



Department  
for Business  
Innovation & Skills

**PRIVATE ACTIONS IN  
COMPETITION LAW:**

A consultation on options for  
reform - final impact assessment

JANUARY 2013

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<b>Title: Private Actions in Competition Law</b>  <b>IA No: BIS0357</b> <b>Lead department or agency: Business, Innovation and Skills</b>  <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>		
	<b>Date: 08/01/2013 (minor revision from 25/10/2012 to update cover sheet)</b>		
	<b>Stage: Final</b>		
	<b>Source of intervention: Domestic</b>		
	<b>Type of measure: Primary legislation</b>		
<b>Contact for enquiries: Heeran Buhecha (heeran.buhecha@bis.gsi.gov.uk, 0207 215 1289)</b>			
<b>Summary: Intervention and Options</b>			<b>RPC Opinion: GREEN</b>

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£828.0m	£0	£0	Yes
			Zero Net Cost

**What is the problem under consideration? Why is government intervention necessary?**  
 Anti-competitive behaviour damages the businesses or consumers directly affected and the economy more widely, through lower output and increased prices. In the UK, this is largely addressed through public enforcement by the competition authorities, who pursue prioritised cases and impose fines. It is difficult for private actions to be brought, particularly against anti-competitive behaviour that harms many consumers/businesses, as collective actions are only available in very limited circumstances. Extending the role of private actions, particularly collective actions, would allow directly harmed parties (who may be very numerous) to (a) gain redress and (b) bring extra cases (and so provide a deterrence effect).

**What are the policy objectives and the intended effects?**  
 The objectives are  
 - To ensure that parties injured by anti-competitive behaviour are able to gain redress  
 - To complement current public enforcement to tackle and deter anti-competitive behaviour  
 - To avoid any increase in private actions creating tensions with the public enforcement system  
 - To enable meaningful cases to be pursued while avoiding incentives for vexatious or frivolous claims  
 The intended effects are for there to be greater access to justice for businesses and consumers whilst enhancing deterrence

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**  
 We have considered 4 overall options which aggregate a number of sub options. These are  
 Option 1 – Do nothing  
 Option 2 – A set of small reforms involving developing court rules, Alternative Dispute Resolution (ADR) and the leniency regime.  
 Option 3 – Introducing reforms of option 2 plus allowing private opt-out collective actions by consumers or businesses.  
 Option 4 – Similar to option 3 but allowing the OFT to bring collective actions rather than private opt-out collective actions.  
 Option 3 is our preferred options as we believe the small reforms combined with collective actions would assist the deterrence effect through creating new cases and also assist redress, especially for consumers.

<b>Will the policy be reviewed? It will be reviewed. If applicable, set review date: 5 years from commencement</b>					
Does implementation go beyond minimum EU requirements?				N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		<b>Micro</b> No	<b>&lt; 20</b> No	<b>Small</b> No	<b>Medium</b> No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)				<b>Traded:</b> 0	<b>Non-traded:</b> 0

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister



Date: 15 January 2013

# Summary: Analysis & Evidence

# Policy Option 2

Description: Court reforms, Alternative Dispute Resolution and complementing public enforcement

## FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 492.4	High: 629.7	Best Estimate: 497.0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	0.6	4.8
High	N/A	0.6	5.1
Best Estimate	N/A	0.6	4.9

### Description and scale of key monetised costs by 'main affected groups'

There are small additional costs to the Competition Appeal Tribunal (CAT) and the Office for Fair Trading (OFT). There will also be much larger additional costs to businesses contesting court cases (£17.7m per annum) and redress payments (£8.3m p.a.). However, as these costs would only fall on a business losing a case (those who win can reclaim their costs under the 'loser-pays' rule), they would arise from not being compliant with the Competition Act, and are thus not included in the above cost figures and are out of scope for One-in One-Out (OIOO) calculations.

### Other key non-monetised costs by 'main affected groups'

None

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	58.5	497.5
High	N/A	74.3	634.5
Best Estimate	N/A	58.8	501.9

### Description and scale of key monetised benefits by 'main affected groups'

The greatest benefit arises from deterrence, in that each case brought will deter others, leading to a more competitive market. £29.3m p.a. benefit arises from deterrence, based on an estimate of a 25% increase in cases of all kinds and a relationship between deterrence and case outcomes of 5:1 in a stand-alone case, and 1:1 in a follow-on case. These indirect benefits from eliminating and deterring cartels creates £20.7m p.a. of benefit in lower prices and £10.3m in deadweight gain. Only half these benefits are included in the first year, to reflect the time taken for cases to have an effect, which reduces the annual average.

### Other key non-monetised benefits by 'main affected groups'

The improvements brought by competition bring a range of longer-term benefits to growth, productivity and innovation, beyond those which can be captured by this analysis. The guarantee of an open competitive marketplace provided by the effective enforcement of competition law through both public and private channels will be attractive to promoting investment in the UK. One more quantifiable benefit not included in the totals above is the estimated £8.3m gained in redress on average per annum.

### Key assumptions/sensitivities/risks

CAT benefits are based on low estimates of benefit per case, but high numbers of cases reaching conclusion. The ratio for deterrence benefits is based on OFT estimates but cannot be demonstrated on a case-by-case basis. The number or scale of cases year by year is likely to fluctuate significantly. Benefits from court cases have been halved in the first year in our modelling to indicate some lag effect.

Discount rate (%)

3.5

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0	Benefits: 0	Net: 0	Yes	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 3

Description: Private opt-out collective actions, in addition to Option 2

## FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 491.4	High: 2160.4	Best Estimate: 828.0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	0.6	4.9
High	N/A	0.7	6.0
Best Estimate	N/A	0.6	5.6

### Description and scale of key monetised costs by 'main affected groups'

The cost limits here are not those used in the overall high and low net present value calculations, for reasons set out below (paragraphs 41-44). Most costs included above relate to reforms already outlined in Option 2, which is contained by this option. There is also a very small additional cost to the CAT. There are much larger additional costs to business in terms of contesting court cases (£13.9m p.a.) and redress payments (£16.9m p.a.), but as in option 2 these are out of scope for the figures above and OIOO.

### Other key non-monetised costs by 'main affected groups'

None.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	58.5	497.5
High	N/A	253.7	2165.2
Best Estimate	N/A	97.7	833.5

### Description and scale of key monetised benefits by 'main affected groups'

The largest benefits relate to reforms already outlined in Option 2, which is contained by this option. The majority of the additional benefit (£33.8m p.a.) is from the deterrence effect (halved in the first year, as above). International comparisons, particularly to Canada, are used to judge the number and quantum of cases (see Section 4 pg 37). There is also a smaller £7.1m p.a. benefit related to lower prices and deadweight effect. These figures use the Canadian example to suggest an average of 0.4 cases per year.

### Other key non-monetised benefits by 'main affected groups'

Improvements brought by competition bring a range of longer-term benefits to growth, productivity and innovation, beyond those which can be captured by this analysis. One key benefit not included in the totals above is a predicted average of £16.9m in redress per annum, additional to the £8.3m from Option 2 for an increase of £25.2m compared to the 'do nothing' option. Introducing collective actions could incentivise greater settlement through ADR schemes, but there is not evidence available on which to model this.

### Key assumptions/sensitivities/risks

Discount rate (%) 3.5

This calculation is strongly affected by the estimate made of the deterrence effect of further fining. The model of caseload is based on international comparisons, and considers the outcome of an entire system being in place, including suitable supports and safeguards. Collective actions are particularly uneven in how the benefits fall year by year, as they involve fewer, larger cases. Some experts have stated they would not expect any stand-alone cases, reducing deterrence and eliminating the cartel prevention benefits.

## BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0	Benefits: 0	Net: 0	Yes	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 4

Description: Public opt-out collective actions, in addition to Option 2

## FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 484.6	High: 777.7	Best Estimate: 495.6

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	1.9	16.7
High	N/A	1.5	12.9
Best Estimate	N/A	1.7	14.8

### Description and scale of key monetised costs by 'main affected groups'

In addition to the costs discussed in Option 2, there are costs to the OFT and business for contesting court cases, at around £1.1m p.a. each and an additional £1m p.a. of redress payments from business. The additional costs to business arise from not being compliant with the competition act, and are thus not included in the above cost figures and are out of scope for One-in One-Out (OIOO) calculations.

### Other key non-monetised costs by 'main affected groups'

The introduction of a public opt-out power may lead the OFT to spend resources on such cases against its currently prioritised approach. If this is the case, then there will be benefits in terms of redress, but at the cost of the current benefits to the economy at large of public enforcement. Stakeholders have argued the threat of this system might increase the effectiveness of settlement. If additional cases were resolved through redress imposition (see option 2) instead of court cases, costs would drop significantly.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	58.5	497.5
High	N/A	93.0	794.4
Best Estimate	N/A	59.8	510.4

### Description and scale of key monetised benefits by 'main affected groups'

Most benefits of this option are included in Option 2. The additional monetised benefit for this option is £1m worth of deterrence p.a.

### Other key non-monetised benefits by 'main affected groups'

One of the key objectives that has not been monetised is a predicted average of £1m gained in redress per annum, additional to the £8.3m from Option 2 for a total increase of £9.3m in redress compared to the 'do nothing' option. Public collective actions could also incentivise settlement through ADR schemes, but there is not evidence available on which to model this.

### Key assumptions/sensitivities/risks

Discount rate (%) 3.5

This is modelled on the average OFT fine in 2000-2006, which was £3.3 million. However, these fines vary greatly, and some of the most relevant cases for such a power would be very large cartels. Long running cartels have led to fines of tens of millions of pounds, and the average above must be considered in the light of the fact that individual redress schemes under this scheme could be many times the average annual benefit.

## BUSINESS ASSESSMENT (Option 4)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0	Benefits: 0	Net: 0	Yes	Zero net cost

# Evidence Base (for summary sheets)

## What is the problem under consideration?

### Summary

1. The damaging effects of anti-competitive behaviour are well-established. A 2000 report for the OECD found that in the US alone, cartels were affecting trade worth around \$10 billion dollars and resulting in higher prices of around \$1 billion dollars.<sup>1</sup>
2. In the UK, anti-competitive behaviour is largely addressed through the work of the public authorities rather than by private individuals. The OFT's *Positive Impact* report for the financial year 2011/12, estimates that the benefits of its competition law enforcement work, result in direct savings for consumers of around £151 million, excluding the substantial deterrent effects.<sup>2</sup>
3. The competition authorities prioritise cases to bring based on a set of criteria, and a limited budget means that they may not be able to pursue all cases. As their emphasis is on high-impact cases, their resources tend to be directed primarily at larger cases, and it is unlikely for smaller businesses in particular to receive swift resolution if they become victims of anti-competitive behaviour.
4. As well as this limitation on the number of cases that are resolved, the OFT addresses infringement through fines rather than through awarding damages, meaning that even where the anti-competitive behaviour is tackled the injured party or parties will not be able to gain redress without bringing a private action.
5. Individuals and businesses have an intrinsic right to pursue redress from business for infringement of competition law, and in the UK a breach of anticompetitive behaviour covered by Chapters I and II of the Competition Act 1998 provides a basis for private actions under these provisions.<sup>3</sup> However, currently the process of pursuing such cases through private actions is costly and complex. This is particularly true as competition cases may involve very large sums but be divided across many businesses or consumers, each of whom can only claim a small amount.
6. This means that most anti-competitive behaviour does not lead to private actions seeking redress: in 2005-8 there were only 27 cases resulting in judgements, and most OFT findings of infringements were not followed by private actions. Although responses to the Government's consultation on private actions indicate that this number has grown in recent years (albeit with cases settling before court), there continue to be very few cases involving SMEs or consumers. Furthermore, the competition pro-bono scheme receives almost 100 enquiries a year concerning anti-competitive behaviour, suggesting that there is a broader need for resolution and redress than the cases currently addressed by the OFT.

### Competition and the economy

7. Anticompetitive activity typically leads to lower output and higher prices for 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. These include reduced choice for consumers, sub-optimal allocation of resources and reduced innovation. In addition, rent seeking behaviour, whereby businesses attempt to protect their profits from competition (for example by raising barriers to entry through restrictive technical standards) increases the social costs of anticompetitive activity. These wider costs of anticompetitive activity suggest that such behaviour is different from other economic torts and therefore that it may require specific measures designed to (a) improve access to redress and (b) prevent social costs arising, through deterrence.
8. Anti-competitive behaviour includes abuses of a dominant position and anti-competitive agreements between firms, which seek to distort competition, such as jointly restricting output or raising prices. In the UK, anti-competitive behaviour is prohibited under Chapters I and II of the

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<sup>1</sup> <http://www.oecd.org/dataoecd/39/63/2752129.pdf>

<sup>2</sup> [http://www.of.gov.uk/shared\\_of/reports/Evaluating-OFTs-work/of1428.pdf](http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/of1428.pdf)

<sup>3</sup> Rodger, Barry (2009) Competition law litigation in the UK courts: a study of all cases 2005-2008- Part I. Global Competition Litigation Review. pp. 93-114.

Competition Act 1998 (the Act) and may be prohibited under Articles 101 and 102 of the TFEU. The Competition Act provisions prohibit anti-competitive behaviour which affects trade in the UK, while the provisions of the TFEU cover anti-competitive behaviour which affects trade between Member States.

9. The economic literature suggests the effects of anti-competitive behaviour can be significant. Estimates of the effects of cartel behaviour suggest that such behaviour results in higher prices of 20-35% for cartels as a whole, and 28-54% for cartels within the EU.<sup>4</sup>
10. Competition also encourages innovation in the form of new products, services, production processes and R&D investment as firms strive to gain and maintain a leading position against their competitors. Research analysing the impact of the EU single market programme, found that increases in competition reduced firm profitability (as prices fell) while raising the levels of innovation. The higher levels of innovation led in turn to higher productivity growth.<sup>5</sup> In addition, competition creates pressure for management efficiency. Research in this area found that competition increases management quality but does not reduce work-life balance, a trade off that has been argued.<sup>6</sup>

### **Private actions in the current antitrust regime**

11. The current antitrust regime in the UK protects consumers against anticompetitive behaviour such as anticompetitive agreements between firms and abuses of a dominant position. The current system also contains a specific cartel offence against individuals who engage in certain forms of price-fixing and other 'hard core' cartel activity. Private actions could complement the public antitrust enforcement regime but in the UK, as at the EU level, competition offences are overwhelmingly pursued through the public regime.<sup>7</sup> This is in contrast to other jurisdictions, where private actions account for a greater share of antitrust cases. For example in the USA, around 90% of filed antitrust suits are private cases.<sup>8</sup> It is noteworthy however, that the US experience is not directly comparable, not least due to differences in cost rules and issues around the level of damages that can be awarded.
12. Private actions can be 'stand-alone' cases, in which individuals or business can bring claims of detriment arising from anti-competitive behaviour, where the alleged breach of competition law is not already the subject of a European Commission or OFT decision (or an appeal against a decision from the relevant Authority). Under this type of action, the claimant will have to prove to the court that the breach of competition law occurred and that he suffered loss as a result of that breach. All stand-alone actions must be brought before the ordinary courts<sup>9</sup>, since the Competition Appeal Tribunal (CAT), which has a specialist interest in competition, has no jurisdiction to hear stand-alone actions.
13. Alternatively, private actions can be follow-on. These are cases when the OFT or the EC have already issued findings of anti-competitive behaviour, The claimants can rely on the Commission or OFT decision as evidence of infringement, meaning that they only have to show that the infringement caused them the loss for which redress is being pursued.<sup>10</sup> Follow-on claims can be brought before the CAT or the High Court.
14. Most follow-on cases only involve a single or small number of claimants. However, follow-on claims can also be brought before the CAT by a representative body on behalf of a larger group of harmed consumers. Representative actions are particularly valuable to consumers, since they allow for the aggregation of a large number of small claims, which would have otherwise not been pursued since the costs of individual actions would outweigh the benefits from individual claims. Action can only be brought on behalf of named consumers. This means that a consumer will be included in the action only if he expressly agrees to join, or 'opts in'.

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<sup>4</sup> [http://www.ofc.gov.uk/shared\\_ofc/consultations/ofc423con.pdf](http://www.ofc.gov.uk/shared_ofc/consultations/ofc423con.pdf)

<sup>5</sup> Griffith, R. et al. (2006), 'Product Market Reform and Innovation in the EU', Institute for Fiscal Studies.

<sup>6</sup> Bloom, N. and Van Reenen, J. (2006), 'Measuring and explaining management practices across firms and countries', NBER Working Paper No. 12216.

<sup>7</sup> See for example, Rodger, B.J. (2009), 'Competition Law Litigation in the UK Courts: a Study of all UK Cases 2005-2008- Part 1', Global Competition Review, pp. 93-114.

<sup>8</sup> Jones, C. (1999), 'Private Enforcement of Antitrust law in the EU, UK and USA', Oxford University Press.

<sup>9</sup> The Chancery Division of the High Court of England and Wales, The Court of Session, Sheriff Court in Scotland and The High Court of Northern Ireland.

<sup>10</sup> Even in cases where the facts of the case differ somewhat from the Commission's or OFT's decision, the claimants can generally rely on the findings of the relevant Authority as positive evidence of the infringement.



## The need for reform

15. In the UK competition law is primarily enforced by the Office of Fair Trading (OFT) together with several sector regulators who have concurrent powers with the OFT to enforce the relevant law in their respective sectors. The OFT and the regulators have wide-ranging powers to support their investigations into suspected anticompetitive behaviour, such as powers to request information and powers of entry into premises. Infringement decisions may lead to issuing of directions (for example for the infringer to stop a certain practice) and/or issue penalties. These may be accompanied by other sanctions such as criminal sanctions or director disqualification for a period of up to 15 years. Therefore the objective of the public antitrust regime in the UK is to detect and bring an end to anticompetitive agreements and conduct, and deter future anti-competitive behaviour.
16. The public enforcement regime in the UK is highly regarded internationally. For example, the Global Competition Review (GCR) awarded the OFT 4 stars out of a possible 5, in its assessment of the OFT's enforcement work. However, antitrust is one of the areas where weaknesses in the UK competition enforcement regime have been identified. It is also an area where other individuals or companies are directly involved, and have a right to pursue redress. Therefore, an effective private actions system would help complement the public enforcement regime.
17. There are several reasons which mean that an effective and strong private actions system can improve the antitrust system in the UK.
18. Firstly, competition authorities such as the OFT have finite resources which they devote to detecting, pursuing and stopping anticompetitive behaviour. If the public authorities were also tasked with responsibility for securing redress for parties harmed by anticompetitive activity, there is a risk that effort would be diverted away from enforcement. Furthermore, this means that a significant proportion of anticompetitive behaviour may not be caught by the regime.
19. Redress is an area that is very naturally pursued by the injured parties, whether through ADR or the courts. Private parties also have practical advantages over public enforcers when tackling anti-competitive behaviour against themselves. 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 enforcers.<sup>11</sup>
20. There is evidence that the uncovering of infringements has a significant effect on deterrence. Recent research carried out by the OFT suggests that for every case it investigates, 12-40 potentially anticompetitive occasions of anticompetitive behaviour are stopped.<sup>12</sup>
21. There is evidence that the UK typically brings a lower number of antitrust cases than many other regimes as shown in table 1 below. Due to this, expediting antitrust cases is a priority of the wider competition reforms. Stand-alone private actions, whether individual or collective, can effectively raise the detection rate, the penalty for infringements and thus the resultant deterrence.

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<sup>11</sup> McAfee et al (2008), Private v. Public Antitrust Enforcement: A Strategic Analysis

<sup>12</sup> OFT (2011), The impact of competition interventions on compliance and deterrence ([http://www.offt.gov.uk/shared\\_offt/reports/Evaluating-OFTs-work/off1391.pdf](http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/off1391.pdf))

**Table 1: Aggregate figures on antitrust cases for selected member states 1 May 2004 – 1 September 2010**

Member state	New case investigations	Decisions notified to the European Commission
France	189	70
Germany	128	58
Italy	81	58
Netherlands	76	32
Denmark	62	32
Spain	75	30
Greece	31	22
Hungary	79	20
Sweden	36	16
Slovenia	24	12
UK	52	11
(European Commission)	195	N/A

22. The current arrangements in the UK for private actions (such as collective actions having to be follow-on consumer cases), mean that few cases arrive in the courts. Research shows that between 2005 and 2008, there were 41 cases which came before the courts and where judgments were delivered.<sup>13</sup> Another important aspect is the number of cases that are settled before getting to court. A survey of legal practitioners estimated that there have been 43 out-of-court settlements between 2000 and 2005, relating to anticompetitive practices.<sup>14</sup> Although responses to the Government's consultation on private actions indicate that this number has grown in recent years (albeit with cases settling before court), there continue to be very few cases involving SMEs or consumers, who currently have very little practical opportunity to obtain redress. Overall, the number of private cases undertaken in the UK is low by international standards. For example the German courts dealt with 368 private antitrust cases between 2005 and 2007.<sup>15</sup>

#### *Effectiveness of current regime*

23. Research from the OFT surveyed 202 companies about their views on private actions under competition law.<sup>16</sup> This survey indicated that companies and their advisers view private actions regime in its current form as the least important aspect of the competition regime in deterring infringements under the current regime.<sup>17</sup> When asked for suggestions as to what could be done to improve compliance with competition law in the UK, removing the obstacles to private actions was the most frequently provided suggestion among lawyers, although it was only the 8<sup>th</sup> most commonly cited factor among companies, for whom reputational damages were the most significant concern.<sup>18</sup> This could reflect different levels of awareness or different incentives between these two groups.
24. Although 45 of the 202 companies surveyed by the OFT (22 per cent) thought that their company had been harmed by a breach of competition law by someone else, only five companies finally decided to bring an action. The most commonly cited reason for not bringing an action was that the expected costs outweighed the benefits.<sup>19</sup>
25. Furthermore, even when an infringement is identified, this does not usually lead to redress. In 2000-2007, there were 21 findings of infringement by the OFT under the Competition Act 1998. 13

<sup>13</sup> Rodger (2009).

<sup>14</sup> Rodger, B. (2008) "Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the UK, 2000-2005" E.C.L.R. 96.

<sup>15</sup> Peyer, S. (2010), "Myths and Untold Stories- Private antitrust enforcement in Germany", University of East Anglia - Centre for Competition Policy.

<sup>16</sup> OFT 962, "The deterrent effect of competition enforcement by the OFT", November 2007

<sup>17</sup> See *The deterrent effect of competition enforcement by the OFT* (OFT962 and OFT963, November 2007), particularly OFT962 para 5.58

<sup>18</sup> OFT962 para 5.107

<sup>19</sup> OFT962 para 5.87

of these could have resulted in follow-on cases brought by injured parties, but in fact only two (against Genzyme and Burgess) did.<sup>20</sup>

### *Deterrence effect of Private Actions*

26. In stand-alone cases, private actions provide a straightforward deterrent effect, as the action causes an additional case of infringement to be acted against with the associated publicity, need for behaviour change and direct financial costs. This can be modelled in line with the OFT's survey of the ratio of anti-competitive behaviours abandoned or modified to those where an OFT decision was made. This shows an effect of 5:1 for cartel cases, 4:1 for abuse cases and 7:1 for commercial agreements. We take the middle estimate of 5:1 for our calculations. It is more difficult to assess the impact that redress has upon deterrence in follow-on cases. Commonwealth precedents suggest that damages typically increase the total cost of infringement by somewhere between 30% and 153%, averaging at 80%<sup>21</sup>. Some link between this and deterrence is to be expected. However, studies by the OFT suggest that deterrence does not directly track the level of fine: issues such as reputational damage are involved<sup>22</sup>. It is therefore difficult to quantify the significance of follow-on damages claims in terms of redress.
27. A high estimate of the impact of follow-on claims would work on the basis that a fine increased by 80% was a fine 80% again as effective in terms of deterrence, and therefore redress from follow-on damages was equal to that from fines or stand-alone cases. It should be noted that as well as the direct cost of paying redress, other deterrents are strengthened by redress. In particular, a collective action case against a company would be likely to raise awareness of their offence and thus increase reputational damage. An OFT report<sup>23</sup> notes that 'survey evidence also shows that high profile OFT enforcement cases result in greater behavioural change than lesser known cases. Specifically, the replica football kit cartel case led to more cases of behavioural change than any other intervention covered in the survey'. Given that the replica football case is the single example of a collective action, this might reflect the increased publicity due to private collective actions. The same study also gives the results of an OFT behavioural experiment that not only shows that the size of fine changed people's behaviour, but that the greatest deterrence was from an unknown fine. The unpredictable nature of private actions and the wide range of their potential results could therefore be a very powerful disincentive for infringement. Finally, while businesses themselves did not rate it so highly, the level of financial penalty was the most likely of a list of sanctions and tools in competition deterrence to be rated as 'very important' by an OFT survey of lawyers.<sup>24</sup> This high model therefore assumes that the deterrence effect of damages is equivalent to that of stand-alone cases, at 5:1.
28. A low estimate would ignore deterrence effects entirely for follow-on cases, due to the difficulty of quantifying them in individual cases. It should be noted however that the principle that businesses are not at all reactive to the risk of increased costs seems implausible, especially in the light of the evidence outlined above. The low estimate would still model the benefits of stand-alone cases at 5:1, as these are better understood.
29. For the purposes of this analysis, we therefore assume in our best estimate figures throughout a modest deterrence level of £1 worth of damage deterred for ever £1 of costs in a follow-on case, increasing to 5:1 for stand-alone cases due to the impact of new cases being highlighted and thus the risk of action being taken against them rising. Our low figures ignore the deterrence effect of follow on cases entirely, and our high figures raise the deterrence effect of follow-on cases to 5:1.

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<sup>20</sup> It should be noted, however, that settlement may have been reached in other cases.

<sup>21</sup> Mulheron

<sup>22</sup> OFT 391 ([http://www.of.gov.uk/shared\\_of/reports/Evaluating-OFTs-work/oft1391.pdf](http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft1391.pdf))

<sup>23</sup> Ibid

<sup>24</sup> Ibid, pg 77

## Summary

30. In this case, the primary need from government is to create a framework whereby individuals and businesses can represent their own interests, rather than to rely on state involvement in competition law. This is partially because public enforcement is limited by cost considerations. But it is also because private actions uphold the rights of individuals to seek resolution and redress, and because victims of anti-competitive behaviour are particularly well-placed to confront and address this.
31. An intervention to make private actions, and particularly collective actions, more practicable is needed because both the theory of competition cases (that a large case that has caused significant harm to the economy and consumers in general can nevertheless lack any one individual for whom pursuing costs makes economic sense) and the evidence of practice (that most infringing businesses are not compelled to make redress to injured parties) implies that current private actions are not able to address all valid cases.

## Policy objectives

32. Our objectives are
  - To ensure that parties injured by anti-competitive behaviour are able to obtain redress
  - To work with current public enforcement to tackle and deter anti-competitive behaviour
  - To complement the public enforcement system, and avoid any tensions
  - To enable meaningful cases to be pursued while avoiding incentives for vexatious or frivolous claims

## Description of options considered

33. The options considered to address these policy objectives are as follows
34. **Option 1:** Do nothing – collective actions would be restricted to opt-in follow-on consumer cases and stand-alone cases would have to be heard in the High Court rather than the CAT
35. **Option 2:** Reforms to court jurisdictions, encouragement of Alternative Dispute Resolution (ADR) and collective settlement and protection of public enforcement. These reforms would make the Competition Appeal Tribunal (CAT) the main forum for private enforcement of competition cases, and ensure that good practice on ADR was built into competition cases. They would also protect the public enforcement system from any unintended negative consequences from an increase in private actions by addressing the leniency and joint and several liabilities system.
36. This option also includes two more targeted interventions, with specific benefits. An additional power for the public competition authorities to impose redress schemes on infringers would help gain redress in certain cases, and a fast-track for small businesses would help ensure better access to justice in competition law.
37. **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. As well as the direct benefits from successful collective action cases, the potential for such actions to be brought would strengthen the impact of the reforms in Option 2, by encouraging infringers to resolve cases through ADR.
38. **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. This could allow redress to be gained in additional cases, both directly and through providing an incentive for infringers to resolve cases through ADR.

## **Monetised and non-monetised costs and benefits of each option**

39. The options outlined involve several detailed elements which we would introduce alongside one another. The analysis of costs and benefits is therefore undertaken below on a thematic basis in *Analysis of Proposed Reforms*, below. The four sections addressed are:
- 1) Court reforms
  - 2) Alternative Dispute Resolution
  - 3) Leniency
  - 4) Collective Actions
40. Of these, sections 1-3 cover less contentious issues. Taken alone, 1-3 make up Option 2, and they are also included as part of the framework for the further developments proposed in Options 3 and 4. Section 4 is the most contentious area, and includes analysis of the distinction between private collective actions (Option 3) and public collective actions (Option 4).

### **Additional cost analysis**

41. Throughout the analysis, High scenario, Low scenario and a best estimate have been used to derive the net benefit of options.
42. Most variables only affect cost or only affect benefits – for instance, variations in legal costs per case or variation in the deterrence effect per £1 of redress awarded. For these, the High scenario uses estimates that increase benefit or decrease cost, and the Low scenario those that decrease benefit or increase costs.
43. However, the key variable of number of court cases has a positive impact on both benefits and costs. In Option 3, therefore, the High scenario costs are increased due to the increase in court cases, whereas the Low scenario costs are decreased by the low number of court cases. This means that the costs involved in the high and low scenarios do not represent the range of possible costs. To ensure that this point is clear, a short section setting out the cost ranges has been included in each section.
44. In theory, this same principle could mean that the benefits in the High scenario and Low scenario were not the high and low limits of benefit. However, in practice variables that affect both cost and benefit have a more significant impact on the latter, which means that the High scenario benefit is in fact the high limit of predicted benefit, and the Low scenario cost is in fact the low limit of predicted cost.

### **Rationale for level of analysis provided in this Impact Assessment**

45. Although it is difficult to accurately predict all of the outcomes from introducing private actions, this Impact Assessment has attempted to monetise benefits wherever possible. This is because we wish to ensure that stakeholders are fully apprised of our current views and motivated to provide evidence to support or challenge this analysis.

### **Risks and assumptions**

46. The largest risk associated with this policy is that making private actions, particularly collective actions, more accessible will lead to a large number of vexatious or frivolous claims. Many experts identify the US system as containing flaws which incentivise unmeritorious cases to be brought. Unmitigated, this could create high costs on business and the courts. The consultation document sought views on how best to avert that risk.
47. In general, no significant risk arises from the impact of these reforms being less dramatic than expected, in terms of fewer or smaller cases being brought than our models suggest. As the reforms involve giving permissions and capabilities rather than establishing new bodies or funds,

the costs are closely linked to the benefits: if a particular proposal fails to create benefits then it will not usually involve wasted costs.

48. Assumptions used to derive specific figures are noted in the detailed analysis on those individual cases. It should be noted that this impact assessment provides estimated annual costs for the options presented, but these are broad averages, and costs per year are not expected to be stable. In particular, regimes which have private collective actions see significant variation in the number and size of cases brought or finalised in any one year, from no cases whatsoever to redress of over £100m.

### **One-in One-out**

49. Whilst the options we propose do not create new legal or regulatory restrictions or burdens on businesses, they do create new avenues for enforcing the Competition Act. The options are all directed at ensuring that enforcement of current competition law is more effectively implemented, and the costs arise in the enforcement process. There may be scenarios where vexatious claims against compliant parties may lead to this policy being in scope of OIOO. However, as companies facing vexatious claims would be able to claim back costs in court if the case is unsuccessful, there would be a zero net cost to business. Any other costs to business would arise from not being compliant with the competition act, thus out of scope of OIOO.

### **Micro-business exemption**

50. Whilst the proposals may be in scope for OIOO and thus in theory within the scope of the micro business exemption, the proposals are aimed at supporting SMEs and micro-businesses as well as consumers. It is unlikely that in practice a micro-business would be the subject of a challenge under the competition acts through the courts.

### **Direct costs and benefits to business calculations (following OIOO methodology)**

51. As set out above, whilst these proposals may fall within the scope of One-in, One-out, there is a zero net cost to business because of the ability for firms to claim back costs if the case against them is unsuccessful. Nevertheless, the costs to business arising from the stronger enforcement expected to arise from the proposals has been calculated in each section below. It should be noted that the largest part of costs to business are the payments made by infringers to the consumers or businesses that are victims of their anti-competitive behaviour: this is one of the core intended outcomes of the policy rather than a side-effect cost. It should also be noted that as a transfer, these transfers are not included as an economic cost or benefit and do not enter into the overall cost-benefit analysis of the options.
52. For the CAT reforms (see Section 1 below), cases will be between businesses. Therefore, all legal and other associated costs of a case to participants are business costs, and all redress are transfers, counting as both a benefit and a cost to business (for a net nil effect)
53. For the redress imposition power (see Section 3), and the private and public opt-out options (see Section 4), the cases are expected to frequently be wholly or largely consumers. We have modelled the business costs in these cases on an estimate of 70% of cases involving consumers.

### **Parties who are affected by these reforms**

#### **Large businesses**

54. Large businesses are potentially both litigants and defendants in competition cases. The court reforms and improved ADR elements of this proposal should help ensure cases run more smoothly and cheaply for both those seeking redress and those accused of infringement, benefitting large businesses in either position. Increases in collective action are likely to directly affect large businesses as infringers more than as claimants, as they are capable of behaviours affecting a large group of smaller businesses and consumers, and are more able to pursue damages themselves on an individual basis. Indirectly, however, large businesses stand to benefit from a

reduction in anti-competitive behaviour due to individual cases being tackled and the knock-on deterrent effect on markets as a whole. Key data to judge the effect on large businesses are:

- Number, scale and cost of additional cases brought against them
- Number, scale and cost of additional unmeritorious cases brought against them
- Number and scale of additional cases brought by them (or collective actions joined by them)
- Savings made through improved ADR and cheaper court processes
- Impact of improvement in competition (may be estimated at whole-economy level)

### **Small businesses**

55. Helping small businesses is a key aim of these proposals: the cost and complexity of competition cases means that small businesses have fewer options available to them to tackle anti-competitive behaviour. The court reforms and ADR may be helpful to swifter and cheaper resolution for small businesses, including making some cases affordable that previously would not have been so. This is particularly true of measures targeted at reducing costs for small businesses, such as the proposed fast track in the CAT. These measures may be particularly likely to effect behaviour change, although redress may also be involved. Additional cases will primarily involve small businesses as claimants, but may involve them as accused infringers as well. Collective actions will allow redress in particular to be sought in cases where this previously would not have been practical, and will be likely to involve many small businesses (or consumers) seeking redress from larger businesses. Key data to judge the effect on small businesses:

- Number and scale of additional cases brought by them (or collective actions joined by them). This includes cases decided (and thus behaviour change) as well as redress
- Number and scale of additional cases brought against them
- Savings made through improved ADR and cheaper court processes
- Impact of improvement in competition (may be estimated at whole-economy level)

### **Consumers**

56. Increasing protection for consumers is a further key part of these proposals. The court reforms and ADR may occasionally help consumers take stand-alone cases. The power for the OFT to impose redress may benefit consumers in certain large cases. Most important for consumers is collective actions: these are currently permitted as opt-in only. Moving to an opt-out system is likely to mean that more consumers are involved in each case, increasing the benefit per case. This in turn is also likely to make taking such cases more attractive, increasing the total number of cases as well. Key data to judge the affect on consumers:

- Number of collective actions taken partly or wholly on behalf of consumers
- Number of stand-alone cases taken
- Take-up of opt-out compared to opt-in cases

### **Public sector (courts and public competition authorities)**

57. Considering an extension of private actions inevitably has an impact on public sector bodies, particularly the courts who hear the actions and the public authorities who have responsibility for enforcing competition law. Proposals to increase the use of the CAT should result in a more effective and efficient use of the courts, with the CAT having developed experience in dealing with competition cases. Proposals are intended to support and complement public enforcement rather than making demands on public enforcers that distract from their primary duties, or creating systems that undermine the effectiveness of our top-ranking public enforcement systems. Key data to judge the effects on public sector bodies

- Net courts costs (CAT and High Court)
- Length of individual cases, and throughput of cases
- Changes to throughput of the OFT
- Cases where public bodies draw on data gained during private investigations

# Analysis of proposed reforms

## Section 1 - Court rules, processes and jurisdictions

### Issues under consideration

58. The practical detail of court rules, processes and jurisdictions can be very important for ensuring that suitable cases are brought and that unnecessary costs are avoided. For instance, a large number of competition cases in Germany can be satisfactorily resolved due to their cheap, accessible and streamlined court system, as well as the difference in how they define and measure anti-competitive behaviour. In most cases these matters must be decided across the justice system as a whole, but in this policy area the existence of a specialised court, the Competition Appeal Tribunal (CAT), makes matters more flexible.
59. The CAT currently hears follow-on cases for redress after an infringement of competition law has been established. It also is an appeal body for OFT decisions, and hears judicial reviews of Competition Commission decisions. These twin roles require an extensive expertise in competition law. Any reforms in terms of rules, processes and jurisdictions are therefore likely to be largely constructed around the increased use of the CAT, and the development of its internal processes.
60. Currently, all stand-alone claims arising in England and Wales pleading a breach of EC or UK competition law must be issued in or transferred to the High Court and, unless they come within the scope of Rule 58.1(2) of the CPR (in which case they are assigned to the Commercial Court), they are assigned to the Chancery Division<sup>25</sup>.
61. 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 Competition Appeal Tribunal (CAT)<sup>26</sup> 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. Between 2005-2008 there were 12 follow-on competition cases, of which 9 were brought in the CAT.
62. Under section 16(1) of the EA02, the Lord Chancellor may, by regulations, enable the High Court to transfer cases concerning infringements to the CAT. To date no such regulations have been made. This means that private actions may only be heard before the CAT if they are exclusively follow-on cases, i.e. that all aspects of the case follow-on from a prior finding of infringement by the OFT or other competition authority.
63. Between 2005 and 2008 there were a total of 41 judgements in competition litigation cases in the UK, of which 9 (22%) were before the CAT<sup>27</sup>.
64. Consultation with business and legal experts (both prosecuting and defending competition cases) indicates that the CAT is regarded by most practitioners as a suitable place to bring competition cases, and capable of dealing with such cases in an efficient, flexible way.
65. Through its flexible case management procedures and the appropriate scheduling of hearings, the CAT has the potential to absorb these cases using its existing facilities.
66. A second issue in terms of court processes is the prohibitive cost of even the best-run cases for smaller claims. Any stand-alone court case will bear time and financial costs, and will not be suited to very small claims. These are usually a result of anti-competitive behaviour having a small effect on a wide range of individuals or businesses, which might be addressed through some form of collective actions (see above/below). However, legal sources currently estimate that private cases are prohibitively expensive unless they involve redress of at least £500k. This means that fairly substantial individual cases where redress or behaviour change is needed may not be practical to pursue through the courts.

<sup>25</sup> See *Practice Direction - Competition law - Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998* and Rule 30.8 of the Civil Procedure Rules.

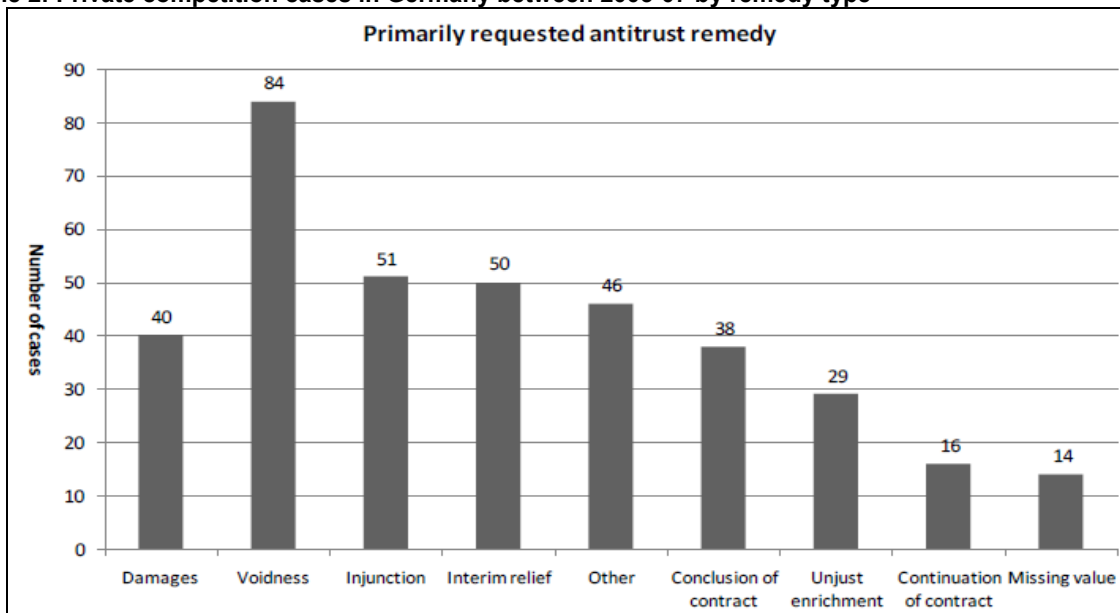
<sup>26</sup> Under section 47A of the Competition Act (inserted by section 18 of the Enterprise Act 2002) any person who has suffered loss or damage as a result of an infringement of either UK or European Union competition law may bring a claim for damages or for a sum of money before the Tribunal in respect of that loss or damage. Such claims may only be brought in relation to loss or damage suffered as a result of infringement of the following prohibitions: The Chapter I and Chapter II prohibitions and Articles 101 and 102 of the TFEU.

<sup>27</sup> Rodger (2009)



67. While supporting the right to redress is important, there is some evidence that in competition cases, particularly smaller cases, the priority is not damages but changing behaviour. For instance, a recent study of private actions in Germany shows that only about one in ten cases lead to damages being awarded, while most are resolved by voiding of contracts, a permanent injunction being placed on the infringer and other forms of relief for the affected parties. Cases not involving financial claims are also likely to require less expensive expert evidence and to be more likely to be settled by defendants. One option for a fast track competition process would be to exclude financial payments from the range of outcomes that can be pursued; however, this could also result in unfairness to the claimant or in a case being brought twice, once for an injunction and once for redress.

**Table 2: Private competition cases in Germany between 2005-07 by remedy type**



Source: Peyer (2010)

68. We have considered the use of county courts, including the Small Claims Court, to address these cases. This option was also explored in the informal OFT consultation of 2007. Like the OFT, we have found that most stakeholders consulted, including almost all legal experts, have indicated that the county courts do not have sufficient competition expertise. This would mean that such cases would not be satisfactorily resolved, and would always be vulnerable to appeals to a higher court.
69. The CAT is a better candidate for hosting a fast-track service, due to its flexible rules and case management skills. The CAT has the requisite competition expertise, and is capable of concluding cases without oral hearings in certain cases. It has already had to decide several smaller competition cases.<sup>28</sup>

### Policy objectives

70. Policies concerning court rules, processes and jurisdictions help support the core objectives of increasing deterrence and redress. They do this in the following two ways
- 1) Ensuring that private competition cases are efficient, affordable and practical for both parties concerned
  - 2) Extending the number of cases that can practically be taken to court, to give the protection of law to a wider range of vulnerable parties

### Description of options considered

71. We have considered three options in this area. The second and third options can be combined
- Option a: Do nothing.
  - Option b: Increase use of the CAT.

<sup>28</sup> CAT has some sample cases of dealing well with small cases, e.g. Wilson, Burgess and Albion. Also by analogy Bracken Bay Kitchens, Brannigan and CityHook

- Option c: Introduce a fast-track scheme in the CAT.

## Benefits and costs of each option

### *Option a: Do nothing*

72. Leaving the current system unchanged would fail to capitalise on the opportunities presented by the CAT. Additionally, if collective actions were introduced without any enhancement of the CAT's powers and jurisdictions they would be likely to bear an increased cost.

### *Option b: Increase use of the CAT*

73. This could be achieved through allowing the High Court to transfer competition cases to the CAT and/or allowing competition cases to be laid in the CAT from the outset. Our preferred option is to allow both, as this would maximise flexibility. If the CAT's use is increased, it should also be given the power to hear applications for injunctions, as these are one of the key remedies in competition cases.
74. Moving cases that would be heard in the High Court to the CAT would not create new redress or deterrent effects. However, if this change in court jurisdictions was to affect the expense or difficulty of bringing cases, then it could lead to a change in the number of cases. As our initial evidence is that extending use of the CAT would make the system cheaper and easier to use, there would therefore be some associated increase in cases.
75. Historically, the CAT has dealt with follow-on cases only, averaging 2.25 cases per year between 2005-8 (75% of all follow-on cases).<sup>29</sup> Our reforms would allow it to hear stand-alone cases as well, and our best estimate is that if provided with suitable powers to do so, it would also hear around 75% of these. The reforms are also expected to make it easier to bring cases, through changes to the rules for funding sources, cost liabilities and relative burdens of proof. One leading legal expert we have consulted suggests that these changes would lead to total caseload of all cases increasing by 25% per year from these reforms alone, without the introduction of collective actions (see Section 4 below).
76. However, as these cases would be transferred from the High Court, the net effect can only be calculated by comparing these costs to those in the High Court, which we would expect to be higher. As an indicative figure, one legal expert we have surveyed suggests that High Court cases take significantly longer. At consultation stage, we estimated likely High Court costs of approximately £28,000 for follow-on cases and £105,000 for stand-alone cases; these figures were not challenged by stakeholders at consultation. However, it is recognised that this is a rough estimate and so it must be treated with caution. The table below sets out how many cases are currently heard in the CAT and High Court respectively, how this would be affected by a 25% increase in number of cases and 75% of stand-alone cases being heard in the CAT, and the total costs which would result from this.<sup>30</sup>
77. The CAT's best estimate of the cost of handling a follow-on case is £15,400, covering court time of members and chairmen plus other direct case costs but excluding other staff costs. They estimate that a stand-alone case is likely to cost between three and four times the amount of a follow-on case. Our best estimate, based on the number of likely days per case, is 3.75, which indicates a follow-on case may cost approximately £57,750. It should be emphasised that these are estimates, as individual cases may vary greatly; however, these figures are broadly compatible with the CAT's current average case cost (across all types of cases, not just private actions) of £45,000 per case. The CAT further estimates that additional staff costs required will vary depending on the level of increase in cases, but range between a best estimate of £125,000 (one additional referendaire and an additional caseworker) to a maximum estimate of £160,000 (one additional referendaire and two extra caseworkers).

<sup>29</sup> Rodgers (2009)

<sup>30</sup> Note numbers of cases are rounded in 'reform' case.

**Table 3: Court costs associated with CAT reforms**

		Current annual cases and costs			Annual cases and costs after reforms						
		Stand-alone	Follow-on	Total	Stand-alone	Follow-on	Total				
High Court	Number of Cases	7.25	0.75	8	2	1	3				
	Cost per case	£105,000	£28,000		£105,000	£28,000					
	High Court Cost	£761,000	£21,000	£782,000	£210,000	£28,000	£238,000				
CAT	Number of Cases	0	2.25	2.25	7	3	10				
	Cost per case	N/A	£15,400		£57,750	£15,400					
	CAT Cost	0	£34,650	£34,650	£404,250	£46,200	£450,450				
<b>Total Cost</b>							<b>£816,650</b>				<b>£688,450</b>

78. This shows a net saving for the court system of around £128,200 per annum, excluding the need for extra staff for CAT, estimated at between £125k and £160k. Taking staffing into account, it will therefore lead to a net cost on the courts and CAT of between -£3k (i.e. a small saving) and +£31.8k
79. These figures suggest that the total costs of cases (including staffing figures) are likely to remain broadly level, despite an increased number of cases. This would be consistent with having met the overall policy objective of making it easier for private individuals and businesses to seek redress through the courts, but also having transferred the cases to an expert tribunal with the capacity for more efficient procedures.
80. Opinions from legal experts on the costs expected for businesses involved in competition cases suggested that, again, these were likely to vary with the complexity and length of the case. The cost of legal advice were estimated to amount to at least £1m and significantly more if other expert advice was required, or if the case challenged jurisdictional points or involved extensive disclosure. One expert estimated that the costs of current follow-on actions were likely to be between £1m-£1.8m, and that the costs of stand-alone cases were between £2m-3m. These figures must be doubled to reflect the fact that costs are incurred by both parties. Further costs to businesses of pursuing and defending claims must also be considered, such as management of the case and dealing with disclosure requirements. One party has estimated that these might be around 50% of the external legal costs. Taking this into account, the total cost per case is £3m-£5.4m for follow-on cases and £6m-£9m for stand-alone cases. This creates total costs as follows.

**Table 4: Business costs associated with CAT reforms**

		Current			Reform		
		Stand-alone	Follow-on	Total	Stand-alone	Follow-on	Total
Number of cases		7.25	3	10.25	9	4	13
Cost per case	Low	£6m	£3m		£6m	£3m	
	<b>Best</b>	<b>£7.5m</b>	<b>£4.2m</b>		<b>£7.5m</b>	<b>£4.2</b>	
	High	£9m	£5.4m		£9m	£5.4m	
Cost	Low	£43.5m	£9m	£52.5m	£54m	£12m	£66m
	<b>Best</b>	<b>£54.4m</b>	<b>£12.6m</b>	<b>£67m</b>	<b>£67.5m</b>	<b>£16.8m</b>	<b>£84.3m</b>
	High	£65.25m	£16.2m	£81.5m	£81m	£21.6m	£102.6m

81. The relevant figures here are the additional costs from further cases being brought. The analysis above assumes legal costs in the CAT and the High Court are identical, whereas we might expect savings due to the specialist nature of the tribunal and to cases being swifter but we do not currently have information on this.
82. Taking the best figures above, we reach the following totals of cost and benefit in terms of court and business expenditure. It should be noted that this includes costs incurred by infringers, and that cost shifting means that a winning claimant might also be able to recoup their cost from an infringer. The increase in cost here is due to an increase in the total number of cases, and therefore in the CAT’s effectiveness: it should be remembered that the costs per case are lower after the reforms.

**Table 5: Change in cost due to CAT reforms (best estimate)**

	Current costs	Costs after reforms	Saving
Court	£0.8m	£0.8m	£0.0m
Business	£67m	£84.3m	<b>-£17.3m</b>
Total	£67.8m	£85.1m	<b>-£17.3m</b>

83. It should be noted that the proposals to increase the role of the CAT, and therefore potentially the number of cases brought, are to be taken alongside the proposals around Alternative Dispute Resolution below. Effective ADR could substantially reduce the court and legal costs by resolving cases before a court decision, or even before the case reaches court.
84. The benefits of extending the CAT’s jurisdiction are broader improvements in terms of access to justice, tackling anti-competitive behaviour and redress. Our current estimates are based on the Rodger (2008) into UK Competition Litigation Settlements between 2000-2005. This is based on a very limited quantity of data, but shows five cases where settlement was below £1m, three where it was £1m-£5m and one where it was £5m-£20m. Given the other input we have had that suggests that £500k is the lowest bar for bringing a case, and that claimants would only be expected to take cases that might be expected to cover their own costs, a mid-point of £3m per case is realistic in light of this data. The extra 1.75 stand alone cases and 1 follow on case lead to an additional £8.25m of redress.
85. As well as providing justice for the victim of infringement, we would expect this to have knock-on effects in terms of deterrence. As set out in paragraphs 26-29, we are modelling a benefit of 5:1 for stand-alone, suggesting a benefit of £15m per case, and 1:1 for follow-on, suggesting a benefit of £3m per case. Additionally, around 55% of stand-alone cases heard involve cartels.<sup>31</sup> OFT estimate that there is a saving of £21.4m due to lower prices and £10.7m in deadweight gain when

<sup>31</sup> Rodger (2009)

a cartel is discovered, for a total benefit of £32.1m. As around 55% of stand-alone cases have related to cartels, this gives an average benefit per stand-alone case of £17.7m. It should be noted that these are net benefits to the economy, whereas the £8.25m of direct damages is restorative justice for the individual company involved rather than benefitting the system as a whole.

86. Additionally, there are significant benefits to the businesses that bring the cases in terms of behaviour change and restoration of fairer competitive conditions. We have not been able to quantify these benefits, but they can be critical to individual businesses that bring cases, and are a major incentive for cases to be brought.

**Table 6: Economic benefits of CAT reforms**

Case type	Increase	Deterrence	Lower pricing and deadweight gain	Total
Follow-on	1	£3m	-	£3m
Stand-alone	1.75	£26.25m	£31.0m	£57.25m
Total	2.75	£29.25m	£31.0m	£60.25m

87. The tables below set out our High and Low scenarios as well as our best estimate for CAT costs. Note that these reflect variations in how we can calculate deterrent effects (see paragraphs 26-29), and the ranges of costs to businesses of fighting cases. In particular, the High scenario considers all cases to have a deterrent effect of 5:1 (creating an addition £12m p.a. deterrent effect from follow-on cases), whereas the Low scenario only includes deterrent effects for stand-alone cases (removing the £3m given as deterrence from follow-on cases). The options below do not model different possible increases in the number of cases, or proportions that might transfer to the CAT. They also do not include savings to business through cases being heard in the CAT rather than the High Court: given that we have reason to believe CAT cases are swifter and involve fewer days in court, these could be significant. Note that the Low scenario uses the higher business cost figures and the High scenario uses the lower business costs figures, to find High and Low net benefit.

**Table 7: Costs and benefits of CAT reforms**

	Business Costs	Court savings	Economic benefits	Net economic benefit	Additional: redress provided
Benefit – LOW scenario	-£21.1m	£0.0m	£57.3	£36.2	£8.25m
<b>Benefit - Best estimate</b>	<b>-£17.3m</b>	<b>£0.0m</b>	<b>£60.3m</b>	<b>£43.0</b>	<b>£8.25m</b>
Benefit – HIGH scenario	-£13.5	£0.0m	£72.5m	£59.0	£8.25m

### Additional cost analysis

88. As the only variable affecting our estimate of the costs of CAT reforms is the cost to business per case, the high limit of the costs of these reforms is simply the cost in the Low scenario (£21.1m cost to business plus £415.8k cost to the CAT, for a total of £21.3m) and the low limit is simply the cost in the High scenario (£13.5m cost to business plus £415.8k cost to the CAT for a total of £13.7m).
89. For the purposes of calculating the costs to business of CAT reforms, we have to consider the costs to both participants, as cases in the CAT are between businesses. According to our best estimates, this will be around £17.3m. Additionally, the redress itself is a business-business transfer of £8.25m, counting as both a cost and a benefit. The CAT reforms therefore have a cost to business of £26.3m and a benefit to business of £8.25m for a net direct cost of £17.3m. It should be noted that this figure does not include the large indirect benefits to business of an improved competition regime.

*Option c: introduce a fast-track scheme in the CAT*

90. This would involve identifying the group of suitable cases and how the court processes could be streamlined: for instance by avoiding oral hearings where possible, or reducing the number of judges sitting for a particular case. There is a question as to whether this scheme should permit redress or simply injunction, voiding of contracts and similar 'behaviour change' resolutions. Removing or capping redress may allow cases to be quicker and cheaper by avoiding the lengthy economic analysis involved in establishing the degree of harm caused by anti-competitive behaviour.
91. A fast-track mechanism would provide an opportunity for cases to be heard that would otherwise be impractical, so it represents an increase in caseload rather than simply a shift in where cases are heard. It therefore creates additional costs, but also more substantial benefits.
92. The CAT's ability to deal with cases flexibly means that it would be able to deal with smaller, simpler cases more cheaply and quickly than a High Court case. For instance, the CAT can avoid oral hearings entirely, and has conducted some cases entirely on the documents<sup>32</sup>.
93. The fast-track scheme would allow genuinely new cases to be heard, creating a deterrent effect on categories of company or anti-competitive practice that would otherwise effectively be immune to being pursued under the current system. It is hard to accurately identify the number of cases that are currently not heard because costs would make them impractical. One indication that there is a potentially significant need for reforms in this area is that the competition pro-bono legal service has informed us that it receives over 100 complaints of anti-competitive behaviour a year, largely from smaller businesses.
94. The precise details of how a fast-track scheme would work were discussed further in the consultation document. As both the form of the scheme and the number of cases involved have not yet been ascertained, we have not been able to provide a cost-benefit analysis.

## Summary

95. It is proposed that the following initiatives are adopted in this area:
  - Allowing stand-alone cases to be transferred to and brought directly in the CAT
  - Ensuring the CAT has all relevant powers to allow it to hear stand-alone cases (such as the ability to grant injunctions)
  - Exploring possibilities for a fast-track route for small businesses
96. Increasing the use of the CAT will help concentrate expertise on competition law in a well-qualified specialist court. It should allow cases to be dealt with in the most efficient possible manner, taking full advantage of the CAT's flexibility. This will primarily benefit cases that would be brought anyway, although if cases can be shown to be significantly swifter or cheaper, this should encourage an increase in cases. The data available suggests that the court costs are likely to be lower due to the flexible and streamlined processes of the CAT. Increasing the caseload has been assumed to increase the costs for business, although we welcome comments on whether the costs to business per case are likely to be different due to being heard in a specialist forum.
97. Introducing a fast-track system could open up access to the courts for a group of particularly vulnerable businesses. It may help tackle and deter anti-competitive behaviour, and might also help small businesses to gain redress, depending on what model is decided upon.

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<sup>32</sup> For instance, the claim made by BCL against BASF (<http://www.catribunal.org.uk/237-660/1098-5-7-08-1-BCL-Old-Co-Limited-2-DFL-Oldco-Limited-3-PFF-Old-Co-Limited-4-Deans-Foods-Limited.html>).

## Section 2 - Alternative Dispute Resolution

### Issues under consideration

98. 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. 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.
99. The primary benefits of ADR include:-
- a. Restoring positive working relationships between the parties
  - b. Allowing the underlying problem to be resolved more swiftly
  - c. Defending both parties from the uncertainties and additional costs of a trial
  - d. Reducing court costs for the state
100. Of these, (a) may particularly come into play in less serious and more individual cases, such as when a locally dominant company is unaware that it is acting improperly in the way it exploits its dominant position and may be willing to simply cease such behaviour and restore better business relationships with a claimant. Benefit (b) is important for competition cases in the context of injunctions and removal of supply cases, as our consultation with stakeholders suggests that removing barriers to business is often a higher priority than gaining pecuniary compensation. Benefits (c) and (d) are likely to be more significant, as the great complexity of both ascertaining blame and calculating damages means that competition cases can involve great uncertainties and costs.
101. Potential risks of ADR include:
- a. Creating additional arbitrary burdens on claimants or defendants
  - b. Providing opportunities for lawyers to increase the costs of a case through lengthy but ineffective pre-trial processes
  - c. allowing the party with better access to information and legal provision (usually but not always the defendant) to exert pressure on the other party to accept a settlement that does not benefit them
  - d. Creating a system that is so tilted towards ADR that the threat of a case ever actually reaching court is diminished, removing the pressure to settle reasonable cases
102. All of these risks must be carefully mitigated against. Risks (a) and (b) are linked: both underline the need for ADR options to be clearly linked to reducing the number of cases going to court, and to be carefully controlled to limit the opportunity for them to become lengthy and complex processes themselves. Risk (c) is particularly relevant for competition law, due to complexity, and collective actions, due to the difficulty of a party acting on behalf of a large and diverse group of participants. One element of this risk is that, whereas in some cases it is only the *quantity* of the redress that is in dispute, in a collective action (particularly an opt-out collective action) the *nature* and even the *recipients* of the redress can be decided by negotiation. It also relates to benefit (b) above, as claimants may urgently need a cessation of anti-competitive behaviour and therefore be pressured to waive rights to compensation. Risk (d) needs to be largely addressed through the system suggested for the way the courts deal with cases, but ADR will have to be re-assessed towards the end of policy development in light of the proposals on the courts that have emerged.
103. The options below focus on areas where changing court rules or the powers of public body can increase the effectiveness of ADR. However, as set out in the consultation document, we recognise the vital importance of ADR being driven and developed by relevant business groups wherever possible, and we invite representative bodies and other private or third sector organisations to bring forward their own suggestions. Approaches such as early neutral evaluation or both parties committing to accept the finding of a private adjudicator can be brought in by non-governmental organisations and would be a welcome addition to the initiatives proposed below.

## Policy Objectives

104. The role of ADR varies depending on the precise form used. It can help to deter vexatious or frivolous cases, or at least to minimise the damage these cause. It can allow redress to be gained quickly and efficiently, particularly where infringement has already been established or admitted. It also plays a more general supplementary role of keeping costs for both parties, and for the courts, as low as possible. The following are objectives for ADR proposals

- Maintain rights to trial and redress for injured parties
- Deter frivolous or unmeritorious cases
- Ensure ADR solutions are used rather than court cases where possible
- Minimise time and costs during ADR and in court

## Description of options considered

105. We have considered four options

- Option a. Do nothing
- Option b: Introduce a mandatory or default process of ADR in the CAT, including considering the role of pre-action protocols and formal settlement offers.
- Option c: Give OFT a role in enforcing/approving redress schemes
- Option d: Introduce an opt-out collective settlement mechanism in the CAT.

## Benefits and costs of each option

### *Option a: Do nothing*

106. This would fail to establish benefits in terms of saving costs and improving redress. It could also make extension of private actions, particularly through collective actions, very costly and leave court cases as the default recourse.

### *Option b: Introduce a default assumption for use of ADR*

107. An obligatory process of ADR before litigation is an obvious way to ensure that the as many cases as possible are filtered out before court. Ensuring that parties have undergone mediation or early neutral evaluation might 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.

108. Making mediation mandatory is considered counter-productive by professional mediators, as mediation relies upon mutual willingness to come to a resolution<sup>33</sup>. Mediation where participants are not willing to engage is simply a waste of money for both participants, clashing with the aim of minimising time spent on cases. Early neutral evaluation could also be mandatory, but a realistic estimate of damages can be very expensive to obtain in competition cases; if this estimate could influence a following court case, whether by acting as a baseline for damages, or affecting cost allocation, then there will be incentives for parties to spend substantial amounts on economic evidence at this stage, front-loading the case and potentially adding to the total costs. If the estimate could not be heard at the case, then it could be an additional cost with no benefit, as parties forced to early neutral evaluation would be unlikely to commit resource to it or agree to its findings. Mandatory ADR of this kind is therefore not a preferred option.

109. However, a 'nudge' approach could be implemented, whereby ADR is the default first resort, and is at least considered before court cases are initiated. This would help ensure as many as cases as possible were addressed through ADR, but without the problems of mandatory mediation. As larger businesses tend to be more familiar with the benefits of ADR, this might be most useful as part of the process of the fast-track system proposed as part of the Court Reforms above.

110. The CAT is already strongly committed to ADR<sup>34</sup>, for instance in Rule 44 of their Rules of Procedure., and is well placed to advise litigators and defendants on the options available to them,

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<sup>33</sup> For instance see <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/docs/Twisting-arms-mediation-report-Genn-et-al.pdf>

<sup>34</sup> See for instance Rule 44 of their Rules of Procedure



and to encourage them to use ADR wherever possible.<sup>35</sup> Some of the potential ADR methods that may be useful in the CAT are set out below.

111. Pre-action protocols are used in several areas of law. These are aimed at assisting pre-action settlement of cases, but also supporting the efficient management of proceedings that cannot be avoided, helping reduce the time taken on cases as well boosting the number of cases resolved through ADR.<sup>36</sup> Pre-action protocols tend to require a fixed set of actions in simpler cases, while in more complex cases, parties must abide by their spirit. In the former case, it can be mandatory to fulfil protocols before a case starts: in the latter, parties' attention to the protocols can affect how costs are allocated. If a fast-track system is introduced in the CAT, this might be suited to a fixed protocol, but in general the complexity of cases means that enforcing the spirit of the protocols would be more practical.
112. Pre-action protocols have to be considered carefully as they carry the risk of imposing unnecessary bureaucracy (threatening objective 4) and for upping the bar before a case can be brought, making it harder to bring cases (threatening objective 1). But the increased clarity they give to good practice can not only avoid unmeritorious cases, but might give more confidence to litigants to progress as they can judge whether their case fulfils the requirements.
113. Formal settlement offers can be permitted in courts, 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.

*Option c: Give OFT/ CMA a role in enforcing/approving redress schemes*

114. Many forms of ADR are focused on redress, once the matter of fault has been established. As the competition regime involves most large cases being detected and tackled by the public authorities, the question of compensation for injured parties would generally arise once an infringement has been established and the business in question fined. As the public authorities will have built up a detailed understanding of the infringement in the process of making their finding, they are well placed to deal with the issue of redress.
115. The OFT/ CMA could be given a power to certify a redress scheme proposed by a business that has infringed competition law to make suitable compensation available to injured parties. This could be modelled on the Financial Standards Authority's Section 404 powers, as they apply to individual businesses rather than whole sectors. As the OFT's priorities and primary expertise is in detecting infringement rather than calculating damages, they would certify that the scheme had been created according to certain principles, rather than assess the fairness of the final award. To ensure that this decision was regarded as reliable by all parties concerned, it might be preferable for an independent body to make the calculations on behalf of the business. Businesses would create such redress schemes to help repair their reputations or to avoid the risk of court cases, particularly if collective action powers are increased. Promptly creating such a redress scheme might also reduce the level of redress imposed by the OFT/ CMA.<sup>37</sup>
116. Another option for ADR through the public authorities would be to give the OFT, or a new body, powers to make binding arbitration on cases. This could be modelled on the Financial Ombudsman Service (FOS), which makes rulings on disputes between consumers and financial services providers. However, the case is different as the FOS is focused purely on consumers, who require different kinds of protection. It is also responsible for a single industry, and its costs are borne by that industry, whereas a competition arbitrator would have an undefined scope and would not be able to be funded from a specific private sector group. Finally, the great complexity of competition cases means that establishing infringement through this process would be very costly: essentially,

<sup>35</sup> See for instance the Burgess cases (<http://www.catribunal.org.uk/238-1201/Final-judgment.html>) where CAT case management assisted the parties in mediation

<sup>36</sup> [http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice\\_directions/pd\\_pre-action\\_conduct.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_pre-action_conduct.htm)

<sup>37</sup> For more detail see [http://www.of.gov.uk/shared\\_of/consultations/oft423con.pdf](http://www.of.gov.uk/shared_of/consultations/oft423con.pdf)

this would require the OFT undertaking investigations on the request of any party that felt it had been harmed by anti-competitive behaviour, rather than using its own prioritisation methods.

117. The approach of the CMA certifying business redress schemes is therefore more suitable for this case. Allowing the CMA to initiate these schemes gives it the flexibility to help with redress where this is practical and a priority, while allowing them to authorise redress schemes is likely to be particularly productive if collective actions are introduced and provide the motivation to resolve cases as swiftly as possible.
118. We can give a broad estimate the number of cases likely to be resolved under this scheme by considering the number of cases where redress is currently not provided. Between 2000-7, there were 21 findings of infringement by the OFT under the 1998 competition act. 13 of these could have led to follow-on cases from injured parties, but only two did - against Genzyme and Burgess. Settlement may have been reached in other cases, so an estimate of the relative propensity of court cases and settlements is needed. Research shows that between 2005-8, 41 judgements were made at court: about 10 per year.<sup>38</sup> However, the same research shows that only around 30% of cases were follow-on, for a total of 3 per year. A survey of legal practitioners indicates that there were 43 out-of-court settlements between 2000-5 related to anticompetitive practices, about 7 per year.<sup>39</sup> We can therefore model on the assumption of there being around two settlements for every follow-on case, suggesting that a further four of the 13 cases were resolved. This leaves seven over the course of eight years: an average of just under one per year. Discussions with the OFT have made it clear that they would not automatically prioritise such cases: we therefore assume that 50% would be suitable for the use of this power, meaning approximately one case every two years, or 0.5 per year.
119. The costs and benefits of this scheme can be estimated based on the example of the similar FSA power. The FSA have provided estimates to us that a typical section 404 case requires 0.4FTE of legal work and 0.1 FTE of policy work for a period of around three months. Assuming both the policy and the legal employee are Grade 7 equivalents, their annual payroll costs will be around £65,600.<sup>40</sup> 0.5 FTE for three months at £65,600 provides a cost of approximately £8,200 to the OFT per case. This would not be a judicial process, so there would not be legal costs for the business, but there would be some cost in calculating the amount of damages to be paid. This would be less than the management time and cost needed for a court case, estimated at approximately 50% of the non-legal cost associated to a court case. This suggests a cost to participants in court of approximately £350,000 per case.<sup>41</sup>
120. The level of benefit depends upon the level of redress imposed - these would by definition be follow-on cases so the benefit is in redress and deterrence rather than tackling new cartels. The average OFT fine between 2000-2006 was £3.3m<sup>42</sup>; there is no direct precedent for the level of damages, but Rachael Mulheron's study of opt-out regimes showed payouts in Canada and Australia varied from 0.3 of the fine to 1.53 of the fine, with an average of 0.8. This can be used as a very rough indication of the broad proportion of damages to fines, suggesting that a £3.3m fine would create payouts per case of £1m-£5.5, with an average of £2.6m. These figures are based on the results of court cases, and settlements involve a degree of negotiation over quantum. We therefore model the redress scheme as being worth 80% of this, at £2.1m per case. Given that we are modelling a 1:1 relationship of deterrence to payout in follow-on cases, this gives a benefit to the economy of £2.1m per case, or 1.05m per year.
121. The High and Low scenarios have been built around the same assumptions as those set out in Section 1: in particular, the High scenario has a 5:1 deterrence effect for follow-on cases, whereas the Low scenario has no deterrence effect for such cases. Note that different proportions of cases being heard have not been modelled in the High and Low scenarios.

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<sup>38</sup> Rodgers (2008)

<sup>39</sup> Rodger, Barry (2008) 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the UK, 2000-2005'

<sup>40</sup> Figures derived from total paycosts on BIS payroll for a Grade 7 official

<sup>41</sup> From same figures used in CAT: £1.4m legal costs for one side in a follow-on action, non-legal costs being half this at £700k and costs for economic calculations without other non-legal costs being half this at £350k. Low and high limits of £1m and £1.8m for legal costs suggest low and high business costs of £250k and £450k respectively

<sup>42</sup> [http://www.offt.gov.uk/shared\\_offt/economic\\_research/offt1132.pdf](http://www.offt.gov.uk/shared_offt/economic_research/offt1132.pdf) This figures represents fine per case (rather than per infringer), after leniency reductions but before any appeal.

**Table 8: Costs and benefits of redress imposition power**

	Cases p.a.	OFT costs per case	Business costs per case	Gross costs per case	Deterrence per case	Net benefit per case	Net benefit per annum	Additional: redress p.a.
Benefits – LOW scenario	0.5	£8k	£450k	£458k	-	-£458k	-£229k	£1,050k
<b>Best estimate</b>	<b>0.5</b>	<b>£8k</b>	<b>£350k</b>	<b>£358k</b>	<b>£2,100k</b>	<b>£1,617k</b>	<b>£808k</b>	<b>£1,050k</b>
Benefits – HIGH scenario	0.5	£8k	£250k	£258k	£10,250k	£9,992k	£4,996k	£1,050k

**Additional cost analysis**

122. As the only variable affecting our estimate of the costs of the redress imposition power is the cost to business per case, the high limit of the costs of these reforms is simply the cost in the Low scenario (£458k per case for 0.5 cases per year for a total of £229k per year) and the low limit is simply the cost in the High scenario (£258k cost per case for 0.5 cases, for a total of £129k per year).
123. For the purposes of calculating a cost to business of the redress imposition power, we have to consider that while all infringers bearing costs would be businesses, not all OFT cases are brought on behalf of businesses. Considering recent OFT cases, the potential beneficiaries of such as scheme are fairly evenly split between consumers and businesses, and we use a very rough estimate of 50% of redress benefitting consumers.
124. This means that business costs per annum would be £175k for the economic costs of formulating the system, plus £1,050k in redress for a total of £1.225m. The business benefits would be half of the redress, around £525k.

**Option d: Introduce an opt-out collective settlement mechanism in the CAT.**

125. Another option, that would complement the involvement of the OFT in facilitating redress, is the introduction of opt-out collective settlements. Here, a business and a representative of the potential claimants would jointly petition the CAT for judicial approval of a collective settlement, on an opt-out basis. An overseas precedent for this is the Collective Settlement Act (2005) in force in the Netherlands<sup>43</sup>. These agreements would need to be overseen by the CAT as part of the ADR process, to minimise the risk of a representative body agreeing an unsuitable collective settlement, thereby effectively robbing other consumers or businesses of their right to redress through the court system. This approach would meet the policy objectives of encouraging use of ADR rather than the courts where appropriate, and minimising time and costs, whilst providing redress for injured parties (a similar action under the Dutch model resulted in over Euro 50m being returned to claimants in one case).
126. To estimate costs and benefits of collective settlement is difficult, owing to lack of clear precedent. However, it would be reasonable to assume that the costs to the court were around a third of those predicted for opt out collective actions, as, under a settlement, less court time would be required as both parties have the same objective. The benefits and the costs to business have been estimated in a similar manner as for settlements certified by the CMA, as in both cases the business would essentially be engaged in a collective settlement mechanism with those who had suffered loss.

**Additional cost analysis**

127. Calculating additional costs to business for private collective actions in the same manner as for the redress imposition power described in paragraphs 122-124, we find that business costs are again £350k for legal and other costs (halved to £175k to reflect 0.5 cases per year), with an additional £1050k in redress per annum, giving a total business cost of £1.225m per year. Business benefits per year are £525k per year, reflecting half the redress, giving a net cost to business of £700k per year.

<sup>43</sup> Dutch Collective Settlement of Mass Damage Act (WCAM 2005).

**Table 9: Costs and benefits of collective settlements**

	Cases p.a.	CAT costs per case	Business costs per case	Gross costs per case	Deterrence per case	Net benefit per case	Net benefit per annum	Additional: redress p.a.
Benefits – LOW scenario	0.5	-£7.7k	-£450k	-£457.7k	-	-£457.7k	-£229k	£1,050k
<b>Best estimate</b>	<b>0.5</b>	<b>-£7.7k</b>	<b>-£350k</b>	<b>-£357.7k</b>	<b>£2,100k</b>	<b>£1,742.3k</b>	<b>£871.2k</b>	<b>£1,050k</b>
Benefits – HIGH scenario	0.5	-£7.7k	-£250k	-£257.7k	£10,250k	£9,992.3k	£4996.2k	£1,050k

**Summary**

128. It is proposed that the following initiatives are adopted in this area:

- Ensure that ADR is the default route for competition cases, particularly in any fast-track system
- Allow the OFT to impose/authorise redress schemes for businesses that are found to have infringed competition law
- Introduce an opt-out collective settlement mechanism in the CAT.

129. ADR is already likely to be considered by those pursuing competition cases. Ensuring that it is the clear default, particularly for smaller cases if a fast-track is introduced, will help deter frivolous or unmeritorious cases and should prevent unnecessary legal costs and court time. Maintaining this as a default rather than a mandatory requirement not only reflects the experience of mediators, but ensures that injured parties' right to take offenders to court is not restricted.

130. Updating ADR for competition cases, particularly in the CAT, supports a range of objectives. Certification is particularly important for reducing the number of unmeritorious cases, while formal settlement offers help to reach the sought outcome of redress while minimising the time and money spent in court.

131. Giving the OFT power to certify redress schemes after an infringement decision could allow very swift movement from the infringement decision to an effective redress package, avoiding court entirely. However, it is vital that this power does not replace the ability of an injured part to litigate, and that the OFT's role as focused on detection and deterrence is clearly maintained.

### 3 - Complementing public enforcement

#### Issues under consideration

132. The UK has a strong, internationally respected public enforcement system which has grown up in an environment with few private actions. Public enforcement of antitrust is worth £151m a year according to the most recent OFT positive impact report<sup>44</sup>. It is important that any changes made to the private actions environment is complementary with the work done by the 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.
133. Our proposals on private actions are designed to positively work alongside public enforcement. Policies that streamline follow-on cases complement the deterrence effect of public authorities' penalties, both by increasing deterrence 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.
134. 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.

#### Leniency

135. The OFT's leniency programme (and that of the European Commission and other EU NCAs) 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 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 through deterrence - of cartel conduct.
136. However, businesses which come forward, particularly whistle-blowers, are more vulnerable to private actions than other cartelists. This might lead to fewer businesses 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 *Pfleiderer* case<sup>45</sup>, showing that access to them is in principle permitted: this judgement, and its consequences are currently being considered by the EC
137. 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 whistleblowing 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 whistleblower or apply for leniency.

<sup>44</sup> [http://www.offt.gov.uk/shared\\_offt/reports/Evaluating-OFTs-work/oft1428.pdf](http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1428.pdf)

<sup>45</sup> Case details can be found at <http://www.cgsh.com/files/Publication/e2c45440-d839-4560-af19-86952d47457c/Presentation/PublicationAttachment/2aa07cde-1470-4431-a038-8a601d947812/National%20Competition%20Report%20Q3%202011.pdf>

138. By helping to encourage leniency applications, these policies would increase detection and deterrence of cartel cases, including many of the most serious. In the UK leniency applications play a crucial role in these two areas. Research conducted by the OFT has found that an effective leniency programme is one of the most important determinants of the deterrence effect of competition policy. The OFT receives a significant number of leniency applications. For example between April 2002 and March 2011 it received 215 applications for leniency related to breaches of competition law. It is difficult to identify precisely how many of these companies would have applied for leniency if they expected to be vulnerable to private actions, including collective actions. However, those motivated by fear of a fine might be unwilling to risk the damages cost. The strength of this disincentive for leniency applications will depend upon the policies below on leniency documentation and joint and several liability, but also upon the more general regime. The more litigants are able to gain significant amounts of redress, whether through well-functioning ADR or a strong collective actions regime, the stronger the disincentive is likely to be, and the more important effective policies in this area become.

### **Policy objectives**

139. As well as supporting the general objectives of private actions policy as a whole, policies to protect public enforcement

- Ensure that consistency is maintained between public and private regimes
- Maintain an incentive for whistleblowers particularly and leniency applicants more generally
- Retaining access to redress for injured parties

### **Description of options considered**

*Option a: Do nothing*

*Option b: Protect leniency documentation from use in private actions*

140. This would require careful consideration to ensure that companies did not become disproportionately vulnerable due to their co-operation with competition authorities, but equally that the protection of documentation did not extend to broader evidence of wrongdoing which may form part of their application but would have existed if they had not applied for leniency. Work on this issue is ongoing at the European level.

*Option c: Reduce vulnerability of leniency recipients to joint and several liability*

141. The aim of this would be to ensure leniency applicants are not the primary targets for damages claims, given that even if leniency documents are not released they remain more vulnerable than other cartelists. This could be achieved through a number of approaches, from simply removing joint and several liability from leniency recipients entirely to allowing injured parties to seek full damages from any party of their choosing, but making it easier for leniency recipients to reclaim payments from other cartelists.

### **Benefits and costs of each option**

*Option a: Do Nothing*

142. For the reasons set out above, this option may be problematic, particularly when combined with action on other areas. If private actions become more attractive and practicable due to other reforms, then it will be increasingly critical to protect the leniency regime from unintended consequences of this.

*Option b: Protect leniency documentation from use in private actions*

143. As outlined above, the incentive systems around leniency are complex, and we cannot reliably isolate the influence of leniency documentation being made available in private actions. We welcome suggestions on what sort of protection of leniency documentation would be suitable.

144. The objective of this proposal is to avoid any significant cost in terms of damaging the leniency programme of the OFT. However, this must be done in a way that puts as few limits as possible on the ability of injured parties to seek redress from at least some source. We welcome suggestions

on how this might be approached. The risks attached to a poorly handled leniency system are critical. An overly protective system would increase costs for claimants and lower the likelihood of success, decreasing the net benefit of the increase in private actions set out in Sections 1 and 4. However, an overly free system might undermine the effectiveness of the OFT leniency system.

*Option c: Reduce vulnerability of leniency recipients to joint and several liability*

145. As with Option b, we are seeking views on how best to achieve our aim of protecting the leniency system, and have not been able to quantify this option.

**Summary**

146. It is proposed that the following policies are adopted in this area, though it is likely that these will be taken forward at European rather than at national level.

- Protect leniency documents from use in private actions
- Reduce vulnerability of leniency recipients to joint and several liability.

147. Protecting leniency documents and reducing the vulnerability of leniency recipients to joint and several liability will both help ensure that leniency programmes continue to be an effective method of public enforcement.

## 4 - Collective actions

### Background

148. An effective system for collective actions in competition has often been seen as desirable to gain redress: this is for instance the focus of the current consumer collective action power. However, collective actions also discourage future anti-competitive behaviour, both from the infringer and more widely, by lowering the incentives to engage in such behaviour. This is because successful actions result in penalties which raise the cost of anti-competitive behaviour to the infringer, over and above any fines levied by the public competition bodies.
149. Collective actions can also raise the probability of detection of anti-competitive behaviour, if they can be taken as stand-alone as well as follow-on cases. Parties who have suffered from anti-competitive behaviour are best placed to gauge the existence and effects of such behaviour and as such of the potential infringement. Coupled with the incentives (of remedial actions) in pursuing such violations through the courts, collective actions can act as an important mechanism for redress.<sup>46</sup>
150. Cases taken through collective actions could in theory be resolved in a series of cases by each individual claimant. However, litigation costs act as a barrier to individual claims to redress, particularly where the expected payout from successful claims are significantly smaller than the legal costs involved. Collective actions therefore have a particular role to play in situations where the cost of an action brought on behalf of the entire group of those who have been harmed is likely to be lower than the sum of the costs of individual actions and possibly also of the sum of the cost of individual settlements.
151. For this reason, greater efficiency for injured parties, as well as the courts, are achieved by aggregating the claims. An action brought on behalf of consumers or businesses at large, that have been affected by anti-competitive action maximises economies of scale.

### Problems with the current system

#### *Collective actions for consumers*

152. Only one collective action has been taken on behalf of consumers in the UK.<sup>47</sup> Therefore consumers have rarely recovered damages for breach of the competition rules in the UK, even though they have been directly harmed by a number of cartels operating at the retail level.<sup>48</sup>
153. Several factors can explain the low number of cases despite the significant harm suffered by consumers. Currently, only opt-in, follow-on consumer representative actions are permitted. The reliance on findings from the Competition Authorities may be deterring valid representative claims, particularly seeing the length of the typical antitrust case (for example on average, both cartel and abuse of dominance cases took around 50 months to complete by the OFT<sup>49</sup>).
154. Furthermore, participation rates in representative actions on behalf of consumers are relatively low, particularly seeing the current opt-in arrangements. Research conducted for the Civil Justice Council, shows that the great majority of opt-in rates achieved under Group Litigation Orders (GLOs)<sup>50</sup> are 50 percent or lower. By contrast it notes that the median participation rates in opt-out cases where evidence is available have been between 87 and over 99 per cent.<sup>51</sup> Therefore, the current system may not be reaching a sufficient number of harmed consumers, due to the current opt-in system.
155. Evidence suggests that current arrangements for representative follow-on actions, which are restricted to opt-in, continue to fail to optimise economies of scale and give rise to unnecessary costs and complexity. For example Which? noted in its response to an OFT discussion

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<sup>46</sup> McAfee et al 'Private v Public enforcement', 2008

<sup>47</sup> The Consumers Association v. JJB Sports plc. Case No 1078/7/9/07.

<sup>48</sup> For example see the case of Hasbro/Argos/Littlewoods, where a leading toy supplier entered into agreements to fix prices with major retailers. (<http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/argos2>)

<sup>49</sup> Global Competition Review 2011

<sup>50</sup> GLOs allow the courts to group cases which are similar in the facts or points of law which they raise.

<sup>51</sup> "Reform of collective redress in England and Wales", available here:

[http://www.lawcentres.org.uk/uploads/Collective\\_Redress\\_Prof.Mulheron\\_.pdf](http://www.lawcentres.org.uk/uploads/Collective_Redress_Prof.Mulheron_.pdf).



document<sup>52</sup>, 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 recruit a small proportion of those harmed by the cartel. OFT has noted that the requirement to take representative actions on an opt-in basis (as Which? was required to do in its action against JJB Sports) is restrictive and fails to maximise economies of scale. Which? have since stated that they would not take further cases under the current regime.

### *Collective actions for businesses*

156. Currently, while representative follow-on actions can be heard by the CAT on behalf of consumers, they cannot be brought before the CAT on behalf of businesses. Evidence suggests that businesses are deterred from bringing an individual claim, even in follow-on cases, where they do not have the burden of proving liability. According to a Rodger (2009) study, from the introduction of the Competition Act 1998 (CA98) until the end of the financial year 2006/07, there were 13 OFT infringement decisions where a claim could have been brought by individual businesses in the UK<sup>53</sup>. Only two follow-on claims have been raised and dealt by the High Court (English, Welsh and Scottish Railway Ltd vs. E.On UK Plc and Devenish Nutrition Ltd vs. Sanofi-Aventis SA France), with the latter proceeding onto the Court of Appeal.<sup>54</sup> It is worth noting that settlements may have been reached in other cases without legal proceedings having been commenced.
157. An OFT survey of companies and competition lawyers, seeking to estimate the deterrent effect of the competition regime, found that the threat of private damages actions under the current UK system had a very limited deterrence effect on behaviour which could be construed as anti-competitive.<sup>55</sup> Furthermore, despite the fact that a significant proportion of the companies surveyed thought that they had been the victim of anti-competitive behaviour (22 percent or 45/202 companies), just over half of these did not even consider taking the legal challenge route, with only 11 percent (or 5/45) of the harmed firms finally bringing action. The most commonly cited reason for not bringing an action was that the expected costs outweighed the benefits.<sup>56</sup> Improved access to private actions for businesses through collective actions would mean that a greater proportion of these are likely to pursue redress through the courts or result in other forms of resolution, such as dispute resolution mechanisms or settlements.

### **Policy objectives**

158. The policy objectives for the policy proposal are as follows:
- Improved redress mechanisms for parties harmed through anti-competitive behaviour, both through follow-on as well as stand-alone collective actions;
  - Providing a significant deterrent effect to future anti-competitive behaviour through an effective system for collective actions; and
  - The proposals strike the right balance between the need for an effective system for collective action claims and protecting of defendants from having to settle unmeritorious claims.

### **Options considered**

159. The policy options under consideration are as follows. For options a-e, each option builds on the previous one by introducing an additional element that further opens up private actions. Option f considers the alternative approach of giving opt-out powers to a public authority, building on the same model that has been reached in option e.
- Option a: Keeping the existing private actions systems in place. That is follow-on and opt-in consumer representative actions heard before the CAT. Businesses would not have access to collective actions.

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<sup>52</sup> “Private Actions in competition law: effective redress for consumers and business”, available here: [http://www.of.gov.uk/shared\\_of/reports/comp\\_policy/oft916.pdf](http://www.of.gov.uk/shared_of/reports/comp_policy/oft916.pdf).

<sup>53</sup> Rodger (2009),

<sup>54</sup> Ibid, pp. 93-114.

<sup>55</sup> See OFT 1391 and OFT 963

<sup>56</sup> OFT “The deterrent effect of competition enforcement by the OFT”, November 2007. Available here: [http://www.of.gov.uk/shared\\_of/reports/Evaluating-OFTs-work/oft962.pdf](http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft962.pdf)

- Option b: Extending the current consumer rights to businesses, allowing businesses to initiate follow-on collective actions, under an opt-in system;
  - Option c: Introducing opt-in actions, including stand-alone cases, for consumers and businesses;
  - Option d: Introducing pre-damage opt-in actions, including stand-alone cases, for consumers and businesses; or
  - Option e: Introducing opt-out actions, including stand-alone cases, for consumers and businesses.
  - Option f: Introducing opt-out actions, including stand-alone cases, for a public authority to pursue on behalf of consumers or business
160. The introduction of collective actions is proposed as part of a broader range of reforms, including the court reforms, changes to ADR and protection of leniency documentation outlined in the sections above. If collective actions are introduced, a group of supplementary measures are included below with the aim of making them effective but carefully controlled. These are outlined in the consultation document in more detail.

### **Benefits and costs of each option**

161. In the section that follows, each of options a-f are assessed against the baseline, which in this case is the option to retain the current system for collective actions. The most detailed numerical analysis is in Option e, the preferred option.

#### *Option a: Do nothing*

162. This would leave a class of anti-competitive behaviour, cases where benefit is gained by relatively low damages to a wide range of individuals or businesses, reliant entirely on the public competition authorities to resolve, with no practical way for private parties to pursue behaviour cessation or redress on their own terms. This fact would further mean there was little incentive for companies guilty of such behaviour to settle with ADR methods. However, the risk of creating a large number of vexatious claims would be avoided.

#### *Option b: Extension of current consumer rights to businesses (follow-on opt-in collective actions)*

163. The introduction of an opt-in framework for business collective actions follows from on the presumption that the businesses affected by anti-competitive behaviour are best placed to decide whether they wish to pursue this route. Therefore, a system where the onus is placed on the claimant arguably strikes the right balance between allowing claims to be brought before the Courts, while giving the business the option to select their representatives and by implication greater control over the case.
164. Under this option, the rights of businesses in this area would be aligned with those of consumers, bringing equality between the two groups. This is particularly important for smaller businesses, which may be hampered by the expected costs of legal action, creating a more just and consistent regime.
165. More 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.<sup>57 58</sup>
166. However, it should be noted that these arrangements would not address some of the issues faced by the current consumer representative system, such as the need for the representative body to identify affected parties at an early stage of proceedings. This is crucial since the representative

<sup>57</sup> 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.

<sup>58</sup> See paragraphs 3.41-3.42 in "An assessment of discretionary penalties regimes", report prepared for the OFT by London Economics, October 2009.

body may be disincentivised from beginning court proceedings where it is hampered by the difficult task of identifying affected businesses.<sup>59</sup>

167. Another important element of this policy option is the requirement for the representative body to name claimants which are taking part in the action. This requirement has been shown to be prohibitive on the consumer side, 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. Therefore, a proportion of affected claimants may be disincentivised from joining representative actions for fear of damaging business relations. This would clearly affect smaller businesses significantly, since they would be the ones most likely to take the representative action route (since launching own legal challenge would have been prohibitively expensive) and most likely to be affected by any damages to business relationships.
168. We sought the views of legal experts on the likely effects of the introduction of an opt-in collective action option for businesses on the number of cases going through the judicial system and their characteristics. Respondents were mainly of the view that the proposed changes were likely to result in a minimal uptake of this option. One respondent noted that opt-in collective actions for business had become more accessible since the introduction of access to the High Court. Another stated that unless reforms specifically addressed the legal costs of taking litigation for harmed parties, there was unlikely to be a significant increase in the number of cases.
169. The experience of opt-in collective actions on the consumer side, shows limited success, given that only one case reached the courts and that only a few hundred claimants signed up to the £10 and £20 refunds as a form of redress for that particular infringement. This is far outweighed by the fines that the parties involved in the price-fixing case received, amounting to circa £19 million.<sup>60</sup> The redress gained for consumers was very limited relative to the costs of the case, and the additional deterrent effect would be minimal given the relative size of the fine and the redress. Additionally, the body that brought the claim has indicated that it would not do so again under the current system.
170. Based on this analysis, it seems unlikely that simply extending current rights to businesses would produce a significant number of additional cases, and it may well create none at all. We have therefore not attempted to calculate costs or benefits for this option. Instead, we have considered how the rights of both consumers and businesses can be extended to create an effective collective actions regime.

#### *Option c – Stand-alone opt-in*

171. As outlined above, current collective actions are limited to follow-on cases for consumers only. Our evidence suggests that simply extending follow-on actions to business would not be effective. The proposed measures would therefore extend the scope of stand-alone actions, by facilitating representative actions on a stand-alone basis.
172. The most obvious benefit of allowing stand-alone actions is the fact that it enables parties affected by anti-competitive behaviour to seek resolution without having to rely on an infringement decision by the competition authorities, which can take a long time to conclude. Furthermore, the measure would allow economies of scale in bringing cases before the courts, since the current stand-alone regime has only seen one case, and the uncertainty of achieving sufficient involvement to justify the costs is a significant part of the reason for this. Stand-alone actions are also beneficial as they allow both a more immediate corrective mechanism against anti-competitive behaviour and also the detection of infringements, which could have gone undetected under a follow-on system, given the resource constraints faced by the public authorities.
173. Opt-in regimes rely on claimants affirmatively opting into the collective action within a specified time frame and being bound by the judgement or the settlement resulting from the proceedings. Opt-in places the responsibility for the decision on whether to join the collective action and as such arguably strikes a balance between allowing the benefits of representative actions, while giving the individual freedom as to the legal route they follow in relation to the claims.<sup>61</sup> Even if affected

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<sup>59</sup> This is less likely to be an issue here, since we would expect that the parties would have good records of past contracts and transactions, making identification of affected parties relatively easier.

<sup>60</sup> [http://oft.gov.uk/news-and-updates/press/2003/pn\\_107-03](http://oft.gov.uk/news-and-updates/press/2003/pn_107-03)

<sup>61</sup> Mulheron (2006).

parties do not take up the right to join the collective action, they may benefit from any precedent-setting decision resulting from the collective action, should they decide to bring an individual claim.

174. It is not possible to estimate with precision how many stand alone cases are likely to come forward as a result of the proposed measures, although international practice and a consideration of the design of the UK proposals are helpful in indicating broad parameters.
175. Sweden's group litigation regime is an example of an opt-in regime, covering a range of issues rather simply competition law. Between its introduction in January 2003 and June 2006, there had been six private class actions and one public action. At the time of the study, none of these cases had resulted in a ruling from court.<sup>62</sup>
176. Legal experts were of the view that the option to bring stand-alone opt-in collective actions before the courts, was unlikely to result in any meaningful rise in the number of cases being brought. One respondent noted that the real impediment to this type of action was the complexity and cost of bringing such action. Another noted that the cost of such action would continue to act as a deterrent to harmed parties.
177. The expectation of minimal take-up of such cases arises both from the complexity of managing the identification and participation of multiple parties, and the need to prove that a breach of competition law took place, as well as the impact the breach had on the harmed parties. 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.
178. There is therefore no clear evidence of successful cases under this opt-in system, as we would not expect strong engagement amongst potential participants and so we have not attempted to provide costs and benefits for this option. We instead need to consider how to raise involvement in cases

#### *Option d – Pre-damages opt-in*

179. A collective action system which allows pre-damages opt-in would result in action being brought initially in terms of a defined group with a minimum number of identified members. Other affected parties could opt-in or confirm participation at any time before the damages are quantified, including in the period after any findings of infringement. The issue of liability would be determined for any individual who had not expressly opted-out before it was decided. But individuals who had not opted in or out of the action could still bring separate claims for damages if the liability decision was favourable.
180. In theory, the pre-damages opt-in route has a key advantage over the pure opt-in route, since it does not restrict the representative body to identifying a sufficiently large proportion of affected parties, before legal proceedings become a viable route.<sup>63,64</sup> 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 collective actions. 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. Therefore the net effect would be that a greater proportion of the affected parties would achieve some form of redress. However, the extent of this is questionable, and it should be noted that no major regime functions on a pre-damages opt-in system, so evidence of effectiveness is hard to uncover.
181. While it has some benefits over the proposals above, we have not been able to find any evidence of pre-damages opt-in being superior to the opt-out system outlined below: the main effect would simply be to lower the redress paid in the initial case, and create further independent cases from those who had not opted in before damages, increasing court costs relative to the redress achieved. We therefore consider the pure opt-out option.

<sup>62</sup> [http://ec.europa.eu/consumers/redress/out\\_of\\_court/adr/abyhammar\\_intervention\\_adr2006.pdf](http://ec.europa.eu/consumers/redress/out_of_court/adr/abyhammar_intervention_adr2006.pdf)

<sup>63</sup> Note that there is not numerosity requirement in collective actions currently. See Mulheron, R. (2006), 'The class action in common law legal systems: a comparative perspective', Hart Publishing, pp.91.

<sup>64</sup> 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 vs. 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](http://globalcampus.ie.edu/webes/servicios/descarga_sgd_intranet/envia_doc.asp?id=9684&nombre=AccesoDatosDocumentoI.Documento.pdf&clave=WPLS10-03).

## Option e – Opt-out

182. Under this option actions would be brought in the CAT 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. Failure to opt-out would make the outcome of the collective action binding on the individual. This is a major advantage of this option to businesses, since it limits the degree to which action at a later time can take place, thus providing greater certainty, particularly for the defendants. Even if a significant number of affected parties opt-out of the collective action, the defendants are able to reliably estimate the number that could bring individual claims. This is also efficient since it reduces the likelihood that individual proceedings will take place after the collective action, which can be duplicative.
183. Research shows that the great majority of opt-in rates achieved under Group Litigation Orders are 50% or lower. By contrast it notes that the median participation rates in opt-out cases where evidence is available have been between 87 and over 99 per cent.<sup>65</sup> Therefore participation and by implication consumer redress, are likely to be higher under the opt-out proposals.
184. Opt-out has been adopted under the competition regimes of Quebec, Ontario, British Columbia, the Canadian federal regime, Australia's federal regime, the state regime of Victoria and in the US class action regime.<sup>66</sup> Mulheron notes that the opt-out period in these jurisdictions is typically between 1 and 6 months.<sup>67</sup> Opt-out also exists in Poland, Spain and Portugal.
185. Experience in Canada, for which most data is available, shows that between 1997 and 2008, approximately 25% of collective action cases were stand-alone actions<sup>68</sup>. It is clear both that a non-trivial amount of cases were brought and, equally, that permitting stand-alone actions did not unleash a flood of frivolous claims.
186. Legal experts we contacted gave mixed views as to the likely impact of these reforms on the number and type of cases that were likely to end up in court. One noted that given the significant costs associated with bringing action, it was unlikely that a significant number of cases would be brought. Another noted that while the proposal was unlikely to affect the number of stand-alone case, the number of follow-on actions was likely to rise, particularly for consumer-related breaches of competition law. They noted that the recent tobacco<sup>69</sup> and dairy<sup>70</sup> cases, both had consumer elements and that if the incentives were there, more of such cases would be taken under the proposed reforms. In a similar argument, another respondent suggested that the opt-out element of the reform would result in a significant uptake of follow-on cases.
187. The proposal of a system working under opt-out but with strict controls most closely resembles the regimes currently present in Canada, Australia and Portugal. These systems have been compared in a study (Mulheron 2008), considering a period of sixteen years for Canada and Australia and thirteen years for Portugal. Over this period, 35 Canadian cases, 5 Australian cases and 1 Portuguese case were brought.<sup>71</sup> The success rate of cases that have been finalised is 78%. As the number of individual cases is very low, this success rates is applied to all countries in the analysis below.
188. This large variation is underlined by similar variation within the same regime but in different years: for instance, Canada saw 4 cases in 1999 but none between 1992 and 1997. However, the difference between the regimes is reduced somewhat by the fact that there is a strong inverse relationship between the number of cases and the average size of settlement, as set out below.

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<sup>65</sup> "Reform of collective redress in England and Wales", available here:

[http://www.lawcentres.org.uk/uploads/Collective\\_Redress\\_Prof.Mulheron\\_.pdf](http://www.lawcentres.org.uk/uploads/Collective_Redress_Prof.Mulheron_.pdf)

<sup>66</sup> Mulheron (2006), pp.45-35.

<sup>67</sup> Ibid, pp 35.

<sup>68</sup> Mulheron (2008)

<sup>69</sup> <http://www.ofc.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/tobacco>

<sup>70</sup> <http://www.ofc.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/dairy-products/#named5>

<sup>71</sup> Mulheron (2008)

**Table 10: Settlement level and number of cases in international collective actions systems**

	Canada	Australia	Portugal
Average successful cases per year	1.7	0.24	0.06
Mean settlement	\$10.6m	\$30.5m	\$160m
Mean settlement per year(\$m)	\$18.2m	\$7.4m	\$5.6m
Mean settlement per year (£m) <sup>72</sup>	£11.8m	£4.8m	£3.6m

189. An increased level of collective actions in Canada compared to the other two regimes reflects the fact that lower value claims are pursued as well as higher value claims, rather than that additional very high value claims are being pursued: this is reflected in the fact that the median settlement for Canada is far lower than the mean at around \$1.5m. For this reason, the analysis below has always considered the mean payout per year, rather than mixing the payouts from one regime with the cases from another. It seems unlikely for instance that a regime would combine the \$160m average Portuguese payout with the 1.7 successful cases in Canada per year.
190. Additionally, it should be noted that the figures above have been logged by when the case was initiated rather than when it was concluded, and that the number of recent cases and long time-scale of these sorts of actions mean that many of the cases are still to be finalised (or were at the time of the survey). The mean settlement is therefore based on the cases which have been completed, with the inclusion of a success rate (78% as set out above) ensuring that the figures account for the fact that not all claims will succeed.
191. To use these figures to estimate the likely mean settlement per year under a UK system, they have to be scaled to account for the differences between the countries. Below two alternative approaches are shown: scaling by GDP and by population.

**Table 11: International collective actions system, scaled to the UK**

	Canada	Australia	Portugal
Mean transfer per year	£11.8m	£4.8m	£3.6m
GDP/UK GDP	0.7	0.5	0.1
<b>Scaled transfer per year (by GDP)</b>	<b>£16.9m (BEST ESTIMATE)</b>	<b>£8.7m</b>	<b>£35.7m</b>
Population/UK population	0.56	0.37	0.18
<b>Scaled transfer per year (by population)</b>	<b>£21.0m</b>	<b>£13.0m</b>	<b>£20.5m</b>

192. These figures show that if we scale by GDP the range of transfer per year is £8.7m-£35.7m, whereas if we scale by population the range is £13.0m-£21m per year. The wider range shown by the GDP figures is used to provide high and low estimates of £8.7m and £35.7m, and the middle figure of £16.9m from this option is also used as the best estimate. As well as being the middle figure, Canada is based on significantly more data: 19 cases that have so far either reached a settlement or will never have a monetary result, compared to 1 for Portugal and 2 for Australia.
193. The wide range of potential payouts indicates the degree of uncertainty in these cases, especially as there is also a large level of variation between years in individual countries, this should be taken with caution. In Canada, around 25% of cases are stand-alone, so a quarter of this payout, £4.2m, can be considered to be stand-alone related, and according the earlier reasoning in paragraphs 26-29 create a 5:1 deterrence effect of £21m. The remaining £12.7 is modelled as having 1:1 deterrence at £12.7m for a total of £33.8m.

<sup>72</sup> Exchange rate of £0.65=\$1

194. There are also potential benefits from stand-alone cases. From the example of private actions cases outside of collective actions, we might expect 70% of cases to be stand-alone.<sup>73</sup> However, the examples of collective actions in other regimes and the input of legal experts suggest that collective actions are much more likely to be follow-on. Our best model is Canada, where we have by far the most data for a comparable opt-out system. Here, around 25% of cases are stand-alone, at 0.4 successful cases a year. Given the scepticism of legal firms about the viability of stand-alone cases, this figure will be used as the best estimate without any increase from our higher GDP. As noted in paragraph 86, the lower prices and deadweight gain of preventing a cartel are £32.1m per case, and 55% of stand-alone cases are related to cartels, giving an average benefit of £17.7m per case. Applying this to an average of 0.4 cases per year gives a benefit of £7.1m per annum.
195. To find lower and higher estimates we use the same modelling assumptions as High and Low cases for previous Sections: in particular, follow-on cases are assumed to have a 5:1 deterrence effect in the High model and no deterrence effect in the Low model. Otherwise, figures reflect the total payouts from the three regimes above. We assume a Canadian number of cases (2.2 total, 1.7 successful, 25% of which are stand-alone) for High and Low scenarios, although case numbers are increased in line with GDP for the High scenario. This number of cases is inconsistent with the low redress in the Low scenario. We have therefore used the average annual caseload of Australia: 5 cases in 16 years, or 0.3 cases per year, scaled with GDP for 0.6 cases per year. In line with the predictions of some legal experts, we have assumed that the low limit has no standalone cases whatsoever.

**Table 12: Deterrence effect of collective actions**

Deterrence	Annual payout	Of which stand-alone	Of which follow-on	Deterrence effect
LOW scenario	£8.7m	0	£8.7m	0
<b>Best estimate</b>	<b>£16.9m</b>	<b>£4.2m</b>	<b>£12.7m</b>	<b>£33.8m</b>
HIGH scenario	£35.7m	£8.9m	£26.8m	£178.7m

**Table 13: Cartel prevention effect of collective actions**

Cartel prevention	Standalone cases	Value per case	Value
LOW scenario	0	£17.7m	0
<b>Best estimate</b>	<b>0.4</b>	<b>£17.7m</b>	<b>£7.1m</b>
HIGH scenario	0.6	£17.7m	£10.1m

196. The costs of collective actions to courts and participants are hard to estimate: figures from other countries may reflect different court costs in general and there is only a single, opt-in case to serve as an example within the UK. We have discussed the potential costs of cases such as these with law firms. One has suggested that duration and the costs to courts and participants are likely to be similar to other competition cases. Another has suggested that the length of follow-on cases is likely to increase by around 50%, suggesting court costs in the CAT of £23,100 per case. If the same principle applies to stand-alone cases, these would be expected to cost around £86,625 (i.e. the follow on cost times 3.75). The same firm suggests that the legal costs of the action are likely to be increased by around £500,000 to around £1.5-£2.3m for each business in each case, or £2.5-£3.5m for stand-alone cases. Taking the midpoint of each of these, adding a further 50% for non-legal costs (see paragraph 81) and doubling to reflect the costs for both businesses, we estimate costs per case of £5.7m for follow-on and £9m for stand-alone.
197. Again, we use the Canadian figures (including unsuccessful cases, so 2.2 p.a.) for number of cases in the best estimate and High scenarios. For the High scenario this total is scaled with GDP to reflect the increased caseload associated with higher payouts. For the Low scenario, using Canadian figures would suggest a very low payout per case, lower than our estimated legal costs for the body bringing the case, which makes the figures implausible. We have therefore used the average annual caseload of Australia: 5 cases in 16 years, or 0.3 cases per year, scaled with GDP for 0.6 cases per year. This suggests the following costs. Note that as with Section 1, the 'Low'

<sup>73</sup> Rodger (2008)

model includes higher business costs per case and the High model includes lower business costs by case: this is because they will be used to find the net High and Low benefits.

**Table 14: Court and participant costs of private collective actions**

Costs	Stand-alone			Follow-on			Total
	Cases p/a	Cost per case	Cost p/a	Cases p/a	Cost per case	Cost p/a	Total Cost
Court- LOW scenario	0	£86,625	0	0.6	£23,100	£13,860	£13,860
<b>Court - Best Estimate</b>	<b>0.4</b>	<b>£86,625</b>	<b>£34,650</b>	<b>1.8</b>	<b>£23,100</b>	<b>£41,580</b>	<b>£76,230</b>
Court – HIGH scenario	0.6	£86,625	£51,975	2.6	£23,100	£60,060	£112,035
Participants – LOW scenario	0	£10.5m	0	0.6	£6.9m	£4.1m	£4.1m
<b>Participants – Best Estimate</b>	<b>0.4</b>	<b>£9.0m</b>	<b>£3.6m</b>	<b>1.8</b>	<b>£5.7m</b>	<b>£10.3m</b>	<b>£13.9m</b>
Participants – HIGH scenario	0.6	£7.5m	£45m	2.6	£4.5m	£11.7m	£16.2m

198. The table below sets out the low, high and best estimates of economic impact. These share the assumptions used for Section 2, and the figures are found in Tables 12, 13 and 14.

**Table 15: Total costs and benefits of private collective actions**

	Court costs	Participants costs	Deterrence	Cartel prevention	Net benefit per annum	Additional benefit: redress
Benefit – LOW scenario	-£13,860	-£4.1m	-	-	-£4.1m	£8.8m
<b>Benefit - Best estimate</b>	<b>-£76,230</b>	<b>-£13.9m</b>	<b>£33.8m</b>	<b>£7.1m</b>	<b>£26.9m</b>	<b>£16.9m</b>
Benefit – HIGH scenario	-£112,035	-£16.2m	£178.7m	£10.1m	£172.4m	£35.7m

199. As the analysis above is based on international comparisons, it is not possible to straightforwardly reflect the effect of various measures to either encourage or control the number of private actions. However, the question of how to maximise valid private actions while avoiding frivolous cases is vital.
200. A key feature to encourage only meritorious claims under an opt-out system 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 English law and has become the starting point in claims for damages before the CAT<sup>74</sup>.
201. 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. Rules on cost capping are already a feature of the legal system, including in the CAT, and similar principles could be applied equally well to collective actions.
202. One important element of ensuring an effective but safe system of collective actions will be how unallocated funds are treated. Our current preference for this is to avoid cy-pres, due to the risk of arbitrary windfalls or bodies becoming unduly motivated to pursue cases, but equally to avoid funds returning to the infringer, as this is returning ill-gotten gains and gives the infringer an incentive to attempt to raise additional complexities and barriers to claiming redress. We therefore favour the approach of unallocated funds always passing to the same named organisation, with social objectives closely linked to this area, such as the Access to Justice Foundation. More details of this are set out in the consultation document.

### Additional cost analysis

203. The estimates of costs in private opt-out collective actions are based on three estimates: the costs per case to the courts (which are fixed), the legal and associated costs of a case to each participant, and the number of cases brought. Each of these variables includes the distinction

<sup>74</sup> See *BCL Old Co Ltd & Ors v BASF SE (formerly BASF AG) & Ors* [2010] CAT 6, para 7.



between follow-on and stand-alone, with stand-alone involving higher costs per case to both courts and participants.

204. To calculate the high limit of costs we therefore need to assume the highest limit of cost per case for participants and also the highest number of cases, including the highest number of stand-alone cases. This uses costs per case from the Low net benefit scenario and number of cases from the High net benefit scenario. To calculate the low limit of costs we need to use the opposite assumptions: costs per case from the High net benefit scenario and number of cases from the Low net benefit scenario.

**Table 16: High and low cost limits for private collective actions**

	Stand-alone				Follow-on				Overall cost
	Cases	Court cost per case	Participant cost per case	Total cost	Cases	Court cost per case	Participant cost per case	Total cost	
Low cost limit	0	£86,625	£7.5m	0	0.6	£23,100	£4.5m	£2.7m	<b>£2.7m</b>
High cost limit	0.6	£86,625	£10.5m	£6.4m	2.6	£23,100	£6.9m	£18m	<b>£24.4m</b>

205. In terms of calculating impact on business for opt-out collective actions we have to rely on estimates of what proportions of participant costs and redress payments, outlined above, would relate to businesses and what proportion to consumers. Defendants would by definition be businesses, but claimants would be more varied. Based on a study of cases in comparable jurisdictions<sup>75</sup>, it appears that a majority of cases are either purely consumer or have a substantial consumer element. We therefore roughly allocate 70% of the claimant benefits and costs to consumers. This means that 35% of participant costs fall on consumers, however they can claim these costs back from businesses and so these ultimately fall on businesses, and that 70% of the transfer from infringer to claimant is a transfer from business to consumer rather than between two businesses.
206. On this basis, we can estimate that the legal and associated costs to business of collective actions are around £13.9m. Our best estimate is that businesses pay out £16.9m in redress, for a total cost to business of £30.8m. The benefits to business are the 30% of redress received by business, around £9.24m. We therefore estimate the net cost to business at £21.56m.

#### *Option 5: Opt-out powers for a public enforcer*

207. While most legal and academic experts have focused on the various options for private actions, similar collective redress powers are wielded in some countries by public sector bodies. The analysis of the options above has presumed a private system, although the arguments in favour of opt-out over opt-in are relevant regardless of the prosecutor. Having established the reasons why an opt-out system is preferred, we can turn to the question of who wields that power
208. Whereas the private actions model we are modelling above is a largely Commonwealth approach, public sector Ombudsmen are most often found with collective action powers in Nordic states. The Finnish and Danish ombudsmen in particular have been analysed with a view to the transferral of the same principles to the UK<sup>76</sup>. These system are focused on protecting consumer rights, however, with competition powers only a fairly recent, and never used, power of the Danish Ombudsman. The relevance of the Nordic experience is therefore questionable, as consumer protection is generally pursued in a different manner to competition law.
209. The powers of discovery available to a public sector ombudsman might make them a more effective threat to infringers, providing a very powerful backstop defence to encourage settlement. Indeed, the collective action powers of Nordic Ombudsmen seem to have remained entirely unused. Advocates have argued that this shows the effectiveness of the threat of their powers.
210. However, this lack of cases could also reflect these authorities having an inevitably narrower scope than the range of cases that individual private claimants might take an interest in. Moreover, the

<sup>75</sup> Mulheron (2008)

<sup>76</sup> Hodges 'The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe' 2008

variation between legal cultures makes it very difficult to simply transplant a single element of another system and presume it will work in an identical way. In particular, Nordic countries have very sophisticated and well-established ADR systems set up and a stronger history of using settlement rather than court systems<sup>77</sup>.

211. The difficulty of predicting the number of cases highlights the further problem of budgeting for an Ombudsman of this kind. All international examples of collective actions suggest that the number and scale of them is very unpredictable, and a publically funded body would not be able to respond as agilely and flexibly to new infringements as a private system. Ombudsmen in the UK tend to be funded by a specific industry which has accepted its responsibility for supporting its own policing (e.g. the Financial Ombudsman Service by banks and other financial services providers). An Ombudsman with such a broad purview would be hard to fund through industry in a fair manner, and the creation of a new publically-funded body would be difficult to justify, as it would involve significant set-up costs without any reason to believe that it would bring cases.
212. This opt-out power would therefore, if introduced, be given to the OFT. They are well placed to take such cases, due to their expertise and hands-on experience of the individual cases likely to lead to public follow-on actions, but they have indicated that they do not believe that such powers would gel effectively with their current priorities or those proposed in the Competition Landscape reforms.
213. A public sector ombudsman would create greater confidence amongst businesses that a US-style system was not being introduced, as cases would be selected on a public interest basis rather than pursued based on the ability of litigants to fund cases. The number of unmeritorious cases could be expected to be lower, and frivolous cases avoided. However, the cost of this is the delay that this decision about public interest might bring, and the issue of principle that businesses and individuals should have the ability to seek redress for damage caused to them, rather than relying on the infringer having caused sufficiently wide or significant damage to be prioritised by a public body. Evidence suggests that victims tend to best placed to challenge anti-competitive behaviour, in terms of both their incentives and their expertise.<sup>78</sup>
214. Additionally, the combination of collective action powers with current OFT powers carries risks. In particular, in discussions with us the OFT has expressed concern that the protections on leniency documentation outlined above would be called into question, as the OFT would receive in the course of its enforcement work certain leniency documents that may be protected from disclosure to a claimant in private actions. Potential leniency parties may nevertheless be concerned at the prospect of the OFT holding such documents if it also had the primary responsibility for seeking judicial redress, which might undermine their willingness to apply for leniency.
215. As noted above, only a single Ombudsman has competition responsibilities, and this power is recent and never-used. As such, independent analysis of data on the benefits and costs of a public system is not possible. In general terms, it would be expected to deliver comparable damages in individual cases, although the stricter controls in terms of both public interest and funding capabilities might mean that fewer cases were brought. Additionally, a significant proportion of the legal costs identified for a private actions opt-out system would instead fall upon the public purse.
216. It is difficult to calculate expected costs for a public ombudsman, as those which exist have not brought cases. However, if we assume it to be somewhat more active, we can model it on the assumption that it would take around 40% of the OFT's infringement decisions as the basis for follow-on actions, in addition to the 50% that can be addressed through the simpler powers proposed under Option 2. This reflects that not all cases would be addressed, but that some would require full cases to resolve while others would be suitable for a simpler resolution. The benefits of these cases resolved through the courts would be higher than settlement, at approximately £2.6m, and as this would be entirely follow-on, would carry an associated deterrence effect according to our 1:1 best estimate model of £2.6m per case.
217. This figure seems low given that occasionally very large fines are given on issues such as the dairy cartel.<sup>79</sup> While basing it directly on OFT fines remains our best estimate, a high estimate can be created by assuming that the scale will instead be comparable to collective action payouts. Taking Canada as our best example, we find a mean payout of \$10.6m, equivalent to £6.9m, which scaled

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<sup>77</sup> *ibid*

<sup>78</sup> McAfee et al 'Private v Public enforcement', 2008

<sup>79</sup> <http://www.ofc.gov.uk/news-and-updates/press/2011/89-11>

with GDP is £9.9m.<sup>80</sup> Given our high deterrence model of 5:1, this creates a High scenario of £49.3m per case. As our Low estimate for deterrence is nil for follow-on, no quantifiable benefit is gained according to the Low scenario.

218. Our best estimate for costs is that these would be similar to private court costs. We can therefore apply the same cost principles per case as for private opt-out i.e. £5.7m (£4.5m low and £6.9m high), except that half of the costs to business would instead attach to the OFT.

**Table 17: Costs of public collective actions**

	Cases p/a	Cost per case	Cost p/a
Court cost	0.4	£23.1k	£9.2k
Business Cost	0.4	£2,850k	£1,140k
OFT cost	0.4	£2,850k	£1,140k
Total		£5,723.1k	£2,289.2k

219. The Low and High scenarios below are based on the same general assumptions used in Option 2. The High scenario is additionally based on the assumption that payouts will resemble those in overseas private actions cases (see paragraph 215). The 'Low scenario has no further differences to the best estimate. We have not been able to model the significant increase in settlements expected by supporters of this model, except through our usual deterrence calculations. In particular, we have not been able to model the effect of a body that brings no actual cases, as the international examples suggest, but nevertheless exerts a powerful threat and thus causes increased settlement. No quantitative evidence that would support such a calculation was provided in the consultation by supporters of this model.

**Table 18: Costs and benefits of public opt-out collective actions**

	Cases p.a.	Court costs per case	OFT costs per case	Business costs per case	Gross costs per case	Deterrence per case	Net benefit per case	Net benefit per annum	Additional benefit – redress p.a.
Benefits – LOW scenario	0.4	-£23.1k	-£3.5m	-£3.5m	-£6.9m	-	-£6.9m	-£2.8m	£1.0m
<b>Benefits - Best Estimate</b>	<b>0.4</b>	<b>-£23.1k</b>	<b>-£2.9m</b>	<b>-£2.9m</b>	<b>-£5.7m</b>	<b>£2.6m</b>	<b>-£3.1m</b>	<b>-£1.2m</b>	<b>£1.0m</b>
Benefits – HIGH scenario	0.4	-£23.1k	-£2.3m	-£2.3m	-£4.5m	£49.3m	£44.8m	£17.9m	£4.0m

### Additional cost analysis

220. As the only variables affecting our estimate of the costs of introducing public opt-out collective actions are the costs to OFT and business per case, the high limit of the costs of these reforms is simply the cost in the Low scenario (£6.9 per case for 0.4 cases for a total of £2.8m per annum) and the low limit is simply the cost in the High scenario (£4.5m per case for 0.4 cases for a total of £1.8m).

221. For the purposes of calculating a cost to business of the redress imposition power, we can use the same principles as those set out for the redress imposition power in paragraph 123, to reach a very rough estimate of 50% of redress benefitting consumers.

222. This means that business costs would be £2.9m for the legal and associated costs of defendants, plus £1m in costs of making redress, for a total business cost of £3.9m. The business benefits would be half of the redress total, at £0.5m. This creates a net business cost of £3.4m.

### Summary

223. It is proposed that the following policies are adopted in this area

- Introducing opt-out representative actions in the CAT, including for stand-alone cases

<sup>80</sup> On a rough exchange rate of \$1-£0.65

- Considering a range of linked reforms around issues including the funding of cases, the costs regime, and the allocation of unclaimed damages to ensure the regime is effective but controlled
224. The need for some kind of representative action can be made in theory, on the basis that cases can cause significant damage but spread this sufficiently widely that no individual has an economically rational case for pursuing damages. More practically, there is clear evidence that in the current system many infringing businesses are not made to make redress, and many injured parties fail to reclaim their losses, as the public system and very limited private actions regime does not make this practical.
225. The case for opt-out rather than other options is founded on the experiences and insights of legal experts, and the practically observed outcomes of alternative systems, including the testimony of Which? that despite their collective action being successful they would not take a similar action again, due to the limitations of an opt-in system.
226. A private actions system for collective actions is preferred to a public system for a number of reasons. There is an issue of principle that the ability of an individual to seek redress should not rely (either in principle or in terms of a punitive cost system) on a public authority having approved the case. There is another issue of simple practicality that the funding for such an Ombudsman does not seem to be feasible either from constrained public funds or from an industry levy. Between the issue of principle and the pure practicality, there are further questions around whether such a system would be practical in our litigious culture, about whether an Ombudsman could consider the whole spectrum of cases, and about whether we have any clear cases of this system actually in practice.
227. While a private actions opt-out system is therefore preferred for representative actions, there is a good deal of debate around what precise form this would take. The analysis of costs and benefits is necessarily broad, and is based upon comparing the UK to a range of countries with functioning private actions systems that avoid the pitfalls of a US-style class action system. Our consultation sought advice on the best design for a system which reflects the best of private actions practice and delivers deterrence and redress but retains sensible controls on the number and cost of cases, and we are currently considering these responses.

## Summary of preferred option

228. The case for change being needed, and for rejection of Option 1, 'do nothing' is set out in the *Need for Reform* section (pages 8-10), and follows from the benefits expected from the other options. Below, the three substantive options are analysed against our policy objectives, set out on page 10 of this document

- To ensure that parties injured by anti-competitive behaviour are able to obtain redress
- To work with current public enforcement to tackle and deter anti-competitive behaviour
- To complement the public enforcement system, and avoid any tensions
- To enable meaningful cases to be pursued while avoiding incentives for vexatious or frivolous claims

### *Laying the groundwork for reform: Option 2*

229. Option 2 provides the basis for Options 3 and 4: it constitutes a group of largely non-contentious reforms, which bring direct benefits as well as providing a framework in which more radical changes are possible. We have been able to quantify three elements of Option 2: the changed court rules that lead to an increased use of the CAT (table 8, page 19), the introduction of a redress imposition power for the OFT, and modelling collective settlement.
230. The court reforms have a powerful positive impact in terms of our second objective, tackling and deterring anti-competitive behaviour. In line with the current proportions of stand-alone and follow-on cases in the courts, most of the increase in caseload through this reform is expected to be in stand-alone cases, creating stronger deterrence effects against anti-competitive behaviour. The court reforms are also expected to provide redress of around £8.25m, from infringing businesses to their victims. This upholds justice, and may also empower innovative businesses with high growth potential which have been damaged by anti-competitive behaviour such as cartels.
231. The redress imposition power has a smaller impact than CAT reforms, with estimated redress of around £1.05m. Its deterrence effect is also much lower than the CAT reforms, due to its focus on follow-on rather than stand-alone cases.
232. In terms of the benefits that have not been quantified, the proposed fast track is intended to tackle behaviour affecting small and medium sized businesses, and possibly gain them some redress, while containing elements that filter cases and ensure meaningful cases rather than vexatious or frivolous cases are pursued. The broader ADR reforms are also designed to provide a level of protection against vexatious and frivolous claims, and to ensure that cases are resolved in the most practical and low-cost way possible. The proposed reforms of the leniency regime are squarely focused on the objective of avoiding tensions with public enforcement.
233. All of these are positive benefits, and also help lay the ground for Options 3 and 4, which build on these with private and public collective actions respectively.
234. The proposed court reforms pave the way for effective collective actions and the combination of additional individual cases with an extension of collective actions would help further develop the CAT's expertise and experience in this area.
235. An effective ADR system helps ensure that the introduction of collective cases does not lead to greater burdens on courts or in legal costs to businesses than necessary. If collective actions are introduced, this will create a very significant increase in the motivation to settle cases through ADR of all kinds, including but not restricted to the redress imposition power outlined in table 9, page 25.
236. The reforms to leniency are already becoming an important principle to clarify, but the introduction of collective actions would make them particularly critical as it would increase the likely impact of redress relative to fine, lowering the incentive for avoiding the fine at the risk of being more vulnerable to claims for redress.

### *Benefits of collective redress: Options 3 and 4*

237. As outlined above, a set of fairly un-contentious reforms can create positive outcomes in terms of our key objectives. They would essentially extend business as usual, enabling court cases and providing some redress through public enforcement. However, this approach is still limited in terms of the problems identified with the current regime, and in terms of the outcomes sought. The amount of redress gained is limited, at around £9.3m per annum. Critically, it does not address the problem that there can be cases where a large quantity of damage is spread across many participants, meaning that bringing a case is not worthwhile for any individual. For this reason, it has very limited benefits for consumers, only gaining them a small quantity of redress through the redress imposition powers of the OFT (an estimated 70% would benefit consumers, at around £735,000 per annum). Where there is redress in these larger cases, it is at the discretion of the public authorities, rather than individual consumers and businesses being empowered to seek resolution and redress on their own terms.
238. Option 3, private collective actions, addresses this gap, providing a basis on which injured parties can directly seek to gain redress for established infringements, and even bring new stand-alone cases against suspected anti-competitive behaviour. This is estimated to unlock an additional £16.9m per annum in redress, £11.8m of which is expected to benefit consumers. Option 4 has a more limited expected impact of around £1m, of which £700k is expected to go to consumers. Critically, it also leaves the responsibility for choosing to bring cases in the hands of public enforcers rather than empowering individuals to bring their own cases. Option 3 is therefore our preferred option in terms of empowering individual businesses and consumers, and ensuring redress.
239. The benefits in terms of deterrence and cartel prevention are reliant upon the caseload, and there are stronger deterrence benefits for stand-alone than follow-on cases. Both of these factors mean that the advantages outlined above for Option 3 over Option 4 translate directly into their economic impact, with Option 3 bringing £7.1m worth of benefit from tackling anti-competitive behaviour as well as £33.8m in deterrence, while Option 4 only has the deterrence effects of its limited follow-on cases, at £1m.
240. Turning to complementing the public enforcement system, Option 4 has the benefit of concentrating enforcement and redress powers in the hands of the public enforcement powers, which would plausibly support their current work. As the OFT would be bringing follow-on cases as well as making infringement decisions, it would minimise any chance for conflict or poor communication between these two phases. However, placing the responsibility for gaining redress on the OFT would damage public enforcement simply through the cost burdens it creates. In terms of the leniency regimes, businesses would be concerned about whether the OFT could consider a leniency application for the purposes of deciding infringement and then entirely discount it when considering redress. Option 3 requires some external protections for the leniency regime to ensure that conflicts are not created by the separate private and public involvements in the same sphere, but has the benefit of building on the work of OFT and increasing their positive impact through unlocking redress, without creating financial burdens.
241. Our final objective is to maximise meaningful cases while minimising vexatious or frivolous claims. Option 4 is naturally very strong at the second half of this, by concentrating claims in the responsible hands of the OFT. However, as we see above, the number and scale of claims is not maximised. Conversely, Option 3 naturally helps increase the number of claims but does not have the same in-built protections against vexatious or frivolous claims. It is for this reason that we have consulted in depth on the protections necessary for private actions to ensure low quality claims are avoided, and are examining the responses received.
242. Therefore, we consider that Option 3 is the better approach for achieving our objectives, due mostly to its substantial advantages in terms of redress and deterrence. The less quantifiable issues of complementing public enforcement and maximising valid cases while minimising poor ones are more disputable: for both, Option 3 has potential benefits over Option 4 but these rely on creating solid protections around the powerful tool of private collective actions. We have proposals on these protections in this Impact Assessment and the broader consultation, and have sought views on how best to achieve these outcomes.
243. Option 3 is also preferable to Option 2, largely due to the redress benefits to consumers and small businesses, although as noted above there are other benefits too. The total costs and benefits of

our three options are set out below. Option 2 is derived from figures on court reforms (table 8 page 19) and the redress imposition power for the OFT (table 9, page 25). Option 3 includes both these and private collective actions (table 15, page 38). Option 4 includes the costs and benefits of Option 2 and also public collective actions (table 18, page 42).

**Table 19: Total costs and benefits for options considered against the baseline**

	Public sector benefits/costs	Participant costs	Deterrence	Cartel prevention	Total net benefit	(Redress gained)
Option 2	£296k	-£17.5m	£30.4m	£31m	£44.2m	£9.3m
Option 3	£256k	-£31.4m	£64.2m	£38.1m	£71.2	£26.2m
Option 4	-£909k	-£18.7m	£31.4	£31m	£43m	£10.3

244. These figures reflect the system while fully functioning, and so vary from the annual averages given in the cover sheets, which halve the benefits from court cases in the first year to reflect the time taken for cases. Public sector benefits/costs includes both the OFT and the courts, and in some cases there are both costs and benefits (e.g. savings in the High Court but increased costs in the CAT). In the summary sheets, the costs and benefits are separated to give total cost and total benefit figures.

## **Annex – Specific Impact Tests**

### **Competition Assessment**

245. The measures described above will enhance competition by assisting consumers and businesses in challenging anti-competitive behaviour, and thus leading to the cessation of such behaviour, deterrence of similar behaviour, and transfers from anti-competitive businesses to their victims.

### **Small Firms Impact Test**

246. The measures described above are essentially neutral to the size of the firm. Some reforms are specifically aimed to level the playing field for small and medium sized firms, by establishing a specific fast track which enables them to challenge anti-competitive behaviour without such high costs. Small firms will also be able to benefit from participating in collective actions.

### **Race, Disability and Gender Equality**

247. The measures described above are expected to have a positive impact on all consumers, including those from minority groups, by helping them gain redress as well through longer-term benefits from a more competitive economy. In particular, the policy of opt-out collective actions will help redress be gained by consumers who do not have sufficient understanding of their rights to currently seek redress, in particular those for whom English is not a first language.

### **Other specific impact tests**

248. After an initial screening it has been concluded that no significant impact is anticipated in any specific cases above.



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