# Contents

# 4 New Square

This is the response of 4 New Square, Lincoln's Inn, a set of barristers practising in civil/commercial law with over 70 members. We are only responding to questions 20 and 21 and do so as follows:

**Q20 What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums?**

We consider that there are significant merits in paying unclaimed sums to a single specified body. A single destination that is set out in statute would be beneficial because:

- The problem of trying to find a suitable recipient for each case is avoided, as well as the associated lobbying of judges and potential satellite litigation which would detract from both the sentiment and practical application of collective actions.

- The named charity would receive funds in the public interest and would retain its independence having not been involved in the litigation.

- A full deterrent effect against anti-competitive companies is achieved as companies practising such behaviour will need to compensate the total amount of harm the court decided was suffered by individuals from their anti-competitive action, regardless of the number of individuals who came forward to collect their damages.

- There would be legal certainty for all parties and the court, before and during litigation.

- The system is administratively simple, which would save time and cost for the parties and the court, maximising the funds available from such actions.

As for the other options:

Cy-près

- There would be difficulties in identifying who is the appropriate cy-près beneficiary.

- Of the two major options for cy-près, the "price roll-back" might well not benefit the previous customers harmed. Also, this might give the (anti-competitive) company an advantage over its competitors and so reward anti-competitive behaviour.

- The second major option to pay the residue funds to an organisation, usually a charity, considered the next best beneficiary to the harmed individuals involves the need to decide who the most appropriate recipient is. This may again place undue demands on the time and funding available. Indeed, the funds could be largely or entirely exhausted in argument as to which charity should receive them.

- As mentioned previously, it has been witnessed in other jurisdictions that class-action judges are routinely lobbied by charities seeking the money, a problem reported by the Civil Justice Council in their report on collective proceedings (page 181). Furthermore, lawyers seek to suggest their personally favoured charities, which would lead to inconsistent outcomes and irrelevant favouring of particular charitable causes.

Escheat to the Treasury

- This option could be viewed as a form of taxation, or a civil fine, which bears little relevance to the individuals who have been harmed.

Reversion to the defendant

- The guilty party benefits from an unjust windfall. We would, however, caution that the assessment of damages should be based on proper evidence of loss and not punitive.

- Reversion creates an incentive for the company to minimize awareness of the award and the number of customers claiming.

**Q21 If unclaimed sums were to be paid to a single specified body, in your view would the Access to Justice Foundation be the most appropriate recipient, or would another body be more suitable?**

We agree with and support the suggestion that the Access to Justice Foundation should be the sole recipient. Members of our chambers support this organisation and its work.

1. Support for access to justice

- The purpose at the heart of collective actions is to enable access to justice for individuals who would otherwise not have it, in this case from illegal anti-competitive of companies. Therefore it is logical that residue damages be used to support further access to justice for the public.

- Reductions in funding for legal assistance are having a severe impact on the availability of free legal help and therefore access to justice at all levels.

- The advice sector and pro bono sector have an increasingly vital role in providing free legal assistance to those who cannot afford it.

- The sector's work is targeted at those not currently empowered by the law whether through poverty, social exclusion, or lack of education.

- Improved access to justice will in turn benefit many other charities, whether because the beneficiaries of the charity receive legal help, or because the charities themselves directly receive free legal assistance.

2. The Foundation is a trusted national grant maker

- The Access to Justice Foundation is an independent charity, acting in the public interest to improve access to justice.

- The Foundation's purpose is to receive and distribute additional funds to support free legal assistance and to support access to justice generally. To this end it acts on behalf of the sector to raise money and then make grants to legal help organisations across England & Wales.

- The Foundation has a trusted role in the advice sector and legal profession, who worked together to establish the charity.

- As a national grant maker the Foundation is able to support the whole advice and pro bono sector in providing free legal help.

- The Foundation works with the regional network of Legal Support Trusts (which includes us, the London Legal Support Trust) across England & Wales, and with national organisations, in order to provide funding strategically at all levels.

- As the recipient of pro bono costs under the Legal Services Act 2007, the Foundation has experience with receiving funds from litigation and has the necessary expertise when legal issues arise as well as dealing with inherently unpredictable sources of income.

- The Foundation was recommended as a suitable body to receive residue funds from collective actions by the Jackson Review of Civil Litigation Costs, the Civil Justice Council and the HMT Financial Services Rules Committee.

**Mark Cannon QC**
**Barrister**
Direct: 020 7822 2020
Mobile: 07590 098 277
www.4newsquare.com

# Access to Justice Foundation

THE ACCESS TO JUSTICE FOUNDATION

Tony Monblat
Consumer and Competition Policy
Department of Business, Innovation and Skills
1 Victoria Street
LONDON
SW1H 0ET

Sent by email to competition.private.actions@bis.gsi.gov.uk

23 July 2012

Dear Sirs,

Please find enclosed the response of the Access to Justice Foundation to the Government consultation “Private actions in competition law: a consultation on options for reform”. This is submitted on behalf of the Access to Justice Foundation as an organisation.

Yours sincerely,

Toby Brown
Trustee
The Access to Justice Foundation

# Private actions in competition law: a consultation on options for reform. Response form

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

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

This response form can be returned to:

Tony Monblat
Consumer and Competition Policy
Department of Business, Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
Westminster
SW1H 0ET
Tel: 0207 215 6982
Fax: 0207 215 0235
Email : competition.private.actions@bis.gsi.gov.uk

| Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type. |
|---|
| Representative Organisation |
| Trade Union |
| Interest Group |
| Small to Medium Enterprise |
| Large Enterprise |
| Local Government |
| Central Government |
| Legal |
| Academic |
| Other (please describe): **National charity** |

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

## Consultation questions

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

Competition cases may involve pro bono (free of charge) advice or representation given to individuals or SMEs, as shown by the Competition Pro Bono Scheme. Because of this, if the CAT gains the jurisdiction proposed in the consultation paper, the ability of civil courts to grant “pro bono costs” should also be extended to the CAT.

Pro bono costs are currently available under section 194 of the Legal Services Act 2007 in the County Court, High Court and civil division of the Court of Appeal. Pro bono costs are the equivalent of ordinary legal costs, but are available where the winning party had free of charge assistance for some or all of their litigation. The courts assess how much the representation would have cost on a fee-paying basis, and order the losing party to pay the costs to the prescribed charity, the Access to Justice Foundation. The Foundation then distributes the funds to support organisations providing legal help to others in need.

An important aim of the pro bono costs jurisdiction is to level the playing field for costs risks between a pro bono assisted party and the (usually better resourced) other party. The other party now faces the normal risk if they lose of having to pay the other side’s legal costs. This in the usual way encourages settlement rather than continuing to a trial. Part 36 of the CPR can also now have the potential costs sanctions even for a pro bono assisted matter.

Therefore the CAT should have the ability to award pro bono costs in appropriate cases. For a claimant or defendant in need of pro bono help in a competition case this will help ensure their access to justice by helping to level the playing field and will help encourage settlement.

The CAT can be given the jurisdiction to award pro bono costs by amendment to section 194(10) of the Legal Services Act 2007, namely to add “Competition Appeal Tribunal” into the definition of “civil court”. An amendment to similarly extend pro bono costs to the Supreme Court was recently passed with cross-party support (Section 61, Legal Aid, Sentencing and Punishment of Offenders Act 2012).

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

### *A. Why the Foundation*

The Access to Justice Foundation is already the recipient of "pro bono costs" under section 194 of the Legal Services Act 2007, in which the court at the end of a civil matter awards costs against the losing party in favour of the prescribed charity. The 2007 Act provides for a single specified body for this purpose, following debate at the time as to whether the court should have the ability to award such funds to other charitable destinations.

Having the Foundation as the single recipient for pro bono costs provides in each case:

(i) A single choice removing the danger of lobbying of judges by lawyers or charities;

(ii) Removal of the risk of satellite litigation as to the proper destination;

(iii) Legal certainty, before and during litigation, for the parties and the court as to the destination of such funds;

(iv) An administratively simple solution saving time and expense for parties and the court;

(v) The ability for the funds to be used in a strategic way across the country, in a way that is difficult for a judge to achieve in an individual case; and

(vi) Funds directed to a charity that receives and uses them in the public interest, acting independently of the parties, their lawyers and the litigation.

Each of (i) to (vi) would be features available to a collective action regime through having a national specified body as the single recipient for residue damages.

As the recipient of pro bono costs, the Foundation has experience and a strong governance system to deal with funds arising from litigation and has the necessary expertise to consider and take appropriate action when legal issues arise, such as non-payment of a court ordered sum. This experience includes dealing with a source of funding that is inherently unpredictable, resulting from litigation taken by third parties and only then relevant to the Foundation if the litigation is successful.

In this consultation response we seek to provide information on the Foundation which will be of relevance to its suitability as the destination for residue damages from collective actions, bearing in mind that the principal purpose of the consultation will be to hear views of other stakeholders than the proposed recipient. If the Government or any stakeholder

would find further information of assistance we would be pleased to provide additional detail.

In relation to the specific question as to the suitability of the Foundation we make two comments:

First, we endorse as recorded in the consultation paper, that a number of independent reports and bodies have recommended the Foundation as a suitable body to receive residue funds from collective actions. Namely the Jackson Review of Civil Litigation Costs, the Civil Justice Council, and HMT Financial Services Rules Committee on collective actions.

Second, we note that the aim at the heart of collective actions is to enable access to justice for claimants who might otherwise be unable or unwilling to take litigation individually. There is a logical and moral connection in using residue funds from such a process to support further access to justice for the public.

Ultimately the issues raised are for Government and Parliament and if the decision was made to prescribe the Access to Justice Foundation as the recipient of residue funds from collective actions, the Foundation can confirm that it is willing in the public interest to receive and distribute such funds.

### *B. About the Foundation*

The Access to Justice Foundation is an independent charity, acting in the public interest to improve access to justice. The Foundation was established in 2008 under the aegis of the Attorney General's Pro Bono Coordinating Committee as a result of collaboration between the legal profession (through the Bar Council, Chartered Institute of Legal Executives and Law Society) and the voluntary advice sector (through its umbrella body the Advice Services Alliance). Importantly its establishment was assisted and endorsed by the Ministry of Justice, the Attorney General's Office and the Judiciary. It is the only independently body recognised by statute in this field.

The Foundation was established pursuant to statute (section 194 of the Legal Services Act 2007) as the national charity to receive and distribute funds to support the provision of free legal help to those in need and, more generally, to improve access to justice. It was prescribed by the Lord Chancellor as the recipient of 'pro bono costs' under the 2007 Act. Funds are also raised through other schemes such as the "It's not just peanuts" campaign, under which law firms donate funds that are dormant or unclaimed in client accounts.

The Foundation works with and coordinates a network of seven Legal Support Trusts covering England and Wales, which raise funds through events such as sponsored legal walks. The combined funds of the Foundation and Legal Support Trusts available for distribution in 2011 were nearing £900,000. The Legal Support Trusts provide knowledge of the local provision and public need at a local level as well as stakeholder involvement at a regional level. Together with collaboration with other national charities, the Foundation is able to ensure funding decisions take account of local, regional and national needs.

This enables, importantly, the Foundation to take a strategic approach to the distribution of grant funding to organisations and projects within the pro bono and voluntary advice sector and those aimed at the wider objective of promoting access to justice.

The Foundation does not fund individual cases, nor their disbursements, and does not itself provide legal help. Furthermore, it is not involved in litigation unless and until a court makes an order awarding pro bono costs.

### *C. Governance*

The Foundation is a company limited by guarantee (6714178) and a registered charity (1126147), providing oversight by both Companies House and the Charity Commission. There are four member organisations: Advice Services Alliance, the Bar Council, the Chartered Institute of Legal Executives and the Law Society, to which the Foundation reports and each of which appoints a trustee to the Foundation's Board. In addition, one trustee is appointed by the Lord Chief Justice and two trustees are appointed by Law Firms. Two additional trustees, including the Chair, are appointed by the Board.

The Board of trustees therefore includes senior representatives of the advice and pro bono sectors, the legal profession and the judiciary. The current trustees are:

- Lord Goldsmith, QC, PC (appointed by the trustees), Chairman of the Board
  *Former HM Attorney General*
- Sandra Barton (appointed by CILEx)
  *Former President of the Chartered Institute of Legal Executives*
- Toby Brown (appointed by the trustees)
  *Former executive officer of the Foundation*
- Robert Gill (appointed by Law Firms)
  *Former CEO of LawWorks*
- Diana Good (appointed by Law Firms)
  *Retired partner of Linklaters; Chair of the Mary Ward Settlement and trustee of the Legal Advice Centre*
- Sir Charles Haddon-Cave (appointed by the Lord Chief Justice of England and Wales)
  *Serving High Court Judge*
- Andrew Holroyd CBE (appointed by the Law Society)
  *Former President of the Law Society 2007-8; Managing Partner, Jackson & Canter LLP*
- Steve Johnson (appointed by ASA)
  *CEO of Advice UK; Former Chairman of the Advice Services Alliance;*

- Bob Nightingale MBE (appointed by the Legal Support Trusts)
  *CEO of the London Legal Support Trust; Former Chairman of the Law Centres Federation*
- Ingrid Simler QC (appointed by the Bar Council)
  *Deputy High Court Judge; Member of the Panel of Counsel for the Equality and Human Rights Commission*

Diana Good and Robert Gill are shortly to resign and the new trustees to be appointed are Professor Sara Chandler, a Law Society Council Member and Laurence Harris, Deputy Managing Partner at Edwards Wildman & Palmer LLP.

The Ministry of Justice performs a light touch regulatory role over the continuing prescription of the Foundation under the 2007 Act. This includes receiving the Foundation's Annual Report and Accounts, attending the Annual General Meeting, regular reports on the work of the Foundation via the Attorney General's Pro Bono Coordinating Committee meetings, and ad-hoc updates when requested.

The Foundation's charitable objects supported by the powers conferred in the Memorandum and Articles of Association are wide enough to administer UK receipts on a UK wide basis. However, given the Foundation's remit currently extends to England and Wales, in the event that the Foundation was charged with a UK statutory role, the Foundation would make an appropriate revision to its objects to confirm this. The Foundation has started a dialogue with stakeholders to establish legal support trusts for both Northern Ireland and Scotland which would provide an appropriate structure for the Foundation to have a distribution remit that is UK wide.

### *D. Administration and Resources*

The Foundation's administration is led by a full time Chief Executive, Ruth Daniel, supported by interns, volunteers and trustees.

The Foundation and Legal Support Trusts currently distribute near to £900,000 per annum. It was intended, in particular through a strong governance and reporting structure, including independent examination of annual accounts, that the Foundation would be well placed to receive and distribute very large sums of money.

The Foundation seeks to operate with minimal administrative costs so that deduction from funds received is minimal and any future expansion would reflect this important aim. Future expansion would also recognise that the nature of the incoming funds available to the Foundation is inherently unpredictable and that the Foundation would not want to take on long term liabilities that could prove unaffordable.

A flexible structure has been implemented and the Foundation is able to deal with the unpredictability of funds coming in to the charity by ensuring administrative costs are controlled. The Foundation has conducted planning ready for administration of significantly

increased funds, including the ability to scale up operations using consultants with long standing experience in the sector.

### *E. Grant Making and Distribution Processes*

The Access to Justice Foundation currently has a straightforward grant process described below. It is intended that the Foundation remain flexible in its approach so that it can adapt to increased sources of income and the trustees remain committed to reviewing appropriate changes to the Foundation's principles and priorities as necessary.

Current Application Process

The Access to Justice Foundation is committed to a simple, transparent application process. Applications for grants may be made by post or email, by completing the relevant application form.

Distribution Principles

The Foundation has a transparent published set of Distribution Principles. Revisions to the Principles if made will be published on the Foundation's website.

The Foundation is primarily established to provide financial and other support to those who provide, or organise or facilitate the provision of, legal advice or assistance which is free of charge and which is provided directly or indirectly to people who are in need of such advice or assistance by reason of youth, age, ill-health, disability, financial hardship or other disadvantage. The Foundation is secondarily established to promote charitable purposes aimed at improving access to justice.

Monies received from a pro bono costs order may only be applied to provide financial support to persons who provide, or organise or facilitate the provision of, legal advice or assistance (by way of representation or otherwise) which is free of charge.

Eligible Organisations

Grant applications are accepted from national organisations, strategic projects and the Legal Support Trusts. Applications from local organisations are generally accepted via the Legal Support Trusts, although under certain circumstances may be accepted by the Foundation.

Decision-Making

Decisions on grant-making are ultimately for the Board of Trustees. The Foundation has planned when income reaches a significant level that it will be advised by a grants committee that would include nationwide representatives of the Legal Support Trusts and experts from national grant-making foundations.

When making its decisions on distribution, the Foundation has an absolute discretion and the Trustees do not accept any duty or liability to any person seeking a distribution. In the published Distribution Principles the Foundation states, subject to the point just made, it:

- Will have regard to (but will not be bound by) any preferences stated by those associated with the donation.
- Will take a strategic approach, recognising that the Foundation is able to take account of a countrywide picture.
- Will assume that local and regional distribution needs will be identified by the appropriate Legal Support Trust.
- Will look to distribute some money to projects that enable new work rather than simply the continuation of existing work.

Monitoring and Evaluation

The Foundation seeks to operate simply and a straightforward monitoring and reporting format will be used wherever possible. The detail of the monitoring and evaluation process will be determined for each grants programme, depending upon the criteria for and objectives of that programme.

Further Principles

The Foundation seeks to operate flexibly. Thus:

- Both capital and revenue grants may be made.
- Grants for both sole and supplementary funding may be made (and the latter need not be confined to funding on a “matched” basis).
- An emergency arrangement may be made in serious cases.

The Foundation seeks to operate simply. Thus:

- A single, simple, application format will be used wherever possible.
- A single, simple, funding agreement will be used wherever possible.
- A single, simple monitoring and reporting format will be used wherever possible (although interim audits will be possible for longer term or larger grants).

The Foundation seeks to operate transparently. Thus:

- There will be full transparency between Legal Support Trusts and the Foundation.
- All grants will be listed in available records, on website, and in annual report.

Specialist Rounds

Generally funds are generally distributed in an “open” programme – that is, available for any type of application. However, the Foundation will be flexible so that it can respond to particular need as well as particular sources of funds. It may therefore allocate funds to themed programmes, for example:

- Dedicated to meeting the needs of a particular type of beneficiary.
- Aimed at improving provision of services at a regional or national level.
- To support particular types of innovation or structural support in the sector.

### *F. Investment Strategy*

The Foundation has a general power to make investments of funds where they are not immediately required. Given the level of funds received to date, the Foundation has invested funds received in a savings account to enable interest to be received on funds prior to timely distribution.

Further to the expectation that the Foundation’s income will continue to increase, and particularly given the inherently unpredictable nature of the funds received, the Foundation has planned to implement a broader investment strategy, and utilise the power in its governing documents to appoint an Investment Manager further to an Investment Policy.

The Investment Policy would enable the Foundation to:

- Make strategic decisions as to the best mechanism and timings for distribution of funds.
- Produce the best financial return on funds received prior to distribution.
- Consider using investment of assets to further the Foundation’s aims.
- Level out the unpredictable nature of the funds received by the Foundation in order to best meet the charity’s objects.

# Addleshaw Goddard LLP

**ADDLESHAW GODDARD LLP**

# RESPONSE TO THE BIS CONSULTATION ON PRIVATE ACTIONS IN COMPETITION LAW - A CONSULTATION ON OPTIONS FOR REFORM (APRIL 2012)

## EXECUTIVE SUMMARY

1 Addleshaw Goddard LLP (**Addleshaw Goddard**) considers the proposals BIS sets out in its consultation document amount to a step change that has the potential to significantly improve the cost effective use of private actions in competition law whilst supporting the public enforcement regime. We consider the move to allow the Competition Appeal Tribunal (**CAT**) to hear stand-alone claims and injunctions to be a bold but welcome development and one which, with further enhancements, could establish the CAT as the forum of choice for competition cases, not just in the UK but, potentially, across Europe.

2 We also welcome the introduction of a rebuttable presumption of loss in cartel cases, although we do make some comments on the precise figure to be applied. Similarly, we support the introduction of an opt-out regime for collective actions subject to some further points for consideration. We welcome giving competition authorities the power to order redress schemes where consumers have suffered harm, with the proviso that companies complying with such an order receive a discount of the fine to be imposed.

3 We also have some comments regarding the introduction of the fast track procedure. The proposal in principle is welcomed and should, if properly implemented, lead to quicker and cheaper dispute resolution, but we recognise that the procedure is not suitable for all cases and we would urge flexibility in the way the procedure is applied.

## PROPOSED CHANGES TO THE COMPETITION APPEAL TRIBUNAL (CAT)

4 Addleshaw Goddard considers that the proposals to concentrate competition litigation in the CAT, enhance its case management powers

and enable it to issue injunctions are to be welcomed and could make the CAT a major venue for competition litigation in the UK, if not Europe.

5 In effect, what the government proposes is to confer on the CAT the same powers which already exist in the High Court, but in a tribunal which focuses virtually exclusively on competition law. Instead of persevering with the tribunal model, which is not always delivering cost, speed or access advantages to litigants, we wonder whether the government would not be better placed simply making the CAT a division of the High Court and then remodelling it on that basis. However, assuming that is not on the agenda at this time, we have the following observations on the proposals.

6 Addleshaw Goddard appreciates the desire to utilise the procedural advantages associated with the CAT (as set out in the consultation paper). Such advantages could be further enhanced by additional reforms, for example:

(a) Chancery Court judges should be utilised to a much greater extent by the CAT, which would be advantageous given the experience of such judges in hearing applications for injunctions and dealing with the issue of cross-undertakings in damages, etc.

(b) We consider the constitution of the CAT could and should vary depending on whether a High Court judge is appointed to hear the case, or if a part-time Chairman is appointed. We see little necessity for the appointment of lay members of a panel if a High Court judge is hearing a case. Where a High Court judge is conducting the case alone, we see real advantages with regard to reduced costs and greater flexibility in timetabling and case management.

(c) We see no reason why the CAT should not hear stand-alone actions and this would help overcome the difficulties faced by claimants in relation to jurisdiction and the limited way in which the CAT is bound by findings in competition authorities' decisions.

(d) We see a natural distinction between 1) the CAT's appellate jurisdiction and 2) when dealing with claims for damages:

(i) for claims for damages, whether follow-on or stand alone, we believe the CAT should apply the Civil Procedure Rules;

(ii) similarly, we consider High Court judges should hear damages cases proceeding before the CAT on their own. That would dispense with the need for transfer of cases between the High Court and the CAT. If the CAT continues with its use of panels, then it would be important that litigants can readily transfer cases to/from the High Court; and

(iii) it is also important that the CAT and the High Court harmonise on key issues, such as limitation periods and jurisdiction. Divergence is unhelpful.

Fast Track

7 In principle, Addleshaw Goddard welcomes the introduction of a fast track procedure, but we have concerns with the proposals set out in the consultation paper.

(a) Whilst the proposals should streamline the process and reduce the cost and complexity of actions brought by SMEs, it is not clear how many cases will be suitable for this procedure. Given the often complex nature of competition cases, the six month period may not be suitable for all cases. For instance, we consider that even the examples quoted in the consultation paper (including a long-term agreement between a farmer and an outdoor advertising company) are arguably not clear-cut infringements.

(b) The proposed cost cap of £25,000 would not be high enough for the majority of cases and may, therefore, act as a disincentive to taking action. The capping of costs in such a way, especially if the cross-undertaking in damages is waived or limited, runs the risk of tilting the balance too far in favour of claimants.

(c) As for the suggestion of a proposed damages cap, we doubt the legality of such a provision having regard to EU law principles of equivalence and effectiveness (*Courage v Crehan*) and Article 1 of Protocol 1 to the European Convention on Human Rights (The Right to Property) unless the claimant can opt out of the damages

cap and, therefore, the fast track procedure. We are not sure how feasible that would be in practice.

(d) The waiving of cross-undertakings in damages should not be allowed to encourage unmeritorious claims and, therefore, we consider that this power should be applied rigorously in accordance with mandated guidance.

8 Addleshaw Goddard considers that should a fast track procedure be introduced, it should be drawn heavily from the Civil Procedure Rules and experience already gained in the High Court and a degree of flexibility should be built in. For example, it may be that there is a presumption in favour of the fast track procedure for certain cases with the position to be reviewed at the first case management conference (**CMC**), or for the parties to agree to proceed on the fast track at the first CMC. Our view is that a Practice Direction should be issued by the CAT providing guidance as to how the CAT will exercise its power in relation to costs capping, cross-undertakings in damages and when and at what stage the fast track should be utilised.

<u>Rebuttable Presumption</u>

9 Addleshaw Goddard can see there may be some merit in having a rebuttable presumption of loss in competition cases, in order to incentivise defendants (which hold the relevant data) to prove that the amount of the overcharge was lower, thereby effectively reversing the burden of proof. However, this begs the question as to why competition law claims should be treated any differently from (for example) product liability claims.

10 However, ascribing a presumption of loss which is too high could have unforeseeable consequences:

(a) it would make the CAT appear particularly attractive for potential claimants and may act as a magnet for claims;

(b) it may have an adverse affect on settlements if claimants have unrealistic expectations as to their value of their claim, thus encouraging cases to litigate which could have otherwise settled; and

(c) alternatively, some defendants may settle at an early stage, even where the merits of their claims may otherwise have warranted defending the claims.

11 Addleshaw Goddard considers that a rebuttable presumption of loss without ascribing a value to such loss would be the safer position to adopt.

Passing-on Defence

12 Addleshaw Goddard considers that legislation dealing with the passing-on defence would be helpful. We would favour legislation which had the following outcomes:

(a) defendants should be denied the opportunity to raise the passing-on defence against direct purchasers, which are entitled to recover the full amount of any overcharge;

(b) if and in so far as there are claims by any indirect purchasers, such claims are joined together with the claims by the direct purchasers and stayed pending resolution of the direct purchasers' claims;

(c) at the conclusion of the claims by the direct purchasers when the value of the overcharge has been determined and damages awarded to the direct purchasers, a judicial or other enquiry takes place to determine how those damages are to be allocated as between the direct or indirect purchasers. That could be done by the judge who has dealt with the direct purchasers claims, or by using the ADR model advocated by the CBI.

13 Addleshaw Goddard believes that this approach:

(a) would ensure there is sufficient incentive to ensure the infringers will be pursued and will have to pay for the loss suffered by direct and indirect customers;

(b) acknowledges that direct purchasers are often better placed to advance claims having regard to the evidence available to them;

(c) acknowledges direct purchasers will, more often than not, suffer harm as a result of the infringing behaviour by:

(i) having to absorb the cost of the overcharge;

(ii) raising prices and losing sales volume as a result;

(iii) losing profit margin for inelastic goods;

(d) enables the initial court case to focus on the amount of the overcharge; and

(e) stops the defendants being able to play direct and indirect purchasers off against each other with the possibility that the defendant avoids paying damages to either.

**COLLECTIVE ACTIONS**

14 Addleshaw Goddard considers that the proposed changes represent a positive development and supports the proposal for an opt-out regime, but only for end consumers.

15 The value of individual claims for end users can be small, and collective action for them would overcome the difficulties encountered by Which? when advancing claims for consumers with regard to the *Replica Kit* case.

16 However, Addleshaw Goddard does not believe that similar benefits could be expected to accrue for businesses which are likely to sit within the supply chain. We consider an opt-in system remains appropriate for B2B claims.

17 The Government acknowledges the need to ensure that appropriate safeguards are put in place to prevent speculative or unmeritorious claims and considers that its proposals and the safeguards already present in the UK legal system (for example, the "loser pays" costs rule and the absence of treble or punitive damages and contingency fees) will address these risks. However, the "loser pays" cost rule means that third party funding or an after the event insurance policy would have to be mandatory if a successful defendant is to recover its costs. The Jackson cost reforms likely to come into force in April 2013 may impact the feasibility of this.

Further, whilst punitive damages are not envisaged, the Jackson cost reforms and the amendments to CFAs are likely to lead to an increased reliance on contingency fees through Damages Based Agreements. Addleshaw Goddard considers that if such funding models are not permitted in collective actions - whilst being freely utilised in other areas of law - it will act as a disincentive to such claims. Addleshaw Goddard's view is that the CAT should ensure that there is a preliminary review of the merits of the case at the certification stage, which would include a consideration of whether the claim could be brought more efficiently by another means (including, for example, a modified "opt-in" basis or using the ADR model favoured by the CBI) and to ensure that the claimant has an appropriate exposure to costs, thereby discouraging unmeritorious claims.

18 As regards the ability of private bodies to bring collective actions, we believe the government is correct to apply caution as to which bodies would be permitted and that a restrictive view of bodies *"…which could reasonably be considered as representative*" should be taken. Clearly Which? was an appropriate body. We would suggest that bodies driven by a profit motive should be treated with some care in this context.

19 We also note that opt-out collective actions would work well for consumers who have suffered loss as a result of anti-competitive conduct by retailers. They are the direct purchaser, and there is no prospect of arguing pass-on.

20 In circumstances were the infringement occurs a few layers upstream of the consumer, Addleshaw Goddard considers that addressing the pass-on defence in legislation, as described above, enabling all the overcharge to be recovered by the direct purchaser coupled with an opt-out system for end consumers would help ensure consumers are suitably compensated for the losses they have suffered following an account being made as to how the damages recovered by the direct purchaser should be divided with the indirect purchasers.

21 Addleshaw Goddard considers that collective actions should be allowed in stand-alone as well as follow-on actions.

22 Addleshaw Goddard does not consider that the OFT is the right body to bring collective actions as this would mean that the OFT would be responsible for determining if parties have infringed competition law and then to issue proceedings against the same party, which is a removal from the traditional separation of such roles. In addition, there are concerns that the OFT may not have sufficient resources and this could impact on its public enforcement role.

**ALTERNATIVE DISPUTE RESOLUTION (ADR)**

23 Addleshaw Goddard considers that the ADR proposal appears sensible, and consistent with the general approach to litigation under English law. However, Addleshaw Goddard's view is that it is questionable whether encouraging parties to mediate before coming to court is really workable in the context of all competition claims. Clearly, encouraging the parties to negotiate on quantum in the context of a follow-on damages claim where an infringement has already been established could be beneficial and reduce the costs of resolving the dispute over loss and quantum. However, requiring an SME to mediate prior to use of the fast-track procedure would appear inconsistent with the stated objective of achieving swift outcomes at low costs.

24 We welcome the clarification that would be offered by formally amending the CAT's rules on formal settlement offers so as to align them with the Civil Procedure Rules. Similarly, we would welcome the introduction of a specific pre-action protocol in relation to competition claims.

25 We note that the consultation paper includes the proposal to give the competition authorities power to order redress schemes. Addleshaw Goddard appreciates that this most closely resonates with cases where consumers are affected, such as in the *Replica Kit* case, and supports the introduction of such a power subject to the infringing party receiving a suitable discount to its fine in return for complying.

26 We see there are grounds for arguing that redress could be ordered in cases where it is businesses that suffer and we consider that it is possible for a competition authority to make a finding as to the relevant overcharge and to determine the number of cartelised products affected during the period of infringement to establish the overall loss incurred by those

affected (although in practice a competition authority is unlikely to go this far in its decision). However, our concern is that claimants may be under-compensated under such a scheme as this would not take into account losses suffered as a result of fewer sales of complimentary products and/or an umbrella overcharge. Further, we consider that such assessments of loss are best left to the courts. As a result, we do not welcome the introduction of a power to order redress other than where it is consumers that are clearly affected by the infringing behaviour.

27 As regards the proposal to give discounts on fines where a company has made redress, we welcome this proposal and would support a reduction of 10%.

28 Addleshaw Goddard has seen a draft of the ADR scheme proposed by the CBI and endorses it.

**INTERACTION BETWEEN PRIVATE ACTIONS AND PUBLIC ENFORCEMENT REGIME**

29 Addleshaw Goddard considers that the proposal to protect leniency applicants from disclosure of leniency documents and the protection of whistleblowers from joint and several liability strikes the right balance between maintaining the efficacy of the leniency regime and encouraging private enforcement, and is to be welcomed.

30 However, whilst the proposals would support the leniency regime in the UK, Addleshaw Goddard considers that there are two considerations which may act as a disincentive to potential leniency applicants. First, even if the proposals were implemented, there remains a risk that leniency documents will be ordered to be disclosed and/or that parties will be held jointly and severally liable in other jurisdictions where such principles do not apply and the protection proposed will not extend. Second, the proposals will not prevent the reputational harm that a leniency applicant will suffer despite such protections. Our practical experience has been that clients are extremely sensitive to the prospect of being publicly identified in connection with an investigation.

31 Further, Addleshaw Goddard anticipates that such a reform (absent legislation on the pass-on defence) would create problems for indirect purchasers of cartelised products who would have the additional burden of

establishing the upstream supply chain in order to bring its claim against the correct party. This goes against the stated objective of achieving swift outcomes at low costs.

32 In Annex A we respond succinctly to each question set out in the consultation document.

24 July 2012

Addleshaw Goddard LLP

## ANNEXE A

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

- Yes.

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

- Yes.

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

- Yes.

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

- Yes, but CPR if incorporated into the CAT would provide the CAT with all the case management tools it would need.

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

- Unrealistic and difficult to imagine they would work well in practice.

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

- No.

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

- Yes, because the defendants are best placed to disclose the value of the overcharge and it would make the CAT a more attractive venue for claimants. However, it is unrealistic to ascribe a figure and 20% would be too high.

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

- Yes, see paragraphs 12 and 13 above.

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

- Addleshaw Goddard favours an opt-out regime for consumers only.

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

- Please see our substantive comments.

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

- No, just consumers.

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

- Not relevant if available just to consumers.

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

- Yes.

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

- Addleshaw Goddard favours Opt-out for consumers. In B2B cases, Addleshaw Goddard would not be adverse to a modified Opt-in system, which permitted business to Opt-in to an ongoing action at a late stage of proceedings, perhaps after liability has been established, or, in respect of indirect purchasers, after a direct purchaser has succeeded in its claim and recovered damages (assuming the government accepts our suggestion regarding pass-on).

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

- No strong view.

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

- Yes.

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

- No.

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

- An opt-out collective action brought on a representational basis on behalf of consumers should be protected from adverse cost risk.

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

- No.

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

- No strong view.

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

- No strong view.

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

- Yes.

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

- Restricted only to those who have suffered harm and genuinely representative bodies.

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

- Yes.

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

- Yes, mirroring closely the approach already adopted in the High Court.

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

- Yes, to bring them into line with the CPR.

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

- We consider the scheme proposed by the CBI has particular merit and would be happy to support it.

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

- Yes.

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

- Power and discretion to do so, yes, but it is unlikely to be exercised often.

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

- Yes.

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

- At the moment, the system makes it exceedingly difficult for those harmed by competition law to gain redress. It is a failing of the system, and it needs to be addressed.

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

- Yes; the application and the supporting documents. Some of the supporting documents might be separately susceptible to disclosure, but copies in the hands of the regulator should not be.

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

- Whistleblowers' liability should be limited to the losses they directly cause.

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

- No strong view.

# Advice Centres for Avon

**ADVICE NETWORK**
Developing advice services in Bristol, North Somerset and South Gloucestershire

LOTTERY FUNDED

**84 -88 Colston Street, Bristol BS1 5BB Tel: 0117 929 2153**
**email info@advicenetwork.org.uk**

The Baring Foundation

**BIS: 'Private Actions in Competition Law' consultation**

**Submission by the Advice Network on behalf of Advice Centres for Avon (ACFA)**

## 1 Introduction

We are responding to this consultation on behalf of a network of independent advice agencies who offer legal advice in social welfare areas of law such as housing, welfare benefit, debt, employment, and associated areas across Bristol, North Somerset, & South Gloucestershire.

## 2 Consultation questions

Our member agencies in general support the actions of BIS in giving greater clarity to this process of pursuing a case relating to anti-competitive practices, and support the proposal to allow actions to be taken collectively by groups of consumers. We have specific responses to the following questions:

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

We strongly support the principle of allowing unclaimed damages to be paid to a single specified body, on the following grounds:

- The difficulty of establishing the most suitable body in each separate case is avoided, reducing administration and processing costs, and avoiding the potential for extensive lobbying and possible follow-up litigation if a given decision about allocation is contentious.
- Awarding the sums to named charity can be strongly argued to be in the wider public interest, without the named charity having to be engaged directly in the litigation. The named charity would receive funds in the

public interest and would retain its independence having not been involved in the initial litigation.
- It would remove the potential anomaly of a company being found unequivocally guilty of anti-competitive practices yet not being subject to appropriate consequences due to only having to recompense a comparatively small number of individuals who come forward to make a specific claim.

**Q21 If unclaimed sums were to be paid to a single specified body, in your view would the Access to Justice Foundation be the most appropriate recipient, or would another body be more suitable?**

Our member agencies strongly support the proposal to paid unclaimed damages to the Access to Justice Foundation.

- The work of the Access to Justice Foundation is entirely consistent with the principle behind allowing collective action in these cases. This seems a very good fit for use of unclaimed funds from these actions.
- The work of the AtJF is going to become ever more important in the next few years as reductions in state funding for legal advice begin to bite and free-at-the-point-of-delivery frontline legal advice services continue to restrict services, or in the worst cases, close altogether.
- The work of the pro-bono sector cannot be a complete replacement for the loss and reduction of these services, but can at least provide a small measure of mitigation of the worst impacts.
- The work of frontline advice services, and the pro-bono services that help support them are in general aimed at the most deprived communities and in-need households providing invaluable legal services to those who would otherwise be completely unable to access them. This legal advice has a valuable multiplier effect through communities, both through improving living conditions for individual families, increasing income into local economies through advice regarding welfare benefits and debt advice, and improving the general awareness regarding legal matters within a community.
- As a charity of good-standing the Access to Justice Foundation is trusted to act appropriately in its grant-making function.
- It already has a well-established and robust grant-making process.
- Previous reviews and discussions have concluded that the Access to Justice Foundation is a suitable body to receive residual funds, such as the Jackson Review of Civil Litigation Costs, the Civil Justice Committee, and the HMT Financial Services Rules Committee.

**Advice Network & Advice Centres for Avon**
**July 2012**

The Advice Network is a three-year project managed by Avon & Bristol Law Centre on behalf of Advice Centres for Avon (ACFA). ACFA is a network of advice agencies who have been working together for over 25 years; most members are registered charities and all offer free, confidential, impartial, high-quality legal advice on issues such as housing, debt, welfare benefits, community care, employment, education and health. For more details visit our website – www.advicewest.org.uk.

# Advice Services Alliance

Dear Sir/Madam

The Advice Services Alliance is the representative body for independent not-for-profit advice organisations in the UK. Our members include Citizens Advice, Advice[UK], the Law Centres Network (formerly Law Centres Federation), Age UK and Shelter.

We are not in a position to put in a full response to the consultation paper, but do wish to respond very briefly to Questions 20 and 21, which relate to the payment of unclaimed sums.

We are of the view that it is appropriate to pay unclaimed sums to a single specified body, on the grounds that this approach will

(a) avoid the problems associated with trying to find a suitable recipient for each case, and the associated risks of lobbying of judges and potential satellite litigation
(b) ensure that the single recipient will receive and use the funds solely in the public interest, acting independently from the parties, their lawyers and the litigation
(c) achieve a full deterrent effect against anti-competitive companies
(d) provide legal certainty for all parties and the court, before and during litigation
(e) be administratively simple, which may save time and cost for the parties and the court.

If unclaimed sums are to be paid to a single specified body, we consider the Access to Justice Foundation to be the most appropriate recipient, taking into account its current remit, experience and reputation.

Yours faithfully

Richard Jenner

**Richard Jenner**
**Director**

The Advice Services Alliance
The Foundry (Room 303)
156 Blackfriars Road
London SE1 8EN.

Tel 020 7953 3088
E-mail richard.jenner@asauk.org.uk

# Albion Water

Albion Water
GROUP LIMITED
Albion Water Group Limited
Harpenden House
Southdown Road
Harpenden
AL5 1TE

T +44(0)20 8943 4867 (direct)
T +44(0)1582 767 720 (main)
M +44(0)7754 786777

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

By email : competition.private.actions@bis.gsi.gov.uk

Dear Mr Monblat,

**Private actions in competition law: a consultation on options for reform.**

Albion Water is a small to medium enterprise (SME) that has the rare distinction of bringing follow-on action under the Competition Act 1998 (CA98) before the Competition Appeal Tribunal (CAT) that led to the successful overturning of a non-infringement decision by Ofwat (the sectoral regulator for water under the concurrency regime).

The overturning of that non-infringement decision was, we believe, unprecedented. That it was achieved by an SME, facing not only a well-resourced regulator but also the combined forces of two major water companies (as interveners on Ofwat's behalf), adds to its singularity.

It is worth considering some of the salient facts of that case.

**March 2001**, Dŵr Cymru (Welsh Water) offered Albion Water a price for common carriage access. Albion immediately complained to Ofwat that the price was excessive and a breach of the Chapter II prohibition of CA98.

**May 2004**, After an investigation of over three years, Ofwat published a Decision that Dŵr Cymru had not infringed the Chapter II prohibition of CA98.

**July 2004**, Albion Water appealed that Decision to the CAT (Case 1046/2/4/04).

**September 2004**, Dŵr Cymru and United Utilities intervened in support of Ofwat.

**2005-2009**, In a series of judgments, the CAT rejected the conclusions and a large amount of the reasoning within Ofwat's contested Decision and found that Dŵr Cymru had indeed abused its dominant position, in breach of the Chapter II prohibition, by seeking to impose a price that was abusively excessive and imposed a clear margin squeeze. Dŵr Cymru unsuccessfully appealed aspects of those judgments to the Court of Appeal.

The CAT's judgments, that Dŵr Cymru had indeed abused its dominant position, have led to a claim for damages that will be heard by the CAT this October. The process of securing justice for this SME will have taken over 12 years by that time and will have incurred costs to Albion in excess of £1 million. The costs incurred by Ofwat, Dŵr Cymru and United Utilities in their prolonged but ultimately unsuccessful attempt to defend the original 'not guilty' decision, are estimated to exceed £10 million in total.

That 12-year battle was only made possible because of the determination and sacrifice of Albion Water and its directors and the significant financial support provided by the customer involved, Shotton Paper. Without that, justice would not have been served and Albion Water would certainly have had to exit the market. It is unreasonable to expect SMEs to follow that same path in the pursuit of fair competition and we therefore welcome this consultation. It is Albion's experience which is reflected in this response.

I am conscious that Albion Water has missed the deadline for responses to your earlier consultation on options for reform of the competition regime. I believe that many of the following comments will have a bearing on that wider picture and regret that one drawback of being an SME is that we have insufficient resources to respond to all relevant consultations.

I have only addressed the questions where our experience appears particularly relevant and have no objection to the publication of this response.

**Consultation questions**

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

Yes, we believe that this would be of assistance. The CAT has indeed shown itself to be the most competent court for cases of this kind.

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

Yes. The performance of many of the sectoral regulators, with concurrent powers under CA98, has been poor compared to the OFT and Ofwat's record is particularly poor. SMEs in the water sector face very real barriers to entry from monopoly incumbents and these barriers have, for the past decade, been reinforced by a regulator that suffers from the effects of both information asymmetry and a poor technical, investigative and competition law skill base. This has tended to reinforce a cultural confirmation bias, where Ofwat will reinforce earlier decisions and ignore evidence pointing to contrary conclusions, rather than admit to past errors. This confirmation bias was demonstrated markedly in the CAT appeal described above where Ofwat's determination to justify a flawed decision and its failure to disclose the existence of evidence concealed by Dŵr Cymru, were major factors that prolonged those proceedings.

Albion began its CAT appeal acting as litigant in person and received a level of professional support from the CAT registry and subsequently from the Tribunal, which enabled that action to be maintained, against overwhelming odds, and, ultimately to prevail. The CAT has demonstrated itself to be not only competent and efficient but also very accessible and 'user-friendly' from an SME perspective.

The argument for extending the CAT's powers is further reinforced by Ofwat's tendency to ignore its concurrent CA98 powers in favour of its sectoral powers (particularly those under the 1991 Water Industry Act). in the past, Ofwat has defended such decisions by claiming that sectoral powers are "bespoke" and will provide for a more rapid and efficient means of addressing issues relating to competition in the water market. Regrettably, those claims are unfounded and it appears that Ofwat's primary motivation has been to avoid further CAT scrutiny after being heavily criticised by the CAT during the Albion case. Decisions made by Ofwat using its sectoral powers are not appealable to the CAT but only by judicial review and Ofwat is well aware that it may therefore escape accountability because the JR route is unlikely to be contemplated by most SMEs.

Following the successful conclusion of Albion's case before the CAT in 2009, Dŵr Cymru responded by seeking to impose other charges on Albion Water that would have had an exclusionary effect on the market in which Dŵr Cymru were dominant. Albion immediately brought a complaint to Ofwat under CA98 but Ofwat decided to use its sectoral powers to deal with the issues raised. Following an investigation of some 30 months, Ofwat issued a Determination under section 40A of the 1991 Water Industry Act, the effect of which was to deprive Shotton Paper of any benefit from Albion's successful action before the CAT and require Albion Water to pay

compensation to Dŵr Cymru. In reaching its decision, Ofwat neither gathered nor considered contemporaneous cost information and allowed Dŵr Cymru to earn a rate of return on its services to Albion Water that was significantly higher than Ofwat allows for any other customer in England and Wales.

Albion Water has therefore had no option but to seek judicial review of that determination. JR was refused on the papers because the judge was of the mistaken belief that there were available remedies through the CAT. There will be a JR permission hearing on 25/26 July at which it is hoped that permission will be given. Albion recognises the costs and risks associated with the JR route but there are no other no other routes to justice that are currently available.

It is considered likely that extending the powers of the CAT will also have a beneficial effect on the behaviour of those who are currently dominant in their markets and for whom the risk of enforcement action under CA98 by the sectoral regulator is judged to be small.

Such a move may also encourage concurrent regulators to take their competition responsibilities more seriously although Albion Water's view remains that the concurrency arrangements need careful review and that concurrent regulators who are not able to reach the necessary standards should be stripped of those powers. It is often argued that the sector regulators have the necessary skills to do the job better than a 'generalist' regulator (OFT). Experience suggests that (in the case of Ofwat) technical, investigatory and competition law skills are often poor and a role in approving the tariffs of monopoly incumbents can lead to confirmation bias and a reluctance to investigate potential regulatory gaming by those whose tariffs it has approved.

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

Yes, we believe that speed is often of the essence and that potential customers will default to the monopoly provider if an entrant faces the prospect of lengthy delays in the face of anti-competitive behaviour.

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

Yes. The water industry has had no clear signals that anti-competitive conduct does not pay. Anything that provides entrants (and SMEs in particular) with a low and capped cost route to a rapid resolution mechanism will create beneficial changes in the attitude of monopoly water companies and it is likely to produce similar beneficial effects in other sectors.

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

Entirely appropriate. We are in favour of the proposed approach and consider that capping exposure to costs is important

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

The proposals will greatly improve the current situation but the performance of the new regime could usefully be reviewed after 5/10 years to see whether it can be further improved.

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

Yes. A figure of 20% appears to be a sensible approach.

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

We believe that it would be helpful if the passing-on defence were not available

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

We are in favour of the opt-out model. It is clear that the current model is ineffective.

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

We believe that they are correct.

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

Yes.

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

We are not convinced that there is any significant risk. If such a risk emerges at a later date then it may be appropriate to impose restrictions to address the particular issues that have emerged, rather than second guessing.

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

Given our earlier comments about the poor performance of the concurrency provisions of CA98, we believe that it would be sensible to allow stand-alone actions to be allowed.

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

We are content to give the CAT the powers to decide.

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

We cannot find the relevant section in the consultation document

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

No. There needs to be a stronger deterrent effect for those who may choose to act illegally.

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

Probably. It would be wrong to penalise an innocent defendant.

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

There may well be such circumstances but we offer no opinion.

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

Yes.

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

We have no strong views

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

We have no strong views

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

Yes.

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

Only to those who have suffered harm and genuinely representative bodies.

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

Strongly agree.

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

We have no strong views but it may be sensible to introduce such a protocol for the fast track regime in the first instance and then extend it if justified by results.

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

Probably but with the necessary safeguards to prevent impecunious litigants being "bought off on the cheap" by a larger competitor who stands to profit from exploiting that weakness by offering a much smaller sum than might ultimately be awarded in damages.

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

It is unlikely that we will have the resources to take such an initiative but would commit to encouraging and supporting such a move in the water sector.

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

We agree.

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

Yes.

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

Yes

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

Yes. For the reasons given at the start of this response, the performance of competition law enforcement by Ofwat, in the water sector, has been wholly inadequate and monopoly companies have been given no strong signals that anti-competitive behaviour will be swiftly investigated and punished. These proposals are welcomed as a powerful stimulus to the creation of a more competitive, innovative and sustainable market.

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

If a company has benefited from leniency rules it will have seen that benefit in the reduction of fines that would otherwise have been imposed. That in turn will protect it from exemplary damages. There is however no reason why that company should be protected from an appropriate award of restitutionary damages and it is therefore unclear why the normal rules of disclosure should not apply in full.

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

We agree with the need to incentivise whistle blowers and protection from joint and several liability appears realistic. We are not in a position to judge how far this benefit should be extended.

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

We have no views on this matter.

**Q. 35 Do you have any other comments that might aid the consultation process as a whole?**

No, but we welcome the opportunity to contribute and will make ourselves available should we be able to assist further.

Yours sincerely,

Dr Jeremy Bryan
Executive Chairman

# Allen and Overy LLP

# Response to BIS

## *Private Actions in Competition Law: A Consultation on Options for Reform*

## 24 July 2012

ALLEN & OVERY

**Allen & Overy LLP**
**LONDON**

**Introduction**

We welcome this opportunity to respond to the Department for Business, Innovation & Skills' (**BIS**'s) April 2012 consultation paper *Private Actions in Competition Law: A Consultation on Options for Reform* (the **Consultation Paper**).

This response represents the views of practitioners in the London office of the law firm Allen & Overy LLP (**A&O**). We respond without attributing any particular view to any particular lawyer. To the extent that there are divergent views on particular issues, we have tried to capture these while at the same time making a single submission. This response is also inevitably very general given the broad nature of the questions asked, and the early stage of the process. More detailed comments would be made in response to any specific proposals.

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

1. We welcome the Government's proposal to establish the CAT as a major venue for competition actions in the UK. In particular, we agree that the cross-disciplinary expertise of the CAT's membership means that it is well placed to handle complex competition litigation. Indeed, we consider that in pure competition cases the CAT would often be better placed than a single non-specialist High Court judge who may not have the necessary expertise.

2. We therefore agree in principle with the proposals that Section 16 of the Enterprise Act should be activated to allow competition cases to be transferred from the High Court to the CAT and that the Competition Act should be amended to allow the CAT to hear stand-alone cases. However, as described below, we consider that a number of issues need to be further clarified as part of these proposed reforms.

3. A number of the proposals in the Consultation Paper would be likely to lead to a greater caseload for the CAT. While we note the Government's view that this would not present an issue, we believe that a full assessment should be carried out ahead of introducing the reforms to ensure that the CAT has adequate capacity and that its ability to carry out its existing functions is not compromised.

4. We understand that the Government's intention is that cases which raise both competition and non-competition law issues would continue to be heard by the High Court, but that competition elements may be transferred to the CAT. We also note that it is envisaged that if the judge happened to be chairman of the CAT it would be open to him to continue to hear the case while making use of the procedures, members, staff and facilities offered by the CAT. Although we do not object to these proposals in principle, in practice there will be complex case management issues that will need to be addressed where a case is to be split between the High Court and the CAT. It will therefore be important that there are comprehensive procedures to ensure that cases are dealt with efficiently and that costs are not driven up and that delays do not result. In particular, among other issues, we consider that these procedures will need to address the following points:

   (a) Will the High Court and the CAT progress their aspects of the case in tandem?

   (b) Will separate hearings sometimes be necessary in both the High Court and the CAT?

   (c) Is it possible that witnesses would need to give written and oral evidence to both the High Court and the CAT?

   (d) How will cases be treated if it becomes apparent only at an advanced stage of the proceedings that they raise both competition and non-competition issues?

   (e) Will High Court judges other than the chairman of the CAT have access to the CAT's expertise and facilities where the decision is made not to transfer aspects of the case to the CAT?

5. Although the Government has proposed that the CAT should be permitted to hear stand-alone cases, certain key differences in the jurisdictions of the CAT and the High Court remain. For example: (a) limitation periods;[1] (b) the time from which follow-on claims can be brought[2]; and (c)

[1] Under Rule 31 of the CAT Rules, follow-on claims must be brought within two years from the latest of either: (a) the end of the time period during which the decision can be appealed to the CAT, another higher court, or the European Courts; (b) the final determination of any appeal; or (c) the date of the cause of action. This contrasts with the position which applies in the High Court as set out in the

the approach to the issue of whether a company which is not an addressee of an infringement decision can be an 'anchor defendant'.[3] In many cases, the jurisdiction of the High Court has been wider than that of the CAT. We believe that unless these differences are addressed many competition law cases would continue to be brought in the High Court and would presumably not be capable of being transferred under Section 16 of the Enterprise Act because of a relevant limitation to the CAT's jurisdiction. These differences will need to be addressed by the Government if the aim of making the CAT a major venue for competition cases is to be successful.

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

6. See response to Question 1 above.

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

7. We agree with the Government's proposal to allow the CAT to grant injunctions. However, as mentioned below in our response to Question 4, this is subject to our view that injunctions should be granted only on the basis of established principles.

8. We assume from the hypothetical example on page 19 of the Consultation Paper that the Government also intends to give the CAT the power to grant declaratory relief. If not, we consider that the CAT should be given this power because it is often an important aspect of the remedy that a claimant would seek in the High Court.

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

9. We understand in principle the problems that SMEs may face when threatened by anti-competitive behaviour. However, we have concerns about how the proposals for a fast track procedure will operate in practice and the potential for such a procedure and the design elements proposed by the Government to lead to unmeritorious claims which could unfairly prejudice defendants.

10. It is not clear from the Consultation Paper how SMEs would be defined or if it is intended that the fast track could be used by one SME to bring a claim against another SME. In particular, if a fast track procedure for SMEs were to be introduced care would need to be taken to ensure that there are no unintended consequences and that a definition is adopted which focuses on at least the number of employees and the financial strength of a business (a definition focused only on the former could potentially lead to an organisation such as a hedge fund being classified as a SME).

11. It would seem from the Government's proposals that there is a particular focus on abuse of dominance cases. In our experience, such cases are generally complex, in that they require a claimant to establish, among other things, that the defendant is dominant in the market. Despite the fact that the amount claimed may be relatively small, we consider that the legal issues raised are often no less complex than they would be in larger cases. We therefore question whether the

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Limitation Act 1980, which is that an action must be started within six years of the date on which the relevant damage was suffered (this is subject to any applicable suspension of the limitation period by fraud or concealment under Section 32 of the Limitation Act).

[2] By Sections 47A(7) and (8) of the Competition Act, if a person (or specified body) wishes to bring a damages action before the two-year time period commences, permission from the CAT is required. This contrasts with the position in the High Court, where no such permission is needed. In some circumstances it is important for a claimant to be able to take advantage of the element of surprise, especially where there is a risk of a tactic of commencing pre-emptive proceedings in the same matter in another EU member state to delay proceedings commenced in English courts.

[3] In *Emerson Electric Co v Morgan Crucible Co Plc [2011] CAT 4*, the CAT struck out cartel damages claims against an English company on the basis that, unlike its parent company, it had not been an addressee of an infringement decision by the European Commission (i.e., it was not identified as having infringed competition law or as being subject to a fine). This can be contrasted with the position taken by the High Court in *Toshiba Carrier UK Ltd v KME Yorkshire Ltd [2011] EWHC 2665 (Ch)*. At the date of this response, the decisions from the Court of Appeal in the appeals in relation to both cases are pending.

six month period is realistic, especially where the claimant is a SME which may have limited resources to dedicate to the case. It may also be questionable whether the SME would be able to achieve a significant cost saving, as it would still be likely to require extensive economic evidence. We consider that the focus on determining issues on paper without holding a hearing should be approached with caution. In our view, an oral hearing is an essential part of the litigation process and there is a danger that relevant issues would not be properly aired and tested by the CAT if a hearing is not held. There may also be a risk that the absence of an oral hearing would increase the likelihood of an appeal.

12. As the Government notes in the context of the discussion of collective actions, the 'loser-pays' concept is a significant safeguard against unmeritorious claims. We therefore do not support the proposal that a blanket costs cap of £25,000 should be imposed whatever the context because we consider that removing this safeguard could significantly prejudice defendants. This would especially be the case if claims could be brought by one SME against another (as is permitted in the Patents County Court) or in a case where a SME brought a claim against a party that narrowly fell outside of the SME category. If such a costs cap were introduced, we believe that, rather than leaving it to the Competition Pro-Bono Service or other legal advisers, the CAT chairman should actively carry out an assessment of the merits of the case as part of the decision whether to allocate a case to the fast track.

13. We are not opposed in principle to the emphasis on injunctive relief. However, in recognition of the fact that injunctions are a draconian remedy the courts have developed principles that ensure that the rights of defendants are adequately protected. We would be concerned if the proposal to "*...focus on providing fast access to injunctive relief...*" were to lead to a lower threshold being applied to the grant of injunctions in the CAT than in the High Court. We assume that only High Court judges sitting in the CAT who are familiar with the jurisprudence surrounding injunctive relief would be entitled to hear applications for injunctions. It will be particularly important that the safeguards which form part of existing jurisprudence are maintained, since a party would have little remedy if an injunction were wrongly granted in light of the Government's proposals on costs capping and cross-undertakings in damages. It will also be important to ensure that the CAT has adequate resources and procedures to hear urgent interim injunction applications on top of its regular caseload.

14. We are opposed to the Government's proposal to empower the CAT to waive or limit the SME's obligation to give a cross-undertaking in damages. The High Court already has the discretion to order an interim injunction subject to a limited undertaking in damages.[4] We consider that, rather than creating a special power, the CAT should decide whether to order cross-undertakings in damages according to the principles applied by the High Court.

15. If a fast track model is to be introduced we support the proposal to cap damages, since this would provide a degree of protection for defendants against the potential injustice the model could create. This would be especially important if a costs cap were introduced. However, damages capping could potentially inhibit SMEs from bringing claims. This is because, assuming the Government does not intend to prohibit contingency fees for competition actions outside collective actions once permitted in other areas of civil litigation[5], it may be that lawyers would not act on a contingency fee basis where damages are limited.

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

16. See response to Question 4 above.

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4 *RBG Resources plc v Rastogi (2002) LTL 31/5/2002*

5 We understand that this is expected to happen by 2013

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

17. In our view, a 'plain English' website aimed at aiding SMEs to determine whether they have a legitimate competition claim would be of particular assistance even if the Government does not adopt the fast track route. This could be a consolidation of the OFT's "Quick Guides" on various aspects of competition law and procedural matters relating to private actions in particular.

18. Assuming the Government does not intend to prohibit contingency fees for competition actions outside collective actions once permitted in other areas of civil litigation, we consider that they will be likely to assist SMEs to bring competition cases.

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

19. We are opposed to this proposal for a number of reasons. Firstly, in our view it is questionable whether it is necessary or appropriate to tip the balance so far in favour of claimants by abandoning the principle that loss must be proved. The courts in the UK can and do make complex calculations of loss in many areas of law including, for example, cases of loss of a chance or for loss of a profit based upon an unpredictable income stream. There are a number of tools available to assist the courts, such as expert evidence and the disclosure process. The European Commission is currently consulting on draft guidelines for national courts on quantification of harm caused by breaches of EU competition law[6] which, once finalised, will also be a useful aid. We consider that a rebuttable presumption of loss would be a blunt instrument. It would be particularly questionable in the context of situations of any complexity, such as a claim by a party which bought a product containing a cartelised product rather than the product itself.

20. Secondly, from a practical perspective we question whether introducing a rebuttable presumption of loss would lead to cost and time savings. In our view, extensive economic evidence would still be produced by the parties but it would be the defendant who would lead the economic evidence to rebut the presumption. If credible evidence from the defendant displaced the presumption, the claimant would then be likely to introduce its own evidence to prove its case on loss.

21. Thirdly, we do not consider that this would be the most appropriate method to address perceived informational advantage for defendants. There are already adequate disclosure procedures under the CPR both pre-action and during the proceedings which allow claimants to secure the documents necessary to prove loss. There is also the possibility of arranging for the without prejudice disclosure of documents in the context of settlement negotiations. In this regard, it should also be noted that any informational advantage for defendants is limited because claimants will almost certainly have important information, particularly sales data, on which they will have based their decision to bring a claim.

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

22. If a rebuttable presumption of loss were introduced, we consider that there would be a case for addressing the passing-on defence in legislation so as to ensure that defendants are not made liable for losses which are in excess of a claimant's loss. Clarification of how a rebuttable presumption of loss and the passing-on defence would interrelate, particularly in more complex situations, e.g. a claim by an indirect purchaser who had only been passed-on part of the increase in price as a result of the cartel, would assist both defendants and claimants.

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[6] Draft Guidance Paper: Quantifying harm in actions for damages based on breaches of Articles 101 or 102 of the Treaty on the Functioning of the European Union: Public Consultation (June 2011).

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

23. See response to Question 10 below.

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

24. The Consultation Paper concludes that the current collective action regime for consumers under the Competition Act has not proved effective. While we can see the case for strengthening the regime in some respects, we have serious reservations about the wholesale nature of the changes proposed and whether they would achieve the stated policy objectives. These reservations underlie all of our responses to the questions in this area.

25. In our experience, the English courts' claimant-friendly procedural rules mean that a significant number of competition damages actions are brought here even if the events complained of have very little connection to the UK. If a wide-ranging collective actions regime were introduced in the UK, but not elsewhere in the EU, the UK would become even more a forum of choice for competition damages actions, without necessarily having the effect of increasing deterrence in the UK economy. We therefore consider that there is a case for waiting to see the outcome of the proposals on collective actions currently been considered by the EU (and actively engaging in any further consultation process) before embarking on wholesale reform in the UK.

26. As we discuss in our answer to Question 11 below, especially in the cases of claims by businesses, the claims brought under the umbrella of a collective action regime may not necessarily be closely aligned and may have varying strengths and weaknesses. We are concerned that, despite the safeguards proposed, a wide-ranging collective actions regime would wrongly pressure defendants to settle even where they have a good defence to some of the claims.

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

27. In our experience, businesses have increasingly sought damages for breaches of competition law. We therefore consider that it would be helpful to see more up-to-date figures on cases brought and out-of-court settlements reached than those quoted at paragraph 3.12 of the Consultation Paper.

28. We follow the argument for permitting businesses to bring collective actions where the issues raised by the claim are closely aligned. This would appear to be the case in the example on page 29 of the Consultation Paper where consumers and businesses bought the cartelised product on the same terms and there are no issues with the cartelised product being resold. However, in our experience cases involving businesses are likely to be much more complex and the issues more varied. In particular, there are more likely to be complex issues of passing-on and issues caused by the fact that businesses would be likely to have individually negotiated the price of the cartelised product. We consider that a collective actions regime would not be appropriate in such cases since it would increase the risk that defendants would wrongly be pressured to settle weak claims forming part of a wider collective action. This concern might be addressed if the certification process was robust enough to ensure that such cases did not proceed as collective actions.

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

29. The Government could consider imposing clean team requirements on claimants, for example, so that only legal personnel (and perhaps certain key commercial employees) have access to information that might be commercially sensitive.

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

30. Subject to our other comments on the proposals for collection actions, we see no reason why collective actions should be limited to follow-on cases. However, it would be particularly important in the context of stand-alone cases that the certification process operates effectively so as to ensure that unsuitable cases are not permitted to proceed as collective actions.

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

31. Not least because the European Commission's proposals in this area are awaited, we consider that the Government should first consider whether the current collective actions regime could be amended rather than embarking on wholesale reform. This could include, for example, reforms to:

(a) allow pre-damages opt-in so that the publicity attracted by the case would encourage claimants to come forward; and

(b) adopt the Government's proposal to extend the scope of the bodies which are permitted to bring damages claims on behalf of claimants (subject to our answer to Question 22 below).

32. The virtue of this approach would be that it would avoid the complexities that adopting an opt-out model would pose (e.g. issues surrounding estimations of damages and of the enforceability of judgments and settlements in other jurisdictions.) It should therefore also increase the speed at which the CAT would be able to deal with cases.

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

33. We consider that it would be appropriate for the courts to consider all of the issues identified by the Government in Annex A of the Consultation Paper at the certification stage to ensure that unsuitable cases do not proceed as collective actions.

34. While we think that the CAT should be given discretion in this area, we think that it would be advisable to introduce guidelines about the application of the certification criteria to ensure consistency. In particular, for the reasons given in our response to Question 11 above, we think that it is particularly important that guidelines explain what will constitute the necessary "*commonality of issues*" that will permit a collective action to proceed.

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

35. For the reasons the Government outlines on page 56 of the Consultation Paper, we agree that treble or other punitive damages should be prohibited in a collective action regime.

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

36. As the Government notes in the Consultation Paper, the principle of two-way costs shifting is an important safeguard in encouraging only those claims where the claimant believes it has a reasonable chance of success. We consider that it would be more important than ever to maintain

this safeguard if a collective actions procedure were introduced for competition claims so as to ensure that defendants are protected from unmeritorious claims.

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

37. We have no objection in principle to a claimant being permitted to extract its costs from a damages fund in appropriate cases so long as there are other effective safeguards to protect against unmeritorious claims. However, we consider that any proposal to introduce cost-capping would need to be approached with great caution so as to ensure that defendants are not unfairly prejudiced.

38. The review of the costs of civil litigation carried out by Lord Justice Jackson, recommended the removal or modification of 'loser pays' in English civil litigation in certain limited circumstances, in particular consumer actions. The Government has now signalled that, with the exception of personal injury cases, there is no intention to modify the principle of loser pays "*at this stage*". If the Government's comment should be taken to mean that this issue is likely to be revisited, we believe that the question of whether 'loser pays' should be modified in the context of competition claims should form part of that exercise so as to ensure consistency. This comment would equally apply to the proposal to introduce cost-capping in the context of the fast track procedure.

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

39. For the reasons outlined on page 58 of the Consultation Paper, we agree with the Government's proposal that contingency fees should be prohibited in this area.

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

40. In our view, paying the unclaimed sums to a single specified body would be administratively workable when compared with the other options. We also consider that it would have the virtue of ensuring that there is certainty for all concerned.

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

41. We would have no objection to the Access to Justice Foundation receiving the unclaimed funds. Allen & Overy LLP's Pro Bono team has worked with the Foundation and is familiar with its work as a charitable foundation with a track record of distributing funds to support access to justice.

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

42. Subject to our comments in response to Question 23 below, if any collective actions procedure were introduced we do not see why in theory the right to bring such actions should not be granted to appropriate private bodies.

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

43. We agree with the Government's view that the ability to bring collective actions should be limited to those who have suffered harm or who are genuinely representative bodies. We agree with the assessment that allowing legal firms and third-party funders to bring claims could cause problems where the interests of those bodies diverge from the interests of those who have suffered harm.

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

44. We agree that, as is currently the case under the CAT Rules and the CPR, the CAT and the High Court should continue to encourage the use of ADR, but that it should not be made mandatory.

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

45. We can see the merit of introducing a pre-action protocol in the context of any fast track model for SMEs so as to ensure that claimants are required to consider carefully whether a case is appropriate for fast track. This is especially the case in light of the Government's observation that the Competition Pro-Bono Service has said that it is not uncommon that SMEs who believe they are victims of anti-competitive behaviour in fact do not have a strong competition case.[7] It would also complement some of the elements of the proposed fast track model proposed by the Government, for example the 'plain English' web page proposal, as SMEs will be more likely to make use of the resources available where this is required by a pre-action protocol.

46. We can also see that it may be desirable to introduce a pre-action protocol in the context of collective actions which would require claimants, among other things, actively to consider whether their case would meet the certification standards.

47. Any provision in a pre-action protocol which would lead to cost consequences in the event of non-compliance (e.g. by not taking reasonable steps to use ADR) would need to take account of the risk of pre-emptive proceedings commenced by a potential defendant in another jurisdiction.[8] More specifically, we consider that claimants should not be penalised for failing to comply with pre-action protocol if there is a genuine risk that a defendant may launch 'protective proceedings' for the sole purpose of preventing the English court from being first seised of the claim.

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

48. We consider that the CAT rules governing formal settlement offers should be amended to address the fact that they give limited incentive for the parties to settle. In particular, the fact that rule 43(5) permits a claimant to accept an offer at any point up to 14 days before the final hearing does not give a claimant an incentive to settle at an early stage of the proceedings because Rule 43(6) establishes a default position that the claimant will be entitled to recover its costs up to the date of acceptance.

49. We do not consider that Part 36 would work any better in this context. This is because, due to the imposition of joint and several liability, a defendant would be unlikely to gain any costs protection under Part 36 unless they made an offer for the whole of a claimant's losses caused by all the cartel participants. For obvious reasons, a defendant would be reluctant to do this.

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7 See paragraph 4.29 of the Consultation Paper

8 See footnote 2 above.

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

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

50. We agree. Two different opt-out collective options may create unnecessary complexity especially given, as recognised in the Consultation Paper, "*if an infringer wished to settle on such a basis, the representative body would simply need to bring a collective action in the CAT*". However, we also share the concern that an infringer who wishes to settle would in such circumstances be forced to wait for an action to be brought against it, which we agree appears counter-intuitive. Nevertheless, if in order to mitigate the risk of abuse there is a need for judicial oversight of the settlement itself, it seems appropriate to combine the collective settlement option with the collective opt-out action.

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

51. In our view, the OFT (or CMA as it will become) should not be given a power to impose a redress scheme on a business (a power which is effectively judicial in nature). We believe that giving the OFT this active role would detract from its existing position in investigation and enforcement of anti-competitive activity and could give rise to serious resourcing issues. On the other hand, we can see merit in giving the OFT a power to approve a redress scheme voluntarily offered by a company. This would work particularly well when the redress scheme is offered as part of an overall settlement (or early resolution) of a case (see also our response to Question 30 below). In framing this power, however, the Government should be careful to ensure that adequate information sharing and consultation mechanisms are available in cases where the voluntary offer of redress follows an investigation which was not carried out by the OFT itself, but by a sector regulator (or the European Commission). It will be important that the OFT has all the facts and an understanding of the case in order to make a considered assessment of whether the redress scheme is appropriate to compensate consumers or businesses who have suffered loss.

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

52. We support the option proposed at paragraph 6.46 of the Consultation Paper that a voluntarily offered redress scheme could, in appropriate cases, be viewed as a mitigating factor when it comes to setting administrative fines. This would be similar to the OFT's discretion to award a 10% reduction in fine where a company has taken "reasonable steps" to promote a culture of compliance. It might be particularly appropriate to take a redress scheme into account for the purposes of setting fines when it is offered in parallel with a settlement or other early resolution of the administrative investigation.

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

53. We agree with the Government that it is important that strengthening private actions does not undermine the role played or the tools used by public competition authorities. However, as long as mechanisms are available to preserve the effectiveness of the administrative regime (particularly the leniency process), we believe that encouraging private actions would be a positive complement to the current work of the OFT (and the European Commission) in deterring infringement of competition law. We have included our more specific thoughts in response to Questions 32 to 34.

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

54. We support the proposal that the documents directly involved in the leniency application which would not have been created if the company had not been seeking leniency should be protected from disclosure. This would primarily involve preventing disclosure of the voluntary 'corporate statements' or witness statements which explain and contextualise contemporaneous documents submitted to the competition authority as part of the leniency application.

55. In our experience, many cases before the OFT and the European Commission involve leniency applications by one or more of the parties being investigated. At the time leniency applications are made, the scope of applications by other parties is unclear and the question of whether a party will ultimately benefit from leniency is not determined. So as to ensure that leniency applications are not discouraged, we therefore consider that protection should be given to all 'corporate statements' or witness statements irrespective of whether the party in question is successful in their application for leniency.

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

56. We consider that entirely removing joint and several liability for whistleblowers would go too far. Whistleblowers already receive a substantial incentive to come forward in the possibility of avoiding or reducing the administrative fine. Preventing them from being jointly and severally liable in the context of damages actions would constitute a further unjustified benefit. This would present issues of fairness, particularly in cases where the whistleblower is the entity most deeply embroiled in the cartel.

57. In our view, the problem that should be addressed is that it is often easier for a claimant to commence a damages action for the whole of a claimant's losses suffered against the whistleblower at an early stage than against the other cartelists. This is the case where the parties other than the whistleblower are appealing the administrative decision imposing the fine. We consider that, in such circumstances, there is a strong argument that the whistleblower should be protected from joint and several liability. There would also be a case for extending this protection to other leniency applicants who may be unfairly prejudiced. Alternatively, it may be that a power to stay proceedings against a whistleblower and/or leniency applicant where a damages action had been started against them at a time when the other addressees of the administrative decision are appealing would be appropriate. We envisage that this stay would apply for a specified period after resolution of such appeals.[9]

[9] In some respects, this would codify the position taken in the Emerson Electric case where the CAT made an order staying a damages claim against *Morgan Crucible* (the leniency applicant) until the appeals of the other addressees of the European Commission's decision were resolved.

58. However, where a claimant has started proceedings against a number of the addressees of the administrative decision including the whistleblower there is a weaker case for protecting the whistleblower from the effects of joint and several liability. In such cases, the whistleblower would not be unfairly exposed compared with the other addressees of the decision. In those circumstances we do not consider that there is a case for providing a further benefit over and above protection from the administrative fine.

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

59. We do not consider that there are any other measures that would be required to protect the public enforcement regime other than those discussed above.

# American Bar Association

AMERICAN BAR ASSOCIATION

**Section of Antitrust Law**
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5550
FAX: (312) 988-5637
E-mail: antitrust@americanbar.org
www.americanbar.org/antitrust

July 23, 2012

**Via E-mail**

competition.private.actions@bis.gsi.gov.uk

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

Re: Joint comments of the ABA Sections of Antitrust Law and International Law to the United Kingdom Department for Business Innovation & Skills ("BIS") regarding its consultation paper entitled *Private Actions in Competition Law: A Consultation on Options for Reform*

Dear Mr. Monblat:

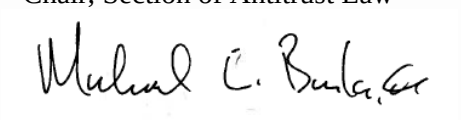
On behalf of the American Bar Association Sections of Antitrust Law and International Law, we are pleased to submit the attached comments regarding the United Kingdom Department for Business Innovation & Skills ("BIS") consultation paper entitled *Private Actions in Competition Law: A Consultation on Options for Reform*.

Please note that these views are being presented only on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Richard M. Steuer
Chair, Section of Antitrust Law



Michael E. Burke
Chair, Section of International Law

Attachment

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW TO THE DEPARTMENT FOR BUSINESS INNOVATION & SKILLS' CONSULTATION ON OPTIONS FOR REFORM OF PRIVATE ACTIONS IN COMPETITION LAW**

**July 23, 2012**

*The views stated in this submission are presented jointly on behalf of the Sections of Antitrust Law and International Law only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.*

The Section of Antitrust Law and the Section of International Law (together, "the Sections") of the American Bar Association ("ABA") are pleased to submit these joint comments to the United Kingdom Department for Business Innovation & Skills ("BIS") regarding its consultation paper entitled *Private Actions in Competition Law: A Consultation on Options for Reform*.[1] The Sections applaud the BIS's careful examination of the various options for, and methods of, reforming private actions in competition law. The BIS has identified many issues worthy of serious consideration before any reform is implemented.

Antitrust class action litigation is a controversial topic in the U.S., with views often sharply diverging.[2] Because the Sections include within their membership many practitioners on both sides of this divide, these comments do not take a position on whether, on balance, the U.K. should or should not create rules permitting collective redress beyond opt-in follow-on consumer cases in the competition sphere. Rather, the purpose of these comments is to explain how many of the key issues raised in the consultation document regarding this form of antitrust enforcement are addressed in the U.S. context.

We offer our views on those issues as to which we can draw on our collective experience with private and class action (collective redress) antitrust cases in the U.S., limiting our responses to questions 7, 8, 11, 13, 15, 16, and 19, where the lessons learned from the U.S. experience may be of most interest.

## RESPONSES TO QUESTIONS FOR CONSULTATION

*Question 7*

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

*Sections' Response to Question 7*

Based on U.S. experience, the Sections recommend against such a presumption, and suggest instead that some form of "soft guidance" be provided to aid courts in determining damages in such cases.

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[1] DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, PRIVATE ACTIONS IN COMPETITION LAW: A CONSULTATION ON OPTIONS FOR REFORM (Apr. 2012), *available at* http://www.bis.gov.uk/assets/biscore/ consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf ("BIS 2012 Consultation").

[2] For a more detailed discussion, see COMMENTS OF THE ABA SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW TO THE EUROPEAN COMMISSION STAFF'S WORKING DOCUMENT: TOWARDS A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS (Apr. 30, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20110430.authcheckdam.pdf

A. Damages Practice in the U.S.

At the federal level in the U.S., the scope of recovery by private plaintiffs is prescribed by Section 4(a) of the Clayton Act.[3] This statute (enacted in 1914) provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor … and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Accordingly, damages in a U.S. civil antitrust case are based on antitrust-related loss to the plaintiff, not gain by the infringer or some other measure.[4] Where a qualifying antitrust loss is found, these damages are automatically trebled.

Instead of imposing a presumption upon the parties, U.S. law has accounted for the inherent uncertainties and difficulties in proving damages in antitrust cases through the use of a comparatively lenient standard of proof for the amount of damages, so as to avoid allowing defendants to escape liability for their violations.[5] U.S. law therefore does not impose any predetermined constraints on the methods that plaintiffs may use to estimate damages as long as the selected method does not employ speculation. Plaintiffs' evidence of damages is subject to rigorous cross-examination and testing by the defense, particularly where such evidence is adduced through expert testimony. In estimating damages through economic models and expert testimony, plaintiffs must demonstrate that such models and testimony are based on sufficient facts or data, are the product of scientifically reliable principles and methods, and the expert has applied such principles and methods reliably in this specific case.[6]

In a typical cartel case, where the plaintiffs allege that horizontal competitors have colluded to increase prices, the measure of damages may be the difference between the price paid by the plaintiffs and the "but for" or competitive price that would have prevailed in the absence of the cartel.[7] In such a case, the prices actually paid are usually ascertainable from purchase records. The challenge is to determine what the "but for" price would have been in the absence of the conspiracy. In the U.S., the appropriate method for estimating prices "but for" the conspiracy is often subject to debate, with differing expert testimony.[8]

Despite this debate, many courts have allowed plaintiffs to prove damages based on multivariate regression techniques that assess the impact of the conspiracy along with other factors that might influence price (such as input costs, demand, capacity and production levels, exchange rates, etc.). While in many cases there is controversy over whether regression techniques can be accurately applied to estimate class wide damages, most U.S. courts have presumed the validity of the method and have focused their analysis in particular cases on the quality of data and the assumptions used in running the selected model.[9] For example, a "before and after" model may assume that the conspiracy began and

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[3] 15 U.S.C. §15(a).

[4] Gain by the infringer is relevant for other purposes under U.S. antitrust law. For example, the maximum fine for a criminal antitrust violation can be the greater of double the loss to victims and double the gain to the defendant. 18 U.S.C. §3571(d). Also, the Federal Trade Commission has sought disgorgement of unlawful profits in government enforcement actions. *See, e.g.*, *FTC v. Mylan Labs, Inc.*, No. 1:98CV03114 (TFH) (D.D.C. Feb. 9, 2001); *FTC v. The Hearst Trust*, No. 1:01CV00734 (TJP) (D.D.C. Nov. 9, 2001). For private plaintiffs suing under the federal antitrust laws, however, recovery under Section 4 of the Clayton Act is based on loss to the plaintiff.

[5] Plaintiffs must adduce evidence of the fact of damage according to the typical preponderance of the evidence standard.

[6] *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Blomkest Fertilizer Inc. v. Potash Corp.*, 203 F.3d 1028, 1037 (8th Cir. 2000); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000); *Am. Booksellers Assoc., Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031 (N.D. Cal. 2001).

[7] *See In re: Potash Antitrust Litig.*, 159 F.R.D. 682, 697-98 (D. Minn. 1995) (describing appropriate methodologies of damage calculations); *Three Crown Ltd. P'ship v. Salomon Bros. Inc.*, 906 F. Supp. 876, 885 (S.D.N.Y. 1995).

[8] *See* ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES, Chapter 3, (2d ed. 2010).

[9] *See* ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES, Chapter 6 at 129, (2d ed. 2010), ("But using regression analysis does not guarantee that the analysis will be accepted. The regression must be in

ended on certain dates. It can then look at prices over time as a function of various factors including whether the conspiracy was in effect at a particular time. If the assumptions about beginning and ending dates are incorrect, however, the results of the regression may be skewed and this may affect the reliability of the result. There may be statistical tools that can test alternate dates and possibly address this situation. Similarly, a "yardstick" approach compares the prices paid in a market affected by a conspiracy with the prices paid in a comparable market not affected by the conspiracy. But if the assumptions about the comparability of the two markets or the existence of the conspiracy in one but not the other are incorrect, then the model may not produce reliable results.[10]

B. The Use of a Rebuttable Presumption of Loss

Although acceptance of a rebuttable presumption of loss might reduce some of the cost of bringing a cartel case, the Sections have significant concerns about using such a presumption. In the U.S., there is not an explicit presumption of damages. Our experience indicates each case is unique, and the impact of price fixing differs from cartel to cartel and industry to industry. While there might be broad patterns across multiple cartel cases, it would be unwise to adopt a single percentage as a presumptive measure of damages. There would be a substantial danger that monetary awards would tend toward that percentage regardless of the particular facts at issue, so some plaintiffs would recover more than they should and some less, and some cartelists would pay more than the damage they inflicted and some less. Moreover, the repeated use of a "benchmark" percentage could diminish the body of precedents that use actual calculations, making it harder to study the issue in the future. The number would become self-fulfilling.

To be sure, data about overcharges in other cases may, in appropriate circumstances, provide anecdotal evidence or statistical background information. But such data should not be used as a method of calculation in itself. The U.S. Department of Justice ("DOJ"), for example, uses a percent of turnover as a starting point for determining cartel fines, but final fines typically vary substantially from these calculations.[11]

The Sections recognize that damages calculations can be difficult, cumbersome, and expensive in certain cases, but our experience shows that – given the appropriate standard of proof – establishing antitrust damages does not have to be more complex than the exercises routinely carried out by courts in complex commercial disputes or economic torts. The Sections therefore respectfully suggest that the use of presumptions on estimating loss would be inappropriate. As explained above, in U.S. antitrust litigation, the parties routinely retain economists to assist with damages calculations. Various estimates are often offered as evidence, sometimes as part of a series of alternative calculations of different complexity. The appropriateness of using simplified and more complex calculations will vary from case to case, and will turn on the facts. The Sections are therefore generally opposed to the use of a rebuttable presumption to calculate damages in cartel-related cases, based on our experience that easier administration is generally not worth the cost in lower accuracy, reliability, and fairness.

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a form that assists in determining a material fact, such as the amount of lost sales or the size of price changes. The analysis also must be based on data 'reasonably relied upon by experts in the field.'") (citations omitted), and Mark Glueck & Eileen Reed, *Use and Abuse of Regression Analysis in Determining Damages in Antitrust*, University of Amsterdam ACLE workshop on Forensic Economics in Competition Law Enforcement, March 17, 2006.

[10] *See* ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES, Chapter 6 at 132-75 (2d ed. 2010).

[11] *See* Ann O'Brien, Antitrust Division Department of Justice, *Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions*, 13th Annual EU Competition Law and Policy Workshop, Florence, Italy, June 6, 2008 *available at* http://www.justice.gov/atr/public/speeches/235598.htm, and Robert Kneuper and James Langenfeld, *The Potential Role of Civil Antitrust Damage Analysis in Determining Financial Penalties in Criminal Antitrust Cases*, 18 GEO. MASON L. REV. 953, 953-86 (2011).

Admittedly, case-specific calculation of damages might require a greater level of discovery than that currently available under U.K. law, particularly if a pass-on defense is recognized and discovery is required from third parties. This does not have to mean unlimited discovery. Under U.S. rules, courts can limit discovery in a wide variety of ways. And with modern-day electronically-stored information, the sharing of relevant data should limit the burden on the parties.

In addition, as the Sections, together with the Section of Business Law, expressed in their June 2008 comments on the European Commission's White Paper on Damages Actions for Breach of the EC Antitrust Rules, we support the concept of informal guidance on the subject of antitrust damages generally, and cartel damages in particular.[12] There are of course limits to what such guidance can achieve, and its value will depend on its content. However, the Sections recognize that U.K. Office of Fair Trading ("OFT"), courts, and litigants could benefit from an articulation of key principles in this complex area.

Informal guidance may be particularly useful where U.K. civil law provides insufficient or no guidance on the calculation of cartel-related damages. The Sections therefore respectfully recommend that rather than endorsing any particular presumption or calculation method for use in all cases, the OFT or other appropriate offices should issue guidelines explaining the tools most often used by economists to generate estimates of loss together with objective commentary on the strengths and limitations of different methods. An inexperienced court may be faced with calculations produced by each party using different methods and reaching very different results, but lack the tools to evaluate the different methods. A guidance document explaining the core concepts, outlining how different methods operate and commenting on their reliability could be very useful for courts not accustomed to dealing with these matters.

*Question 8*

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

*Sections' Response to Question 8*

The U.S. has extensive experience wrestling with (but not comprehensively resolving) the often competing considerations raised by the passing-on defense including maximizing deterrence, providing reasonable compensation to all injured parties, and avoiding duplicative recoveries. Under federal antitrust law, a defendant is prohibited except in very narrow circumstances from raising pass-on as a defense to a damages claim. As a result, a direct purchaser may recover all of its damages caused by the violation, even if it passed on the overcharge to its customers. As the corollary to this rule, indirect purchasers are barred from seeking damages under federal antitrust law.[13] More than half of the states, however, permit indirect purchasers to sue to recover antitrust damages under their counterpart state

[12] *See* COMMISSION OF THE EUROPEAN COMMUNITIES, WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES § 2.5, at 7 (Feb. 2008).

[13] In *Hanover Shoe v. United Shoe Machinery Corp*., 392 U.S. 481 (1968), the U.S. Supreme Court held that an antitrust defendant could not avoid liability by showing that the plaintiff, a direct purchaser, had passed on any overcharge to its customers. The Court reasoned that it would be too difficult to calculate the amount of the pass-on, and that allowing the defense would detract from the deterrent value of private antitrust enforcement because direct purchasers would have less incentive to sue for damages. Following *Hanover Shoe*, the Supreme Court held in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) that indirect purchasers (with very narrow exceptions) could not sue for damages under federal antitrust law. The Court reasoned that offensive use of pass-on by indirect purchasers was inconsistent with *Hanover Shoe*, could result in multiple liability for defendants, and that allocating damages would prove unworkable.

antitrust law. Thus, under the dual federal-state antitrust enforcement regime of the U.S., a defendant may be exposed to liability to both direct and indirect purchasers, often suing in different courts, even though there is no formal mechanism for allocating damages among the various purchasers to avoid duplicative recoveries.

The Antitrust Law Section issued a report in 2004 ("the Report")[14] that attempted to balance the interests of maximizing deterrence and providing compensation to victims against the interests of avoiding inconsistent results and duplicative liability. The Report included an example of legislation that would have permitted both direct and indirect purchasers to recover damages in federal court, but would have precluded duplicative recovery. Subsequently, in 2006, the Antitrust Modernization Commission ("AMC")[15] recommended legislation that would have overruled *Hanover Shoe* and *Illinois Brick* to the extent necessary to permit indirect purchasers to recover antitrust damages in federal court, allowed consolidation of all direct and indirect purchaser actions in a single federal forum for pre-trial and trial proceedings, and limited total aggregate damages to overcharges (trebled) incurred by direct purchasers, with damages to be apportioned among all direct and indirect purchaser plaintiffs in accordance with the evidence as to the extent of the damages each actually suffered. Neither of these legislative proposals has yet been enacted.

Although no federal legislation directly addressing pass-on issues has been enacted in the U.S., some of the apparent conflict between federal and state law has been ameliorated by the passage of the Class Action Fairness Act,[16] which allows defendants to remove most indirect purchaser class actions from state to federal court, where they can be consolidated with direct purchaser actions for pre-trial proceedings.[17]

The Sections recommend against enacting any legislation that would create a rebuttable presumption of pass-on, which could discourage direct purchaser litigation.[18] Further, the Sections agree with the BIS that consideration should be given to judicial mechanisms for consolidating cases and apportioning damages among direct and indirect purchasers. One appropriate solution may be the one suggested by the AMC: consolidation of direct and indirect purchaser claims in a single action in which liability and the aggregate amount of the overcharge can be determined and damages apportioned among the various purchasers.

*Question 11*

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

*Sections' Response to Question 11*

To the extent that collective actions for breaches of competition law are ultimately approved, the Sections agree that businesses that have suffered loss due to infringements of competition law should

[14] A full copy of the August 2004 Report is available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_remediesreportcouncil.authcheckdam.pdf.

[15] Congress created the bipartisan Commission in 2002 to examine whether the antitrust laws needed to be modernized and to submit a report to Congress and the President. A copy of the report is available at http://govinfo.library.unt.edu/amc/.

[16] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. § 1711).

[17] Federal law requires that cases transferred and consolidated for pre-trial purposes under the multidistrict litigation statute be remanded to the originating district for trial. *See Lexecon v. Milberg Weiss Bershad Hynes & Lerach LLP*, 523 U.S. 26 (1998). However, many indirect and direct purchaser actions are directly filed in the same district court where the actions are consolidated, thus obviating the need to transfer any action for trial.

[18] Similar to our comments for Question 7, the Sections recognize quantification of the pass-on in a particular case cannot be realistically assessed without appropriate discovery.

not be denied the right to recover their reasonably provable losses. In certain cases, as illustrated by the BIS 2012 Consultation's example, collective action may allow businesses efficient access to justice without costs outweighing the benefits to the businesses. To the extent that businesses are entitled to bring collective actions on the same terms as consumers, there is also a greater likelihood that businesses harmed by anti-competitive behaviour may be able to recover compensation, rather than being deterred by the costs of litigation. In addition, given the UK rules on costs that generally require the losing party to pay the winning party's costs, the ability to bring collective actions enables businesses to share the potential costs of the defendant in the event that they lose.

*Question 13*

*Should collective actions be allowed in stand-alone as well as in follow-on cases?*

*Sections' Response to Question 13*

Allowing stand-alone private actions is one of the most effective means of furthering the stated goals of the proposed reforms, namely, to promote more private sector challenges to anti-competitive behavior to stop such behavior and to compensate injured businesses and consumers. In the U.S., private enforcement of the antitrust laws, including through class actions, has long been considered an important complement to public enforcement.[19] Given the limited resources available to federal and state enforcement authorities, private antitrust litigation has helped promote compliance with antitrust laws and provide compensation to victims.[20]

However, some have argued that individual private litigation, together with public enforcement, is sufficient to promote compliance with antitrust laws and provide compensation to victims, and that class actions can result in coercive settlement of non-meritorious claims because of the magnitude of potential class-wide damages.[21] On the other hand, the class action mechanism has facilitated the

[19] *See, e.g., Zenith Radio Corp.*, 395 U.S. at 130-31 ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), *overruled on other grounds by Copperweld Corp. v Independence Tube Corp.*, 467 U.S. 752 (1984) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.").

[20] The U.S. first adopted collective redress procedures nearly 80 years ago. The opt-out class action model that is currently reflected in the Rules of Civil Procedure is nearly 50 years old. Despite this considerable experience, U.S. courts continue to innovate and our current understanding of how class actions work differs significantly from what was considered the norm a generation ago. The Sections recognize that U.S. system may remain flawed, and there are continuing efforts to improve the model by providing greater due process rights to all interested parties. Indeed, over the last decade, the U.S. has also experimented with alternative models for victim compensation. In response to two major tragedies, the terrorist attacks of 9/11 and the Gulf Oil Spill, legislative and quasi-legislative funds were used to streamline the process for victim restitution. Elsewhere, Congress has provided for administrative funds, such as the Fair Funds victim compensation funds administered by the U.S. Securities and Exchange Commission. While the class action device remains the predominant model for effecting victim restitution, it is no longer the exclusive model as legislatures and courts continue to innovate.

[21] *See, e.g., Project, Developments in the Law--The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 HARV. L. REV. 1806, 1812 (2000) ("Unfortunately, the pressure to settle exists even with respect to frivolous filings, which are an ongoing concern in the class action context, and are as costly to litigate as legitimate claims. The pressure on defendants to settle even non-meritorious claims gives plaintiffs substantial leverage--so much so that some courts and commentators characterize it as 'blackmail."'); *see also* COMMENTS OF THE SECTION OF ANTITRUST LAW AND THE SECTION OF INTERNATIONAL LAW OF THE AMERICAN BAR ASSOCIATION IN RESPONSE TO THE REQUEST FOR PUBLIC COMMENT OF THE COMMISSION OF THE EUROPEAN COMMUNITIES ON DAMAGE ACTIONS FOR BREACHES OF EU ANTITRUST RULES 47 (Apr. 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_breaches-of-eu-at-rules.authcheckdam.pdf.

prosecution in the U.S. of meritorious antitrust claims where otherwise there might not have been any public or private enforcement. [22].

There is a long tradition of allowing both standalone and follow-on litigation in the U.S. Standalone and follow-on collective actions play the same compensation role: where a cartel or other unlawful conduct has injured business or individuals, class actions can be an efficient and effective means of ensuring adequate compensation, especially where the violation resulted in harm to many victims with low-value claims. In that respect, they are equivalent. Of course, by definition a follow-on class action takes place after a government investigation has become known, and possibly after the government has obtained guilty pleas, convictions, or other acknowledgment of wrongdoing. For that reason, some believe that follow-on class actions play a lesser deterrence role than do standalone class actions, which arguably fill in a gap in enforcement, or perhaps that allowing follow-on class actions result in overdeterrence. Others believe that follow-on class actions do play an important deterrence function, and that in any event even if they overdeter the antitrust system should nevertheless provide victims with compensation.

Under the current U.S. system, while private parties can initiate antitrust class actions in the U.S. in the absence of any government enforcement action, there is often substantial interplay between government enforcement actions and private antitrust litigation. Where class action litigation follows the announcement of a criminal investigation, for example, the class action litigation is often consolidated in the same district in which the criminal investigation is proceeding. Similarly, the government often requests and receives a stay or limitation of discovery in the private suit, to avoid undue interference with the investigation and prosecution of the criminal case. In addition, a judgment against a defendant in a government antitrust action, including a conviction entered on a guilty plea, can be admissible as prima facie evidence of the defendant's liability in a follow-on civil case.[23]

*Question 15*

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

*Sections' Response to Question 15*

The Sections concur that many of the issues listed in Annex A to the Consultation are appropriately considered in determining certification.[24] In the U.S., a party seeking to represent a class

[22] *See, e.g.*, HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 18.01, at 18-3 (3d ed. 1992) ('"It may be that a class action lawsuit is the most fair and efficient means of enforcing the law where antitrust violations have been continuous, widespread, and detrimental to as yet unidentified consumers. Sometimes a class-action lawsuit is the only way in which consumers would know of their rights at all, let alone have a forum for their vindication."') (quoting *Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 520 (M.D. Ala. 1992)); Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 451 (1997) ("Although inevitably there are some abusive cases, it is likely that many antitrust class actions still play a useful role, especially through deterring conduct that stops short of being criminal and through identification of antitrust violations that might otherwise go unchallenged."); *see also* COMMENTS OF THE SECTION OF ANTITRUST LAW AND THE SECTION OF INTERNATIONAL LAW OF THE AMERICAN BAR ASSOCIATION IN RESPONSE TO THE REQUEST FOR PUBLIC COMMENT OF THE COMMISSION OF THE EUROPEAN COMMUNITIES ON DAMAGE ACTIONS FOR BREACHES OF EU ANTITRUST RULES 45 (Apr. 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_breaches-of-eu-at-rules.authcheckdam.pdf.

[23] 15 U.S.C. § 16(a) (2000).

[24] BIS 2012 Consultation 55.

has the burden of establishing that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. In addition, where a plaintiff seeks monetary damages on behalf of the class, it must establish that questions of law or fact common to all class members predominate over questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.[25]

One of the issues in Annex A is not part of the U.S. certification process: "A preliminary merits test, for example that 'there is a reasonable possibility that material issues of fact and law common to the class will be resolved at trial in favour of the [claimants].'" Although recent class certification decisions in the U.S. have required plaintiffs to provide more evidence of the commonality of their claims,[26] it is clear the certification process is not designed or intended to require a claimant to preliminarily establish it will prevail at trial on the merits. Examination of the commonality of plaintiffs' and class members' claims may, however, overlap with a merits inquiry.[27]

In light of the U.S. experience, the Sections respectfully suggest that the BIS carefully consider the need for requiring a preliminary merits inquiry at the class certification stage and, if there is to be such an inquiry, the burden of proof that will be required.

*Question 16*

*Should treble or other punitive damages continue to be prohibited in collective actions?*

*Sections' Response to Question 16*

The automatic trebling of damages under U.S. antitrust law has been the source of extensive debate within the U.S. antitrust bar. Because of divergent positions, the Sections are not able to present a consensus U.S. view of treble damages. Nevertheless, the U.K. may find the competing considerations of some use.

Some would encourage the OFT to reject the concept of treble damages, or at least reject treble damages except in egregious cases where the infringer clearly meant to break the law – i.e., hard core cartel activities. They argue trebling damages creates too great an incentive and an excessive reward for private litigation and therefore encourages the filing of non-meritorious lawsuits. [28] Treble damage liability also arguably raises liability risk to unreasonably high levels thereby deterring companies from engaging in even procompetitive and efficient conduct. [29] In addition, large fines and the potential for criminal sanctions, including prison sentences in the U.S., already provide a powerful deterrent against violations without the need for treble damages. [30] This may apply in the U.K., where fines and prison sentences for infringements can be very substantial.

Others argue treble damages are an essential element of private antitrust enforcement. Without treble damages, many plaintiffs may not have sufficient incentive to pursue their claims even where

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[25] FED. R. CIV. P. 23(a) and (b)(3).

[26] *See, e.g., Wal-Mart Stores, Inc.*, 131 S.Ct. 2541; *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305.

[27] *Wal-Mart Stores, Inc.*, 131 S.Ct. at 2552.

[28] Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul L. Rev. 777, 806-07, 809-10 (Mar. 1987)

[29] AMC REPORT AND RECOMMENDATIONS, *supra* note 14, 243; Cavanagh, *supra* note 29 at 793-94, 801-02.

[30] AMC REPORT AND RECOMMENDATIONS, *supra* note 14, 296; Edward D. Cavanagh, Statement Before The Antitrust Modernization Commission 7 (July 28, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Cavanagh.pdf

clear violations have occurred. Government enforcement resources are limited and encouraging private actions is an important feature of U.S. antitrust enforcement. The possibility of treble damages may serve as an important deterrent against violations, although some researchers find that the damage awards actually recovered in the U.S. work out to be much less than what would be yielded from the trebling remedy.[31] Treble damages in the U.S. may also help offset the lack of prejudgment interest available in antitrust cases.[32] It should be noted that, even with treble damages and other deterrents such as criminal sanctions, antitrust violations continue to occur in the U.S.

One important aspect of multiple damages is compensating for violations that go undetected. From this perspective, a multiplier is necessary if the probability of detecting and penalizing the offense is less than one and prejudgment interest is not available[33] Accordingly, a multiplier greater than one is most justified for practices that are concealable, particularly cartels.[34] In that sense, the trebling of damages carries the further arguable justification that it compensates for the fact that a portion of illegal conduct will always go unpunished since the probability of detection of cartels is likely less than one-half, and may be lower.[35] Limiting the multiplier to cartels could makes sense because exclusionary practices and mergers are ordinarily not concealable.[36] In addition, exclusionary practices are frequently challenged by business rivals, who are more likely than consumers to perceive a significant financial gain from initiating litigation – and thus carry less need for a damage multiplier to mitigate the litigation deterrent. At the same time, business rivals challenging practices alleged to be exclusionary are more likely than consumers to use the antitrust laws for strategic purposes, and thus are less sympathetic candidates for liberal damage remedies.

Both sides of this debate in the U.S. recognize that the treble damage remedy has been part of U.S. antitrust jurisprudence since the inception of the Sherman Act.[37] In this regard, it is important to recognize that substantive and procedural U.S. antitrust law has evolved in ways that specifically take into account the existence of the treble damage remedy. For example, judicially-imposed requirements for antitrust injury, the standards for pleading and for granting summary judgment, and the substantive proof standards for various offenses, all exist in the context of the treble damage remedy. Accordingly, if the U.K. were to adopt a treble damage provision, it cannot be considered in isolation. It should be analyzed and implemented with a careful consideration of the many ways in which antitrust offenses, defenses, and procedures account for the existence of that remedy.

*Question 19*

*Should contingency fees continue to be prohibited in collective action cases?*

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[31] Robert H. Lande, *Are Antitrust 'Treble' Damages Really Single Damages?*, 54 OHIO ST L.J. 115 (1993); *see also* Robert H. Lande, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008); Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. REV. 315 (2011).

[32] In at least some cartel cases where the cartel and litigation are long in duration, prejudgment interest can be larger than trebling.

[33] *See also*, WOUTER P.J. WILS, THE OPTIMAL ENFORCEMENT OF EC ANTITRUST LAW 24-26 (2002), discussing A. Mitchell Polinsky & Steven Shavell, *Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?*, 10 J.L. ECON. & ORG. 427 (1994).

[34] Frank Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 450 (1985).

[35] Peter G. Bryant & E. Woodrow Eckhard, *Price Fixing: The Probability of Getting Caught*, 73 REV. ECON. & STAT. 531 (1991) (estimating a probability of 0.15, which would yield a multiplier of over 6).

[36] Easterbrook, *supra* note 35, 458-61.

[37] Although Congress from time to time has seen fit to "detreble" antitrust damages in narrow circumstances and to address explicit countervailing policies, the basic treble damage remedy remains in place.

*Sections' Response to Question 19*

Contingency fee arrangements have been the primary method of financing antitrust class actions in the U.S. Plaintiffs' counsel typically advance all fees, costs and other expenses of the litigation, including the cost of providing notice to the class members. Plaintiffs' counsel spread this risk by associating with a number of law firms and, in large cases, almost all collective actions are consolidated with certain counsel taking lead. Lead counsel typically are allocated higher fees at the end of the case. If a case proceeds to final judgment, plaintiffs' counsel may be awarded statutory attorney fees in addition to any damages awarded the plaintiffs but the vast majority of the antitrust cases settle or are resolved prior to trial.

In the U.S., plaintiffs' counsel must apply for and receive court approval for the payment of attorneys' fees and costs from class settlements, regardless of the contingency fee arrangement. These filings require detailing time spent on the case, itemization of actual costs incurred, assessment of the complexity of the case and consideration of other factors.

Court approval could have counsel justify its "reasonable" percentage award with a declaration as to the number of attorney hours, a schedule of costs (expert witness fees, deposition costs or other hard costs), the degree of risk and skill involved, and other factors. Also, as is typical in these cases, many attorneys may bring actions that are then consolidated and this mechanism parses out fees amongst various groups who brought actions that are eventually consolidated with "lead" counsel. Fee awards can be made as parties settle and need not await the end of the entire case.

It is reasonable to inquire whether contingency fees drive a lawyer to push the limits of a case, bring frivolous actions, or make less investment in the case to get a higher return. Some studies have concluded that at a certain threshold (e.g., a collective cartel price fixing case) there is no difference in how a lawyer handles a contingency fee versus an hourly fee case. [38] In large cases, the risk of investment (sizable), the scrutiny by the court (of both the merits and the fee approval), and the sophistication of the attorneys are intended to balance out any negative ethical tendencies.

Finally, contingency fees are one method that may be appropriate in certain cases to provide a monetary incentive for attorneys to take on collective action cases.[39] The Consultation provides for three other methods of structuring fees, including "loser pays," the American Rule (each side bears their own risk of fees), and conditional fees (an attorney only receives payment if the case is won, based upon hourly fees with a potential bonus). The "loser pays" method is potentially a disincentive, because it adds risk to the litigation;[40] however it mitigates any damage to the defendant, should the defendant win the case. The American Rule is disadvantageous to the defendant, because the defendant pays fees and

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[38] *See, e.g.*, Herbert M. Kritzer, *What Are Contingency Fees Really Like?* University of Wisconsin Madison, Madison, WI 53706, March 15-16, 2002. Paper prepared for the presentation at 2002 F. Hodge O'Neal Corporate and Securities Law Symposium, Hollywood Florida, the Institute for Law and Economic Policy, University of Pennsylvania Law School, and Washington University School of Law.

[39] *See, e.g.*, THE ABA SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW, COMMENTS TO THE EUROPEAN COMMISSION STAFF'S WORKING DOCUMENT: TOWARDS A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS (Apr. 30, 2011) *available at*
http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20110430.authcheckdam.pdf

[40] As the ABA sections have noted in previous comments, "The potential for crippling cost-shifting awards may remove contingency fees altogether as a means of financing a plaintiff lawsuit, as counsel may not want to assume the risk of both the investment of time and the downside of a cost-shifting award if the lawsuit is not successful." THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, SECTION OF INTERNATIONAL LAW, & SECTION OF BUSINESS LAW, JOINT COMMENTS ON THE COMMISSION OF THE EUROPEAN COMMUNITIES' WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES 32 (June 30, 2008), *available at*
http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_ec_whitepaper-damages.authcheckdam.pdf.

costs regardless of the outcome, but each party can adequately assess their own risk as the litigation continues and settlement is encouraged when the cost of litigation exceeds the potential damages. The conditional method can be problematic if the hourly fee exceeds the award, and, if combined with "loser pays" or if the bonus percentage is not high enough, may not provide enough incentive for attorneys to bring antitrust cases.

## CONCLUSION

The Sections applaud the BIS's careful examination of the various options for, and methods of, reforming private actions in competition law, and appreciate the opportunity to offer comments in response to the consultation.

# Andreas Stephan (University of East Anglia)

# Private actions in competition law: a consultation on options for reform. Response form

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

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

This response form can be returned to:

Tony Monblat
Consumer and Competition Policy
Department of Business, Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
Westminster
SW1H 0ET
Tel: 0207 215 6982
Fax: 0207 215 0235
Email : competition.private.actions@bis.gsi.gov.uk

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| Central Government | |
| Legal | |
| Academic | ✓ |
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University of East Anglia

# Private Actions in Competition Law: A Consultation on Options for Reform

Response from

**Dr Andreas Stephan**

Senior Lecturer in Competition Law
UEA Law School & ESRC Centre for Competition Policy
University of East Anglia, Norwich NR4 7TJ
a.stephan@uea.ac.uk

## 1. Introduction

1.1. This response focuses on the relationship between private and public enforcement, broadly covered by questions 29-35 in the BIS consultation document. In particular, the dangers posed by greater private enforcement to the effectiveness of the leniency programme and how these might be overcome. It argues that all leniency documents should be protected and that the revealing firm (or immunity applicant) should also enjoy protection from joint and several liability, or preferably immunity from private enforcement. Finally, it is suggested that the deterrent power of private enforcement may be weaker than thought and that paying damages out of public fines might be a more efficient mechanism for delivering compensation to injured consumers.

1.2. It is difficult to exaggerate the importance to cartel enforcement of an effective leniency programme. Around two thirds of cartels investigated by the European Commission were uncovered by a leniency applicant. In many cases, cooperation in return for leniency has resulted in further infringements coming to light in parallel industries.

1.3. A firm's decision to self-report an infringement is ostensibly driven by two factors:

1.3.1. (i) The race to be first through the competition authority's door in order to secure immunity. This is heightened by a greater difference between the whistleblower's prize (immunity) and the sanctions otherwise faced if beaten by another cartel member.

1.3.2. (ii) Certainty and predictability in the way the immunity prize is granted. This is widely considered to be a hallmark of effective leniency.[1] Important reforms made to the EU leniency programme in 2002 (and similar amendments to US leniency in 1993) made it easier for firms to predict the consequences of blowing the whistle and resulted in significant increases in the number of leniency applications made.[2]

1.4. By promoting private enforcement, the government risks undermining this key tool of cartel detection and investigation. Private enforcement should only be encouraged in a manner that *complements* public enforcement. As the BIS consultation document points out (at 3.8):

> "The primary purpose of the public competition enforcement regime is, and should continue to be, deterrence. Whilst there may be a case for the competition authority to have a small role in facilitating redress, the detection, enforcement and deterrence regime must not be compromised by an undue diversion of resources into facilitating redress"

This is supported by the 2007 CCP survey into public attitudes to price fixing and enforcement. 80 per cent of Britons supported imposing a deterrent punishment on cartels, while only 56 per cent felt businesses should be made to compensate consumers who have been overcharged by the infringement.[3] A similar study in Australia produced a very comparable result.[4]

## 2. Disclosure of Leniency Documents

2.1. Private enforcement may undermine leniency if evidence submitted in cooperation can later be used against the leniency applicant by private claimants.

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[1] See for example: S D Hammond, 'Cornerstones of an Effective Leniency Program' Presented at the ICN Workshop on Leniency Programs, Sydney Australia. November 22-23, 2004.
[2] The European Competition Network's Model Leniency Programme (2006) was designed to ensure greater predictability across EU Member States.
[3] A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' [2008] 5(1) Comp. Law Review pp 123-145.
[4] C Beaton-Wells *et al*, 'The Cartel Project: Reporting on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement' (2011) University of Melbourne Legal Studies Research Paper No. 519. Available: http://ssrn.com/abstract=1743268

2.2. In *Pfleiderer*, the European Court of Justice recognised this danger, but said it could not defeat the well established right of individuals to bring a claim for damages.[5] It was therefore up to the national courts and tribunals to consider each application for access to leniency documents on a case-by case basis, according to national law, and taking into account all the relevant factors in the case.

2.3. The Amtsgericht Bonn – the German court making the Article 234 reference to the ECJ – went on to deny Plfeiderer's request for access to the Bundeskartellamt's leniency documents.[6] However, the recent UK case of *National Grid Electricity*[7] went the other way, allowing partial disclosure of leniency documents. Mr Justice Roth expressly rejected that leniency applicants had a legitimate expectation that leniency materials would be protected from disclosure (para 34) and suggested it was difficult to weigh the interest of disclosure against the need to protect an effective leniency programme, in the way suggested by the ECJ in Pfliederer. The outcome is not surprising. The EU leniency notice specifically states that immunity or leniency 'cannot protect an undertaking from the civil law consequences of its participation [in the cartel]'[8]

2.4. In an environment of increased levels of private enforcement, this position could put firms who cooperate with the competition authority at risk of greater liability in civil litigation than those firms who do not cooperate. At the very least, whistle blowing will result in costly damage payments for even revealing firm, where staying quiet about the agreement might have resulted in the infringement never coming to light. Cartelists could actually cite private enforcement in their dealings, alongside threats of punishment, as a reason not to betray the cartel agreement.

2.5. The high stakes involved are highlighted by the Vitamins cartel. Connor estimates that while worldwide public fines totalled £1.21 billion, private damages in the same case totalled over £2 billion.[9] Thus damages can exceed public fines. Although it is true that a large bulk of these damages were awarded in the US, it is not correct to suggest that these necessarily represented treble damages. Most private litigation in the US is settled for single damages or less.[10]

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

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

[5] Judgment of the Court in *Pfleiderer AG* v. *Commission*, C-360/09, 14 June 2011 at 26
[6] See Bundeskartellamt, 'Decision of Local Court of Bonn Strengthens leniency programme' (30 January 2012) Available: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_01_30.php
[7] *National Grid Electricity* v *ABB Ltd and Others* [2012] EWHC 869 (Ch).
[8] Commission Notice on Immunity from fines and reduction of fines in cartel cases OJ [2006] C 298 at 39
[9] J Connor, 'The Great Global Vitamins Conspiracy: Sanctions and Deterrence' (2006) AAI Working Paper 06-02
[10] See R H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 *Ohio State Law Journal* 115.

2.6. Concerns over the dissuading effect of private enforcement were the motivation behind the US Antitrust Criminal Penalty Enhancement and Reform Act 2004 (ACPERA).[11] This appears to have succeeded in strengthening the incentive to self-report while improving the efficiency of damage recovery. The revealing firm is protected from treble damages and joint and several liability. In return, it must cooperate with the civil plaintiffs in the damage case in order to assist them to more efficiently establish liability. This protection is not afforded to other cooperating parties – indeed leniency in the US refers only to first firm immunity. Subsequent firms who come forward can only receive beneficial treatment through plea bargaining. This process occurs behind closed doors and generally circumvents the submission of 'leniency evidence' which could later be used against the firm in civil litigation. Class actions in the US will generally settle low with the revealing firm, using the money to finance more ambitious claims against the other firms involved in the cartel.

2.7. Given the importance of leniency in uncovering cartel infringements, protection should be given to all leniency evidence – but especially that submitted by the revealing party. Choosing to whistle blow or cooperate with an investigation, should not put firms at a disadvantage in terms of civil liability, as compared to firms who choose not to cooperate. Even if they still choose to cooperate, this could have a detrimental impact on the quality of evidence submitted through leniency and therefore adversely affect the efficiency of public investigations. Some responses to this consultation may say that most (if not all) firms under investigation end up cooperating and that this could therefore choke any follow-on actions. However, the protection of public enforcement should be the Government's priority. Moreover, claimants can still rely on the finding of an infringement in pursuing a claim and will therefore still have a significant advantage over stand-alone actions.

2.8. The revealing firm should also be protected from joint and several liability. This will help shield the incentive to whistle blow in return for immunity and reduce the prospect of the revealing firm paying more in damages than they would otherwise have paid in public fines. Helping civil plaintiffs build a case against the other cartelists could be a condition of this protection, as it is under the ACPERA.

## 3. Should Immunity mean Immunity?

3.1. Any success in promoting private enforcement risks blunting the incentive to self-report. Even with the protections outlined above, immunity from public fines will almost certainly

[11] J L Himes, 'It Ain't Funny How Time Slips Away: Amnesty Recipient Cooperation in Civil Antitrust Litigation' (2009) Global Competition Policy, AUG-09(1).

come hand in hand with damages of an uncertain magnitude.[12] It is therefore important to ask what further action could be taken to protect the effectiveness of leniency.

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

3.2. One possibility is to protect the revealing firm with anonymity, excluding it from the infringement decision. This is an approach which has been taken in the US in criminal antitrust prosecutions. While it would not be difficult for prospective claimants to work out the revealing firm's identity, the fact the firm would not be subject to an infringement decision makes it harder for a private action to succeed.

**3.3. In order for private enforcement to truly *complement* public enforcement, two elements are needed. The first is that the revealing firm receive immunity from public fines, criminal sanctions against employees and private actions for damages. Immunity would mean immunity. Extending immunity to private enforcement would heighten the race to be first through the door by raising the stakes further. The second element necessary is that, as a condition of immunity, the revealing firm helps claimants seek damages against the other cartelists – who would be jointly and severally liable for all the harm caused.**

3.4. This combination of incentives could actually increase the detection rate of cartels, as firms fearing stand alone actions would approach the competition authority for an immunity deal. Although such a protection would be unprecedented, it is no more controversial than granting civil and criminal immunity to a revealing party (something we now accept as a permanent feature in the competition law landscape), or indeed the suggestion of a rebuttable 20 per cent over-charge presumption (which goes against the fundamental principle that it is for the claimant to demonstrate a loss).

3.5. The effectiveness of this protection in terms of damages would be limited where there are only one or two other firms involved in the infringement, or where the revealing firm is by far the largest (and therefore the one with the money). Although it may be harder for claimants to secure damages in these situations, this loss to private enforcement is outweighed by the more important interest of protecting the leniency programme and incentivising self reporting.

[12] The CAT's recent Cardiff Bus Decision suggests that the revealing firm should receive a fine reduced to zero rather than 'no punishment' in order to avoid the award of exemplary damages: *Travel Group PLC (in liquidation)* v *Cardiff City Transport Services Limited*. [2012] CAT 19. See comments by Morten Hviid at http://competitionpolicy.wordpress.com/2012/07/23/cardiff-bus-exemplary-damages-in-follow-on-cases/

## 4. Is Private Enforcement about Deterrence or Compensation?

4.1. In both the BIS consultation document and the White Paper on private enforcement prepared by the European Commission, encouraging private enforcement appears to be both about strengthening deterrence and ensuring injured parties are compensated. Yet the purpose we wish to pursue has important implications for the design of the private enforcement regime. Indeed treble damages in US antitrust cases have traditionally served a deterrent rather than a compensatory role.

4.2. In terms of deterrence, stand alone actions may very well tackle cartel infringements that would not otherwise come to light. Historical data from the US suggests that 90 per cent of private cases were stand-alone between 1973 and 1983. These outnumbered follow on suits by 4 to 1.[13] However, this data examines a period of relative inactivity in terms of public enforcement. Modern US cartel busting did not really gain momentum until well into the 1990s. Moreover, the treble damage incentive has historically meant that many breach of contract cases focus on an alleged antitrust violation in order to secure three times the harm. The experience appears to be different between jurisdictions. Recent German experience suggests most stand alone cases are likely to concern abuse of dominance and seek injunctive relief.[14] In Japan, the majority of cases have been follow-on.[15] Where there is a healthy level of public enforcement, one would expect there to be more follow-on cartel cases. Unlike abuse of dominance (such as refusal to supply or predatory pricing), it is much harder for prospective claimants to spot price fixing agreements – especially as they become more sophisticated in response to stepped up enforcement.

4.3. Studies carried out by the OFT in 2007 and 2011 suggest businesses consider corporate fines and private enforcement to be the weakest driver of compliance with competition law. Criminal penalties, director disqualification and adverse publicity were all ranked higher. The consultation document draws the conclusion from these studies that "companies and their advisers view private actions as they currently stand as the least effective aspect of the competition regime..." (at 3.11). This implies that private enforcement is currently weak and therefore has little deterrent effect. However, if this were the case then firms would surely have ranked fines at the top, instead of criminal penalties and director disqualification. No competition disqualification orders have been sought and *Marine Hoses* is the only successful criminal case to date.

4.4. The ranking in the OFT studies does not reflect the likelihood of enforcement, but the deterrent nature of the sanction. Undertakings have shown a remarkable capacity to absorb even very substantial levels of cartel fines. Once their magnitude is known, they

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[13] L J White, *Private Antitrust Litigation* (MIT 1988); T E Kauper and EA Snyder, 'An inquiry into the efficiency of private antitrust enforcement: follow-on and independently initiated cases compared' (1986) 74 Georgetown Law Review, 1163.
[14] S Peyer, 'Myths and Untold Stories – Private Antitrust Enforcement in Germany' CCP Working Paper 10-12
[15] Simon Vande Walle, 'Private Enforcement of Antitrust Law in Japan: An Empirical Analysis' [2011] Comp. Law Review 8(1), pp. 7-28

can be dealt with as a cost by the firm. Damages paid in civil litigation simply constitute an extension of this cost.

4.5. To the extent to which these damages have a deterrent effect, the same strengthening of enforcement could be achieved by simply raising public fines. This would have the same result without the transaction costs of private enforcement or the risk of undermining the leniency programme.

4.6. There are in fact serious doubts about the deterrent effect of corporate fines (and therefore damages). A number of economic studies suggest that even the very significant levels of fines imposed by the European Commission fall well short of the likely illegal cartel profits.[16] Fines and damages of the level needed to be 'optimal' would bankrupt most firms and therefore are not feasible. Further reasons to question their deterrent effect include the fact price fixing is not generally coordinated within corporate institutions, and the time lag which typically exists between instigating an infringement and paying a fine and/or damages. In EU cartel cases, this averages ten years. Even the period of time between a cartel being detected and an infringement decision being delivered averages 4-5 years. By the time corporate fines are imposed and follow-on actions are settled, the individuals responsible for the infringement may have moved on or retired. It is for this reason that a mixed approach to enforcement – which includes sanctions against individuals – should be pursued by the UK competition law enforcement regime.

4.7. The more convincing argument for promoting private enforcement is to ensure injured consumers and buyers are compensated for their loss.

## 5. Will Compensation Reach the Injured Parties?

5.1. As the consultation document rightly identifies, harm in competition cases is frequently passed on down the chain of production, becoming less concentrated. Even where an infringement involves firms selling directly to final consumers, the harm can be very dispersed, with each individual consumer being overcharged by only a small amount.

5.2. The introduction of opt-out collective actions will make it easier to recover damages on behalf of a large group of injured consumers. Yet it does not address the problem of how to effectively identify these individuals. In the JJB case, Which? only succeeded in signing up 0.1 per cent of those affected, despite committing significant resources to publicity.

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

[16] E.g. E Combe and C Monnier, 'Fines Against Hard Core Cartels in Europe: The Myth of Over Enforcement' (2009). Cahiers de Recherche PRISM-Sorbonne Working Paper; see also OECD Hard Core Cartels – Harm and Effective Sanctions. (May 2002).

While the sign up rate would certainly be higher if compensation had been claimed and was ready to be paid out, a significant transaction cost would still exist in identifying the beneficiaries.

5.3. While the unclaimed money can be put to good use – the Access to Justice Foundation being a very worthy cause – it would be unsatisfactory if the majority of collective action damages did not reach injured parties.

5.4. In terms of standing, allowing actions from indirect purchasers may make civil litigation harder – especially in calculating the damages. The US policy of forbidding a passing on defence, while removing standing for indirect purchasers, may encourage more claims but it is fundamentally unfair because compensation frequently ends up in the hands of parties who did not necessarily suffer the corresponding injury. It is a reflection of the emphasis in US private enforcement on deterrence rather than compensation.

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

## 6. Why not Pay Compensation Out of Public Fines?

6.1. This is something that was suggested some years ago by the Belgian Competition Authority, but which was not given serious consideration by the European Commission. Paying compensation out of public fines circumvents the danger of undermining leniency while averting many of the significant transaction costs associated with increased private enforcement. In particular, legal representation and economic evidence could constitute a very significant cost to the economy, while adding limited value in terms of developing the law or our understanding of economics.

6.2. Firms could be made to set up a compensation fund alongside the public fine, as a condition of leniency. Claims could also be made to the competition authority before the Statement of Objections is issued, with payments made from public fines. This would force the competition authority to take a greater effects based analysis in its cartel cases, aided by the submissions of claimants. It would become a centre for expertise in awarding compensation. More effects analysis would actually improve the competition authority's decisional practice and make it easier to defend fines at appeal – something highlighted by the Competition Appeals Tribunal in

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

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

its decision to lower fines imposed for cover pricing by 90 per cent.[17]

6.3. Another alternative suggested in the consultation is for the competition authority to be responsible for bringing claims (at 5.42) before the CAT, avoiding over-deterrence by taking damages into account when setting fines.

6.4. As with extending immunity to private enforcement, making the competition authority responsible for compensation could actually increase the detection of cartels, by encouraging firms to be first through the door in order to enjoy complete immunity. Any such system should not prevent private claimants from pursuing stand alone cases with the High Court or the CAT.

6.5. One of the biggest obstacles to such as system is that lawyers, economists and competition authorities would all benefit from greater (conventional) private enforcement and therefore have no interest in exploring such alternative mechanisms for delivering compensation to consumers. More civil litigation is good for practitioners and takes some of the pressure off the competition authority in terms of enforcement.

**I am prepared to give oral evidence in connection with any of these comments, respectfully submitted as a response to the consultation on private actions in competition law.**

***Dr Andreas Stephan***

***20 July 2012***

[17] *Kier Group PLC and others* v *Office of Fair Trading* [2011] CAT 3

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Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

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# Ashurst LLP

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**RESPONSE OF ASHURST LLP TO**

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

## INTRODUCTION

Ashurst LLP welcomes the opportunity to respond to the consultation published by the Department for Business, Innovation and Skills (**"BIS"**) in April 2012 on options for reform of private actions in competition law (the **"Consultation Document"**). We confirm that nothing in this response is confidential.

This response is made in our own name, drawing on our professional experience of advising clients on the application and private enforcement of UK and EU competition law before the Competition Appeal Tribunal (**"CAT"**) and the English courts. We are not responding on behalf of any particular client.

## RESPONSE TO CONSULTATION QUESTIONS

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

1.1 We agree that the CAT's position as a centre of competition law expertise means that it should in principle be best placed to hear competition cases. We therefore welcome the proposal to allow the transfer of competition cases from the courts to the CAT, subject to the comments below.

1.2 As to whether it is necessary to amend section 16 of the Enterprise Act to achieve this (rather than simply making regulations pursuant to that section), we note as a preliminary point that the discussion at paragraphs 4.16-4.18 of the Consultation Document focuses solely on the implementation of that section to enable the courts to transfer competition cases to the CAT, rather than proposing any specific statutory amendments.

1.3 In its current form, section 16(1) of the Enterprise Act empowers the Lord Chancellor to make regulations to enable the courts to transfer "*so much of any proceedings before the court as relates to an* [competition law] *infringement issue.*" Section 16(6) defines "*an infringement issue*" as meaning "*any question relating to whether or not an infringement of*" UK or EU competition law has been or is being committed. As currently drafted, it is possible that questions could arise as to whether regulations made under section 16(1) could permit the entire proceedings to be transferred from the courts to the CAT where, for example, they relate primarily to a competition law infringement but also involve other issues not directly concerned with the question of whether there has been an infringement. We consider that in such cases the whole of the proceedings should be considered to "*relate to an infringement issue*". However, it is not clear that this is how sections 16(1) and 16(6) would be interpreted, and in the interests of clarity it may be desirable to amend section 16(1) to make clear that regulations made by the Lord Chancellor under that section may enable the whole of a case involving competition law issues to be transferred to the CAT, and not only the issue of whether a competition law infringement has been established, where the court considers it appropriate to do so.

1.4 With regard to the issue of when competition cases should be transferred to the CAT, we agree that transfer to the CAT should not be automatic for every case involving

competition law issues, but rather that it should be for the presiding judge in each case to determine whether, in the particular circumstances of that case, the transfer of the case to the CAT would be appropriate. We would welcome more detailed guidance on the factors to be taken into account by the courts in this regard, and the procedures to be followed (in particular where, as suggested in the Consultation Document, the judge is also a Chairman of the CAT, and wishes to continue to hear the case while making full use of the members, staff and facilities offered by the CAT).[1] In general terms, we consider that transfer to the CAT would normally be appropriate where an infringement of competition law is the predominant issue at stake. Where a case is not primarily concerned with an infringement issue, but aspects of competition law are raised as one of many issues, we consider that it would be more appropriate for the ordinary courts to continue to hear the case.

1.5 In line with this, we consider that it would rarely (if ever) be appropriate for the competition law elements of a case to be transferred to the CAT whilst the court continued to hear the rest of the case (as suggested in paragraph 4.21 of the Consultation Document). Such bifurcation of cases involving competition law elements would give rise to considerable practical difficulties, both in terms of timetabling and case management issues, as well as debate regarding which collective actions regime should apply, if the proposal to introduce an opt-out regime for competition cases is adopted. It would also be unnecessary in the context of transfer of cases from the High Court: all Chancery judges are Chairmen of the CAT and are very capable of dealing with competition law issues which arise in a primarily non-competition case, without any need to transfer the competition law element to the CAT to be heard separately, under different procedural rules.

1.6 We would also point out that section 16(5) of the Enterprise Act currently envisages the transfer of proceedings from the CAT to the courts.[2] The Consultation Document does not consider the transfer of cases in this direction (as opposed to from the courts to the CAT), but we would stress that the possibility of transfer "both ways" should be maintained. We note in this regard that section 16(5) currently refers to transfer from the CAT of "*a claim made in proceedings under section 47A of the 1998 Act*" (i.e. follow-on claims). We understand that it is currently intended that the proposals to allow the CAT to hear stand-alone cases as well as follow-on cases would be implemented by amending section 47A of the Competition Act 1998 (**"CA98"**) – if that is the case then no amendment to section 16(5) would appear to be required to allow the CAT to transfer a stand-alone case to the appropriate court. However, regard should be had to the potential need to amend section 16(5) to reflect any expansion of the CAT's jurisdiction, depending on how this is ultimately achieved.

1.7 Finally, an important issue which is not addressed in the Consultation Document but which will need to be dealt with if the transfer of cases from the courts to the CAT is to be permitted is the question of limitation periods. The CAT has its own limitation periods in many cases (for example, claims brought under section 47A CA98 must be brought within two years of the final decision in any appeal process in respect of the relevant infringement decision of the Office of Fair Trading (**"OFT"**) or European Commission[3]), whereas in, for example, the High Court, standard limitation periods apply, requiring claims to be brought within six years from the date the cause of action accrued or the date of knowledge (whichever is the later).[4] There is therefore the potential for confusion

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1 Consultation Document, paragraph 4.17.

2 We note that this option was recently used for the first time in respect of an action lodged at the CAT under section 47A of the Competition Act 1998, in the claim brought against those involved in the copper plumbing tubes cartel (*W.H.Newson Holding Limited & Ors v IMI Plc & Ors*, Case No. 1194/5/7/12, transferred from the CAT to the Chancery Division of the High Court by way of an Order dated 24 July 2012).

3 Section 47A CA98, and paragraphs 31(1)-(3) of the Competition Appeal Tribunal Rules 2003, SI 2003/1372 (the **"CAT Rules"**). We note in this regard that the position on exactly when the two year limitation period starts to run when appeals have been lodged against the infringement decision is currently unclear, but it is expected that the forthcoming judgment of the Court of Appeal in *Deutsche Bahn & Ors v Morgan Crucible & Ors* will clarify this.

4 Section 2 of the Limitation Act 1980.

to arise as to which limitation period applies if a case is transferred from the courts to the CAT, and the position should be clarified. We would suggest that the limitation period should match the cause of action, rather than the forum, such that stand-alone cases are subject to a six year limitation period whether the claim is originally lodged in the CAT or the High Court, and follow-on claims are subject to the two year limitation period.

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

2.1 We agree that the CAT is well suited to becoming the main venue for private actions in the UK – both follow-on and stand-alone - and we support the proposal to amend section 47A CA98 to remove the requirement that civil actions brought before the CAT under that section have to "follow on" from a prior administrative decision. We consider that this would be helpful in addressing the difficulties which have resulted from the Court of Appeal decision in *EWS v Enron*[5] regarding the scope of cases that the CAT can consider under the current rules, and would encourage claimants to bring cases before the CAT (which, as already noted above, we consider ought to be best placed to hear competition cases given its considerable experience in this field).

2.2 However, if the CAT's jurisdiction is to be expanded in this way, there are a number of issues which need to be addressed. First, it will be important to ensure that differences in procedure for claimants bringing a private action in a stand-alone case before the CAT compared to the courts are minimised as far as possible. The question of limitation periods has already been discussed in response to Question 1 above. In addition, the ability of claimants to bring proceedings in a situation where an appeal has been lodged against an infringement decision by some addressees of the decision but not others should be harmonised as between the courts and the CAT. Under the current rules, claimants are prohibited from starting an action in the CAT prior to the final decision in any appeal process in respect of the relevant infringement decision of the OFT or European Commission, which has to date resulted in a significant number of competition damages claims that could potentially have been filed at the CAT instead bring filed at the High Court (in order to claim jurisdiction). If it is intended that the CAT should become the main venue to hear stand-alone as well as follow-on competition claims, then it will be important to ensure that differences in procedure between the CAT and the courts do not discourage claimants from making use of the CAT's new expanded jurisdiction.[6]

2.3 Second, we note that the Consultation Document does not consider in any detail the extent of the CAT's jurisdiction to hear stand-alone cases which are not solely concerned with competition law issues. In practice, claimants in stand-alone cases may wish to plead various different causes of action, of which competition law is just one, and a defendant may seek to issue a counterclaim which is unrelated to competition law. As explained above in response to Question 1, we do not consider that the CAT would be the appropriate forum to hear cases which are not primarily concerned with competition law. However, for stand-alone cases which are predominantly competition cases, but also raise other issues, we would suggest that such cases should, in principle, be heard by the CAT but reserved, in terms of Chairmanship, to Chancery Division judges (all of whom are Chairmen of the CAT), sitting as usual with two wing members.

2.4 Finally, from a practical perspective, we have some reservations about the potential impact of this extra work on the CAT's ability to continue to hear cases quickly and effectively. Clearly, the CAT is best placed to offer an opinion on any potential capacity constraints and increased budgetary requirements, and we note that the Government

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5 *English Welsh & Scottish Railway Limited v Enron Coal Services Limited* [2009] EWCA Civ 647.

6 We recognise that there may be circumstances where a claimant may nonetheless prefer to lodge a claim at the High Court rather than with the CAT even if these issues are addressed – for example, a claimant may, for strategic reasons, prefer the "bare bones" approach of a High Court claim form compared to the "front-loaded" nature of the CAT process. However, as a general rule, if the CAT is intended to become the main venue for all competition private actions, it will be important to ensure that it is a procedurally attractive (or at least no less attractive) option.

states in the Consultation Document that it considers the CAT to have sufficient capacity to take on this expanded role.[7] This is however something which will require careful consideration and discussion with the CAT.

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

3.1 We welcome the proposal to empower the CAT to hear applications for (and grant) both interim and permanent injunctions in competition law cases, and, subject to the point made below about suitable judicial supervision, we agree that the proposal to name the CAT a Superior Court of Record is an appropriate way to achieve this in England and Wales.

3.2 If the CAT's role is to be expanded to enable it to hear stand-alone as well as follow-on cases (which we support – see the response to Question 2 above), then it would be illogical not to grant the CAT the power to grant injunctions. In a stand-alone case, the infringing conduct may still be ongoing at the time proceedings are lodged, and the issue of availability of interim relief pending a full hearing may be a significant concern for claimants (particularly in cases concerning an alleged abuse of dominance, as recognised in the example scenarios set out in Box 2 on page 22 of the Consultation Document). Similarly, a claimant's primary concern in some cases may be to obtain a permanent injunction preventing the anti-competitive conduct going forward, rather than obtaining damages. In order to be able to deal with such cases appropriately, the CAT should be given the power to grant injunctive relief.

3.3 When determining whether to grant an injunction in a given case, we consider that the CAT should be granted the same level of discretion and flexibility as the courts in this regard. In particular, we would propose that the CAT should follow the *American Cyanamid* guidelines[8] when deciding whether to grant a prohibitory interim injunction. In addition, we consider that all applications for injunctive relief should be heard by a CAT Chairman who also sits as a Chancery judge, so as to ensure the level of judicial supervision and experience that granting such relief requires.

3.4 We would also propose that the CAT should be allowed to waive or limit any requirement to provide a cross-undertaking in damages as a condition of granting an interim injunction where it considers it appropriate to do so in the circumstances of a particular case.[9] Our experience in past cases has been that the requirement to provide such an undertaking can act as a significant deterrent to companies deciding whether to proceed with a credible stand-alone claim. This is the case not only in relation to smaller companies, but also in circumstances where, for example, a larger corporate group is deciding whether to proceed with a case involving alleged abuse of dominance affecting a small subsidiary company within the group (on the basis that the cross-undertaking may have group-wide repercussions).

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

4.1 Whilst we agree that SMEs may face greater difficulty in obtaining redress through public enforcement, due to the tendency not to prioritise small local or regional cases,[10] we note that the Consultation Document does not cite any clear empirical evidence that the existing regime is in fact deterring a significant number of meritorious claims from SMEs. Indeed, the experience of the Competition Pro Bono Service (**"CPBS"**) to date (cited in

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7 Consultation Document, paragraph 4.15.

8 As set out by Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396.

9 We note that this is expressly proposed in the Consultation Document in the context of a possible fast track route for SMEs (paragraph 4.28); we consider that this option should be extended to all cases, not just those suitable for any fast track route which may be introduced.

10 Consultation Document, paragraph 4.24.

the Consultation Document[11]), indicates that a significant number of SMEs who currently believe they are the victims of anti-competitive behaviour actually have no strong competition case to bring. Usually this arises from a misunderstanding that commercial unfairness equates to anti-competitive behaviour, or that because a business finds it hard to compete, it must be the victim of anti-competitive practices, which is not necessarily the case.

4.2 We would therefore question whether there is a need to introduce a separate fast track procedure specifically for SMEs, particularly given the existing wide case management powers of the CAT which already allow it to deal with many of the difficulties identified in paragraph 4.25 of the Consultation Document. For example, the concerns identified in the Consultation Document relating to the possibility of liability for the other side's legal costs can already be addressed by the CAT's existing powers under Rule 55(2) of the CAT Rules to impose a costs cap at any stage in proceedings, at whatever level it thinks appropriate in the circumstances of the case. Similarly, concerns about the time and money needed to pursue an action over several years can be addressed by the CAT's existing powers to give directions to enable a case to proceed to a hearing within a matter of months, where appropriate and practical in the circumstances of an individual case.[12]

4.3 Extending the CAT's powers to allow it to grant injunctive relief (as proposed in the Consultation Document) would also enable it to address one of the most important issues for SMEs in our experience, namely the availability of quick and effective interim relief, for example where they are threatened with foreclosure from a market owing to the abusive behaviour of a larger rival (as recognised in the examples given in Box 2 on page 22 of the Consultation Document).

4.4 Nonetheless, we recognise that introducing a specific fast track or "no frills" procedure for smaller, less complex competition cases (not just those involving SMEs) could provide a greater degree of certainty for the parties, and improve access to justice for those who may otherwise be deterred by the cost and complexity of bringing a private competition law action.

4.5 We would however emphasise the importance of ensuring that any such fast track route is carefully designed so as to avoid unjustly burdening defendants. We discuss in more detail below in response to Question 5 some of the specific design elements proposed in the Consultation Document.

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

5.1 Whilst we recognise that there may be some benefits in introducing a fast track procedure in the CAT (see the response to Question 4 above), we have a number of concerns about the specific design elements proposed in the Consultation Document.

*Restricting availability of fast track procedure to SMEs*

5.2 We would question whether it is appropriate to limit the availability of any new fast track route solely to SMEs, rather than, for example, all smaller or less complex cases.

5.3 In practice, we do not believe that the fact that a case involves an SME will necessarily mean that it is a less complex case which is suitable for a fast track process. Furthermore, precisely how an SME would be defined for this purpose is not considered in the

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11 Consultation Document, paragraph 4.29.

12 We note that there are already examples of the CAT dealing with even very complex cases within a relatively short timeframe under the existing rules. A good recent example is the way in which the CAT dealt with the *Construction* appeals, where a complex case involving multiple appellants was carefully case managed by the CAT to ensure all hearings took place within six months of a case management conference to determine how to manage the multiple appeals effectively (see the Order of the CAT dated 25 January 2010 in Cases 1114-1115/1/1/09 and 1117-1139/1/1/09).

Consultation Document. Although there are definitions of an "SME" in other legislation which could be imported into this context, it is easy to envisage the potential for drawn out debate as to whether a particularly claimant was entitled to seek to use the separate fast track route if it were limited solely to SMEs. It is also worth noting in this regard that the fast track process in the Patents County Court referred to in the Consultation Document is not limited solely to SME claimants – rather, it is aimed at smaller, less complex cases (irrespective of the size of the claimant), or those cases where the parties are willing to accept the limitations of the process (e.g. costs caps, damages caps, no standard disclosure, limited time permitted for hearings) in return for a low cost and quick means of getting their case heard.

5.4 We would suggest that, rather than introducing a fast track route restricted to SME claimants, modelled on the Patents County Court fast track procedure, it would be preferable to introduce a fast track route for all smaller, less complex competition claims before the CAT, modelled on the allocation arrangements already applied in the High Court, with modified criteria more suitable for competition cases. For example, the CAT Rules could provide that the fast track would be the normal track for claims which meet the following criteria:

(a) the value of the claim is less than £500,000;[13]

(b) the trial is likely to last for no more than three days; and

(c) there are no more than five factual witnesses and experts in total between the parties.

5.5 The ultimate decision as to whether to allocate a claim to the fast track should remain a matter of discretion for the CAT, taking into account all the relevant circumstances of the case. For example, the fact that the value of the claim is less than £500,000 will not automatically mean that a case is less complex and therefore suitable for a fast track process, and careful consideration by the CAT Chairman of the suitability of the fast track route would still be required.

5.6 We would, however, suggest that there should be a mechanism whereby a defendant could contest an application to have a particular case allocated to the fast track route and/or apply to have to have the case heard under the normal procedure (particularly in light of the suggestion that the Chairman's decision on whether to allocate a case to the fast track would not be appealable by either party).[14]

*Emphasis on injunctive relief*

5.7 As noted above in response to Question 4, the availability of interim injunctive relief may be a very important issue for a claimant faced with a scenario where they believe they have been the victim of an infringement of competition law and either the OFT will not investigate due to its prioritisation criteria, or the claimant fears it will have been forced to exit the market before any OFT investigation has reached a conclusion. Whilst we do not consider that a new fast track process is necessarily required to ensure the grant of swift interim relief in appropriate cases,[15] we agree that any new fast track route should be used primarily for non-monetary resolutions such as injunctions, with a particular focus on providing interim relief (where appropriate) in the first instance.

5.8 We also agree that the CAT should be granted flexibility to allow a cross-undertaking for damages to be waived or limited in cases allocated to a new fast track route, provided

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[13] Value could be defined in the same way as in the High Court, with the possibility of allocating a higher value claim to the fast track at the discretion of the CAT.

[14] Consultation Document, paragraph 4.30.

[15] As discussed in response to Questions 3 and 4, if the CAT were to be granted the power to grant injunctions then it could provide swift interim relief where necessary, without the need for a separate fast track process.

that the CAT takes into account the prima facie merits of the underlying claim when deciding whether to exercise its powers in this regard.

*Proposed six-month timeframe for hearing cases*

5.9 The degree to which the proposed six-month timeframe for hearing cases allocated to the fast track route is a realistic proposal will depend to a large extent on the type of cases allocated to the fast track, and the resources which the CAT has available.

5.10 In more complex cases, particularly where the disclosure process is likely to be a lengthy one, it may often be unrealistic to hear the substantive case within six months of the claim being laid (although as already noted above in response to Question 4 there are examples of cases being heard by the CAT within a relatively short timeframe under the existing rules). Furthermore, an insistence on scheduling the substantive hearing within six months of the claim being lodged for all cases allocated to the fast track could actually lead to an increase in costs, as the parties would be required to collate the necessary evidence and expert reports etc. within a very tight timeframe.

5.11 We would therefore suggest that greater discretion should be given to the CAT to vary the timeframe for hearing cases allocated to the fast track, whilst retaining an expectation that the CAT will, where possible, aim to hear a fast track case within six months.

*Cost capping*

5.12 We would question whether a costs cap should be automatically imposed in every case allocated to the fast track. Whilst costs caps can provide a degree of certainty for the parties, they will not necessarily be appropriate in every case, or may only be appropriate up until an interim injunction stage. We also note in this regard that the absence of any formal costs cap would not prevent the CAT from responding robustly to costs being unnecessarily incurred by either party, and preventing recovery of any disproportionate or unjustified costs when undertaking a costs assessment following judgment on the substantive case.

5.13 Even where a costs cap is appropriate, we have a number of serious concerns about the proposal to cap costs awards at a maximum of £25,000 (or possibly lower in individual cases) for all cases allocated to any new fast track route. This represents an extremely low cap which is likely to give rise to significant and justified concerns for defendants faced with allegations of competition law infringements. Even in less complex cases which are conducted as efficiently as possible, costs can easily be many times that amount by the time the substantive case is heard. Under the current proposals a defendant could therefore be left with the risk of a significant costs liability even if the claimant ultimately loses the case. In practice, this is likely to result in the highly undesirable outcome of defendants agreeing to settle cases allocated to the fast track route, even if they consider they have a good defence to the claim.

5.14 Rather than adopting the "one size fits all" automatic approach proposed in the Consultation Document, we would therefore suggest that the CAT should be given discretion to set any costs caps at a level it considers to be appropriate on a case-by-case basis. Clear guidance should be given to the CAT regarding the circumstances which it should take into account when setting any costs cap, which should include the CAT's early impressions of the merits of the case, and the way in which a claim is being funded/the availability of insurance to cover any costs liability.

5.15 In addition, we consider that the rules on cost capping (both in the context of any new fast track route and other cases before the CAT[16]) should allow defendants to apply for the claimant's costs to be capped in appropriate circumstances. Limiting the CAT's discretion so as to only permit costs caps to be imposed on a defendant's costs would not strike a fair balance in this regard.

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[16] See further the response to Question 18 below.

*Issue of a warning letter*

5.16 We note the suggestion in the Consultation Document that under the preferred fast track model the commencement of proceedings could be preceded by a letter being written to the alleged infringer, warning them that there is a reasonable case against them.[17] It appears to be suggested that this would be (and currently is) done by bodies such as the CPBS. We assume that this is intended to refer to the process whereby lawyers working for the CPBS may write letters to third parties in their capacity as a representative of the client in question, rather than being given (or having) any power to do so in any other capacity. Provided this assumption is correct, we have no objection to this element of the proposed mechanism, which offers a sensible way of attempting to resolve a dispute at an early stage (and could, we assume, potentially be tied into the proposed pre-action protocol discussed elsewhere in the Consultation Document).

5.17 We note the alternative suggestion that such warning letters could be sent by the CAT or the OFT in order to give them formal authority. We agree that this would be inappropriate, for the reasons outlined in paragraph 4.35 of the Consultation Document.

*Capping of damages*

5.18 We would suggest that rather than imposing a cap on the amount of damages which can be awarded by the CAT under any new fast track route, one of the conditions for allocation to the fast track route should be that the value of the claim should normally be no more than £500,000 (subject to the CAT's discretion to allocate a higher value claim to the fast track where it considers it appropriate in the particular circumstances of the case), as discussed above.

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

6.1 We do not consider that any further measures are required to enable SMEs to bring competition cases to court.

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

7.1 It is a fundamental principle of English law that a claimant in an action for damages must prove his loss. Whilst we recognise that establishing causation and quantum of loss in competition law cases can be a complex task, we consider that the presumption proposed in the Consultation Document that all "cartels" affect prices by a fixed amount is too blunt an instrument, and inappropriate for use even as a rebuttable starting point, for a number of reasons.

7.2 First, we note that the Consultation Document states that references to "cartels" in this context refer to *any* breach of the Chapter I prohibition or the corresponding European prohibitions.[18] Even if the economic literature did support the conclusion that prices will usually rise by around 20% where, specifically, a price-fixing cartel is in operation (which we dispute, as explained further below), there are clearly a number of other forms of cartel or other types of infringement falling within the scope of the Chapter I prohibition (or the corresponding European prohibitions) where an assumed 20% price rise would make no logical sense (e.g. a market sharing agreement, information exchange or resale price maintenance).

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[17] Consultation Document, paragraph 4.35. We note that this is not mentioned in the main discussion of the proposed model, but when discussing "Alternative options" the Consultation Document states that "*Currently, and under the scheme proposed above, such letters would be written by bodies such as the CPBS in their own capacity*." We assume that "*the scheme proposed above*" is intended to refer to the main scheme proposal.

[18] Consultation Document, footnote 38.

7.3 Secondly, even if the presumption were limited to price-fixing cases, it is too simplistic to equate a rebuttable presumption as to the level of overcharge to a presumption as to the level of loss. The complexities which can arise where at least some of the price overcharge may have been "passed on" to indirect purchasers are recognised in the Consultation Document,[19] yet the proposals relating to the introduction of a rebuttable presumption of loss in cartel cases seem to ignore the risk that, if direct and indirect purchasers both sue the cartelists in separate proceedings, the courts may find there is insufficient evidence to rebut the presumption in both cases, leading to a double jeopardy scenario for defendants.

7.4 More generally, introducing a rebuttable presumption of loss would also ignore the possibility that the infringing conduct may have had different effects on different customers or product variants, or that market entry or exit, or significant cost, demand or capacity changes may impact significantly on the appropriate level of damages in a particular case. The fact that the proposed presumption could be rebutted by showing that damages were either higher or lower than the presumption does not justify shifting the burden of proof on to the defendant in this way (particularly given that key evidence relating to the extent of a direct or indirect purchaser's loss is more likely to be held by the purchaser(s) than the defendant cartelists).

7.5 Thirdly, we disagree with the suggestion that the ability to estimate likely damages by reference to the proposed presumption of loss could help potential claimants to see the benefits of litigation,[20] and/or reduce the need to assemble extensive economic evidence.[21] In many cases the proposed figure will not provide a realistic estimate of the appropriate level of damages (and may therefore be misleading to potential claimants), and in practice it is highly unlikely to lead to a reduction in the need for detailed economic evidence to be presented.

7.6 Finally, even if it were appropriate to introduce a rebuttable presumption of loss for all cases involving a breach of the Chapter I prohibition (or the corresponding European legislation), we consider that the proposed figure of 20% is not founded on a sufficiently strong evidential basis to have the status of a statutory presumption. The Consultation Document states that this figure represents "*the lower end of the range that the current economic literature suggests prices can be raised by*",[22] but does not cite any economic literature to back up this assertion, other than noting that 20% was "*indicated as the average in the recent EU draft guidance paper*".[23] Numerous economic studies have considered the effect of competition law infringements on prices but these do not collectively offer any strong evidential basis for the suggestion that prices will "usually" be increased by approximately 20%. Against this background, we do not consider that it is appropriate to conclude (as the Government appears to have done) that a figure of 20% is appropriate simply in light of the fact that the study prepared by Oxera for the European Commission found examples of cartels leading to price increases of between zero and 40%.[24] Taking the median figure of this range is too simplistic an approach to what can be a difficult question.

7.7 We also note in this regard that the proposed 20% figure is higher than, for example, the default price overcharge figure used by the OFT when estimating the consumer benefits

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19 Consultation Document, paragraphs 4.44-4.49.

20 Paragraph 4.41 of the Consultation Document states: "*The ability to estimate likely damages could help the benefits of litigation may become clear*" [sic]. We assume that this was intended to state "*The ability to estimate likely damages could help the benefits of litigation to become clear".*

21 Consultation Document, paragraph 4.41.

22 Consultation Document, paragraph 4.43.

23 Consultation Document, paragraph 4.43, citing paragraph 123 of http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html (at footnotes 40 and 41 of the Consultation Document).

24 "Quantifying antitrust damages: Towards non-binding guidance for courts", Oxera et al, December 2009; paragraphs 4.40-4.43 of the Consultation Document.

resulting from its competition enforcement work. According to the most recent OFT Report on the impact of its work, its "default rule of thumb" is to assume that a cartel will result in a 15% overcharge to consumers.[25] Furthermore, the OFT expressly states that in practice it often uses assumptions which are lower than this default 15% overcharge figure when calculating the impact of its work on consumers.[26]

7.8 Whilst we acknowledge that the OFT is seeking to calculate a lower bound estimate for the purpose of its impact report and is therefore adopting a conservative approach in its calculations, we consider that, in the event that a rebuttable presumption were to be introduced (which we oppose), the Government should also favour a conservative approach, given the difficult and complex task likely to be faced by a defendant wishing to rebut the presumption.

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

8.1 As a preliminary point, we do not consider that the passing-on "defence" is a defence properly so-called. Rather, it is simply a reflection of the principle that a claimant must prove that he has suffered loss as a result of a tort: if a direct purchaser has passed on an overcharge resulting from an illegal cartel to his customers without any loss in margin or sales volume, then he has suffered no loss at all.[27]

8.2 We agree that the concept of "passing-on" has the potential to play a significant role in private actions in competition law. In our experience, the main difficulty which arises in practice is that issues relating to passing-on can raise complex questions requiring detailed economic evidence. We consider that the key starting point/guiding principle should be that of "no unjust enrichment", and we are therefore opposed to prohibiting the use of this "defence" (which would arguably create more complexity than it solved).

8.3 We also note in this regard that if the passing-on "defence" were to be prohibited, then it would arguably need to be accompanied by the removal of standing for indirect purchasers (as otherwise there would be a strong risk of double jeopardy for defendants), as acknowledged in the Consultation Document.[28] This would however be contrary to the general principle of effectiveness under EU law such that any person who has suffered loss as a result of anti-competitive conduct in breach of EU competition law must be entitled to bring a claim.

8.4 We share the Government's view that there is no need for specific UK legislation to address the issue of passing-on. Rather, the CAT (and the courts more generally) should simply endeavour to work out as accurately as possible who has suffered what loss – for example, in an overcharge case, the focus should be on the *net* overcharge incurred by the claimant - and damages should then be awarded accordingly, in accordance with the general principle under English law that damages will normally be compensatory in nature.[29] We agree that, should the proposals in relation to collective actions be taken forward, further consideration should be given to judicial mechanisms for consolidation of cases and apportionment of damages between direct and indirect purchasers.

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25 OFT 1354 Positive Impact 10/11 Consumer benefits from the OFT's work (July 2011), paragraph 2.4.

26 OFT 1354 Positive Impact 10/11 Consumer benefits from the OFT's work (July 2011), paragraph 2.4.

27 As acknowledged by the Court of Appeal (albeit obiter) in *Devenish Nutrition v Sanofi-Aventis* [2008] EWCA Civ 1086, at paragraph 151.

28 Consultation Document, paragraph 4.47, which also acknowledges the difficulties which would arise under EU law if standing were to be removed for indirect purchasers.

29 Punitive or exemplary damages are, of course, available as the exception (see *2 Travel Group Plc (in liquidation) v Cardiff City Transport Services* [2012] CAT 19).

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

9.1 We acknowledge that the current collective actions regime contained in section 47B CA98 is subject to a number of limitations which may prevent it from working as well as it could for individual consumers and businesses. As discussed further in response to Questions 11 and 13 below, we therefore support, in principle, the Government's proposals to extend and strengthen the regime by amending section 47B to allow collective actions to be brought on behalf of groups of businesses as well as groups of consumers, and in stand-alone as well as follow-on cases (subject to the caveats discussed below, and on the proviso that an extended and strengthened regime must be tightly judicially managed through the certification process, so as to minimise the risk to defendants of a significant increase in vexatious, speculative or unmeritorious claims).

9.2 However, we do not agree that it is also necessary to replace the current opt-in regime with an opt-out regime in order to address the obstacles faced by potential claimants. As acknowledged in the Consultation Document, this is an issue which falls to be considered independently from the proposals to extend and strengthen the regime set out in paragraphs 5.8-5.14 of the Consultation Document. We explain our position on that issue in response to Question 14 below.

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

10.1 As a matter of policy, we do not consider that any extension of the collective actions regime should be aimed at deterring infringements of competition law. Deterrence is, and should remain, the clear policy objective of *public* enforcement of competition law, achieved through the imposition of fines by the UK and EU authorities, which are set at a level which is expressly stated to be calculated to deter others from engaging in anti-competitive behaviour.

10.2 The primary policy objective of the *private* enforcement regime is, and should remain, the provision of redress for those who have been harmed by anti-competitive activity (whether through the award of damages to compensate them for their loss, or other means of redress, such as injunctive relief). This is consistent with the general legal principle that damages for competition infringements are awarded on a compensatory basis in all but exceptional cases. Any extension of the collective actions regime should be squarely focussed on pursuing this objective, rather than focussing on punishment and deterrence.

10.3 We acknowledge that, in practice, one of the ancillary effects of an effective private enforcement regime will be to provide an additional deterrent to companies contemplating engaging in anti-competitive activity (alongside the potential fine which could be imposed by the relevant competition authorities and the other potential adverse consequences, such as reputational damage). However, whilst this is a desirable outcome from a public policy perspective, we do not consider that deterrence should become a specific policy objective either in any expansion of collective actions in competition cases or the private enforcement regime as a whole.

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

11.1 As a preliminary point, we note that there are already a number of forms of "group" or "collective" action available to businesses under the general civil litigation rules set out in CPR 19, including group litigation orders (**"GLOs"**) and representative actions, which could potentially be used in competition cases.[30] In addition, as illustrated by the recent

[30] We acknowledge the difficulties in using representative actions under CPR 19.6 in stand-alone competition cases, following the decision of the Court of Appeal in *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284

action lodged at the CAT in respect of the copper plumbing tubes cartel, businesses can join together to bring a claim for damages under section 47A CA98.[31]

11.2 However, where businesses can demonstrate that they have suffered loss as a result of an infringement of competition law, we do not object, in principle, to amending section 47B CA98 to allow a collective action under that section to be brought on behalf of businesses, as well as consumers.

11.3 However, as acknowledged in the Consultation Document,[32] such an action should only be available where it is the most appropriate means of bringing the case. In the printer cartridges example given in the Consultation Document, depending on how many different businesses purchased the 500,000 cartridges affected by the price-fixing cartel, a collective action under section 47B brought on behalf of all the affected businesses may be the most appropriate means of obtaining redress. However, given that this example involves a follow-on case, joining together to bring a claim under section 47A CA98 (as seen in the damages action brought in respect of the copper plumbing tubes cartel, referred to above) may be another option worth considering. In any event, a collective action will not *always* be the most suitable means for businesses to bring a claim, and it is therefore important to ensure that the certification process is carefully designed to limit the availability of the collective action route to those cases where it is the most suitable means of resolving the common issues (see further the response to Question 15 below).

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

12.1 We do not have any major concerns about collective actions being used as a vehicle for anti-competitive information sharing, provided that appropriate case management procedures are followed. Any competitively sensitive information relevant to a collective action being brought by a group of businesses active in the same market should be aggregated by an independent third party and, where appropriate, confidentiality rings should be established to minimise the competition law risks. The CAT already has extensive experience of dealing with these sort of issues, where competitors are engaged in common litigation with (some) aligned interests, and we do not anticipate any particular concerns in relation to its continued ability to do so under an expanded regime.

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

13.1 The fact that there is no formal infringement decision by the UK or EU competition authorities does not necessarily mean that competition law has not been infringed, or that consumers and/or businesses have not been harmed by anti-competitive behaviour. Indeed, the OFT's prioritisation policy means that meritorious complaints cannot necessarily be pursued through public enforcement routes. However, as acknowledged in the Consultation Document,[33] a claimant wishing to bring a representative action in a stand-alone competition case under the existing representative action rules contained in CPR 19.6 may currently face difficulties following the Court of Appeal decision in *Emerald Supplies Ltd v British Airways plc*.[34]

13.2 We also agree that there is a risk that restricting the CAT's ability to hear collective actions to follow-on cases could severely limit the number of cases brought if (as would seem likely) such a restriction was interpreted in a similar way to the current limitations on the CAT's ability to hear (non-collective) follow-on actions, following the Court of

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(see further the response to Question 13 below).

31 *W.H.Newson Holding Limited & Ors v IMI Plc & Ors* (Case No. 1194/5/7/12, claim lodged at the CAT on 17 May 2012, transferred to the Chancery Division of the High Court by way of Order dated 24 July 2012).

32 Consultation Document, paragraph 5.9.

33 Consultation Document, paragraph 3.14, citing "*A Missed Gem Of An Opportunity For The Representative Rule*" (2011), Rachael Mulheron.

34 *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284.

Appeal decision in *EWS v Enron*.[35] As the Government rightly points out in the Consultation Document, a case which is primarily follow-on may nonetheless have a small proportion of stand-alone elements. Restricting collective actions to follow-on cases would also go against the main thrust of the proposals contained in the Consultation Document in terms of extending and strengthening the scope for private enforcement of competition law in the UK.

13.3 We therefore do not oppose the proposal to extend competition collective actions to stand-alone as well as follow-on cases before the CAT. An appropriate certification process will however be particularly important for stand-alone collective actions, as the potential for vexatious or unmeritorious claims is clearly increased where the existence of an infringement has not already been determined by a prior decision of a relevant competition authority. As recognised in the Consultation Document, there is an increased risk of "fishing expeditions" being launched in order to try to pressure a defendant company into settling a spurious claim,[36] and it is crucial that appropriate safeguards are put in place to minimise this risk (see further the response to Question 15 below).

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

14.1 While we do not oppose the proposed extension of the competition collective actions regime to businesses as well as individuals, and to stand-alone as well as follow-on cases (see the response to Questions 9, 11 and 13 above), we do not support the more radical proposals to also introduce an opt-out collective actions regime for competition cases before the CAT.

14.2 First, we do not consider that there is sufficient empirical evidence to support such a radical change to the current opt-in regime. Whilst it is true that "only" 130 claimants opted in to the only competition collective action brought under section 47B CA98 to date (*Football Shirts*[37]), we do not consider that a single case should be relied upon as sufficient evidence to conclude that an opt-in regime is unworkable and that a major policy change should be introduced specifically for competition cases. We would also highlight that there were certain features present in that case which contributed to the low participation rate, which were not directly linked to the design of the current collective actions regime. For example:

(a) JJB Sports made an open offer to give anyone who could prove they had purchased a relevant shirt (either by presenting the original receipt, or the shirt itself) a free England shirt and a mug.[38] In practice, many potential claimants are likely to have opted to take up this offer, rather than signing up to the Which? collective action seeking compensation – not only was the JJB offer likely to be perceived as simpler and easier, in most cases it was also likely to be financially more attractive.[39] Although it is not known how many of those who accepted the JJB offer would have signed up to the Which? action in the absence of the JJB offer, we believe it is

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35 See footnote 5 above.

36 Consultation Document, paragraph 5.11.

37 *The Consumers Association v JJB Sports Plc* (Case No. 1078/7/9/07).

38 As discussed further below in response to Question 15, the offer of redress made by JJB was made in February 2007, prior to the issue of proceedings by Which? under section 47B of the Competition Act 1998 the following month. Which? has stated that it assessed JJB's offer to be "*an insufficient amount of compensation*", although it has not explained the basis on which it came to this conclusion (which, on its face, is difficult to understand, as the amount of compensation recoverable was always likely to be limited to the illegal overcharge suffered by the consumer, which would inevitably be less than the price of a new shirt and mug. It is possible that cash compensation was considered to be preferable to goods in lieu.) (see http://www.which.co.uk/documents/pdf/collective-redress-case-study-which-briefing-258401.pdf).

39 Any compensation based on the estimated illegal mark-up would always be less than the retail price of a new England shirt (and a mug!), although we acknowledge that some claimants may have valued cash compensation more highly than a replacement product.

misleading to suggest that this case provides clear evidence that an opt-in regime is wholly unworkable.

(b) The case involved (i) a low value product (a £40 football shirt) which (ii) was not frequently purchased (as for example fast moving consumer goods might be). A significant degree of inertia in claimants coming forward was therefore inevitable (and would not necessarily be addressed by a move to an opt-out regime, where potential claimants would still need to come forward to claim their share of any damages awarded). In contrast, cases involving frequent, low-value purchases of consumer goods over time, or less frequent, higher value purchases, might well attract higher rates of participation (particularly if not accompanied by an attractive settlement offer, as was the case in *Football Shirts*).

14.3 Second, we are very mindful of the concerns acknowledged by the Government in the Consultation Document that the introduction of an opt-out regime could lead to large businesses settling unmeritorious claims for significant sums simply to avoid the cost of further litigation, as can arise under a US-style class litigation model. Whilst we agree that there are a number of key differences between the US and proposed UK regimes which should help to minimise the risk of US-style "class actions", we do not consider that these differences eliminate the risks entirely.

14.4 In particular, an opt-out regime could lead to the creation of a litigation culture by enabling lawyers and funders to encourage claimants to litigate in circumstances where there is no genuine appetite to litigate (even if they are not permitted formally to bring collective actions on behalf of the (potential) claimants as representative bodies). If the primary objective of the private enforcement regime remains to ensure compensation for those who consider that they have been harmed by anti-competitive activity (rather than a deterrence aim, which is the focus of the public enforcement regime – see the response to Question 10 above), why should the Government seek to circumvent a lack of appetite to litigate by introducing an opt-out approach in competition cases? If the harm suffered is considered by those who have suffered the harm to be so insignificant that, in the words of the Consultation Document, it is "*simply … too much hassle to be worth claiming*", then we would question whether it is socially useful or efficient to try to reform the regime to encourage greater litigation. This is particularly pertinent in relation to follow-on claims where a penal fine calculated to achieve deterrence has already been imposed by the OFT/European Commission, and the infringing undertaking(s) cannot therefore be regarded as having "got away with" their anti-competitive behaviour.

14.5 Third, we would highlight the fact that an opt-out collective action regime is not available in civil litigation generally, and we do not consider that clear evidence has been put forward in the Consultation Document to support adopting a fundamentally different approach in competition cases. Furthermore, introducing an opt-out regime solely for competition collective actions would give rise to a number of difficulties/concerns:

(a) it would seem likely to encourage undesirable "forum shopping", with claimants (encouraged by their representative/funder) choosing to pursue their claim in the CAT rather than the High Court because of the availability of the opt-out regime;

(b) it could encourage claimants to frame their claim as a competition case in order to have it heard by the CAT, under an opt-out regime, rather than by the ordinary courts, under an "opt-in" regime under CPR 19; and

(c) it could create confusion as to which regime is applicable in cases which are initially brought before the High Court but subsequently transferred to the CAT (or vice-versa) under section 16 of the Enterprise Act (as envisaged in the Consultation Document – see further the response to Question 1 above).

14.6 Finally, we note that the Consultation Document does not address the question of how cross-border cases would be treated under the proposed new opt-out regime, and in particular whether potential claimants domiciled in other Member States would be

considered to automatically form part of the class of claimants if an opt-out collective action were brought in the UK.

14.7 In light of the above, we consider that the collective actions regime adopted for competition cases should remain an "opt-in" regime and mirror that of the current GLO regime in other civil cases, i.e. at the certification stage the CAT should order the steps to be taken to draw the potential group of claimants' attention to the collective action. Consideration should also be given to extending the timeframe within which potential claimants must sign up to the collective action, so as to enable a representative claimant to use the increased publicity which is likely to result from commencing proceedings to attract further claimants to the action, and to make the prospects of settlement more attractive to the defendant (assuming the claim has a reasonable prospect of success). The appropriate cut-off point could be left to be determined by the CAT at the certification stage, but we would suggest that three months before trial would be an appropriate timeframe in most cases.

14.8 We recognise, however, that views on the issue of opt-out will be mixed, and that this is an issue on which opinions are often polarised. Should the Government, contrary to our strong preference, ultimately conclude that opt-out competition collective actions should be permitted, we would strongly recommend that such actions only be permitted in very limited circumstances, with guidelines setting out the circumstances in which an opt-out approach would be appropriate, as an exception to the general rule that collective actions should proceed on an opt-in basis. The types of case that could potentially be appropriate include, for example, follow-on cases involving consumers where the amount of loss per claimant is very low but the cumulative losses are high, and the infringing undertaking has not taken (and will not agree to take) any steps to provide appropriate redress.

14.9 As detailed in response to Question 15 below, we would suggest that, if the possibility of bringing a collective action on an opt-out basis is to be introduced, this issue should be considered by the CAT at the certification stage. The onus should be on the claimants' representative to show that proceeding on an opt-in basis would prevent access to justice and that proceeding on an opt-out basis would be appropriate in light of the particular circumstances of the case. This would enable the CAT to keep a tight rein on the use of opt-out actions and avoid the creation of a "litigation culture" that many (including ourselves) are understandably concerned an opt-out regime could lead to. As discussed further in response to Question 20 below, we consider that in circumstances where a collective action is permitted to proceed on an opt-out basis at the certification stage and damages are ultimately awarded, any unclaimed funds should revert to the defendant(s).

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

15.1 As already stated above, we believe that introducing a strict certification process will be crucial in minimising the risk of unmeritorious and/or vexatious collective actions being launched in order to try to pressure a defendant company into settling a spurious claim. We consider that this will be particularly important if an opt-out collective actions regime is introduced (which we do not support – see the response to Question 14 above). However, even if an opt-in regime is retained, the proposed extensions to the scope of collective actions mean that a certification process will still be an important stage in the proceedings.

15.2 We consider that the proposed list of issues to be addressed at certification set out in Annex A to the Consultation Document has a great deal to recommend it, but we would welcome further clarification on a number of points, discussed below. We would also suggest adding some further issues to the list, in order to ensure that all relevant considerations are taken into account at this important stage in the proceedings.

*Preliminary merits test*

15.3 We strongly support the proposed inclusion of a preliminary merits test at the certification stage. This will be very important in ensuring that unmeritorious claims are filtered out at an early stage in proceedings, and that defendants are protected from incurring unnecessary and unreasonable costs in defending vexatious or spurious claims which have little chance of succeeding.

15.4 However, we consider that the proposed formulation of this test (that "*there is a reasonable possibility that material issues of fact and law common to the class will be resolved at trial in favour of the* [claimants]") is unnecessarily complex. We would suggest that a simpler alternative would be to simply ask whether the claimants' case has a "reasonable prospect of success" (akin to the general test applied when the courts are considering whether they have jurisdiction).[40]

15.5 We would also suggest that the preliminary merits test should include consideration of whether there is a reasonable (or at least arguable) basis for the CAT to take jurisdiction over the claim (i.e. forum admissibility),[41] and whether the representative claimant has reasonable grounds to consider that the claim is within the relevant limitation period (see further the response to Question 1 above).

*Minimum number of claimants*

15.6 We agree that there should be a minimum number of claimants in order for a collective action to be permitted to proceed: clearly a collective action would not be suitable for a case which did not involve multiple claimants. It is however unclear from the Consultation Document whether it is proposed that there should be a minimum number of *actual* claimants at this stage, or merely a minimum number of *potential* claimants. We would suggest that the former approach should be favoured i.e. a minimum number of actual claimants should be identified at the certification stage. We would suggest that the threshold should be set relatively low, but that fulfilment of this condition should not automatically mean that a collective action should be permitted to proceed – consideration would still need to be given to the other issues listed in Annex A and the additional issues discussed below.

*Sufficient commonality of issues*

15.7 We agree that a collective action will only be suitable where the claimants all share sufficient "common ingredients" in their claims. We would however welcome clarification as to exactly what is meant by "sufficient commonality of issues" in this context: is this intended to mirror the requirement in CPR 19.6(1) that the class members must have the "same interest" in a claim?

15.8 We note in this regard the issues encountered in *Emerald Supplies*, where the Court of Appeal rejected the use of the representative action in CPR 19.6 in a stand-alone case to determine the "common ingredients" shared by all class members' claims (and embodied in the declaration sought by Emerald in that case)[42] on the basis that these common ingredients needed first to be established to meet the requirement that that Emerald and the class members had the "same interest in a claim". It would seem that the same issues

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40 Under CPR 6.

41 We note in this regard the difficulties which have arisen in the cases of *Provimi Ltd v Roche Products* [2003] 2 All ER (Comm) 683, *Cooper Tire v Dow Deutschland* [2010] EWCA Civ 864, and *Toshiba Carrier v KME Yorkshire Ltd* [2011] EWHC 2665 Ch (appeal to the Court of Appeal pending).

42 It is important to remember in this context what Emerald was seeking in its representative action, namely a declaration as to the outcome of various points in dispute, including that BA was a party to agreements or concerted practices to fix the prices of air freight services, that EU and UK competition law had been infringed, and that damages were recoverable in principle from the defendants. Although the European Commission subsequently fined BA (and others) for participation in a price-fixing cartel, its investigation was still ongoing at the time Emerald commenced proceedings.

could potentially arise in relation to the requirement that the claimants have "sufficient commonality of issues" to bring a stand-alone competition collective action. We would therefore welcome clarification as to what claimants would need to show to fulfil the proposed "sufficient commonality of issues" condition at the certification stage if there is no prior decision by the OFT or European Commission establishing the existence of a competition law infringement. In light of the approach taken by the Court of Appeal in *Emerald*, we would also welcome clarification as to whether it is intended that the "sufficient commonality of issues" requirement could be met where, for example, the net overcharge suffered by the (potential) claimants may differ between them, depending on the extent to which they have successfully "passed on" their loss.[43]

*Most suitable means of resolving the common issues*

15.9 Careful consideration of whether a collective action is the most suitable means of resolving the common issues will clearly be important in preventing unsuitable cases from proceeding in the form of a collective action. We would support granting the CAT a considerable degree of discretion in this regard, but we would welcome some further guidance as to how it would propose to exercise its discretion, and the factors which it would take into account.

15.10 In particular, we would suggest that where certification is sought for a collective action to be brought on behalf of a group of business claimants, careful consideration should be given to whether a collective action is the most suitable means of bringing the claim, when compared to other options such as a GLO. In carrying out this assessment, the CAT should have regard to factors such as whether each of the businesses has the resources to bring their claim alone, and whether the quantum of loss they are each seeking to claim is proportionate to the costs they are likely to incur.

15.11 We would also recommend that consideration should be given to the extent to which the parties have already sought to resolve the dispute through ADR (where appropriate – see further the response to Question 24 below), and whether further attempts at ADR should be encouraged prior to granting permission to proceed with a collective action.

*Adequate/suitable representative*

15.12 We support the proposed requirement that the individual or body bringing the case is an adequate representative for claimants, in terms of absence of conflicts of interest, adequacy, typicality (if an individual) or a suitable representative of the claimants' interests. As explained further in response to Question 23, we do not consider that third party funders or legal firms would fulfil this requirement.

*Sufficient funds to cover the costs of the defendant should the case be unsuccessful*

15.13 It is essential that a representative be able to demonstrate that it has sufficient funds to cover the costs of the defendant (subject to any costs cap imposed by the CAT at its discretion) should the case be unsuccessful. We would suggest that when addressing this issue the CAT should also consider whether an order for security for costs may be required if the case is permitted to proceed.

*Additional suggested issues to be added to the list*

15.14 In addition to the matters listed above, we would suggest that the extent of any voluntary redress scheme already proposed by the defendant should be specifically listed as a matter to be taken into account by the CAT at the certification stage. This would

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[43] In the *Emerald* case the Court of Appeal considered that the fact that the "passing-on defence" was available against some of the claimants but not others meant that the claimants did not have the same interest in the action, and could not therefore fulfil the requirement of CPR rule 19.6(1) (see in particular paragraph 64 of the judgment: "*BA could successfully run a particular defence against those who had passed on the inflated price, but not against others. If there is liability to come customers and not to others they have different interests, not the same interest, in the action.*"

encourage defendants to consider the possibility of voluntary redress at an early stage (particularly in follow-on cases, where the existence of the infringement has already been established), and would also enable the CAT to consider whether a collective action is the most suitable way for those harmed by the (alleged) infringing conduct to be compensated for their loss.

15.15 Clearly, in some cases it will be difficult to assess whether a proposed redress scheme offers adequate compensation for victims of an (alleged) infringement at the certification stage, given that there will be a number of issues still in dispute between the parties. We wish to stress that we are not suggesting that the fact that some offer of redress has been made should automatically mean that a collective action should not be permitted to proceed. However, in cases where an offer has been made which clearly offers appropriate compensation to the victims of the infringement, we believe it would be in the interests of affected consumers, as well as the wider public interest, to avoid unnecessary litigation.

15.16 For example, in the *Football Shirts* case, following the dismissal of JJB's appeals against the OFT's infringement decision JJB offered to give everyone who had bought a relevant replica shirt a free new season shirt and a mug. Which? turned down this offer, and started proceedings the following month in the CAT under section 47B of the Competition Act 1998.[44] We were not involved in this case and are not aware of the detailed reasons why the offer of voluntary redress was rejected: publicly Which? has simply stated that it considered the offer to represent an insufficient amount of compensation.[45] However, on its face, the offer represented a better deal for consumers affected by the infringement than any award of compensation could ever achieve, as the amount of the illegal overcharge would inevitably be less than the retail price of a brand new shirt and a mug (although it is possible that liquidity considerations came into play, and cash compensation was considered to be preferable to illiquid goods in lieu). We would suggest that the CAT should be able to refuse to allow a collective action to proceed if the defendant has already made an offer of redress which the CAT considers to be plainly adequate in the circumstances of the case.

15.17 We would also suggest that the claimants' representative should be required to show, at the certification stage, that they have taken (or will take, if the collective action is permitted to proceed, within a timeframe to be determined by the CAT) appropriate steps to publicise the collective action widely, so that all potential claimants are made aware that a collective action is being brought, and can choose to opt-in to the proceedings.

15.18 Finally, in the event that the Government decides that, contrary to our preferred approach of retaining an opt-in regime, an opt-out approach is needed in at least some cases (see the response to Question 14 above), we would suggest that the question of whether a collective action should be permitted to proceed on an opt-in or opt-out basis should be determined by the CAT at the certification stage (on the basis of published written guidance on the circumstances in which an opt-out approach would be appropriate). A representative claimant seeking to bring a collective action would not need to invest significant resources in identifying affected parties prior to seeking certification to proceed on an opt-out basis, as the requirement for a minimum number of (actual) claimants would (we anticipate) be relatively easily fulfilled (see above). As already noted above in response to Question 14, we would recommend that the onus should be on the claimants' representative to show that proceeding on an opt-in basis would prevent access to justice and that proceeding on an opt-out basis would be appropriate in light of the particular

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[44] The timeline of the key events in the *Football Shirts* case is succinctly summarised in an article published in The Lawyer on 18 March 2011: http://www.thelawyer.com/competition-which/1007296.article. This article features an interview with Deborah Prince, head of legal affairs at Which?, in which she is quoted as saying "*They* [i.e. JJB] *didn't want to agree a settlement, so we initiated proceedings.*" However, this does not tie in with the offer made by JJB in February 2007, prior to the issue of proceedings in the CAT by Which?, which is acknowledged in Which?'s own document published in July 2011 summarising the case (http://www.which.co.uk/documents/pdf/collective-redress-case-study-which-briefing-258401.pdf).

[45] http://www.which.co.uk/documents/pdf/collective-redress-case-study-which-briefing-258401.pdf

circumstances of the case. This would enable the CAT to keep a tight rein on the use of opt-out actions and prevent their abuse.

15.19 In the event that a collective action was permitted to proceed on an opt-out basis following the certification stage, we would recommend that it should be made a condition of certification that the claimants' representative take appropriate steps to publicise the collective action, so as to bring it to the attention of potential claimants, and give them the opportunity to opt out of the collective action if they wish to do so. We note in this regard that some potential claimants (in particular, larger businesses) may wish to retain sole control over any litigation strategy relating to (alleged) competition law infringements which they consider to have caused them loss, and will not want to be prevented from pursuing the infringing undertaking(s) independently of any collective action.

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

16.1 It has long been a fundamental principle of English law that damages should be calculated on a compensatory basis, and that exemplary or punitive damages should only be available in extremely limited circumstances. We do not consider there to be any good reason for adopting a different approach in competition collective actions. The general principles developed in damages actions should continue to be applied, as they have been to date. This has resulted in just and appropriate outcomes and it is not clear why specific rules should be adopted for competition collective actions.

16.2 In follow-on cases in particular, there is normally no justification for awarding a punitive element of damages, as the infringing undertaking has already been "punished" by the fine imposed by the relevant competition authority, as recognised in *Devenish Nutrition v Sanofi Aventis*[46] (unless no fine has been imposed following a finding of infringement, for example because the de minimis exception for small businesses has been applied, as in the recent case of *2 Travel Group Plc v Cardiff City Transport Services Limited*[47]*).* In stand-alone cases, even though a comparable "punishment" has not already been imposed, we do not consider that it would normally be appropriate to try to add a punitive element into a private enforcement damages calculation. To do so would unjustly enrich successful claimants (who should be compensated for their loss but should not normally benefit from any additional payment) and would move the UK regime closer towards that of the US (which we would not support, for the reasons identified by the Government in the Consultation Document).

16.3 We note in this regard the recent CAT decision in *2 Travel Group Plc v Cardiff City Transport Services Limited,*[48] in which exemplary damages were awarded in a follow-on case, but we would point to the exceptional circumstances of that case, which was considered to fall within the second category of cases where an award of exemplary damages may be appropriate as set out in *Rookes v Barnard.*[49] We do not consider that this decision should be viewed as changing the fundamental principle that damages should generally be calculated on a compensatory basis, and there is nothing in the CAT's judgment to suggest that it intended its judgment to be interpreted otherwise.

16.4 If a right to treble or other punitive damages were to be introduced, we would have serious concerns about the potential for distortion of the relative incentives between fighting a case and settling, which, as acknowledged in the Consultation Document, would unfairly penalise defendants who may not have committed any fault.[50] The US experience shows that where treble damages are the norm, a defendant must be very confident of

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46 *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086.

47 *2 Travel Group Plc (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19.

48 See footnote 47 above.

49 *Rookes v Barnard* [1964] 1 AC 1129, at 1126.

50 Consultation Document, paragraph A7 of Annex A.

winning a case in order to decide not to settle and insist on fighting the case. We consider this to be a highly undesirable outcome.

16.5 We also share the concern identified in the Consultation Document that introducing such a system would provide an incentive for cases to be presented as competition cases, even if they would more accurately be classed as another type of case, such as a contract law case, simply so that the claimant could potentially benefit from the availability of treble damages.

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

17.1 We consider that it is critical that the loser-pays principle be maintained for collective actions.[51] As recognised in the Consultation Document, this principle is one of the traditional checks and balances of English law and has become the starting point for damages before the CAT.[52] We see no reason to depart from this principle in the context of collective competition law actions.

17.2 Indeed we would be concerned that if the loser-pays principle were to be abolished this could lead to a significant increase in unmeritorious claims being brought. Whilst the bulk of such claims should in principle be "filtered out" at the certification stage, we consider that the loser-pays rule provides an additional valuable safeguard in encouraging only claims in which the claimant thinks it has a reasonable chance of winning.

17.3 We note in this regard that the CAT rules do not currently contain any explicit default rule reflecting the loser-pays principle. Whilst we support the retention of a significant degree of discretion for the CAT in determining costs issues (see further the response to Question 18 below), if the collective actions regime is extended as proposed in the Consultation Document then we would suggest that the CAT rules are amended to provide that in collective actions cases the default rule is that costs follow the event (as in the High Court under rule 44.3 of the CPR).

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

18.1 As a general starting point, we consider that the CAT's existing wide discretion on costs should be maintained for competition collective actions, and that this should be sufficient to allow it to deal appropriately with cases in which it may be appropriate to depart from the loser-pays principle. The exercise of this discretion is well illustrated by the recent case of *Quarmby Construction v OFT,*[53] in which the CAT concluded that the appellant was not entitled to recover any of its costs, even though it had succeeded in obtaining an overall reduction in the level of the fine imposed by the OFT, given "*the* [limited] *extent of the Appellants' success in relation to the multiplicity of issues raised in their Notice of Appeal, and the amount of work and time that was reasonably expended by the parties and the Tribunal in addressing these issues*".[54] In particular, the CAT noted that in that case "*a large amount of time was spent considering other unsuccessful arguments, some of which we considered to be very bad points.*"[55]

18.2 With regard to the possibility of departing from the loser-pays principle and introducing cost-capping in the interests of access to justice, we acknowledge the statements in the Consultation Document that cost-capping can reduce the incentives to run up costs and

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51 Consultation Document, paragraph A12 of Annex A.

52 Consultation Document, paragraph A9 of Annex A, citing *BCL Old Co Ltd & Ors v BASF SE (formerly BASF AG) & Ors* [2010] CAT 6, para 7.

53 *Quarmby Construction Company Limited and St James Securities Holding Limited v Office of Fair Trading* [2011] CAT 34.

54 Paragraph 16 of the ruling on costs, [2011] CAT 34.

55 Paragraph 18 of the ruling on costs, [2011] CAT 34.

provide certainty for claimants,[56] but we would caution against introducing a cost cap in all competition collective actions which would be fixed in advance at a pre-determined level.

18.3 We consider that cost-capping is unlikely to be appropriate in all but truly exceptional cases in the collective action context. It is important to remember that claimants can seek ATE insurance to assist with the adverse costs risk. Furthermore, even if a costs cap were to be appropriate in a particular case, we do not consider that it would be appropriate to set a pre-determined level for any such cap. As already noted above in the context of possible cost-capping as an element of a new fast track route for SMEs, we do not consider that a "one size fits all" approach is appropriate when assessing potential costs caps. This issue should be left for the CAT to determine on a case-by-case basis, at an appropriate stage in the proceedings (e.g. once the CAT has had an opportunity to consider the prima facie merits of the case), rather than being pre-determined.

18.4 We would also point out in this context that whilst the individual claimants involved in a collective action may each be relatively small, this does not necessarily mean that it would be inappropriate to ask them to bear the risk – collectively – of the defendant's reasonable costs if they lose their claim (particularly where the action is being funded by a third party funder and/or insurance is available to cover the risk of liability for costs).

18.5 With regard to the possibility of departing from the loser-pays principle where the costs of the claimant could be more appropriately met from the damages fund, we do not follow the references to the Jackson Review of Costs and statements made by the Ministry of Justice in paragraph A.11 of Annex A to the Consultation Document.[57] It is unclear exactly what the Consultation Document is proposing in this regard. However, we agree that the defendant's exposure to costs should be based on normal recoverability principles, and the defendant should not incur any additional liability e.g. for a success fee or ATE insurance premium.

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

19.1 We agree that if cases are to be brought, there must be a mechanism under which legal representatives can obtain an appropriate fee. However, we do not consider that the introduction of contingency fees (as opposed to conditional fees) would be an appropriate mechanism to achieve this in competition collective action cases.

19.2 We share the concerns recognised by the Government in the Consultation Document regarding the problems which would be likely to arise if contingency fees were allowed in this context.[58] In particular, we agree that contingency fees would distort the incentives to bring cases and would be likely to encourage spurious litigation focused on claims with the potential to involve a very large number of claimants (who, under the opt-out regime currently favoured by the Government, would not need to have specifically come forward before damages – and therefore the amount payable under a contingency fee arrangement – were quantified), rather than claims with a reasonable chance of success.

19.3 We note in this regard that whilst contingency fees are to be permitted from April 2013 for civil cases generally, following the Jackson Review of Costs, this position has been adopted against the background of an opt-in collective/representative actions regime. If, as proposed in the Consultation Document, a special broader opt-out collective actions regime is to be introduced for competition cases, we do not consider that it would be appropriate to also permit contingency fees in such cases.

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[56] Consultation Document, paragraph A10 of Annex A.

[57] In particular, the second sentence of paragraph A.11 appears to be incomplete.

[58] Consultation Document, paragraph A14 of Annex A, which notes that introduction of contingency fees could (i) create a perverse incentive to artificially inflate the number of claimants, a matter that is particularly problematic in an opt-out case where claimants need not specifically come forward before damages are quantified; (ii) encourage spurious litigation and place an unjustified cost on the defendant; and (iii) create an incentive for lawyers to focus only on the largest cases, neglecting smaller meritorious claims, as the amount received by the legal firm is directly proportional to the number of claimants, rather than the amount of work done.

19.4 We would also note that the introduction of contingency fees could affect incentives to settle. Under a contingency fee arrangement, the fees payable if a settlement is reached will not be calculated by reference to the amount of work undertaken up until that point, but rather by reference to the settlement amount. This could lead to lawyers putting increased pressure on claimants to settle a case, even if the settlement is not in the best interests of the claimants, in order to obtain more remuneration for less work. This conflict of interest does not arise if payment is made on a conditional fee basis (as the lawyers' success fee is calculated by reference to the actual work done/costs incurred, and claimants still retain the benefit of a "no-win, no-fee" arrangement).

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

20.1 If, as we recommend in response to Question 14 above, an opt-in regime is retained, the question of the relative merits of paying any unclaimed sums to a single specified body does not arise. However, if an opt-out collective actions regime is introduced (either generally, or in exceptional circumstances), it is likely that many opt-out actions will result in at least some money remaining unclaimed by those who have been harmed by the anti-competitive conduct. Even where a claim is successful, claimants must still make themselves known to the court and prove their loss before receiving their share of the damages, and in practice many simply will not do so, for a variety of reasons.[59]

20.2 In the event that opt-out collective actions are permitted in competition cases we would strongly recommend that any unclaimed funds should revert to the defendant(s). We consider that paying any unclaimed sums to another specified body, whether the Access To Justice Foundation (**"ATJF"**) or any other body selected by the CAT, would be inconsistent with the primary policy objective of private enforcement, namely redress for victims of competition law infringements.

20.3 We note the concerns expressed in the Consultation Document regarding the risk that defendants would have an incentive to minimise awareness of an award of damages in the event that unclaimed funds reverted to the defendant. We consider that these concerns can easily be addressed through mechanisms for the notification of potentially eligible claimants and management of distribution of the damages fund.

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

21.1 As explained above in response to Question 20, we do not consider that it would be appropriate for unclaimed sums to be paid to a single specified body. In the event that an opt-out regime is introduced (which we oppose), we strongly recommend that any unclaimed funds should revert to the defendant(s).

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

22.1 As explained above, we disagree with the proposal to move to an opt-out regime for competition collective actions, and strongly recommend that an opt-in regime is maintained, albeit with amendments to allow collective actions to be brought by businesses as well as individual consumers, and in stand-alone as well as follow-on cases. We therefore do not agree that the ability to bring opt-out collective actions for breaches of competition law should be granted to private bodies.

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[59] As recognised in the Consultation Document, some claimants may not be aware of the award, even with widespread advertising, some may not have the required evidence to prove their loss (such as receipts) and some may simply consider it to be too much hassle to go through the process of claiming the compensation to which they are entitled.

22.2 However, the question of whether the ability to bring a collective action should be granted to private bodies, rather than granting it solely to the competition authority, is also relevant if an opt-in regime is retained. We agree that it would not be appropriate to continue to limit the ability to bring collective actions under an extended regime solely to representative bodies designated in advance by the Secretary of State, even if the list of such bodies were extended to include bodies other than Which?. As recognised in the Consultation Document, if the right to bring a collective action is extended to businesses as well as individuals (which we support in principle – see the response to Question 11 above), maintaining a list of suitable representative bodies would become much more complicated.[60] We therefore agree that the question of the suitability of the representative body in a particular case is a matter which could be better assessed by the CAT at the certification stage.

22.3 Allowing private bodies to bring collective actions would also be in keeping with the fundamental principle that those who have suffered loss should have a right to take direct action through the courts. Whilst we recognise the potential for frivolous or vexatious claims, we consider that this risk can be minimised by limiting the right to bring an action to genuinely representative bodies (or, where the CAT considers it appropriate, an individual representative claimant), approved via a strictly controlled certification process (as discussed in response to Question 15 above).

22.4 We do not favour the alternative proposal contained in the Consultation Document, under which the ability to bring collective actions would be given only to the OFT (or the new Competition and Markets Authority (**"CMA"**) in due course). We consider that this would place a disproportionate limitation on the ability of consumers and small businesses to seek redress, and would go against the main thrust of the proposals, which are stated to be aimed at empowering businesses and individuals to take direct action against allegedly anti-competitive behaviour that may be harming them. We also share the concerns set out in the Consultation Document regarding the OFT's capacity to take forward collective actions, the potential risk to public enforcement of competition law if significant resources were diverted into facilitating redress, and the potential negative impact on the leniency regime if the competition authority holding leniency documents also had primary responsibility for seeking judicial redress.[61]

22.5 We also agree with the view expressed in the Consultation Document that private actors are ultimately better placed than public authorities such as the OFT to know where anticompetitive behaviour is causing them harm and to weigh up the relative costs and rewards to them of pursuing an action for damages.[62]

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

23.1 We support the proposal that collective actions should only be permitted to be brought by those who have suffered harm or bodies which are genuinely representative of those who have suffered harm. Although third party funders or legal firms may/will be involved in the process as providers of funding or legal advice respectively, we do not consider that it would be appropriate to grant them the right to bring opt-out collective actions on behalf of a group of potential claimants.

23.2 We note that, in practice, even if third party funders/legal firms are denied standing, there is a risk that they will try to identify a nominal figurehead claimant to act as the "representative claimant" to front a collective action. This could foster a "litigation culture", which the Consultation Document makes clear the Government wishes to avoid.

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60 Consultation Document, paragraph 5.41.

61 Consultation Document, paragraphs 5.47-5.48.

62 Consultation Document, paragraph 5.52.

However, we consider that this risk can be minimised by requiring the CAT to consider the suitability of the representative at the certification stage (see the response to Question 15 above).

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

24.1 In principle, we agree that ADR should be strongly encouraged as the default first option in competition private actions, but not made mandatory. In our experience many potential competition private actions are already resolved prior to trial using some form of ADR, such as mediation or negotiated settlement, and, as noted in the Consultation Document, the CAT already has the power to encourage and facilitate the use of ADR if it considers it appropriate.[63] However, we agree that more could be done to ensure that ADR is the default first option for parties considering litigation in competition cases.[64]

24.2 As recognised in the Consultation Document, resolving cases through alternative means and reducing the involvement of the courts can often lead to a more satisfactory outcome for all parties, as well as reducing burdens on the State, and encouraging the use of ADR in competition cases would be in line with the Government's wider policy to promote ADR throughout the court system wherever it is feasible to do so.[65] We therefore welcome proposals aimed at encouraging greater use of ADR in competition cases.

24.3 We would however stress that, as recognised in the Consultation Document,[66] there are many different forms of ADR (and indeed the Consultation Document envisages private and third sector bodies being encouraged to provide further forms of ADR in the future).[67] Each of these has different features which make it more or less suitable for particular circumstances. We agree that given the range of different options covered by ADR, it would be difficult to mandate a specific type of ADR for all cases, and we would not be in favour of such an approach.[68] Rather, we would recommend that parties in competition cases should be encouraged to consider which would be the most appropriate form of ADR in the circumstances of their particular case, both pre-action and throughout the proceedings. For example, in our experience, mediation tends to work better in follow-on cases, where the issue of liability has already been decided, compared to stand-alone cases.

24.4 We would also counsel against making the use of ADR mandatory in competition cases. As recognised in the Consultation Document, if one or even both parties are determined to take matters to court then it is likely to be a waste of both time and money to compel them to undertake some form of ADR.[69] Furthermore, ADR will not always be appropriate, for example where one party believes it has a watertight case (as confirmed recently by the Court of Appeal in *Mason and others v Mills & Reeve*[70]). Making the use of ADR mandatory in competition cases would also go against the general approach adopted in

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63 Under Rule 44(3) of the CAT Rules.

64 Consultation Document, paragraph 6.9.

65 Consultation Document, paragraph 6.3.

66 Consultation Document, paragraphs 6.1 and 6.7.

67 We note in this regard that paragraph 6.1 of the Consultation Document states that for the purposes of the consultation, ADR "*is considered to refer to all means of resolving disputes before a final ruling is made in court, including mediation, arbitration, early neutral evaluation and settlement. This ranges from simple provision of services that may provide such resolution, to making the 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.*"

68 Consultation Document, paragraph 6.7.

69 Consultation Document, paragraph 6.7.

70 *Mason and others v Mills& Reeve (A Firm)* [2012] EWCA Civ 498.

respect of other types of claims, where the use of ADR is actively encouraged through the use of pre-action protocols but is not mandatory.[71]

24.5 We consider that a sufficient incentive to consider the potential for ADR can be achieved by providing that a party can be penalised in costs if they unreasonably fail to do so, without any need to make the use of ADR mandatory.

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

25.1 In our experience, claimants and defendants already tend to engage in discussions directed towards settlement and/or narrowing the issues in dispute following the issue of proceedings, particularly in follow-on cases. However, we believe that a formal pre-action protocol (subject to certain caveats, and with costs sanctions for non-compliance, as discussed further below) may be helpful in ensuring that the claimant's arguments are fleshed out early on in proceedings, particularly in stand-alone cases.

25.2 With regard to the types of competition cases to which such a pre-action protocol should apply, we consider that the principle that litigation before the courts should always be treated as an option of last resort, rather than the default first option, should apply to all competition private actions, as it does to other cases. We do not believe that there is any good reason for drawing a distinction between different types of cases before the CAT in this regard: the same principles should apply generally in all cases.

25.3 We are however concerned that any pre-action protocol introduced for competition cases in the CAT should be sufficiently flexible to permit formal issuing of proceedings before complying with the pre-action protocol steps where there is a good reason for doing so.

25.4 For example, existing pre-action protocols used in the ordinary courts have a carve out for cases where a limitation period is due to expire shortly and the relevant deadline would have passed before the claim was lodged if the pre-action protocol steps were followed before issuing the claim.[72] In the competition law context, additional concerns may arise in relation to jurisdictional issues in light of the Brussels Regulation.[73] The combined effect of Articles 2, 5(3) and 6(1) of that regulation is that a victim of an alleged competition law infringement will often have a choice of national courts available in which to bring a claim for damages. Under Article 27 of the Brussels Regulation it is the court "first seised" which will have jurisdiction to hear the case in such circumstances, and any proceedings brought in another national court must be stayed until the court first seised has disposed of the claim(s) brought before it. If a pre-action protocol were to be introduced which required a claimant to give the defendant prior notice of an intention to lodge a damages claim, this could prevent the claimant from being able to bring the claim in the courts of its choice, as it would give the defendant an opportunity to launch a so-called "Italian torpedo" (i.e. issue proceedings in another court of its choice for a declaration that it has no liability to the claimant), with a view to preventing (or significantly delaying) the proceedings which had been notified to it by the claimant.[74]

25.5 However, provided that there is sufficient flexibility to accommodate such cases, so that parties are not penalised provided they follow the pre-action protocol steps as soon as possible after proceedings have been lodged (and before the preparation of the defence

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[71] We note in this regard that paragraph 3.9 of the Pre-Action Protocol for Defamation Claims states "*It is expressly recognised that no party can or should be forced to mediate or enter into any other form of ADR*", and similar statements are also made in other existing pre-action protocols. We do not consider that there is any good reason to adopt a different approach for competition cases.

[72] See for example paragraph 9.6 of the general Practice Direction on Pre-Action Conduct.

[73] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 012, 16.01.2001, 1-23).

[74] This risk is not merely a theoretical one, as illustrated by the proceedings in respect of the synthetic rubber cartel (*Cooper Tire & Rubber Company Limited.& Ors v Shell Chemicals UK Ltd & Ors* [2009] EWHC 2609 (Comm); *Cooper Tire & Rubber Company Limited & Ors v Dow Deutschland Inc & Ors* [2010] EWCA Civ 864).

stage at the latest), we would support the introduction of a pre-action protocol in all cases before the CAT.

25.6 We note that the Consultation Document does not clearly state whether failure to follow any new pre-action protocol in competition cases would be taken into account by the CAT when awarding costs, or whether failure to make reasonable attempts to use ADR should be taken into account as a factor when determining whether to certify a case as suitable for a collective action, although both these possibilities are mooted.[75] We consider that failure to follow a pre-action protocol requiring consideration of the potential use of ADR in competition cases should be taken into account by the CAT when awarding costs in all cases, although the precise impact on costs issues should be left to the CAT's discretion on a case-by-case basis, rather than being set at an automatic fixed level. As noted above in response to Question 15, we also consider that whether reasonable attempts have been made to use ADR should also be one of the factors to be taken into account when determining whether or not to certify a case as suitable for a collective action.

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

26.1 We agree that the CAT's rules of procedure should be amended in order better to facilitate the use of formal settlement offers. In its current form, Rule 43 of the CAT's Rules is subject to a number of undesirable limitations and provides very little incentive to either claimants or defendants to make offers to settle. We would highlight in particular the following issues with the current rule:

(a) the combined effect of Rule 43(5) (which permits a claimant to accept a settlement offer at any point up to 14 days before the final hearing) and Rule 43(6) (which provides a default rule that a claimant will be entitled to its costs up to the date of acceptance of the offer) acts as a significant deterrent to the making of formal settlement offers by defendants at an early stage in proceedings, as the defendant will potentially be liable to pay the claimant's costs up to the point 14 days before the final hearing, even if the settlement offer is made much earlier and the claimant should have accepted the offer immediately;

(b) the limited consequences of the claimant failing to beat the offer (liability to pay the defendant's costs from the last date on which it was permitted to accept the offer i.e. 14 days before the final hearing) also act as a disincentive for defendants considering making a formal settlement offer;

(c) the rule only sets out a process for formal offers by defendants, and does not deal with offers made by claimants;

(d) the requirement to obtain permission from the Registrar to withdraw or reduce an offer once it has been made has no logical basis, and there is no clear guidance available as to the conditions which must be met in order for permission to be granted;

(e) the requirement for a cash payment to be made into court by a defendant is outdated – the equivalent High Court rule (CPR 36) no longer requires actual payment to be made. In addition, there are no guidelines which deal with exactly how a payment into court under Rule 43 is to be made; and

(f) although the making of offers in any other form is not precluded (as expressly recognised in Rule 43(10)), there is little incentive to consider making such offers

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[75] Paragraph 6.11 of the Consultation Document states: "*Most typically, failure to follow a pre-action protocol may be taken into account by the court (or, in this case CAT) when attributing costs. It could also be established that whether reasonable attempts had been made to use ADR would be one the factors* [sic] *that a judge would consider when determining whether or not to certify a case as suitable for a collective action.*" It is not made clear whether the Government is proposing that either of these consequences of failing to follow a pre-action protocol is being proposed in the context of competition cases, if a new pre-action protocol were to be introduced.

as Rule 43(10) only provides that the CAT "*may*" take account of such offers when considering costs.

26.2 We would suggest that the CAT Rules should be amended to more closely reflect the approach taken in Part 36 of the CPR, subject to a number of amendments to ensure that the mechanism adopted is suitable for use in competition private actions.

26.3 In this regard, we would recommend tailoring the rules contained in Part 36 to address some of the particular issues which can arise in competition cases, for example widening the circumstances which the CAT can take into account when determining whether an offer is beaten, and clarifying that the CAT would be able to consider settlement offers made for a proportion of the loss (and whether the offer made in respect of that portion is beaten).

26.4 The rules on revision of offers should also be clarified to make clear that it is open to defendants to revise their offers throughout the case (so that issues such as the addition of claimants or identification of new sales can be dealt with), rather than having to withdraw and re-issue a settlement offer as the claim proceedings evolve (which would expose the defendant to increased liability for costs as the relevant time period would start running again). It would then be for the CAT to decide what impact all of the offers should have at the hearing stage (e.g. whether costs protection goes back to the original offer, or a later offer if the later one is deemed to be less advantageous).

26.5 Finally, it should be made clear that the CAT may, at its discretion, depart from the automatic costs consequences where they would lead to an unjust outcome, and we would welcome the provision of more detailed guidance to the CAT in this regard. We would suggest that this category of cases include the scenario where the claimant(s) only failed to beat an offer or offers made by *some* of the defendants (as the claimant would have had to incur the same costs even if they accepted the offers they failed to beat in order to deal with the other defendants).

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

27.1 We do not currently anticipate establishing any specific initiatives to facilitate the provision of ADR for disputes relating to competition law, although we would continue to encourage clients (whether claimants or defendants) to consider the potential merits of pursuing ADR when advising on such disputes.

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

28.1 If an opt-out competition collective actions regime is introduced (whether at the discretion of the CAT or as a general rule), we consider that, contrary to the suggestion in the Consultation Document, there would be a need to make separate provisions to deal with collective settlement.

28.2 The key question in this context is whether some can bind others/all. From a practical perspective, and in the interests of certainty, it would be undesirable for a settlement agreed by a defendant with a claimants' representative not to be binding on those who have not opted out of the collective action (although those that have chosen to opt-out should of course remain free to initiate their own separate proceedings, and, potentially, agree a different settlement).

28.3 We would suggest that provision should be made for settlements agreed in the context of a collective action to be subject to a certification process overseen by the CAT, and that once a settlement has been certified it should be binding on all potential claimants other

than those who have opted out. Requiring the settlement to be reviewed and certified in this way would offer protection for those claimants who are not actively involved in negotiation and agreement of the terms of the settlement, and address concerns that a small number of claimants might agree to a collective settlement which was not actually in the interests of the class of claimants generally. Introducing separate provisions for collective settlement would also provide scope for parties to apply to the CAT for certification of a collective settlement without any need for prior issue of proceedings.[76]

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

29.1 We disagree with the proposal to give the OFT (and presumably, in the future, the CMA) additional powers to *oblige* businesses to take steps to make redress to those that have suffered loss due to their anti-competitive behaviour. We consider that the OFT's primary responsibility should remain public enforcement of competition law, and we do not believe that it would be appropriate for the OFT to take on a major role in deciding whether to impose (or not to impose) redress schemes, even if that power were genuinely discretionary for the OFT and could be designed so as to try to minimise the risk of undue legal challenges and the associated resource burdens.[77] We do not consider that the analogy drawn in the Consultation Document with the FSA's ability to impose a scheme which "*corresponds to or is similar to a consumer redress scheme*"[78] is particularly helpful in this regard, as this power is granted in the context of a single regulated sector, whereas the OFT operates across the whole economy.

29.2 Furthermore, we anticipate that giving such additional powers to the OFT would in practice inevitably divert resources away from and/or delay its public enforcement activities (particularly if, as would seem likely, the OFT was also required to monitor compliance with the order to implement a redress scheme, on an ongoing basis). We would be concerned that this could result in a reduction in deterrence and therefore an increase in anti-competitive behaviour. We understand that the OFT has also expressed concerns about the proposed level of its involvement in facilitating redress, and the potential impact on already stretched resources.

29.3 However, we agree that there may be potential advantages in involving the OFT in facilitating redress in a more limited way, whereby it could encourage companies found guilty of an infringement of competition law to offer voluntary redress schemes (prior to any issue of collective proceedings by affected individuals or businesses before the CAT).[79]

29.4 We would however question whether it would be appropriate for the OFT to become involved in a formal certification process requiring approval of the specific design of a particular redress scheme, and precisely how redress should be calculated in an individual case (as suggested in the Consultation Document[80]), as the OFT is not necessarily best placed to assess this in detail.

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[76] Whilst the Consultation Document may well be correct that it would be possible to generate a collective action with a view to agreeing settlement in most cases where there was a desire to reach a collective settlement, we do not consider it to be desirable or efficient for proceedings to be issued simply to enable a collective settlement to be approved.

[77] Consultation Document, paragraph 6.32.

[78] Under section 404F(7) of the Financial Services and Markets Act.

[79] If a redress scheme were offered by an infringing undertaking in order to settle a collective action brought before the CAT, as part of a collective settlement agreement, then the terms of the scheme should be reviewed by the CAT, as part of the certification of the collective settlement agreement – see further the response to Question 28 above.

[80] Consultation Document, paragraph 6.39.

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

30.1 In the interests of incentivising companies voluntarily to offer to implement redress schemes, we would welcome a discretionary reduction in fines which reflects the significance of the redress offered to those suffering loss. Where this is significant, we do not believe that an arbitrary cap as to the level of discount should be set in advance. We do not consider that this would unduly undermine the deterrent impact of fines, which would still represent a significant "punishment" for companies engaging in anti-competitive behaviour.

30.2 We note in this regard that, under recent proposed reforms to the OFT's decision-making procedures, details of the proposed fine calculation will in future be included in the Statement of Objections (**"SO"**).[81] It would therefore be open to each of the addressees of the SO to include in their response details of any redress scheme which it would be willing to implement in the event that the OFT ultimately adopted an infringement against it (in the same way that arguments are made in the response to the SO regarding the appropriate level of any fine to be imposed, in the event that the OFT does not accept the arguments put forward in the response against the finding of an infringement).

30.3 For the avoidance of doubt, we consider that any reduction granted in return for implementing a redress scheme should be calculated separately from any "settlement discount" granted in return for entering into an early resolution agreement with the OFT.

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

31.1 When considering how public and private enforcement can complement each other, it is important not to lose sight of the fact that these two regimes are driven by different policy objectives: as discussed in response to Question 10 above, the primary objective of public enforcement is deterrence, whereas the primary objective of private enforcement is ensuring appropriate redress for victims of competition law infringements.

31.2 That said, we consider that an extended role for private actions has the potential positively to complement public enforcement in a number of ways:

(a) strengthening the private enforcement regime could increase the number of competition law infringements which are identified and brought to an end, without requiring any additional public resources, by facilitating stand-alone claims in cases where the OFT decides not to investigate;

(b) by facilitating redress for those who have suffered loss as a result of competition law infringements by strengthening the private enforcement regime, rather than by involving the OFT in ordering redress in addition to imposing fines, the OFT could continue to focus on its primary responsibility of public enforcement of the competition law rules; and

(c) although not a driving objective, encouraging private actions against undertakings which have infringed competition law will inevitably have some deterrent effect, which can usefully complement the deterrent effect of financial penalties imposed by the OFT and the European Commission.

31.3 We acknowledge the concerns identified by the Government in paragraph 7.3 of the Consultation Document regarding the risk of damage being caused to the public enforcement system through the introduction (or strengthening) of private actions. However, we believe that the potential conflict and tensions can be addressed through the measures discussed below.

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[81] See paragraph 2.44 of the OFT's recent consultation document entitled "Review of the OFT's investigation procedures in competition cases" (OFT 1263con2).

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

32.1 We agree that potential leniency applicants may be deterred from applying for leniency if they believe that doing so could make them more vulnerable to private actions than their co-cartelists. Given the significant role of the leniency regime in increasing the likelihood of detection – and ultimately prevention – of cartel conduct we therefore support the proposal that certain leniency documents should be protected from disclosure in the context of private actions brought in the English courts.

32.2 With regard to the precise details of which documents should be disclosed and which documents should be protected, we agree that it is important to strike the right balance between claimants' rights to compensation on the one hand and ensuring the continued success and effectiveness of the OFT's leniency programme on the other. We would propose that only those documents which would not have existed but for the leniency process should be protected from disclosure in the context of a private action brought before the CAT (or the High Court, if the proposals to extend the role of the CAT are not implemented). So, for example, a corporate leniency statement should be protected, but pre-existing documents disclosed to the OFT as part of an application for leniency should not be.

32.3 We note in this regard that the European Commission's work programme for 2012 includes adopting a directive that would harmonise certain aspects of private damages claims across the EU and coordinate private and public antitrust enforcement.[82] We understand that this is intended to include regulating access by private claimants to documents provided by a whistle-blower pursuant to a leniency programme, in the wake of the European Court of Justice's decision in the *Pfleiderer* case.[83] The possibility of legislative proposals being brought forward by the European Commission on this issue is acknowledged in the Consultation Document,[84] but it is suggested that these will not be immediately forthcoming and there is therefore an urgent need to deal with the issue of disclosure separately at the UK level. We would note that, based on the "roadmap" published by the European Commission[85] a proposed directive was due to be published in June 2012, so may well be published fairly shortly.

32.4 It is not entirely clear whether the planned EU directive will cover only documents provided to the European Commission under the EU leniency regime, or also documents provided to national competition authorities such as the OFT under national leniency regimes. However, given the stated intention to harmonize certain aspects of private damages claims across the EU, and the fact that these issues have arisen in relation to national competition authority investigations as much as European Commission investigations, the second of these two options seems likely. If this is the case, then we would query the need for any separate legislative initiative at UK level if the EU issues a directive. In any event, we would assume that the Government will have regard to the proposed EU approach when reaching a final decision the extent to which certain leniency documents should be protected from disclosure under the UK regime.[86]

32.5 Although the precise details of the European Commission's proposed approach are not yet clear, it seems clear from its submission to the English High Court in the *National Grid*

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82 See the Annex to COM (2011) 777final, 15.01.2011, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2012 (available online at: http://ec.europa.eu/atwork/pdf/cwp2012_annex_en.pdf).

83 Case C-360/09, *Pfleiderer AG v Bundeskartellamt* (judgment of 14 June 2011 (not yet reported)).

84 Consultation Document, paragraph 7.5.

85 http://ec.europa.eu/governance/impact/planned_ia/docs/2009_comp_023_damages_breaches_antitrust_en.pdf

86 Whilst it is anticipated that any EU directive in this field will only set minimum standards, and Member States will remain free to adopt higher standards should they wish to do so, it will nonetheless clearly be important to have regard to the ongoing developments at EU level.

case[87] that it will seek to ensure that leniency documents are protected as far as possible and only disclosed as a last resort. This is also the approach adopted in the recent resolution adopted by the European Competition Network (**"ECN"**) on this issue (with which the OFT was presumably involved as a member of the ECN).[88] As set out above, we would suggest that the OFT should take a similar approach on this issue, subject to the caveat that not all documents associated in any way with a leniency application should be protected from disclosure, but rather only those which would not have existed but for the leniency application.

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

33.1 We agree that the current rules on joint and several liability in competition private actions can act as a disincentive for potential leniency applicants, who are likely to be concerned that they will be chosen as the party against which to bring a damages claim, potentially even before a formal infringement decision identifying the other cartelists has been reached by the competition authorities. Whilst it is of course possible for a leniency applicant subsequently to pursue other parties involved in the infringement to recover the appropriate contribution from each of them, the leniency applicant is likely to incur additional legal costs in doing so, and, as recognised in the Consultation Document,[89] recovery is not guaranteed, for example if some of the other cartelists have gone bankrupt or are not easily pursued due to being located in other jurisdictions.

33.2 In addition to the points made in this regard in the Consultation Document, we would note that the potential liability risk faced by a leniency applicant can be exacerbated in circumstances where the other (alleged) cartelists have lodged appeals against the infringement decision: a successful leniency applicant is prevented from appealing against the decision, and may therefore become a "target" for damages claims pending the determination of the appeal proceedings (which may take a number of years). In addition, if all the other alleged cartelists successfully appeal against the infringement decision, this raises the question of whether a leniency applicant can be held jointly and severally liable for the whole of the loss caused by a "cartel of one", which, in the case of the successful appellants, has been held by the courts not to amount to an infringement of competition law. We note the ongoing consideration of the difficult issues which arise in this context by the Court of Appeal in the *Deutsche Bahn* case,[90] in which judgment is expected shortly, and to which we assume the Government will have regard in reaching a final position on this issue.

33.3 However, we also share the concerns expressed in the Consultation Document that simply removing joint and several liability in competition private actions would risk leaving victims of an infringement unable to obtain proper redress.[91] On balance, we do not therefore consider it to be appropriate simply to remove the principle of joint and several liability for all leniency applicants. We would however welcome amendments to protect an initial whistle-blowing company which has received "Type A" immunity under the OFT's leniency regime in return for providing evidence of cartel activity of which the OFT was not already aware. The liability of such a company to pay compensation to victims of the infringement should be limited to the loss which it has caused. We consider that this would strike the appropriate balance between the two competing objectives, and could help encourage companies to come forward and report cartel behaviour.

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87 *National Grid Electricity Transmission plc v ABB Ltd & Ors* [2011] EWHC 1717 (Ch) and [2012] EWHC 869 (Ch).

88 Resolution of the Meetings of Heads of European Competition Authorities of 23 May 2012, "Protection of leniency material in the context of civil damages actions" – see http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf

89 Consultation Document, paragraph 7.7.

90 Appeal to the Court of Appeal of the CAT decision in *Deutsche Bahn v Morgan Crucible* [2011] CAT 16.

91 Consultation Document, paragraph 7.8.

33.4 We do not consider that this protection should be extended to other leniency applicants, who may have been granted a reduction in the level of fine imposed in recognition of the additional information and assistance they have been able to provide to the OFT in respect of cartel activity of which the OFT was already aware (i.e. applicants who have been granted "Type B" or Type "C" immunity/leniency). Extending the protection to all leniency applicants would significantly and, in our view, unjustifiably increase the risk that victims of the infringement may be unable to obtain proper compensation for their loss. In addition, limiting protection to "Type A" leniency applicants could incentivise leniency applications and help render cartels less stable.

33.5 We note in this regard that a similar rule is already applied in the United States, where (successful) leniency applicants are only liable for damages in respect of the loss caused by their own conduct, rather than being liable for treble damages jointly and severally with the other members of the cartel.[92]

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

34.1 We do not consider that there are any other measures other than those discussed above which are necessary to protect the public enforcement regime in light of the proposed strengthening of the private enforcement regime.

**Ashurst LLP**

**July 2012**

[92] Antitrust Criminal Penalty Enhancement and Reform Act 2004.

# Association of Independent Music

BIS consultation: Private Actions in Competition Law: A Consultation on Options for Reform

Response from the Association of Independent Music (AIM)

1. Introduction

AIM is a trade body established in 1999 to provide a collective voice for the UK's independent music industry. AIM welcomes the Intellectual Property Office's call for evidence on its Mediation Service.

AIM represents over 800 member companies, from the largest and most respected labels in the World, to small start-ups and individual artists releasing their own music for the first time. AIM promotes this exciting and diverse sector globally and provides a range of services to members, enabling member companies to grow, grasp new opportunities and break into new markets.

The UK's independent music sector produces some of the most exciting and popular music in the World, and makes a huge contribution to the country's economy. AIM's 800+ members span every musical genre and every corner of the UK. They are a vibrant, entrepreneurial and diverse bunch who have one thing in common: the music comes first.

AIM oversees a sector whose artists have claimed five of the last seven Mercury Music Prizes and regularly accounts for 30% of all UK artist album awards (silver, gold, platinum). Artists signed to member labels include: Adele, Amadou and Miriam, Arctic Monkeys, Basement Jaxx, Bjork, Franz Ferdinand, Friendly Fires, Jay Sean, Justice, Lostprophets, Maximo Park, Radiohead, Roots Manuva, Royksopp, The Prodigy, The Strokes, The White Stripes and thousands of others.

These responses are submitted on behalf of AIM. Where examples relate to personal or individual professional experience, these responses relate to the experience of AIM's Head of Legal and Commercial Affairs for the Worldwide Independent Network, Charlie Phillips. Where responses have not been provided to specific questions, this is due to lack of available information on which to base a response. We are happy to input further on this consultation on any points on which BIS requires addition input from our sector and/or membership.

2. AIM responses to BIS questions:

1. *Should s16 of the Enterprise Act be amended to enable the courts to transfer competition law cases to the CAT?*

Yes. AIM supports the proposals to open up access to the CAT, such that private competition law actions become more accessible than at present.

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

Yes. AIM's members are especially vulnerable to potential anti-competitive actions of larger companies trading in the same sector, since so much market power in concentrated in the hands of so few players (four 'major' record companies on the one hand, and several hundred independents on the other, of which some 800 are AIM members).

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

Yes, if this is structured to fit within the specialist competition law experience of the CAT. Prima facie, it would not seem to make sense to limit any remedies from the arsenal available to a specialist forum, if those remedies are particularly relevant, as injunctions are in cases of competition law.

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

We agree strongly with this point, as most of AIM's member companies are SMEs. Our members are particularly exposed to potential anti-competitive behaviour where very large numbers of individual companies might individually lose, or be forced to pay, a small amount over what otherwise be the case, in absence of anti-competitive behaviour. A cheaper, quicker and simpler method than is current on offer would, we feel, be to the benefit of our SME members.

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

We broadly support the proposals set out from 4.24 to 4.35, and feel that the proposal to cap costs may provide reassurance to our members, and act as an incentive to consider this route, if necessary. The practical measures set out at 4.30 appear sensible and realistic to our members. We do not, at least initially, see the merits of capping damages, since (depending on the level of the cap) this may not act as a suitable deterrent for large companies which might be able to

absorb the capped damages fairly easily. It would be unfair for large companies to get away with a ‘slapped wrist’ after wreaking severe harm on smaller competitors.

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

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

We understand the reasoning presented in the consultation, and agree that a presumption of no loss, as is currently the case, is something of a non-sequitur. Nevertheless, we feel that applying a figure to such presumed loss would vary enormously from case to case, with no ‘one size fits all’ solution. We would need to see more information on this before commenting further.

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

This point is understood, but we do not have sufficient information or experience to comment further at this time.

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

The current system is clearly not functioning as well as it could, and we would broadly support the proposed moves to extend access to bring collective actions in competition law cases, and to strengthen the current system.

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

AIM is an association representing businesses, and therefore supports the proposal to extend the collective action regime to allow collective actions to be brought on behalf od businesses as well as consumers. We would also support moves to allow collective actions to be brought in stand-alone as well as follow-on cases, for the same reasons.

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

Yes.

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

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

From the information provided, we believe at this stage that collective actions should be allowed in both cases.

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

As a trade association, AIM is well placed to represent and/or communicate to a large number of companies which might all have been affected by potential anti-competitive behaviour. We understand the positive aspects of using an opt-out model, and the negative aspects of approaching a large amount of individuals on a case by case basis, to encourage them to opt in. On balance, we feel an opt-out model might be preferable for our members, if the practicalities were managed centrally by representative groups such as AIM.

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

We broadly agree that the list of issues covers the key areas to be addressed. We would need more information on this area before making more substantive submissions with respect to the issues set out in Annex A of the consultation document.

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

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

Our experience in litigation in contexts other than competition law is that this fundamental principle has merit. There is at this stage nothing to suggest that this should change as an overall principle, but we accept that an element of cost capping might be appropriate given the make-up of potential parties to competition litigation.

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

We are supportive of access to a fund whereby under funded claimants may gain access to an otherwise prohibitively expensive process. A capped cost structure, while maintaining the 'loser pays' principle would have the added advantage of certainty with respect to maximum sums to be paid out of such a fund.

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

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

This has been mooted in other contexts in which AIM is working, and we would not dismiss the idea that where payments are made to an entity which generally represents the best interests of a particular consistency, this can be a useful route to take, if it is otherwise difficult or impossible to locate and distribute sums which remain unclaimed or unidentifiable to individual entities.

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

It may be that no single entity is an appropriate recipient of any and all such sums, and that organisations working on behalf of the respective collective entities in the action may be the more appropriate recipients. This would ensure that damages paid in respect of an action affecting a particular group of claimants are allocated to the benefit of that particular group.

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

Yes. If this were to be extended to businesses, we believe that limiting access to public bodies only would add a layer of beaurocracy to an already complicated process.

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

We believe that those who have suffered genuine harm should have the right to take direct action, but there may be some merit in allowing third party funders to bring cases – although we suspect that this would be something more applicable

to consumers than businesses, and is not something we would necessarily expect to fit easily with independent recording companies.

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

Our experience of ADR has been largely positive in terms of outcomes acheived, but there is a tendency within our sector to view it as weak, and an unnecessary additional cost when it is likely that court action will be required in any event. We feel that there is no need to make the rules of use of ADR different in this context to other litigation scenarios.

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

If the pre-action protocols are not unduly onerous or beaurocratic, and provide clarity, then there is no reason to dismiss them from the outset. Given that they would be used in the context of new routes to litigation, they may be of more use than in more familiar and more widely used litigation procedures.

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

There is an argument that the CAT rules should be consistent with the CPRs, unless there is a very clear reason for them to differ. This scenario does not appear to be one where the differences between the CAT system and that of the High Court might merit a different approach.

27. *The government would be interested to hear of whether, should reforms in this consultation be carried our, your organisation would intend to establish any initiatives that might facilitate the provision of ADR disputes relation to competition law.*

Other than providing general overview and guidance information to assist member companies in understanding the context and substantive legal issues of any area, AIM does not provide bespoke legal services for its members. We would however gladly advocate for the benefits of ADR, since we are aware that there is mistrust and misunderstanding of this route, while going directly to court is often perceived as being more advantageous, without regard for the risks and downsides of this option.

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

There appear to be merits to this view at face value, but we are unable to comment further at this time.

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

We believe that a system which provides the opportunity to make redress should not be at the cost of potential punitive measures to act as a deterrent for future wrong doing. With this in mind, we support measures that would put the victims of anti competitive behaviour in the position they would have been in had that behaviour not taken place, but we would also seek measures which actively discourage such behaviour in the longer term.

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

See response to question 29 above.

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

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

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

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

AIM, 13 July 2012

**Association of Independent Music**
Lamb House, Church Street, Chiswick, London W4 2PD
**T**:+44(0)2089945599 **F**: +44(0)2089945222 **E**: info@musicindie.com **W**: www.musicindie.com

Registered in England and Wales Company number: 3685877 Registered office: Lamb House, Church Street, Chiswick, London W4 2PD

# Avon and Bristol Law Centre - Beth Cooper

**Q20 What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums.**

I view the merits of paying unclaimed sums to a single specified body as significant.
A single destination that is set out in statute would be beneficial because:

- The problem of trying to find a suitable recipient for each case is avoided, as well as the associated lobbying of judges and potential satellite litigation which would detract from both the sentiment and practical application of collective actions.

- The named charity would receive funds in the public interest and would retain its independence having not been involved in the litigation.
- A full deterrent effect against anti-competitive companies is achieved as companies practising such behaviour will need to compensate the total amount of harm the court decided was suffered by individuals from their anti-competitive action, regardless of the number of individuals who came forward to collect their damages.

- There would be legal certainty for all parties and the court, before and during litigation.

- The system is administratively simple, which would save time and cost for the parties and the court, maximising the funds available from such actions.

I view the disadvantages of the other possible options as being:

*Cy-près*

- There would be difficulties in identifying who is the appropriate cy-près beneficiary.

- Of the two major options for c*y-près*, the “price roll-back” might well not benefit the previous customers harmed. Also, this might give the (anti-competitive) company an advantage over its competitors.

- The second major option to pay the residue funds to an organisation, usually a charity, considered the next best beneficiary to the harmed individuals involves the need to decide who the most appropriate recipient is. This may again place undue demands on the time and funding available.

- As mentioned previously, it has been witnessed in other jurisdictions that class-action judges are routinely lobbied by charities seeking the money, a problem reported by the Civil Justice Council in their report on collective proceedings (page 181). Furthermore, lawyers seek to suggest their personally favoured charities, which would lead to inconsistent outcomes and irrelevant favouring of particular charitable causes.

*Escheat to the Treasury*

- This option could be viewed as a form of taxation, or a civil fine, which bears little relevance to the individuals who have been harmed.

*Reversion to the defendant*

- The guilty party benefits from an unjust windfall.

- Reversion creates an incentive for the company to minimize awareness of the award and the number of customers claiming.

**Q21 If unclaimed sums were to be paid to a single specified body, in your view would the Access to Justice Foundation be the most appropriate recipient, or would another body be more suitable?**

I view the Access to Justice Foundation as the most appropriate recipient for two main reasons:

*1. Support for access to justice*

- The purpose at the heart of collective actions is to enable access to justice for individuals who would otherwise not have it, in this case from illegal anti-competitive of companies. Therefore it is logical that residue damages be used to support further access to justice for the public.

- Reductions in funding for legal assistance are having a severe impact on the availability of free legal help and therefore access to justice at all levels.

- The advice sector and pro bono sector have an increasingly vital role in providing free legal assistance to those who cannot afford it.

- The sector's work is targeted at those not currently empowered by the law whether through poverty, social exclusion, or lack of education.

- Improved access to justice will in turn benefit many other charities, whether because the beneficiaries of the charity receive legal help, or because the charities themselves directly receive free legal assistance.

*2. The Foundation is a trusted national grant maker*

- The Access to Justice Foundation is an independent charity, acting in the public interest to improve access to justice.

- The Foundation's purpose is to receive and distribute additional funds to support free legal assistance and to support access to justice generally. To this end it acts on behalf of the sector to raise money and then make grants to legal help organisations across England & Wales.

- The Foundation has a trusted role in the advice sector and legal profession, who worked together to establish the charity.

- As a national grant maker the Foundation is able to support the whole advice and pro bono sector in providing free legal help.

- The Foundation works with the regional network of Legal Support Trusts (which includes us, the London Legal Support Trust) across England & Wales, and with national organisations, in order to strategically provide funding at all levels.

- As the recipient of pro bono costs under the Legal Services Act 2007, the Foundation has experience with receiving funds from litigation and has the necessary expertise when legal issues arise as well as dealing with inherently unpredictable sources of income.

- The Foundation was recommended as a suitable body to receive residue funds from collective actions by the Jackson Review of Civil Litigation Costs, the Civil Justice Council and the HMT Financial Services Rules Committee.

Beth Cooper
Immigration Solicitor

# Avon and Bristol Law Centre - Clare Carter

Dear Sirs

My response to the above named consultation is set out below:-

**Q20 What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums.**

LLST views the merits of paying unclaimed sums to a single specified body as significant.
A single destination that is set out in statute would be beneficial because:

- The problem of trying to find a suitable recipient for each case is avoided, as well as the associated lobbying of judges and potential satellite litigation which would detract from both the sentiment and practical application of collective actions.

- The named charity would receive funds in the public interest and would retain its independence having not been involved in the litigation.
- A full deterrent effect against anti-competitive companies is achieved as companies practising such behaviour will need to compensate the total amount of harm the court decided was suffered by individuals from their anti-competitive action, regardless of the number of individuals who came forward to collect their damages.

- There would be legal certainty for all parties and the court, before and during litigation.

- The system is administratively simple, which would save time and cost for the parties and the court, maximising the funds available from such actions.

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- There would be difficulties in identifying who is the appropriate cy-près beneficiary.

- Of the two major options for c*y-près*, the “price roll-back” might well not benefit the previous customers harmed. Also, this might give the (anti-competitive) company an advantage over its competitors.

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- As mentioned previously, it has been witnessed in other jurisdictions that class-action judges are routinely lobbied by charities seeking the money, a problem reported by the Civil Justice Council in their report on collective proceedings (page 181). Furthermore, lawyers seek to suggest their personally favoured charities, which would lead to inconsistent outcomes and irrelevant favouring of particular charitable causes.

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- Reductions in funding for legal assistance are having a severe impact on the availability of free legal help and therefore access to justice at all levels.

- The advice sector and pro bono sector have an increasingly vital role in providing free legal assistance to those who cannot afford it.

- The sector's work is targeted at those not currently empowered by the law whether through poverty, social exclusion, or lack of education.

- Improved access to justice will in turn benefit many other charities, whether because the beneficiaries of the charity receive legal help, or because the charities themselves directly receive free legal assistance.

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- The Foundation was recommended as a suitable body to receive residue funds from collective actions by the Jackson Review of Civil Litigation Costs, the Civil Justice Council and the HMT Financial Services Rules Committee.

Clare Carter
Strategic Development Co-ordinator
Avon & Bristol Law Centre

# Avon and Bristol Law Centre - Clovis Reese

**Q20 What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums.**

LLST views the merits of paying unclaimed sums to a single specified body as significant.
A single destination that is set out in statute would be beneficial because:

- The problem of trying to find a suitable recipient for each case is avoided, as well as the associated lobbying of judges and potential satellite litigation which would detract from both the sentiment and practical application of collective actions.

- The named charity would receive funds in the public interest and would retain its independence having not been involved in the litigation.
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- There would be legal certainty for all parties and the court, before and during litigation.

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LLST views the disadvantages of the other possible options as being:

*Cy-près*

- There would be difficulties in identifying who is the appropriate cy-près beneficiary.

- Of the two major options for c*y-près*, the “price roll-back” might well not benefit the previous customers harmed. Also, this might give the (anti-competitive) company an advantage over its competitors.

- The second major option to pay the residue funds to an organisation, usually a charity, considered the next best beneficiary to the harmed individuals involves the need to decide who the most appropriate recipient is. This may again place undue demands on the time and funding available.

- As mentioned previously, it has been witnessed in other jurisdictions that class-action judges are routinely lobbied by charities seeking the money, a problem reported by the Civil Justice Council in their report on collective proceedings (page 181). Furthermore, lawyers seek to suggest their personally favoured charities, which would lead to inconsistent outcomes and irrelevant favouring of particular charitable causes.

*Escheat to the Treasury*

- This option could be viewed as a form of taxation, or a civil fine, which bears little relevance to the individuals who have been harmed.

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*1. Support for access to justice*

- The purpose at the heart of collective actions is to enable access to justice for individuals who would otherwise not have it, in this case from illegal anti-competitive of companies. Therefore it is logical that residue damages be used to support further access to justice for the public.

- Reductions in funding for legal assistance are having a severe impact on the availability of free legal help and therefore access to justice at all levels.

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Clovis Reese
Immigration Solicitor

# Avon and Bristol Law Centre - Rolnan Mulqueeny

**Q20 What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums.**

The merits of paying unclaimed sums to a single specified body as significant.
A single destination that is set out in statute would be beneficial because:

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Ronan Mulqueeney
Employment, Discrimination and Mental Health solicitor
DD: 0117-9167708

Avon and Bristol Law Centre, 2 Moon Street, Stokes Croft, Bristol BS2 8QE.
Telephone: 0117 9248662. Fax: 0117 9248020
Registered in England and Wales.

# Avon and Bristol Law Centre - Will Stone

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

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

This response form can be returned to:

Tony Monblat
Consumer and Competition Policy
Department of Business, Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
Westminster
SW1H 0ET
Tel: 0207 215 6982
Fax: 0207 215 0235
Email : competition.private.actions@bis.gsi.gov.uk

| Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type. |
|---|
| Representative Organisation |
| Trade Union |
| Interest Group |
| Small to Medium Enterprise |
| Large Enterprise |
| Local Government |
| Central Government |
| Legal √ |
| Academic |
| Other (please describe): |

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

**Consultation questions**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The merits of paying unclaimed sums to a single specified body are significant. A single destination that is set out in statute would be beneficial because:

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- The Foundation was recommended as a suitable body to receive residue funds from collective actions by the Jackson Review of Civil Litigation Costs, the Civil Justice Council and the HMT Financial Services Rules Committee.

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

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

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

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

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

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

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

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

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

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

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

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

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

**Q. 35 Do you have any other comments that might aid the consultation process as a whole?**

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

# Bail for immigration Detainees

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**Yours sincerely**

## Celia Clarke

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Celia Clarke
Director
Bail for Immigration Detainees
28 Commercial Street
London E1 6LS

# Baker and McKenzie LLP

BAKER & MCKENZIE

**Private Actions in Competition Law: a Consultation on Options for Reform**

We welcome the opportunity to respond to the Government's proposal on options for reform that may facilitate private actions to enforce competition law. This response is submitted on behalf of Baker & McKenzie LLP, London. The views expressed are those of Baker & McKenzie LLP only and do not necessarily represent the views of our clients.

As a preliminary comment, we note that the implementation of the reforms proposed will expand the remit of the Competition Appeal Tribunal ("CAT") and will necessarily result in a greater administrative burden upon the institution as a whole. We agree that the CAT is efficient and has demonstrated a robust approach to case handling in respect of its current work. However, it is important that any expansion of its role includes consideration of existing pressure points (for example, Communications Act 2003 appeals) and ensures a sufficient allocation of resources to the CAT going forward in order that it is able to service its remit whilst maintaining the high standards and reputation established to date.

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

1.1 Section 16 of the Enterprise Act should be activated and regulations introduced so that courts may transfer all or part of proceedings relating to an infringement of competition law to the CAT.

1.2 Claims involving competition law infringement can raise complex issues outside of the law – whether of economics or sectoral operations – and the CAT was established so as to create an independent body with the necessary expertise to enable it to hear appeals engaging those issues in relation to decisions made by sectoral regulators. CAT members are drawn from a range of backgrounds – including law, economics, accounting and business – and receive ongoing training in respect of economic concepts and the structure of each of the regulated industries from which Competition Act 1998 appeals may be made.[1] As such, the CAT is uniquely placed to address some of the harder-edged questions arising in cases of competition law infringement and High Court judges ought to be able to take advantage of that expertise as they consider appropriate when addressing competition law questions.

1.3 However, we also agree with the views expressed on 10 June 2008 by Sir Gerald Barling, then President of Competition Appeal Tribunal, that

> "It is a curious anomaly that the UK's specialist competition court has no jurisdiction to determine whether there has been an infringement of the competition rules for the

[1] "The Accountability of Regulators to Citizens and Parliament" Memorandum by the Competition Appeal Tribunal to the House of Lords Select Committee on the Constitution produced by Charles Dhanowa Registrar on 26 June 2003 (http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/3111202.htm)

> purposes of a "stand-alone" claim and that such a claim can only be brought in the High Court and in the equivalent courts in Scotland and Northern Ireland. The anomaly could be alleviated to some extent (but not entirely removed) by bringing into force section 16 of the Enterprise Act 2002. It is my earnest hope that we can make some progress on this and on some of the other jurisdictional obstacles to effective private actions in the near future."[2]

1.4 Activating section 16 will go some way toward increasing the use to which the expertise of the CAT is put, but it is important that claimants also have the choice of initiating proceedings in the CAT should they wish to do so rather than this being at the discretion of the High Court. Accordingly, subject to the comments made regarding question 2 below, we consider in principle that the CAT should also be able to hear stand alone competition law claims.

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

2.1 We agree that the CAT should be empowered to hear stand alone and follow on cases – if only so that the CAT is no longer constrained in the findings that it can make in respect of claims brought before it, as was the case in *Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited* [2009] CAT 7. Further, as noted above, we also consider that it is anomalous that the CAT does not have jurisdiction to address those issues that fall within the ordinary scope of its expertise (i.e. the question of whether an infringement has in fact occurred) and is instead restricted to resolving questions of causation and quantification in the context of private damages actions.

2.2 However, we do have concerns as to the range of stand alone claims that the CAT will consider itself able to determine and how it might address "mixed" claims (i.e. those where infringement of competition law is not the only cause of action or where counterclaims are raised on different grounds). The question of whether the CAT would accept and attempt to determine such claims or instead seek to transfer non-infringement questions to the High Court is very important as to whether any extended jurisdiction is likely to work in practice and whether it is likely to be taken up by claimants in any numbers.

2.3 This point on "mixed" claims is not addressed in the Consultation, but it is important that some guidance or expectations are set so that the mechanics of the proposal are clear. Without such clarity, we will likely see the High Court continue to be the *de facto* preference for claimants bringing actions in view of the complications and/or risk that might be involved in starting proceedings in the CAT instead.

2.4 One practical solution might therefore be for the CAT to be empowered to determine both follow-on and stand alone issues but for pure stand-alone cases (rather than follow-on claims that might seek to establish liability in broader terms than that identified in the underlying infringement decision) to be reserved, in terms of chairmanship, to Chancery Division judges (all of whom are Chairmen of the CAT), sitting as usual with two wing members. Pure stand alone cases could still be transferred to the CAT under section 16 in whole or in part if the High Court determined it appropriate to do so. It might be sensible to give the CAT power to transfer

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[2] President's statement, CAT Annual Review 2007/2008

cases to the High Court so that it has some flexibility if it concludes that any particular case is far more about non-competition than competition issues and that it would be better for the case to be dealt with by the High Court in the usual way.

**3 Should the CAT be allowed to grant injunctions?**

3.1 The object of many stand alone actions based upon competition law is securing a change in behaviour and in this happening as soon as possible – whether in order to achieve continuation of supply, competitive pricing or to gain access to a market.

3.2 We therefore agree that the CAT ought to be empowered to order the same range of remedies as the High Court if it is to be given a stand alone jurisdiction.

3.3 We note that an additional consequence of making the CAT a Superior Court of Record would be that the CAT would be able to punish instances of contempt of court. We think that this would be an ancillary benefit and a useful threat in underpinning certain orders of the CAT – such as confidentiality rings etc.

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

4.1 The combination of the costs and time involved in pursuing litigation can be off-putting to some potential claimants and so a fast track system may encourage claims to be brought. However, the fast track procedure does not appear to be targeted at increasing the number of claims brought overall but in lowering the bar that must be met by applicants in order to secure injunctive relief.

4.2 The consultation paper suggests that the fast track would primarily focus on providing fast access to injunctive relief in order to alleviate the immediate pressure on the SME caused by anti-competitive conduct. It is already possible to obtain injunctive relief in respect of anti-competitive behaviour from the High Court – where necessary on an interim basis and on very short notice (literally at any time of the day or night). It is therefore unclear why a fast track process is required in addition to the power to grant injunctive relief. Although described as a "fast-track" proposal, it seems that the Government's real focus is on removal of safeguards (such as undertakings in damages) that have been deemed essential to balancing the interests of the party claiming injunctive relief and those of the party against whom that relief is granted in the High Court.

4.3 In our view, any rebalancing of the basis upon which injunctive relief is granted might only be justified by a corresponding reassessment of the burden upon an applicant – for example, one might be required to show more than an arguable case that an infringement exists or agree to a very short period in which the injunctive relief would apply before any waiver of the cross-undertaking in damages might be considered. It may be that this is the intention underlying elements of the design outlined in the consultation paper (formal application determined by the CAT chairman, non-refundable deposit etc), however, it is far from clear how those elements might be implemented so as to ensure that the fast track process is able to weed out abusive applications and/or to avoid unfair prejudice occurring to defendants.

4.4 We note that the fast-track proposal has been inspired by the model used by the Patents County Court. However, that mechanism appears to have been focussed on disputes between entities of similar size/power – rather than disputes between SMEs and (allegedly) dominant entities (as is likely to be the case in the competition context). The complexity of the issues and the nature of the claims in competition law mean that it is unlikely that such claims will, for the most part, be suitable for fast track determination.

4.5 We suggest that, rather than adopting an approach modelled on that implemented by the Patents County Court, any streamlined approach adopted by the CAT be modelled on methods of case allocation and the fast-track procedure as developed by the High Court. This may also enable transfer of cases between the CAT and the High Court (and vice versa) to be managed with greater ease. The CAT might publish guidance as to how it would approach such cases whilst retaining the flexibility to apply the approach best-suited to the case at hand.

4.6 As a final note, if a fast track model were implemented, we do not think that it would be appropriate to limit that route to SMEs. Not only might this lead to unnecessary litigation as to whether an entity is entitled to use the route but it might arbitrarily prevent use of the procedure for claims that would have been entirely suitable for resolution using it. We suggest that a number of considerations be identified as relevant to allocation and that these might include: respective size of the parties, complexity and value of the case.

4.7 The consultation paper notes that another option for SMEs would be for an appropriate authority (whether the CAT, the OFT or the CPBS) to write to a potential infringer at the request of an SME warning that there is a reasonable case against the potential infringer. In our view it would not be appropriate for any of these entities to take such a course for the reasons set out in the consultation paper. We assume that this suggestion has been triggered as a result of those cases where entities have sought to interest the OFT in their claims but the OFT has determined that pursuing the case does not warrant allocation of resources – leaving the complainant either to litigate the claim privately or continue to bear the alleged anti-competitive conduct. In our view, the OFT should not issue any letter to the alleged infringer in such a case for the reasons set out in the consultation paper and because failure to investigate further in the face of such conclusion might well lead to *Cityhook* type challenges against the OFT; i.e. if the OFT were to simultaneously say that there is a reasonable case against the infringer but that it will not take the case further itself may result in challenges to the rationality of its decision not to proceed. In any case, even if such a scheme were implemented and it was accepted as appropriate that letters might be sent without the relevant authority initiating further investigation, the letters might well lose their power to deter if it were clear that they were unlikely to be followed by further action from the regulatory authority.

4.8 We do, however, consider that the OFT should be encouraged to take a view on whether it is minded to investigate claims further (or, if investigating, whether it is likely to act) and communicate this to the complainant at the earliest appropriate stage so as not to extinguish the possibility of the complainant securing injunctive relief from the courts in circumstances where the OFT does not propose to investigate further or take any action. The lesson learned from *AAH Pharmaceuticals Ltd & Ors v Pfizer Ltd & Anor* [2007] EWHC 565 (in which the High Court concluded that applicants for an interim injunction against an allegedly anti-competitive distribution agreement had unduly delayed in seeking an injunction by first pursuing a complaint with the OFT) is that those looking for immediate assistance must pick a course and

cannot afford to delay whilst the OFT considers its interest in a complaint if immediate relief is considered necessary.

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

5.1 As noted above, if waiver or limitation of cross-undertakings in damages were to be permitted, it would be important that this were only granted by the CAT in view of all of the circumstances (including the *prima facie* merits of the underlying claim).

5.2 Further, given that this type of claim tends to be complex and involve large-scale disclosure exercises, it may simply be unrealistic to expect that claims for final injunctions might be resolved within six months or at a particular level of costs. Many cases brought (or defended) will raise a range of factual, legal and/or economic issues and, establishing liability (or even establishing a good arguable case as to liability) can be a difficult exercise for claimants. If the parties' respective positions and the evidence are to be dealt with justly, claims will inevitably require time and considerable resources in order to analyse the full evidential picture properly. Any guidance on allocation ought to recognise and address these issues in identifying the type of case that simply will not be appropriate for fast track determination.

5.3 As to cost-capping, if the CAT is to be given the power to impose a cap in individual cases, we suggest that the decision to do so should not be taken at the very outset of proceedings but only once the CAT has seen the Defendant's response to the claim, whether that be by way of a full defence or (say) a strike-out application. As the proposal currently stands, there is a strong risk that the CAT would be deciding on the question of cost-capping without having proper sight of the *prima facie* merits of the claim – a key part of the assessment. A compromise position might be to provide for costs protection up until the point at which the CAT decides the cost-capping issue; i.e. there could be a rule that no costs are recoverable from the claimant unless and until the claimant has decided to continue with the claim after the CAT has reached a decision on cost-capping (which it is proposed would occur at a first case management conference ordinarily after service of the claim and defence).

5.4 In terms of the level at which costs should be capped, we consider that the suggested maximum of £25,000 is far too low for just about any competition case. The maximum should be set at a much higher level, but the CAT should be left to issue guidance as to the factors it will take into account, including the claimant's ability to pay, when assessing the level of a cap in any given case. As discussed in response to Question 4, we would propose having guidance on the approach that the CAT might take – this could include case studies indicating the likely cap in a number of different situations.

5.5 We see no basis to cap damages recoverable by reference to the procedure adopted to manage the case (and consider that this might deter some from electing to use this route). Limiting damages will not necessarily reduce the amount of legal costs involved in trying the dispute or minimise the risk of vexatious claims being brought (remembering that the objective of many claims is to secure a change in behaviour as well as damages).

5.6 It would in our view be preferable to give the CAT the power simply to order that there be a split trial; this would be desirable from the perspective of efficiency and the economical

conduct of proceedings, without unfairly prejudicing SMEs who have suffered considerable financial loss.

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

6.1 As noted above, time and costs of litigation are key factors likely to deter SMEs from pursuing competition law claims. In our view, these concerns are heightened in respect of competition litigation as compared to commercial litigation in view of the uncertainties attaching to key elements in the conduct of such litigation.

6.2 For example, until addressed by the *National Grid* and *Cooper Tire* cases, it was unclear at what stage claims relying on regulatory decisions subject to appeal might be stayed pending determination of those appeals and whether disclosure would be ordered prior to any stay being imposed. Further, there have been few judgments addressing the approach to quantification of damages (including whether the passing-on defence will be recognised) and, to date, there have only been two final awards of damages (one, *Crehan*, being overturned on appeal and the other, against Cardiff City Transport Services Limited, having only been handed down by the CAT on 5 July 2012). In our view, clarity on these key issues, as contemplated by questions 7 – 8 of the consultation paper and also promised by the European Commission, will be important factors in giving SMEs the confidence to bring claims in this area in future.

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

7.1 We do not consider that it would be helpful to introduce a rebuttable presumption of either loss or overcharge in competition infringement cases.

7.2 Broadly, when dealing with a cartel, one might assume that an unlawful overcharge was agreed between the cartelists and implemented during the cartel period – hence the damage suffered by the claimant can be calculated by multiplying the volume of goods purchased by the claimant during the cartel period by that overcharge. However, this analysis is simplistic and does not account for a number of considerations relevant to determination of actual loss suffered. We therefore do not think that loss should be equated with overcharge but instead, even presuming the cartel was efficient and that a certain level of overcharge was imposed during the cartel period, the claimant should nonetheless be obliged to demonstrate the loss that it in fact suffered as a result of the infringement.

7.3 So, in the case of a direct purchaser, the claimant may be entitled to rely on the presumed overcharge but will nonetheless be obliged to demonstrate that it suffered loss and did not pass on the overcharge by way of higher prices to its own customers. Further, in the case of indirect purchasers, claimants may rely on the presumed overcharge but must show that it was passed on to them by the direct purchaser. The evidence as to pass on in both cases is most likely in the hands of the claimant rather than the defendant (and so it will be up to that claimant to decide whether he wishes to disclose his own internal pricing or purchasing habits in order to pursue the claim). There is also a risk, if loss is presumed and the defendant must rebut that presumption, that the defendant may end up paying out twice to direct and indirect purchasers if the courts find that there is insufficient evidence to rebut the presumption in each case.

7.4 We also question whether a presumption of the amount of the *overcharge* rather than *loss* would necessarily make claims any easier to succeed on. In our experience, the other elements relevant to determination of loss (such as the amount of loss passed-through) are at least as contentious as the level of overcharge and there would therefore be little saving in time or effort by having a presumption as to one element.

7.5 Claimants and defendants will inevitably argue for higher and lower overcharges respectively. A professional judge is unlikely to give much weight to a presumption in the face of highly detailed and case-specific expert evidence. The presumption will therefore be superseded in every case and there will be no saving of time or effort.

7.6 Further, a presumption may well make it harder to settle cases. Claimants and their advisers will inevitably fix on the figure of 20% as the (minimum) overcharge they will expect. Defendants, by contrast, are unlikely to be willing to offer anything like 20% as they will see that as the worst case scenario.

7.7 Finally, in our view the proposed figure of 20% is far too high. The research upon which it is based is of highly questionable provenance that, for example, calculated the average in part from sources such as claimants' statements of case rather than the amounts ultimately awarded to the claimants or paid in settlement. It probably also under-stated the incidence of low overcharge cartels because such cartels are less likely to have given rise to legal action. Use of a relatively high figure for any presumption risks transforming the system of private actions into one which aims to punish the defendant rather than just compensate the victim; as mentioned at A.6 of the Consultation, this latter aim of punishment is more routinely and appropriately pursued by the public competition authorities rather than by private interests.

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

8.1 We see no need to recognise the passing-on defence by way of new legislation. Case law to date indicates that English courts are likely to recognise the extent of any passing on of an overcharge in assessing quantum. For example, in *Devenish Nutrition v Sanofi-Aventis* [2008] EWCA Civ 1086 Tuckey LJ said at para 151 (admittedly *obiter*):

> "...Devenish is claiming the overcharge as if it were the defendants' net profit so as to avoid having to take into account the fact (if true) that it passed on the whole of the overcharge to its customers. I can see no way in which it could avoid taking this "pass on" into account in any compensatory claim for damages"

8.2 Likewise, in *Emerald Supplies v British Airways* [2010] EWCA Civ 1284, which concerned the question whether an action could be brought under CPR 19.6 by a "representative" of both direct and indirect purchasers, Mummery LJ said:

> "After all the applications, arguments, authorities, amendments and adjournments, it is a straightforward Bear Garden kind of case that falls outside the rule on representative actions. Emerald and those they purport to represent do not all have "the same interest" required by the rule. The persons represented are not defined in the pleadings, either initially or in the proposed amendments, with a sufficient degree of certainty to constitute a class of persons with "the same interest" capable of being

represented by Emerald. The potential conflicts arising from the defences that could be raised by BA to different claimants, such as direct purchasers who have "passed on" the inflated price and would not want BA to run that passing on defence to their claims and those indirect purchasers to whom the inflated price has been passed on and who would want BA to raise the pass on defence to claims by direct purchasers, reinforce the fact that they do not have the same interest and that the proceedings are not equally beneficial to all those to be represented."[3]

8.3 In our view, the approach of the Courts is the correct one. The passing on 'defence' is not a defence properly so-called: it is simply a reflection of the principle that a claimant must prove that he has suffered loss as a result of a tort. If, say, a direct purchaser has passed on the overcharge to his purchasers without any loss in sales which would otherwise have been made, then he has suffered no loss at all.

8.4 The Consultation correctly notes that any legislation prohibiting reliance by a defendant on passing on would have to be accompanied by a removal of standing for indirect purchasers so as to avoid the risk of double recovery by both direct and indirect purchasers. It may be helpful to note that in the US, despite a federal prohibition on indirect purchaser claims, there are over twenty states that have enacted laws enabling indirect claims to be brought and, although some allow private entities to bring such claims regardless of the double recovery risk, others permit only the state attorney general to bring such claims (allowing an assessment of consumer interest and of the risk of double recovery to occur prior to any claim being initiated).

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

9.1 The process provided in Section 47A of the Competition Act 1998 (claims brought on behalf of consumers by a consumer body, Which?) plainly has not had much impact on the compensation flowing to consumers for violations of competition law affecting them. Apart from anything else, there has been only a single claim in the ten years that the provision has been around.

9.2 It does not necessarily follow, though, that there is a need for extension of the collective actions regime.

9.3 Our view is that the replica kit case provides a good illustration of why it would not be desirable to employ opt-out collective actions as a measure to increase compensation to victims. Which?'s decision to settle the replica kit case was undoubtedly influenced by the low numbers of consumers opting-in and the proportionately high costs that would have been involved in progressing the claims in those circumstances. Bearing in mind the extent of the advertising done by Which? to seek claimants, and the relatively low barriers to opting in, there is no particular reason to think that the numbers claiming compensation would have been higher had an opt-out action been used in that case. What you would have had, though, is much higher costs incurred. You would also have had a large pot of unclaimed damages that no doubt Which? would have been keen to see allocated to it on a *cy pres* basis.

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[3] See also the Chancellor's judgment at first instance [2009] EWHC 741 (Ch) at para 37.

9.4 The suggestion that an opt-out mechanism is the only way to overcome disincentives to instigate claims overlooks the relevance of cost and proportionality in determining whether it is appropriate to bring claims in the first place. We question the efficiency of pursuing individual compensation even if claims are too small for claimants to be bothered to bring them or if the costs of compensating individuals are disproportionate to the compensation to be provided.

9.5 As shown by the replica kit discussion above, opt-out collective actions may increase the costs to businesses that have infringed competition law if unclaimed damages are not returned to them but introducing opt-out collective actions for that reason would be to change the objective of private actions from compensation to additional punishment and deterrence. Such an approach would represent a fundamental departure from English law principles and would also necessitate a debate about the optimal levels for sanctions. It needs to be borne in mind, in this context, that EU antitrust fines are typically higher than US antitrust fines. To combine EU fines with US-style damages would arguably result in greater punishment than ever before. Some may think that desirable but there are social and economic costs to increased deterrence; over-deterrence can result in prudent companies not engaging in welfare-enhancing behaviour.

9.6 In our view, the primary objective in facilitating private claims ought to be the compensation of victims and the Government should be wary of reforms that penalise businesses to a significantly greater extent than the increase in compensation provided. The Government needs to ensure that the beneficiaries of reforms are really the victims and not just the claimant lawyers, funders and designated bodies.

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

10.1 It is important to note that the majority of collective claims are likely to "follow on" from a decision from a regulatory authority that a competition infringement has occurred. In such cases the infringing party will already have been penalised by being ordered to pay a fine - so creating a deterrent effect. We agree that an ancillary effect of promoting civil damages claims will be that this amplifies the deterrent effect for infringers - both by enabling private individuals to bring stand alone actions where a regulatory authority does not consider it cost efficient or necessary to investigate a matter and by creating the financial downside of civil damages pay-outs in addition to payment of criminal fines. However, if consumers are not motivated to rely on the finding of infringement and act so as to seek compensation or to collect their share of any damages obtained, we do not think that a collective claim ought to brought on the justification of deterrence alone. It is therefore important that consumer interest in claims is tested prior to claims being brought or at least at an early stage in such litigation. The opt-in model has significant advantages over the opt-out model in this context.

10.2 We also consider that it is important to remember that there ought to be a balance of interests involved in considering how best to facilitate claims. As matters stand currently in the U.K., claimants are able to initiate follow-on actions prior to appeals of the underlying decision being resolved (without permission in the High Court and with permission in the CAT). Although it is now clear that such claims will be stayed before the final hearing pending determination of any appeal, our experience is that the courts will be prepared to order disclosure before imposing such a stay with a view to allowing claimants to prepare their case and, perhaps, allow the parties to better determine settlement parameters. The claimant lawyer business

model of relying on regulatory decisions and piling on litigation pressure so as to secure early settlement does not factor in delay for resolution of appeals. This means that defendants may be obliged to incur substantial costs in defending a case in which the underlying facts might change significantly or in which the underlying finding of infringement might fall away completely. This was precisely the experience of a client that we defended recently; a small Polish entity of limited resources that was able to secure an annulment of the European Commission's decision that it had been involved in the Butadienne Rubber cartel and only then able, after more than 3 years of litigation and incurring significant irrecoverable losses, to force withdrawal of damage claims brought against it in England.

10.3 The relative ease of securing jurisdiction in England, coupled with high litigation costs that can be a significant motivator for defendants to settle, already attracts claimant firms to "forum shop" for the U.K. as a jurisdiction in which to bring actions. An overly broad collective action model will only add to the U.K.'s attractions for claimant firms and, without appropriate safeguards, might lead the U.K. to develop a litigation culture rather than securing the objective of compensating those harmed materially by competition law claims.

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

11.1 We see no reason to limit the right of claim (or to restrict the type of business that might properly bring a claim). We agree with the Government's view that businesses who have suffered loss due to infringements of competition law should not be denied the right to bring a collective action to recover their loss, provided that a collective action is the most appropriate means of bringing the case (appropriateness to be assessed at certification stage).

11.2 We consider that businesses or categories of business need not be ruled out from participation as a matter of principle - especially as businesses might prove a valuable source of funding and strategic input in those cases where their interests are aligned with those of the class as a whole. Any filtering of participants should be a fact based exercise so that the appropriateness or otherwise of business participation is addressed on a case by case basis at the certification stage.

11.3 It may well be that in some cases it is not appropriate for SMEs or larger businesses to participate in a particular class as their interests may not be the same as those of the majority of the class and may even conflict with other members of the class. However, this issue can be addressed adequately at the certification stage (as it is in the U.S.), and regardless of whether the model is opt in or out, so that entities whose interests are not homogenous are identified and ruled out of the class (either to bring non-class claims or to form separate classes). For example, in the U.S. case of Valley Drug Company v Geneva Pharmaceuticals Inc 350 F.3d 1181 (11th Cir. 2003) certification of a class involving wholesalers and consumers was reversed as the defendants argued successfully that three national wholesalers (who together represented over 50% of claims in the class) might have benefited from the absence of competition in the market from generic pharmaceuticals and this benefit might equal or outweigh any injury suffered as a result of generic pharmaceutical products being withheld from the market. As such the national wholesalers' interests were not necessarily aligned with the rest of the class, who had suffered from higher prices as a result of generic pharmaceutical products not entering the market, and so the national wholesalers were not permitted to participate in the class claim.

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

12.1 We believe that this risk can easily be overstated. In follow on actions, the majority of information disclosed is old and no longer competitively sensitive. Where information does remain competitively sensitive, it is typically confined to confidentiality rings of external advisors. This approach has worked reasonably well in the CAT and is increasingly being adopted in the High Court as well. If any reform would be desirable then it may be to put confidentiality rings on a solid statutory footing in the High Court as well as the CAT.

12.2 The text of Question 12 also seems to envisage the possibility that sham claims might be brought by competitors with the objective of using disclosure to secure confidentially sensitive information. We have seen nothing to suggest that this is occurring in practice and anticipate that an exchange of competitively sensitive information between clients in these circumstances would still be considered to give rise to a competition infringement even if carried out pursuant to disclosure rules (given the scope for advisers to put in place confidentiality rings and/or seek guidance from the Court).

12.3 In short, we see no need for any further restrictions to be introduced.

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

13.1 We think it is likely that the majority of claims will "follow on" from regulatory decisions as being able to rely upon the findings made of infringement eases the evidential burden upon claimants. However, we see no reason to preclude claimants from bringing stand alone actions and, indeed, consider that this may be where real value is added in terms of deterrence by enabling private parties to act in respect of infringing activity even where a regulatory authority is not minded to do so.

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

14.1 The advantage of an opt-in model (whether pure or pre-damages) in this context is - as discussed in response to Question 9 above - that it allows consumer interest to be demonstrated at the outset of proceedings, whereas an opt out model does not.

14.2 The consultation paper notes the risk that an opt-out system may result in a greater number of unmeritorious or vexatious claims being brought and states that "the Government does not wish to bring about a regime in which the correct move for a defendant with a strong and winnable case is nevertheless to settle to avoid the risk of damages or legal costs". If this is to be avoided, there would need to be stringent certification criteria.

14.3 We also query the adoption of a model inconsistent with the approach likely to be taken at EU level. As matters currently stand, few EU jurisdictions have adopted any law on class actions (and those that have, such as Italy, have elected to use an opt-in mechanism). The European Commission is currently considering reform in the area of collective consumer redress and its general proposals are to be followed by specific suggestions as to their application in respect of competition law claims. Further, the European Parliament adopted a resolution on 2 February

2012 in respect of the Annual Report on EU Competition Policy "in order to prevent the development of a class action system involving frivolous claims and excessive litigation". The European Parliament stated that any reform should include a number of safeguards including:[4]

a the group of claimants must be clearly identified before the claim is brought (opt-in procedure);

b a class-action system must be rejected on the grounds that it would promote excessive litigation, may be contrary to some Member States' constitutions and may affect the rights of any victim who might participate in the procedure unknowingly whilst being bound by the court's decision.

14.4 Given the perspective of the EU and other Member States, we are concerned as to the potential enforceability of English class action judgments *per se* but particularly as to the consequences if some of the more controversial elements of the design proposed (e.g. payment of the unclaimed residue of damages to a designated body) are adopted. Should foreign courts not be prepared to recognise such judgments as binding on potential claimants who did not actively participate in the claim (but did not formally opt-out), defendants risk being forced to engaged in litigation twice and, if unclaimed damages have not reverted to the defendant, being forced to pay for the same damage twice.

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

15.1 We agree that thorough certification can address potential concerns as to the scope of the class and in testing the motivation of representative claimants and their counsel. We also agree that the criteria highlighted by the consultation paper identify the issues that ought to be addressed no later than the certification stage.

15.2 However, whilst it is possible to resolve key questions such as whether the claim is appropriate for collective action and adequacy of representative claimants at the certification stage, the consultation paper does not make clear what approach the Government proposes to take on these issues. By comparison, the U.S. Federal Rules of Civil Procedure specifies the circumstances in which representative litigation is appropriate and so articulates the policy

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[4] The other safeguards specified by the European Parliament included:

1. public authorities, such as ombudsmen or prosecutors, as well as representative bodies, may bring an action on behalf of a clearly identified group of claimants;
2. the criteria used to define the representative bodies qualified to bring representative actions needs to be established at EU level
3. collective claimants must not be in a better position than individual claimants;
4. claimants seeking minor and diffuse damages should have appropriate means of access to justice through collective redress and should secure fair compensation;
5. compensation may be awarded only for the actual damage sustained; punitive damages and unfair enrichment must be prohibited;
6. each claimant must provide evidence for his or her claim;
7. the damages awarded must be distributed to individual claimants in proportion to the harm they sustained individually;
8. by and large, contingency fees are unknown in Europe and must be rejected.

basis for such actions:[5] In addition to identifying pre-requisites for collective action such as merits, numerosity and commonality, it is important that the Government makes clear when in fact such actions will be considered the most suitable means of resolving common issues. On our analysis, this would be when sufficient consumer interest in recovery can be established, however, it would be helpful for the Government to clarify its view on this issue. It is also important that the factors relevant to identifying an adequate representative are made clear and that the powers (and constraints) attaching to any appointed or de facto class counsel are both specified and subject to judicial scrutiny on exercise.

15.3 We note that the U.S. Federal Rules of Civil Procedure clarifies that there are two elements to assessing adequacy of representatives – assessing both representative class members and class counsel (i.e. counsel acting for one or more members of the class nominated to lead the action)[6] It would be helpful to understand if the Government considers that a similar approach would be required in the U.K at the certification stage.

15.4 The commentary to the U.S. Federal Rules of Civil Procedure explains that the assessment of class counsel "responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action… experience has recognized the importance of judicial evaluation of the proposed lawyer for the class" The court is able to appoint an applicant for class counsel only if that person is deemed "adequate" taking into account the following considerations:

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[5] ) Rule 23 http://www.law.cornell.edu/rules/frcp/rule_23

A PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

B TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:
(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

[6] Rule 23(G).

a the work counsel has done in identifying or investigating potential claims in the action;

b counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

c counsel's knowledge of the applicable law; and

d the resources that counsel will commit to representing the class;\

15.5 The court may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class and may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees.

15.6 If there is more than one applicant for class counsel, the court may go beyond scrutinising the adequacy of counsel and may compare the strengths of each of the applicants If none are satisfactory, the court may deny class certification, recommend that an application be modified, or invite new applications. Further, if appointed, class counsel must fairly and adequately represent the interests of the class (i.e. not only his clients)..This also means that no individual members of the class can command class counsel to take a particular action (including accepting or rejecting a settlement proposal); class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole. This underlines the importance of judicial scrutiny in the selection and appointment of that counsel.

15.7 Another suitable alternative approach may be for the CAT, in certifying a claim, to look for there to be formal structures for keeping victims informed and for empowering them to take decisions - something like a creditors' committee or the sort of foundation arrangement that is employed in many Dutch collective actions.

15.8 As a final comment, it is important to note that a degree of disclosure may be required from the representative claimant or claimants in order to certify the scope of any opt-out class and so as to verify that the representative claimant is truly representative of the class as a whole. It is important to note that the court must be satisfied not only that the class is appropriate but also that it has jurisdiction to hear the claim. Given the potential importance of claimant/ defendant relationships in establishing jurisdiction to bring a claim in England and Wales (i.e. at least one identified claimant ought to have purchased a cartelised good from an infringing party), the scope of the class claimed may have a bearing on jurisdiction. It is therefore important that information relevant to jurisdiction and certification is particularised on filing the claim and that the documents the claimants are prepared to produce voluntarily in support of the claim to jurisdiction and certification are also identified in the claim form or particulars of claim (where the particulars of claim need not be filed until intent to defend has been confirmed, then the information regarding jurisdiction and certification should be included in the claim form). This approach will allow the defendant to take an informed view on whether it is appropriate to submit to jurisdiction and in raising any objections to certification.

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

16.1 Yes – as a matter of public policy exemplary or punitive damages are not recognised in the majority of EU jurisdictions and creating such an entitlement in the U.K. might well render any

such awards unenforceable in those jurisdictions. This could be particularly problematic given that this type of claim tends to involve defendants from a number of jurisdictions. Further, the promise of damages beyond a compensatory level would not only be inconsistent with the principles underpinning this type of claim but also likely another factor galvanising unmeritorious and vexatious claims.

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

17.1 Some might argue that the loser pays principle should not apply in consumer cases as individuals may not have the resources to countenance the risk of paying litigation costs incurred by the defence. However, in our view the loser pays principle will be an important safeguard in this type of case so as to disincentivise vexatious or unmeritorious claims. The risk for consumers can be readily mitigated through after-the-event insurance.

17.2 We note that the Jackson proposals on cost reform include the suggestion that CFA success fees and after-the-event insurance premiums agreed under conditional fee agreements no longer be recoverable from the defendant and think that it is important no exception from this be made in the case of competition claims. We also think that it would be helpful if some guidance were given on the range of success fees appropriate to these cases in view of the (very limited) risk attached (particularly in the follow-on context) so that claimants get a fair deal. Our experience to date is that claimant lawyers inevitably set success fees at the maximum 100% allowed even where there is effectively no risk of failure. We would hope that victims may force claimant lawyers to be more reasonable when the success fee is to be deducted from their own damages but we note that they may not necessarily have much bargaining power. They also may not care very much if - in an opt-out scenario - the fees are to be deducted from the pot of damages recovered for all potential claimants.

17.3 Whilst, as we discuss in response to Question 19, we consider that contingency fees are not desirable in this context, we do think that CFA success fees and insurance premiums should be limited to a maximum percentage of damages actually claimed by victims in order to avoid a situation where lawyers, funders and insurers benefit more than victims and where this results in a claims industry evolving that is largely unrelated to the demands of victims.

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

18.1 We do not consider that there are circumstances in which the loser pays principle should be departed from.

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

19.1 We think that contingency fees should be prohibited in collective action cases. Creating such a direct interest for lawyers in the outcome of the claim risks impacting adversely upon the approach of the legal team involved to the strategy for litigation and settlement of the claim. To some extent, this risk applies in any use of contingency fees and is an important reason why they were historically not permitted in England. The risk, though, is greater in collective actions than in other types of action (and more in opt-out than opt-in collective actions) because the claimants will tend to be less motivated and empowered to set strategy themselves.

19.2 The perverse effects of connecting lawyer incentives to the outcome of class action litigation are illustrated by the target of one of the reforms made to the US system by the U.S. Class Action Fairness Act of 2005, which was introduced so as to prevent class-action lawsuit abuse. The Act required courts approving settlements to scrutinise the terms agreed more closely – and particularly those where claimants were given a coupon to exchange for a particular good or item sold by the defendant. "Coupon settlements" arguably cost less for defendants than being obliged to pay out large sums in cash and so are easier for them to agree. Equally, though, they are arguably less attractive to victims because they typically give no benefit without further purchase. Redemption rates tend to be low. In a market where victims' interests are at the heart of the negotiation, one would expect there to be few "coupon settlements". However, the perception was that claimant lawyers were favouring "coupon settlements" because of the effect on their own remuneration. Claimant lawyers negotiated payment in cash by reference to the face value of coupons available to the whole class regardless of whether redeemed. It was therefore in their interests to opt for "coupon settlements" even if it ultimately meant that less compensation would be paid to victims. The Act aimed to tackle the potential for abuse that this created by allowing courts to reduce legal fees that appear to be excessive as compared to the benefits secured for claimant class members.

19.3 The commentary to the U.S. Federal Rules of Civil Procedure that implements these changes[7] explains:

> "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw

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[7] ) Rule 23 http://www.law.cornell.edu/rules/frcp/rule_23

A PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

B TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:
  (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
  (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
  (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
  (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
  (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
  (D) the likely difficulties in managing a class action.

development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections [from class members], the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members….

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving non-monetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief")."

19.4 In our view, judicial scrutiny of the type described by the commentary to the U.S. Federal Rules of Civil Procedure would be required from the courts should contingency fees be permitted (and should also be applied to the percentage uplift applied in conditional fee arrangements). This would ensure that legal fees are not excessive and that any contingency properly reflects the risk of the action being unsuccessful. The burden of such scrutiny might be limited if contingency fees continue to be prohibited in collective action cases. However, should contingency fees be permitted, we consider that the approach recommended by Jackson in respect of conditional fees should also be taken here so that any contingency fee is recoverable from the claimants only (i.e. not recoverable from the defendants in addition to the damages payable).

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

20.1 In our view, if the Government proceeds with an opt-out collective action regime, unclaimed sums must revert to the defendant payor rather than to a single specified body (or anyone else).

20.2 As stated at the outset of this response, we consider that the principal policy objective of facilitating claims ought to be the compensation of consumers with the risk of private actions as a deterrent to infringers being merely an ancillary effect. Coupling the creation of an opt-out

class action with reversion of unclaimed damages to entities other than the defendant increases the likelihood that claims will be brought by representative bodies without proper evaluation of the consumer interest in doing so. It will also increase the cost to businesses without actually increasing compensation to victims.

20.3 There could also be a serious risk of defendants paying twice if unclaimed damages do not revert to the defendants. This is so because there must be serious doubts about whether any judgment or settlement of the opt-out proceedings would be binding on victims who have neither participated nor opted-out and who may not even have been aware of the proceedings. English law could make the judgment binding so as to prevent other claims in England but could not itself make the judgment or settlement binding anywhere overseas. Whilst we are not aware of any cases yet considering the enforceability of antitrust opt-out judgments or settlements in Europe, we are aware of concerns that opt-out judgments and settlement more broadly may not be enforced under the Brussels Regulation[8]. We note that this would be an issue even if the opt-out class only included UK-domiciled victims because UK-domiciled victims could still bring claims in other jurisdictions. In any event, though, it must be questionable whether European law would allow a class to be restricted to UK-domiciled victims.

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

21.1 If, contrary to our views expressed in relation to Question 20, it were determined that unclaimed sums should revert to a specified body, we agree that the Access to Justice Foundation would be an appropriate recipient. We do not consider that such sums should be directed to the identified claimants (or any body designated to bring representative claims) as this would create a windfall for those entities inconsistent with the compensation principle underpinning this type of claim.

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

22.1 Yes – there will be cases where competition authorities do not consider it a regulatory priority (whether as a matter of resourcing or otherwise) to act and private bodies should not be hampered from instigating claims in those cases. As noted above, we consider that this may be where real value is added in terms of deterrence.

22.2 Consideration would need to be given to the circumstances in which specific bodies might be afforded standing to act on behalf of individuals (and whether this would be a matter of their members affording them authority to do so or an additional issue to be addressed on

[8] See, for example, S. Bariatti, *Recognition and Enforcement in the EU of Judicial Decisions Rendered upon Class Actions: The Case of US and Dutch Judgments and Settlements* due for publication shortly in *Recasting Brussels I* edited by Fausto Pocar, Ilaria Viarengo and Francesca C. Villata (CEDAM, 2012).

certification). However, we see no reason in principle why private bodies should not be afforded standing to bring collective claims in appropriate circumstances.

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

23.1 In our view, the ability to bring collective actions ought to be restricted to genuinely representative bodies (such as trade associations) who are acting so as to recover compensation for their members. Such bodies are able to demonstrate a connection to those that they represent and so are better placed than other private entities (whether law firms or third party funders) to bring a claim without the interests of the body conflicting with the interests of the individual claimants.

23.2 It is possible that other private bodies could act as a representative and prosecute such claims without conflict. However, a high level of scrutiny at the certification stage and throughout would be required from the Court in order to monitor appropriate behaviour and, even then, the risk of conflict would remain. We therefore consider it better to restrict those bodies granted standing to bring collective claims so as to minimise the risk that the motivations for pursuing such claims will be subverted.

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

24.1 We agree that ADR should be encouraged but do not consider that it should be made mandatory.

24.2 Many private competition claims are currently resolved by way of negotiated settlement. However, it is important to note that claimants now often choose to issue their claim in their jurisdiction of choice before opening up discussion with defendants so as to minimise the risk of "torpedo" litigation being employed by potential defendants as a strategy to avoid suit in jurisdictions that they consider unfavourable. This was the approach taken by ENI in response to pre-action correspondence received in respect of the Butadienne Rubber litigation. The Government may wish to consider claimant concerns around securing jurisdiction and so encourage ADR not only pre-action but also immediately following issue so as to reinforce for claimants that they might seek to resolve their claims prior to serving and initiating the procedural timetable for litigation.

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

25.1 We agree that the issue of guidance as to steps that might be taken pre-action would be helpful to parties. This could be incorporated into the existing CAT Guide to proceedings. As noted above, we do not consider that any guidance should be too prescriptive or mandate particular actions.

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

26.1 We agree that it would be helpful to amend CAT Rule 43 so as to reflect any relevant developments in legal proceedings and so as to encourage the use of formal settlement offers.

26.2 However, we note that Civil Procedure Rule 36 as applied by the High Court raises its own challenges in respect of multi-party litigation and, given competition claims characteristically involve both multiple claimants and defendants, the Government might take this into account when formulating any amendments to the CAT rules.

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

27.1 No. As a law firm that has long espoused the virtues of ADR, we would expect to recommend involvement in such initiatives to our clients but it is unlikely to be appropriate for us to establish the initiatives ourselves.

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

28.1 We do not agree provisions on collective settlement would be rendered unnecessary by the introduction of an opt-out collective action mechanism.

28.2 It is unclear why the risk of potential claimants being unaware of an opt-out settlement offer should weigh so heavily against the introduction of a potentially useful settlement mechanism when it does not appear, from the Government's perspective, to weigh against the introduction of opt out collective actions. In our view, this concern can be addressed by stipulating publication and notification requirements and by providing for court approval of any settlement so as to ensure that its terms are fair.

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

29.1 We consider that competition authorities might encourage infringers to establish a settlement fund or commit to model redress procedures (along the lines previously suggested by the CBI and others) and take this into account as a mitigating factor in setting any fine. However, we do not consider that it would be appropriate for an authority to be able to mandate such action or to penalise companies that prefer to deal with claims as they arise individually.

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

30.1 We agree with the consultation paper that payment of compensation or commitment to an alternative redress scheme could be viewed as a mitigating factor in certain circumstances.

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

31.1 As noted in response to question 10, we agree that an ancillary effect of promoting civil damages claims will be to amplify the deterrent effect for infringers - both by enabling private individuals to bring stand alone actions where a regulatory authority does not consider it cost efficient or necessary to investigate a matter and by creating the financial downside of civil damages pay-outs in addition to payment of criminal fines.

31.2 However, in our view the primary policy objective in facilitating private actions properly should be in broadening consumer access to compensation – not in adding to the existing deterrent effect established by the statutory enforcement regime. The Government should be careful to take this into account when making changes to the framework in which private actions may be brought.

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

32.1 We agree with the resolution issued by the Heads of the European Competition Authorities on 23 May 2012 that, "as far as possible under the applicable laws in their respective jurisdictions and without unduly restricting the right to civil damages,… leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes."[9]

32.2 In our view, companies will often continue to take advantage of leniency programmes regardless of the risk of subsequent civil actions in view of the potential benefits that leniency can offer. However, if there is a possibility that documents created with a view to applying for leniency or submitted as part of the leniency application might be disclosed, there may well be a chilling effect on certain applications[10] as well as on the scope of admissions and disclosure made. We therefore agree that documents directly involved in the leniency application and which would not have been created if the company had not been seeking leniency ought to be protected from disclosure so as to ensure the ongoing effectiveness of leniency programmes.

32.3 We do not consider that this approach will unduly disadvantage claimants, who will still be able to apply for access to other materials on the investigation file and to seek disclosure from the parties to any claim issued. We note that in *National Grid*, the only English case to date that has applied *Pfleiderer*, the High Court found little in the leniency materials relevant or necessary for disclosure and so made a very limited order. Establishing a firm position on disclosure of leniency materials as a matter of law might also therefore have the helpful effect of answering (and so avoiding) drawn out interlocutory applications for such material.

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

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[9] http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf

[10] For example, where the decision to go for leniency is already finely balanced or where the applicant knows that it would only be eligible for a reduction in its fine rather than full immunity.

33.1 We would not favour any complete exemption from joint and several liability as it is liable to cause unfairness for victims and/or other addressees of a decision where one or more of the addressees becomes insolvent. We can see merit, though, in discouraging claimants from viewing the leniency applicant as an "easy target".

33.2 As matters stand at present, if the successful Type 1 leniency applicant (i.e. the addressee with 100% immunity from fines) is domiciled in England, it may seem to make good sense to a claimant to pursue that leniency applicant alone for the whole loss rather than have to wait for the resolution of appeals brought by other addressees or take the risk that the appeals might succeed. It may be beneficial to introduce an arrangement like that which exists in Hungary where claimants are required to pursue other defendants ahead of the successful Type 1 leniency applicant where practicable to do so.

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

34.1 We have no additional suggestions as to steps that might be taken to protect the public enforcement regime in view of the changes proposed so as to facilitate private enforcement.

Please contact Richard Pike (020 7919 1416, richard.pike@bakermckenzie.com) if you have any questions about this response.

**Baker & McKenzie LLP**

**24 July 2012**

# Bar Council

**Bar Council response to BIS consultation: "Private actions in competition law: a consultation on options for reform"**

1. The General Council of the Bar of England and Wales (the Bar Council) welcomes the opportunity to respond to the BIS consultation: "Private actions in competition law: a consultation on options for reform".

2. The Bar Council is the governing body and the Approved Regulator for all barristers in England and Wales. It represents and, through the independent Bar Standards Board (BSB), regulates over 15,000 barristers in self-employed and employed practice. Its principal objectives are to ensure access to justice on terms that are fair to the public and practitioners; to represent the Bar as a modern and forward-looking profession which seeks to maintain and improve the quality and standard of high quality specialist advocacy and advisory services to all clients, based upon the highest standards of ethics, equality and diversity; and to work for the efficient and cost-effective administration of justice.

3. The Bar Council's response is restricted to questions 20 and 21 of the consultation.

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

Using a single, specified body to receive unclaimed sums is the most straightforward option from an administrative perspective, saving time and costs for the parties and the court, providing legal certainty for all parties throughout the litigation process. It also circumvents the challenges associated with trying to find a suitable recipient in each case, and the associated lobbying of judges and additional litigation.

By paying the funds to a single recipient, these funds would be received and used solely in the public interest, acting independently from the parties, their lawyers and the litigation and with a view to the wider picture nationally. Although the court may consider a recipient suitable for payment in a particular case, they cannot be fully sighted on whether it is the most strategic use of those funds.

Use of a single recipient acts as a deterrent against anti-competitive companies; they have to compensate for the total amount of harm the court decides is caused by their illegal conduct, irrespective of the number of individuals that come forward to collect their damages.

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

In our view, the Access to Justice Foundation would be the most appropriate recipient. It was set up as the national charity to receive and distribute funds to support the provision of free legal help to those who need it. It is the result of joint-working between the advice sector and legal profession (including the Bar Council, Law Society and CILEx) and its creation was endorsed by the Ministry of Justice, the Attorney General and the Judiciary. It was prescribed by the Lord Chancellor in secondary legislation as the single recipient of costs awarded against the losing party where the winning party was represented by a pro bono lawyer. The Board of Trustees includes senior and experienced representatives of the advice and pro bono sectors, the legal profession and the Judiciary, with the Board chaired by a former Attorney General, Lord Goldsmith. The Foundation was also recommended as a suitable body to receive residue funds from collective actions by Sir Rupert Jackson in his Review of Civil Litigation Costs, the Civil Justice Council and the HM Treasury's Financial Services Rules Committee. The charity has strong governance that includes involvement from the relevant stakeholders.

The Foundation has a statutory role in receiving pro bono costs and has developed a scheme to receive dormant client monies donated by law firms. It makes grants to support organisations and projects that provide free legal advice or representation to those in charitable need, developing a nationwide network of Legal Support Trusts, which enhance the ability to distribute funds strategically. The Trusts raise and distribute funds locally as well as providing background to the local provision and public need for assistance. The network encourages stakeholder involvement at a regional level and the Foundation also works with other national charities to ensure funding decisions take account of local, regional and national needs.

Reductions in funding for legal assistance will have a severe impact on the availability of free legal help and therefore access to justice at all levels. The advice and pro bono sector have an increasingly vital role in providing help to those not empowered by the law, whether through poverty, social exclusion or lack of education. Improved access to justice in turn benefits other causes and charities. The purpose at the heart of collective actions is to provide access to

justice for the group of individuals who might otherwise not have redress from harm caused by a company. It is therefore logical for residue damages to be used to support further access to justice for the public.

The Foundation has, as a result of its position as the statutory recipient of pro bono costs, experience of receiving funds from litigation and the requisite expertise to manage legal issues arising from it.

The Foundation is experienced in dealing with a source of income that is innately irregular since it arises only when a piece of litigation is successful; the Foundation does not fund individual cases and is not involved in litigation until the court has awarded pro bono costs.

**Bar Council**
**27 July 2012**

# Bar Pro Bono Unit

The National Pro Bono Centre, 48 Chancery Lane, London WC2A 1JF
Tel: 020 7092 3960 Fax: 020 7242 5233 DX: 188 London Chancery Lane
E-mail: enquiries@barprobono.org.uk

Bar Pro Bono Unit

Tony Monblat
Consumer and Competition Policy
Department of Business, Innovation and Skills
1 Victoria Street
LONDON
SW1H 0ET

20th July 2012

Dear Mr Monblat

**Response to the consultation paper ' Private actions in competition law - a consultation on options for reform'**

The Bar Pro Bono Unit is the national clearing house for pro bono legal advice and representation by barristers. The advice and representation is provided in all areas of law and in all parts of the country. Some 3000 barristers (including 350 QCs) volunteer through the Unit. This response is provided on behalf of the organisation.

As a charity concerned with access to justice, the consultation raises two particularly important questions.

**Q.20 What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums.**
We believe that unclaimed sums from collective actions should be directed to a single named body. This will ensure the defendant company has to compensate for the total harm from their anti-competitive acts. It will avoid the problems and uncertainty of finding a suitable destination in each case such as lobbying of judges. It will provide certainty of an independent destination to receive the funds in the public interest, in order to support further access to justice.

**Q.21 If unclaimed sums were to be paid to a single specified body, in your view would the Access to Justice Foundation be the most appropriate recipient, or would another body be more suitable?**
In our view the Access to Justice Foundation would be the most appropriate recipient, as it will distribute the funds to organisations and projects that provide free legal help to those in need. This will support the ultimate aim of collective actions which is to enable access to justice. The Foundation will receive funds on behalf of the whole advice and pro bono sector, whose ability to provide help to the public is being endangered by the legal aid and local authority cuts. The Foundation is already the recipient of pro bono costs and therefore has experience of receiving and distributing funds from litigation.

Yours sincerely

Rebecca Wilkie

**Rebecca Wilkie**
**Chief Executive**

# Ben Sansum

# ADVICE NETWORK

Developing advice services in Bristol, North Somerset and South Gloucestershire

LOTTERY FUNDED

**84-88 Colston Street, Bristol BS1 5BB Tel: 0117 929 2153**
**email info@advicenetwork.org.uk**

The Baring Foundation


## BIS: 'Private Actions in Competition Law' consultation

## Submission by the Advice Network on behalf of Advice Centres for Avon (ACFA)

### 1 Introduction

We are responding to this consultation on behalf of a network of independent advice agencies who offer legal advice in social welfare areas of law such as housing, welfare benefit, debt, employment, and associated areas across Bristol, North Somerset, & South Gloucestershire.

### 2 Consultation questions

Our member agencies in general support the actions of BIS in giving greater clarity to this process of pursuing a case relating to anti-competitive practices, and support the proposal to allow actions to be taken collectively by groups of consumers. We have specific responses to the following questions:

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

We strongly support the principle of allowing unclaimed damages to be paid to a single specified body, on the following grounds:

- The difficulty of establishing the most suitable body in each separate case is avoided, reducing administration and processing costs, and avoiding the potential for extensive lobbying and possible follow-up litigation if a given decision about allocation is contentious.
- Awarding the sums to named charity can be strongly argued to be in the wider public interest, without the named charity having to be engaged directly in the litigation. The named charity would receive funds in the public interest and would retain its independence having not been involved in the initial litigation.
- It would remove the potential anomaly of a company being found unequivocally guilty of anti-competitive practices yet not being subject to appropriate consequences due to only having to recompense a comparatively small number of individuals who come forward to make a specific claim.

**Q21 If unclaimed sums were to be paid to a single specified body, in your view would the Access to Justice Foundation be the most appropriate recipient, or would another body be more suitable?**

Our member agencies strongly support the proposal to paid unclaimed damages to the Access to Justice Foundation.

- The work of the Access to Justice Foundation is entirely consistent with the principle behind allowing collective action in these cases. This seems a very good fit for use of unclaimed funds from these actions.
- The work of the AtJF is going to become ever more important in the next few years as reductions in state funding for legal advice begin to bite and free-at-the-point-of-delivery frontline legal advice services continue to restrict services, or in the worst cases, close altogether.
- The work of the pro-bono sector cannot be a complete replacement for the loss and reduction of these services, but can at least provide a small measure of mitigation of the worst impacts.
- The work of frontline advice services, and the pro-bono services that help support them are in general aimed at the most deprived communities and in-need households providing invaluable legal services to those who would otherwise be completely unable to access them. This legal advice has a valuable multiplier effect through communities, both through improving living conditions for individual families, increasing income into local economies through advice regarding welfare benefits and debt advice, and improving the general awareness regarding legal matters within a community.
- As a charity of good-standing the Access to Justice Foundation is trusted to act appropriately in its grant-making function.
- It already has a well-established and robust grant-making process.
- Previous reviews and discussions have concluded that the Access to Justice Foundation is a suitable body to receive residual funds, such as the Jackson Review of Civil Litigation Costs, the Civil Justice Committee, and the HMT Financial Services Rules Committee.

**Advice Network & Advice Centres for Avon**
**July 2012**

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The Advice Network is a three-year project managed by Avon & Bristol Law Centre on behalf of Advice Centres for Avon (ACFA). ACFA is a network of advice agencies who have been working together for over 25 years; most members are registered charities and all offer free, confidential, impartial, high-quality legal advice on issues such as housing, debt, welfare benefits, community care, employment, education and health. For more details visit our website – www.advicewest.org.uk.

# Bournemouth and Poole Pro Bono

**Department for Business, Innovation & Skills**

By email only: competition.private.actions@bis.gsi.gov.uk

24 July 2012

Dear Sirs

**Private actions in competition law**

On behalf of Bournemouth & Poole Pro Bono, I would like to submit a response to Questions 20 and 21 of the above Consultation Paper.

Background

Bournemouth & Poole Pro Bono is a charity which arranges the delivery of pro bono (i.e. free) legal services to local charities and voluntary groups serving the local community and develops other pro bono projects in the Bournemouth and Poole area.

Response

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

We view the merits of paying unclaimed sums to a single specified body as significant.

A single destination that is set out in statute would be beneficial because:

- The problem of trying to find a suitable recipient for each case is avoided, as well as the associated lobbying of judges and potential satellite litigation which would detract from both the sentiment and practical application of collective actions.
- The named charity would receive funds in the public interest and would retain its independence having not been involved in the litigation.
- A full deterrent effect against anti-competitive companies is achieved as companies practising such behaviour will need to compensate the total amount of harm the court decided was suffered by individuals from their anti-competitive action, regardless of the number of individuals who came forward to collect their damages.
- There would be legal certainty for all parties and the court, before and during litigation.

- The system is administratively simple, which would save time and cost for the parties and the court, maximising the funds available from such actions.

We view the disadvantages of the other possible options as being:

*Cy-près*

- There would be difficulties in identifying who is the appropriate cy-près beneficiary.
- Of the two major options for c*y-près*, the 'price roll-back' might well not benefit th e previous customers harmed. Also, t his might give the (anti- competitive) company an advantage over its competitors.
- The second major opti on to pay t he residue funds to an organisatio n, usually a charity, con sidered the next best b eneficiary to the harmed individuals involves the need to decide who the most appro priate recipient is. This may again place undu e demands on the time and funding available.
- As mentioned previously, it has been witnessed in other jurisdictions that class-action judges are r outinely lobbied by charities see king the mone y, a problem reported by the Civil Justice Cou ncil in their report on collective proceedings (page 181 ). Furthermore, lawyers seek to sug gest their p ersonally fa voured charities, which would lead t o incon sistent outcomes and irrelev ant favouring of particular charitable causes.

*Escheat to the Treasury*

- This option could be viewed as a form of taxat ion, or a civil fine, which bears little relevance to the individuals who have been harmed.

*Reversion to the defendant*

- The guilty party benefits from an unjust windfall.
- Reversion creates an incentive for the company to minimize awareness of the award and the number of customers claiming.

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

We view the Access to Justice Fo undation as the most a ppropriate r ecipient f or two main reasons:

*1. Support for access to justice*

- The purpose at the heart of co llective action s is to ena ble access to justice fo r individuals who would otherwise not have it, in this case from illegal anti-competiti ve of companies. Therefore it is logical that residue damages be used to support further access to justice for the public.
- Reductions in fund ing for lega l assistance are having a severe impact on t he availability of free legal help and therefore access to justice at all levels.
- The advice sector and pro bono se ctor have an increasing ly vital role in providing free legal assistance to those who cannot afford it.

- The sector's work is targeted at those not currently empowered by the law whether through poverty, social exclusion, or lack of education.

- Improved access to justice will in turn benefit many other charities, whether because the beneficiaries of the charity receive legal help, or because the charities themselves directly receive free legal assistance.

*2. The Foundation is a trusted national grant maker*

- The Access to Justice Foundation is an independent charity, acting in the public interest to improve access to justice.

- The Foundation's purpose is to receive and distribute additional funds to support free legal assistance and to support access to justice generally. To this end it acts on behalf of the sector to raise money and then make grants to legal help organisations across England & Wales.

- The Foundation has a trusted role in the advice sector and legal profession, who worked together to establish the charity.

- As a national grant maker the Foundation is able to support the whole advice and pro bono sector in providing free legal help.

- The Foundation works with the regional network of Legal Support Trusts (which includes us, the London Legal Support Trust) across England & Wales, and with national organisations, in order to strategically provide funding at all levels.

- As the recipient of pro bono costs under the Legal Services Act 2007, the Foundation has experience with receiving funds from litigation and has the necessary expertise when legal issues arise as well as dealing with inherently unpredictable sources of income.

- The Foundation was recommended as a suitable body to receive residue funds from collective actions by the Jackson Review of Civil Litigation Costs, the Civil Justice Council and the HMT Financial Services Rules Committee.

Thank you for taking this response into account

Yours truly

Nick Hanning
**Bournemouth & Poole Pro Bono**
*nhanning@bppb.org.uk*
Web: www.bppb.org.uk

# BPP Pro Bono Centre

Dear Mr Monblat

I am Joint Director of Pro Bono at BPP Pro Bono Centre, part of BPP University College. I have reviewed the recent consultation paper and attach my response.

**Response to Q1, 2, 9, 10, 11, 13, 14, 22:**
We support the proposal that collective actions be introduced for competition cases, because they will enable access to justice where individuals would otherwise have no or little ability to litigate against anti-competitive companies.

Private bodies, whether consumers or business should be allowed to bring stand-alone actions. The Competition Appeal Tribunal would be the appropriate venue. Opt-out actions should be permitted to enable the whole class of affected people to potentially benefit, and so the anti-competitive company can be ordered to pay damages for the full amount of their illegal behaviour.

Pro bono costs under Section 194 Legal Services Act 2007 should be extended to cover cases in the CAT.

**Q20**
**(What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums.)**

We believe that unclaimed sums from collective actions should be directed to a single named body. This will ensure the defendant company has to compensate for the total harm from their anti-competitive acts. It will avoid the problems and uncertainty of finding a suitable destination in each case such as lobbying of judges. It will provide certainty of an independent destination to receive the funds in the public interest, in order to support further access to justice.

**Q21**

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

In our view the Access to Justice Foundation would be the most appropriate recipient, as it will distribute the funds to organisations and projects that provide free legal help to those in need. This will support the ultimate aim of collective actions which is to enable access to justice.

The Foundation will receive funds on behalf of the whole advice and pro bono sector, whose ability to provide help to the public is being endangered by the legal aid and local authority cuts.

The Foundation is already the recipient of pro bono costs and therefore has experience of receiving and distributing funds from litigation.

Many thanks and regards

Jessica

**JESSICA AUSTEN**
JOINT DIRECTOR OF PRO BONO

# Brighton and Hove Advice Strategy Society

# Private actions in competition law: a consultation on options for reform. Response form

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

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

This response form can be returned to:

Tony Monblat
Consumer and Competition Policy
Department of Business, Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
Westminster
SW1H 0ET
Tel: 0207 215 6982
Fax: 0207 215 0235
Email : competition.private.actions@bis.gsi.gov.uk

| Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type. |
|---|
| Representative Organisation X |
| Trade Union |
| Interest Group |
| Small to Medium Enterprise |
| Large Enterprise |
| Local Government |
| Central Government |
| Legal |
| Academic |
| Other (please describe): |

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

## Consultation questions

The Brighton and Hove Advice Strategy Project is funded by the lottery and supports the 'Advice' arm of the Brighton and Hove Strategic Partnership.

Our responses to this consultation are limited to Q20 and Q21

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

We are of the view that unclaimed funds should be directed to a single body, set out in statute as such a system would be administratively simple, thereby maximising the funds that could be directed towards the public good.

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

The Advice Strategy Project believes that the Access to Justice Foundation is the most appropriate recipient. The Foundation has a trusted role in the advice sector and legal profession, who worked together to establish the charity and it's work is targeted at those not currently empowered by the law whether through poverty, social exclusion, or lack of education.

This publication is also available on our website at www.bis.gov.uk

Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

**URN 12/742RF**

# British Bankers' Association

The voice of banking & financial services

# PRIVATE ACTIONS IN COMPETITION LAW: BIS CONSULTATION ON OPTIONS FOR REFORM

## Response by the British Bankers' Association

The British Bankers' Association (BBA) is the leading association for the banking and financial services sector in the UK representing over 200 banking organisations from 50 countries.

The BBA welcomes the opportunity to respond to the consultation on private actions in competition law. We fully endorse the proposition that parties disadvantaged by breaches of competition law should have access to suitable redress. Accordingly we support many of the proposals in the consultation document, including that on expanding the role of the Competition Appeal Tribunal.

That said we think it is important to address the issues arising on a holistic basis and to pay regard to some of the costs, as well as the benefits, that could arise from certain of the proposals. In particular we are mindful of the risk of encouraging a more litigious commercial environment involving greater exposure for businesses, an outcome that could act as a disincentive to enterprise. This needs to be put alongside the potential economic benefits identified in the consultation.

## KEY POINTS

### Alternative Dispute Resolution

We agree that alternative dispute resolution (ADR) mechanisms can provide an efficient and positive contribution in resolving cases and that there is significant scope for their role to be expanded. The thrust of the proposals in the consultation document is therefore welcomed. In fact of the various proposals presented in the document in our view greater emphasis on ADR and on mechanisms to incentivise ADR offers the best chance of addressing effectively the challenges identified.

### Extended Role for the Competition Appeal Tribunal

We are supportive (as above) of the proposal to give the Competition Appeal Tribunal (CAT) extended responsibilities in the competition law area – given the

experience and expertise of that body this would be a positive step. We have no problem with the CAT also being able to hear stand alone cases – though some of the figures in the impact assessment suggest that this route would not be likely to be taken very often. If the CAT is to have an extended role then it is vital that this is coupled with suitable resources to enable it to discharge its enhanced responsibilities efficiently and effectively.

**Fast Track Route for SMEs**

On the proposed fast track route for SMEs we have reservations. Taken together, the proposed cap on costs (with maximum of £25,000), the possibility of claimants being able to obtain injunctions fairly rapidly and the CAT's ability to waive the requirement for cross undertakings in damages could have a material impact on outcomes. Also we are not convinced of the case for any particular sector of the economy having access to a special protected process. In addition we note that competition matters often involve complex issues and important points of principle that may be ill suited to a fast track process.

**Rebuttable Presumption of Loss in Cartel Cases**

We are opposed to the proposal to proceed on the basis of a rebuttable presumption that a cartel had increased prices by a fixed amount of 20 percent. This would involve a major departure from the fundamental principle of English law that a claimant has to demonstrate its loss and we are not persuaded that such a radical step would be justified - and are concerned that it could encourage spurious claims.

**Collective Actions**

Though the reasons for considering the introduction of opt out collective actions are understood we have serious misgivings on the wisdom of embarking on this course. We believe it is inevitable that this would lead to a more litigious culture, so increasing costs on businesses with damaging economic consequences. Also there would seem to be a realistic prospect that once the opt out model was enshrined in competition legislation it could well over time be replicated in other areas of the law.

Responses to the specific questions posed in the consultation document are set out below.

**SPECIFIC RESPONSES**

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

We believe this could provide additional flexibility.

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

Please see our comments under Key Points.

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

Whilst there will circumstances where presumptive relief will be appropriate consideration should be given to safeguards for defendants as the granting of injunctions may have a serious effect on their businesses.

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

Please see our comments under Key Points.

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

As above.

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

We would refer again to enhancing incentives for ADR.

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

We do not favour this proposal. Please see our comments under Key Points.
**Q.8 Is there a case for directly addressing the passing-on defence in legislation? If so, what outcome is desired and how, precisely, should this best be done?**

As recognised in the consultation this is a difficult issue. On balance we incline to the provisional view expressed in the document that there is not a clear case for new legislation at this time.

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

Lack of interest by consumers where relatively low levels of individual compensation are at stake is clearly a factor. Greater focus on ADR mechanisms could possibly improve the situation.

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

We agree with the proposed objectives - obviously there is room for debate as to what would constitute a 'balanced system'.

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

Whilst we do not have a problem with this in principle it is felt that the case for having businesses in scope may be less compelling. Business claimants can and do come together in group litigation orders.

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

There could well be a case for some restrictions though we are not sure if this is a major issue.

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

Yes, in principle – as noted we do not support the introduction of opt out collective actions.

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

Please see our comments under Key Points.

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

In general terms we agree with the proposed list, subject to the views already expressed.

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

Yes – to avoid increasing still further the risk of encouraging a US style litigation culture.

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

We agree that the loser pays rule should be maintained.

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

An element of flexibility here would be sensible.

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

It is agreed that contingency fees could distort the incentives to bring cases and should be avoided.

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

In line with the fundamental principle of English law that damages are paid for the purpose of compensation in our view it would be appropriate for any unclaimed sums to be repaid to the defendant. The purpose of collective actions is not to punish (that being the role of the competition authorities in levying fines) but to compensate and it is important that this distinction is not blurred.

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

Not applicable.

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

Please see our comments under Key Points. We do not support opt-out collective actions. As recognised in the consultation document for the competition authorities to bring collective actions could run the risk of diluting the authority's focus in regard to its primary enforcement role.

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

As above – though use of third party funding would raise additional concerns in commercialising the process as per the situation in the US. In our view only bodies without a commercial agenda/objective should be empowered to bring any collective actions.

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

Yes.

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

Pre-action protocols could have a useful role to play – but we do not support the proposed fast track regime or opt out collective schemes.

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

We think this merits serious consideration.

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

We have no current plans to do so.

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

This would appear to be the case – though it is not entirely clear.

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

It is agreed that the possibility of giving the competition authorities a power to certify a voluntary redress scheme should be explored further.

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

We share the view that it should not be ruled out for the payment of compensation to be a mitigating factor in certain circumstances.

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

We think an extended role for private actions could make a contribution**.**

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

It is agreed that 'leniency documents' that could compromise a whistleblower's position vis-à-vis subsequent private legal actions should be protected from disclosure – for the reasons set out in the consultation.

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

Similarly we agree that whistleblowers would have to be protected from joint and several liability.

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

We have no further comments.

July 2012

# British Chambers of Commerce

# Private Action in Competition Law - Government Consultation on options for reform
# British Chambers of Commerce response

**Background**

The British Chambers of Commerce is the national body for a powerful and influential Network of Accredited Chambers of Commerce across the UK: a Network that directly serves not only its members, but the wider business community.

The British Chambers of Commerce represents 100,000 businesses who together employ more than 5 million employees. Every Chamber sits at the heart of its local community working with businesses to grow and develop by sharing opportunities, knowledge and know-how.

**BCC response**

The BCC welcomes the opportunity to respond to the consultation on private actions in competition law. The BCC supports the overarching objective of this consultation to secure vibrant, competitive markets and to enable businesses, particularly SMEs, to be better able to take direct action against anti-competitive behaviour.

However, the BCC has concerns that many of the proposals in this consultation will be of little benefit to smaller businesses that will be put off private sector challenges due to their position in a supply chain and the resulting effect this could have on them commercially. The BCC has not received specific feedback from members requesting a change from the current system and we do not believe that it is the role of private businesses to enforce the law. The burden of taking actions is higher for SMEs and therefore businesses need a strong regulator and access to information from the government to enforce competition cases. The BCC believes that the focus should not be on compensation for losses but on how SMEs can stop anti-competitive behaviour in order for them to continue trading and competing in an effective and functioning market.

**Alternative Dispute Resolution**

The BCC welcomes the introduction of Alternative Dispute Resolution (ADR) in appropriate cases as a means of ensuring that litigation is the last resort. Whilst it is important that those engaged in anti-competitive behaviour can be taken to court, it is also right that businesses and consumers are encouraged to resolve their differences outside court in order to reduce the costs and time spent on a dispute. If ADR does become part of the regime for private competition law actions, chambers could play a role in such an ADR scheme. Some Chambers of Commerce across the country already offer ADR, for example Business West which operates the Chambers of Commerce operations across Bristol, Bath and Gloucestershire is a joint partner in the Mediation in Business service for businesses across the South West.

**Opt-out Collective Actions**

The BCC is concerned at the proposal to introduce an opt-out collective actions regime for competition law to allow consumers and businesses to collectively bring a case to obtain redress for their losses.

The BCC opposes anything which would create a US-style litigation culture in the UK. Opt-out collective actions could increase the number of speculative claims and fuel litigation, whilst not substantively benefiting SMEs. A US-style system of class action could damage entrepreneurship and the BCC does not believe that the safeguards set out in this proposal will prevent this. If a loss felt by a consumer or business is severe then they can already choose to opt into collective action, for example PPI claims. Therefore the BCC does not see why it is necessary for an opt-out collective actions regime to be implemented.

**The proposed fast track procedure for SMEs**

SMEs are particularly vulnerable to anti-competitive behaviour due to the difficulties with the current system of obtaining redress. The BCC therefore welcomes the principle of the proposed fast track procedures for SMEs, particularly because of the focus on faster access to injunctive relief. By comparison to the current system the proposed "light touch" procedure would without doubt considerably reduce the costs and risk exposure to a SME, particularly if the case is settled after the grant of a swift interim injunction.

More generally, the BCC wishes to comment on the benefit of having a panel system with business experience in the competition authorities. Panel members with business experience are needed in order for the system to be fair towards small and medium-sized companies. The BCC would also like to see the panel system being extended to anti-trust.

This submission was compiled with the assistance of Pannone LLP. For more information, please contact Kamala Mackinnon, Campaigns Adviser, k.mackinnon@britishchambers.org.uk / 0207 654 5808.

# British Retail Consortium

BRITISH **RETAIL** CONSORTIUM
for successful and responsible retailing

**Private actions in competition law: a consultation on options for reform**

**July 2012**

**Response from the British Retail Consortium**

**The British Retail Consortium (BRC) represents the whole range of retailers, from the large multiples and department stores through to independents, selling a wide selection of products through centre of town, out of town, rural and on-line stores. Our policies and positions are approved by Committees representative of the whole membership.**

**Contact: Graham Wynn**
**0207 854 8954**
**graham.wynn@brc.org.uk**



Second Floor, 21 Dartmouth Street, London, SW1H 9BP T: 020 7854 8900 F: 020 7854 8901 email: info@brc.org.uk www.brc.org.uk
Brussels Office, Square de Meeus 38/40, 4th floor B-1000 Bruxelles T: +32 (0) 2 401 6824
Scottish Retail Consortium, PO Box 13737, Gullane, EH31 2WX T: 0870 609 3631 F: 0870 609 3631

**Private actions in competition law: a consultation on options for reform**
**July 2012**

**Comments from the British Retail Consortium**

The BRC wishes to submit some general comments on the Collective Actions and the ADR sections of the consultation.

We have noted the submission by the Centre for Socio-Legal Studies, University of Oxford and we fully agree with the thrust of that submission.

We do not support private collective actions as proposed. However, if the Government decides to proceed, we would prefer the approach we outline below – namely either follow-on actions through a public body separate from the enforcer or redress as part of the overall settlement.

**No evidence of need**

1. The BRC is not convinced that there is real evidence of need for the introduction of potentially costly collective actions in competition or any other cases – especially at this time of economic hardship.
2. While we understand the view that businesses should not profit from illegal anti-competitive practices, we also believe that the Which? case that is referenced in the consultation demonstrates that consumers who suffer low levels of detriment (and this seems to be one of the main reasons advanced for collective actions) have no great interest in seeking redress often long after the detriment has been suffered. Fines - and reputational damage - should provide a suitable and substantial deterrent and ensure that those found guilty do not profit.

**Need for safeguards**

3. The consultation itself notes the dangers of speculative or unmeritorious claims. Opt-in, loser pays and strictly limiting the right to bring such actions are generally regarded – and have been so regarded in the past by BIS - as sensible measures to limit such claims. The proposed opt out procedure totally undermines these safeguards.

**Public enforcement – the key to effective competition enforcement**

4. The BRC does not support stand-alone collective actions.
5. We believe that public enforcement of the competition regime strengthens the regime and that in a time of public expenditure restraint the introduction of stand-alone actions would eventually lead to a diminution of public enforcement given the availability of alternative stand-alone options. More than that, a public enforcement regime provides the correct degree of public interest and independence that should characterise any enforcement regime and the required investigative capacity – and confidence in investigations. Consequently we believe that any actions should be follow-on once guilt has been admitted or established.

6. Public enforcement is critical in ensuring that businesses are not blackmailed by the threat of action into settling claims under threat of a collective action when they do not really believe they have committed a violation.
7. Much is made in the consultation of allocation of resources and the effect of this on whether or not the public enforcer is willing to take a case. In our view, this is the unstated nub of the issue for the government rather than any good argument in favour of change. With sufficient resources, the public enforcer is able to take as many cases as the public interest allows. It would be preferable to examine new imaginative ways to ensure sufficient resources are made available (and this does not necessarily mean more public expenditure) even in the current economic climate. At the end of the day the total cost of enforcement is much the same whether it is solely by the public enforcer or by a mixture of public and private. It is how the resources are raised that is different.

**Voluntary redress as part of settlement of a case**

8. In the past BIS has stressed its desire for businesses, where appropriate, to offer redress on a voluntary basis as part of a settlement of a case or indeed in place of enforcement action per se. The proposals in this consultation would not seem to support that policy. We can see no particular reason why competition should be singled out for a different approach.

9. Thus we believe that a preferable system would be for redress to be considered and provided as part of the overall settlement of a publicly enforced case or in place of enforcement action. For example, the court or CAT could ask a business to propose a settlement for ratification once the case is admitted or proven. The fine could be adjusted accordingly where appropriate. This should encourage a business to come to the party voluntarily with a realistic offer. There is no reason why the competition regime should require a *totally* different approach to deterrence from other enforcement regimes - other than possibly a belief that competition breaches are inherently more difficult to detect.

**Review the current system**

10. We also note that the Government believes the current system of representative actions has failed because only one case has been brought. However, it would be preferable to examine the reasons for this failure and whether improvements could be made perhaps by designating other bodies or by changes in the rules.

**The following comments indicate our preferred approach if the Government is determined to go ahead**

**Public rather than private actions**

11. We would prefer to give a public authority a role in delivering redress.
12. In the case of consumer actions in particular, if it is nevertheless decided to proceed with collective actions, we believe there is a role for a public figure to bring cases. Indeed, we thought this would be a role for the consumer advocate when that proposal was under consideration.
13. The Government seems to argue in a circular manner that this would have to be undertaken by the OFT and that a drawback is that this might divert resources from the enforcement role of the OFT.

14. In this scenario, there would be a consumer 'ombudsman' (the term is used here only for convenience and to give a flavour of the sort of role rather than in a strictly defined sense) whose role would be to bring follow-on actions on behalf of consumers (and perhaps businesses) once guilt was determined or once an ADR procedure had determined 'guilt' and this had been accepted by both parties.
15. In this instance, the first task of the ombudsman would be to try to agree a voluntary redress option. If that failed it would be for the ombudsman to determine whether there should be a collective action given the likelihood or otherwise of whether those who had suffered could be identified in a cost effective manner and whether they would receive a worthwhile payment; or whether a more general payment would be appropriate; or whether a fine alone was more realistic. Other considerations could then be made - even perhaps whether the case should be on an opt- in or opt out basis.
16. We should make it clear that we oppose any opt-out regime – but believe that further consideration could be given to this idea were the opt-out approach to be chosen by the government. There is no reason why the ombudsman should not be self-financing in the same way that any 'private' system would inevitably have to be.
17. We are also not convinced of the value of general payments to third parties in the absence of a proportionate allocation of direct redress to affected consumers. The circumstances in which a general payment might be appropriate are where it can be made in some form that takes into account all those potentially affected rather than a third party.
18. Any follow-on power for the enforcer or ombudsman to *impose* redress outside a court process should be limited to these general payments where it would be impossible to identify the individuals who had suffered losses or the cost of making individual refunds would be out of kilter with the refund itself. The enforcer or ombudsman could identify ways in which redress could be appropriately made in another way. However, we do believe that in such circumstances the fine should take account of the redress. That does not mean there should be a direct correlation.
19. While we would not advocate it, if the government is determined to proceed with stand-alone collective actions, the Ombudsman could also provide a second back up to the public enforcer. His criteria and financing would be different from those of the enforcer and framed in a fashion to provide the alleged benefits of stand-alone actions as foreseen by the government but without some of the defects. There could, for example, be a requirement for a sufficient number of affected consumers to sign up before proceeding – or if opt out is insisted upon a requirement that the case does not meet the public interest test in terms of its competition effects and is therefore not a case for the enforcer but it has affected a sufficient number of consumers and the claim is of a low level in each case. Effectively the costs of the action would have to be met in the same way as the costs of any other stand-alone private action – on a loser pays basis.
20. A key objection to opt-out in stand-alone cases is that effectively a private body is acting as an alternative enforcer with its own enforcement criteria and objectives. Opt in stand-alone cases at least require those with an alleged grievance to identify themselves. With opt out the private body decides whether to pursue a company itself. This undermines the coherence of the public enforcement system – unless the private body is in fact an ombudsman of some sort operating with a clear public interest criterion.

**Collective actions by business**

21. As far as collective actions by businesses are concerned, the example would seem to suggest that the government has in mind cases where a business has suffered detriment much like a consumer – i.e. from having purchased a good from another business that has engaged in anti-competitive practices. In that case we believe the same considerations apply as those for consumers above. We tend to agree that whatever arrangements are made for consumers should also apply to businesses in these sort of cases. These are businesses that have in a sense been indirectly affected.
22. However, that is rather different from a collective action for businesses that have been directly affected as businesses from the actions of other businesses. We believe that here the circumstances of each business are likely to be different and, if they are not, group actions are the most appropriate way forward. In other words, collective actions for businesses should only extend to those cases where the affected business is affected in the same way as a consumer would be.

**ADR**

23. The BRC supports the use of ADR where both parties agree to do so. We believe this should be a voluntary procedure, which the Government may wish to encourage. To make it mandatory would merely mean that it became part of the formal procedure and would undermine the co-operative nature of the process. It would cease to be an alternative resolution procedure and become part of the formal resolution procedure itself.
24. For this reason we believe pre-action protocols which resulted in failure to engage in ADR prior to a court case being taken into account in the final judgement would suffer from the same drawback.
25. However, other areas could be subject to protocols such as enabling formal settlement offers.