internationally as a key strength of the UK regime and the CBI has previously cited the model when calling for a European competition court distinct from the General Court.
- 4.12 Additionally, the CAT's system of active case management and preparation, as well as the cross-disciplinary expertise of its membership, means that it is well suited to handling complex competition litigation. By concentrating on essential issues, minimising oral hearings and enforcing timetables, the CAT can ensure costs and burdens are kept to a minimum.
- 4.13 Extensive discussion with stakeholders has confirmed this view of the CAT, with the majority of lawyers – whether accustomed to representing claimants or defendants – describing it as a good and efficient institution. Academic and business stakeholders, including the CBI, have also acknowledged the CAT's efficiency and strong case management.
- 4.14 However, stakeholders have also advanced the opinion that, as a result of the limitation on the CAT to hear only follow-on cases, the CAT has unfulfilled potential. Senior members of the legal profession have described the rule to BIS as 'self-denying ordinance' citing numerous cases which, despite being primarily follow-on, could not be heard in the CAT because the claimant wished to introduce one or more aspects of evidence or damages that did not rely on a prior infringement decision³².
- 4.15 The Government believes that expanding the role of the CAT would allow it to play a central role in competition private actions and would build on and strengthen its position as a centre of competition expertise. The Government considers that the CAT has capacity to take on extra work whilst still carrying out its function of hearing appeals quickly and effectively.

³² See for example *Enron v. EWS* [2009]

Transferring cases from the High Court

- 4.16 Section 16 of the Enterprise Act empowers the Lord Chancellor to make regulations to enable the High Court³³ to transfer cases from the High Court to the CAT³⁴.
- 4.17 Implementation of Section 16 would not automatically transfer cases to the CAT. In each case, it would be for the presiding judge to determine whether this would be an appropriate step to take in the circumstances of the particular case. In certain cases, where the judge is also a chairman of the CAT, it would be open to the judge to decide to continue to hear the case while making full use of the procedures, members, staff and facilities offered by the CAT. The greater flexibility this would bring would be to the benefit of both participants and the court system.
- 4.18 The Government considers that this would also allow cases alleging competition law infringements that may currently be brought under Rule 19.6 of the Civil Procedure Rules (CPR) or in England and Wales as GLOs under CPR 19.10-19.15 to be transferred.

Hearing cases directly

- 4.19 The Government is also minded to take the further step of permitting claimants to file a stand-alone claim (raising issues of competition law only) in the CAT directly, as an alternative to the ordinary courts. This would require an amendment to section 47A of the Competition Act 1998 to remove the requirement that civil actions brought before the CAT under that section have to follow on from a prior administrative decision. Once that is done the CAT would be able to hear all civil competition actions whether they are stand alone or follow on in nature.
- 4.20 This change could deliver additional efficiencies in terms of speed and simplicity. Giving the CAT jurisdiction over a wider range of competition claims could also deliver an additional safeguard on the use of certain forms of representative action by excluding their use except before the CAT (see chapter 5 on Collective Actions).
- 4.21 Any mechanism providing direct access to the CAT would not eliminate the need for implementation of Section 16, as there are a large number of cases where competition is only one of the issues. If competition is only one of the issues, it would be appropriate for the ordinary courts to continue to hear such cases, although the competition elements could still be transferred to the CAT if the judge thought that would be an appropriate step to take in the circumstances.

Injunctions

- 4.22 One remedy that may be sought in competition cases is an injunction³⁵ – frequently, redress and damages are less important to the claimant than simply causing the

³³ Or, in Scotland, the Court of Session

³⁴ See Footnote 25.

³⁵ Or, in Scotland, an interdict or order for specific performance

anticompetitive activity to stop. In Germany, where there is a much higher level of private action litigation, injunctions and declarations of ‘voidness’ (declaring a contract or agreement void) are sought much more frequently than monetary redress³⁶.

4.23 If the CAT is to hear competition cases, it should therefore also have the ability to hear applications for injunctions. This could be brought about in England and Wales by naming the CAT a Superior Court of Record.

Q.1 Should Section 16 of the Enterprise Act be amended to enable the courts to transfer competition law cases to the CAT?

Q.2 Should the Competition Act be amended to allow the CAT to hear stand-alone as well as follow-on cases?

Q.3 Should the CAT be allowed to grant injunctions?

Fast Track Route for SMEs

What a fast track needs to provide

4.24 Smaller businesses, like large businesses, should be able to operate without being threatened by anticompetitive behaviour. However, they are more vulnerable to weaknesses in enforcement, as local or regional cases are less likely to be significant enough to be prioritised by the OFT and because the high cost of bringing cases in competition law means it is very difficult to pursue cases privately. Furthermore, whilst a large company may have sufficiently diverse revenue streams to continue trading whilst it tackles anticompetitive behaviour, SMEs can be significantly more vulnerable and may simply be forced out of business. This has a direct negative impact on growth and jobs, as well as to the livelihood of hard-working business people. Furthermore, forcing a business to close in this way may allow the dominant (infringing) business to transform its position into a virtual monopoly, damaging competition, consumers and the economy. The Competition Pro-Bono Service (CPBS) has provided a number of examples of where SMEs have been forced to deal with anti-competitive behaviour (see Box 1).

Box 1: Examples of SMEs facing anti-competitive behaviour.

- A software developer had developed a component which interfaced with a programme offered by a major software company. That company sought to force the developer to discontinue the compatibility of his software in a way that appeared to infringe competition law and could have reduced his ability to effectively make his software available.
- A farmer owned a large amount of land which he had inherited from his father. His father had previously agreed a deal with a large outdoor advertising company to allow advertising on the farm land for a term of approximately 30 years, despite the fact that the Vertical Block Exemption stipulates that an agreement of this nature cannot be longer than 5 years. This was preventing the farmer taking advantage of a higher-priced offer from a rival company.

³⁶ ‘Myths and Untold Stories - Private Antitrust Enforcement in Germany’ (2011), Sebastian Peyer

4.25 Enabling SMEs to tackle such anti-competitive behaviour rapidly and effectively is therefore a primary aim of this consultation. To give SMEs genuinely accessible recourse to the courts for anticompetitive behaviour will require the process:

- **To be cheaper.** The possible liability for the other side's legal costs can strongly deter SMEs from seeking remedies through the courts.
- **To be quicker.** SMEs have neither the time nor the money to pursue an action over several years – and if they did, the results would probably come too late.
- **To be simpler.** SMEs are less likely to have in-house legal support or to be familiar with competition law. Making the process easy to understand and facilitating access to advice is essential.

4.26 Applying these principles to complex competition issues will be a significant challenge, but we believe that the CAT's case management abilities and track record on SME cases shows that it will be practical. There is also some precedent for such an approach in the Patents County Court, where a High Court judge with relevant specialist expertise deals with patent cases in a speedy and light touch manner.³⁷

4.27 The Patents County Court focuses on disputes involving relatively small damages between two SMEs or one SME and one larger firm, and has strict cost capping of £25,000 or £50,000 depending on the kind of case. It uses strict case management to minimise delays, and limits the trial itself to two days in total. Although we recognise that this is not directly comparable to the proposal of a competition fast track - even simple competition cases would be too complex to be heard in the county courts - the principle of such an approach could be adapted to the CAT.

4.28 Our early discussions with claimant lawyers and business groups suggest that the ability to challenge anti-competitive behaviour is a higher priority than redress in the form of damages for most SMEs, particularly in abuse of dominance cases. What SMEs need most is the opportunity to compete fairly so they can survive and grow. The fast track will therefore primarily focus on providing fast access to injunctive relief in order to alleviate the immediate pressure on the SME caused by anti-competitive conduct. In appropriate cases an injunction can be granted on an interim basis pending a full hearing at a trial and the determination of any accompanying claim for damages (potentially up to a defined maximum). The CAT's current extensive case management powers would be expressly supplemented by a discretion as to waiver or limitation of any obligation on the part of the claimant SME to provide a cross-undertaking for any damage that might be suffered by the defendant (should it transpire that the interim order was inappropriate in the circumstances) and to cap liability for defendants' costs (up to a maximum of £25,000).

4.29 The experience of the Competition Pro-Bono Service (CPBS) indicates that a significant number of SMEs who currently believe they are the victims of anti-competitive behaviour actually have no strong competition case to bring. Of those who

³⁷ For further details, see <http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/courts/patents-court/patents-court-guide.pdf>

do have a case to bring, many disputes can be resolved simply by letter writing (if backed by an informed legal opinion). It would therefore be desirable for SMEs to seek legal advice, potentially from a free source such as the CBPS, before applying to the fast track.

Proposed fast track model

4.30 In keeping with the Government's proposals to make the CAT a major venue for competition cases in the UK, we believe that the CAT would be the best place in which to establish a fast track. The CAT has the specialist expertise that the county courts would lack and its strong case management would allow cases to be processed rapidly. The fast track would proceed through four stages.

- i. **The SME would access a 'Plain English' web page on the CAT site**, containing explanations of competition law, links to bodies that provide free legal advice (such as the Competition Pro Bono Service) and details of the fast track rules. SMEs would be strongly encouraged to make use of these resources before bringing a case to ensure the case was genuinely competition related and that the claim was made in a clear way.
- ii. **The SME would submit a formal application to have their case heard in the fast track.** This form could be a simplified version of a normal application to begin a case. It would also detail what cost-capping the SME sought and what sort of interim and permanent relief it applied for. The bid would require payment of a refundable deposit to avoid vexatious or frivolous claims.
- iii. **A CAT chairman would decide whether to allocate the case to the fast track**, including deciding the level of cost-capping if this was lower than the maximum cap of £25,000. In the course of this process, they would invite representations on paper from the other party. The chairman's decision would not be appealable by either party, although if the case was not accepted for the fast track it could still be heard as a normal case.

4.31 If allocated to the fast track, the SME would benefit from a procedure that would:

- Allow swift granting of interim injunctions – in practice many cases will not need to proceed beyond this stage.
- Allow cross-undertakings for damages to be waived or limited.
- Aim to hear the case within six months of it being laid.
- Resolve issues on paper wherever possible.
- Keep oral hearings to a minimum, normally a matter of days
- Have no or limited court fees, and cap costs awarded up to a maximum of £25,000. In individual cases the CAT could set a lower cap.

4.32 The fast track would focus on non-monetary resolutions such as injunctions, and would seek in the first instance to provide swift interim relief. It is expected that as well as the CAT itself resolving cases, some cases would be settled between the parties at earlier stages, after the SME sought legal advice, formally lodged the case or was granted an interim injunction. The powers outlined above would be without prejudice to the CAT's general case management powers. Box 2 provides examples of how the fast track might work in practice.

Box 2: Hypothetical examples of how the fast track might work in practice

(1) A small pharmaceutical supply company (A) is threatened with the abrupt termination of its supplies of prescription drugs by a drugs manufacturing company. A immediately applies to the CAT and an urgent hearing takes place a day later at which both parties are present. As there has not been the time to file detailed written evidence, the CAT hears directly from the parties and their representatives at the hearing. It is established that this is a case which cannot wait until the conclusion of a full hearing to see if A is entitled to claim a permanent injunction and/or damages because A's business might have folded by then. In those circumstances and given that there appears to the CAT to be an arguable case of infringement of competition law and that the interests of justice require immediate action, the CAT makes an interim order requiring the manufacturer to continue to supply A pending the full and final hearing of the matter.

(2) A medium-sized private care home (B) considers that a healthcare body is abusing its dominant position by paying uneconomically low prices for home care services. B applies to the CAT both for an injunction and damages. The CAT grants the injunction on an interim basis because B had provided credible evidence as to an infringement of competition law and that its commercial survival will be in doubt if it must await trial. The CAT also gives directions to enable the matter to go to trial on an expedited basis within 6 months. Later the parties reach a negotiated settlement that obviates the need for a trial.

(3) A small mini-bus company (C) applies to the CAT seeking a declaration, injunction and damages founded on its assertion that a larger bus company (D) abused what is said to be its dominant position in the relevant bus market by threatening predatory behaviour directed at driving C out of business. Having granted an interim injunction the CAT caps C's liability for D's costs at £25,000 and lists a hearing within six months of the claim being lodged. The matter remains contested and goes to trial. At the trial (which lasts 4 days) the CAT hears 2 witnesses of fact as to the circumstances of the alleged behaviour and 2 expert economists as to the economic effect of that behaviour. The CAT hands down a judgment that the claim is well-founded. The CAT orders D to pay damages in the sum of £75,000 and that D shall bring the infringement to an end and refrain from any conduct having the same or equivalent effect.

4.33 Given the focus on interim relief and the light-touch nature of the fast track, we think that a case could be made for damages to also be capped. We invite comments on whether this is a sensible principle to follow, and if so what a suitable maximum damages award would be.

Alternative options

4.34 The model set out above could be replaced by giving greater discretion to the CAT, allowing them to decide the possible outcomes, length of the case, cost capping and so on as each case reached the court. This allows for the solution to be fine-tuned to the participants. However, this is not fundamentally different to what currently exists.

4.35 Another possibility would be that a fast track procedure would be preceded by a letter being written to the alleged infringer, warning them that there is a reasonable case against them. Currently, and under the scheme proposed above, such letters would be written by bodies such as the CPBS in their own capacity. However, some stakeholders have suggested the CAT or OFT write these letters to give them a formal authority. Stakeholders including both bodies themselves have raised significant objections. In either case there would be concerns around prioritisation of limited resource. For the CAT, taking on such a role would be inconsistent with its standing as a court. For the OFT, making provisional judgements in terms of letters which then lead to court cases might undermine the OFT's reputation for giving powerful, effective decisions, damaging its deterrence effect in other areas. Additionally, given the OFT's rules around prioritisation, it is unclear whether the OFT could write such a letter and then fail to follow the case up further if for whatever reason it was not resolved through the courts.

Q.4 Do you believe a fast track route in the CAT would help enable SMEs to tackle anti-competitive behaviour?

Q.5 How appropriate are the design elements proposed, in particular cost thresholds, damage capping and the emphasis on injunctive relief?

Q.6 Should anything else be done to enable SMEs to bring competition cases to court?

Presumptions on the Quantification of Damages

- 4.36 The Government has considered whether there are areas in which the burden of proof in competition case should be amended in order to facilitate redress for those who have suffered loss.
- 4.37 Even once anti-competitive behaviour has been established, the quantifiable effect of it on intermediate purchasers and consumers is frequently a difficult question with many intricacies and variables. The economic evidence that must be assembled is considerable and frequently the party with the best access to the relevant data will be the defendant who will, in most cases, not be inclined to cooperate. Uncertainty over the likely eventual outcome, even if the breach of competition law is clear-cut, also has the potential to inhibit whether or not cases are brought.
- 4.38 The Government does not consider that any amendments are necessary with regards to the fundamental question of whether or not a breach of competition law has occurred. However, the Government does consider that, in private cases, there may be a case for re-examining the presumptions used, if any, when establishing the quantum, in particular for those areas relating to quantification of loss.
- 4.39 There are two principal areas in which the Government is considering whether the law should be amended: introducing a rebuttable presumption of loss in cartel cases and issues relating to the passing-on defence.

A rebuttable presumption of loss in cartel cases

- 4.40 The Government is considering introducing a rebuttable presumption of loss in cartel cases. This would be likely to take the form of a presumption that a cartel³⁸ had affected prices by a fixed amount, such as 20% - a figure which would be indicative of the amount that the current economic literature suggests prices can be raised by cartels³⁹. If no economic evidence was presented by either side, the damages award would be based on this assumption. The presumption would be rebuttable by either the claimant or defendant; however, to do so they would have to present the necessary evidence to do so. A presumption of this nature was referred to by DG Competition in its recent draft guidance on the quantification of harm⁴⁰.
- 4.41 Such a presumption could reduce the disincentive for parties to start litigation against cartelists. The ability to estimate likely damages could help the benefits of litigation may become clear and would reduce the need to assemble extensive economic evidence, a process that is likely to be costly and time-consuming, if it is possible at all. Such a presumption could be particularly helpful for purchasers at, or near the end of the distribution chain, such as consumers: these are often those most harmed by antitrust infringements, but given their distance from the infringement they find it particularly difficult to produce sufficient proof of the existence and extent of passing-on of the illegal overcharge along the distribution chain. The presumption might particularly encourage follow-on cases, where infringement has been previously found by the competition authorities, but would also be usable in stand-alone cases, once the initial fact of a breach of competition law had been proven.
- 4.42 Furthermore, such a rebuttable presumption would have the effect of shifting the burden of proof on to the defendant, the party most likely to possess the data necessary to calculate the true damages. Such a shift is consistent with the principle that an informational advantage of one party should naturally lead to that party holding the burden of proof and is, in any case, more than justified in a case where that party has been found to have been carrying out a cartel.
- 4.43 The Government recognises the fact that the damage caused by cartels varies from case to case and that any given figure is unlikely to be correct for all cases. However, the figure of 20% represents the lower end of the range that the current economic

³⁸ References to cartels in this section refer to any breach of the Chapter 1 prohibition or the corresponding European prohibitions.

³⁹ “The economic literature also suggests that cartels can raise the prices in respect of the goods or services in question by as much as 20 to 35 per cent or even higher. See, for example, the study prepared for the European Commission by Oxera et al: Quantifying antitrust damages: Towards non-binding guidance for courts, December 2009. See also a Connor and Lande report which found that cartels overcharged on average between 18 per cent and 37 per cent in the US and between 28 per cent and 54 per cent in the EU: J.M. Connor and R.H. Lande 'The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies', in *The Antitrust Bulletin*, vol.51, No.4/Winter 2006, 983-1022.”

http://www.offt.gov.uk/shared_offt/consultations/oft423con.pdf

⁴⁰ See paragraph 123 of http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html; see also comments by Professor Bruce Lyons on the above guidance paper:

http://ec.europa.eu/competition/consultations/2011_actions_damages/uea_ac_uk_en.pdf

literature suggests prices can be raised by and is therefore considered a more appropriate starting point than the current apparent presumption that a cartel has caused no damage. The figure of 20% was also indicated as the average in the recent draft EU guidance paper⁴¹. The fact that the presumption would be rebuttable by either side would help prevent any abuses of justice as, should a party have evidence to show the damages were either higher or lower than the presumption, it will be able to present evidence to support this.

The passing-on defence

- 4.44 The passing-on defence could potentially be used by a defendant to negate the claimant's case by showing that, as the claimant had passed on the entirety of the overcharge to an indirect purchaser, the claimant had suffered no loss. It should be noted that this is only an issue in business to business cases, not in cases where it is consumers who have suffered loss, as consumers cannot pass on a loss.
- 4.45 It has not been decided whether the passing-on defence is permitted under English law⁴²; however, under general principles of English tort law it appears that there is no clear reason why such a defence is not permissible. It has been argued that the defence is not, strictly speaking a defence, but simply a part of the quantification of loss⁴³. The issue was raised before the CAT⁴⁴, where it was referred to as a 'novel and important issue', but the case settled prior to the substantive hearing and therefore the CAT did not rule on it.
- 4.46 It is clear that the passing-on defence has the potential to play a significant role in private actions in competition law, in determining which cases get brought, the evidence likely to be required to be assembled for a case and ultimately the outcome and amount of damages. The Government has therefore considered whether the current uncertainty should be removed by specifically addressing in law.
- 4.47 There are a number of ways in which the passing-on defence could be addressed; however, all have their advantages and disadvantages. For example:
- Explicitly allowing the passing-on defence would remove any uncertainty in the law, but would be unlikely to result in a substantive alteration of the current position.
 - Forbidding the passing-on defence would make it easier for direct purchasers to bring claims; however, this would be unjust unless combined with, as is the case in the US, by removing standing for indirect purchasers (who may include consumers), which would deny these indirect purchasers access to justice, something that would be forbidden by European law⁴⁵.

⁴¹ Ibid.

⁴² Passing On, Indirect Purchasers and Loss Allocation between Claimants (2012), Duncan Sheehan, LMCLQ (Forthcoming)

⁴³ Ibid

⁴⁴ BCL Old Co & Others v Aventis SA & Others

⁴⁵ Passing On, Indirect Purchasers and Loss Allocation between Claimants (2012), Duncan Sheehan, LMCLQ (Forthcoming)

- 4.48 A rebuttable presumption that passing-on happened in its entirety would make it easier for the end purchaser – frequently a consumer to bring a claim, at the expense of direct purchasers. Although this would benefit consumers, it could also reduce the total number of claims brought, as direct purchasers are likely to be more able to successfully prove a claim.
- 4.49 After due consideration, the Government is not convinced that there is a strong case for new legislation explicitly addressing the passing-on defence. Given the EU-wide implications of this matter, it is likely that, even were action required, this might be more appropriately taken at EU level⁴⁶. It notes, however, that should collective actions (as described in Chapter 5) be taken forward, consideration could be given to judicial mechanisms for consolidation of cases and apportionment of damages among direct and indirect purchasers, to enhance case management and avoid erroneous decisions.

Q.7 Should a rebuttable presumption of loss be introduced into cartel cases? What would be the most appropriate figure to use for the presumption?

Q.8 Is there a case for directly addressing the passing-on defence in legislation? If so, what outcome is desired and how, precisely, should this best be done?

⁴⁶ http://www.ofc.gov.uk/shared_ofc/reports/comp_policy/ofc916resp.pdf

5 Collective Actions

The Government considers that the current collective actions regime set out in the Competition Act, limited as it is to opt-in follow-on cases on behalf of consumers, is inadequate in delivering fair redress for consumers and businesses. It is therefore minded to strengthen the regime by both extending the types of cases that can be brought and making it easier to bring such cases.

The Government is seeking views on:

- **Whether to introduce an opt-out collective actions regime for competition law to allow businesses and consumers to obtain redress. The regime would apply to both follow-on and stand-alone cases, with cases to be heard only in the Competition Appeal Tribunal (CAT).**
- **What safeguards should be put in place to prevent the abuse of such a regime via an increase in speculative or unmeritorious claims.**
- **Who should be permitted to bring such actions, with those under consideration including individual companies and consumers, representative bodies, legal firms, third party funders and public sector bodies.**

5.1 In theory, all individuals or businesses that can show they have been affected by a breach of competition law may bring an action before a court. In competition law, a single breach could potentially harm a large number of persons, including consumers and small businesses, who would have similar claims (although often for different values). If each claim were pursued individually, the same, potentially complex, issues would have to be litigated in each case. It might be difficult, given the value of the individual claim, to finance a competition case. Finally, should an individual claimant get as far as filing an action in a court, it will be at risk of costs liability in the event that it should lose – and these costs may far outweigh the individual value of the case. This direct exposure can be a clear disincentive to smaller claimants, or those with smaller claims, from bringing an action.

5.2 The Government expressly recognised these difficulties in Section 19 of the Enterprise Act (2002), by amending the Competition Act to enable a designated body to bring claims for damages on behalf of a group of consumers before the CAT, provided that the OFT, a sectoral regulator or the European Commission has previously made an infringement decision. This, in theory, is a means by which consumers can obtain redress.

5.3 These powers do not allow for representative follow-on actions for damages on behalf of businesses. Nor are there powers for representative bodies to bring stand-alone actions to establish a competition law infringement on behalf of either consumers or businesses. Nor are there powers to bring stand-alone actions for infringement/damages directly before the CAT. Furthermore, currently only one body – the consumer organisation Which? – is certified as a representative body capable of bringing such actions.

5.4 In 2008 Which? settled its landmark case against the retailer JJB Sports out of court. This was the first and only representative action to date. The case followed the OFT

fining JJB £6.7 million for fixing the prices of replica England and Manchester United football shirts in 2000 and 2001. Despite wide press coverage, only 130 claimants (fewer than 0.1% of those affected) signed up to the action - though some others have settled on similar terms following the event. Under the settlement, each claimant won £20 - the estimated illegal mark-up. There have been no other cases brought and Which? has made clear that it considers the system must be changed to one that is opt-out.

5.5 Which? has said, “To make it attractive for designated bodies to bring follow-on actions in all competition redress cases, the system must be changed so that opt-out systems can be used. As most representative bodies will be charities, there will always be concerns about proportionality if an opt-in system prevails — both from a cost and time perspective. The only real, practical way to get over this is to introduce an opt-out system.”⁴⁷

5.6 Given the fact that there has been only one case in almost ten years, and that that case retrieved only a small fraction of the consumer losses involved due to the low level of participation, the Government considers that the current collective actions regime in competition law is inadequate in delivering restorative justice for consumers and small businesses. It is therefore minded to strengthen the regime by both extending the types of cases that can be brought and making it easier to bring such cases, whilst striking the right balance between the need for an effective system for collective action claims and protecting of defendants from having to settle unmeritorious claims.

5.7 It should be noted that the proposals in this consultation refer to competition law only. The Government does not favour the introduction of a generic collective redress mechanism covering all sectors either in its domestic jurisdiction or at EU level. Instead it favours an approach based on minimum standards of access to justice and ability to combine individual claims with initiatives targeted at specific sectors on the basis of robust assessment of need. As the discussion above and the Impact Assessment to this consultation makes clear, the Government considers that competition law is one area in which there is a robust case for collective actions.

Q.9 The Government seeks your views on how well the current collective action regime is working and whether it should be extended and strengthened.

Q.10 The Government seeks your views on whether the proposed policy objectives for extending collective actions, taking into account redress, deterrence and the need for a balanced system, are correct.

Extending the Regime

5.8 The Government sees two principal ways in which the current collective action regime could be extended, independently from the question of opt-out or opt-in:

⁴⁷ Dr. Deborah Prince, then Head of Legal Affairs at Which?, quoted in “Reform of Collective Redress in England and Wales” Rachael Mulheron (2008)

- Allowing collective actions to be brought on behalf of businesses as well as consumers.
- Allowing collective actions to be brought in stand-alone as well as follow-on cases.

5.9 With regards to the first, the Government considers that businesses who have suffered loss due to infringements of competition law should not be denied the right to bring a collective action to recover their loss, provided that a collective action is the most appropriate means of bringing the case⁴⁸. Box 3 gives an example of a situation in which to deny rights to businesses would make little sense.

5.10 More broadly, representative claims being made by businesses would raise the deterrence effect of the UK competition system as it increases the penalty for non-compliance. Furthermore, detection rates may increase, since affected businesses have a greater incentive to raise suspected anti-competitive behaviour with the relevant competition authority.^{49,50} It recognises that there is a potential concern that such an action could be used as a vehicle for inappropriate information sharing that would itself be a breach of competition law, but believes that such risks would be most appropriately mitigated by the courts via appropriate certification and case management. The Government therefore considers that any reforms to the system should apply equally to consumers and businesses.

Box 3: Printer Cartridges

Consider a hypothetical case in which a company that makes printer cartridges has been found to have been involved in a price-fixing cartel, raising prices by £25 per cartridge. Over the period in which the cartel was operating, the company sold 1 million cartridges, of which 500,000 were sold to consumers and 500,000 sold to businesses, for use in office printers. None of the cartridges were resold.

In such a case, the most natural approach would be to bring a collective action on behalf of those who had bought cartridges. To allow an action to be brought on behalf of the consumers only would simply deny redress to the business users and allow the cartelists to keep half of its ill-gotten gains – something that would be of no benefit to anyone other than the cartelists.

5.11 With regards to the second, the situation is more complex. An advantage of restricting cases to follow-on actions is that it ensures the only companies who are the subject of such claims are ones where an infringement has already been found. This would help to prevent spurious cases, or ‘fishing expeditions’ where a case is brought to try to pressure a company to settle. However, the Government would note that there are many other ways to prevent spurious cases, many of which are addressed below⁵¹.

5.12 There are, however, several disadvantages to restricting collective actions to follow-on cases. Most seriously, if interpreted in a similar way to the restriction currently placed on the CAT to only hear (non-collective) follow-on cases⁵², it could severely limit

⁴⁸ Which could be assessed at certification; see Annex A: Design Details of a Collective Action Regime.

⁴⁹ Although this ‘detection effect’ would be greater under a regime which allowed stand-alone actions as well, since agents would not have to go through the intermediary step of the competition authority.

⁵⁰ See paragraphs 3.41-3.42 in “An assessment of discretionary penalties regimes”, report prepared for the OFT by London Economics, October 2009.

⁵¹ See Annex A: Design Details of a Collective Action Regime.

⁵² As set out in Section 47A of the Competition Act (1998)

the number of cases brought, as even a case which is primarily follow-on may have a small proportion of stand-alone elements. In the current regime, this restriction to follow-on has been widely criticised and resulted in a number of cases having to be brought in the High Court rather than the CAT. It is one of the restrictions the Government is consulting on removing in the chapter on CAT reform⁵³.

5.13 Furthermore, one of the principal ways in which private action reforms could help to reduce the amount of anti-competitive behaviour in the economy would be by tackling cases where the competition authority had not brought a case. Restricting collective actions to follow-on cases only would prevent this from happening. Although it has sometimes been suggested that stand-alone cases will not occur, a study of collective actions in Canada, between 1997 and 2008, shows approximately 25% of cases in competition were stand-alone actions⁵⁴. As the Impact Assessment sets out, we therefore consider that restricting collective actions to follow-on only would significantly limit the amount of redress and deterrence generated by the reforms.

5.14 The Government therefore considers that it would be appropriate to allow collective actions to be brought in stand-alone as well as in follow-on cases.

Q.11 Should the right to bring collective actions for breaches of competition law be granted equally to businesses and consumers?

Q.12 Should any restrictions be introduced to prevent such cases being used as a vehicle for anti-competitive information sharing?

Q.13 Should collective actions be allowed in stand-alone as well as in follow-on cases?

Opt-in or Opt-out?

5.15 Representative collective actions are often discussed in terms of two basic models: 'opt-in' and 'opt-out'. The current system of collective follow-on actions on behalf of consumers is an opt-in model.

5.16 The Civil Justice Council has noted⁵⁵, however, that the distinction between 'opt-in' and 'opt-out' is not necessarily clear cut: in order to receive any compensation a party has to step forward at some point⁵⁶. In considering options for reform, we have therefore also included for comparison a third model, known as 'pre-damages opt-in', which lies approximately halfway between opt-in and opt-out, containing elements of both.

5.17 A brief definition of the three models is given below:

⁵³ See chapter 4.

⁵⁴ Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal (2008), Rachael Mulheron.

⁵⁵ http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf

⁵⁶ A recent paper by Professor Rachael Mulheron sets out ten potential collective action models along the opt-in / opt-out spectrum, ranging between the pure opt-in and the pure opt-out. 'Opting in, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Law Makers' (2010), Rachael Mulheron

- **Pure opt-in:** Individual parties have to actively elect to join the action as members of the represented group. An individual who does not opt-in would not benefit from the outcome of the collective action, except that it might constitute a precedent were they to bring a separate claim.
- **Pre-damages opt-in:** Individual parties have to actively elect to join the action as members of the represented group, but can do so at any point up until the damages are quantified – even after liability has determined. However, any individuals who do not opt-out are bound by the outcome of the case as to whether or not they can bring subsequent claims for damages.
- **Pure opt-out:** All parties who fall within the definition of the represented group are bound by the outcome of the case whether unless they actively opt-out of the action. Damages are determined on the basis of an estimation of the total size of the group with claimants coming forward after the quantification of damages to claim their share.

Opt-In

5.18 Evidence suggests that the current opt-in arrangements for representative follow-on actions make it very difficult to bring cases. For example Which? noted in its response to an OFT discussion document⁵⁷, that “the single biggest hurdle to the effectiveness of the current statutory representation procedure is the requirement to name claimants on the claim form.” Which? was only able to name 130 claimants out of an estimated several hundred thousand of those harmed by the cartel. Each of these 130 individuals, plus several hundred of those who settled, received a £10 or £20 refund – the total amount recovered being therefore a small fraction of the fines that the parties involved received (c. £19 million).⁵⁸

5.19 In addition to this very low level of participation in the only case in the UK to date to make use of the opt-in collective action regime, research conducted for the Civil Justice Council shows that the great majority of opt-in rates achieved under Group Litigation Orders (GLOs)⁵⁹ – a type of action in which cases are grouped after having been laid in court individually – are 50 percent or lower. By contrast it notes that the median participation rates in opt-out cases (in other legal systems) where evidence is available have been between 87 and over 99 per cent.⁶⁰

⁵⁷ “Private Actions in competition law: effective redress for consumers and business”, available here: http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf.

⁵⁸ http://oft.gov.uk/news-and-updates/press/2003/pn_107-03

⁵⁹ GLOs allow the courts to group cases which are similar in the facts or points of law which they raise. They exist in England and Wales, but not in Scotland.

⁶⁰ “Reform of collective redress in England and Wales”, available here: http://www.lawcentres.org.uk/uploads/Collective_Redress_Prof.Mulheron_.pdf.

5.20 Particularly in cases where the level of individual damage to each consumer or business is very low, it is difficult to see how an opt-in regime can provide a satisfactory means of resolution. The hassle-factor of opting in may simply, for many claimants, outweigh the reward available, even if the aggregate damages are very large. The ‘Toys’ case⁶¹, described in more detail in Box 4, provides an example of a case which it would be hard to tackle under an opt-in regime.

5.21 OFT has noted that the requirement to take representative actions on an opt-in basis is restrictive and fails to maximise economies of scale. Legal experts that the Government has spoken to have also indicated that they think it unlikely that remaining with an opt-in system would deliver change, even if extended to businesses and stand-alone cases.

5.22 Critically, an opt-in system requires businesses or consumers to link themselves to a case before they know what the damages are, or even if it is successful. The lack of certainty makes it difficult to engage potential participants, a difficulty which has been shown to be prohibitive in large consumer cases, largely due to lack of awareness of the process. It is possible that this problem would be less acute with businesses, but they could also face the additional complications of still having ongoing business links with the infringers.

5.23 The Government’s view is therefore that for the collective action regime to deliver benefits to either businesses or consumers it will be necessary to move away from a pure opt-in model.

Pre-damages Opt-In

5.24 A collective action system of pre-damages opt-in would allow individuals to opt-in at a later stage of proceedings. This is a key advantage over the pure opt-in route, since it does not restrict the representative claimant to identifying a sufficiently large proportion of affected parties before legal proceedings become a viable route.^{62,63} Under the pure opt-in system a significant amount of resources have to be invested early in the process, in order to identify affected parties prior to launching the legal challenge, which can disincentivise

Box 4: Price Fixing in Toys

On 21 November 2003, the OFT found that Hasbro, Argos and Littlewoods had entered into price-fixing agreements with regards to the prices of certain toys and games.

The total fines imposed were £19.5m. However, despite the severity of the case and the fact that the total aggregate damage to consumers is likely to have been in the millions or higher, each individual consumer would only have been likely to have lost a few pounds, meaning a case for redress could only be effectively taken under an opt-out, rather than an opt-in regime.

⁶¹ <http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/argos2>

⁶² Note that there is no specified minimum number requirement in collective actions currently. See Mulheron, R. (2006), ‘The class action in common law legal systems: a comparative perspective’, Hart Publishing, pp.91.

⁶³ Spain has a numerosity requirement which imposes on the seeking to bring legal action that most of the affected parties be identified. This requirement has been criticised for raising the burden of proof for the claimants and thus limiting the take-up of this route. See for example: Leskinen, C., ‘Collective antitrust damages actions in the EU: The opt-in v. the opt-out model’, available here: http://globalcampus.ie.edu/webes/servicios/descarga_sgd_intranet/envia_doc.asp?id=9684&nombre=AccesoDatosDocumentoI.Documento.pdf&clave=WPLS10-03.

collective actions⁶⁴. Pre-damages opt-in could be particularly useful in generating interest from affected parties, since the news of the infringement finding is more likely to be publicised than the decision by a representative body to launch the legal proceedings and a person is more likely to opt-in if they know that they will be entitled to receive damages than if there is only a chance if the claim succeeds. Therefore the net effect would be that a greater proportion of the affected parties would achieve some form of redress. This would of course also increase the additional deterrent effect achieved.

5.25 However, pre-damages opt-in is still, fundamentally, an opt-in system and would therefore still be likely to deliver a lower level of redress (and deterrence) than an opt-out regime. As with a pure opt-in system, there are some cases, particularly those where the level of individual damages are very low, where it is fundamentally difficult to see how they could ever be taken under a pre-damages opt-in regime. Furthermore, securing funding for such a claim could be more difficult than in an opt-out regime, as uncertainty would remain until the very end as to the number of claimants and the overall size of the case.

Opt-out

5.26 In an opt-out case, the action would be brought on the basis of an estimation of the total size of the group with claimants coming forward after the quantification of damages to claim their share. This has at least two principal advantages. Firstly, it is the type of regime that is most likely to deliver redress to most of those wronged: claimants only have to step forward after the judgment and amount of award are decided and the publicity of winning an award likely to generate publicity to make potential claimants aware. The Civil Justice Council has noted that the median participation rates in opt-out cases where evidence is available have been between 87 and over 99 per cent⁶⁵.

5.27 Secondly, in cases where the amount of damages per claimant is very low, only an opt-out action is likely to succeed in delivering redress. Because the action is brought on the basis of an estimation of the total size of the group, the damages can be calculated accordingly and a fund created to deliver redress to claimants. This can then be used in case-specific ways to deliver redress, such as in the example of DECO v. Portugal Telecom⁶⁶ in which €120m was delivered to consumers, as described in Box 5.

5.28 A further advantage of opt-out is that failure to opt-out would make the outcome of the collective action binding on any individual

Box 5: DECO v. Portugal Telecom

During 1998/1999 DECO, a Portuguese consumer organisation, filed a case alleging that Portugal Telecom's (PT's) increase of a call charge constituted of an abuse of PT's dominant market position. In 2003 the Portuguese Supreme Court ruled in favour of DECO and ordered PT to refund the connection charge (€120m) to consumers.

Following this, PT reached a settlement with DECO whereby it granted all of its customers free telephone calls on Sunday for a period of approximately three months.

⁶⁴ It is recognised that in both the pre-damages opt-in and the opt-out model, While it is not necessary to obtain the explicit agreement of parties members at the outset, efforts do need to be taken at a relatively early stage to make them aware of the case so that they can be given an opportunity to opt-out.

⁶⁵ "Reform of collective redress in England and Wales", available here: http://www.lawcentres.org.uk/uploads/Collective_Redress_Prof.Mulheron_.pdf

⁶⁶ See Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal (2008), Rachael Mulheron and <http://www.telecom.pt/NR/rdonlyres/C1074D9D-FF21-4AA8-AF5C-0A6D24F89BF8/1320571/item8p135141.pdf>

who did not opt out. This limits the degree to which action at a later time can take place, thus providing greater certainty for the defendants as they are able to clearly define their losses. It is also efficient as it reduces the likelihood that parallel proceedings will take place.

5.29 The Government recognises that this last proposal, where individuals or businesses may be represented in an action without their express consent, is of concern to certain stakeholders. In particular there are concerns that such a provision would be similar to the 'class action' procedure available in the USA. This procedure has allegedly led to instances of large businesses settling for significant sums simply to avoid the cost of further litigation. The Government considers that other factors in the USA are more directly responsible for the high volume of litigation in the US. These include treble damages (imposing such a high risk on defendants that they may be encouraged to settle cases to which they have a reasonable defence), the lack of the loser-pays rules and jury trials. These issues are discussed in more detail in Annex A.

5.30 The Government notes that other jurisdictions outside the USA have mechanisms under which cases can be brought or settled in an opt-out manner. Federal and provincial regimes in Australia and Canada, in particular, can be cited in this regard. While these regimes are not specific to competition law, they suggest that the perceived excesses of the USA system can be avoided through a combination of appropriate filters, active case management and judicial control. Jurisdictions in the EU with opt-out mechanisms under which cases can be brought (or settled) on behalf of consumers/businesses include Denmark, Norway, the Netherlands, Portugal and Spain (although some of these systems are relatively new and, in some of the jurisdictions, can only be brought by certain bodies such as public ombudsmen or consumer organisations).

5.31 When taking all these aspects into consideration, the Government considers that there would be a benefit for UK businesses and consumers in having a system of collective actions that is proportionate, balanced and attuned to UK interests and that this would be best fulfilled by an opt-out regime. It considers that collective actions should only be heard in the CAT, as this is the most appropriate place to deal with complex and specialised competition cases. Whether or not an action could be brought as an opt-out case would depend on the CAT determining whether or not this was the most suitable means of bringing the case, according to the parameters set out in more detail in Annex A.

Q.14 The Government seeks your views on the relative merits of permitting opt-out collective actions, at the discretion of the CAT, when compared to the other options for collective actions.

Design Details of an Opt-Out Collective Action Regime

5.32 The Government recognises the importance of ensuring that any collective action regime is designed carefully to prevent vexatious or unmeritorious claims or the use of the court mechanism as a strategic tool in disputes between parties. Whilst collective actions may be an important mechanism for providing access to justice for the claimant, as well as of increasing deterrence through tackling anti-competitive behaviour that the public authority has not addressed, it is equally important to ensure that the defendant's right to justice is maintained: the Government does not wish to bring about a regime in which the correct move for a defendant with a strong and winnable case is nevertheless to settle to avoid the risk of damages or legal costs.

5.33 Although such design issues are important for any form of collective action regime, they are particularly critical for a regime that allows cases to be brought on an opt-out basis, to protect of defendants from having to fight and/or settle frivolous or unmeritorious claims. In particular, is clear that treble or punitive damages and contingency fees have no place in a UK collective action regime. The preservation of the loser-pays rule in collective actions is also critical in ensuring fairness for defendants and a check on unmeritorious claims.

5.34 The details of the proposed regime, along with Questions 15 to 21, are set out in detail in Annex A: Design Details of an Opt-Out Collective Action Regime and are summarised in Box 6, below.

Box 6: Key Differences between the US and proposed UK regimes.		
Aspect	US Regime	Proposed UK Collective Actions
Type of case	Many different areas of law, including personal injury and employment law.	Competition law only.
Damages	Treble damages – defendant pays three times the damage caused.	Actual damages – defendant only pays what was lost or unjustly gained.
Costs	No loser pays rules – each side pays own legal costs so no disincentive to bring cases.	Loser pays – if you bring a case and lose, you pay for both sides.
Fees	Contingency fees – lawyers can take a percentage of the damages.	No contingency fees.
Who hears the case?	Jury trials – can be unpredictable in such a technical area as competition.	Cases heard in by a panel of judges of the specialist Competition Appeal Tribunal.
Unclaimed money?	Unclaimed money distributed via ‘cy-près’: i.e. given to an institution thought to be relevant to the claimants.	No ‘cy-près’ – unclaimed money given to a named charity, the Access to Justice Foundation.

Who should be allowed to bring cases?

5.35 The question of who is allowed to bring cases is critical to the design of a collective actions regime. Under the current opt-in follow-on consumer-only regime, actions must be brought by a representative body designated by the Secretary of State for Business, Innovation and Skills. Currently, Which? is the only such designated body.

5.36 In considering the potential move to an opt-out regime, there are a number of possibilities with regards to ‘standing’ (i.e. who should be allowed to bring cases). Options for who could be given standing include private individuals, representative bodies (such as consumer organisations and trade associations), other private bodies such as law firms or third party funders, or public bodies such as an ombudsman or the OFT. The Government sees this dividing into two principal options:

- To allow actions to be brought by private bodies, in a similar way to what has been done in a number of Commonwealth countries including Canada and Australia, as well as in Poland, Spain and Portugal. If this option were adopted, it would then be necessary to consider, within this, precisely which bodies or individuals – for example individual claimants, representative bodies or third party funders and law firms – would be authorised to bring such actions.

- To adopt a more Nordic model, in which only a public body was allowed to bring actions. In Denmark, for example, only the Danish Consumer Ombudsmen may bring an opt-out collective action, although individuals may bring opt-in actions⁶⁷. In the UK, rather than establishing a new public body, the most natural body to bring such actions in the field of competition would be the OFT, as it is the body already responsible for enforcing the antitrust prohibitions⁶⁸.

Private collective actions

5.37 Allowing collective actions to be brought by private bodies would allow consumers and businesses to take direct action to obtain redress. It would be in keeping with the underlying principle that those who have suffered loss have a right to take direct action through the courts and would be providing a suitable mechanism whereby they could do so in competition claims.

5.38 By directly empowering consumers and businesses, it allows them to take action themselves without relying on others. Those who have suffered loss will, in general, be best placed to provide evidence as to where and how that loss occurred. They will also be best-placed to assess whether or not a case is worth pursuing, both in terms of the likelihood of success and in terms of prioritising according to the amount of loss: a 2008 study by McAfee, Mialon and Mialon argued that private parties have greater incentive, lower detection and evidence gathering costs and superior industry-specific knowledge than public enforcers⁶⁹.

5.39 One concern that is raised about private collective actions is the potential for frivolous or vexatious claims to be brought. Another concern is where actions are brought by third party funders, such as law firms, whose financial interests may not be well-aligned with those of consumers. It has been argued that because private enforcement is driven by private profit motives, it will inevitably diverge from the public interest⁷⁰.

5.40 The Government recognises these concerns, but considers that they can be addressed by the safeguards outlined above and set out fully in Annex A. For example, the 'loser-pays' principle will deter frivolous claims and the absence of triple damages will avoid claims being brought simply to force the defendant into an unwarranted settlement. The Government recognises that whilst allowing third party funders to bring claims could lead to abuses, this is not a necessary part of allowing private collective actions, as a strong certification regime could require a judge to certify that the representative was suitably representative of the claimants, either by virtue of being a claimant or by being a representative body that could reasonably be considered to represent the claimants.

5.41 Under the current regime, representative bodies must be designated by the Secretary of State. However, it has been suggested to Government by some stakeholders that this may be one of the reasons why collective actions have been so little used.

⁶⁷ Class Actions in Europe: The Latest Developments (2008), Regina Dahm-Loraing, http://www.genre.com/sharedfile/pdf/Topics16_DahmL-en.pdf

⁶⁸ Ability to bring such actions could potentially also be given to sector regulators, in so far as they enjoy concurrent competition powers, or it could remain reserved to the OFT only.

⁶⁹ McAfee et al (2008), Private v. Public Antitrust Enforcement: A Strategic Analysis

⁷⁰ Should Private Antitrust Enforcement Be Encouraged in Europe (2003), Wouter P.J. Wils

Furthermore, if the right of collective actions was extended to businesses it would become increasingly difficult to maintain a list of representative bodies, as there is a wide variety of industry bodies, many sector-specific, that might reasonably act as a representative body. Moreover, a body that might be a suitable representative for one case might not be suitable for a case affecting a different sector, meaning that it would be inappropriate to designate a body as generally suitable to bring cases. The Government observes that a strong certification regime obviates the need for a specified list of representative bodies, as the suitability of the representative would be assessed by the CAT at the certification stage.

Public Collective Actions

5.42 It has been argued that the most appropriate body to secure redress would be a public sector body⁷¹. In the case of competition, this would most likely be the OFT – as this body is already responsible for enforcing the antitrust prohibitions and would have the expertise and knowledge from having successfully proven an infringement of competition law to successfully bring a collective action. This would be different from the case in Nordic countries, where competition powers were given to the Danish Consumer Ombudsman. The Government recognises that only allowing a public body to bring such claims would be one way of helping to ensure that unmeritorious claims were not brought.

5.43 It has also been posited that granting the public authority powers to bring an opt-out collective action could encourage the company to enter into a settlement, granting swifter redress to consumers and businesses. This would enable the public authority to consider a market based approach to competition enforcement, taking into account restitution, removal of illicit gains and deterrence. It has been suggested that such an approach would also prevent any issues of over-deterrence or inconsistency, as it would allow the competition authority to always take into account any redress when determining its fine, and has the further advantage of avoiding costly court cases.

5.44 An example of how such powers could work can be seen in Denmark, where the Danish Consumer Ombudsman is the only body that can bring an opt-out case for breaches of consumer or competition law. Although he has not yet had to use them, it has been argued that this is a strength of the power: rather, companies will come to him to seek approval of plans for restitution. The model therefore provides an example of integrated enforcement, uniting both deterrence and redress. It is worth noting, however, that this system are focused on protecting consumer rights, however, with competition powers only a fairly recent addition to power of the Danish Consumer Ombudsman.

5.45 On the other hand, restricting the right to bring opt-out actions to the public authority would do nothing to assist consumers and small businesses to exercise their fundamental right to seek redress for themselves for damages that they have suffered. It would deny these bodies access to an effective tool for redress, even whilst acknowledging that the tool has value by granting it to the competition authority. The Government does not consider that such an approach would be in keeping with the spirit of these proposals to empower businesses to take action against anti-competitive behaviour that may be harming them and, indeed, might be seen as an unfair and inappropriate limitation of individuals' civil rights of action.

⁷¹ 'Market Based Competition Enforcement Policy' (2011) Chris Hodges

5.46 Furthermore, such an approach would restrict cases to follow-on cases only. Although one might expect in any opt-out regime that the majority of cases would be follow-on, the experience of other countries shows that there is also the potential for stand-alone cases – in Canada, 25% of cases were stand-alone⁷². Not allowing private bodies to take cases would eliminate these cases, which, as the Impact Assessment makes clear, would have a consequent reduction in redress and deterrence.

5.47 Significant concerns also arise from a consideration of the number of cases likely to be brought and the consequent impact on anti-trust enforcement. The competition authority's capacity to take forward collective actions is likely to be less than that of potential claimants/representative bodies across the economy as a whole. Furthermore, the competition authority's resources are necessarily limited. A significant diversion of these resources to deliver redress – the cost of taking even one opt-out collective action would be considerable – could result in fewer and/or smaller enforcement cases being taken. This would significantly reduce the deterrent effect of the UK regime as a whole. Such a reduction in detection and deterrence may far outweigh any additional deterrence that was caused by the collective actions.

5.48 The Government is also not convinced by the Danish and other Nordic examples that a public approach would lead to fewer cases needing to be brought and fewer appeals. Approaches to such matters vary drastically from country to country and, in the UK, Government bodies are routinely challenged and judicially reviewed, and a significant number of anti-trust decisions by the OFT are taken to appeal. A further concern is the potential impact of such a power on the leniency regime, and hence on cartel detection and enforcement⁷³. Potential leniency parties may be concerned at the prospect of the competition authority holding leniency documents if it also had the primary responsibility for seeking judicial redress, which might undermine their willingness to apply for leniency.

Conclusion

5.49 The Government's current position is that to restrict standing in bringing opt-out collective actions to public sector bodies would both be out of keeping with the spirit and aims of these proposals and would reduce the impact of these reforms.

5.50 The primary purpose of the public competition enforcement regime is deterrence. Financial penalties on undertakings have a crucial part to play in incentivising compliance with competition law and bringing about the benefits of competition to consumers, businesses and the economy as a whole⁷⁴.

5.51 Whilst we accept that there may be a case for the OFT to have a small role in facilitating redress, as discussed in chapter 6 below, the deterrence regime should not be jeopardised by a significant diversion of the OFT's resources into facilitating redress, as could occur if it was granted the ability to bring collective actions. As a leading academic has stated, "it is axiomatic that if anyone breaks the law, they should pay all the damages

⁷² 'Competition Law Cases Under The Opt-Out Regimes Of Australia, Canada And Portugal' (2008) Rachael Mulheron <http://www.bis.gov.uk/files/file49008.pdf>

⁷³ The OFT has issued 52 decisions to date. These include infringement, non-infringement and no grounds for actions decisions, but exclude interim measures and commitments decisions. 25 of these decisions have been appealed. Of the OFT's 28 infringement decisions, 19 have been appealed.

⁷⁴ http://www.of.gov.uk/shared_of/consultations/oft423con.pdf

(full compensation) and also suffer such penalty as society deems appropriate in the circumstances”⁷⁵. It is the Government’s view that the OFT’s fine does not excuse the company from subsequently making full redress to those it has wronged, should it be sued.

5.52 Equally, the Government considers that individual consumers and small businesses should be facilitated in exercising their fundamental right to seek redress for themselves for damages that they have suffered. Private actors may be better placed to know where anticompetitive behaviour is causing them harm and are best placed to weigh up the relative costs and rewards to them of pursuing an action.

5.53 The Government does recognise the concern of some stakeholders around lawyer-driven claims and, in particular, the dangers that could arise where the interests of lawyers or of the representative body diverges from that of the individual consumers or businesses that have suffered harm. It has no wish to create a so-called ‘litigation culture’. It is therefore minded to say that cases could only be brought by bodies which could reasonably be considered as representative; in other words, either a party that has itself suffered harm or a body that could reasonably be considered to represent the wider interests of those who have suffered harm, such as a trade association or consumer group, rather than by legal firms or third party funders. The Government considers that the assessment of the adequacy of the representative, in addition to issues such as whether the case can most appropriately be taken forward as a collective action⁷⁶, would be best assessed at the certification stage.

Q.22 Do you agree that the ability to bring opt-out collective actions for breaches of competition law should be granted to private bodies, rather than granting it solely to the competition authority?

Q.23 If the ability to bring collective actions were granted to private bodies, do you agree that it should be restricted only to those who have suffered harm and genuinely representative bodies, or would there be merit in also allowing legal firms and/or third party funders to bring cases?

⁷⁵ European Competition Enforcement Policy: Integrating Restitution and Behaviour Control (2011), Chris Hodges

⁷⁶ For example, if those harmed are few in number and horizontal rivals, the court may need to consider whether an opt-out collective action is really the most appropriate way of taking forward the case, bearing in mind the individual circumstances, considering issues such as the commonality of issues, quantification of loss, case management and the risk that the case could become a vehicle for anti-competitive knowledge sharing.

6 Encouraging Alternative Dispute Resolution

The Government considers that cases being resolved through alternative means, avoiding court involvement, can be a more satisfactory outcome for all parties as well as reducing burdens on the state; it also notes that an extension of private actions through the reforms above would be more effective and less expensive if matched by increased Alternative Dispute Resolution (ADR). It therefore is minded to ensure that courts and the OFT can use ADR wherever suitable, and to encourage private and third sector bodies to provide further forms of ADR to reflect any change in the number or nature of private actions.

The Government is seeking views on:

- **Whether mediation should be purely voluntary, mandatory, or a default but non-mandatory approach.**
- **Whether pre-action protocols should be introduced for competition cases in the CAT, and if so, what forms these should take.**
- **Whether the competition authorities should be given a power to order a company found guilty of an infringement of competition law to implement a redress scheme, or to certify such a voluntary redress scheme.**

Additionally, the Government would be interested in any plans from private or third sector bodies to extend ADR if the proposals on private actions are taken forward.

6.1 Alternative Dispute Resolution (ADR) covers a range of mediation and settlement approaches designed to resolve cases in a manner favourable for all parties before they reach a formal court or tribunal, or at least before the work of that court or tribunal has been completed. In this consultation, it is considered to refer to all means of resolving disputes before a final ruling is made in court, including mediation, arbitration, early neutral evaluation and settlement. This ranges from simple provision of services that may provide such resolution, to making use of such services obligatory or incentivising their use by taking willingness to settle into account in the process of deciding on the allocation of costs or damages.

6.2 Principal benefits of ADR can include:

- Restoring positive working relationships between the parties.
- Allowing the underlying problem to be resolved more swiftly
- Defending both parties from the uncertainties and additional costs of a trial
- Reducing court costs for the state

6.3 Informal discussions with a range of stakeholders, including business organisations, legal firms and academics indicate widespread support for the use of ADR. In accordance with the Government's wider position on promoting ADR throughout the court system wherever it is feasible⁷⁷, the Government is therefore minded to take steps to encourage ADR in competition law wherever it is practically possible, to ensure that the courts are the option of last resort.

6.4 It should be noted, however, that Government sees ADR as an important complement to, not a substitute for, an effective mechanism for tackling anti-competitive behaviour in the courts. In the words of Philip Collins, Chair of the OFT:

*"It has been suggested that some form of ADR or Ombudsman system could be introduced to deliver [redress]. That may be attractive, but I do not believe that it will be effective unless it stands alongside a system for collective redress that enables cases to be taken through the courts efficiently and effectively, and at reasonable cost"*⁷⁸.

6.5 The Government is therefore consulting on how to promote the use of ADR through two means:

- Ensure the CAT plays a stronger role in facilitating ADR, in particular by ensuring ADR is the initial default option, by establishing pre-action protocol(s) and allowing formal settlement offers.
- Granting the OFT a new power to facilitate redress.

Should ADR be made mandatory?

6.6 An obligatory process of ADR before litigation would be one obvious way to ensure that the as many cases as possible are filtered out before court. It would allow some cases to be resolved to the satisfaction of both parties, and others to be identified as unrealistic to fight for either the litigant or the defendant. It is not clear, however, that making ADR mandatory would be the right option for dealing with breaches of competition law, though it could potentially be in other circumstances.

6.7 Given the range of options covered by ADR, it would be difficult to mandate a specific type of ADR: mediation, arbitration and early neutral evaluation may all have their uses in different cases and it would be inappropriate to prescribe any one of them for all cases. Furthermore, a mandatory requirement to engage in ADR when

⁷⁷ Justice Minister Jonathan Djanogly has said:

'I believe that government should be leading by example by resolving issues away from court using alternatives which are usually quicker, cheaper and provide better outcomes.'

'We want people to see court as a last resort rather than a first option, and cut down on the amount of unnecessary, expensive, painful and confrontational litigation in our society.'

'In many cases methods like mediation are simply a common sense solution which benefits everyone involved. Although they will not be suitable in every case, they are already saving taxpayers millions every year and can save much more.'

<http://www.justice.gov.uk/news/press-releases/moj/moj-newsrelease230611a.htm>

⁷⁸ Competition Law: Sanctions, Redress and Compliance, King's College London, 27 June 2011

one or both parties is set upon taking matters to court could prove to be a waste of time and money. This is particularly true of participatory processes, such as mediation, which rely on mutual willingness to come to a resolution⁷⁹, but also applies to any form of ADR, if one party enters the process determined not to accept the judgement.

6.8 The Government therefore considers that in competition cases, although ADR should be strongly encouraged, via a ‘nudge’ approach that would make ADR the default first option, it should not be made mandatory.

Q.24 Do you agree that ADR in competition private actions should be strongly encouraged but not made mandatory?

Facilitating ADR in the CAT

6.9 The CAT already has a mandate to encourage the use of ADR⁸⁰ and has exhorted parties to consider ADR on several occasions⁸¹. However, we consider that there are a number of ways in which it could do even more to ensure that ADR is the default first option for those considering litigation.

Pre-action protocols

6.10 One option would be for the CAT to develop one or more pre-action protocols for competition cases. Pre-action protocols provide rules and guidelines for what needs to occur before a case is brought to court. The objectives of pre-action protocols, as set out in the relevant Practice Direction⁸², are to:

- enable parties to settle the issue between them without the need to start proceedings (that is, a court claim);
- support the efficient management by the court and the parties of proceedings that cannot be avoided.

6.11 Most typically, failure to follow a pre-action protocol may be taken into account by the court (or, in this case CAT) when attributing costs. It could also be established that whether reasonable attempts had been made to use ADR would be one of the factors that a judge would consider when determining whether or not to certify a case as suitable for a collective action.

⁷⁹ <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/docs/Twisting-arms-mediation-report-Genn-et-al.pdf>

⁸⁰ Rule 44(3) of the Competition Appeal Tribunal Rules enables the Tribunal to encourage and facilitate the use of an ADR procedure if the Tribunal considers that appropriate

⁸¹ See for example *JJ Burgess & Sons v Austin & Sons* where the Chairman of the Tribunal encouraged settlement talks between the parties at a case management conference (CMC) on 20 November 2007 www.catribunal.org.uk/237-650/1088-5-7-07-ME-Burgess-JJ-Burgess-and-SJ-Burgess-trading-as-JJ-Burgess--Sons.html, or *Wilson v Lancing College* www.catribunal.org.uk/237-3525/1108-5-7-08-N-J-and-D-M-Wilson.html.

⁸² http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_pre-action_conduct.htm

6.12 One risk to pre-action protocols is that they carry the risk of imposing unnecessary bureaucracy. But the increased clarity they give to good practice can not only avoid unmeritorious cases and help settle cases early through ADR, but might also give more confidence to litigants to progress as they can judge whether their case fulfils the requirements.

6.13 The Government considers that two types of cases in the CAT that might therefore be particularly suited to the use of a pre-action protocol would be the proposed new fast track procedure and collective actions.

Enabling formal settlement offers

6.14 Formal settlement offers incentivise ADR by allowing a party's willingness to settle to be taken into account when allocating costs. An example of a formal settlement system is the 'Calderbank' offer. This is an offer from a defendant to settle at a certain level of damages, made while the case is still being heard. If the litigant continues the case and their eventual damages are not higher than those offered in the Calderbank offer, then the defendant can use the Calderbank offer to support an application for costs incurred after the offer was made to be shifted to the litigant. The result of such a regime would be that litigants' incentives have a link to the state's interest of reducing court time and costs, as well as avoiding a needless increase in legal costs for the defendant.

6.15 Formal settlement offers are allowed in the High Court under the Civil Procedure Rules, and are also currently permitted in the CAT under Rule 43 of its Rules of Procedure. However, the CAT's rules do not allow it to take full advantage of latest developments in legal proceedings. The Government is therefore minded to amend the CAT's rules of procedure in order to better facilitate the use of formal settlement offers.

Q.25 Should a pre-action protocol be introduced for (a) the proposed new fast track regime, (b) collective actions and/or (c) all cases in the CAT?

Q.26 Should the CAT rules governing formal settlement offers be amended?

Further encouragement of ADR

6.16 Whilst the Government can go so far in encouraging ADR, if it is to become truly embedded it must be driven by the private and third sectors, whether that be the litigants themselves, the legal profession, professional mediation bodies, business groups or the third sector. One of the principal reasons for making private actions easier is to empower businesses and consumers to take action themselves against anticompetitive behaviour.

6.17 The Government recognises that a variety of types of ADR are already occurring in this area, but considers that the proposed reforms, if taken forward, are likely to result in a significant increase in the demand for such activity. In particular, two areas where there may be an opportunity for the extension of ADR provision are in collective actions, and in the fast track procedure for simpler cases.

6.18 Whilst the Government would never wish to bind a litigant into using a particular provider of ADR, any more than it would wish to mandate the type of ADR that should be used, it recognises that there is considerable value in having as wide as possible a range of ADR providers available, in order to allow a company that wishes it to most easily resolve its case.

6.19 The Government therefore invites interested business groups, representative bodies and other private or third sector organisations to bring forward their own proposals as to what initiatives they might take to expand ADR provision in this area, to facilitate resolution of disputes for both parties and more rapid redress for wronged businesses and consumers. No Government funding would be provided for such endeavours.

Q.27 The Government would be interested to hear of whether, should the reforms in this consultation be carried out, your organisation would intend to establish any initiatives that might facilitate the provision of ADR for disputes relating to competition law.

Collective Settlement

6.20 The Government has considered whether it would be worthwhile introducing a legal method of collective settlement (as opposed to collective action), whereby an infringer could settle on an opt-out basis, with legal certainty, with those who have suffered loss. Such a law could take a similar form to the Netherlands 2005 Collective Settlement of Mass Damage Act (WCAM 2005). Without such a law, settlement could only be made with named individuals that come forward to settle.

6.21 A legally certified collective settlement has the advantage for the infringer in that it creates certainty, ensuring that it is able to draw a line under its losses without fear of future court action. There may also be strong reputational advantages to voluntarily providing redress to those that have suffered loss. For consumers, clearly, something that encourages an infringer to make redress will mean that they are more likely to be compensated for their loss.

6.22 Whilst the Government can see some benefits to such a regime, the question it must consider is not whether, in the abstract, collective settlement would be desirable, but whether, if a right to bring opt-out collective action for breaches of competition were introduced as described in chapter 3 of this consultation, whether it would be necessary to also introduce separate provisions for collective settlement along the lines of WCAM (2005).

6.23 On the one hand, it would seem perverse for a company that wished to settle to be forced to wait for a third party to bring it to court in order to do so. On the other hand, if legally binding settlement were to be awarded on an opt-out basis – something that would bind parties who may not even be aware of the settlement – it is clear that, unless there is the involvement of a court, there is the potential for grave abuses of justice. A system cannot allow a third party to agree a settlement on behalf of others without judicial oversight or check.

6.24 WCAM (2005) fully recognises this fact. To obtain a collective settlement, once a settlement has been reached between the infringing party or parties and a body acting in the common interest of those who have suffered loss, the parties must jointly petition the Amsterdam Court of Appeals to declare the settlement binding. The Court will then hear the arguments of all parties, consider the substantive, procedural fairness and efficiency of the settlement and then give a ruling; if it rules in favour, the settlement will be binding upon all parties unless they opt-out⁸³. The Government considers that a similarly rigorous involvement of a court would be needed were such a law to be introduced to the UK.

6.25 The Government, therefore, believes that were a right to bring opt-out collective actions for breaches of competition law to be introduced, this would obviate the need for a separate provision for collective settlement in the field of competition law. If an infringer wished to settle on such a basis, the representative body would simply need to bring a collective action in a CAT. If a settlement had been already agreed between the two parties, the certification would presumably be uncontested and all that would remain would be for the judge to certify the claim (in particular, with regards to the adequacy of the representative body to represent those that had suffered loss) and the eventual settlement. An infringer who wished to settle on an opt-in basis could, of course, do so under existing UK law.

Q.28 Do you agree that, should a right to bring opt-out collective actions for breaches of competition law to be introduced, there would be no need to make separate provisions for collective settlement in the field of competition law?

A Role for the Competition Authority in Facilitating Redress

6.26 As has been discussed above, the Government would not favour a regime in which only the competition authorities were able to bring a collective action on behalf of those who have suffered loss, in order to achieve redress. This would do nothing to assist consumers and small businesses to exercise their fundamental right to seek redress for themselves for damages that they have suffered. The Government believes that empowering those who have suffered loss to take direct action against those who have caused it is the best way, in general, to increase deterrence and secure redress.

6.27 However, alongside a strong private actions regime, the Government recognises that there are some situations where it may be appropriate for the public enforcement body to consider mechanisms for redress, as part of its administrative settlement of cases. For example, in its case against certain independent schools, the OFT decided to impose a fine on the schools found to be price-fixing but also agreed that they would establish a series of trust funds to benefit the pupils who attended the schools during the academic years in which the infringement took place^{84,85}. A number of other public bodies, including the Financial Services

⁸³ Collective Settlement of Mass Claims in the Netherlands (2009), Willem H. Van Boom

⁸⁴ See OFT press release 166/06, 23 November 2006.

Authority (FSA)⁸⁶ and Ofcom⁸⁷ have powers to facilitate redress, and DECC has recently announced that it is considering giving similar powers to Ofgem⁸⁸.

6.28 A number of stakeholders, including the CBI⁸⁹, have publicly advocated an approach along these lines and, in the words of a leading competition academic:

*“Consider a case where the competition authority finds that a group of firms have engaged in price fixing and fines them accordingly. Subsequently, a body acting on behalf of the consumers brings a following-on case in the Competition Appeals Tribunal asking for damages. This means running the case for a second time [or a third if it has already been through an appeal]. Unless we learn something substantially new and damaging about the effects of the cartel, this is potentially entirely wasteful...rather than forcing the case to be run again to secure damages, it would be worthwhile at least considering giving the competition authority the power to use settlement procedures to set up mechanisms to compensate those harmed.”*⁹⁰

6.29 Although an OFT investigation and a follow-on case consider different matters, in particular around quantification of loss, the Government recognises the potential advantages of providing the OFT with a power, in appropriate cases, to take some role in facilitating redress. However, the Government also considers it important that any new role does not detract from the OFT’s existing role of detecting, examining and sanctioning anticompetitive activity.

6.30 In particular, Government would not wish steps taken by a company to make redress to cause the level of fines to be significantly reduced. To do so could undermine the deterrent impact of sanctions, a crucial means of driving competition law compliance. Whilst redress is also important, it should not be achieved at the expense of deterrence⁹¹.

6.31 Whilst recognising that any involvement in delivering redress would involve some resource implications, the Government would not wish the OFT to become so involved in the business of quantifying the degree of loss suffered by consumers or business that this led to an impairment in carrying out its other functions. To divert resources away from or delay enforcement activities in order to help facilitate compensation could cause a reduction in deterrence and therefore an increase in anticompetitive behaviour.

⁸⁵ It should be noted that this was a settlement in lieu of a higher fine being imposed; it was not a settlement that would have protected the school against subsequent private actions.

⁸⁶ Under S404 of the Financial Services and Markets Act (FSMA) (2000).

⁸⁷ Under the Communications Act (2003) <http://www.legislation.gov.uk/ukpga/2003/21/section/94>

⁸⁸ http://www.decc.gov.uk/en/content/cms/news/pn11_076/pn11_076.aspx

⁸⁹ [http://www.cbi.org.uk/ndbs/positiondoc.nsf/1f08ec61711f29768025672a0055f7a8/295D209489C426DF802573370057C25E/\\$file/oftprivateactionsresponse260607.pdf](http://www.cbi.org.uk/ndbs/positiondoc.nsf/1f08ec61711f29768025672a0055f7a8/295D209489C426DF802573370057C25E/$file/oftprivateactionsresponse260607.pdf)

⁹⁰ Professor Morten Hviid, Director, Centre for Competition Policy, University of East Anglia <http://competitionpolicy.wordpress.com/2011/05/03/why-private-enforcement-should-be-reformed-alongside-public-enforcement/>

⁹¹ http://www.oft.gov.uk/shared_oft/consultations/oft423con.pdf

6.32 The Government believes that the proposals will have to be carefully formulated to ensure that the decision to impose (or not impose) redress schemes is genuinely discretionary for the OFT and does not lead to undue legal challenges and the associated resource burdens. We do not believe, for instance, that infringers should have the right to appeal either a redress scheme imposed by the OFT or an OFT decision not to approve their voluntary redress scheme. Similarly, we do not believe that victims of anti-competitive behaviour should be able to seek a judicial review of a decision not to impose a redress scheme. This scheme is proposed alongside empowering consumers and businesses to bring more private actions, and is envisaged as providing a helpful adjunct to such reforms in certain cases, rather than giving the OFT the primary responsibility for ensuring redress.

6.33 The Government is also clear that giving the public authority a role in delivering redress is not a substitute for encouraging private actions: all of the burden would fall on the state in a time of increasingly tight public resources and, furthermore, it would not help to tackle anti-competitive behaviour that the OFT has not yet addressed, a key objective of encouraging private actions. Allowing businesses to bring private actions more easily will give them the tools that they need to tackle their own problems where they deem this a priority.

A new power for the OFT

6.34 The Government is proposing that the competition authority would be given an additional power to oblige businesses to take steps to make redress to those that had suffered loss due to their anti-competitive behaviour. This power could be used to benefit either consumers or businesses, though it is expected that the majority of cases in which such a power could appropriately be used would primarily benefit consumers.

6.35 Though not a sanction, the power would only be exercisable on a business that had been previously been found guilty of an infringement of competition law. Furthermore, it is proposed that the public authority would be able to certify the voluntary entry by an undertaking (again, one that had previously been found to have infringed competition law) into such a settlement scheme.

6.36 Some cases would be much more appropriate for the use of such a power than others: in particular, this procedure would likely be most appropriate for cartel cases involving large numbers of undifferentiated products bought by many consumers, such as milk or football shirts. As it happens, these are cases where there is often most consumer detriment in aggregate, and where bringing cases before the UK courts can be most difficult.

6.37 The OFT would have a discretion whether or not to seek compensation for victims of the infringement, rather than a duty, based on factors such as the suitability of the case and the resources that would be required from the OFT, bearing in mind the need to prioritise its resources effectively across all areas of activity. A decision to impose a redress scheme would be appealable to the CAT by the subject of the decision; however, it is not considered that a decision not to impose a scheme, or a decision to refuse to certify a voluntary scheme, should be appealable.

6.38 Such a power could have a similar effect to the FSA's ability under Section 404F(7) of the Financial Services and Markets Act (FSMA) to impose, on a single firm, a scheme which 'corresponds to or is similar to a consumer redress scheme'⁹². The FSA does this by altering a firm's permissions or authorisation to operate either and can be done at either the request of the firm or on the FSA's initiative. It is recognised that any power for the OFT to establish such a redress scheme would need to operate in a very different way as the OFT operates across the whole economy, not in a single regulated sector.

6.39 Four key aspects of the FSA's power that the Government considers might be worth including in a new power for the OFT are:

- Use of the power would be entirely independent of any fines or other sanctions that may be imposed.
- The OFT would not attempt itself to quantify individual loss. Rather it would set out the types of redress that could be awarded and direction as to how redress should be calculated, but would leave it for the firm to apply these rules to calculate loss on an individual case basis.
- A redress scheme could either be imposed by the OFT or entered into on a voluntary basis by the undertaking and certified by the OFT. No consultation would be necessary.
- Although any consumers who make use of the redress scheme give up their right to sue (it is essentially a form of settlement), there is no curtailment of the rights of consumers to take action through the courts if they do not believe the scheme to be satisfactory. This would be an important check as it ensures that the scheme must provide genuine restitution for the wrong done.

6.40 It should be emphasised that although we are considering adopting some aspects of the FSA's abilities under S404F(7), any new power for the OFT would not duplicate the FSA's abilities entirely either in results or in operation. Furthermore, the incentive for a firm to enter into such a scheme would be different: whereas in the financial sector, it might stem from the fact that the FSA must authorise firms in question before they can carry out regulated activities, for firms that had breached competition law the incentive might rather be to avoid a costly collective private action or to mend reputational damage. In practice, the Government considers it likely that the most frequent use of this power would be on a voluntary basis, potentially concluded simultaneously with a settlement decision on the fine.

6.41 Such an approach might lead to a more efficient and effective way for consumers and businesses to obtain compensation and reduce the burden on the courts than proceeding with a court case. If introduced, the Government considers it would be most consistent to provide that such a power could be used by the OFT

⁹² This section is referring strictly to the FSA's powers to vary permissions under S404F(7), not to the broader rule-making power under S404.

regardless of which body – the OFT, a sector regulator or the European Commission – had made the initial infringement decision. Otherwise, a situation could arise in which whether the power could be used would depend on which authority had proved the breach.

Should the fine be reduced?

6.42 It has been suggested to the Government that, should a company voluntarily decide to establish a suitable mechanism to make redress to those it has wronged, it should be rewarded by a corresponding reduction in the level of fine imposed by the OFT. It has been suggested that without such an incentive, companies will not enter into such arrangements, which would make it harder for those who have suffered loss to receive redress. It has also been argued that such an approach would allow the OFT to take into account the amount a company must pay in both fines and redress when determining the amount of the fine, to “*ensure that the combined economic impact is taken into account so as to prevent organisations being unjustly burdened*”⁹³. This is because, when considering whether or not to enter into anti-competitive behaviour, a company will consider the potential costs of a fine, legal costs and redress when making its decision, not solely the fine.

6.43 Although recognising that both arguments have some merit, the Government does not consider that they are conclusive. As initially stated, a company that does wrong should both pay a fine and make appropriate redress to those wronged. The act of making redress is an obligation and does not absolve a company from paying a fine; furthermore, if a company could get away with only restoring loss this would significantly reduce the deterrent effect of the antitrust regime. This applies whether the offence is a hard-core cartel or an unintentional abuse of dominance: although in the latter case, it is correct that the offence is much less serious (and that there could, in theory, be a potential risk of ‘over-deterrence’, in which economically beneficial activity was unduly deterred through fear of sanction), the Government considers that this is already taken into account by the fact that the OFT adjusts the magnitude of its fines to reflect the gravity of the offence. In the competition field, it is vital to maintain financial penalties as a deterrent to infringement: appropriate penalties not only penalise individual breaches of competition law, but they also help to raise awareness across the economy of the risks of infringing competition law and so deter businesses from doing so in the future⁹⁴. Compensation for damages, to which victims are legally entitled, should be seen as additional to, not as a substitute for the fine.

6.44 Furthermore, the argument that fines must be reduced if companies are to have an incentive to voluntarily make redress would only be true if there was no private means of effectively pursuing the company through the courts. If a new and effective collective actions regime for competition is introduced, companies found guilty of infringement will face a significant risk of a legal case to cause them to make redress. There will therefore be a significant incentive avoid this by making

⁹³ Collective Redress in Europe: EJF Position Paper. <http://europeanjusticeforum.org/ejf-position-papers/>

⁹⁴ http://www.of.gov.uk/shared_of/consultations/of423con.pdf

redress via an ADR settlement. Companies are also likely to consider the reputational benefits that such a settlement could confer – particularly when compared with a private action.

6.45 The Government also has concerns over a number of issues that are more practical in nature. If the OFT had to consider the appropriate reduction, how would the quantum of reduction relate to the quantum of compensation, especially if not all had been distributed? It could lead to resource intensive arguments between the business and the OFT about the adequacy of the compensation paid and the level of discount that must be granted. A final disadvantage is that the need to wait to consider redress before imposing a fine would slow down the operation of the antitrust regime, which would be directly contradictory to the aims of Government's recently announced reforms⁹⁵.

6.46 To conclude, although the Government does not rule out that, in certain situations, payment of compensation could be viewed as a mitigating factor. It could perhaps warranting a modest (five to ten per cent) decrease in the amount of the penalty, as described in the OFT's recent consultation document as to the appropriate amount of a penalty⁹⁶. However, in general, the level of penalty imposed should not depend on whether or not redress has been made.

Q.29 Should the competition authorities be given a power to order a company found guilty of an infringement of competition law to implement a redress scheme, or to certify such a voluntary redress scheme?

Q.30 Should the extent to which a company has made redress be taken into account by the competition authorities when determining what level of fine to impose?

⁹⁵ Ibid

⁹⁶ Ibid

7 Complementing the Public Enforcement Regime

The Government considers that, as the current competition regime has developed in the context of low levels of private enforcement, the public enforcement authorities do not have clear powers of intervention in court cases, and public enforcement is not sufficiently protected against the possible impact of private action cases; it further notes that the extensions to private actions proposed above could make these issues more pressing. It therefore is minded to protect the public authority regime by ensuring that courts take its judgements into account and by protecting the leniency regime.

The Government is seeking views on:

- **Whether the leniency regime, in terms of documentation and joint and several liability, needs to be protected to ensure its ongoing effectiveness and if so how this can be most effectively done without unduly limiting the ability to gain redress through private actions.**
- **Whether there are other areas where action should be taken to ensure that private actions complement public enforcement or to protect the public enforcement regime.**

7.1 The UK has a strong, internationally respected public enforcement system which has grown up in an environment with few private actions. There are therefore few rules in place governing the interaction of public and private enforcement. It is important that strengthening private actions does not undermine the role played or the tools used by public competition authorities. It is also important for legal clarity and business certainty that the public and private regimes are consistent with one another in their standards and principles.

7.2 This objective is primarily achieved through our proposals on private actions working positively alongside public enforcement. Policies that streamline follow-on cases complement the deterrent of public authorities' penalties, both by increasing that deterrent through raising the cost of infringement to business and by providing redress to injured parties. Policies that allow or facilitate stand-alone cases assist the work of the public enforcement system by sharing their caseload, as well as working alongside public enforcement to deter infringement.

7.3 However, it is also important to avoid damage being caused to the public enforcement system through the introduction of private actions. The two main ways this could happen are through private actions setting precedents which conflict with the public authority's approach and through private actions changing the incentives that lead to whistleblowers within cartels reporting some of the most serious anti-competitive behaviour. This issue of preventing tensions between public enforcement and a strengthened private enforcement system is the focus of this chapter.

Q.31 The Government seeks your views on whether and how an extended role for private actions would positively complement current public enforcement.

Incentivising leniency while upholding the right to redress

7.4 The OFT's leniency programme (and that of the European Commission and other EU National Competition Authorities) is an essential tool in the investigation of cartels. It encourages businesses to come forward with information about a cartel in which they are involved. Under the leniency programme, businesses who come forward may have their financial penalty reduced substantially, or they may be able to avoid a penalty altogether (in which case it is referred to as 'immunity'). Immunity is normally automatically available where the business coming forward is the 'whistle-blower', in which case current and former employees and directors of the business who cooperate with the OFT's investigation will also be guaranteed immunity from prosecution for the cartel offence under the Enterprise Act; immunity is available on a discretionary basis to the first business to come forward where an investigation has already commenced. Leniency significantly increases the likelihood of detection - and ultimately prevention - of cartel conduct.

7.5 However, this process also potentially makes companies which come forward, particularly whistle-blowers, more vulnerable to private actions than other cartelists. This might lead to fewer companies co-operating and the public enforcement system being weakened. The question of whether companies can be forced to release leniency documents for use against them in court has recently been tested in the Pfeleiderer case, showing that access to them is permitted: this judgement, and its consequences are currently being considered by the European Commission. The European Commission may bring forward proposals to protect leniency documentation, but if private actions are extended through the proposals above, there is increased urgency for this in the UK.

7.6 In light of these concerns, we are minded to protect certain aspects of leniency documents from disclosure. Broadly speaking, these documents would be those directly involved in the leniency application and which would not have been created if the company had not been seeking leniency. However, we welcome views on the precise details of which documents should be disclosed and which should be protected.

7.7 The vulnerability of leniency recipients to private actions, particularly if leniency documents can be used in cases, has a knock-on effect in terms of joint and several liability. Joint and several liability enables an individual or business who suffers loss as a result of an anti-competitive agreement to obtain full compensation from any party to that agreement. The party which has paid full compensation may then pursue the other parties to recover the appropriate contribution from each of them. However, in practice, this often means that a single party can be found liable for the entire loss suffered as a result of the agreement and has to face additional legal costs in recovering from other parties. Indeed, if some parties have gone bankrupt or are not easily pursued for funds due to for instance being located in other countries, then the cost can permanently fall on the company that was first pursued for compensation. As the leniency regime highlights the behaviour of the

leniency applicant, particularly the initial whistle-blowing company which is likely to receive full immunity, the increased risk of being chosen as the party to bring a case against may factor into any decision to act as a whistle-blower or apply for leniency.

7.8 While joint and several liability as it stands threatens incentives for leniency applicants, simply removing it could have the undesirable consequence of injured parties being unable to gain redress despite there being cartel members with available funds. Some have suggested an approach which maintains joint and several liability for whistleblowers but then allows them to pursue these more easily from other members of the cartel: however, we are concerned about potential increased costs and complexity with such a system. Suggestions are therefore sought on how to maintain a maximal incentive for whistle-blowing and thus discovery and deterrence, while causing minimal damage to the rights of individual injured parties to seek redress and avoiding unnecessary satellite litigation. We are minded to protect whistle-blowers from joint and several liability, limiting their liability to damage they directly cause. However, we are aware that arguments about whether to extend this protection to other leniency applicants, and if so how far and in what precise form, are finely tuned.

Q.32 Do you agree that some leniency documents should be protected from disclosure, and if so what sort of documents do you believe should be protected?

Q.33 Do you agree that whistleblowers should be protected from joint and several liability, and to what degree, if at all, do you think this should be extended to other leniency recipients?

Other interactions between public and private enforcement

7.9 Private actions and enforcement by public competition authorities deliver decisions based on the same laws. However, requirement for direct interaction between the two is limited, leading to the possibility of private actions being inconsistent with the decisions of public authorities, and potentially creating problematic precedents or misleading rulings.

7.10 Some stakeholders have suggested in discussions with us that reforms might be needed to prevent any such problems arising. However, we note that the OFT currently has the ability to contribute to private cases and uses this where it sees fit: it seems likely that any increased need for this can be resolved through good co-ordination between public competition authorities (which will be concentrated in the CMA) and private competition cases (which will be concentrated in the CAT). We therefore do not believe a change is needed here.

7.11 Some experts have also suggested that courts should remain consistent with decisions by the National Competition Authorities (NCAs) of other EU Member States. The European Commission has suggested this in the following terms: “national courts that have to rule in actions for damages on practices under Article 81 or 82 on which an NCA in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment

upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling.”⁹⁷ However, we note the response of the Competition Law Association (CLA) to the European Commission on this matter.⁹⁸ First, there are substantial procedural issues where Member States’ understanding of legal privilege and of judicial review may not match our own, or indeed the European Union’s, standards. Second, there are more pragmatic issues, including the fact that this could lead to some co-defendants in a case being already considered guilty while others are being tried as well as translation and similar barriers. We therefore do not believe that action in this area is desirable.

Q.34 The Government seeks your views on whether there are measures, other than protecting leniency documents or removing joint and several liability, where action should be taken to protect the public enforcement regime.

⁹⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:HTML>

⁹⁸ <http://www.competitionlawassociation.org.uk/new/documentation.htm>

Annex A: Design Details of an Opt-Out Collective Action Regime

A.1 In considering the design details of an opt-out collective action regime, the Government acknowledges the work of organisations such as the European Justice Foundation⁹⁹ and the Civil Justice Council¹⁰⁰, as well as academics such as Rachael Mulheron¹⁰¹ and others, who have all done considerable work in this area.

A.2 The majority of these measures could be implemented via amendments to the CAT's Rules of Procedure.

Certification

A.3 A thorough preliminary process of certification is essential in order to ensure that a collective action is the most suitable way of taking forward the case and to prevent unsuitable cases taking up time in the courts. This could include some or all of:

- A preliminary merits test, for example that “there is a reasonable possibility that material issues of fact and law common to the class will be resolved at trial in favour of the [claimants]”,¹⁰².
- Minimum numerosity: there must be a minimum number of claimants.
- There exists sufficient commonality of issues amongst claimants.
- That a collective action is the most suitable means of resolving the common issues.
- That the individual or body bringing the case is an adequate representative for claimants, in terms of absence of conflicts of interest, adequacy, typicality (if an individual) or a suitable representative of the claimants' interests.
- That the representative has sufficient funds to cover the costs of the defendant should the case be unsuccessful.

A.4 It has also been suggested that at this stage there could be an assessment of whether there is a significant risk that the action might become a vehicle for anticompetitive information sharing and, if so, how this could be mitigated, before the case should proceed. The Government would welcome views on how significant this issue is considered to be.

⁹⁹ <http://europeanjusticeforum.org/ejf-position-papers/>

¹⁰⁰ <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/publications/CJC+papers/Improving-Access-to-Justice-through-Collective-Actions>

¹⁰¹ Justice Enhanced: Framing an Opt-Out Collective Action for England (2007), Rachael Mulheron; Sixty (60) Design Issues for an Opt-Out Collective Action Regime (2008), Rachael Mulheron

¹⁰² Ontario Law Reform Commission Report (1982)

Q.15 What are your views on the proposed list of issues to be addressed at certification?

Damages

A.5 The existence of treble damages is a feature of the US system that is commonly regarded as creating a 'litigation culture', in which claimants are able to bring speculative cases and defendants are forced to settle simply to avoid the risk.

A.6 The existence of treble damages may, in the US, be somewhat justified in that it provides an incentive for the claimant to bring a case, to provide a punitive element and to 'compensate' the claimant for the role they are playing in enforcing the competition regime. Such justifications, however, carry less weight in the UK where the bulk of enforcement activity, including fining, is undertaken by the public competition authorities. A further disadvantage to a treble damages system is that it would provide an incentive for cases to be presented as competition cases even if they would more accurately be classed as contract law cases, simply so that the claimant can benefit from the treble damages available.

A.7 Furthermore, a treble damage system distorts the relative incentives between fighting a case and settling, unfairly penalising defendants who may not have committed any fault. In the US, a company must be very confident of winning the case to decide not to settle. Such a scenario is potentially unjust and is often considered to promote spurious and unmerited litigation.

A.8 The Government therefore considers that treble damages, or other punitive damages, should not be allowed, with the defendant able to, as now, claim only the damages they have suffered.

Q.16 Should treble or other punitive damages continue to be prohibited in collective actions?

Costs

A.9 A key feature to encourage only meritorious claims is to fully maintain the principle of two-way cost shifting; i.e. that the loser pays the cost of the winning party. This is one of the most valuable safeguards in encouraging only claims in which the claimant thinks they have a reasonable chance of winning as it places a potential cost on the claimant should they lose. The loser-pays principle is one of the traditional features of UK law and has become the starting point in claims for damages before the CAT¹⁰³.

¹⁰³ *BCL Old Co Ltd & Ors v BASF SE (formerly BASF AG) & Ors* [2010] CAT 6, para 7.

A.10 In the interests of access to justice, it would be both possible and desirable to allow, in certain circumstances at the discretion of the judge, some form of cost-capping to ensure that a small claimant was not liable for an unlimited sum from a potentially much better funded adversary. Cost-capping can reduce the incentives to run up costs and provide certainty for claimants, meaning that meritorious cases that might not otherwise be brought would be more likely to occur¹⁰⁴. Cost capping is already a feature of the UK legal system, including in the CAT, and similar principles could be applied equally well to collective actions.

A.11 There are also some circumstances when the Government considers that it may be appropriate to extract some or all of the costs of the claimant from the damages retrieved, in particular when an opt-out action has led to the creation of a large fund. This would be in accordance with the Jackson Review of Costs and March 30th 2011 MoJ statements on principle of costs in civil law cases, all costs (under whatever mechanism) should be deducted from the calculated payout, rather than extracted as an additional sum from the defendant.

A.12 Taking all these points into consideration, the Government therefore considers that it is critical that the loser-pays principle should be maintained. However, there may, at the discretion of the court, be slight departures made from this in certain circumstances, in particular for the interests of access to justice (by cost-capping) or by extracting the costs of the claimant from a damages fund, where this would be appropriate).

Q.17 Should the loser-pays rule be maintained for collective actions?

Q.18 Are there are circumstances in which it should be departed from, either (a) in the interests of access to justice or (b) where the costs of the claimant could be more appropriately met from the damages fund?

Fees of legal representatives

A.13 If cases are to be brought, lawyers will have to be willing to bring them – which means there must be a mechanism whereby which legal representatives can obtain an appropriate fee. It has been suggested that the introduction of contingency fees in collective actions (see Box 7 for definitions) would provide such a mechanism.

A.14 However, there is a concern that, in the field of collective actions, contingency fees

Box 7: Fee Definitions

Contingency Fees: The lawyer will receive no payment if the case is lost. If won, they will take a fixed percentage – for example, 30% – of the damages reclaimed.

Conditional Fees: The lawyer will receive no payment if the case is lost. If won, they receive their normal fee, which may be multiplied by a pre-determined amount – for example, 1.5 times their normal fee.

¹⁰⁴ http://www.ofc.gov.uk/shared_ofc/reports/comp_policy/ofc916resp.pdf

could unduly distort the incentives to bring cases. If contingency fees are allowed, the greater the number of people who sign up to a case, the greater the fee received by the lawyer if successful which has a number of problems. In particular, it could:

- Create a perverse incentive to artificially inflate the number of claimants, a matter that is particularly problematic in an opt-out case where claimants need not specifically come forward before damages are quantified¹⁰⁵.
- Encourage spurious litigation and place an unjustified cost on the defendant.
- Create an incentive for lawyers to focus only on the largest cases, neglecting smaller, meritorious claims, as the amount received by the legal firm is directly proportional to the number of claimants, rather than the amount of work done.

A.15 Conditional fees, on the other hand, would still provide a suitable reward if a case were brought, but would remove some of the perverse incentives of contingency fees. Critically, even if it is stated that the fee may be uplifted if the case is won, there is no direct link with the total number of claimants, and so would be more acceptable than contingency fees.

A.16 The Government therefore considers that contingency fees should continue to be prohibited in collective action cases.

Q.19 Should contingency fees continue to be prohibited in collective action cases?

Cy-Près and Unclaimed Sums

A.17 Successful opt out collective actions would usually require the court to assess a sum of aggregate damages payable by the defendant to the claimants. In order to receive damages claimants must make themselves known to the court and prove the harm they have suffered because of an infringement; otherwise redress cannot be paid.

A.18 There would be an obligation to advertise a case widely¹⁰⁶; however, even with the most widespread advertising not all potential claimants will come forward. This may be for a variety of reasons, but most likely that some claimants will simply not be aware of the award, some may not have the necessary proof of loss (such as receipts) and some may simply consider it too much hassle to be worth claiming.

¹⁰⁵ It is acknowledged that in some cases the defendant should know the numbers precisely, for example via sales records, and so this issue would not arise in every case.

¹⁰⁶ See for example:

<https://www.airpassengerrefund.co.uk/Default.aspx>

<http://www.aircargosettlement.com/en/notice.pdf>

<http://www.insurancebrokerageantitrustlitigation.com/zurich/default.htm>

<http://www.babyproductsantitrustsettlement.com/documents/notice.pdf>

Typically, a specified period (say, six or twelve months) would be allowed for claimants to come forward; after this period, there is therefore likely to be a sum of money which has been awarded as damages but has not been paid out. Options for distributing this include¹⁰⁷:

- a. **Cy-près**: the money is distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit and the interests of class members – the recipients to be determined either by the judge concerned or by a named independent party, such as the Charity Commissioner¹⁰⁸.
- b. **Escheat to the Treasury**: the funds are simply paid to the Treasury.
- c. **Reversion to the Defendant**: the funds revert to the defendant.
- d. **Distribution to a named scheme**: such as a legal aid scheme or other access to justice scheme. Unlike in cy-près, the scheme in question would be set out in legislation (primary or secondary) and would not vary from case to case.
- e. **Claimant-sharing**: the remaining funds are shared amongst the claimants who have already come forward.

A.19 The Government recognises that each of these has advantages and disadvantages.

Cy-près

A.20 Cy-près is the dominant means of distribution, used in the US, Canada and Portugal, amongst others, though not in Australia. One of the CJC's 2008 recommendations was that unallocated damages from an aggregate award should be distributed by a trustee of the award according to general trust law principles. In appropriate cases it was noted that such a cy-près distribution could be made to a Foundation or Trust. It is also one of the most controversial, when discussed in the UK. These controversies centre around the frequent difficulty of identifying a suitable cy-près beneficiary in cases where there is no single party that clearly overlaps with the claimants.

A.21 The two dominant methods of cy-près are known as 'price roll-back', in which prices are reduced on consumers¹⁰⁹, and 'organisational distribution' where the moneys are paid to an organisation, usually a charity, considered to be a 'next best'

¹⁰⁷ Cy-près Damages Distributions in England: A New Era for Consumer Redress (2009) Rachael Mulheron

¹⁰⁸ Under the Charities Act 1993 c 10 s16(1)(1), the Charity Commissioners are currently permitted to exercise a concurrent jurisdiction with the High Court in charity proceedings for the purposes of 'establishing a scheme for the administration of a charity', which includes a cy-près scheme.

¹⁰⁹ For example, in *DECO v Portugal Telecom (1998-99)*, Portugal's only collective action case, a cy-près award allowed consumers to make free telephone calls at weekend for a specified future time.

recipient¹¹⁰. The latter is by far the more common: price roll-back is frequently unsuitable either because those who would benefit from a future price roll-back are unlikely to be those who were harmed by the former over-charging, or because a price roll-back would give the company concerned an unfair advantage over its competitors.

A.22 However, there are also frequently substantial difficulties in determining a suitable candidate for organisational distribution – often there may be no body which has a strong overlap with the claimants who have not claimed. There can be difficulties in ensuring that an appropriate body is chosen as the beneficiary¹¹¹, there is very likely to be strong lobbying of judges and there may be satellite litigation disputing the party chosen. This can all give rise to the impression, sometimes rooted in fact, that an essentially unconnected party has been arbitrarily chosen to benefit from the result of the collective action.

A.23 When collective actions were being introduced in Australia, the Australian Law Reform Commission put forward four reasons why it did not endorse cy-près distributions¹¹²:

- a. Litigation was intended to compensate claimants, not to punish or deter defendants, and a cy-près award was inconsistent with that primary compensatory function.
- b. A payout by the defendant should match, as closely as possible, those claimants who came forward with claims and who desired compensation.
- c. A cy-près distribution could result in two types of windfalls, one to non-claimants who benefited from the cy-près distribution but who were not harmed by the defendant's behaviour, and the other to claimants who obtained both direct distribution of damages to them and then a further benefit from the cy-près distribution.
- d. A cy-près distribution was merely a mechanism for damages distribution that had nothing to do with enhancing access to the courts, the primary goal of a class actions regime.

Escheat to the Treasury

A.24 This is in some ways the simplest option; however, some judges have equated escheat to a 'civil fine' that bears little or no relationship with the claimants who have suffered damages. This could be particularly the case in a follow-on action, where the company concerned had already been fined substantially by the competition authority. It would be seen that someone was being fined for the same offence.

¹¹⁰ For example, in Canada, in *Garland v Enbridge Gas Distribution Inc* (2006), a cy-près award was made to a 'Winter Warmth Fund programme', to help poorer people to pay their gas bills.

¹¹¹ <http://www.publichealthtrust.org/docs/USF-PHI%20Cy%20Pres%20Symposium%20Report.pdf>

¹¹² *Grouped Proceedings in the Federal Court* (Rep No 46, 1988) [237]-[239]

Reversion to the Defendant

A.25 The justification here is the argument that the defendant's right to the money is superior to all except the injured claimants. This is the position favoured by the Australian system¹¹³.

A.26 On the other hand, can it be fair that the guilty party benefits from a windfall, being able to retain money it gained unjustly despite the fact that it has been found to have infringed competition law? Such an option would reduce the funds that could otherwise benefit society, claimants or the interests of justice more widely and would significantly reduce the deterrent effect by reducing the damages paid.

A.27 Additionally, the guilty party may plausibly have some degree of influence over how effectively a right to redress is advertised amongst its customers. Reversion to the defendant would create an incentive for them to minimise awareness of the award and therefore the number of injured parties gaining redress.

Distribution to a named organisation

A.28 This option would avoid the problems of finding a suitable recipient, lobbying of judges and satellite litigation that arise from the handling of cy-près. The option would be administratively simple and would achieve the full deterrent effect upon the defendant.

A.29 On the other hand, it is unlikely that the named recipient would have a strong overlap with the specific claimants of any individual case and could, therefore, be seen to be arbitrary.

A.30 A positive aspect, however, of this option, is that it could be used to fund a relevant socially desirable objective such as access to justice, of benefit to the whole of society. Given that a principal purpose of introducing a collective action regime would be to enable better access to justice, such a recipient would be in keeping with the broad aims of collective actions as a whole, even if not with the details of an individual case.

A.31 In the UK, one potential recipient could be the Access to Justice Foundation, a charity to facilitate access to pro-bono legal assistance to those who need it most. The Foundation supports access to justice across the entire legal system and was founded by the Institute of Legal Professionals, the Law Society and the Bar Council. It does not directly fund litigation and therefore not be incentivised to fund more cases for its own benefit. A precedent is that the Foundation is already the prescribed charity to receive pro-bono legal costs, under Section 194 of the Legal Services Act 2007. It has been recommended as a recipient of unallocated funds after collective actions by the Jackson Review of Costs, the Civil Justice Council and the HMT Financial Services Rules Committee.

¹¹³ 'The Modern Cy-près Doctrine: Applications and Implications' (2006) Rachael Mulheron

Claimant-sharing

A.32 This option ensures that only those damaged receive compensation; however, in a situation in which only a small proportion of claimants come forward it could result in those who do receiving a large windfall, potentially many times the amount of their original redress. Had the Which? case, for example, been an opt-out case and the funds allocated in this way then, assuming the same number of claimants had come forward, each of them would have received a windfall that, given the small proportion of claimants who came forward, could easily have been in the hundreds or even thousands of pounds.

A.33 In addition, the option is administratively difficult in terms of tracking down and notifying claimants. A further problem is that this may not actually distribute all the moneys, if some claimants do not come forward to collect their 'windfall'.

Conclusion on unclaimed sums

A.34 As stated, the Government sees the introduction of private actions as fulfilling two objectives: delivering redress to those who have suffered loss and tackling anticompetitive practices forbidden by competition law. Given these objectives, there are significant concerns about reversion to the defendant: such an option would reduce the funds that could otherwise benefit society, claimants or the interests of justice more widely and would significantly reduce the deterrent effect by reducing the damages paid.

A.35 Equally, although cy-près in theory has major advantages, as described above there are significant concerns about how cy-près regimes have operated in practice. In particular, the apparent arbitrariness of some cy-près distributions that have occurred and the fact that it can lead to satellite litigation are particularly undesirable. The Government would, however, welcome further evidence on this point as it recognises that it is the procedure favoured by the majority of opt-out regimes. It would also note that it sees no problem, in principle, to a settlement that contains strong elements of cy-près, provided that both parties are in agreement and that the settlement has been approved by a judge. A settlement, unlike a formal ruling, would minimise the risk of a judge being lobbied by charities and of satellite litigation as he would simply be approving a prior agreement, rather than personally choosing a recipient.

A.36 The Government also sees significant problems with redistribution to existing claimants, in terms of both fairness and administrative procedures. Such redistribution does not serve any wider social purposes. The Government also considers that escheat to the Treasury would not usually be the most appropriate recourse in the UK, given the strong system of fines imposed by the OFT.

A.37 At this stage, therefore, the Government's favoured option is for any unclaimed sums to be paid to a single specified body, ideally one with a remit to promote or widen access to justice. This would not only maximise deterrence and prevent defendants from receiving an unjustified windfall, but would allow the funds to be put to a useful purpose in promoting access to justice for the wider benefit of society. The Access to Justice Foundation (AtJF), has been recommended by the

Jackson Review of Costs, the Civil Justice Council and the HMT Financial Services Rules Committee as a suitable such body and the Government would welcome views on whether the AtJF, or another body, would be the most appropriate recipient.

Q.20 What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums.

Q.21 If unclaimed sums were to be paid to a single specified body, in your view would the Access to Justice Foundation be the most appropriate recipient, or would another body be more suitable?

Annex B: List of Individuals/Organisations consulted

Access to Justice Foundation
Addleshaw Goddard LLP
Administrative Justice & Tribunals Council
Allen & Overy LLP
American Bar Association
Ampersand Stable of Advocates
Ashurst
Attorney General's Office
Baker & McKenzie LLP
Bar Council
Barry Rodgers (University of Strathclyde)
Barclays Bank Plc
Berwin Leighton Paisner
Better Regulation Delivery Office
Bill Wood QC
Bird & Bird LLP
Black Stone Chambers
Brick Court Chambers
Bristows
British Chambers of Commerce
British Council of Shopping Centres
British Institute of International and Comparative Law
British Retail Consortium
Burgess Salmon LLP
Cambridge University, Centre for European Legal Studies
CDC Cartel Damages Claims
CEDA
Centre for Socio-Legal Studies, University of Oxford
Chancellor of the High Court
Charles Rivers Associates
Charles Russell Associates
Chris Hodges
CIIPR
Citizens Advice
Citizens Advice Scotland
City of London Corporation
City of London Law Society
Civil Justice Council
Claims Funding International
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance LLP
CMS Cameron McKenna LLP
Compass Lexecon
Competition Appeal Tribunal
Competition Commission
Competition Law Association
Competition Pro-Bono Scheme
Confederation of British Industry

Consumer Council for Northern Ireland
Consumer Focus
Consumer Focus, Scotland
Consumer Focus, Wales
Crowell & Moring LLP
Crown Office and Procurator Fiscal Service
Deborah Prince
DLA Piper
Dundas & Wilson LLP
Ernst & Young
European Commission
European Justice Forum
Eversheds
Faculty of Advocates
Federation of Small Businesses
Field Fisher Waterhouse LLP
Financial Ombudsman Service
Financial Services Authority
Forum for Private Business
Freshfields Bruckhaus Deringer LLP
Hausfeld LLP
Herbert Smith LLP
Hill Dickinson LLP
Hogan Lovells
Information Commissioner's Office
In-house Competition Lawyers Association
Institute for Legal Reform
Institute of Directors
International Bar Association
International Chambers of Commerce
Joint Working Party of the Bars and the Law Societies of the United Kingdom
Kings College London
Kirkland & Ellis LLP
KPMG
Law Society
Law Society of Scotland
Law Society of Northern Ireland
LEK Consulting LLP
Linklaters LLP
Local Government Association
London School of Economics
Macfarlanes LLP
Maclay Murray and Spens LLP
Matrix Chambers
Mayer Brown International LLP
McGrigors LLP
McGuire Woods LLP
Monckton Chambers
Nabarro LLP
National Audit Office

National Economic Research Associates
Northern Ireland Assembly
Northern Ireland Executive
Northern Ireland Utility Regulator
Norton Rose LLP
Ofcom
Office of Fair Trading
Office of Fair Trading Scottish Representative
Office of Rail Regulation
Ofgem
Ofwat
One Essex Court
Orrick, Herrington & Sutcliffe LLP
Oxera
Oxford Law
Rachael Mulheron
RBB Economics
Reed Smith LLP
Registers of Scotland
Regulatory Policy Institute
Retail Motor Industry Federation
Scottish Assembly
Scottish Competition Law Forum
Shearman & Sterling LLP
Shepherd and Wedderburn LLP
Simmons & Simmons
Sir Peter Roth
SJ Berwin LLP
Slaughter and May
Speechly Bircham LLP
Squire Saunders Dempsey LLP
Taylor Wessing LLP
The City of London Law Society
The Law Society of England and Wales
The Law Society of Northern Ireland
The Law Society of Scotland
The Work Foundation
Trading Standards Institute
Travers Smith LLP
Federal Trade Commission (USA)
University College London
University of East Anglia
University of Exeter
Welsh Assembly
Which?
White & Case LLP
Wilmer Cutler Pickering Hale and Dorr LLP
Wragge & Co.
39 Essex Street Chambers

Annex C The Code of Practice on Consultation

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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BIS Consultation Co-ordinator,

1 Victoria Street,

London

SW1H 0ET

Telephone Sameera on 020 7215 2888

or e-mail to: Sameera.De.Silva@bis.gsi.gov.uk

Annex D: List of Questions

Q.1 Should Section 16 of the Enterprise Act be amended to enable the courts to transfer competition law cases to the CAT?

Q.2 Should the Competition Act be amended to allow the CAT to hear stand-alone as well as follow-on cases?

Q.3 Should the CAT be allowed to grant injunctions?

Q.4 Do you believe a fast track route in the CAT would help enable SMEs to tackle anti-competitive behaviour?

Q.5 How appropriate are the design elements proposed, in particular cost thresholds, damage capping and the emphasis on injunctive relief?

Q.6 Should anything else be done to enable SMEs to bring competition cases to court?

Q.7 Should a rebuttable presumption of loss be introduced into cartel cases? What would be the most appropriate figure to use for the presumption?

Q.8 Is there a case for directly addressing the passing-on defence in legislation? If so, what outcome is desired and how, precisely, should this best be done?

Q.9 The Government seeks your views on how well the current collective action regime is working and whether it should be extended and strengthened.

Q.10 The Government seeks your views on whether the proposed policy objectives for extending collective actions, taking into account redress, deterrence and the need for a balanced system, are correct.

Q.11 Should the right to bring collective actions for breaches of competition law be granted equally to businesses and consumers?

Q.12 Should any restrictions be introduced to prevent such cases being used as a vehicle for anti-competitive information sharing?

Q.13 Should collective actions be allowed in stand-alone as well as in follow-on cases?

Q.14 The Government seeks your views on the relative merits of permitting opt-out collective actions, at the discretion of the CAT, when compared to the other options for collective actions.

Q.15 What are your views on the proposed list of issues to be addressed at certification?

Q.16 Should treble or other punitive damages continue to be prohibited in collective actions?

Q.17 Should the loser-pays rule be maintained for collective actions?

Q.18 Are there are circumstances in which it should be departed from, either (a) in the interests of access to justice or (b) where the costs of the claimant could be more appropriately met from the damages fund?

Q.19 Should contingency fees continue to be prohibited in collective action cases?

Q.20 What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums.

Q.21 If unclaimed sums were to be paid to a single specified body, in your view would the Access to Justice Foundation be the most appropriate recipient, or would another body be more suitable?

Q.22 Do you agree that the ability to bring opt-out collective actions for breaches of competition law should be granted to private bodies, rather than granting it solely to the competition authority?

Q.23 If the ability to bring collective actions were granted to private bodies, do you agree that it should be restricted only to those who have suffered harm and genuinely representative bodies, or would there be merit in also allowing legal firms and/or third party funders to bring cases?

Q.24 Do you agree that ADR in competition private actions should be strongly encouraged but not made mandatory?

Q.25 Should a pre-action protocol be introduced for (a) the proposed new fast track regime, (b) collective actions and/or (c) all cases in the CAT?

Q.26 Should the CAT rules governing formal settlement offers be amended?

Q.27 The Government would be interested to hear of whether, should the reforms in this consultation be carried out, your organisation would intend to establish any initiatives that might facilitate the provision of ADR for disputes relating to competition law.

Q.28 Do you agree that, should a right to bring opt-out collective actions for breaches of competition law to be introduced, there would be no need to make separate provisions for collective settlement in the field of competition law?

Q.29 Should the competition authorities be given a power to order a company found guilty of an infringement of competition law to implement a redress scheme, or to certify such a voluntary redress scheme?

Q.30 Should the extent to which a company has made redress be taken into account by the competition authorities when determining what level of fine to impose?

Q.31 The Government seeks your views on whether and how an extended role for private actions would positively complement current public enforcement.

Q.32 Do you agree that some leniency documents should be protected from disclosure, and if so what sort of documents do you believe should be protected?

Q.33 Do you agree that whistleblowers should be protected from joint and several liability, and to what degree, if at all, do you think this should be extended to other leniency recipients?

Q.34 The Government seeks your views on whether there are measures, other than protecting leniency documents or removing joint and several liability, where action should be taken to protect the public enforcement regime.

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