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# Cartel Damage Claims

## **CDC CARTEL DAMAGE CLAIMS**

### **Comments on the UK Government's Proposals on Private Actions in Competition Law: A Consultation on Options for Reform published in April 2012**

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## **Comments on the UK Government's Proposals published in April 2012**

CDC Cartel Damage Claims ("CDC") welcomes the opportunity to comment on the Government's proposals on Private Actions in Competition Law: A Consultation on Options for Reform, published by the Department for Business Innovation & Skills.

CDC is a Brussels-based group of companies which is active in the field of private enforcement of competition law since its foundation in 2003. Over the years CDC has developed a unique know-how and set of tools in order to overcome existing obstacles to the enforcement of justified compensation claims resulting from antitrust infringements. Today CDC is pursuing damage claims with a value of several hundreds of million Euros resulting from infringements of EU and/or national competition law. In particular, CDC has developed tools to (i) purchase claims for damages resulting from competition law infringements at EU or national level from a multitude of victims, (ii) to collect and analyse sector-wide representative purchase and market data, which allows for well-founded conclusions as to the market-wide price effects of cartels (iii) to enforce aggregated or individual damage claims in its own name and on its own account and risk in and out-of court.

We believe that our practical experience across a wide range of EU jurisdictions may be helpful for the Government in further considering how the framework for the enforcement of antitrust damage claims can be improved. In this respect, we aim in particular at showing that the assignment model (or "joinder of claims") is a further alternative to collective actions in the field of competition law. The assignment model is already practised in several EU Member States on the basis of existing law. It is an additional alternative in order to ensure an effective enforcement of justified claims for damages resulting from the infringement of EU or national competition law and, therefore, to gain access to justice. A specific recognition by the Government would allow for example to bring claims resulting from the infringement of Art. 101 TFEU previously bundled on a Europe-wide basis before UK courts.

### **Overall comments on the reform proposals**

1. The UK Government is right to propose reforms regarding private actions in competition law. Although it is well known that cartels are most detrimental to the economy and cause damages between 12 and 24 billion Euros every year across the EU, still comparatively few actions for the recovery of damages caused by hardcore infringements of competition law are brought in the EU. This results in a situation where competition law infringements, in particular hardcore cartels, continue to be lucrative, despite increasing fines.
2. The reasons for the lack of private enforcement, which CDC experiences in its daily work can be summarised as follows:

- ***Lack of access to information regarding the infringement and data required for establishing the damage.*** This obstacle is increased by the growing use of public “settlement” procedures by competition authorities across the EU which result in no or no meaningful public versions of fining decisions on which victims can rely in follow-on damage actions.
- ***Lack of knowledge of the economic effects of the infringement.*** It is extremely difficult for single victims to quantify and prove the damage suffered as a result of a cartel or an abuse of a dominant position. In-depth economic analyses require large amounts of data covering potentially long time periods before, during and after the infringement. They are costly and require careful preparation. The quantification of damages is in particular difficult for end-consumers and SMUs, the parties which are regularly most harmed by anti-competitive practices.
- ***High up-front costs and long duration of court proceedings.*** Due to the legal and economic complexity of damage claims resulting from competition law infringements, court proceedings, even follow-on actions, typically take many years. This is true for any of the jurisdictions across the EU where damage actions have been brought, including the UK. In addition, the internal up-front costs are very high. Besides the costs of preparing a case and quantifying the damage, claimants have to bear up-front court and lawyers’ fees and to pay for economic experts.
- ***Cartel victims face asymmetric litigation cost risks.*** CDC would like to encourage the Government to modify and to adjust the existing cost compensation regime in a more appropriate manner, taking adequately into account the unbalanced cost risks for plaintiffs. Cartel members are jointly and severally liable for the damage caused. Given that cartels usually have a long duration, often a multitude of companies have participated in the infringement (in part as legal predecessors or successors) or have implemented the cartel agreements. In view of this (special) liability regime in cartel cases defendants are likely to make use of a large number of third party proceedings and third-party notices. This may on the face be intended to secure contribution claims towards co-tortfeasors and potentially further involved companies, natural persons or insurances (D&O). But in practice the primary effect is an artificial increase of the plaintiffs asymmetric cost risk and thus a deterrence for cartel victims to pursue their claims.

Plaintiffs are therefore inherently confronted with a multiplied cost risk as each defendant and potential third-party defendant is entitled to cost reimbursement should the plaintiff not prevail. This risk might even exceed the potential damage and does in practice often discourage victims to pursue

their claims. In our experience a very high number of justified compensation claims are foregone due to the significant financial burden and risk inherent in cartel damage actions, even if the infringement was established by a competition authority.

The following measures would be adequate solutions to rebalance the asymmetric cost risk of plaintiffs and to avoid an artificial and abusive increase of the risk by making excessive use of third-party proceedings or notices:

- the limitation of the plaintiff's obligation to reimburse the adverse parties' costs in total to the amount that the plaintiff would be entitled to receive in case he prevails; and/or
- the limitation of the plaintiffs' obligation to provide upon request securities for adverse parties' costs; and/or
- the possibility for judges to award partial amounts of the requested compensation prior to concluding an overall judgment. This would allow the plaintiff to finance an ongoing litigation. For example in a case where the cartel related overcharge is between 5% and 30% and the parties are engaged in costly expert discussions concerning the overcharge amount, the judge could award a partial compensation based on a 5% overcharge.

This proposal is neither intended to call into question the 'loser pays rule', if applicable, nor to introduce an unjustified 'cost shifting' at the expense of cartel members or third-party defendants. Instead, it aims to create a true level playing field for both sides that does not place the plaintiff in a less favourable position than the cartel members and other companies whose intentional, illegal conduct gave cause for the legal action and the associated cost risk for the cartel victim. The rebalancing of the cost risks is in particular necessary as regards follow-on actions to allow for the effective enforcement of competition law.

- ***Uncertainty as regards limitation periods.*** Although the ECJ in *Manfredi* (2006) recalled the importance of the principle of effectiveness as well as regards the regime of limitation periods, there often remain uncertainties. It should be clarified that limitation periods for antitrust damage claims are (i) long enough, (ii) in follow-on cases do not start to run before the competition authority has published its decision, and (iii) will be suspended during the potential review of such decision by courts.

3. Against this background we value the proposals of the Government as overall very positive. In particular following elements will strengthen the effective enforcement of justified damage claims and thus promote access to justice and fair competition:
  - ***The establishment of the Competition Appeal Tribunal (“CAT”) as a specialised venue for competition actions.*** We are convinced that the complex legal and economic issues at stake in private actions for competition infringements are best decided by specialised judges with a background in competition law.
  - ***The introduction of a fast track route for SMEs.*** In our experience SMEs often lack the organisational and financial means to pursue private damage actions, even if they have clearly suffered significant harm. The introduction of a specific fast track procedure seems a valid option to overcome these obstacles.
  - ***The introduction of an opt-out collective action regime for consumers and businesses.*** Experience has shown that in cases of relatively low-level damages which are dispersed across a large group of victims, in particular at the level of end-consumers, no private actions are filed. Due to the high organisational efforts and costs, also opt-in models have not proven to be effective solutions in cases of low value claims (below 1000 Euro). This is true across the EU. Infringers are therefore still able to keep their illegal benefits to the detriment of competitive market structures. The only effective solution to ensure compensation also in cases of low value and dispersed damages, are opt-out collective actions.
4. In the following we will not further comment on these issues but rather focus on those proposals where we can add additional thoughts based on our practical experience.

#### **Proposals Chapter 4 – The Role of the Competition Appeal Tribunal**

5. Regarding the Government’s proposals in Chapter 4 we would like to address those relating to the presumption of price overcharges and the passing-on defence.

##### ***Rebuttable presumption of 20 % price overcharges reasonable***

6. The Government rightly acknowledges the need for a rebuttable presumption of loss in cartel cases. Such presumption takes account of the fact that it is precisely the aim and effect of competition law infringements, in particular hardcore cartels, to raise prices to the detriment of customers.
7. A rebuttable presumption would have following advantages which would facilitate the effective enforcement of damage claims and access to justice:

- Firstly, it would reduce the need for victims to assemble extensive economic evidence to prove damages. This task is in particular challenging in the field of clandestine cartels where an information asymmetry is inherent in the infringement. The assessment of market-wide price effects without unrestricted access to the relevant data and information is a very costly and time-consuming process. The complexity of the required evidence in many cases discourages cartel victims, in particular SMEs and consumers, to pursue justified claims.
  - Secondly, a rebuttable presumption would shift the burden of proof to the defendant(s), i.e. the party/ies most likely to possess the data required to quantify the real damages. This seems justified in view of the objective of cartels to increase prices. This will change the dynamics of damage proceedings significantly: Defendants will no longer be in the position to merely rebut the damage analysis of claimants as unfounded or flawed without providing their own estimates, but will instead have to come up with a substantial analysis themselves should they want to rebut the presumption.
  - Thirdly, a presumption with a pre-defined but rebuttable presumption of 20% price overcharges would facilitate the negotiation of fair settlements and ADR solutions. The parties would focus on the specific issues of the case instead of losing time and money in lengthy and costly court battles regarding economic theory and disclosure of evidence.
8. The amount of the overcharge presumption of 20% as proposed by the Government widely corresponds to economic reality. According to current empirical studies, this figure can be considered as the average cartel-related overcharge<sup>1</sup>. However, in many cases the overcharge exceeds such 20%, as the Government rightly pointed out (*“lower end of the range”*). In the cases pursued by CDC, the overcharge was also generally higher than 20%.
9. However, important is the existence of a statutory rebuttable presumption of loss in cartel cases. The fact that the presumption is rebuttable by either side will allow for a more precise calculation or estimation of the damages should they have evidence in order to prove a higher or lower damage level.

### ***The passing-on defence***

10. The Government is right to take a careful approach in respect of the passing-on defence. In practice such defence is often used to artificially complicate and delay proceedings. Situations where infringers, by relying on the passing-on defence, could effectively block the enforcement of legitimate damage claims should be avoided.

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<sup>1</sup> See e.g. Oxera Consulting, Quantifying antitrust damages – Towards non binding guidance for courts, Study prepared for the European Commission, December 2009, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf).



11. Following principles, which were for example established by the German Federal Court of Justice<sup>2</sup>, seem fundamental in order to avoid such obstacles:

- Firstly, it should be clarified that the victim/direct purchaser has suffered the entire damage in the form of price overcharges (100%). Whether it has passed-on (part of) the damage at a later stage does not preclude the standing and the right to claim 100% of the harm suffered.
- The defendant has the right, but also the burden of proof to show that the victim has successfully passed on (part of) its damage to the next market-level. In this respect the defendant has to prove that there is a causal link between the infringement and the passing-on. In particular the defendant has to prove that a possible price increase on the downstream market was not caused by other economic factors. Infringers should not benefit from successful commercially motivated efforts of direct purchasers to sell their own products or services to their customers at the highest possible price.
- There is no presumption that the damage has been passed-on, even where the direct purchaser acted as a trader or distributor.
- Possible volume effects in form of reduced sales of the direct purchaser due to higher prices have to be taken into account and may offset any passing-on effect.

12. From a competition policy point of view the UK Government should take into account that the passing-on defence may have a negative effect on the effectiveness of anti-trust damage actions. The incentive for such actions is essentially driven by the aim of direct purchasers to recover significant damage amounts. The application of the passing-on defence should therefore be the exception and not the rule.

13. One could therefore think of limiting the defence to cases in which a passing-on is likely to have occurred, such as market structures characterised by vertically integrated companies or industries which typically price on a “cost-plus” basis (e.g. distributors). The Federal Court of Justice in Germany<sup>3</sup> has for example decided that in cases where the cartelised product has been further processed into another product, a passing-on is almost impossible to prove due to the large number and variety of economic factors which are relevant for the pricing at the downstream level, so that the required causal link between the infringement and the passing-on can only be established in exceptional cases.

14. In any event, the infringers should have the burden of substantiating and proving the passing-on of overcharges as well as the fact that the higher prices on the next market level did not result from other factors. In addition, potential volume effects at the

<sup>2</sup> Judgment of the Federal Court of Justice of 28 June 2011, KZR 75/10 – *ORWI*, available (in German) at: [http://ec.europa.eu/competition/antitrust/national\\_courts/1367230.pdf](http://ec.europa.eu/competition/antitrust/national_courts/1367230.pdf).

<sup>3</sup> *Ibid.*

level of the direct purchaser have to be taken into account. The standard of proof should be full proof.

15. The Government rightly stated that a rebuttable presumption that price overcharges were passed on to end purchasers (*"frequently a consumer"*) in its entirety would reduce the total number of claims brought by direct customers. In our view such presumption would significantly hinder the effective enforcement of competition law:

- A presumption of passing-on of the entire overcharges does not correspond to economic reality. This is in particular true for SME's and other players without significant market power.
- A presumption would not remedy the dilemma of very low and dispersed damages on the end consumer level as they would still have no incentive to start an action. In addition, indirect purchasers would still face the burden to substantiate and prove a claim, in particular the amount of the (low) individual damage, and the lack of evidence in this respect.
- In order to bring a successful damage action, direct purchasers would not only have to rebut the passing-on defence, but also the (statutory) presumption that overcharges were passed-on. Judges would have to take into account such presumption of facts. Furthermore, in subsequent actions by direct purchasers and end purchasers, direct purchasers would risk to lose standing. This dilemma would become even worse in the case of actions by direct and indirect purchasers before different courts in different jurisdictions (e.g. EU-wide infringements).
- The negative impact of such presumption of passing-on would also extend to the field of ADR. It would affect the position of direct purchasers in potential settlement negotiations with their suppliers.
- It is not clear how and on which evidence such presumption would be rebutted in proceedings initiated by indirect customers. The abstract group of direct purchasers which could have the relevant evidence is not party to the proceedings.
- Finally, a presumption would also raise doubts as to its compatibility with fundamental rights of direct purchasers, e.g. their property rights and the principle of equal treatment.

## **Proposals Chapter 5 – Collective Actions**

16. We agree with the Government that the mechanisms to enforce claims for damages resulting from the infringement of EU or national competition law offered under the current regime should be extended. In competition cases there is a need for the bundling of claims to overcome the various existing obstacles for their effective en-

forcement. However, this should encompass the recognition in the UK of the assignment of claims model as a further alternative.

17. Access to justice and the effective enforcement of competition law is best achieved when victims have the choice between a multitude of alternatives to pursue their claims. The assignment of antitrust damage claims is an important cornerstone in this respect:

- The assignment is already practiced in many EU Member States,
- it does not require new and potentially controversial procedural rules, and
- it avoids problems and risks usually associated with "opt-out" actions.

***Recognition in the UK of the assignment model as a further alternative to collective actions in competition law***

18. In its initiative to extend and strengthen the regime for the enforcement of antitrust damage claims the Government should explicitly recognise the possibility of victims of competition law infringements to assign their claims to a third party that bundles and enforces such claims. Such a third party can, for example, be a company, association or foundation. The assignment model, sometimes also referred to as "joinder of claims", follows a collective approach without, however, being collective redress *sensu stricto* as there is only one claimant with one aggregated claim. Claims from SME's as the typical victims of cartel behaviour are in particular suitable for such a bundling.

19. For example, CDC purchases claims resulting from the infringement of EU and/or national competition law by assignment from a multitude of victims and enforces the aggregated claim in its own name and on its own account and risk. The claims are substantiated following a centralised collection and economic analysis of representative purchase and market data. This allows for well-founded conclusions with regard to the precise amount of the damage sustained and serves as a solid basis for the enforcement of damage claims in and out-of court.

20. We encourage the Government to recognise the assignment model as a further alternative to enforcing antitrust damage claims. Notwithstanding existing possibilities to enforce claims (e.g. group litigation, representative action) or the opt-out collective action as proposed by the Government, the assignment model in certain cases of infringements of EU and/or national competition law could be considered as the more efficient and preferable way for victims to pursue claims. Equally, victims should be offered the broadest possible choice when it comes to access to justice.

21. The Government might also clarify that the assignment model used in competition law is an alternative way of enforcing claims that does not run counter to policy considerations (e.g. doctrines of *champerty* or *maintenance*). This would serve legal

certainty and allow the bringing of claims bundled on EU-wide level before the UK courts.

***Advantages of the assignment model compared to forms of collective actions***

22. The assignment model has following advantages compared to collective actions in competition cases:

- The bundling of claims takes place on a substantive law level. Each assignor takes the deliberate and verifiable decision to sell its claims to a third party.
- Many victims of anticompetitive practices, in particular SME's, have ongoing business relationships with infringers. By selling their claims to an independent third party they do not directly confront the infringers and thus do not compromise their business relationships.
- The bundling of a multitude of claims creates synergies as regards their enforcement. This applies also for enforcement out-of court as it strengthens the negotiating position vis-à-vis the cartel members. But also the infringers have a legitimate interest to reach a settlement with an as large as possible group of victims and thereby limiting their risk exposure in a potentially very large number of parallel proceedings in a multitude of jurisdictions.
- The involvement of a specialised third party ensures a careful assessment of the claims and therefore that only meritorious claims are pursued.
- The assignment model allows for a central and market-wide gathering of the evidence for the quantification of the damage at a specialised unit. It is our experience that the market-wide effects of competition law infringements can best be shown on the basis of market-wide purchase data from a multitude of victims.
- Many victims, in particular SME's, do not have the means to substantiate claims, and to bear the resources and costs involved in such legal actions. The assignment model overcomes these obstacles and ensures that the victims will indirectly receive most of the damages recovered.
- Due to the bundling of a multitude of specified claims the assignment model creates interesting incentives and possibilities for third party funders<sup>4</sup>.
- Allocation of the proceeds is not a problem as the victims in form of the single assignors as well as their indirect share in the overall damage recovery are clearly identifiable.

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<sup>4</sup> See for effective litigation funding to enabling access to justice and the different forms of funding *Chr. Hodges/J. Peysner/ A. Nurse*, UK Litigation Funding: Status and Issues, Research Report, 2012; and Lord Justice *R. Jackson*, Review of Civil Litigation Costs: Final Report, 2009.

- The assignment model does not require major changes of civil procedure rules. It is a way of effective enforcement of competition law while avoiding the inherent risks of new and complex procedural rules.
- The assignment model avoids problems and uncertainties which are usually associated with the class certification process and may lead to a more timely compensation for damages.
- The assignment model follows an opt-in approach and is thus in line with the legal cultures in all EU members states. This aspect is relevant in view of the enforceability of judgements in other EU Member States.

***The assignment model has been recognised across the EU as one means for the effective enforcement of EU and national competition law***

23. In its judgments *Courage/Crehan* (2001) and *Manfredi* (2006) the European Court of Justice has underlined the need for possibilities to effectively enforce claims for damages resulting from the infringement of EU competition law. The assignment model has been recognised across the EU as one further possibility to achieve this aim. It is considered as a viable way of practically seeking redress for antitrust damages that, in addition, is compatible with existing law in most EU jurisdictions.

24. The following statements exemplify the wide acceptance of the assignment model:

- The ‘Study Collective Redress in Antitrust’, prepared for the European Parliament (2012), explicitly recognises the model in competition law: *“While it is not yet clear whether this form of funding can successfully apply to mass actions (i.e. those involving final consumers), claims transfer to a third party may help to overcome the problem of lack of participation by injured parties and represent an alternative and effective way of stimulating collective actions.”*<sup>5</sup> It perceives in the assignment model also a form of funding, while considering the *“availability of several funding options (...) crucial to enable access to justice.”*<sup>6</sup>
- The ‘Impact Study on making antitrust damages actions more effective in the EU, welfare impact and potential scenarios’, prepared for the European Commission (2008), states: *“Another variant of joinder procedures are joinder of claims. This mechanism refers to the possibility to consolidate different claims of one plaintiff against the same defendant or group of defendants in one trial.”*<sup>7</sup> The Impact Study further suggests that the procedure can be used when several persons *“transfer their claims to one individual or an association, which then can claim these rights on its own behalf. (...) Perceived major benefits are economies of*

<sup>5</sup> See Study prepared for the European Parliament (ECON), p. 37, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=74351>.

<sup>6</sup> Ibid., p. 41

<sup>7</sup> See Impact Study, jointly prepared by the Centre for European Policy Studies (CEPS), the Erasmus University of Rotterdam (EUR) and Luiss Guido Carlo (LUISS), p. 269, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_white\\_paper/impact\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf).

*scale in the costs of procedures and the possibility to employ the services of professional litigation funders.*" It concludes that the assignment model is possible in most EU jurisdictions<sup>8</sup>.

- The 'Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules', prepared for the Commission (2004), described the assignment model as a potential form of "group litigation".<sup>9</sup>
- From a national perspective, for example in Germany, in a joint statement of the Federal Ministry of Justice, the Federal Ministry of Economics and the Federal Cartel Office (2008) considered that *"a model to be taken into consideration and already practiced under the established legal framework is the transfer of individual claims for damages to a third party whose business is geared towards enforcing these claims collectively"*.<sup>10</sup> The assignment model is explicitly recognised as a concrete alternative to group actions or collective actions.

25. Overall, the availability for victims of a multitude of alternatives, including the assignment model, contributes to the objective of full compensation and the deterrence of infringements of EU and national competition law.

### ***The assignment model is already practised in several EU Member States***

26. The assignment of claims under tort law is a common legal feature throughout the vast majority of the EU Member States. In recent years the assignment model has become a prevalent way of enforcing claims for damages resulting from the infringement of EU and/or national competition law:

- **Austria:** In 2001 a large number of individual damage claims were transferred to the Association for Consumer Information (Verband zur Konsumenteninformation, VKI) which then enforced these claims on its own behalf in court. The assignment model was subsequently used frequently in both competition and consumer protection cases<sup>11</sup>. In 2012 the Austrian Federal Supreme Court confirmed jurisdiction in a follow-on damage action against members of the lifts cartel. Several companies had previously assigned their claims to the plaintiff<sup>12</sup>.
- **Germany:** In 2005 a CDC company filed a follow-on legal action against members of the German cement cartel, bundling the cartel-related damage claims of 36 companies. The German Federal Court of Justice in 2009 confirmed the ad-

<sup>8</sup> Ibid., p. 671.

<sup>9</sup> See Ashurst Study, p. 43, available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>.

<sup>10</sup> See Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission's 'White Paper on Damages actions for breach of the EC antitrust rules', p. 6, available at [http://ec.europa.eu/competition/antitrust/actionsdamages/white\\_paper\\_comments/bund\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf).

<sup>11</sup> Ashurst Report (Fn. 10), p. 46; Impact Study (Fn. 8), p. 269.

<sup>12</sup> Decision of the Supreme Court of Justice of 14 February 2012, 5 Ob 39/11p, available (in German) at: [http://www.ris.bka.gv.at/Dokumente/Justiz/JJT\\_20120214\\_OGH0002\\_0050OB00039\\_11P0000\\_000/JJT\\_20120214\\_OGH0002\\_0050OB00039\\_11P0000\\_000.pdf](http://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20120214_OGH0002_0050OB00039_11P0000_000/JJT_20120214_OGH0002_0050OB00039_11P0000_000.pdf).

missibility of the legal action<sup>13</sup>. Another CDC company filed in 2009 a legal action against members of the Europe-wide hydrogen peroxide cartel (follow-on to European Commission decision). Previously, 32 companies or groups of companies with production sites in 13 European countries had assigned their damage claims. Equally in 2009, the Interest Group of Damaged Printing Shops (Interessengemeinschaft Geschädigter Druckereien, IGD) brought a follow-on damage action against members of the paper wholesale cartel. Over 100 printing shops had previously transferred their claims to IGD.

- **The Netherlands:** In relation to the European air cargo cartel in 2010 the Dublin-based Claims Funding International initiated legal proceedings against cartel members in the Netherlands. Over 100 companies and groups of companies with seats across Europe have previously assigned their damage claims to the plaintiff. Another follow-on action was brought before the court by a CDC company against members of the Europe-wide sodium chlorate cartel. The action was filed after over a dozen companies or groups of companies with seats in different European countries had assigned their claims. A similar legal action was filed in the Netherlands against members of the Europe-wide paraffin wax cartel. In addition, the Dutch company OmniBridgeway is pursuing claims resulting from the Europe-wide cartels in the air cargo and the lifts and escalator cases in the Netherlands on the basis of the assignment model.

27. The recognition in the UK of the assignment model as a further alternative to collective actions would broaden the possibilities to effectively enforce antitrust damage claims, and thus, would allow victims to gain access to justice. Two scenarios can be distinguished in this respect.

***Scenario 1: Assignment of cartel-related damage claims governed by UK law***

28. Firstly, victims of anticompetitive behaviour – whether an infringement of EU or national competition law – with damage claims governed by UK law could assign their claims to a third party interested in purchasing and enforcing a multitude of such claims.
29. In this way UK victims of anticompetitive conducts could benefit from the above-mentioned advantages of the assignment model, in particular synergies on the level of damage quantification and on the level of claims enforcement, while ensuring a fair compensation for the harm suffered.
30. Possibilities for access to justice and the effective enforcement of antitrust damage claims would be extended, irrespective of whether bundled claims will be enforced before courts in the UK or in other EU Member States. Should UK courts have jurisdiction, the victims would have the choice between all existing possibilities to pursue

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<sup>13</sup> Judgment of the Federal Court of Justice of 7 April 2009, KZR 42/08.



claims, including the assignment alternative. Should, however, foreign courts have jurisdiction, UK victims would as well have the possibility to include their claims in enforcement activities under the assignment model in other EU Member States.

***Scenario 2: Standing before the UK courts to enforce antitrust damage claims bundled on EU-wide level***

31. Secondly, the recognition in the UK of the assignment model would broaden access to justice and possibilities of enforcing antitrust damage claims as it will allow the bringing of claims bundled on EU-wide level before the UK courts. The legal certainty associated with such recognition is relevant for the decision of third parties, having purchased a multitude of claims, as to where an action might be filed.
32. Would the UK jurisdiction have to be excluded due to potential policy consideration (e.g. doctrines of champerty or maintenance), the entity pursuing the bundled claims might also have to opt-out of a given collective action.
33. The recognition in the UK of the assignment model would, therefore, significantly extend the possibilities for access to justice and of an effective enforcement of EU competition law in addition to strengthening the position of the UK as a jurisdiction for enforcing bundled claims.

**Proposals Chapter 7 – Complementing the Public Enforcement Regime**

34. Leniency programmes are effective tools for the detection of cartels. However, making use of them requires a certain degree of sophistication and financial means. In practice leniency applicants therefore tend to be the larger, better advised and financially stronger market players. In certain cases leniency programmes may even be used to drive competitors out of the market and to gain a long-lasting competitive advantage. In our view it is therefore important that also successful leniency applicants remain liable for the damage caused by their wrongdoing.
35. An effective way to maximize the incentive for whistle-blowing while avoiding damage to the rights of individual injured parties to seek compensation would be to privilege the successful leniency applicant by allowing him to claim back any compensation effectively paid to victims from the fellow cartel members at the stage of contribution, taking into account their joint and several liability. As is the case in leniency programmes, the privilege of the successful leniency applicant would become effective in the group of co-infringers, without affecting the right of victims to full and effective compensation.



# Centre 70 Advice

Dear Natalia

It is important that your organisation responds to the Consultation being run by the Department of Business Innovation and Skills (BIS):

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

You can download it from

<http://www.bis.gov.uk/Consultations/consultation-private-actions-in-competition-law>

The potted version: This is a proposal that where a firm is found to have overcharged customers in an uncompetitive way, they have to pay the overcharged money back to the customers. That is as it now stands but the collective actions will enable the whole class of affected people to be represented and the miscreant firm will not be able to keep any excess damages – where no customer claims their refund- but should lose those too.

I can't imagine that any advice agency would disagree with that. So supporting the change is quite easy.

Specifically though, we are asking you to support the proposition that those unclaimed sums should go to the Access to Justice Foundation. That is the stated BIS preference but it does need support in the responses as the Treasury may well want to nab the funds.

This could be worth a very large amount indeed to the advice sector in a few years' time if that designation were accepted. One case could produce tens of £ millions.

Below are the relevant sections and LLST's responses to them. Feel free to plagiarise all you like

The easiest way to respond is to email [competition.private.actions@bis.gsi.gov.uk](mailto:competition.private.actions@bis.gsi.gov.uk) and even submitting the briefest response on Q20 and 21 would be of real benefit.

If you're not the right person in your organisation to deal with this please forward the e-mail.

Thanks

Bob

**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.

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 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.
- 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?**

LLST views 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.

# Charles Russell LLP

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

**RESPONSE TO THE CONSULTATION**

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**INTRODUCTION**

Charles Russell LLP welcomes the opportunity to respond to the BIS consultation on private actions in competition law, which was published for consultation on 24 April 2012.

Please note that the comments in this response represent the views of Charles Russell LLP and do not represent the views of our clients. As will be seen, we have limited our comments to particular questions.

For any further information in relation to these comments, please contact Paul Stone, Head of Competition and Regulation.

**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?**

These would seem to be sensible steps and reflect the growing expertise of the CAT in hearing private actions.

**Q.9 THE GOVERNMENT SEEKS YOUR VIEWS ON HOW WELL THE CURRENT COLLECTIVE ACTION REGIME IS WORKING AND WHETHER IT SHOULD BE EXTENDED AND STRENGTHENED.**

**Q.10 THE GOVERNMENT SEEKS YOUR VIEWS ON WHETHER THE PROPOSED POLICY OBJECTIVES FOR EXTENDING COLLECTIVE ACTIONS, TAKING INTO ACCOUNT REDRESS, DETERRENCE AND THE NEED FOR A BALANCED SYSTEM, ARE CORRECT.**

**Q.11 SHOULD THE RIGHT TO BRING COLLECTIVE ACTIONS FOR BREACHES OF COMPETITION LAW BE GRANTED EQUALLY TO BUSINESSES AND CONSUMERS?**

We do not see a strong case for changing the current regime at this time. Although there has been only one collective consumer action to date, we consider that the general competition law regime in the UK still needs further time to bed down before extending the collective action regime. In particular, as there has been only one case to date, it would be useful to see and assess at least one further case under the current regime in order to have a better understanding of the arguments for change.

As most private actions have been brought by businesses – and there appear to be an increasing number of such cases – there would not seem to be a strong case at this time for extending the right to bring collective actions to businesses.

**Q.13 SHOULD COLLECTIVE ACTIONS BE ALLOWED IN STAND-ALONE AS WELL AS IN FOLLOW-ON CASES?**

Again, for the reasons above we do not see a strong case for this change at this time.

**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.**

Again, for the reasons above we do not see a strong case for this change at this time. The potential danger of making changes of this nature is that collective actions become too easy to bring, which gives rise to the risk of spurious litigation and the resulting costs for business that are the targets for such claims.

**Charles Russell LLP**

**20 June 2012**

# Chartered Institute of Legal Executives





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

**A RESPONSE BY  
THE CHARTERED INSTITUTE  
OF LEGAL EXECUTIVES**

**DATE: July 2012**

1. This response represents the views of The Chartered Institute of Legal Executives (CILEx), an Approved Regulator under the *Legal Services Act 2007 (the 2007 Act)*.
2. CILEx promotes proper standards of conduct and behaviour among members of CILEx. We ensure they are competent and trusted legal practitioners, fully aware of their obligations to clients, colleagues, the courts and the public. We help good practitioners stay good and continuously improve throughout their careers. We ensure the public know the quality of work Chartered Legal Executives can provide.
3. CILEx engages in the process of policy and law reform to ensure adequate regard is given to the interests of the profession and in the public interest. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform discourse relating to justice issues.
4. As it contributes to policy and law reform, CILEx endeavours to ensure adequate regard is given to human rights and equality considerations and to the need to ensure justice is accessible for those who seek it. Where CILEx identifies a matter of public interest which presents a case for reform it will raise awareness of this within Government and advocate for reform.

### **Executive Summary**

5. The collective action regime as it currently stands as set out in the Competition Act 1998 (The 1998 Act) does not adequately provide redress for consumers and businesses.
6. A generic collective action should be introduced. Individual and discrete collective actions could also properly be introduced in the wider civil context. For example before the Competition Appeal Tribunal (CAT) or the

Employment Tribunal to complement the generic civil collective action. This is consistent with the recommendations by the Civil Justice Council<sup>1</sup>.

7. The right of redress to breaches of competition law should, as a matter of parity, be granted to consumers and businesses.
8. Collective actions should be permitted in stand-alone cases in addition to follow on cases.
9. Given the difficulty of generating sufficient named claimants on a claim form, CILEx would recommend an opt-out regime under the direction of genuine representative bodies.
10. In recommending an opt out scheme, any residue of damages should be distributed to a named organisation. To this end, we are of the opinion that the Access To Justice Foundation is the most appropriate potential recipient of unclaimed sums.

## **The Proposals**

11. The current collective actions regime under the 1998 Act is limited in the sense that the current scheme does not allow the following:
  - Power for representative follow-on actions for damages on behalf of businesses.
  - Nor are there powers for representative bodies to bring stand-alone actions to establish a competition law infringement on behalf of either consumers or businesses.
  - The capacity to bring stand-alone actions for infringement/damages directly before the CAT.

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<sup>1</sup> **Improving Access to Justice through Collective Actions” Developing a More Efficient and Effective Procedure for Collective Actions. Recommendations to the Lord Chancellor CJC 2008**

12. Given the above, access to justice is being undermined to both consumers and businesses. We therefore support the proposals to strengthen the regime by (i) extending the types of cases that can be brought; and (ii) making it easier to bring such cases.
13. CILEx believes a generic collective action should be introduced, as well as individual and discrete collective action regimes in other specialist tribunals, such as the CAT. This is consistent with a recent recommendation by the Civil Justice Council (CJC)<sup>2</sup>. In making these recommendations, we understand that the CJC took into account issues which it identified would be of concern to consumers and businesses, including unmeritorious claims (particularly those brought solely to extract a settlement).
14. In order to bring parity to the regime, CILEx has no objection in allowing collective actions to be brought on behalf of businesses as well as consumers. We also believe that this would raise the deterrence effect of the UK competition system.
15. For the reasons given in the consultation, and the difficulty of generating enough named claimants on a claim form, CILEx would recommend an out-out regime under the direction of genuine representative bodies. This could, for example, be by way of a prescribed list of representative bodies like consumer groups, Liberty etc. or by certification by the tribunal. Of course, even under an opt-out regime, in the majority of cases the class members will 'have to put their feet on the sticky paper' and actively seek to establish individual entitlement to monetary recovery in the event that the common issues are decided in the class's favour, or the action is settled. The potential to bring such an action should not be determined by a finding of infringement by, for example, the Office of Fair Trading, but should be allowed on a stand-alone basis and determined by the merits of a particular case.

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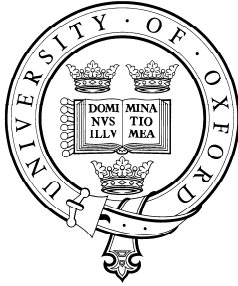
<sup>2</sup> Ibid

16. In recommending an opt out scheme, any residue of damages should be distributed to a named organisation. CILEx has considered the other options, but for the reasons below we would recommend the Access To Justice Council as the most suitable recipient of residue funds from unclaimed damages.

- Avoids the problems associated with trying to find a suitable recipient for each case, and the associated lobbying of judges and potential satellite litigation.
- Even if the court considers a recipient may be suitable for that case, the court cannot be fully sighted on how that decision fits into the national picture and whether it is the most strategic use of those funds.
- The single recipient would receive and use the funds solely in the public interest, acting independently from the parties, their lawyers and the litigation.
- Achieves a full deterrent effect against anti-competitive companies. They have to compensate for the total amount of harm the court decided was caused by their illegal behaviour, regardless of the number of individuals that come forward to collect their damages.
- Provides legal certainty for all parties and the court, before and during litigation.
- Administratively simple, which may save time and cost for the parties and the court.

17. The Access To Justice Foundation supports access to justice across the entire legal system and as the consultation paper rightly mentioned the Foundation is already a charity that receives pro-bono legal costs under s194 of the Legal Services Act 2007. Further, the Jackson Review of Civil Costs also recommended the charity as a beneficiary of unallocated funds after collective actions.

# **Christopher Hodges (University of Oxford)**



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**Response to Consultation on  
*Private Actions in Competition Law: A Consultation on Options for Reform*  
(Department for Business Innovation and Skills, 2012).<sup>1</sup>**

Professor Christopher Hodges\*  
July 2012

**A. GENERAL ISSUES**

I have no general problem with the proposal to move competition cases to the CAT and enhance its rules, so do not comment on that aspect.

It is axiomatic that redress must be paid following infringement of a right that leads to damage. However, I have a series of fundamental problems with the proposed approach in relation to delivering redress by private collective means. I do not think that the proposed technique will work, and I believe that it is a very poor policy that will do considerable harm and little good. The reasons for my view are numerous, summarized below. Overall, I believe that the proposals on private redress would be extremely bad policy, and a major wasted opportunity to adopt other options that would be far better policy.

**1. The proposals fail to support economic recovery**

**The government's proposals would not succeed in delivering the primary objective of contributing to economic recovery. Instead, they would largely do the opposite, promoting an increase in expensive litigation. There are three main reasons:**

- a. The theoretical benefits of these proposals are minimal, as predicted by BIS.**
- b. The costs would far exceed the benefits: the proposals would introduce what is already being perceived by international businesses as a highly unattractive element of litigation risk into the UK's commercial environment and legal system, which would hinder investment in the UK.**
- c. In any event, they would fail to work in practice.**

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<sup>1</sup> <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf>

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The level of economic impact for the proposals that is estimated by BIS' modelling is low and unimpressive. The modelling estimates maybe one or fewer extra stand alone cases a year, one or two extra follow on cases, with only modest levels of damages. The low level of damages raises questions about the financial viability of such cases, comparing damages and costs (see below). In any event, the assumed benefits are hugely outweighed by the potential adverse cost of litigation to the economy and to the negative effect on the economy generally, flowing from the attitude of international businesses towards inward investment into the U.K.

Further, the various approaches adopted in the Impact Assessment raise a series of concerns.<sup>2</sup> The document starts by considering the possible impact of transferring High Court (HC) competition cases to the CAT (option b, para 74 on). This records that the current number of cases heard by the HC and CAT combined is 10.25 cases per year (table 4 on page 19).

The Impact Assessment then adopts the assumption that after the reforms the number of cases will increase by 25%. This expected increase in the number of cases is expected to mean that post-reforms the number of cases will be 12.8125 annually (that is, 10.25 cases x 1.25). Extraordinarily, the basis of this assumption is solely the view of "one leading legal expert" (see para 77).

For some reason that is unexplained, the Impact Assessment then rounds up this number from 12.8125 to 13 cases post reforms (footnote 30 on page 18). (Rounding up has no rational basis and distorts outcomes. If the Impact Assessment did not 'round' the numbers, the total increase in cases post reform would be 2.56 cases annually; of which 1.81 would be stand-alone cases and 0.75 would be follow on cases.)

It also assumes, without citing substantiation, that the number of stand alone and follow on cases will both increase equally (by 25%) after the reforms.

These assumptions lead to the estimation that the reforms would lead to (only) *1 extra follow on case, and 1.75 extra stand alone cases* a year (table 7, page 20). This distribution is arrived at on the basis that:

- the expected number of stand-alone cases after reforms is 9.06 ( $=7.25 \times 1.25$ ) which is then rounded down to 9 cases by BIS. This implies an increase of 1.75 cases (i.e.: 9 - 7.25) (table 7, page 20);
- the expected number of follow on cases after the reforms is 3.75 ( $=3 \times 1.25$ ) which is rounded up to 4 cases by BIS. This implies an increase of 1 case per year (i.e: 4 - 3).

There are, therefore, several methodological issues with BIS' approach. First, the source of the overall growth assumption (the 25% expected increase in cases) is unsubstantiated and highly speculative. Secondly, the assumed 25% growth rate has simply been applied equally across the two types of cases. Thirdly, there is the rounding up.

Later in the document (commencing at para 196) there is an estimation of the impact of introducing opt-out collective actions (option e). That is based on figures of cases from Canada, Australia and Portugal. The analysis concludes that there would be between zero and 0.6 extra stand alone cartel cases in U.K. a year (table 13), and that the best estimate (the Canadian position, for which the data is thin, but not as miniscule as the figures for Australia

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<sup>2</sup> I am indebted to Dr Chris Decker for the following analysis.



and Portugal) would be 0.4 successful cases a year, with total annual damages paid estimated to be £16.9m. In other words, there would be *one extra stand alone case every 2.5 years*, with *damages totalling £4.2m*.

That analysis is based on the assumption that the number of stand alone cases in U.K. would be 25%, since 25% of Canadian cases are stand alone (para 193). Yet the values of costs and damages vary between the two jurisdictions, so the assumption is entirely speculative.

Overall, these figures fail to satisfy the government's policy of only legislating where there is clear evidence of need.<sup>3</sup>

The various problems with the Impact Assessment give rise to the potential prospect of judicial review if the government do not make efforts to explore some of these critical assumptions at the necessary level of detail. The basic point is there is a minimum standard of proof that has to be satisfied with Impact Assessments.<sup>4</sup> Basing the analysis on "one person's view" appears to raise a strong presumption that that standard has not been satisfied. Similarly, simply adopting values from Canada without properly accounting for the substantive differences in the two regimes is poor administrative practice and arguably also open to challenge on this basis.

Further, the proposals fail to explain why:

- There would be any significant increase in whistle-blowing.
- There would be any significant increase in 'stand-alone' enforcement actions.
- The actions that would be likely to be brought would not be limited to 'follow-on' actions after determinations of infringement by a public authority. Hence, why there would be any increase in discovery of infringements and associated deterrence.

I suggest that none of these effects would occur.

## **2. A private action regime is far too slow, costly and uncertain in delivering compensation for dispersed losses. It does not serve claimants' interests.**

Theoretical comparisons of public and private enforcement invariably only compare calculations on the supposed costs of those two methods of enforcement—but *omit* the key

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<sup>3</sup> 'Recurrent weaknesses in departments' assessments of costs and benefits when designing regulation': *Delivering regulatory reform* Report by the Comptroller and Auditor General (National Audit Office, 2011), available at <http://www.official-documents.gov.uk/document/hc1011/hc07/0758/0758.asp>

<sup>4</sup> The judicial review (JR) tests established by Lord Diplock in *Tameside* for administrative decision makers are: (1) did they ask the right questions; and (2) did they take reasonable steps to acquaint themselves with the relevant information in order to answer the question correctly: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at para 1065B. The CAT has also endorsed this general JR principle when conducting judicial reviews. In its PPI decision, the CAT specifically stated that administrative bodies have a duty to ask the right questions and make adequate enquiries, citing the requirement established by Lord Diplock in *Tameside* that: "the question for the Court is, did the [decision maker] ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly". *Barclays Bank v Competition Commission* [2009] CAT 27 at para 24.

criteria of *duration* and the practical realities of *costs* to claimants and their funders in this jurisdiction.<sup>5</sup>

All court processes take time and cost money. Collective procedures, even follow-on cases, take a long time and cost a lot of money. Consumers and SMEs are kept out of their money for a long time – often at least 5 years after an infringement decision by a public authority.

The introduction of collective private actions would *not* result in the benefit that is claimed in some theoretical writing of ‘judicial economy’ and hence efficiency, but would merely delay payment of compensation unnecessarily for several years. There is clear evidence that collective actions give businesses the opportunity to fight a war of attrition for a long time. Large companies can afford to spend large sums in defending collective cases for years, meanwhile reserving against the ultimate cost. Discussions with companies indicate that that is exactly how they would behave if faced solely by a litigation threat, after any fines have been dealt with.

Defendants have a predictable incentive in defending claims for some time: to seek to reach a lower settlement than ‘full compensation’. In economic theory, ‘full compensation’ is discounted by part of the costs the claimants would have to spend and by the risks of litigation, but in reality the sum agreed is reached by negotiation rather than empirical assessment of discounted loss.

Hence, litigation settlements bear little relationship to the level of illicit gain or loss, nor to the seriousness of any unlawful behaviour, or recidivism, but simply to the expediences of commercial negotiation. Hence, private ‘sanctions’ bear little relationship to public sanctions in terms of proportionality or justice.

The overall economic result would be that expensive transactional costs of litigation would be incurred by both claimants’ funders and businesses, and reduce damages paid to victims: neither of those aspects assists economic health. Litigation funders currently take 30 to 40% of victims’ recoveries, usually *net*, after legal and financing costs.

**3. Funders only fund B2B follow-on cases and not stand-alone cases in Europe; and do not fund B2C or SME cases. That situation would only change if reforms in funding and costs rules were introduced that are currently regarded as absolutely unacceptable.**

The government has put forward no evidence that more stand-alone cases would come to light absent the public leniency programme (in other words, the authorities would inevitably be involved, so the starting point is that cases would not be stand alone but follow on), nor that stand alone cases would be funded, given the risks and costs.

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<sup>5</sup> The proposals cite RP McAfee, HM Mialon and SH Mialon, ‘Private v Public Antitrust Enforcement: A Strategic Analysis’, *Journal of Public Economics* 92 (2008) 1863–1875. That paper completely omits consideration of duration and the calculations that it models are based on a cost system that excludes the loser pays rule. Further, the starting assumptions of the paper are unsupported and highly questionable: it asserts that ‘private enforcers have a greater incentive to take antitrust action than public enforcers’ and private enforcers’ ‘costs of detecting possible violations and gathering initial evidence are lower [than public enforcers]’.

The government states that it hopes to ‘create a framework whereby individuals and businesses can represent their own interests’ (Impact Assessment, para 30). That is simply unrealistic in most cases. The Impact Assessment accepts that the minimum threshold of viability for bringing a case is damages of £500,000, and more like £3m (paras 67 and 85), given that costs per case are between £6m and £9m for stand alone cases and between £3m and £5.4m for follow on cases (table 5, p 19). It cites a survey finding that half of those who thought they had been a victim of anti-competitive behaviour did not consider bringing a legal claim because the expected costs outweighed the benefits (para 156<sup>6</sup>). The government’s assumption that a private right of action would solve the problem is misguided. Private litigation is no answer for cases where individual and/or total damage is less than the viability threshold.<sup>7</sup>

In order for any collective action to be sufficiently attractive to those who contemplate funding it, there need to be sufficient financial incentives for it to be worth the investment in costs. That is well established by academic research:<sup>8</sup> the clearest example is the U.S. class action system, which has no barriers to litigation and major incentives (no loser pays rule, widespread one-way cost shifting rules, no investment by claimants, huge incentives for intermediaries through fees and high damages (triple damages in antitrust)).<sup>9</sup>

If those incentives are not in place, European and other experience shows that claimants and funders (lawyers or other investors) will only be attracted to cases that have very high chances of success, and very high profit ratios. That explains why they clearly select follow-on actions rather than stand-alone actions, and large B2B cases, never small dispersed loss cases (consumers or SMEs).

If any funder is to invest in a case, the risk-benefit ratio needs to be attractive. Follow-on cases are inherently considerably more attractive investments than stand-alone cases, since they involve far lower risk. The returns also need to be attractive. This means that a funder should be able to earn a large premium and ideally be insulated from an adverse costs risk. The legal system in U.S.A. provides both those features, and others, but unregulated contingency fees and no ‘loser pays’ rule are regarded in this jurisdiction, and generally across Europe, as introducing unacceptable risks. Hence, the incentives for lawyers to invest in large collective cases are generally unattractive. Instead, ‘third party’ litigation funders have emerged to fund competition damages cases.

Litigation funders pick and choose the cases they invest in, on the basis of maximising their profit, and achieving returns within a reasonable time. Thus, all cases to date have been follow-on cases, since the risk is low: a finding of infringement has already been made, and liability is ultimately not in issue. Why should it be assumed that *any* external funder, let alone consumers or SMEs (individually or collectively) would accept the risk of a stand-alone case, involving potentially significant expenditure on investigation with an inherently uncertain outcome?

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<sup>6</sup> Citing *The deterrent effect of competition enforcement by the OFT* (OFT, 2007).

<sup>7</sup> See the *Cardiff Bus* case noted below. No individual litigant or independent funder would rationally invest in a case costing several millions for damages of £34,000 or even £94,000. A different approach from private litigation is needed for such cases: the OFT could have solved the problem itself but has opted out.

<sup>8</sup> See citations at C Hodges, ‘Objectives, Mechanisms and Policy Choices in Collective Enforcement and Redress’ in J Steele and W van Boom (eds), *Mass Justice* (Edward Elgar, 2011).

<sup>9</sup> For a recent review of the attitudes of Litigation Funders see: C Hodges, J Peysner and A Nurse, *Litigation Funding. Status and Issues* (Centre for Socio-Legal Studies, Oxford and Lincoln University, 2012), at <http://www.csls.ox.ac.uk/documents/ReportLitigationFunding.pdf>

Given the above parameters on funding and costs, the following realities apply:

1. Consumers and SMEs cannot afford to finance *individual* litigation. An assumption that they would be able collectively to finance both the cost and the risk<sup>10</sup> of *collective* litigation is not supported by empirical evidence from litigation behaviour.
2. Hence, funding for collective cases would have to come either from third party litigation funders or from lawyers acting *pro bono*. The litigation funding market for funding follow-on cartel cases has grown quickly in Europe, but operates on selective criteria, as discussed below.<sup>11</sup> Some lawyers currently operate on a *pro bono* basis, but supply is limited and will shrink as litigation funding grows, as lawyers transfer the risk to third parties.
3. The empirical evidence is that neither lawyers nor independent litigation funders find it attractive to finance consumer or SME cases, since they are too costly and cumbersome. Cases that involve small individual losses, especially with a large pool of dispersed claimants, are just not attractive to funders. The administration costs and complexity are too great. There is no likelihood that this situation will change.
4. Thus, funders in Europe have clearly opted to fund B2B collective cases instead of consumer and SME cases. The simple reasons are that B2B cases involve large individual damages, are sufficiently cost-effective, and offer far more attractive returns than could be obtained from C2B or SME cases.<sup>12</sup>
5. Any other funder that might emerge, such as the Access to Justice Foundation, would be at risk of being wiped out by adverse costs if only a small percentage of cases that it funded were lost. It is that reality that has prevented a Conditional Legal Aid Fund (CLAF or related SLAS) from being created, despite much talk over decades.

Whilst ADR can shorten the duration of the process and save costs, ADR cannot be made compulsory and the incentives for defendants to enter ADR are currently not strong enough.

As discussed below, in contrast, the incentive to negotiate a deal when faced with a public authority that has power to impose sanctions as well as to require compensation to be paid is far greater and more effective. The incentive is particularly strong if the company is able to seek a lower sanction in return for paying compensation.

## **6. There is wide consensus that safeguards are needed to guard against abuse in collective litigation**

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<sup>10</sup> The risk of adverse costs is omitted from all U.S. analyses, such as that of McAfee *et al* quoted in the Consultation Paper, since a cost-shifting rule does not apply in U.S.A. But it does apply almost everywhere else across the world, and in U.K. jurisdictions.

<sup>11</sup> C Hodges, J Peysner and A Nurse, *Litigation Funding. Status and Issues* (Centre for Socio-Legal Studies, Oxford and Lincoln Universities, 2012), at <http://www.cslls.ox.ac.uk/documents/ReportLitigationFunding.pdf>.

<sup>12</sup> For example, chemical cartel cases in various EU jurisdictions are funded by Brussels-based CDC, and air freight cartel cases are funded by Dublin-based (and Australian-funded) Claims Funding International: see C Hodges, J Peysner and A Nurse, *Litigation Funding. Status and Issues* (Centre for Socio-Legal Studies, Oxford and Lincoln Universities, 2012).

There have been many statements by European and UK ministers and civil servants that collective actions give rise to a risk of abuse. The reasons for this lie in a ‘toxic cocktail’ of features whose initial purpose is to incentivise private funders of litigation (no or limited loser pays, contingency fees, one way cost shifting, high damages, collective action procedures, assumed loss rules, and other features). The abuse problems arise where the financial incentives for intermediaries are sufficiently large as to produce a risk of behaviour by funders or lawyers is unacceptable, and to make it cheaper for defendants to settle cases of lesser merits at an overvalue.

In view of the risk of a ‘toxic cocktail’ of collective litigation, with unacceptable abuse, there is a clear consensus that safeguards would be necessary in collective actions: statements to that effect have been made by the European Commission,<sup>13</sup> the European Parliament,<sup>14</sup> consumers<sup>15</sup> and business.<sup>16</sup>

The UK government has also clearly supported the need for balanced safeguards to guard against the risks of abuse and cases with poor merits, and has declined to consider any collective action mechanism save for competition damages cases.<sup>17</sup> It was concern about the risks of abuse that led the UK government to drop<sup>18</sup> proposals<sup>19</sup> to introduce a representative action procedure in 2001.<sup>20</sup>

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<sup>13</sup> Amongst many statements to this effect by EU leaders, see European Commission DG SANCO, MEMO/08/741, 2009, p 4: ‘The U.S. style class action is not envisaged. EU legal systems are very different from the U.S. legal system which is the result of a ‘toxic cocktail’—a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures)... This combination of elements – “toxic cocktail” – should not be introduced in Europe. Different effective safeguards including, loser pays principles, the judge’s discretion to exclude unmeritorious claims, and accredited associations which are authorised to take cases on behalf of consumers, are built into existing national collective redress schemes in Europe.’

<sup>14</sup> European Parliament resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI)), at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0021&language=EN&ring=A7-2012-0012>, which stated: ‘(Notes the efforts made by the U.S. Supreme Court to limit frivolous litigation and abuse of the US class action system... stresses that Europe must refrain from introducing a U.S.-style class action system or any system which does not respect European legal traditions ... 20. Reiterates that safeguards must be put in place within the horizontal instrument in order to avoid unmeritorious claims and misuse of collective redress, so as to guarantee fair court proceedings, and stresses that such safeguards must cover, inter alia, the following points: Standing ..., full compensation for actual damage ..., access to evidence ..., loser pays principle ..., No third party funding.’

<sup>15</sup> See *Collective Redress. Where & how it works* (BEUC, 2012): ‘BEUC has long advocated that any European system should have carefully inbuilt safeguards to guarantee only meritorious cases are considered and exorbitant damages are avoided... To begin with, cases must prove they are well-founded before being fully heard. In court, a judge—not a jury—will hear the facts and evaluate compensation, thereby deciding cases strictly in accordance with the law. Thirdly, punitive damages would be unavailable. This prevents excessive settlements and victims would be compensated for the actual loss suffered.’

<sup>16</sup> See *EJF Key Messages*, European Justice Forum, 23 February 2009, at <http://europeanjusticeforum.org/storage/EJF%20KEY%20MESSAGES.pdf>: ‘If collective litigation is unavoidable, there must be safeguards to avoid abuse’.

<sup>17</sup> Statement of policy by E Knight, Ministry of Justice, at the Danish Presidency Collective Actions Conference, Copenhagen, March 2012.

<sup>18</sup> *Consultation Response: Representative Claims: Proposed New Procedures* (Lord Chancellor’s Department, 2002).

<sup>19</sup> *Representative Claims: Proposed New Procedures, A Consultation Paper* (Lord Chancellor’s Department, 2001).

<sup>20</sup> See C Hodges, ‘From Class Actions to Collective Redress: A Revolution in Approach to Compensation’ (2009) *Civil Justice Quarterly* 41, at 50.

In July 2009 the UK government firmly rejected a proposal by the Civil Justice Council (CJC) that a generic class action rule should be introduced,<sup>21</sup> and stated that any changes should be on a sector-by-sector approach and involve strenuous review of the ADR and regulatory options within each sector.<sup>22</sup> The government criticised the CJC's failure to produce empirical evidence of need at that stage.<sup>23</sup> It expressed clear preference for settlement and regulatory-oversight approaches to dispute resolution over litigation-based approaches.

The Government's Response to the CJC included the following points:<sup>24</sup>

- Rights of action should be introduced only where there is evidence of need and following an assessment of economic and other impacts and consideration of alternative approaches.
- In particular, regulatory options should be considered before introducing court based options. For example, in some sectors it might be appropriate to give regulators power to order the payment of compensation ('regulation plus'). This has since been introduced with considerable success in various sectors including financial services, communications, utilities, but the technique does not seem to have been understood by the competition enforcement authority.
- The existence of effective ADR mechanisms in any collective action procedure will be crucial. So too will strong case management by the court, including merits and cost-benefit criteria.
- The 'loser pays' principle for costs should be maintained to help deter unmeritorious litigation.
- The Government would develop a framework document setting out the issues to be addressed when introducing a right of collective action, with options and, where appropriate, a preferred approach. This will act as a 'toolkit' for policy makers and legislators. However, no such framework document has been published.

These points seem largely to have been ignored in the proposals under review.

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<sup>21</sup> "Improving Access to Justice through Collective Actions" *Developing a More Efficient and Effective Procedure for Collective Actions. Final Report. A Series of Recommendations to the Lord Chancellor* (Civil Justice Council, 2008) at <http://www.civiljusticecouncil.gov.uk/index.htm>.

<sup>22</sup> *UK Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'*, Ministry of Justice, July 2009, at <http://www.justice.gov.uk/about/docs/government-response-cjc-collective-actions.pdf>. The key to CJC's approach is that it was originally designed to attract collective cases to be resolved in the UK's courts, and in the belief that that would be good for the UK judicial system and London legal services market, and that business would welcome having an efficient jurisdiction in UK. The CJC failed to recognise that neither business nor government in fact welcomed the prospect of a potentially large increase in major litigation, especially the risk of generating claims of poor merit and high transactional cost. An economic analysis of the proposals would be that it was an attempt by the intermediaries of a particular mechanism to capture exclusivity for that mechanism, so as to seek rents from it. But the government took a wider view of the available pathways and their respective merits, and chose differently.

<sup>23</sup> The CJC had relied on a study by Professor Rachael Mulheron, which concluded that there was overwhelming evidence of need, but which the Ministry of Justice considered related essentially to foreign situations, and evidence was not produced of the English and Welsh landscape of non-court mechanisms and regulatory mechanisms.

<sup>24</sup> This and the above paragraph are taken from C Hodges, 'Collective Redress in Europe: The New Model' (2010) *Civil Justice Quarterly* 370.



## **7. UK's introduction of a series of measures that increase the risk of abusive litigation, risking driving business investment abroad, and damaging economic recovery**

European governments have been sufficiently concerned about the risks of abuse for two reasons. Firstly, abuse would damage confidence in the operation of the legal system through producing unjust outcomes. Secondly, the international business community is highly sensitised to the risk that a particular jurisdiction may become an unattractive business venue because of the risk of high and unjustified litigation costs.

The U.K. government is well aware of the second risk. It has claimed consistently that it wishes the U.K. to be 'open for business' in order to stimulate growth so as to recover from the economic crisis.<sup>25</sup> A recent statement was:

'Growing our economy out of a period of acute crisis is the most pressing issue for this Government. We want to make sure the right conditions are in place to encourage investment and exports, boost enterprise, support green growth and build a responsible business culture. The measures in the Enterprise and Regulatory Reform Bill will help make Britain one of the most enterprise-friendly countries in the world.'<sup>26</sup>

Yet at the same time the government has taken a series of decisions in relation to litigation that increase the risk of litigation, and have been interpreted by international businesses that the UK is becoming a risky and unfriendly environment:<sup>27</sup>

- a. Extending contingency fees from Employment Tribunals to *all types* of claims (as 'Damages Based Agreements').<sup>28</sup>
- b. Introducing Qualified One Way Cost Shifting (QOCS) for personal injury cases.<sup>29</sup>
- c. Failing to regulate private 'Third Party' Litigation Funders.
- d. Proposing to introduce a collective action procedure—with an opt-out mechanism.<sup>30</sup>

Each of these measures constitutes one of the elements that has previously been widely identified as a significant component of the 'toxic cocktail'. Taken together, these reforms

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<sup>25</sup> *The Plan for Growth* (HM Treasury and Department for Business Innovation & Skills, 2011); *Business Plan 2011-2015* (Department for Business Innovation & Skills, 2011). *Better Choices: Better Deals. Consumers Powering Growth*. (Department for Business Innovation & Skills and Cabinet Office Behavioural Insights team, 2011); *A Competition Regime for Growth: A Consultation on Options for Reform*, (Department for Business Innovation & Skills, 2011).

<sup>26</sup> Business Secretary Vince Cable, press release launching the Enterprise and Regulatory Reform Bill, May 2012.

<sup>27</sup> Note publications such as *Plan for Growth: Promoting the UK's Legal Services Sector* (Ministry of Justice, September 2011).

<sup>28</sup> The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 45, amending s 58AA of the Courts and Legal Services Act 1990. A CJC Working Party is currently considering whether to impose a cap on the 'success fee' percentage in commercial cases; it has already been decided there will be a cap of 25% in personal injury cases: see the CJC's press release, which curiously refers simply to DBAs in 'civil litigation', without mention of it being limited to personal injury cases alone:  
<http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/Other%20papers/cjc-press-rel-wp-contingency-fees.pdf>

<sup>29</sup> The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 45.

<sup>30</sup> *Private Actions in Competition Law: A Consultation on Options for Reform* (Department for Business Innovation & Skills, 2012). Opposition to this proposal was voiced by business on the same day that the proposals were published: press release, Confederation of British Industry, 22 May 2012.

will clearly lead to an increase in litigation, which will inevitably include a significantly increased risk of abuse. The extent to which the U.K. stands out from its competitors in these respects is clear. No other European state has gone so far in promoting litigation. The government should not be surprised that its policies have given rise to serious alarm in the business community. The U.K. now stands out as a jurisdiction that is ‘open for litigation’ and not ‘open for business’. The adverse implications for growth of the economy, and national economic recovery, deserve wide-spread and serious consideration.

In relation to competition claims, the risk primarily relates to increasing stand-alone litigation. Follow-on litigation inherently includes a safeguard that the merits of a case have been established by the regulatory authority and/or a court. Stacking the balance of power in favour of follow-on claimants increases the possible speed and quantum of settlement. But in stand-alone cases, stacking the economic incentives in favour of claimants and their funders increases the risk that cases will be settled by defendants at an over-value compared with their merits (producing over-deterrence).

The scale of possible disinvestment in the U.K. that could be produced by even a minor change in the attitude of business towards this country as a jurisdiction in which the cost of doing business includes a litigation premium, especially on unjustified cases, far outweighs the possible benefits identified by the government in its Impact Assessment, which are at best modest in scale. Adverse comments emanated from abroad as soon as this Consultation was issued, and have continued with mounting incredulity.

The perception that the litigation environment is now unfriendly and unjust is built on the risk that the combination of factors such as contingency fees and an opt-out rule would attract entrepreneurial lawyers and funders into launching large *stand-alone* collective actions in which the cost of settling would outweigh the cost of defending, and the result would be abusive ‘blackmail settlements’ that have poor underlying merits.

## **8. Problems with an opt-out mechanism: creating an exception to the European consensus against opt-out, and technical inoperability with litigation funding**

It is theoretically tempting for the government to propose an opt-out rule, in order to try to deliver redress to as many class members as possible, and to maximise deterrence. However, the opt-out approach in private actions has serious defects in practice.

First, in proposing an opt-out rule, the U.K. would be introducing one of the key safeguards that are widely considered essential to guard against abuse.

There is clear consensus across European Member States against the opt-out principle.<sup>31</sup> The reason is that opt-out is rightly regarded as one of the major elements that cause major abuse in collective litigation, notable blackmail settlements that have no merit but impose major cost.

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<sup>31</sup> The European Parliament’s resolution of 2 February 2012 stated: ‘a collective redress system where the victims are not identified before the judgment is delivered must be rejected on the grounds that it is contrary to many Member States’ legal orders and violates the rights of any victims who might participate in the procedure unknowingly and yet be bound by the court’s decision’.



If it were to adopt an opt-out rule, the U.K. would be taking a major and visible step out of line with the EU consensus. As noted above, the consequence would be that the U.K. would be seen by business as an unattractive location for investment, on the basis that it would risk being tarred as a venue for speculative forum shopping litigation that could then be enforced throughout Europe. That might be good for lawyers, but would undermine financial services and other industrial sectors that are regarded as strategic priorities for the U.K. to try to retain.

Secondly, the opt-out rule sets a dangerous precedent nationally. It is just not convincing for the government to say ‘Don’t worry, we will limit opt-out to competition cases in the CAT’. That may be technically correct, but the reality is that if any Member State were to introduce an opt-out rule for any type of collective action, it would be regarded as having major symbolic impact. It would be seen by many as a hugely significant precedent, both nationally and across the EU, for everyone to follow suit in relation to collective actions for all types of cases, not just competition. The introduction of an opt-out rule by the UK would have impact across the world, and any technical limitation would be of little impact.

Thirdly, there are practical and technical reasons why an opt-out rule would not succeed in achieving the stated objective. Experience in Australia has clearly shown that the opt-out class action just does not work for litigation funders. The Australian Full Federal Court had to reverse the statutory opt-out rule and permit an opt-in approach in order to make the arrangements work for litigation funders, since there would otherwise have been a ‘free rider’ problem of claimants who did not sign up with the funders, which would have made the action commercially unworkable by them.<sup>32</sup> Further, evidence from U.S.A. is that where a common settlement fund is agreed as part of a settlement, the percentage of consumers who opt in (to what began as an opt out class) to collect their shares is low<sup>33</sup>

Similarly, it is not possible to combine an opt-out regime with the English ‘loser pays’ rule unless a single representative can be liable for the defendants’ costs. The loser pays rule is a crucial safeguard against abuse and injustice. It is theoretically possible for a single representative to assume the adverse costs liability, but that representative must have appropriate assets. Few individual class members would assume such a risk. An intermediary such as a funder, lawyer or insurer might in theory assume the risk, but would only do so if the chances of success and potential returns were high. Such arrangements would probably only apply for follow-on claims, involving large individual losses (not mass dispersed losses), in B2B cases (not consumer or SME cases), and where the victims’ damages were significantly reduced by the intermediary’s fees. But as the Australian experience shows, an opt-out regime is unworkable for independent funders. By contrast, in an opt-in regime, all class members would sign up to a funding agreement and (at least in theory). But in practice, a funder will require extensive sign-up of class membership so as to make its commercial situation sufficiently attractive and watertight.

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<sup>32</sup> *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275. See M Legg, E Park, N Turner and L Travers, ‘The Rise and Regulation of Litigation Funding in Australia’ (2011) 38.4 *North Kentucky Law Review* 625.

<sup>33</sup> NM Pace, SJ Carroll, I Vogelsang and L Zakaras, *Insurance Class Actions in the United States* (RAND Institute for Civil Justice, 2007).

**9. The inevitable policy conundrum of collective actions. Either collective actions risk major abuse and disinvestments, or they actions will not work in delivering more damages because of the ‘Catch 22’ problem.**

There is a clear and unavoidable ‘catch 22’ for proposals that involve a private collective action technique. If acceptable safeguards are put in place to prevent abuse (which are generally thought to include effective loser pays, opt-in, certification of the merits of a case, individual proof of loss, court approval of settlements and other levers), the financial incentives would not be sufficient to attract investment in collective cases. As outlined above, that would especially be true for cases involving small damages, such as for consumers and SMEs. In these circumstances, a private collective action regime would fail to achieve its objectives. The whole point about an effective private enforcement regime is that it has to have high incentives to attract funders. But it is exactly the size of the financial elements and incentives that gives rise to concern about conflicts of interest and the risk of abuse. The higher the incentives, the higher the concern. But unless the incentives are high, there will be no funding. It is a classic ‘catch 22’.<sup>34</sup>

Furthermore, all the evidence shows that collective action procedures that have adequate safeguards against abuse *take a very long time and cost a great deal of money*, partly defeating the purpose of delivering damages where they are due. This means that a responsible approach before proceeding further would be to examine whether other options for delivering redress exist and would be preferable. Other options do exist, that involve far less risk and also offer the promise of delivering redress more swiftly, cheaply and widely than a litigation mechanism. But if those options are to be truly effective, some ‘sacred cows’ that have been held by the OFT need to be put out to grass.

**10. Significantly increasing private enforcement requires reform of the enforcement policy that is based on fines, which has not been addressed in the consultation.**

The current competition enforcement system is moving from a system of fines alone to a system in which damages are expected to be paid in more cases as well as fines. That change leaves the system open to challenges based on the fact that defendants will in future be paying more than before, since they will be subject to both fines and damages. Since fines have historically been set at levels which public policy has deemed sufficient punishment and sufficiently deterrent, defendants will argue that they have manifestly been treated disproportionately and in breach of their human rights.<sup>35</sup>

Other inconsistencies also arise. Sometimes, defendants will pay damages and sometimes they will not. Sometimes, they might pay less than full compensation (wide anecdotal evidence from competition litigators is that this happens often: settlements are commercial deals and bear little scientific relationship to actual losses and merits). If the fines always

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<sup>34</sup> These points are expanded further at C Hodges and R Money-Kyrle, *Safeguards in Collective Actions* (Foundation for Law, Justice and Society, 2012), at [www.fljs.org/ECJSPublications](http://www.fljs.org/ECJSPublications) and in a forthcoming article.

<sup>35</sup> The most relevant provisions are the prohibition of disproportionality of the severity of penalties for criminal offences (art 49) of the Charter of Fundamental Rights of the European Union (2000/C 364/01), but see also the principle of The equality before the law (art 20, non-discrimination (art 21), right to having affairs handled fairly by public authorities (art 41); see further the European Convention on Human Rights, prohibition against discrimination (art 14 and Protocol 12 art1), prohibition on imposing a heavier penalty than the one that was applicable at the time the criminal offence was committed (art 7).

remain set in advance of the damages, that will lead to injustice and unbalanced markets.<sup>36</sup> Sometimes, fines might not be paid at all, but some damages might be paid. The overall effect on rebalancing a competitive market is unpredictable and fortuitous. It would bring the responsible authority into disrepute.

Follow-on actions involve an inherent and avoidable duplication of costs where private enforcement (for damages) unnecessarily follows public enforcement (findings of infringement and imposition of fines).

**11. The attraction of ‘private enforcement’ in the competition world is based on a series of false premises. At the root of the misperception is a preoccupation with ‘deterrence’ as the sole objective of enforcement. Yet enforcement theory and policy in almost every other type of business regulatory context (excluding the closed competition world) has evolved from ‘deterrence alone’ to adopt other more sophisticated—and effective—enforcement theories and policies. If the competition world were able to take a close, objective look at itself, it would see that it is badly in need of an independent review of its theories and approaches.**

**Further, the adoption of other enforcement approaches in other sectors has been accompanied by the adoption of restorative justice as an integral part of public enforcement. In other words, keeping public and private enforcement separate from each other is an old fashioned and inefficient approach, but the European approach is the *converse* of the U.S. private-enforcement-of-public-norms approach. Public agencies that are responsible for enforcement of non-competition law are now achieving payment of restorative compensation very quickly indeed, and at low cost and with great efficiency in terms of public resource and expenditure. Such approaches *avoid* any need for private enforcement in relation to damages. It is time that the new CMA was subject to an independent and objective review in relation to its enforcement policy.**

I will set out full substantiation for these arguments in a forthcoming work, and merely make the following points here:

- a. UK government policy and law includes requirements on regulators that are being adopted by almost all regulators *apart* from those responsible for competition enforcement. The requirements include risk-based and responsive regulation, minimising burdens on business, promoting self-regulation, achieving compliance through education, eliminating financial gain or benefit from non-compliance (restorative justice). The exclusion of competition enforcers from these requirements appears unjustifiable and arguably illegal.<sup>37</sup> The OFT is itself schizophrenic as between enforcement of consumer<sup>38</sup> and competition law.

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<sup>36</sup> For an analysis of various problems see Michael J Frese, ‘Fines and Damages under EU Competition Law- Implications of the Accumulation of Liability’ *World Competition* 34, no 3 (2011): 397-432; and D Geradin, *Discussion Paper. The EU Competition Law Fining System: A Reassessment* (Covington & Burling LLP & Tilburg University, October 2011), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1937582](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937582).

<sup>37</sup> Relevant sources include: The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 63, amending the Powers of Criminal Courts (Sentencing) Act 2000, s 130(1); Hampton, *Reducing administrative burdens: effective inspection and enforcement* (H M Treasury, 2005); See also *Less is More: Reducing Burdens, Improving Outcomes* (Better Regulation Task Force, 2006); HM Treasury, Better Regulation Executive, and Cabinet Office, *Implementing Hampton: from enforcement to compliance*, November 2006; R Macrory,

- b. There is now a considerable body of scholarship and research on regulation and enforcement,<sup>39</sup> none of which has been noted, still less integrated, within the closed world of competition law. The latter remains dominated by theories that are regarded as obsolete in other sectors. An enforcement theory based on deterrence alone is simply discredited by this scholarship. But the competition world has not noticed this.

It may be argued in response that breaches of competition law are different from other regulated regimes. That argument is looking very thin in the light of developing experience and practice. An emphasis on compliance regimes instead of deterrence alone is emerging as not only more effective but also cheaper.

**12. Since there are so many problems with a privately funded private collective action technique for seeking competition damages, that approach should only be introduced as a last option. There are various other options that are far less risky and far more likely to deliver the policy objectives. The government is ignoring the solutions that are available that could avoid all these problems. Hence, the government is wasting a major opportunity to enhance economic recovery.**

What is needed is one or more robust mechanisms to bring about swift and low cost solutions to competition damages cases. The empirical evidence suggests that B2B damages claims are increasingly made and settled. The problem remains small dispersed claims, involving consumers or SMEs. A litigation procedure would not solve that type of case, nor would it significantly increase the number of stand-alone cases. Where a potential case arises involving mass small losses, no evidence has proved that it would be *identified and proved* solely by private actors. If that is correct, the CMA may well need to be involved in investigating, and clarifying whether or not there has been breach.

The techniques that *do* succeed in delivering *fast, cheap and effective* compensation are:

- a. to use the power of a public regulator to require or incentivise companies to make restitution (a public oversight power),
- b. thereby or otherwise, to incentivise companies to use ADR (or other external assistance) to make acceptable proposals for compensation.

ADR techniques and ombudsmen and are spreading across European civil justice and regulatory systems extremely quickly—because they deliver fast, cheap, accessible and

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*Regulatory Justice: making sanctions effective* (HM Treasury, 2006); The Legislative and Regulatory Reform Act 2006; The Legislative and Regulatory Reform (Regulatory Functions) Order 2007, SI 2007/3544; *Regulators' Compliance Code: Statutory Code of Practice for Regulators*, (Department for Business, Enterprise and Regulatory Reform, 2007); the Regulatory Enforcement and Sanctions Act 2007; *Principles for Economic Regulation* (BIS, April 2011).

<sup>38</sup> See *Consumer Law and Business Practice. Drivers of compliance and non-compliance* (Office of Fair Trading, 2010), OFT1225; *Statement of consumer protection enforcement principles* (Office of Fair Trading, 2010), OFT1221.

<sup>39</sup> A recent compilation of scholarship is C Parker and V Lehmann Nielsen, *Explaining Compliance. Business Responses to Regulation* (Edward Elgar, 2012).

effective solutions.<sup>40</sup> The government's previous support for ADR in relation to collective redress has been noted above.<sup>41</sup>

It is always faster and cheaper for firms to pay voluntarily. So the objective should be to incentivise or force this, whenever there has been an infringement. Both techniques a. and b. above are proposed in the consultation, albeit with insufficient prioritisation. Evidence is mounting that the public oversight power can be used with great effect in far more circumstances than the consultation suggests. It has been adopted by an increasing number of other regulators, and the OFT is looking isolated in not embracing the technique and producing fast, cheap and effective outcomes. An important reason why the approach works for other regulators is that they have more modern (and more effective) enforcement policies than 'deterrence alone', as noted above. The power would inherently incentivise an enhanced ADR or adjudicative technique, and provide a far greater incentive to achieve a swift and fair settlement than the cumbersome Leviathan of collective private litigation.

The failure of the current approach is illustrated by the recent *Cardiff Bus* case,<sup>42</sup> in which OFT expressed the view that there might be an infringement but declined to act as the level of detriment was not large. A private action was subsequently fought at huge cost, over some years, resulting in a recent CAT award of £34,000 in compensatory damages plus loss of interest, which was clearly grossly uneconomic in terms of cost-benefit. Some time before the award, the smaller competitor had gone out of business. It would have been far more effective if OFT had used 'restorative oversight' powers to persuade the dominant company to make a modest payment at the time that the infringement was identified, which was when the smaller competitor needed help and consumers would have benefitted.

A technique that could usefully be added is a power for the court to approve an agreed settlement, on the precedent of the highly successful and admired Dutch Mass Claims Settlement Act 2005. This does not involve a 'front end' (certification) power to start a collective action, thereby avoiding the issues of abuse and frightening inward investment.<sup>43</sup> The Dutch evidence is that its settlement procedure incentivises ADR. The culture of fighting claims is changing, but opportunities to negotiate settlements are impeded by the inability to bind all parties, which is what the Dutch Act does, and UK needs. Adopting this would also maintain strong competition in the international market for settlement venues (i.e. the CAT). This regime should be tried for 5 years. If there is evidence of need after 5 years, and damages claims are not being settled where they should be, then the position can be revisited. But otherwise, making too many changes at once is rarely a good idea.

## CONCLUSION

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<sup>40</sup> C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).

<sup>41</sup> *UK Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'*, Ministry of Justice, July 2009.

<sup>42</sup> *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19. The CAT also awarded £60,000 in exemplary damages.

<sup>43</sup> Indeed, in other non-competition mass claims in England and Wales, the courts have moved away from the need to certify GLOs in the past few years, since the CPR requirements of settlement and case management make them unnecessary (a leading example is the Buncefield litigation, where a GLO was refused).

**The government should:**

- 1. Reject an opt-out mechanism.**
- 2. Undertake an independent review of competition enforcement policy, examining why the enforcement authority should not adopt the same risk-based, responsive and restorative approach that the government has applied by law to almost every other regulator. This review would examine a compliance-based approach towards competition law, in line with government policies on self-regulation and 'better regulatory' enforcement.**
- 3. Encourage business to construct an effective ADR/adjudicatory compensation system.**
- 4. Once those provisions are in place, measure the level of unmet need, and if resultant need is established, at that stage introduce a private action approach available only as a last resort.**

## B. RESPONSES TO QUESTIONS ASKED

### CAT PROPOSALS

<b>BIS PROPOSAL</b>	<b>RESPONSE</b>
Activate S.16 of the Enterprise Act to enable the courts to transfer competition cases to the CAT	Yes
The CAT to be allowed to hear stand-alone as well as follow-on cases	Yes
Whether the CAT should be able to grant injunctions	Yes
Whether to introduce a Fast Track procedure so SMEs can resolve simpler cases more quickly and at lower cost, including: <ul style="list-style-type: none"> <li>- Waiving or limiting cross-undertakings in damages</li> <li>- Target to hear cases within 6 months</li> <li>- No or limited court fees and costs capped at £25K</li> </ul>	Support a fast track, but not support cost capping or waiving cross-undertakings, which introduce arbitrary potential for abuse.
Whether to introduce a rebuttable presumption of loss for cartel cases to shift burden to the defendant, who is most likely to possess the data to calculate the true damages <ul style="list-style-type: none"> <li>- Suggestion this could be 20%</li> </ul>	Strongly oppose as a matter of principle.
Whether the passing-on defence should be addressed by legislation.	No

### COLLECTIVE ACTIONS QUESTIONS

<b>BIS QUESTION</b>	<b>RESPONSE</b>
Allow collective actions to be brought on behalf of businesses as well as consumers?	Not necessary: existing case management procedures exist.
Allow collective actions to be brought in stand-alone as well as follow-on cases?	Only if the private action is available after viable alternatives (regulation and ADR) are not available.
Allow opt-out collective actions to be brought in the CAT, subject to CAT's discretion?	Object: opt-out will not work.
Allow opt-out collective actions to be brought by private bodies, using a strong certification regime so that the representative body was suitably representative of the claimants?	No: clear risk of abuse.
Are law-firms and third-party funders (TPFs) suitable representatives?	No

Should a public body be able to bring an opt-out collective action?	Yes
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### **ENCOURAGING ADR**

<b>BIS QUESTION</b>	<b>RESPONSE</b>
Should ADR be made mandatory?	No: illegal under ECHR art 6.
Should a pre-action protocol be introduced for: <ul style="list-style-type: none"> <li>- The proposed fast track</li> <li>- Collective actions</li> <li>- All cases in the CAT?</li> </ul>	Yes
Should the CAT rules governing formal settlement offers be amended to bring the CAT in line with High Court procedures?	Yes
Should there be court approved settlement scheme similar to that in the Netherlands?	Yes
Should the competition authorities be able to order a defendant to implement a redress scheme, or to certify such a voluntary redress scheme?	Yes
Should redress be taken into account in setting the level of fine?	Yes

### **COMPLEMENTING THE PUBLIC ENFORCEMENT REGIME**

<b>BIS QUESTION</b>	<b>RESPONSE</b>
How can private actions complement public enforcement?	Policy on public enforcement needs to be fundamentally reviewed. If regulatory practice were adopted for competition that is now standard for all other areas, private enforcement would be largely unnecessary.
Should certain leniency documents be protected from disclosure in subsequent litigation?	Yes. But current leniency policy needs to be radically reviewed. There would be no problem if public enforcement worked properly and included restoration.
Should whistleblowers and any other leniency recipients be protected from joint and several liability?	No.
Should decisions of other NCAs be binding in the UK?	Yes.



# Citizens Advice



## Private Actions in Competition Law : options for reform

### Response by Citizens Advice to Department for Business Innovation & Skills

July 2012

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## Introduction

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Citizens Advice welcomes the opportunity to respond to this consultation on future options for private actions in competition law.

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities. It values diversity, promotes equality and challenges discrimination.

The service aims:

- to provide the advice people need for the problems they face
- to improve the policies and practices that affect people's lives.

The Citizens Advice service is a network of nearly 400 independent advice centres that provide free, impartial advice from more than 3,500 locations in England and Wales, including GPs' surgeries, hospitals, community centres, county courts and magistrates courts, and mobile services both in rural areas and to serve particular dispersed groups.

In 2011/12 the Citizens Advice service in England and Wales advised 2.03 million people on 6.9 million problems of which

- 120,014 concerned goods and services.
- 76,744 were about travel, transport and holidays; and
- 82,135 involved utility and communication problems.

There are over 1 million hits on our public advice web site AdviceGuide every month.

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## General comments

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Citizens Advice believes that the Consumer Bill of Rights must include provisions to help consumers to more easily access redress. Whilst we welcome the proposal that both collective actions and Alternative Dispute Resolution (ADR) should be more available to help consumers who have suffered detriment as a result of anti-competitive behaviour to access redress, we also strongly believe that these mechanisms should also be available more widely for breaches of consumer protection legislation.

We agree with the stated aim of the consultation that proposals for private actions in competition law are designed to ensure that private actions complement the public enforcement regime, as we believe that redress should be closely linked to the enforcement process as a deterrent so that illegal practices do not pay. We therefore strongly agree with the consultation's proposal that public enforcement and redress should work together to stop unfair business practices. We want to see this link made for all business to consumer transactions. However, we would be very concerned if the granting of better access to redress for competition issues was used as a justification for reducing the public enforcement role. There will be a lack of consumer awareness of many cases of anti-competitive practices until the regulator takes action and therefore there will be a continued need for follow-on actions, such as the JJB Sport case taken by Which?.

Citizens Advice supports the proposal to grant the OFT and its successor bodies a power to encourage business who have been found to have breached competition law to compensate affected consumers, but we believe that these bodies should be granted the power to require businesses to compensate affected consumers as part of the punishment. This should be available in all consumer protection legislation.

We do not agree with the concern expressed in the consultation that facilitating redress through regulators might divert the regulator from their enforcement work. We believe that this will increase the effectiveness of enforcement because it:

- provides a level playing field for businesses that do follow the rules;
- removes the financial gains made from illegal practices;
- alerts consumers to the bad practice by requiring the business to provide the redress; and
- provides the business being punished with an opportunity to recognise their bad practice and to apologise to their customers along with the redress.

This is not a new proposal. Ofcom and FSA already have these powers in the telecoms and financial services sectors, and DECC has recently consulted on whether it should give the energy regulator Ofgem the same powers.

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## Responses to specific questions raised in the consultation

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We have only responded to those questions which concern consumers.

**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?**

We agree that the CAT should be available for both the transfer by the courts of competition law cases and for cases that do not follow on from regulatory action. The expertise and knowledge of the CAT, its record in case management and the ability to limit damages are relevant features if consumers and businesses are to be able to challenge anti-competitive practices. Legislation should be amended to facilitate this.

**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 agree with Which? That the opt-in regime is not working well for consumers. We agree that the regime for redress should be extended and strengthened to include collective stand-alone actions as well as follow-on actions. We also agree that collective actions should be organised on an opt-out basis to reflect the true level of detriment suffered, including redress for consumers who have not taken steps to participate in the case.

**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 that these are the right policy objectives to protect consumers and to allow access to redress following anti-competitive behaviour, and we believe that option 3 and option 4 together are the best means for delivering this policy.

Option 3 allows both follow-on and stand-alone or pro-active cases to be taken through private opt-out collective action, using the Competition Appeal Tribunal (CAT). This allows for redress to follow cases which are successfully taken by the regulator as well as allowing for redress where the regulator does not act, for example because the case does not meet current priorities for investigation. It also allows wide use of the competition expertise of the CAT, their case management expertise and cost capping powers. The option includes use of ADR to provide more cost effective means of seeking redress and to reduce the need for court cases. It further includes additional powers for the public competition authority to impose redress schemes on infringers that join up redress and enforcement and act as a deterrent.

We recommend that Option 3 is amended to include the facility for the regulator to take follow-on collective actions (currently in option 4). We believe that this provision would deter businesses considering anti-competitive practices. We would not expect that it would need to be used often but the facility would help regulators better tackle bad practice.

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

Yes. We agree that small businesses, can be in a similar position to consumers who suffer loss as a result of anti-competitive practices and should be able to bring a collective action.

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

Yes. Anti-competitive practices that are causing consumer detriment will not always be taken forward by the competition authorities.. But we would not expect that many stand-alone consumer cases would be taken, unless such cases are able to access the CAT with its advantages of speedier results and lower costs than initiating a case in the High Court.

#### 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 agree that opt-out collective actions are the best option for ensuring that all those consumers affected by an anti-competitive practice can access redress. Both opt-in and pre-damages opt-in collective actions require that all consumers affected know about the action and that they are prepared to take active steps to engage. We do not think this is realistic. This is because the sums lost may be small and the consumers affected may not be aware of the case or have the resources in time and ability to engage.

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

We agree that a preliminary process for judging whether proposed collective actions should proceed is an important safeguard, so that unsuitable cases do not waste court or tribunal time. We have commented below on each element listed in the consultation.

There should be a reasonable possibility of success, so that time and money is not wasted and the facility is not misused where there is no case to answer.

We agree that there should be a minimum number of claimants for the collective action but suggest that the CAT should have discretion to decide on the number, so as not to deter actions that have only affected a small number of consumers so far but which would be likely to affect many if left unchallenged.

We believe that the need for a test of the commonality of the issue amongst claimants needs to be amended to allow for commonality of outcomes for consumers. For example, a utility company's sales staff might be told to adopt a range of practices that would all result in consumers switching to this company as a provider. The range of anti-competitive practices might include misrepresenting the identity of the company, switching consumers without their consent or lying about the relative cost of the utility. The resulting outcome is likely to be that the consumers have been pressurised to switch their supply to a costlier supplier.

It is difficult to judge whether there should be a test of whether a collective action is the most suitable means of resolving the common issues. Some cases may be better resolved through action by the regulator but may not be likely to be dealt with in this way within a reasonable time or at all. We suggest that the body bringing the case for consumers should be able to request reconsideration on this point if they can show that other means are not practical or not timely.

We strongly agree that the body bringing the case should be an adequate representative for the claimants. In particular we agree that there should be no conflict of interest. We would be very concerned if the claims management industry were to become active in bringing collective actions because this business model has resulted, in some cases, in consumers failing to benefit from any compensation after paying for the claims management costs.

We agree that the representative should have sufficient funds to cover the defendant's costs if the case is unsuccessful but do not think this will be relevant for follow-on cases, where the anti-competitive practice has already been proved and the losses to consumers exposed.

**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?**

Yes. We agree that the loser-pays rule has merit in encouraging only those claims where there is a likelihood of success, provided there is also a facility for cost-capping to be available. This facility would be an important means of ensuring access to justice where consumers are claiming collectively against a well funded adversary.

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

We have no direct experience of the effects of this prohibition. However, we think that in consumer collective action cases there will often be a large number of consumers who have each lost only a small sum of money. Our concern is that the fees for legal representation do not leave consumer with so little redress that the legal costs and costs in distributing the award result in no payment to consumer at all. Payment of contingency fee or conditional fees could have the effect of limiting consumer collective redress to follow on cases where the anti-competitive practice has been proved and legal costs are therefore more easily assessed when the cost structure is being agreed.

**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.**

There are advantages in allowing unclaimed sums from a collective consumer action being paid to a single specified body provided that body's remit is to fill gaps in the provision of justice for consumers. These advantages include:

- it would avoid the burden on judges, or an independent party, of lobbying by potential benefactors of the money and the need to justify decisions about how the money is used under cy-près;
- it would ensure that the money benefited consumers;
- it would avoid the unjust enrichment of the defendant in the reversion option;
- it would avoid the costs of distribution to those who have already claimed; and
- it could allow a generous timeframe for claimants who are late in initiating an action through ring-fencing of the unclaimed sum by the recipient body. The body could seek clarification of the most suitable time frame in that particular case from the judge.

**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?**

Yes. The Foundation reports to a wide range of legal services organisations including the Advice Services Alliance; has a respected reputation for accepting unclaimed sums, including from law firms where legal clients leave sums unclaimed; uses funds to fill gaps in access to justice, including some relating to the Citizens Advice service; is supported by legal professionals, for example through sponsored events; and is transparent about how income is used.

**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?**

Citizens Advice strongly supports the proposal that private bodies should have the ability to bring opt-out collective actions for breaches of competition law. We also support the case for the competition authority to have a role in gaining redress for those affected by anti-competitive practices. This would allow cases that are not taken forward by the regulator to be taken to the CAT and allow the regulator to take account of restitution, removal of illicit gains and deterrence in a market based approach to competition enforcement, as acknowledged in the consultation.

**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?**

We agree with the suggested restriction and support the proposal for the CAT to assess the suitability of any private body proposing to take an action, at the certification stage. Guidance on features likely to gain CAT approval to take a case would also be valuable.

Citizens Advice would be very concerned if claims management businesses were to become involved in competition or other collective actions. We are concerned that their involvement would largely remove any likelihood of gaining redress for those consumers affected by the anti-competitive practice.

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

Citizens Advice supports ADR as an alternative to court action for consumers. It is an important point of access to justice for consumers seeking redress including where taking a case to court would be too expensive. We agree that it should be encouraged, including by the CAP, in competition private actions. It should be mandatory for cases instigated by consumers or their representatives, so that business defendants cannot refuse to participate in the ADR.

We are unsure how an ADR model would work between the regulator and business or between businesses, as proposed in the consultation and would be interested to see further details.

Our experience of ADR in business to consumer sales has been that consumers can choose this as an independent dispute resolution option when they cannot agree resolution through direct negotiations with a business. In markets such as estate agency and financial services, where provision of ADR for consumers is a legal requirement, the businesses fund the ADR provision and pay for those cases on a case by case basis. Decisions are normally binding on the business but the consumer can go on to take their case to court if they are dissatisfied with an ADR decision. For a competition ADR process, details about who pays, who is bound by the decision and the requirements for evidence would need to be considered in detail if the scope is to include cases between businesses and between the regulator and business.

The EU has been considering a Directive on the key elements of ADR for all member states and has proposed that ADR should not be available between businesses. This would mean that an ADR in the competition sector may not be capable of meeting the key requirements of the Directive if it were available for business to business cases.

**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 support the objective for enabling parties to settle disputes without starting proceedings and the efficient management of proceedings by means of pre-action protocols. These are sensible objectives for the fast track, collective actions and the CAT cases. The consultation only proposes the use of a fast track regime for SMEs, but we believe that this could be developed further for consumer actions.

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

We agree that formal settlement offers can have value but would be concerned if claims management companies were to use this process to settle cases in such a way that only their own costs and fees were covered, without providing redress for consumers.

**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 provisions for collective settlement in the field of competition law?**

No. We believe that there is a role in competition law for collective settlement as well as for opt-out actions. Whilst we strongly support the proposed change to allow opt-out collective actions, we would also want to encourage businesses who have behaved anti-competitively to offer to settle without the need for a representative body to take a collective action on behalf of consumers. We



agree that there would need to be judicial oversight so that the settlement was binding on all those consumers who have suffered loss.

**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?**

Citizens Advice strongly supports this proposal because this could obviate the need for costly court proceedings and it provides the business with an opportunity to mend reputational damage. The OFT should also be able to certify a voluntary offer by a business of redress for an anti-competitive practice where the competition authority has not required redress. These measures would compensate consumers who would not pro-actively seek the redress to which they are entitled. It could also improve consumers' understanding of what constitutes an anti-competitive practice and how such practices can affect them, thus helping meet government objectives for better consumer understanding of consumer protection law.

**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 are very keen to see enforcement and redress working together but do not consider that providing the redress to which consumers are entitled should replace fines for the breach of legislation or be seen a soft option by businesses. We believe that the competition authority should be able to consider actions by a business to provide redress when deciding on the level of fine to be imposed, as is the case now. The regulator should have discretion in this matter as each case will involve different levels of consumer loss.

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

Citizens Advice believes that the extension of the role of private actions should be complementary to public enforcement because public enforcement does not investigate all cases that consumers believe are important or does not do so in a timely enough manner. Consumers or consumer representative bodies using collective actions could help fill gaps in the regulatory process by taking stand-alone cases. Private actions should not, however, replace the need for properly resourced regulation.

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23 July 2012

**The City of London Law Society**

**Competition Law Committee**

**RESPONSE TO THE BIS CONSULTATION  
PAPER ENTITLED “PRIVATE ACTIONS IN  
COMPETITION LAW: A CONSULTATION ON  
OPTIONS FOR REFORM”**

## City of London Law Society Competition Law Committee

# RESPONSE TO BIS CONSULTATION PAPER ENTITLED “PRIVATE ACTIONS IN COMPETITION LAW: A CONSULTATION ON OPTIONS FOR REFORM”

## 1. Introduction & executive summary

### Background to the submission

- 1.1 This paper is submitted by the Competition Law Committee of the City of London Law Society (“CLLS”) in response to the Department of Business innovation and Skills (“BIS”) consultation paper entitled “*Private Actions in Competition Law: a Consultation on options for reform*”, published on 24 April 2012 (“the Consultation Paper”).
- 1.2 The CLLS represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government Departments, often in relation to complex, multijurisdictional legal issues.
- 1.3 The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.
- 1.4 The CLLS Competition Law Committee (“the Committee”) has prepared this submission. The Committee is made up of solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who advise and act for UK and international businesses, financial institutions and regulatory and governmental bodies on competition law matters.
- 1.5 The authors of this response are:
  - Robert Bell, *Speechly Bircham LLP* (Chairman, Competition Law Committee)
  - Howard Cartlidge, *Olswang LLP*
  - Kim Dietzel, *Herbert Smith LLP*
  - Nigel Parr, *Ashurst LLP*
  - Richard Pike, *Baker & McKenzie LLP*
  - Michael Rowe, *Slaughter & May LLP*
- 1.6 We are grateful for the contributions of colleagues on the Committee.

### Executive Summary

- 1.7 The CLLS is generally supportive of BIS’s proposals to strengthen and expand the system for bringing private actions in the UK. We have prepared detailed responses to each of the specific questions raised in the Consultation Paper and provide an executive summary of the views we express in each response below.

- 1.8 **Role of the CAT:-** Firstly, we concur with BIS that the competition law expertise and case management experience of the Competition Appeal Tribunal (“CAT”) leave it better placed than other divisions of the High Court to handle increasing numbers of private competition law actions. We further welcome the proposal to permit “stand-alone” actions (i.e. without any regulatory infringement decision having first been handed down) to be brought before the CAT, as it avoids often complex questions as to which issues in a case relate to an infringement decision and which do not. The CLLS believes that within its expanded remit the CAT should also be empowered to grant injunctions as they represent a key remedy in competition law cases, especially where Small and Medium-sized Enterprises (“SMEs”) are faced with foreclosure from a market owing to the abusive behaviour of a larger rival.
- 1.9 **SME Fast Track Procedure:-** The CLLS supports in principle the introduction of a fast track model for SME claimants. However it believes that it is important that the costs and damages incentives for claimants are appropriately balanced with adequate safeguards for the rights of the defence. Retaining a margin of procedural discretion for the CAT to vary timetables and cost caps will be integral to the successful implementation of the proposals. We believe the CAT chairmen must also be given wide discretion whether to allocate cases to the fast track but that careful consideration needs to be given as to whether it is appropriate to extend any cost capping beyond the interim injunction stage, to dissuade unmeritorious actions and prevent undue prejudice to non-SME companies.
- 1.10 **SME Access to Justice:-** In broad terms, the CLLS believes that the combination of the introduction of the SME fast track procedure and bolstering collective actions, together with promoting the increased use of Alternative Dispute Resolution (“ADR”) (especially through the use of collective redress settlements) will provide improved access to justice for SMEs in competition law cases.
- 1.11 **Rebuttable Presumption of Cartel Losses and Passing On:-** Whilst a rebuttable presumption of loss in cartel cases would clearly benefit claimants and in theory encourage meaningful settlement discussions, the CLLS does not believe that such a presumption is appropriate in practice. In any event, the questions of whether and how to legislate on a possible “passing on” defence would need to be addressed before introducing a presumption of loss. The CLLS agrees with BIS that these would be best addressed at a European Union level.
- 1.12 **Approach to Collective Actions:-** We do not believe the system itself is fundamentally responsible for the lack of collective actions being brought. Whilst we recognise that an opt-in system does present difficulties with attracting high levels of participation we do not believe that this necessarily justifies the introduction of a radical opt-out model. Extending the opt-in regime may be a preferable option. That said, from a policy perspective the system for collective redress should seek to compensate the victim rather than be punitive. An opt-out system, though administratively more taxing to operate, could prove effective only provided that unclaimed damages are returned to the defendant. We believe that any other method of distributing unclaimed funds under an opt-out system, if such a system were adopted, including to the Access to Justice Foundation, would introduce an excessively punitive element to collective redress, and would in fact discourage timely settlement.
- 1.13 **Opt-out System for Businesses:-** We do not consider that it is necessary to go so far as to adopt an opt-out model for collective actions. However if an opt-out model is adopted we would support the extension of opt-out collective actions so that they are available to SMEs and other business claimants, if necessary and appropriate, and, potentially, for combined

claims involving both appropriate businesses and consumers (subject to any issues regarding the defence of “passing on”). We view it as essential that the CAT have the power to reject unmeritorious or vexatious claims at a preliminary certification stage. Among other things, this will protect consumers from signing up in large numbers to claims that ultimately prove unfounded.

- 1.14 **Costs and Information Exchange:-** We do not believe that collective actions will result in either increased information exchange or in a significant jump in the number of “stand-alone” cases brought, although there is no reason why collective redress should not be permitted in such cases. It is essential, however, that the “loser pays” costs principle is retained in “stand-alone” as well as follow-on actions, even if this may require an amendment to the CAT Rules of Procedure 2003 (SI 2003/1372) (“CAT Rules”) to mirror the Civil Procedure Rules 1998 (SI 1998/3132) (“CPRs”) in providing explicitly that “costs follow the event”. We agree with BIS that there should be no punitive or treble damages awards in collective actions (nor in any private competition law claims). Deterrence should remain the preserve of public enforcement and significantly increased damages awards could stimulate a rise in the number of spurious claims. As regards access to justice, cost capping may promote it by providing greater certainty for claimants as to exposure in limited cases where appropriate, but in our view a reciprocal cap in favour of defendants should also be considered. Contingency fees, meanwhile, may also facilitate a rise in claims by providing an extra source of funding, but could give rise to perverse incentives, especially for legal advisers, so should, on balance, continue to be outlawed for collective competition law actions.
- 1.15 **Bringing Collective Actions:-** Empowering competition authorities as the specified bodies for bringing collective actions, meanwhile, may lead to efficiency gains but could dent access to justice given that it would appear unlikely that the Office of Fair Trading (“OFT”) or, in due course, Competition and Markets Authority (“CMA”) will bring claims. As for private bodies, authorised representative organisations, such as Which? and other consumer or trade associations, should have standing. Subject to consideration on certification as to the suitability of the representative claimant, private individuals and relevant businesses should also have standing to act as representative, in order to facilitate access to justice. However, standing should not extend to law firms or litigation funders/sponsors.
- 1.16 **Strong Encouragement for Voluntary ADR:-** The CLLS believes that ADR should be strongly encouraged in all types of private competition law action but not be made mandatory. We would not be in favour of a pre-action protocol, because it would be impractical where claimants often need to act without warning to secure the jurisdiction of the English courts, but we would instead propose a system whereby the parties are incentivised under the rules on costs to follow a “post-issue” ADR protocol, at least by the time of preparing defences. We would not consider the role of establishing initiatives to promote ADR as a role suitable for the CLLS, but would fully support such initiatives generally.
- 1.17 **Cost Orders:-** The CAT Rules on formal settlement procedures should be amended, as they currently provide little incentive for either side to settle, though this should not be replaced by the CPR Part 36 regime, as it fails to address joint and several liability among large groups of defendants. Furthermore, where a claimant is awarded damages exceeding only some of the offers it has received from defendants, its costs should only be paid by those defendants who did not make an offer or whose offers were beaten.
- 1.18 **Redress Schemes and Role of Competition Authorities:-** Redress schemes, meanwhile, should remain voluntary, with the competition authorities having the power to certify such

redress but not to impose a scheme on an unwilling defendant. In any event, if the authorities were given the power to impose redress, it is questionable how this could be enforced practically. Binding commitments to provide voluntary redress should, meanwhile, prompt at least a modest reduction (of at least 10%) in any regulatory fine imposed on the relevant defendant(s), although such reductions need not necessarily be capped. An expanded regime for bringing private actions could complement public enforcement very effectively, by compounding the deterrent effect of the financial penalties imposed by the Office of Fair Trading (“OFT”) or, later, the Competition and Markets Authority (“CMA”), supporting the victims of infringements and facilitating “stand-alone” claims in cases where the OFT’s prioritisation and resource concerns dissuade it from investigating.

1.19 **Status of Leniency Applicants:-** Since potential leniency applicants may be deterred if they fear exposure to private actions, we therefore support proposals to protect certain documents from disclosure (namely those that would not have come into existence but for the leniency process). We do not see much benefit in limiting joint and several liability for leniency applicants, certainly on a unilateral national basis.

1.20 We do not believe any other measures are necessary to bolster public enforcement.

## **2. Specific BIS questions**

### **General Comments on the CAT and its role**

2.1 The CLLS welcomes the fact that BIS is consulting on options for reforming the system for bringing private competition law actions in the UK.

2.2 The CLLS is generally in favour of increased scope and access for private parties to bring actions for redress against infringements of competition law.

2.3 We strongly support the proposal that the CAT becomes the principal forum for bringing private actions in the UK. The CAT has well recognized expertise in ruling on complex competition law issues and in managing competition law cases efficiently. In particular, we welcome proposals to expand the CAT’s jurisdiction to hear stand-alone as well as follow-on cases and to grant injunctive relief, which promise to establish the CAT as a recognised venue for pursuing redress against alleged anti-competitive behaviour.

2.4 The introduction of a fast track procedure for SMEs and an opt-out system for collective redress also looks set to alter substantially the competition litigation landscape in favour of claimants.

2.5 However, some procedural and jurisdictional questions set out in our detailed responses below bear serious consideration.

### **Responses to specific questions**

**Q1. Should section 16 of the Enterprise Act be amended to enable the courts to transfer competition law cases to the CAT?**

**A:** Under section 16 of the Enterprise Act 2002 (“EA 2002”) the Lord Chancellor may currently make regulations to enable the High Court (or, in Scotland, the Scottish Court of Session) to

transfer from the High Court to the CAT “so much of any proceedings before the court as relates to an infringement issue”.<sup>1</sup>

The Government is proposing to amend and implement section 16 so that the presiding judge in a case before the High Court can determine whether it is appropriate under the particular circumstances to transfer the proceedings all or part of the proceedings to the CAT.

In addition, where the High Court judge hearing a case in the High Court is also a CAT Chairman it is proposed that he be given discretion to allow the hearing to continue in the High Court whilst also making use of the procedures, members, staff and facilities of the CAT. Furthermore, it is suggested that a greater number of representative actions are permitted to be brought under the CPRs.<sup>2</sup>

We support the proposals to allow the transfer of competition law proceedings to the CAT and for discretion to be given to CAT Chairmen to use the resources of the CAT to hear competition cases in the High Court. As mentioned above the CAT is an expert tribunal skilled in hearing complex competition law claims and this will help fully utilize its expertise. We also welcome the additional flexibility of transferring claims which contain non-competition elements where the principal claim is competition-based.

However, the question of limitation periods will need to be addressed under the expanded regime for transferring cases to the CAT. Cases before the High Courts are subject to the general rule under Section 2 of the Limitation Act 1980 (“LA 1980”) for actions brought under tort, being six years from the date the cause of action accrued or the date of knowledge, whichever is the later. Meanwhile, proceedings in follow-on actions in the CAT become time barred two years from the determination of the appeal process in respect of any relevant regulator’s infringement decision (see section 47A of the Competition Act 1998 (“CA 1998”)).<sup>3</sup> There is also a prohibition in Paragraphs 31 (1)-(3) of the CAT Rules that states follow-on actions cannot be brought until the determination of the appeal process notwithstanding the presence of a regulator’s infringement decision.

Where proceedings in a High Court case have been transferred to the CAT it will be important to ensure that a two speed approach does not arise and that there is no room for confusion as to which time limit applies. In particular, such confusion can arise with regard to claims that are partly stand-alone and partly follow-on, and cases which involve both competition law and non-competition law issues.

In order to avoid any confusion, we would support the adoption of a single limitation period for competition claims regardless of whether they are stand-alone or follow-on. By way of a suggested example, this could be based upon the six year limitation period applicable to tortious High Court proceedings under Section 2 of the LA 1980. This would mean that both stand-alone and follow-on claims would have a limitation period of six years from the date on which the claimant first had knowledge of his loss. However, we would welcome other proposed limitation periods, provided that whichever period is chosen applies universally to all competition law claims and thereby avoids the procedural uncertainty of having a “two

<sup>1</sup> Per Section 16(6) of the EA 2002, an “infringement issue” is defined as “any question relating to whether or not an infringement of the Chapter I prohibition or the Chapter II prohibition; or Article 81 or 82 of the Treaty has been or is committed”.

<sup>2</sup> Per Rule 19.6, CPRs

<sup>3</sup> Rule 31, CAT Rules



speed” regime. Such uncertainty can give rise to the expenditure of further cost and time in pursuing satellite litigation on issues relating to procedural arguments on limitation.

It will be for the Court to determine when the claimant first had knowledge. In the vast majority of cartel cases the date of knowledge is likely to be the date of the infringement decision, due to a lack of evidence. If there was a concern that knowledge would be imputed to the claimants prior to the infringement decision the CAT Rules could provide for a rebuttable presumption that knowledge shall be imputed to the claimant from the date of the infringement decision.

Secondly, now that jurisdiction to commence stand-alone and follow-on actions is to be amalgamated in the CAT we would recommend that the prohibition on starting proceedings in follow-on actions in Paragraph 31(1)-(3) of the CAT Rules be removed. This rule currently causes claimants to start proceedings in the High Court rather than the CAT after a regulator’s infringement decision but prior to the determination of the appeal process to claim jurisdiction for the case in the UK Courts.

**Q2. Should the Competition Act 1998 be amended to allow the CAT to hear stand-alone as well as follow-on cases?**

**A:** A party seeking redress for anti-competitive behaviour can currently bring either (i) a stand-alone private action before the High Court; or (ii) a follow-on action after the determination of the appeal process against an infringement decision by the relevant competition authority before the CAT.

At present, follow-on actions are potentially easier to pursue but it may take far longer as the claimant has first to await a decision and the determination of the appeal process before commencing proceedings. In addition, of course, there is no certainty of any regulator’s decision being handed down condemning the behaviour in question. Stand-alone actions always present difficulties with proving breach, especially in light of the often complex economic issues at stake and difficulties in obtaining the necessary evidence.

The Government believes that making it easier to bring stand-alone actions is essential in order to complement the work of the OFT and other concurrent UK competition regulators.

It is proposed that the CAT will take on an expanded role permitting claimants to file stand-alone claims directly before it. This would involve passing an amendment to Section 47A of the CA 1998 such that there is no longer any requirement for a prior administrative decision. This expanded scope would also incorporate the competition law elements of that substantial number of cases where the competition law claim is principal among several other, non-competition law claims.

We agree with the UK Government that the case management experience and competition law expertise of the CAT and its panel members leave it better positioned than certain other parts of the High Court to take on an increased competition claim caseload by permitting stand-alone claims.

Allowing for stand-alone actions to be brought directly before the CAT also avoids potentially complicated questions as to what issues in a case are or are not related to a regulatory infringement decision. The current jurisdiction of the CAT only extends to follow-on actions. Therefore, claimants must demonstrate that they have “suffered loss or damage as a result

of the infringement of a relevant prohibition”, covered by the infringement decision.<sup>4</sup> The question whether and which parts of a claim relate to an infringement decision for these purposes can become extremely complex and time consuming, as demonstrated in the case of *English Welsh & Scottish Railway Limited v Enron Coal Services Limited* [2009] EWCA Civ 647, where this issue was taken up to the Court of Appeal on various points.

**Q3. Should the CAT be allowed to grant injunctions?**

**A:** Injunctions can currently only be granted by courts, tribunals and bodies designated as a Superior Court of Record. The CAT does not possess that status at present.

The UK Government is proposing that the CAT be designated as a Superior Court of Record and be permitted to hear applications for and to grant injunctions.

Injunctions are important in delivering redress in competition law cases, particularly where small businesses and consumers are affected. In our experience, SMEs usually need assistance to combat abusive behaviour by larger rivals where there is a relationship of reliance (e.g. they may be a supplier as well as a downstream competitor) and that larger rival is seeking to foreclose them from the market by refusing to supply. In these types of cases injunctive relief is the primary remedy. Although in certain circumstances damages could be an alternative or additional remedy, they do not deliver a meaningful remedy to many exclusionary abuses.

Therefore a CAT without the jurisdiction to grant injunctive relief would lead to a half-baked, inefficient and ineffective system which would substantially undermine the logic of combining stand-alone and follow-on actions into a single venue for competition law claims. The availability of swift interim relief is often essential in order to protect claimants’ interests.

**Q4. Do you believe a fast track route in the CAT would help enable SMEs to tackle anti-competitive behaviour?**

**A:** CAT proceedings currently give the CAT some discretion as to case management and directions on timetabling. However, no specific provision is made to allow for a fast track or “no frills” procedure. The burden of this procedural rigidity inevitably falls upon SMEs.

SMEs are a very important constituent of the business community and the economy in the UK. According to the Federation of Small Business, SMEs account for over 90 per cent of all enterprise in the UK.<sup>5</sup> Consequently, it is crucial to protect their ability to compete vigorously on the market.

The Government is aiming to provide “genuinely accessible recourse to the courts”<sup>6</sup> by introducing a cheaper, quicker and simpler process, involving capped costs, a reduced timetable (certainly not allowing for cases to last over a number of years) and facilitating access to free legal advice.

The Patent County Court (“PCC”) represents the closest model currently in existence in the UK. The fundamental principles behind the PCC seem to have informed the CAT fast-track proposals.

<sup>4</sup> Section 47A(1) of the CA 1998.

<sup>5</sup> Federation of Small Business, available at <http://www.fsb.org.uk/stats>

<sup>6</sup> Consultation Paper, paragraph 4.34

According to its court procedure guidance (“the PCC Guidance”), the PCC:

“aims to provide cheaper, speedier and more informal procedures to ensure that small and medium sized enterprises and private individuals are not deterred from innovation by the potential cost of litigation to safeguard their rights. Longer, heavier, more complex, more important and more valuable actions belong in the High Court”.<sup>7</sup>

The key proposals for the CAT fast track are to: (i) give CAT panel members discretion to waive or limit any obligation on SME claimants to provide a cross undertaking in damages in injunction proceedings; (ii) impose a cap on liability for defendants’ costs up a maximum of £25,000; (iii) establish a link with the Competition Pro-Bono Service so that SMEs can have the strength of their case assessed free of charge before applying to the fast-track; (iv) give CAT Chairmen the power to determine formal applications for fast track allocation (with payment of a refundable deposit); (v) charge no or limited court fees; (vi) hold shortened oral hearings completed within a matter of days; and (vii) determine the issues “on the papers” where possible.

In principle we cautiously welcome the introduction of a fast track procedure from which SMEs can benefit. Such a procedure would provide access to justice for a vulnerable group of smaller /medium-sized companies who:-

- are less able to persuade competition authorities to take up their case; and
- are likely to be deterred by the cost and complexity of bringing a private action.

The introduction of this process is part of a policy objective of Government to create a more claimant-friendly litigation landscape for competition cases. If implemented, this proposal would be a significant step towards this goal.

Nevertheless, the fast track system will only work well if the rights of the defence are adequately balanced with those of SMEs.

In our view, there clearly need to be appropriate costs, damages and procedural incentives by making access to the courts cheaper, quicker and simpler for SMEs than under the present system. For instance, SMEs in an abuse of dominance case have to be given some meaningful incentives to resort to court proceedings. Therefore we welcome initiatives to cap costs, ensure the swift granting of injunctions with limitation or waiver of cross-undertakings in damages, seek the resolution of cases within six months and impose a potential cap on damages.

However, it appears to us that no competition law case is the same. Rather, they often vary greatly in complexity. Therefore, more discretion should be given to the CAT to vary time and costs limits and liability caps during the case management process along the lines highlighted by BIS in its Consultation Paper.<sup>8</sup> Such discretion should be limited so as not to undermine the principal purpose of the fast track procedure, namely to give some certainty on costs and liability exposure in the event of the claimant being unsuccessful.

<sup>7</sup> Patent County Court Guide (issued 12 May 2011), available at <http://www.justice.gov.uk/downloads/courts/patents-court/patents-court-guide.pdf>, p. 5

<sup>8</sup> Consultation Paper, paragraph 4.34

The questions as to what discretion should be given and to the nature of any limitations are discussed below in response to Question 5.

**Q5. How appropriate are the design elements proposed, in particular cost thresholds, damage capping and the emphasis on injunctive relief?**

**A:** Whilst, as stated in the previous response, we cautiously welcome the introduction of an SME fast track procedure, we believe that great care must be taken in designing such a procedure to ensure that support for SMEs does not result in processes with an in-built prejudice against non-SMEs. It is important that the fast track procedure does not result in non-SMEs incurring significant costs, both legal and in management time, in defending cases with little or no merit.

We also question whether availability of a fast track should necessarily be limited to SMEs but not also be potentially applicable to other businesses wishing to bring cases equally suitable for a speedier and cheaper process.

In this context, an effective filter of suitable cases is essential and we therefore welcome the proposed role for the CAT chairman in deciding whether to allocate cases to the fast track.

A further proposal that could retain the benefits of a fast track for SMEs (and potentially others) whilst not prejudicing defendants would be to model the CAT fast track on the arrangements already applied in the High Court (Rules 26.6 to 26.8 of the CPRs). These rules could be adapted to set a higher monetary limit for fast track treatment, and make certain (limited) amendments to the other relevant criteria. This approach would allow the CAT to take account of the SME status of the claimant as a relevant consideration rather than being strictly necessary for entry to the fast track.

For example, the CAT Rules could provide that the CAT fast track should be the normal track for claims where:

- The value of the claim is less than £500,000<sup>9</sup> (where value is defined in the same way as in the High Court, though a claim with a higher value could in suitable circumstances still be allocated to the fast track);
- The trial is likely to last for no more than three days<sup>10</sup>; and
- There are unlikely to be more than four experts between the parties<sup>11</sup>.

Adapting the approach in Rule 26.8 of the CPRs the matters to be considered by the CAT in allocating the case could include:

- the financial value, if any, of the claim both in absolute terms and relative to the resources of the claimant and defendant;
- the nature of the remedy sought and, in particular, whether an injunction is sought to prevent ongoing allegedly anti-competitive conduct;

<sup>9</sup> The maximum for the fast-track in the High Court is much lower, at £25,000.

<sup>10</sup> As compared to one day in the High Court.

<sup>11</sup> This is essentially the same as in the High Court, where the requirement is that there be no more than two fields requiring expert evidence and one expert in each field for each party. Referring to four experts allows for the possibility that the CAT might require the use of joint experts.

- the likely complexity of the facts, law or evidence;
- the number of parties or likely parties;
- the value of any counterclaim or other Part 20 claim (or equivalent under CAT Rules) and the complexity of any matters relating to it;
- the amount of oral evidence which may be required;
- the importance of the claim to persons who are not parties to the proceedings and the importance of the claim to the parties beyond the relationship between themselves (e.g. whether the claim may have wider ramifications for the defendant). Consideration should be given as to whether the dispute can be narrowed or otherwise dealt with in such as a way as to reduce the wider significance of the case;
- the views expressed by the parties; and
- the circumstances of the parties. In particular, the CAT should more readily allocate cases to the fast track where some or all of the parties are consumers or SMEs.<sup>12</sup>

With respect to the other proposed design elements, it does not appear appropriate that a specific cost cap should be applied to every case that is allocated to the fast track. In any event, a costs cap of £25,000 is clearly wholly inadequate for a case that goes to full trial, even (or potentially especially) when the case is conducted on an expedited basis, where costs can easily be 10 or even 20 times that amount.

A better approach would be to give CAT Chairmen discretion as to what caps to set, but to give them firm and clear guidance on how they should approach matters. Relevant guidance could sensibly indicate that:

- There should be an expectation that cost caps will be applied in all fast track cases unless there are exceptional circumstances;
- Particular weight should be given to the circumstances of the claimant(s) and the risk of a denial of access to justice. It may be relevant to take account of the availability of insurance, the terms on which the claimant has obtained its own legal representation and whether there might be other claimants that could share the burden;
- It will be legitimate for the CAT to take account of its early impressions of the merits of the case in deciding on the level of the cap; and
- Consideration should be given as to whether the case can be narrowed or preliminary issues tried, subject to individual caps, as a way to reduce the scope of issues in dispute and/or the wider significance of the case.

Illustrations could be provided of what an appropriate cap might be in particular cases. In order that a claimant can make an informed decision as to whether to proceed, a decision as to track allocation and any costs cap could be made at an early stage, with no costs liability should the claimant abandon its case at that stage.

<sup>12</sup> These nine factors are all included in a more limited form in Rule 26.8 of the CPRs. We have merely expanded some of the factors to include elements focusing more specifically on the concerns relevant to competition matters in the CAT and the reasons for creating a fast-track.

With respect to injunctive relief, the CAT should have at least flexibility as to whether to provide for cross-undertakings in damages, taking into consideration similar factors to those outlined above in relation to cost caps and track allocation.

**Q6. Should anything else be done to enable SMEs to bring competition cases to court?**

**A** In our view, the combination of a new fast track procedure, an enhanced system for bringing collective actions and increased use of ADR and collective settlements are sufficient to enable SMEs to bring competition cases to court.

**Q7. Should a rebuttable presumption of loss be introduced into cartel cases? What would be the most appropriate figure to use for the presumption?**

**A:** A rebuttable presumption of loss clearly provides an advantage to claimants as in practice it is likely to be a minimum starting point for settlement discussions. By increasing the likelihood of a satisfactory outcome for the claimant, this proposal is likely to encourage actions against cartelists and provide a clear basis for settlement (albeit not necessarily a basis that cartelists would welcome).

It is also true that a cartel member is most likely to have evidence of how the cartel agreement influenced its pricing policies and the factors that the cartelist would have applied in determining prices (and therefore the likely outcome). We would note, however, that disclosure should go some way towards ensuring that the claimant would have similar access to documentary evidence on this issue, though not witness evidence.

However, it is not clear how such a presumption can be introduced without resolution of whether the passing on defence is to be permitted. The presumption only makes sense if there is no passing on defence, as otherwise there would be a presumption of loss by the direct customer that may distort calculations of the total losses a cartelist must compensate. This is because the direct purchaser may have passed on to indirect purchasers all of what it perceived to be its loss, but this may be more or less than the suggested presumed level of loss of 20% of the original purchase price.

As to whether 20% is an appropriate figure, we would note that evidence for cartel overcharges is relatively limited, and of course cartels arise in a very wide range of industries with many different factors influencing price, so that a blanket 20% presumption is unlikely to reduce the scale of work carried out by both sides to establish the quantum of any losses.

**Q8. 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?**

**A:** We agree with the Consultation Paper that any legislation addressing a passing on defence would be best dealt with at an EU level. Failure to do so risks opening cartelists to multiple claims in different jurisdictions depending on whether or not the passing on defence is available.

**Q9. The Government seeks your views on how well the current collective action regime is working and whether it should be extended and strengthened.**

**A:** In assessing the effectiveness of the current collective regime, there is the temptation to draw a link between the fact that only one collective action has been brought in almost ten

years (*JJB*<sup>13</sup>) and that case's limited success. In our view, the reasons for the low incidence of collective actions and the limited success of the *JJB* case need to be carefully considered.

First, there are certain obstacles to bringing civil claims of any sort (i.e. not just collective actions for breaches of competition law) and these are no doubt partly responsible for the very low number of collective actions. Key amongst these are the fact that it is unfortunately often not economical to litigate claims for very small losses (in part addressed by judicial processes such as small claims hearings) and the risk of costs exposure that deters claimants from bringing proceedings for relatively small claims.

In addition, a number of infringement decisions reached by the OFT/European Commission do not readily lend themselves to collective redress claims; in many cases the infringing conduct will have taken place in an upstream market, making it difficult to assess what proportion of overcharge (assuming the competition infringement leads to an overcharge) was ultimately passed down to consumers.<sup>14</sup>

While, as described elsewhere in this response, we are broadly supportive of extending the collective action regime in a measured and proportionate way, it is not clear that this will overcome these more generic obstacles to bringing claims for very small amounts of loss. As described in our response to Question 29, we do see a limited role for the CMA/OFT to assist with some form of redress in these cases (possibly along the lines of the agreed resolution arrangements imposed by the OFT in the *Independent Schools* fees investigation) that are clearly unsuited to litigating, even on a collective basis.

As regards the outcome in *JJB*, the single collective action brought to date, we note that the case was hampered by certain issues that will not be present in all collective actions. First, the very low level of damages (£20) in question meant that a degree of inertia in claimants coming forward was inevitable; cases involving frequent, low-value purchases of consumer goods over a period of time (e.g. petrol) or higher value, less frequent, consumer purchases (e.g. notebook computers) are more likely to attract higher rates of participation. A settlement offer of a free mug and t-shirt made by *JJB* before the Which? representative action was commenced would also have reduced participation. Moreover, six years had passed since the time of the infringing conduct; records (customers' receipts) were not readily available and even the majority of football shirts purchased had long since disappeared. Finally, the action was limited to those who had made personal purchases of the football shirts.

The design of the current collective action regime cannot therefore be held exclusively responsible for only one collective action having been brought or the limited success of that case. At the same time, we do recognise that certain aspects of the current regime do not readily facilitate collective redress for breaches of competition law. In particular, the requirement for a body designated by the Secretary of State to bring a collective action under section 47B of the CA 1998 (currently only Which?) impose a material restriction on claimants' access to collective actions and is, in any event, a blunt mechanism for certification of the appropriateness of a claimant. We similarly do not see a compelling rationale for limiting collective actions to consumers who have made purchases for personal consumption (but equally do not support a wholesale extension of the regime to businesses generally (see our response to Question 11 above).

<sup>13</sup> *The Consumers Association v. JJB Sports Plc* (Case No. 1078/7/9/07).

<sup>14</sup> For example, the three highest fined cartels sanctioned by the European Commission include cartels in the markets for Car Glass, Gas Insulated Switchgear and Elevators and Escalators.

Finally, we accept that a pre-action opt-in regime faces challenges in attracting high levels of participation in collective actions, noting the evidence put forward by the Government at paragraph 5.19 of the Consultation Paper. We do not though consider that this in itself automatically justifies a shift to an opt-out model for collective actions (see details of our position in our response to Question 14). Rather, a measured and proportionate extension of the opt-in collective actions regime, together with a small but defined role for the OFT/CMA (see response to Question 29), is likely to result in greater access to redress for consumers and/or small businesses that suffer loss arising out of breaches of competition law.

**Q10. 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.**

**A:** From a pure policy perspective, we are not persuaded that there is justification for the inclusion of deterrence as an express policy objective connected with the reform of collective actions in competition law. Deterrence, as a policy objective, is a function of public law enforcement. Competition law is vigorously imposed in the UK and EU with heavy fines imposed; such fines being levied at a level that is designed to deter others from infringing competition laws. In addition, the criminal cartel offence, orders for disqualification of directors and the career-terminating nature of being found guilty of the cartel offence offer deterrents to responsible individuals.

In contrast, collective actions concern the private enforcement of competition law, the rightful policy objective of which is redress to those harmed by anti-competitive conduct. Damages awarded in collective actions should compensate for losses suffered arising out of infringements of competition law but a further punitive aspect is not appropriate. As described further in our response to Question 16, this would offend the legal principle against double jeopardy. Moreover, the existing private enforcement regime (and indeed UK litigation generally) also entitles claimants to an award of interest on their loss and a right to recover costs from the defendant(s) provided their case is successful.

At the same time, we recognise that, in practice, an effective private enforcement regime contributes to a deterrent effect as businesses contemplating engaging in anti-competitive conduct will weigh the perceived gains of such conduct against both the punitive fines that may be imposed in public enforcement action and the payment of redress arising in private enforcement action. This is undoubtedly a desirable outcome and lends support to the pursuit of increased access to redress as a policy objective.

Ultimately though, if an expansion of the regime to a highly litigious US-style model is to be avoided (and the Government is clear this is not its desired outcome), then the need for a balanced system ought to be a cornerstone policy objective of reforms to the regime. In particular, it is important that extensions to the collective action regime do not erode the rights of defendants and that where significant extensions to the regime are proposed that adequate safeguards are put in place to shield defendants from unmeritorious and/or opportunistic claims.



**Q11. Should the right to bring collective actions for breaches of Competition law be granted equally to businesses and consumers?**

**A:** We are in principle supportive of collective actions being made available to businesses, provided, however, that they are only made available to businesses who would not otherwise have appropriate access to redress. In particular, we recognise that in some cases the barriers that hinder consumers from seeking redress will also apply to SMEs. In contrast with larger/well resourced companies, for SMEs the costs of bringing legal proceedings in the CAT or High Court are likely to be prohibitive (particularly when the risk of costs exposure is taken into account). Additionally, even if an SME is able to bear the costs of litigation (noting that the corollary of the loser pays principle is that it will recover costs if successful) it may be that, much like with consumers, its quantum of loss does not justify the expense of bringing legal proceedings to recover its losses. This point is illustrated by BIS's example of cartelised printer cartridges (see Box 3 of the Consultation Paper).

At the same time, many businesses (especially larger/well resourced businesses) have adequate access to redress for competition law infringements. An increasing number of claims are brought by businesses in both the CAT and the High Court seeking damages for breaches of competition law. In addition, it will frequently be the case that larger/well resourced businesses which have suffered loss due to an infringement of competition law will have an important commercial relationship with the defendant(s) meaning a commercially negotiated form of redress is often able to be reached. Such negotiated outcomes represent, in our view, a more efficient means of obtaining redress. Even if this is not the case, larger/well resourced businesses are well placed to weigh the merits of bringing litigation in the light of the value and strength of their claim, much in the same way as they would, for example, in a dispute with a supplier over faulty goods.

We accordingly question whether, for larger/well resourced businesses, collective redress is an appropriate means of recovery. Previous proposals to develop more extensive collective redress mechanisms have focussed on the need for a mechanism to efficiently allow the bringing of "mass" claims for small amounts of individual harm (see for example DG SANCO consultation paper "Follow-up to the Green Paper on consumer collective redress", 2009). Making collective redress available to large businesses who are sophisticated and well resourced is not consistent with the stated aim of collective actions and is likely to incentivise the bringing of claims that collective redress is not designed to apply to.

As noted above, we are, in principle, supportive of the collective actions regime being extended to include SMEs. Although we consider that the regime should not, in practice, be open to larger/well resourced businesses, we do not propose that the regime is strictly extended only to a defined class of SME claimants. We can envisage attempts to define a class of SMEs, to whom the collective action regime would apply, resulting in extensive satellite litigation concerning claimants' status as SMEs (and in this respect see also our response to Question 4).

In light of this concern, it would seem necessary to extend the collective action regime to businesses generally but to provide clear guidance for the CAT to apply at the certification stage to ensure, on the one hand, that the regime is made available to appropriate SMEs, while on the other hand, not extended, except in appropriate cases, to larger/well resourced businesses for whom collective action is not necessary and/or appropriate. In particular, we are concerned to ensure that the regime is not unnecessarily extended to larger/well-resourced businesses that, acting collectively, would be able to bring serious pressure to

settle, above and beyond the ordinary pressures of a strong case. Extending the regime in this way will require the CAT to be provided with detailed guidance as to which businesses the collective action ought to be potentially available to (see response to Question 15).<sup>15</sup>

For the avoidance of doubt, provided they do not have divergent positions on passing on, we see no reason why mixed representative claims of SMEs and consumers could not be brought.

**Q12. Should any restrictions be introduced to prevent such cases being used as a vehicle for anti-competitive information sharing?**

**A:** We do not envisage anti-competitive information sharing to be a material concern in allowing collective actions to be brought by SMEs.

Insofar as stand-alone proceedings alleging ongoing or very recent breaches of competition law (and will therefore involve current or very recent pricing data) are brought, we remain of the view that the risk of collective actions facilitating anti-competitive information sharing remain low:

- First, the issue already exists in the context of certain types of competition cases that come before the CAT, namely appeals by multiple parties of decisions of sectoral regulators such as Ofcom, and also in connection with merger inquiries and appeals. It is common practice for these sorts of cases to involve extensive use of complex confidentiality/counsel-only arrangements to avoid the risk of any inappropriate information sharing.
- Practitioners are therefore familiar with the use of such arrangements (as is the CAT) and are well placed to advise their clients on ensuring such safeguards are in place. Similarly, practitioners are well aware of the implications of the sharing of price/future strategy-related information between competitors in terms of Chapter I of the CA 1998 / Article 101 of the TFEU and thus are well placed to ensure their client's conduct in collective actions is competition law-compliant.
- Finally, we note that, under its current rules of procedure, the CAT has extensive case management powers, more than sufficient to enable it to make orders to obviate the risk of any such inappropriate information exchange. All but two of the CAT Chairmen also hold warrants as High Court judges in that court's Chancery or Commercial divisions and it is our experience that CAT Chairmen can be relied upon to take case management decisions that effectively deal with the often complex issues arising in competition litigation. We see no reason why, in cases where information sharing safeguards are plainly necessary, that these could not be imposed by the CAT.

In the case of follow-on actions, any pricing information relevant to the parties' claims will be historic; indeed, it is not uncommon for the pricing information to date back as far as a decade prior to the bringing of the claim.<sup>16</sup> While, as noted in our response to Question 13,

<sup>15</sup> We would also expect guidance to be published by the CAT, possibly by way of an addition to its Guide to Proceedings.

<sup>16</sup> It is acknowledged that the Court of Appeal's pending judgment in *Deutsche Bahn & Ors v. Morgan Crucible & Ors*, an appeal from a CAT decision, holding that the two year limitation period for bringing proceedings for

we are not, in principle, opposed to the collective action regime being extended to include stand-alone claims, we do not expect the extensions to the regime of the sort supported in this response to lead to a dramatic increase in the number of stand-alone cases; the less burdensome onus in follow-on cases of establishing causation and quantifying loss means these cases are likely to remain more attractive for both collective and individual actions.

For the above reasons, we do not consider that any specific restrictions are required to guard against anti-competitive information sharing.

**Q13. Should collective actions be allowed in stand-alone as well as in follow-on cases?**

**A:** We do not oppose collective actions being allowed in stand-alone as well as follow-on cases (as detailed in our response to Question 2, we are supportive of widening the CAT's jurisdiction to hear stand-alone claims for breaches of competition law). There does not appear to be any principled reason why eligible parties (i.e. SMEs and consumers) should be precluded from bringing a claim to recover losses arising from breaches of competition law simply because the OFT/European Commission has not investigated the matter and determined an infringement of competition law. The OFT/European Commission have limited enforcement resources and therefore necessarily limit their enforcement of suspected infringements of competition law to cases judged to be highest priority.

It is our view that, in the interests of achieving a balanced system of private redress, stand-alone collective actions ought to be subject to rigorous examination at the certification stage. The complexities associated with establishing an infringement of competition law, which is often reliant on sophisticated expert evidence (particularly in "effects"-based cases) and the corresponding costs that feature in such cases make it essential that opportunistic and/or spurious stand-alone claims are detected and thrown out at the certification stage (see further detail in our response to Question 15).

In light of the complexity, lower prospects of success (compared with a follow-on action) and very high legal costs associated with bringing stand-alone cases, we consider that it is essential that defendants in such cases are fully availed of the costs protections ordinarily afforded in commercial High Court litigation. Specifically, it is essential that the loser pays principle is preserved in stand-alone cases. We also do not consider cost caps to be appropriate in stand-alone cases. As discussed in more detail in our response to Question 18, "after the event" ("ATE") insurance is available to cover claimants' costs exposure to the defendant(s); if a credible case exists, then ATE insurance ought to be readily available.

**Q14. 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.**

**A:** It is accepted that the only collective action for a breach of competition law brought thus far (*JJB*) had a very low opt-in rate (fewer than 0.1% potentially affected). However, as noted in our response to Question 9, there are a number of reasons for the low participation rates encountered in *JJB*, not all of which are directly linked to the design of the UK collective action regime. While, as reflected elsewhere in this response, we are broadly supportive of a measured and proportionate extension to the current collective action regime, we agree

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damages in the CAT is unaffected by appeals of the infringement decision by other addressees, may see a number of claims brought more quickly following an OFT/European Commission infringement decision.

with BIS that the regime must be carefully designed to prevent vexatious or unmeritorious claims or the use of the court mechanism as a strategic tool in disputes between parties.<sup>17</sup>

In considering whether an enhanced and extended collective action regime is best facilitated by an opt-in or opt-out system, we consider that the starting point ought to be to determine whether deficiencies of the current opt-in model could not be adequately addressed via amendments to the existing opt-in system (a significantly less radical departure). In our view there are a number of amendments that could be made to extend the existing opt-in system that would address what we consider to be its two real deficiencies: (i) low participation rates (outside the *JJB* case, other evidence put forward by BIS suggests participation levels in non-competition cases are not high); and (ii) limited incentives for the defendant(s) to settle a collective action under an opt-in model because they will remain exposed to further actions (subject to them being brought within the applicable limitation period).

In our view an enhanced pre-damages opt-in system could be designed so as to make significant headway on the two issues identified above.

- First, by allowing claimants to opt-in up until a late stage in proceedings<sup>18</sup>, this means that the representative claimant is not required to identify a sufficiently large group of claimants before commencing proceedings. A representative claimant will be able to use the heightened publicity arising from the commencing of proceedings to attract further claimants to the action once it has been commenced. Given the complexities that arise even in follow-on actions, this would give representatives a window of at least six months (assuming the cut-off is some time prior to trial) to publicise the case and increase the class of claimants.
- This in turn will make the prospects of settlement materially more attractive to a defendant (assuming the claim has a reasonable prospect of success) as the additional time given for affected parties to opt-in and the heightened publicity ought to diminish the chances of further, separate, claims being brought against the defendant(s);
- Moreover, as compared with an opt-out model, it would also allow a court to accurately set the quantum of damages it orders the defendant(s) to pay, rather than having to estimate the total quantum of damages that the defendant(s) is/are liable for. While in some cases, where the period of infringing conduct is quite recent and there is a relatively limited number of parties who have suffered loss and/or detailed sales records, this will be relatively straightforward; in cases which involve sales made a long time ago, estimating the total quantum of damages will be difficult.

As noted below, retaining a hybrid model of this type also avoids the issue of how to distribute/return unclaimed damages (we are opposed to unclaimed damages not reverting to the defendant(s)).

Moreover, a pre-damages opt-in model avoids difficult jurisdictional issues. If an opt-out action were to be introduced, this would give rise to complex questions of jurisdiction in cross-border cases, which do not appear to have been considered within the Consultation

<sup>17</sup> Consultation Paper, paragraph 5.32.

<sup>18</sup> We would envisage that this could be as late as a short time prior to the matter going to trial. There may be some merit though in making the cut-off point slightly earlier – say, three months prior to trial – to maximise the prospects of a pre-trial settlement.

to date, namely, whether those who had suffered loss in other jurisdictions would automatically form part of the class of claimants (and, if so, whether those claimants would be bound by any judgment or settlement of the action, even if they took no part in it and may have been unaware of it) and whether any judgment or settlement would be enforceable in other jurisdictions. If overseas claimants would form part of the class, but questions about enforceability arose, then this could expose defendants to a risk of double jeopardy.

For these reasons, we do not consider that it is necessary to go so far as to adopt an opt-out model for collective actions. Extending the collective actions regime in the measured and proportionate way advocated in this response, namely via an enhanced opt-in system, will already involve significant change to the existing regime and will see the CAT presented with an extensive volume of new cases raising novel and untested issues. Given that, in our view, an enhanced opt-in system for the most part addresses shortcomings identified with the existing regime, shifting to an opt-out model would constitute an unnecessarily radical change to the regime.

We note, however, the Civil Justice Council's view that the distinction between opt-in and opt-out is not necessarily clear cut and accept that the substantive differences between an enhanced pre-trial opt-in system and an opt-out system where unclaimed damages revert to the defendant(s) are (see further response to Question 20 below) limited. Provided adequate safeguards are put in place, we would not therefore be strongly opposed to the adoption of an opt-out system under which unclaimed damages are returned to the defendant(s). However, we consider that from an administrative perspective, moving to an opt-out system is more challenging (for example, issues as to appropriate representative claimants are more complex due to the fact that they will have to be certified by the CAT as representative of all potential claimants) and it risks creating divergent interests between those driving litigation and those who have suffered loss (see response to Question 18), leading us to prefer a system which operates under an enhanced opt-in model.

### **Design Details of an Opt-Out collective Action Regime**

#### *Certification*

**Q15. What are your views on the proposed list of issues to be addressed at certification?**

**A:** We see the certification process as being vital to ensure that extensions to the current opt-in model are not permitted to give rise to unmeritorious and/or opportunistic claims. We agree that a rigorous certification process could be implemented via changes to the CAT Rules.

We agree with the inclusion of all of the points raised by the Government (at paragraph A3 of Annex to the Consultation) in the certification process, all of which will allow the CAT to filter out unmeritorious claims and/or claims not suited to collective action at the earliest stage possible. It is essential that the CAT is given the opportunity to vet collective actions before they are brought, not just in order to ensure defendants are not required to instruct legal representation and incur costs to defend unmeritorious and/or inappropriate claims to the stage at which they are able to have them struck out, but also so as to provide certainty for representative claimants and other claimants potentially party to a claim. In particular, it would be an undesirable outcome if a large number of consumers were persuaded to join up to a claim that was ultimately flawed or hopeless, especially if brought close to the expiry of the limitation period (and consumers and SMEs will not be well placed to judge the strength

of the case). For the above reasons, we are supportive of the CAT also considering the following at the certification stage:

- As part of considering whether the representative claimant has sufficient funds to cover the costs of the defendant should its case be unsuccessful, we consider that the CAT should form a view as to whether an order for security for costs is likely to be required. Such an order may well dampen a representative claimant's appetite for bringing a claim and it is preferable that representative claimants have the opportunity to reconsider commencing proceedings once the CAT has issued a (non-binding) view on the issue at certification stage.
- Whether the collective action has a reasonable or arguable case on jurisdiction. If it is clear to the CAT that there is no jurisdiction for the representative claimant to bring the claim then they should decline permission to bring proceedings.
- Similarly, the CAT should ascertain that the representative claimant has reasonable grounds to consider that the claim is within the relevant limitation period (within two years of the relevant date).<sup>19</sup> We recognise that limitation is usually used as a shield, with the onus on the defendant to plead and argue limitation as a defence; however, in the circumstances it seems appropriate for the CAT to be able to ensure that the claimant has a clear, at least arguable, basis for considering their claim to be brought within the relevant limitation period.

As we advocate the extension of the collective actions regime to businesses, but with an overwhelming focus on providing access to justice for SMEs (see response to Question 11), if a representative action is being brought on behalf of businesses then we would propose that the CAT determines whether the representative claimant (and any claimants that have opted-in at the time of certification) are appropriate businesses to be bringing a collective action for redress having regard to factors, such as: (i) whether they have the resources (within their corporate group) to bring the claim alone; (ii) the quantum of loss they are each claiming as against the costs they are likely to each incur in bringing the claim; and (iii) whether they are seeking to bring a collective action in good faith.

**Q16. Should treble or other punitive damages continue to be prohibited in collective actions?**

**A:** We agree with BIS's conclusion that treble or other punitive damages should continue to be prohibited in collective (and indeed any other form of) competition law actions.

As outlined in the response to Question 10 above, the proper objective of collective redress (and any form of private competition law action) is compensation for losses suffered, not to punish defendants.

Punishment/deterrence lies in the realm of the public enforcement system and is sufficiently provided for by the ability of the OFT/sectoral regulators and the EU Commission, to impose significant fines, and the ability of the OFT to take additional action in the form of criminal prosecution of individuals and the disqualification of directors.

<sup>19</sup> As indicated above at footnote 4 the position on when the CAT's two year limitation period starts to run is currently unclear but it is expected that the Court of Appeal's judgement in *Deutsche Bahn* (due imminently) will clarify the position.

Moreover, the existence of such punitive damages would infringe the principle of non bis in idem/double jeopardy. This issue was recognised at first instance in *Devenish Nutrition v Sanofi-Aventis SA*<sup>20</sup> in respect of the issue of whether exemplary damages should be awarded: "the principle of non bis in idem precludes the award of exemplary damages in a case in which the defendants have already been fined (or had fines imposed and then reduced or commuted) by the Commission."<sup>21</sup>

Moreover, we agree with BIS that to allow such damages would encourage unmeritorious/spurious claims and would clearly place undue compulsion on defendants to settle; this would not be consistent with the stated aim of seeking to prevent the perceived excesses of the US system. This is particularly the case given that under English law, unlike in the US, interest will be payable from the date of loss (at least in the High Court). If a claimant could recover both interest and treble damages there would be a large inflation of recovery.

In addition, if treble or other punitive damages were available this will impact on undertakings' assessment as to whether to make leniency applications, being likely to deter undertakings from doing so and thereby undermining the public enforcement regime.

Finally, it is unclear why competition law claims over and other deserving claims in other areas should benefit from such damages. Connected to this point, the existence of damages would again lead to claimants seeking to "shoe-horn" what is not in reality a competition law claim into a competition framework in order to benefit from treble or other punitive damages.

**Q17. Should the loser-pays rule be maintained for collective actions?**

**A:** We consider that it is very important that two-way cost shifting/the "loser pays" rule be maintained for collective actions, in particular for stand-alone actions (see Question 13 above). This is an essential safeguard against unmeritorious/spurious claims, as BIS recognises (paragraph A.9 of Annex A). Lack of such cost-shifting is a clear factor leading to the volume of litigation and instances of unmeritorious/blackmail litigation in the US system.

However, unlike in the High Court, where CPR 44.3 provides that the basic rule is that costs follow the event, the CAT Rules do not explicitly contain any default rule in favour of the loser pays principle. "Loser pays" is therefore only the starting point, the CAT stressing that it should retain the flexibility to deal with costs on a case-by-case basis<sup>22</sup> and that the CAT has discretion whether to award costs in particular set of circumstances and what amount to award.<sup>23</sup>

Allowing too much flexibility would undermine the important role of cost-shifting in making claimants (and funders) aware that they are at risk of a significant costs order if unsuccessful.

Therefore if a revised collective action in the CAT were to be introduced, in particular involving any move away from pure opt-in claims and/or extending collective actions to stand-alone cases, it is submitted that the CAT Rules should be amended to provide that in

<sup>20</sup> [2007] EWHC 2394.

<sup>21</sup> The recent award by the CAT of exemplary damages in *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19 does not alter this conclusion, concerning as it did a narrow category of case where the OFT had found an infringement but had not imposed penalties.

<sup>22</sup> See for example *The Institute of Independent Insurance Brokers v DGFT* [2002] CAT 2.

<sup>23</sup> See for example *Vodafone Ltd and others v OFCOM* [2008] CAT 39.

such private enforcement cases the basic rule is that costs follow the event, as under the CPRs in the High Court.

Hand in hand with the clear maintenance of the “loser pays” rule in such cases is the need for the representative claimant’s ability to meet the defendant’s costs to be a key factor on certification, and, as raised in the response to Question 15 above, for the CAT to order security of costs where appropriate (in relation to which we submit that consideration be given to applying an adjusted test on security of costs in a collective action to reflect the enhanced risks involved, in particular in stand-alone cases).

In addition to the above, funders should also be liable for the defendant’s costs in such cases if the claim is unsuccessful, in accordance with the decision in *Arkin v Borchard*.<sup>24</sup>

**Q18. 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?**

**A: (a) In the interests of access to justice**

We consider that cases cost-capping may only be appropriate in truly exceptional cases in this context.

Cost-capping may facilitate access to justice by providing certainty as to costs exposure. Cost-capping can also in some circumstances benefit defendants, for example incentivising claimants to control costs where they have entered into funding arrangements which would mean that they would otherwise not have incentives to do so.

However, given the brake this exerts on unmeritorious claims, the default “loser pays” principle should only be departed from with great caution. It should be remembered that claimants can in principle seek ATE insurance (despite the premium being unrecoverable once the relevant provisions of the Legal Aid, Sentencing and Punishment of Offenders Act have come into force) in appropriate cases, which assists with costs certainty. Cost capping should therefore only be ordered in clearly appropriate cases, which would depend for example on the relative size and strength of the parties, and the type of case - for example it is submitted that cost-capping should not occur in stand-alone case (see Question 13 above) - and be subject to a merits test.

In addition, the CAT would need to ensure that any cost cap was realistic, in light of the inevitable technicality and complexity of competition law private enforcement cases.

It may also be appropriate/necessary in some cases for claimants to agree to accept limitations on the scope of claims/issues pursued in return for cost capping orders.

Finally, BIS does not indicate whether it considers that cost capping would be a one way measure or whether there would also be some level of cap on the recoverability of the claimant’s costs; symmetry/reciprocity should in our view be required in order to ensure fairness and that the claimant retains incentives to control its costs.

<sup>24</sup> [2005] EWCA Civ 655.



**(b) Where the costs of the claimant could be more appropriately met from the damages fund**

We do not follow the reference in paragraph A.11 of Annex A to the Ministry of Justice response to Lord Jackson's *Review of Costs in Civil Litigation* (December 2009) in this context. If this refers to the lifting of restrictions on Damages Based Awards ("DBAs") now implemented by the Legal Aid, Sentencing and Punishment of Offenders Act, under a DBA arrangement a successful claimant will still recover its base costs from the defendant (the success percentage payable to its lawyers being deducted from the damages pay-out, as with the success fee under a Conditional Fee Arrangement ("CFA")).

In any event, the proposal that a successful claimant's costs be deducted from the damages pay-out rather than extracted from the defendant as per the usual rule does merit some consideration, in the circumstances raised in the Consultation Document, i.e. if an opt-out action were introduced under which unclaimed funds did not revert to the defendant (which, as per our submissions in response to Question 14 above and Questions 20-21 below, we oppose). However, we note that such a proposal may serve to give law firms greater incentives to influence the level of damages, leading to potential perverse incentives and making settlements more difficult to achieve. If implemented, this issue should be dealt with on certification.

It is not clear in what other circumstances BIS envisages that such an exception could be ordered.

**Q19. Should contingency fees continue to be prohibited in collective action cases?**

**A:** This is a complex question, as, on one view, allowing contingency fees/DBAs would provide an additional source of potential funding for claimants and therefore potentially facilitate greater access to justice.

However, allowing DBAs in collective competition actions would give rise to the following concerns:

- The interest of lawyers in the level of damages awarded can create perverse incentives/conflicts of interest between the law firms driving the litigation and those who have suffered loss. This is also likely to make settlements more difficult.
- DBAs would also lead to incentives to inflate the size of the class in an opt-out case/the size of the potential damages.

Allowing DBAs in collective competition law actions may also in fact undermine wider access to justice aims, as such fee arrangements would incentivise lawyers to concentrate on cases with high overall damages/a high number of claimants, to the detriment of other claims where consumers/businesses have suffered from competition law breaches (and also those stand-alone cases where the main relief sought is injunctive).

Overall, therefore, we would agree that contingency fee arrangements/DBAs continue to be prohibited in such cases.

We note however that many professional funders operate on the basis that their financing fee is a percentage of the claimant's overall damages recovery, and therefore the issues raised above may arise regardless of the fee arrangements with legal representatives.

The Consultation Paper does not address whether DBAs will also be prohibited for individual competition law claims brought either in the CAT or the High Court; if not, this may give rise to complexities in the co-existence between the different forms of action (and disincentives in utilising the collective action regime).

Finally, in relation to other fee structures such as CFAs, we assume there is no intention to depart for competition cases from the reforms recently enacted within the Legal Aid, Sentencing and Punishment of Offenders Act abolishing recovery of CFA success fees and ATE premiums from defendants. This will be an important further safeguard against unmeritorious claims.

**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?**

**A:** If an opt-out action were to be introduced, contrary to our submissions in the response to Question 14 above, the option of paying unclaimed funds to a single body is unjustifiable and inappropriate, resulting in an unjustified windfall to the Access to Justice Foundation or other specified body. It will in our view also risk undermining incentives for defendants to reach settlements.

An opt-out action combined with any option for the distribution of unclaimed funds other than reversion to the defendant would in our view cross the line from compensation to punishment. Such a model does not aim at or result in compensation/redress, but at punishment and deterrence, which, as discussed above, should not be policy objectives in the private enforcement realm.

The concerns expressed by BIS over a "windfall" to the defendant (paragraph A.26 of Annex A of the Consultation Paper) in a defendant reversion model confuses punishment/deterrence and redress functions, and ignores the fact that the defendant will in most cases have already been fined significant sums. Similarly, the purpose of competition law private actions is not to provide funds to "benefit society" and therefore it is unclear why one of the reasons given for rejecting defendant reversion is that it would reduce funds that would otherwise benefit society (paragraph A.26 of Annex A of the Consultation Paper).

Reversion to the defendant is the only option which would be consistent with the compensatory objective of private actions.

This is particularly the case given that the size of the unclaimed fund pot in opt-out cases, and therefore the level of the damages awarded which does not in fact compensate those wronged, can be very high.

On this point we note that reference within the consultation document to median participation rates in opt-out cases when assessing the type of regime most likely to deliver redress (see our response to Question 5 above) is misplaced. The statistics referred to – 87-99% participation – in fact reflect the level of potential victims opting out of such actions, not the level of victims who actually claimed their share of the damages award, and therefore do not provide any insight into the actual level of redress achieved and the level of "punishment" rather than redress present within the system.

The US experience in fact shows that claim rates can be very low and therefore unclaimed fund amounts very high. For example, in *Re Domestic Air Transportation Antitrust Litigation* 137 FRD 677 (N.D. Ga 1991) the redemption rate for the coupons issued in settlement was

less than 10% of the potential class members, and in *Princeton Economics Group, Inc. v AT&T* 768 F. Supp. 1101 (1991) the redemption rate was around 12%.<sup>25</sup>

In addition, depending on how the issue of non-UK claimants is resolved, double jeopardy issues could arise if such claimants formed part of the class, and therefore the damages pot, but there were issues about the enforceability of the judgment or settlement outside the UK. If a claimant brought a claim elsewhere and the CAT's judgment was not recognised as binding, the defendant would be at risk of paying twice for the same harm in the absence of reversion.

Allowing reversion to the defendant would also ensure that incentives to settle are not undermined (which would breed inefficiency in the system), in particular where arrangements with litigation funders involve remuneration on the basis of a proportion of the damages pot.

The concerns expressed by BIS about defendants under this model having incentives to minimise the awareness of the award are in our view overstated, and can be dealt with easily. Court approval of the settlement/award process, including the mechanisms implemented for notification of those eligible and management of the distribution of damages, for example through use of established claims management/handling companies to handle publicity and distribution (as exist in the US system), will remove any concern in this regard.

**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?**

**A:** Please see our response to Question 20 above. It is inappropriate and unjustifiable for unclaimed funds to be paid to a single specified body, as is any mechanism for dealing with unclaimed funds other than reversion to the defendant.

**Q22. 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?**

**A: Competition authority**

There would be some advantages in a competition authority – i.e. the OFT/CMA – being the specified body to bring collective actions, for example given its expertise and knowledge, and given that this may lead to voluntary redress schemes being agreed as part and parcel of the investigation in a more cost effective and efficient manner (this would obviously not apply to EU Commission follow-on or stand-alone actions). In addition, restricting collective actions to the OFT/CMA would be a safeguard against unmeritorious/spurious claims.

However, such an approach may raise questions of fairness, given that, at least in UK cases, it would be the same body which has investigated and adjudicated on the question of infringement bringing the action.

Moreover, we agree with BIS' conclusion that granting the right to bring collective actions only to the competition authority would not increase access to justice/ability to obtain redress. The OFT/CMA would simply be unlikely to bring claims in light of resource

<sup>25</sup> See Thari/Blockovich, "Coupons and the Class Action Fairness Act" (2005) 18 Geo. J. Legal Ethics 1443.

constraints and competing priorities. This is particular the case in relation to stand-alone claims and EU Commission follow-on claims.

Finally, if the OFT/CMA were to have the ability to bring damages actions, this may also reduce incentives on undertakings to seek leniency.

### **Private bodies**

Whether rejecting a public collective action model necessitates a conclusion that individual consumers and businesses should be able to bring private actions in their own right is not straightforward.

If collective actions are limited to opt-in actions in which each claimant needs to be identified, there should not be an issue in allowing those private individuals and businesses which have suffered harm to bring actions in their own right.

If collective actions were to be brought on an opt-out or pre-damages opt-in basis, given the potential risks (for example of unmeritorious actions and litigation in reality being driven by law firms and funders) there may be some advantage in circumscribing the right to bring such actions to authorised representative bodies, such as Which? or other consumer groups or trade associations. Such bodies could either be authorised on a permanent basis, as with the current action under Section 47B CA 1998, or on a case by case basis by the CAT where appropriate.

However, limiting representative claimants to such legitimate bodies, rather than extending to any consumer or business which has or may have suffered harm (and whom is entitled to bring a collective action – see the response to Question 11 above), would not be consistent with BIS's access to justice objectives. Therefore, on balance we support allowing those parties who have suffered harm, who may be better able to assess whether a claim is worth pursuing and have greater incentives to pursue such cases if so, to act as representative claimants in collective actions.

This would need to be subject to strict certification, to ensure that the claimant was sufficiently representative, and otherwise suitable to bring a claim, both in terms of having access to sufficient funds to meet any adverse costs order (see the response to Question 15 above) and in terms of appropriate governance arrangements being in place, to ensure the efficient running of the claim in terms of dealings with other class members during the pursuit of the claim for example.

Careful consideration would also need to be given as to what class or sub-class could be appropriately represented by the representative (for example where the claimant class is made up of different constituents – such as consumers/SMEs and direct/indirect purchasers).

Finally, on certification, in order to reduce the prospect of the litigation being purely driven by law firms and/or funders in practice, which is a real risk even if law firms and/or funders are denied standing, it would need to be ensured that the representative claimant was not merely a "straw man" or nominal figurehead claimant to front an action for the law firm and/or funder, but had a genuine interest in the running and outcome of the claim. The option of using a body such as Which? or the Federation of Small Business should remain and continue to be encouraged.

**Q23. 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?**

**A:** We agree with BIS that law firms and funders should not be allowed to bring collective actions, in light of the concerns it identifies about the interests of the lawyers/funders potentially diverging from those of the consumers or business who have suffered harm.

However, as noted above, these concerns may still arise as in most cases lawyers/funders will effectively run the claim. Due to funding arrangements, including remuneration for funders on the basis of a percentage of the damages awarded, conflicts of interest/perverse incentives may in any event arise.

**Q24. Do you agree that ADR in competition private actions should be strongly encouraged but not made mandatory?**

**A:** We agree that ADR should be strongly encouraged, but not mandated, in private competition law actions.

As the Consultation Paper recognises (at paragraph 6.3), it has long been UK Government policy to promote the use of ADR throughout the court system wherever it is feasible to use it and it has become a key feature of litigation in this country. Since at least the introduction of the CPRs in 1998, following the landmark *Access to Justice* (July 1996) report by Lord Woolf, the use of ADR and mediation in particular has been actively encouraged by both legislators and judges.

Thus, for example CLLS members have been involved in cases where competition disputes, including the award of damages, have been resolved through mediation as well as arbitration.

In this regard we note that:

- Rule 1.4(e) of the CPRs makes it part of the Court's duty for furthering the "overriding objective" to "encourag[e] the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure";
- Paragraph 8 of the CPR Practice Direction on Pre-Action Conduct encourages parties to consider the use of ADR pre-action and throughout the action. In accordance with paragraph 4.6 of the same Practice Direction, non-compliance may be punished through costs orders, awards of penal interest or deprivation of interest and/or the imposition of a stay. Where formal pre-action protocols exist for particular types of action, it is routinely a requirement of them that the use of alternative dispute resolution be considered;
- Question 1 of the standard Allocation Questionnaire (Form N150) requires all parties to consider whether they would like a stay to try and negotiate a settlement. The Court can order a stay for this purpose even if only one party asks for it;
- Provisions in the Commercial Court Guide require parties to provide information about what steps they have taken to resolve the dispute by ADR or, alternatively,

why ADR would not be appropriate. The Commercial Court can also order use of an ADR process or, more typically, it may order a stay to allow the parties space to try to agree the use of an ADR process. It can even, by agreement, undertake an Early Neutral Evaluation itself, though we are not aware of this option ever being used in a competition law private action. The enthusiasm of the Commercial Court for ADR is of great importance in this context because, alongside the Chancery Division, it is one of the only two courts outside the Competition Appeal Tribunal ("CAT") that can hear competition law private actions;

- A series of judicial decisions have confirmed that it can be appropriate to impose costs sanctions for an unreasonable failure to participate in alternative dispute resolution processes. See, for example, *Dunnett v Railtrack plc* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434 and subsequent cases applying it;
- As noted in the Consultation Paper (at paragraph 6.9), the CAT can also encourage the use of ADR. Rule 44(3) of the CAT Rules gives the CAT the power to "encourage and facilitate the use of an alternative dispute resolution procedure if the Tribunal considers that appropriate". The CAT has used those powers in a number of cases.

There is also now increasing support for ADR at the European level and we would refer to EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters as support for that proposition.

We see nothing to suggest that ADR should be encouraged less in relation to private competition law actions than in relation to other types of litigation.

In fact, it is already the case that most competition law private actions are already resolved by way of negotiation and/or mediation. Very few claims are litigated all the way to trial. This is the same as in other forms of commercial litigation. If there is an issue in relation to the use of ADR in private competition law actions, it is not so much that it is not used but that it is typically only used after proceedings have been issued and often only after quite a lot of time and cost has been incurred in the proceedings. We address the reasons for this further in our response to Question 30 below in explaining why we believe there are very good reasons for providing additional incentives to offer a scheme of redress.

Whilst we believe that ADR should be strongly encouraged, we do also agree with the consultation paper that it should not be made mandatory in private competition law actions.

There has, of course, been a long debate in legal circles about whether it is ever a good idea to make the use of ADR mandatory. We do not propose to repeat all the arguments that have been made over the years but we believe that there are at least three good reasons for not making it mandatory in relation to competition private actions, being that:

- Where the form of ADR is one like mediation, that depends on the parties reaching a voluntary agreement, rather than having a solution imposed upon them by a third party, there is little point in compelling the involvement of the parties because it is unlikely to result in any resolution of the dispute. Parties who cannot even reach agreement on the use of an ADR procedure are unlikely to be able agree on settlement terms. Compelling parties to undertake ADR before they are willing to do

so voluntarily may even obstruct settlement by making one or both parties less willing to try it again later at a more appropriate time.

- Parties should be free to insist on their right of access to the courts. It is a fundamental right of parties, protected inter alia by Article 6 of the European Convention of Human Rights, to have a "fair hearing" before "an independent and impartial tribunal". As most commercial litigators will concede, mediation (probably the most popular form of ADR) does very often resolve disputes but it does so in a fashion that typically has little to do with the merits of the case or, more broadly, in a way that would respect Article 6 rights.
- It has so far generally been the policy of the Government and the courts not to make ADR mandatory. In fact, we note that paragraph 3.9 of the Pre-Action Protocol for Defamation Claims goes as far as to say that, "It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR." Similar statements are made in other pre-action protocols. We see little justification for singling out private competition law actions as an exception in that regard.

We would also oppose any attempt to mandate pre-action ADR in the specific circumstances of private competition law actions. for the same reasons that we would oppose a pre-action protocol, as discussed below.

For the avoidance of doubt, we see no reason why the encouragement of ADR should be restricted only to one type of private competition law action. We can see how ADR is particularly suited to representative actions and collective actions. However, we think that ADR brings benefits for all types of claims and so would not single any out particular type of claim for different treatment.

**Q25. 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?**

The CLLS considers that although some form of incentive for pre-action consideration of ADR would be beneficial, proposals to introduce a pre-action protocol for private competition law actions should be approached with caution.

Pre-action protocols are guidelines under the CPRs for civil proceedings in England and Wales on what needs to happen before a case can be brought to Court. They encourage the parties to exchange information about their dispute and to consider the use of ADR. The CPRs allow the Courts to take into account the extent of the parties' compliance with the general Practice Direction on pre-action conduct<sup>26</sup> and with any applicable specific pre-action protocols in (i) giving directions on claims management and (ii) making orders as to the payment of costs.

There are at present 11 specific pre-action protocols under the CPRs, the latest to be introduced being that for dilapidations claims in commercial property disputes, which came into force on 1 January 2012. There is not currently a specific pre-action protocol for competition law claims brought before the High Court and there are no provisions in the CAT Rules concerning pre-action conduct.

<sup>26</sup> CPRs, Practice Direction: Pre-Action Conduct

BIS's proposal is for the adoption of one or more pre-action protocols for competition law cases. Failure to observe the relevant protocol could then be taken into account in attributing costs or in determining whether or not a case is suitable to be heard as a collective action. The Government considers that pre-action protocols are likely to be particularly useful for cases under the proposed new SME fast track procedure and for collective actions.

#### **a) Fast-track**

We believe that introducing pre-action protocols in respect of proceedings under the proposed new fast track model will help prevent the CAT from being inundated with a large number of potentially frivolous and vexatious claims so that it is well disposed to handle the most meritorious cases. However, we would caution against the introduction of extra procedural steps that a pre-action protocol might bring, especially with regard to pursuing ADR, which would undermine the efficacy of the new fast track timetable. SMEs need quick and direct access to the CAT if they are going to be able to secure immediate interim relief.

There is also a danger that if are too many procedural steps are put in place the fast track procedure will become discredited and consequently be little used.

Under the PCC Guidance, the parties are required to observe the general CPR pre-action Practice Direction, although this stops short of imposing an absolute obligation to attempt ADR prior to the issuing of proceedings, stating that:

*“as unjustified threats to bring legal proceedings in respect of many IP rights can themselves be subject to litigation, each claimant will have to make their own decision as to whether it is appropriate to write to a prospective defendant to see if matters can be settled before any proceedings are issued.”<sup>27</sup>*

We believe that a similarly flexible requirement in relation to pre-action conduct would be favourable to a rigid pre-action protocol for the proposed new CAT fast track.

#### **b) Collective actions**

The requirement to pursue ADR under a pre-action protocol has the potential to precipitate more formal settlement offers, which would complement the proposed new “opt-out” system for bringing collective competition law actions. It would also help encourage regulator-sponsored agreement of redress schemes (discussed elsewhere in the Consultation Paper) by cartellists. Providing a costs incentive for claimants and defendants alike in collective actions to try and agree settlement terms should give them greater appeal. A heightened incentive to settle increases the prospect of swift redress.

#### **c) All cases in the CAT**

Pre-action protocols (and compliance, or not, with the guidelines they contain) can provide a useful guide to the CAT panel when determining costs in a case. Introducing a costs incentive to settle or otherwise resolve a case out of court is generally to be welcomed.

<sup>27</sup> Patent County Court Guide (issued 12 May 2011), available at <http://www.justice.gov.uk/downloads/courts/patents-court/patents-court-guide.pdf>, p. 9.



However, we would urge that careful consideration needs to be given as to the manner and means by which pre-action conduct is regulated in CAT proceedings. Strict requirements to pursue routes of ADR (e.g. mediation and expert determination) may only prove efficacious in a minority of cases and may otherwise only serve to unnecessarily increase the paperwork and bureaucracy involved in bringing, defending and managing claims, which would defeat the aims of the proposed reforms to private enforcement. This is likely to be the case when smaller rivals are seeking to combat the abusive practices of a dominant rival who has taken a strategic business decision to engage in the disputed conduct.

Pre-action protocols as such are not practical in private competition law actions in Europe because of how the jurisdictional rules work under EU Regulation 44/2001 (the "Brussels Regulation").

The interaction of Articles 2, 5(3) and 6(1) of the Brussels Regulation create a situation where there are typically many different national courts that could entirely properly have jurisdiction to determine the loss (if any) suffered by any given purchaser of allegedly cartelised goods. There is, accordingly, a choice of courts available.

Article 27 creates a situation where it is the court "first seised" that takes priority. Any court where proceedings were started later between the same parties, and in relation to the same cause of action, must stay its proceedings until the first court seised has disposed of the claims before it (either substantively or by determining that it does not have jurisdiction).

If the purchaser must give the alleged cartelist prior notice of a claim, the alleged cartelist has the opportunity to pre-empt the claim by issuing its own proceedings in a court of its choice for a declaration that it has no liability toward the claimant. This is what has become known as the "Italian torpedo" and is what happened in the *Synthetic Rubber* case, where we believe that ENI acted precisely because it received a letter before action from a purchaser.

If a pre-action protocol required the purchaser to write to the alleged cartelist before issuing proceedings, it would inevitably create a risk of the purchaser losing the opportunity to bring its claim in England. In fact, it is most likely that purchasers would be advised to ignore the terms of the protocol.

This issue will be particularly acute with large-scale cross-border damages actions such as those that are likely to be brought by way of the new opt-out collective action (if the Government proceeds with that proposal) but it may still arise even in relation to cases that may be amenable to the proposed fast-track route. Indeed, the defendants' desire to avoid the fast-track may make it particularly likely for an Italian torpedo to be used as a tactical weapon.

For these reasons, therefore, we would not support a pre-action protocol as such.

We do believe, though, that there is merit in very strongly encouraging parties to engage with each other to try to narrow the issues in dispute and explore the scope for settlement. We also believe that the procedures typically set out in pre-action protocols can be quite effective for that purpose.

With that in mind, we would propose a slightly different form of pre-action protocol that, strictly speaking, could be considered a "post-issue protocol". This would very strongly encourage all parties to go through the protocol process before the time for preparation of

defences, at the latest, with encouragement to agree stays of the proceedings for that purpose insofar as it may be necessary. We note that this is similar to the approach in existing pre-action protocols where parties issue proceedings before complying with the protocol due to the imminent expiry of a limitation period. As with more typical pre-action protocols, there could be cost sanctions for refusal to comply.

It may be that in at least some cases (particularly follow-on cases) there is no real need for a pre-action or even post-issue protocol because the approach just described is what tends to happen in practice anyway. In our experience, claimants and defendants tend to engage in discussions directed towards settlement and/or narrowing the issues in dispute either immediately following the issue of proceedings and even before service or, alternatively, following the determination of jurisdictional challenges. Nonetheless, we would suggest that a post-issue protocol would be helpful in ensuring that the claimant's arguments are fleshed out early on in proceedings, particularly in stand-alone cases.

**Q26. Should the CAT rules governing formal settlement offers be amended?**

**A:** Yes, the CAT Rules governing formal settlement offers need amending.

Rule 43 of the CAT Rules does not work well for the following reasons:

- The rule only sets out a process for formal offers by defendants and not by claimants;
- The rule requires a cash payment to be made into court by the defendant. The equivalent High Court rule long ago did away with the requirement to actually make a payment in order for a formal offer to be valid;
- There is no explanation of exactly how a payment into court is to be made. It is said that the details are to be found in a practice direction but there appears to be no practice direction;
- The defendant cannot withdraw or reduce the offer once made other than with the permission of the Registrar, however the criteria for granting permission are not set out anywhere;
- Rule 43(5) permits the claimant to accept the offer at any point up to 14 days before the final hearing and rule 43(6) establishes a default rule that the claimant will be entitled to its costs up to the date of acceptance. This is an especially significant deterrent to the making of formal offers by defendants under rule 43 because it requires a defendant to give an open offer to pay all the claimants costs up to the point 14 days before trial even if the claimant should have accepted the offer immediately at a very early stage in the litigation. Conversely, it gives claimants no incentive to accept an offer before the point 14 days prior to trial;
- There is very little benefit to a defendant making an offer under rule 43 because the consequences of the claimant failing to beat the offer are only that it will be required to pay the defendant's costs from the last date on which it was permitted to accept the offer, which would be 14 days before trial. Further, whilst the Tribunal "may" order those costs to be paid on an indemnity basis and/or subject to penal interest, it is under no obligation to do so;

- Although rule 43(10) expressly states that rule 43 does not preclude the making of offers in any other form, it gives little incentive to make such offers since it says no more than that the CAT "may" take account of such offers on the issue of costs.

All said, rule 43 gives very little incentive to either claimants or defendants to make offers to settle.

It does not follow that the CAT should simply adopt the CPR Part 36 mechanism that currently applies in the High Court as that also has serious limitations in relation to private competition law actions.

Part 36 is not well designed to cope with situations where there are a large number of defendants all alleged to be jointly and severally liable for the same loss. An offer by a defendant in relation only to "its" proportion of the loss may be unlikely to give rise to any costs protection under Part 36 because the Court will be forced to acknowledge that the claimant was entitled to pursue that defendant for the whole of the loss caused by the cartel.

It is unrealistic to expect a defendant to make an offer in respect of the whole of the loss as it will not wish to be left in a position where it bears the costs and risk of pursuing other participants in the cartel for a contribution. It may be said that this is no different than if the case were ultimately to conclude with a judgment against the defendant but such a position ignores the reality of how private competition law actions proceed. Virtually all competition law private actions ultimately conclude with a settlement or settlements. Where settlement is reached with an individual defendant or small group of defendants, it is only ever for a proportion of the total loss. Where there is a settlement reached simultaneously between the claimant(s) and all defendants, the defendants agree to split the loss. Moreover, even if the case were to proceed to judgment, there would typically be simultaneous judgments on the contribution between defendants. Whilst the claimants could still enforce against only one of the defendants, the defendant chosen would suffer less uncertainty and delay in its recovery than would be the case were there acceptance of a Part 36 offer in relation to the whole loss. In any event, most defendants are simply not willing to make an offer for the whole of the loss.

The reality is that Part 36, rather paradoxically, pushes the defendant former cartelists to work together again to try to formulate a joint offer for the whole of the loss.

Part 36 is also not well designed to cope with the evolution of claims, where claimants are added, defendants removed (including by way of bilateral settlements) or where new sales are identified.

As with rule 43(10) of the CAT Rules, Part 36 does not prevent the making of offers outside its strict criteria but, again, the incentives for such offers are muted because the rules do not place an obligation on the Court to impose any particular consequences if the offer is not beaten (and there is certainly no expectation of indemnity costs or penal interest). There are also still issues arising from joint and several liability as there remains a question as to how a court will answer the question whether or not an offer has been beaten if it is only for a proportion of the amount claimed. The Court may reasonably feel that it is not appropriate to place a burden on the claimants to assess how liability should be split between the various cartelists but it is far from straightforward for one cartelist to put a burden on other cartelists in that respect.

Our proposed solution would be to adopt an issue-by-issue approach to settlement offers where court procedure and the CAT Rules provide that where an offer is not beaten on a particular issue, the costs of determining that issue will not be borne by the party that made the offer. If the claimant(s) failed to beat offers on the same issue by all defendants then they would have to bear their own costs and pay the costs incurred by the defendants - in line with the current approach in Part 36 but applied on an issue-by-issue basis.

We would suggest another innovation, though, where the claimant(s) only fails to beat an offer or offers made by some of the defendants. In that situation, the claimant(s) would complain - usually with justification - that they would have had to incur the same costs even if they had accepted the offers they failed to beat in order to deal with the other defendants. We would suggest, in that situation, that it is entirely fair that the claimant(s)'s costs should be borne only by the defendants who failed to make offers or whose offers were beaten.

The rules could go further in specifying a non-exhaustive list of types of issue-based offer that could be made bearing in mind the typical contours of cartel damages claims. These types of offer could include:

- Percentage overcharge suffered;
- Proportion of overcharge passed through;
- Volume of purchases affected; and
- Pre-judgment interest rate to be applied.

Such an approach would give individual defendants the opportunity to secure some degree of costs protection without in any way undermining the principle of joint and several liability or shifting the risk on allocation of losses between defendants to the claimant(s). It would also increase incentives to settle by incentivising individual defendants to make more generous offers in order to avoid being left with a disproportionate share of the claimant(s)'s costs and, in turn, by probably leaving the claimant(s) facing higher offers from all defendants.

**Q27. 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.**

**A:** The establishment of initiatives to facilitate the provision of ADR for disputes relating to competition law is unlikely to be a role appropriate for the CLLS, but we would certainly be supportive of any such initiative.

**Q28. Do you agree that, should a right to bring opt-out collective actions for breaches of competition law to be introduced, there would be no need to make separate provisions for collective settlement in the field of competition law?**

**A:** The Consultation Paper may be correct in its view that it would be possible to generate a collective action to be settled in most cases where there was a desire to reach a collective settlement. It would also commonly be possible for the parties to resort to the Dutch courts to give effect to their settlement if they wished to reach a collective settlement. There may still be situations, though, where it would be desirable for parties to be able to apply to the

CAT for certification of a collective settlement without prior issue of proceedings. The CLLS would support giving the CAT the scope to provide for that possibility in its procedural rules.

The same issue arises in relation to any opt-out collective settlement, though, as in relation to any opt-out collective action: namely its enforceability outside the UK. We refer to our response to Question 14 above.

**Q29. 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?**

**A:** We can see merit in the idea of giving competition authorities the power to certify voluntary redress schemes but would be opposed to giving competition authorities the power to impose a redress scheme on an unwilling cartel.

**Voluntary redress schemes**

One of the inevitable, and reasonable, concerns for claimants in looking at a voluntary redress scheme is whether it will deliver a fair level of compensation or whether it is simply an attempt to secure cheap settlements. Individual claimants will rarely be in a position to assess for themselves on an informed basis whether a redress scheme is fair. Further, those wishing to earn fees from making claims for claimants (whether the lawyers, funders or claims handlers) may have their own incentives for advising against the acceptance of the outcome of any voluntary redress process.

A competition authority should be seen by claimants as unambiguously supportive of their interests with no ulterior motives of its own. As such, its opinion of a voluntary redress scheme is likely to carry a lot of weight.

We believe, though, that the Consultation Paper may go too far in suggesting that the competition authority could or should specify "how redress should be calculated" (paragraph 6.39). In our view, such an approach would be subject to the same concerns and criticisms that have previously been aired in relation to suggestions that competition authorities should actually specify the amount of compensation to be offered, namely:

- It would be a resource-intensive exercise for the relevant competition authority requiring it to engage with the specifics of the particular case and diverting its resources away from other, higher priority activities including enforcement;
- It is not necessarily a task that falls within the expertise of the competition authority. Competition authorities do not currently get involved in the quantification of losses at all whereas there are many other professionals who do it every day. Whilst the competition authority's assessment could be expected to be impartial, the approach required could well run the risk of leading to erroneously high or low figures;
- If the competition authority is to get involved in the substance of redress proposals, there may be issues about what information it can use in assessing those proposals. The competition authority may well have access to information that could not or would not otherwise be available to claimants, defendants and/or tribunals determining such issues (e.g. leniency submissions or information relating to connected investigations);

- The competition authority may find itself in a very awkward position if it is simultaneously involved in redress issues and in the defence of appeals against the infringement findings.

Our view is that the competition authority should be asked to do no more than provide assurance that a particular process is non-partisan and fit for the purpose of fairly determining losses. Further, we would not suggest that the competition authority should necessarily be expected to examine and individually sign-off on each and every different scheme of redress that might be imagined. A better suggestion might be that the competition authority should agree with industry organisations a number of model schemes of redress that defendants could choose to adopt.

We are aware that the Confederation of British Industry has suggested this sort of process to both the UK authorities and European Commission. The minimum components of its suggested model process include the following:

- Submission of claims to an independently appointed panel of experts, perhaps consisting of one lawyer, one economist and one accountant;
- Agreement by any participating carteliser to accept the panel's decisions as binding. Decisions would only become binding on purchasers if they chose to accept them;
- Power of the panel to determine its own procedure in any particular case, including the evidence to be received (albeit with an expectation that evidence will be kept to a reasonable minimum);
- Power of consumer / representative organisations to be involved and make submissions;
- Flexibility on defendants to offer non-monetary redress;
- Supervision / administration of the process by a renowned ADR provider such as CEDR;
- Processing of claims by an independent claims handler;
- Funding of the process by the carteliser(s).

The competition authority could more tightly specify these requirements by, for example, being more specific on disclosure requirements or representation of claimants.

It is envisaged that "certification" by the competition authority would give rise to a modest reduction in fines (see response to next question) and costs consequences akin to those under Part 36 of the CPRs if purchasers chose not to accept the resulting offers but failed to beat them in subsequent litigation.

### **Imposition of redress schemes**

We do not believe that it would be a good idea for a competition authority to be empowered to impose a redress scheme on an unwilling carteliser.

The (admittedly) tentative analogy drawn in the Consultation Paper with financial services and other regulated industries is inappropriate for reasons hinted at in the Paper. An important distinction between regulated and unregulated industries is that a business choosing to operate in a regulated industry voluntarily accepts additional obligations in order to be permitted to operate in the industry. Regardless of how impractical it may be to do anything different, the regulated entity does have at least a theoretical choice about whether to accept the requirements of its regulator. It can choose to give up its licence and no longer operate in the industry. Thus, there is always a voluntary element even where a requirement is "imposed" by the regulator.

A redress scheme imposed by a competition authority would not be voluntary in any sense. At the extreme, it could simply amount to a deprivation of property without proper judicial controls - which would no doubt raise issues under, inter alia, Article 1 of Protocol 1 to the European Convention on Human Rights. At best, it would amount to a partial deprivation of rights of defence without any compelling justification. We note, in this regard, that arguments could be made for similar powers in relation to other losses that tend to affect many people to a modest extent: for example, product liability, public nuisance and other "mass torts".

We would also question how practical it would be to enforce the powers. It is not obvious how the proposed compulsory redress scheme could give rise to any rights or remedies that would be enforceable in other jurisdictions under the Brussels Regulation. The redress scheme itself could not give rise to any judgment in civil or commercial matters and even if one could get a High Court judgment to give effect to the outcome from the redress scheme, one could well see that other jurisdictions may refuse to give effect to such a judgment either on public policy grounds or on the grounds that it is effectively penal rather than civil or commercial in character. In the meantime, cartelists could sue for negative declarations in other jurisdictions and secure judgments enforceable in England under the Brussels Regulation.

It has been suggested that the power to compel participation in a redress scheme might only be used where most of the participants in a cartel are willing to take part in a redress scheme and only one or two are not. Whilst we can see some superficial merit in that situation, in that it is clearly preferable to have all participants involved, we would suggest that any refusenik will come under considerable public pressure to participate and it will also face a threat of legal action avoided by all the others. One would hope that, over time, those factors will encourage participation. A reduction in fines would also help in that regard (see answer to next question).

**Q30. 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?**

**A:** We believe that a binding commitment to participate in a certified voluntary redress scheme should result in at least a modest reduction in fines imposed.

A reduction in fines is justified for at least four reasons:

- The threat of opt-out collective action and other litigation otherwise will not necessarily be enough to incentivise participation in a voluntary redress scheme. Participation in a voluntary redress scheme will entail (alleged) cartelists sacrificing

various things that are of value to them and which they might quite reasonably be unprepared to do without some clear financial benefit. For example:

- Companies with infringement appeals pending may legitimately be reluctant to discuss compensation whilst there remains a chance that they will not be held liable at all. The availability of a *Masterfoods* stay in formal damages litigation allows them to avoid doing so;
  - A company submitting to a voluntary redress scheme might be able to avoid the opt-out collective action through a challenge to the jurisdiction of the court, a challenge to class certification or otherwise. More broadly, the company would be sacrificing the ability to raise all manner of procedural objections to claims;
  - A company submitting to a voluntary redress scheme will be accepting a probably less rigorous testing of purchasers' claims;
  - If the model adopted were similar to that proposed by the CBI, which would be binding on the cartelists but only binding on purchasers who accept the result of the process, a company submitting to the scheme would not be getting any certainty and might be wasting a lot of costs for little gain;
  - The formal litigation process will tend to delay the payment of compensation. Even with mounting legal costs and interest, the delay may still be valuable to companies.
- The alleged cartelists would also be exposing itself to the costs of participation in the redress scheme (including the funding of the process if a solution like the CBI's were adopted).
  - There is likely to be a considerable benefit for claimants above and beyond anything they may achieve in litigation. In particular, compensation is likely to be available much more quickly and easily.
  - There is a benefit in terms of deterrence. The Consultation Paper and BIS Impact Assessment recognise that greater and quicker compensation will add to deterrence. If the redress scheme speeds up the process of compensation and avoids procedural obstacles to it, there is likely to be a public deterrence benefit. Such a benefit or, conversely, the reduced need for the penalty to provide deterrence is something that ought properly to be recognised in setting fines.

A modest reduction of at least 10% of the fine would not be out of line with what the OFT has done from time to time in relation to, for example, compliance policies. It would also be very easy to administer.

The Consultation Paper (paragraph 6.45) suggests that there may be practical difficulties in tying a reduction in fine to participation in a voluntary redress scheme. We do not agree. If the reduction were for giving a binding agreement to participate in a pre-certified redress scheme, it would be easy to implement and the fining would not need to be delayed until after the redress was provided. Similarly, we are not suggesting that the reduction would be linked to the amount of the redress provided, so there would never need to be any attempt to assess whether the redress offered was adequate.



**Q31. The Government seeks your views on whether and how an extended role for private actions would positively complement current public enforcement.**

**A:** We consider that an extended role for private actions has the potential positively to complement public enforcement in a number of ways.

First, an extended role for private actions, under which private actions could be brought by both individuals and businesses, in both stand-alone and follow-on cases, could potentially complement the deterrent effect of financial penalties imposed by the OFT.

Secondly, an extended role for private actions could also complement the enforcement of competition law, by facilitating stand-alone claims in cases where the OFT decides not to investigate an alleged infringement due to its prioritisation criteria and limited resources. Strengthening the private enforcement regime could therefore increase the number of competition law infringements which are identified and brought to an end, without requiring any additional public resources. In this way a strengthened and more effective private enforcement regime could work positively alongside the public enforcement regime, to the benefit of both those who have suffered loss and also consumers more generally (due to the increased deterrent effect resulting from increased chance of detection and sanctions).

Thirdly, facilitating redress for those who have suffered loss as a result of competition law would complement the public enforcement of competition law to the benefit of victims of infringements. By achieving this outcome through the strengthening of 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.

We acknowledge the concerns identified by BIS at paragraph 7.3 of the Consultation Paper regarding the risk of damage being caused to the public enforcement system through the introduction (or strengthening) of private actions. However, we believe that any potential conflict and tensions can be addressed through the measures discussed below.

**Q32. 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?**

**A:** 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.

We acknowledge that the opportunity to escape fines and criminal sanctions provides a very strong incentive to apply for leniency that will not lightly be outweighed by increased vulnerability to private actions. We also acknowledge that potential leniency applicants will need to take into account the possibility that others will expose the cartel even if they stay silent. Nonetheless, there are occasions where the decision on whether or not to seek leniency is finely balanced and where increased vulnerability to private actions could be determinative. It may also be a much more significant factor where the potential applicant knows that it only has the potential to be a "Type B" and not a "Type A" leniency applicant (i.e. eligible for a reduction in fines rather than complete immunity).

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.

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/CMA as part of an application for leniency should not be.

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. 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 *Pfleiderer AG v Bundeskartellamt* (Case C-360/09). The possibility of legislative proposals being brought forward by the European Commission on this issue is acknowledged in the Consultation Paper,<sup>28</sup> but it is suggested that there may be increased urgency for action at the UK level if private actions are extended as proposed. We would note that, based on the "roadmap" published by the European Commission<sup>29</sup> a proposed directive was due to be published in June 2012. Although no proposals have been published to date (as far as we are aware), we understand that a consultation document is expected in September or October.

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 the second of these two options seems likely. We would assume that BIS will in any event 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.<sup>30</sup>

On this issue, 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 *National Grid v ABB & others* [2012] EWHC 869 Ch 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).<sup>31</sup> As set out above, we would suggest that the UK Government should take a

<sup>28</sup> See paragraph 7.5 of the Consultation Paper.

<sup>29</sup> [http://ec.europa.eu/governance/impact/planned\\_ia/docs/2009\\_comp\\_023\\_damages\\_breaches\\_antitrust\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2009_comp_023_damages_breaches_antitrust_en.pdf)

<sup>30</sup> 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.

<sup>31</sup> 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](http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf)

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.

We suggest that it would be best for BIS wait to see the European Commission's proposals before bringing forward its own legislation on these issues unless it becomes apparent that there will be substantial delay in the passage of the EU legislation.

**Q33. 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?**

**A:** We are not sure that it is really necessary or would be beneficial to protect leniency applicants from joint and several liability. There is a risk of unintended adverse consequences for victims and/or other participants in the cartel (who may be effectively penalised for a second time). In any event, we are not convinced that these proposals could be implemented effectively on a unilateral national basis. There would be limited value in protecting a leniency applicant from joint and several liability in the UK if it could still be held jointly and severally liable in proceedings in other Member States. In practice, most competition law claims can be brought in more than one Member State.

**Q34. 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.**

**A:** 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.

**City of London Law Society Competition Law Committee**

**23 July 2012**

# **Cleary Gottlieb Steen & Hamilton LLP**

July 24, 2012

**RESPONSE OF CLEARY GOTTlieb STEEN & HAMILTON LLP  
TO BIS CONSULTATION ON PRIVATE ACTIONS IN COMPETITION LAW**

**I INTRODUCTION**

This paper sets out the response of Cleary Gottlieb Steen & Hamilton LLP (“Cleary Gottlieb”) to the Department for Business Innovation and Skills’ (“BIS”) consultation on private actions in competition law, published on April 24, 2012 (the “Consultation”).

The Consultation seeks views on the Government’s proposals to promote private sector challenges to anti-competitive behaviour. The aim is to enable businesses, and in particular SMEs, to be better able to take direct action against anti competitive behaviour, as well as allowing businesses and consumers to recover money that they have lost because of infringements of competition law.

We support the Government’s initiative to promote growth and fairness through an improved procedure of private actions in competition law. We agree that legal and natural persons should be empowered to tackle anti-competitive behaviour and obtain redress for any losses suffered. We also believe that, by boosting the efficiency of the regime and allowing courts to have a greater role in resolving private actions, competition authorities will be able to focus resources on high impact cases.

In our view, however, the Government must strike a balance between enabling the resolution of disputes rapidly and effectively, whilst avoiding the creation of a ‘litigation culture’. Competition law is a notoriously complex area of law, and a legal system that significantly reduces the time and effort spent in carefully analyzing theories of harm will risk exposing businesses to vexatious or spurious claims. Burdening potential defendants with time-consuming processes and legal costs where it is unclear that there is a case for them to answer will not promote competition and/or economic growth.

In this response, we provide a summary of our views on the Consultation’s proposals (Section II) and then address the specific questions asked, focusing on those which, we believe, require further consideration by the Government.

**II EXECUTIVE SUMMARY**

We support the Government’s proposal to expand the jurisdiction of the Competition Appeal Tribunal (“CAT”) in order to permit claimants to file stand-alone claims directly, as an alternative to ordinary courts. We consider that this change will deliver efficiencies arising from the CAT’s status as a specialist tribunal with a growing body of knowledge and expertise in competition law. It will also shorten the time in which some of these disputes are resolved as a result of the CAT’s efficient system of case management and preparation. The CAT should also benefit from similar substantive and procedural mechanisms as are available to ordinary courts, including the power to grant interim remedies and consider formal

settlement offers. As part of this reform, we would expect the CAT's resources to be increased in order to match the volume of its caseload.

We believe the proposed fast-track route is a positive development which, by making proceedings cheaper, quicker and simpler, may enable SMEs to seek compensation for anti-competitive behaviour. We agree that the CAT would be the best placed to establish a fast track procedure, both because of its expertise in competition law and its strong system of case management.

We believe that the calculation of damages in private actions should be proportional to the losses actually incurred by the victims of the infringement. As such, we do not support the introduction of a rebuttable presumption of loss in cartel cases; the losses incurred by victims of cartel activity vary widely from case to case, and the level of damages should be set accordingly. We also do not support the Government's proposal to set the level of the presumption at 20%, since we consider this to be a largely arbitrary figure based on inconclusive studies. Likewise, we believe that the passing-on defence should be directly addressed and expressly acknowledged in legislation. The introduction of the defence is consistent with just compensation, the avoidance of double recovery, and access to justice.

We disagree with the proposal to introduce an opt-out collective action regime, primarily because we believe that improvements to the current system (such as the introduction of 'pre-damages opt-in' regime, or voluntary collective redress) are likely to be more effective. However, if the Government is determined to introduce this type of regime, we would strongly favour limiting it to follow-on actions only. To do otherwise will almost certainly subject businesses to vexatious or spurious litigation.

We believe that damages should be taken into account by competition authorities when determining what level of fine to impose. What is important for deterrence is the amount that companies are liable for as a result of their infringement, and not the manner in which that amount is levied. There is no reason why the correct amount cannot be reached through a combination of compensation to victims and fines by the authorities.

Finally, we believe that it is crucial to protect the leniency regime from the consequences of expanding private actions in competition law. This will involve protecting leniency documents from disclosure, (something which has become increasingly important since the *Pfleiderer* decision) and protecting whistleblowers from joint and several liability.

### **III QUESTIONS & ANSWERS**

#### **1. QUESTION 1**

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

We consider that the High Court has shown itself to be a competent and rigorous arbiter of competition law disputes and that it has demonstrated a willingness to progress claims to the extent reasonably possible (*e.g.*, in *National Grid*<sup>1</sup>). Recognising, however, that there are other demands on the High Court's time, we support the proposal to amend Section 16 of the Enterprise Act to enable the High Court to transfer cases to the CAT. However, we would emphasise that it is important that the presiding judge retains discretion to decide

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<sup>1</sup> National Grid Electricity Transmission v ABB and Others [2012] EWHC 869 (Ch)

whether such transfer is appropriate. This will be of particular importance in cases where competition law issues arise within more general commercial/civil proceedings, and where it may therefore not be efficient to ‘carve-out’ the competition law issues for consideration by the CAT.

## **2. QUESTION 2**

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

We support the Government’s proposal to expand the jurisdiction of the CAT in order to permit claimants to file stand-alone claims directly, as an alternative to ordinary courts. We consider that this change will deliver efficiencies arising from the CAT’s status as a specialist tribunal with a growing body of knowledge and expertise in competition law. It will also shorten the time in which some of these disputes are resolved as a result of the CAT’s efficient system of case management and preparation. As part of this reform, we would expect the CAT’s resources to be increased in order to match the volume of its caseload.

## **3. QUESTION 3**

*Should the CAT be allowed to grant injunctions?*

The CAT should be given the ability to make orders for interim remedies (including injunctions), just as ordinary courts. In matters of competition law, injunctions may be just as, if not more important, than remedies, and may provide a more cost-effective means of addressing competitive distortions than remedies implemented at a later date, once the market has been skewed irremediably. In particular, interim measures are an important tool for competition enforcement bodies in markets that are prone to “tipping” in favour of a particular company, technology, or standard.

## **4. QUESTION 4**

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

We believe that to the extent that a fast-track procedure makes bringing proceedings cheaper, quicker and simpler, the fast track route in the CAT could enable more SMEs to bring actions for anti-competitive behaviour. The CAT has shown itself to be an extremely able forum for expedited cases (e.g., in the context of actions under Section 120 of the Enterprise Act 2002).

## **5. QUESTION 5**

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

We agree that the availability of injunctive relief is a priority for SMEs threatened by anti-competitive behaviour and consider that adopting an approach similar to that followed by the Patents County Court, which has strict cost capping, uses strict case management to minimise delays, and limits the trial duration to a total of two days, would help enable the Government to achieve its aim to enable SMEs to tackle anti-competitive behaviour rapidly and effectively.

## 6. QUESTION 6

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

We believe that the Government should consider providing legal aid to SMEs that show themselves to have a legitimate and credible competition law claim.

## 7. 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?*

We do not support the introduction of a rebuttable presumption of loss in cartel cases. Damages caused by cartels vary widely from case to case; a presumption that a cartel has resulted in a 20% increase in prices is undesirable in principle, insufficiently grounded in empirical evidence, and likely to be inaccurate in practice.

This proposal relies in part on two studies that include findings on the average cartel overcharge in a variety of jurisdictions. It relies, in particular, on the study prepared for the European Commission by Oxera entitled “Quantifying antitrust damages: Towards non-binding guidance for courts” (the “Oxera Report”).<sup>2</sup> These studies attempt to show that cartels can raise the prices of the goods or services in question by as much as 20% to 35% or even higher. The Government concludes from these results that, for any given cartel case, it is appropriate to assume that prices have been raised by at least some fixed amount (such as 20%).

In our view, that conclusion is unwarranted. The Oxera Report provides some useful insights into the possible magnitude of damages from particular situations, but it says nothing about the accuracy with which those damages were calculated. Its key limitation is that, although it considers a number of legal precedents, it fails to question whether, in those legal precedents, damages were estimated by following procedures that would survive economic or financial scrutiny.<sup>3</sup> In fact, in some of the cases considered by the Oxera Report, the court relied on presumptions of loss when setting the level of damages, rather than relying on economic evidence.<sup>4</sup>

A presumption of loss based on these studies will simply reflect the average level of damages that have been found in other jurisdictions within a specific time period, with no indication of whether they were appropriately calculated in the first place. In our view, the court should consider each case on its merits, and determine the level of loss accordingly.

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<sup>2</sup> The study prepared for the European Commission by Oxera *et al*, Quantifying Antitrust Damages: Towards Non-Binding Guidance for Courts, December 2009; and J.M. Connor and R.H. Lande, The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies, in *The Antitrust Bulletin* Volume 51, Number 4, Winter 2006, pp. 983–1022.

<sup>3</sup> See Carlos Lapuerta, Richard Caldwell, and Dan Harris, Towards Non-Binding Guidance for Courts: The Oxera Report and the Quantification of Antitrust Damages, *Journal of European Competition Law & Practice*, Volume 1, Number 5, 2010.

<sup>4</sup> See, e.g., *Fonditaria SAI SpA v. Nigriello*, judgment of the Italian Supreme Court of February 17, 2007.



## 8. 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?*

We believe the passing-on defence should be acknowledged in legislation given that the decisional practice of the English courts has expressly confirmed that the passing on defence is available to defendants.<sup>5</sup>

It is well established principle that “any individual can rely on the invalidity of an agreement or practice prohibited under Article 81 EC and can claim compensation for the harm suffered where there is a causal relationship between that harm and the prohibited agreement or practice.”<sup>6</sup> This implicitly recognizes standing for indirect purchasers to bring actions for violations of competition law. These purchasers are often in a position to pass on losses from infringements of competition law down to consumers, but are not precluded from bringing actions for the same infringements before the courts. Acknowledging the passing-on defence is therefore essential to ensure that damages are only paid where losses have actually been suffered. The system would otherwise encourage speculative claims and could enable the unjust enrichment of claimants who have, in fact, suffered no loss.

The arguments against acknowledging the passing-on defence are not convincing. Its recognition would likely have implications for legal costs and the length of proceedings, and this may discourage some potential claimants from bringing a case. However, this disincentive can be addressed through other mechanisms, such as the fast-track procedure proposed by the Government in the Consultation or through cost-capping. In any event, we believe the increased time and cost involved in allowing this defence is a reasonable trade off in order to guarantee access to justice (for intermediate purchasers) and just compensation (for purchasers and consumers). Furthermore, there are other areas of law where the passing-on defence is currently recognized (such as actions relating to taxation), which shows the courts are well equipped to deal with this type of economic assessment.

## 9. QUESTION 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 agree that the limited use of the opt-in collective action regime to date suggests there is scope for improvement.<sup>7</sup> This improvement could take the form of amendments to current procedures, such as the introduction of a ‘pre-damages opt-in’ regime, which would

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<sup>5</sup> See *Emerald Supplied Limited v. British Airways* [2010] EWCA Civ. 1284 and <http://www.cgsh.com/files/News/eb4bd102-fd61-484e-b19e-22e902d85c2d/Presentation/NewsAttachment/ad6a7445-f79b-480a-bdf8-2d1f59508d17/CGSH%20Alert%20-%20Class%20Actions%20in%20the%20UK%20-%20Emerald%20Supplies%20Limited%20%26%20Anr.%20v.%20British%20Airways%20plc.pdf>

<sup>6</sup> See *Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others* (“*Manfredi*”), Joined Cases C-295/04 to C-298/04, 2006 E.C.R. I-6619.

<sup>7</sup> However, it should be noted that this is merely suggested, and not established by this observation. The extent of non-compliance with competition law is not actually known, and the limited number of collective action cases could equally reflect a limited number of infringements that are suitable for redress through collective actions.

allow members of the represented group to join the action at any point up until the damages are quantified, or collective voluntary redress schemes.

We do not agree with the Government's proposal to introduce an opt-out collective actions regime for competition law. We recognize that the losses from a single breach of competition law can be collectively significant, but individually small, with the result that individuals may lack the incentive to bring costly cases before the court. However, there are many well known problems with introducing opt-out collective actions into the legal system: businesses usually have the incentive to settle for significant and arguably disproportionate sums simply to avoid the cost of further litigation. Even if they are successful, claimants often receive little or no benefit from collective actions, as a large proportion of the award usually goes towards paying for legal costs. The results can therefore be detrimental to businesses, claimants, and the legal process.

Nevertheless, if the Government decides to introduce opt-out collective actions, it is important to ensure that the system is designed to avoid the disadvantages of the US class action system. This could be done by restricting opt-out collective actions to follow-on cases, as discussed below.

#### **10. QUESTION 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 that the Government's general policy objectives of attaining redress, deterrence, and a balanced system are correct. However, we do not believe that the Government is likely to achieve these objectives through the introduction of an opt-out regime for collective actions.

#### **11. QUESTION 11**

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

If the Government decides to introduce opt-out collective actions, we believe 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 an appropriate means of bringing the case.

#### **12. QUESTION 12**

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

If the Government decides to introduce opt-out collective actions, we believe that the risks of anti-competitive information sharing can be mitigated by the courts via appropriate certification and case management.

### 13. QUESTION 13

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

We do not believe that opt-out collective actions should be allowed in stand-alone cases. As mentioned above, we are concerned that introducing an opt-out collective action regime in competition law may result in claims which do not ultimately benefit businesses or consumers. These risks are magnified if collective actions are permitted in stand-alone cases, as this may encourage ‘fishing expeditions’ and/or “discovery blackmail”, in the hope of extracting settlement awards from defendants.<sup>8</sup> The risk may be mitigated if collective actions can only be brought by certified representative bodies, such as consumer groups. However, this is unlikely to achieve the Government’s stated aims of deterrence and redress.

As for deterrence, it is unlikely that representative bodies such as consumer groups will attempt to uncover breaches of competition law. This is an onerous and expensive task, and one that requires the training and resources of a competition authority. It is more likely that these representative bodies would either refrain from bringing stand-alone collective actions, preferring to leave it to a competition authority to establish a breach of competition law, or outsource the work to private bodies (which would reintroduce the risk of spurious litigation).

As for redress, we do not believe that collective litigation is the right avenue for establishing liability. If it is possible to assess and measure the individual loss flowing from an infringement of competition law, then redress can be achieved through a follow-on action. The liability for the infringement can be established by the competition authority, leaving the courts to calculate individual losses. There is no need for consumers to incur the cost, delay, and risk of bringing a legal action on their own behalf. On the other hand, if it is not possible to identify the losses suffered by each of the individuals affected by an infringement, there is little to be gained from bringing litigation.

However, if the Government decides to allow stand-alone opt-out collective actions, it is important that these are restricted through a rigorous certification process, and subject to careful case management.

### 14. QUESTION 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.*

If the Government decides to introduce opt-out collective actions, we believe that such actions should only be permitted at the discretion of the CAT. The CAT’s system of active case management and preparation, as well as the cross-disciplinary expertise of its membership, means that it is better suited to making decisions on, for example, whether collective action is an appropriate means of resolving the common issues, and whether there is a reasonable possibility that the claimants will succeed.

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<sup>8</sup> See, e.g., Richard Epstein, *Class Actions: The Need for a Hard Second Look*, CLP Civil Justice Report; Number 4, March 2002; Michael Greve, *Harm-Less Lawsuits? What's Wrong with Consumer Class Actions*, AEI Liability Studies, April 2005; and Jim Copland, *Class Actions*, available at <http://www.pointoflaw.com/classactions/overview.php>.

## 15. QUESTION 15

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

If the Government decides to introduce opt-out collective actions, we agree with the list of issues to be addressed at certification. In particular, we believe that emphasis should be placed on the requirement for (1) a preliminary merits test, and (2) that collective action is the most suitable means of resolving the common issues.

## 16. QUESTION 16

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

If the Government decides to introduce opt-out collective actions, we believe that treble or punitive damages should continue to be prohibited. In particular, we agree that it is unfair for a company to be pushed into settling for fear of treble damages where, as is normally the case in litigation, it is not certain of being able to successfully defend the claim.

Furthermore, it is unlikely that treble damages would serve as a deterrent from infringements of competition law. A recent report commissioned by the OFT from Deloitte LLP<sup>9</sup> found that fines were one of the least important factors in incentivising businesses to comply with competition law. In fact, in terms of the sanctions which motivate compliance, the report showed that sanctions which operate at an individual level, such as criminal penalties, are significantly more powerful as a deterrent than those which operate at a corporate level. Treble damages are therefore unlikely to increase compliance.

## 17. QUESTION 17

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

If the Government decides to introduce opt-out collective actions, we believe that the loser-pays rule should be maintained. We agree that it is an important filter for vexatious claims and has worked well to date. In this context, close examination should be paid to conditional fee arrangements funded by insurance, as these can detract parties from the merits (*i.e.*, they have the potential to encourage settlement of even poorly founded claims).

## 18. QUESTION 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?*

If the Government decides to introduce opt-out collective actions, we believe that courts should be given the discretion to depart from the loser-pays rule where it is in the interest of justice. We also think courts should be able to have regard to the best way in which the costs may be met (including from the damages fund).

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<sup>9</sup> The Deterrent Effect of Competition Enforcement by the OFT, November 2007 (OFT 962).

**19. QUESTION 19**

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

If the Government decides to introduce opt-out collective actions, we believe that contingency fees should continue to be prohibited. Contingency fee regimes unduly distort the incentive to bring and fairly settle cases. We agree with the Consultation's conclusion that they (a) encourage spurious litigation, (b) create a perverse incentive to inflate the number of claimants, and (c) create an incentive for lawyers to focus only on the largest cases at the expense of the smaller ones.

**20. 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 believe that the relative merits of paying any unclaimed sums to a single specified body is primarily administrative efficiency. It may reduce any litigation relating to the wrongful distribution of unclaimed sums that may arise in more complex methods of distribution.

**21. 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 agree that the Access to Justice Foundation would be an appropriate recipient of unclaimed sums.

**22. QUESTION 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?*

See response to [Question 13](#).

**23. QUESTION 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?*

See response to [Question 13](#).

**24. QUESTION 24**

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

We agree that ADR in competition private actions should be strongly encouraged, and we are not opposed to the adoption of the “nudge” approach mentioned in the Consultation,

which would make ADR the default first option. However, we believe ADR should not be made mandatory because (a) it would be difficult to mandate a specific type of ADR given the range of options available and the fact that they all have their uses in different cases; and (b) mandating ADR when one or both parties is determined to take matters to court could prove to be a waste of time and money.

**25. QUESTION 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 agree with the Government's proposal to limit the application of a pre-action protocol to the proposed new fast track procedure and to collective actions. We consider that pre-action protocols provide increased clarity, reduce the chances of unmeritorious cases being litigated, encourage efficiency, and help settle cases early through ADR, as well as giving potential litigants the ability to review proposed actions and to make a judgment as to whether their case fulfils the requirements.

**26. QUESTION 26**

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

We agree with the Government's proposal to amend the CAT's procedural rules in order to facilitate the use of formal settlement offers. We consider that there is both a public policy and private interest in encouraging offers of compromise so as to settle legal proceedings. We believe that parties before the CAT should have access to the latest developments in legal proceedings, including recourse to Part 36 offers (which have been regarded as one of the most effective parts of the CPR).

**27. QUESTION 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 do not have any current plans to establish initiatives to facilitate the provision of ADR disputes, but it is an avenue that we are willing to consider in future.

**28. QUESTION 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?*

As previously mentioned, we are not in favour of the introduction of opt-out collective actions. We believe there are better methods of collective redress which are based on voluntary dispute resolution. These could be backed by public authorities in order to encourage a fair resolution of disputes, and certified by courts in order to ensure that due process is employed and that no party (or regulator) exerts unfair pressure.

However, if the Government decides to introduce opt-out collective actions, we consider that this would obviate the need for a separate provision for collective settlement.

## 29. QUESTION 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 consider that the OFT should be able to certify voluntary redress schemes, on the basis that it would be an efficient and effective way for consumers and businesses to obtain compensation and would reduce the burden on the court system. We agree that, if introduced, such a power could be used by the OFT regardless of which body had made the initial infringement decision.

## 30. QUESTION 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 believe that the extent to which a company has made redress should be taken into account by competition authorities when determining what level of fine to impose. Without such an incentive, companies are not likely to enter into voluntary compensation arrangements, which would make it harder for those who have suffered loss to receive redress. Furthermore, it is important to take into account the amount of redress repaid in order to prevent organisations from being unjustly burdened with excessive penalties.

The Government does not consider that these arguments are conclusive, and it argues that “*if a company could get away with only restoring loss, this would significantly reduce the deterrent effect of the antitrust regime.*”<sup>10</sup> However, there is no reason that a fining system which takes account of compensation payments would have to limit the overall amount paid by the infringing party to the loss actually suffered. The established economic literature on deterrence suggests that effective deterrence requires the expected sanction for an infringement, that is the expected fine level multiplied by the probability of detection and successful enforcement action, to exceed the benefits that would follow from breaching competition law. What is important for deterrence is the amount that companies are liable for as a result of their infringement, and not the manner in which that amount is levied. There is no reason why the correct amount cannot be reached through a combination of compensation to victims and fines by the authorities.

## 31. QUESTION 31

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

We believe that private actions could be a valuable complement to public enforcement. An increase in private actions would generate a valuable body of case law that would be helpful to companies, practitioners, and public authorities. The Government is concerned about the risk that courts will set precedents which conflict with the public authority’s approach. Even if that risk were to materialise, it would not represent a radical departure from the current system, where many of the public authorities’ decisions are subject

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<sup>10</sup> Department of Business Innovation & Skills, Private Actions in Competition Law: A Consultation on Options for Reform, April 2012, at para. 6.43.

to review by the courts. A policy that allows or facilitates stand-alone cases will also assist the work of the public enforcement system by sharing their caseload.

## 32. QUESTION 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?*

We agree that it is crucial to ensure that leniency documents are protected from disclosure. The leniency programme is an invaluable tool in the enforcement of competition law and one of the principal ways in which cartels are uncovered. There is a real danger that leniency applications will decline as the number of private actions increases, particularly if opt-out collective actions are introduced, where damages awarded may exceed public fines.

The protection of leniency documents is all the more pressing in light of the recent ECJ's judgment in the *Pfleiderer* case<sup>11</sup>. In that case, the European Court of Justice recognised that a national competition authority granting third parties access to such documents could compromise leniency programmes. However, it concluded that this could not defeat the well established right of individuals to bring a claim for damages caused by an infringement of competition law. It is therefore up to national courts and tribunals to consider each application for access to leniency documents on a case-by-case basis, according to national law, and take into account all the relevant factors in the case. In the case of *National Grid Electricity Transmission v ABB and Others*,<sup>12</sup> the High Court found that the *Pfleiderer* decision also applies to the disclosure of leniency materials in the context of European Commission decisions, and is not restricted to national programmes. As private actions in competition law increase, these rulings will undoubtedly discourage companies from filing leniency applications.

We recommend that all information, documents, and evidence regarding the existence and activities of the reported cartel activity be protected. This should be interpreted widely, so as to include any information, in whatever form, which is capable of having some reasonable bearing on the public authority's investigation of the cartel, including pre-existing documents and witness statements from current and former employees. The protected information should include, but not be limited to, any information requested by the OFT/CMA for leniency applications in its leniency guidance. In this regard, guidance can be drawn from the German Federal Cartel Office (Bundeskartellamt), which has issued a notice stating that "*Where an application for immunity or reduction of a fine has been filed the Bundeskartellamt shall use the statutory limits of its discretionary powers to refuse applications by private third parties for file inspection or the supply of information, insofar as the leniency application and the evidence provided by the applicant are concerned.*"<sup>13</sup>

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<sup>11</sup> *Pfleiderer AG v Bundeskartellamt*, Case C-360/09, not yet reported.

<sup>12</sup> *National Grid Electricity Transmission v ABB and Others* [2012] EWHC 869 (Ch).

<sup>13</sup> Bundeskartellamt, Notice No. 9/2006 of the Bundeskartellamt on the Immunity From and Reduction of Fines in Cartel Cases, March 7, 2006, at p. 22.



### 33. QUESTION 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 proposal that whistleblowers should be protected from joint and several liability. We recognise there is a risk that removing joint and several liability could have the undesirable consequence of injured parties being unable to gain redress despite there being cartel members with available funds. However, if the joint and several liability regime discourages potential whistleblowers from making leniency applications in the first place, then it is possible that many cartels will remain undetected; in such cases, victims will be unable to obtain redress in any event.

We also agree that this protection should be extended to other leniency recipients. The cooperation of cartel members (other than the whistleblower) makes it easier to establish an infringement, and it greatly reduces the costs of investigating cartel activities.

\* \*

\*

CLEARY GOTTlieb STEEN & HAMILTON LLP

# CliEx Pro Bono Trust



*Working in partnership to stimulate, facilitate and celebrate pro bono work by CILEx members*

*Please reply to: 48-50 Parkstone Road, Poole BH15 2PG*

**Department for Business, Innovation & Skills**

Your Ref:  
Our Ref:

By email only: [competition.private.actions@bis.gsi.gov.uk](mailto:competition.private.actions@bis.gsi.gov.uk)

24 July 2012

Dear Sirs

### **Private actions in competition law**

On behalf of CILEx Pro Bono Trust, I would like to submit a response to Questions 20 and 21 of the above Consultation Paper.

#### Background

CILEx Pro Bono Trust is an independent charity (registered number 1145776) set up with the support of the Chartered Institute of Legal Executives (CILEx).

Our key goal is to work in partnership with other facilitators and providers of pro bono legal services in order to:

- increase in the engagement of CILEx and other lawyers and trainees in pro bono work
- support the pro bono work of CILEx and other lawyers and trainees
- raise awareness of the pro bono work of CILEx and other lawyers and trainees

#### 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 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.
- 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.

**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 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.

Thank you for taking this response into account

Yours truly



Nick Hanning

**CILEx Pro Bono Trust**

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# Clifford Chance LLP

**Department for Business Innovation & Skills  
Private Actions In Competition Law: A Consultation On Options For Reform**

**Submission of Clifford Chance LLP  
July 24, 2012**

**Introduction.**

We welcome the opportunity to comment on the Department for Business Innovation & Skills consultation on private damages reform.

Our views reflect our experience of damages actions for breaches of competition law in England & Wales. We begin with an overview and some general comments before making more specific comments on certain aspects of the consultation.

**Overview.**

Our principal reaction to the consultation is that it strongly implies that claimants always have good causes of action and that the only obstacle a successful claim for damages is a cumbersome judicial process. In that sense, the consultation assumes that the current system is unfairly biased in favour of defendants to the detriment of claimants. Our experience suggests otherwise.

- Competition cases are never clear-cut. All competition cases require detailed economic analysis and lengthy legal submissions. The biggest obstacle to a successful competition law claim is the complex economic and factual evidence required rather than the current judicial process. We suggest that the Government needs to reconsider its current position that claimants are always the victims of an unresponsive judicial system.
- The consultation has not adopted a consistent analytical framework. For example, the consultation argues that a fast-track procedure is required to facilitate a timely resolution of competition complaints from SMEs. A fast-track procedure would include a six-month time schedule, reduced oral hearings and potentially a cap on costs. On the other hand, the consultation notes that competition cases are

problematic because they involve very detailed and complex economic issues. It is difficult to reconcile the requirement for quicker resolution of competition complaints with the complexity of such cases. Competition cases are indeed complex and a move away from normal High Court procedures towards more summary treatment in the CAT will not necessarily be equitable for either claimants or defendants.

- The consultation threatens to replace a system which is working well, with a new unknown system. This inevitably carries significant and unnecessary risks. For example, whilst we have seen much criticism of the current opt-in system, it is actually a model that in relative terms is still in its infancy and should be allowed time to develop. Private damages claims under the current model will most likely increase as consumers become more aware of their rights under competition law. An opt-out system will in fact do nothing to develop awareness of competition law among consumers generally and will simply fund an eager claimants' bar that stands to gain considerably from a new avenue for potentially speculative claims.
- Finally, the proposed new measures risk a divergence from the European Commission's emerging thinking on private damages actions. The Commission has made it quite clear that it will not adopt an opt-out framework and will not create a rebuttable presumption of loss. There is a risk that the Government will introduce a new regime that will be at odds with any new Directive adopted by the European Union.

These general thoughts underpin our response to each aspect of the consultation. In the sections that follow, we address several of the specific points raised throughout the consultation.

### **Establish the CAT as a major venue for private damages claims.**

The consultation proposes that the CAT be empowered to deal with the bulk of the competition cases in the UK. This would involve a significant change to the current system in which the High Court is the main forum for private actions. We believe that the current system under the High Court's jurisdiction has worked well. The court has sophisticated and efficient procedures and the judiciary is very well equipped to deal with these difficult cases. In contrast, we are concerned that the CAT won't have sufficient resources given the proposed increase in case volume. The High Court has existing experience of large-scale cases and we see no reason why it should not continue as the primary venue for competition claims.

One suggestion put forward in the consultation is to implement regulations under Section 16 of the Enterprise Act to enable the courts to transfer competition law cases to the CAT. We see potential problems with this suggestion. It will in effect create a two-track process in



which a case is first assessed for jurisdiction and then reassessed for jurisdiction in the CAT. It is worth recalling that the CAT has on occasion found against itself on jurisdiction so there is no guarantee of a seamless resolution of jurisdictional issues.

We are also against the suggestion that the CAT's role is expanded to incorporate stand-alone claims. First, it is not clear from the consultation whether or not all stand-alone cases would be transferred to the CAT or if claimants would have the opportunity to select their preferred forum. The latter option would of course encourage forum shopping and introduce a new ambiguity for defendants in private claims actions. Second, we see the High Court as having a broader experience in dealing with these complex cases. Stand-alone cases involve heavy evidentiary burdens and usually result in long and complex trials. This is unavoidable. The High Court has a long experience with these types of commercial litigation and we see no reason to disrupt a system which is working reasonably well.

**Create a rebuttable presumption in favour of a 20% economic loss.**

The consultation proposes the reversal of the burden of proof of damages. Under the current law, claimants are required to prove any damages that they are alleged to have suffered. Under the proposals, the burden would be reversed and defendants would be required to disprove that the claimant suffered damage. In addition, the consultation suggests that this supposed damage be set at 20% of the claimants expenditure on a particular product.

Such a reversal of the burden of proof is entirely novel and creates a very unwelcome precedent. We see a number of problems with this proposed reform:

- Contrary to the conclusions of the literature referred to in the consultation, there is no agreement that a cartel will typically raise prices by 20%. Every cartel carries a different fact pattern and many cartels are actually unsuccessful in increasing prices. It is also the case that very often customers very often are able to avoid the worst effects of a cartel through the agreement of long term supply contracts and other discounts. A careful analysis of the damage allegedly caused by a cartel is therefore required to establish any harm to the claimant.
- The proposed reform would encourage spurious claims. The presumption of a 20% economic loss will encourage claimants to "try their chances" in the hope that a) the defendant will not have sufficiently organised evidence to rebut the presumption, or b) the defendant will settle to avoid costly litigation. Combined with the proposal to introduce opt-out litigation (discussed below), we believe that this proposal will encourage vexatious litigation and force defendants to the negotiating table even where the facts strongly suggest that they would prevail upon a full hearing.

- As noted above, the proposed reform would place defendants under an unreasonable pressure to settle. Indeed, faced with multiple damages claims arising from the same fact pattern, a defendant would undoubtedly feel pressurised to settle rather than attempt to shift the considerable burden of proof. This would allow spurious claims to succeed and would also turn the private damages process into a punitive model rather than a compensatory model.
- The change would not reduce the frequency of litigation and would not expedite litigation. According to the Government, one reason to have a presumption of a 20% economic loss is that it could reduce the disincentive for parties to start litigation because it would reduce the need to put together extensive economic evidence. In reality, however, it is highly unlikely that either party would enter into litigation without such evidence. On the part of the claimant, the benefit of proving economic loss above 20% would be too important to neglect and for the defendant, the possibility of proving that there was no loss and no damages to pay is often the key to their defence.
- The reform is based on the false premise that it is easier for the defendant to assemble the relevant evidence. This is very often not the case. Under the current system, when proving loss, claimants are able to point to invoices that they submitted and for which they were overcharged as a result of the collusive conduct. They will also be able to point to evidence on the number of tenders and bids in which they participated. In addition, the disclosure process is designed to eliminate any information disparity between the parties. On that basis, we do not accept the premise that the defendant should be the party that is obliged to produce the majority of the evidence to rebut an unfair presumption.

The proposed reversal of the burden of proof is among the most problematic reforms suggested in the consultation. We are strongly against reversing the normal burden of proof of damages. It will encourage spurious litigation, creates an unfair pressure upon the defendant to settle, and will do nothing to expedite hearings.

#### **Introduce opt-out as the default model for private damages claims.**

The consultation proposes the replacement of the current opt-in system with a new opt-out model. We see risks with this proposal. The Government should be very cautious about introducing any changes that run the risk of allowing vexatious class action suits that harm companies and benefit only an active claimants' bar. In particular, we see the following problems with the proposed change:

- An opt-out system will encourage representative bodies to assume responsibility for a large number of consumers. There will be a clear incentive for these bodies to take

litigation for its own sake rather than to compensate genuine economic loss that may have accrued to a certain class of consumer.

- An opt-out model will also transform the process into an unnecessarily punitive model rather than a compensatory model. Given that a tiny fraction of the initially assessed category of customers will actually come forward to collect damages, there will be a wide disconnect between the award and those who are compensated. This disproportionate award will therefore constitute a penalty similar to the previous administrative fine.

**Promote Alternative Dispute Resolution (ADR).**

The consultation encourages the increased use of ADR. Whilst we are not at all opposed to the use of ADR, we query the degree to which parties can be coerced to the negotiating table. If parties wish to litigate, they should be free to do so. Indeed, as noted above, the complexity of these cases does not lend them to being settled quickly and easily. If their end resolution inevitably lies in the courts, then it makes sense not to prolong the process by insisting on mandatory ADR. If the case is suitable for ADR, however, we do agree that the parties should be encouraged to consider using it voluntarily as an initial step.

**Clifford Chance LLP**

**July 24, 2012**

\*\*\*\*\*

# **CMS Cameron McKenna LLP**

Consumer and Competition Policy  
Department of Business, Innovation and Skills  
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**For the attention of Tony Monblat**

Your Ref:  
Our Ref: DRM/MIT/000001.00708

24 July 2012

Dear Sirs,

**BIS consultation on private actions in competition law ("Consultation")**

We set out here our headline comments on the Consultation. Attached is our response to the individual questions.

1. Focus on the CAT. We are generally supportive of the specialist CAT being the focus of competition damages cases. We believe this aspect to be uncontroversial, provided the CAT is adequately resourced.
2. Competition damages is a misplaced priority. We do not support the thrust of the proposals to facilitate private actions as a complement to competition law enforcement. Although the proposals are currently confined to competition damages, if they are adopted the principle of collective opt-out litigation will have been conceded and we expect that such a policy will eventually extend to (and pollute) other areas. We believe that the proposals set entirely the wrong tone for the business environment in the UK and we, as a result, expect that the proposals overall will have a chilling effect on investment, the economy and economic recovery. If the objective is to create lucrative opportunities for the legal profession and third party funders, then the proposals may well be a resounding success; but this will be an unintended consequence and we would warn against it.
3. Opt-out is flawed. The adoption of opt-out, even ostensibly just for competition damages cases, would be against the general trend in the wider Europe. It is open to considerable abuse, notably in the form of blackmail settlements in cases which are without genuine merit. It is also difficult to square opt-out within the loser pays rule, itself one of the principal safeguards against litigation abuse.
4. The Consultation's impact assessment is worryingly thin and severely unbalanced. The impact assessment seems to be very narrowly based and does not appear to be at all robust. Furthermore, it seems extraordinary to us that the Consultation advocates such a

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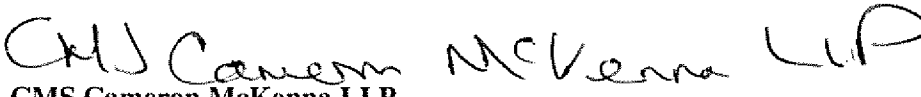
## C/M/S/ Cameron McKenna

disproportionate upheaval in the legal environment (in the context of the UK and in the wider Europe) for such meagre gains as are highlighted in the impact assessment. The modelling suggests that the proposals would result per annum in one or fewer extra stand-alone case and one or two additional follow-on cases, with modest levels of damages.

5. The 20% presumption of overcharge is thinly substantiated and misguided. The empirical justification for a 20% of overcharge appears to be thinly argued and narrowly based. As a matter of principle we do not support what is an exceptional reversal of the burden of proof in tortious cases. Furthermore, insufficient thought has been given to the level of trade at which the putative overcharge would apply. Typically in cartel cases most/all of any overcharge is passed on. So does the 20% refer to the direct or to the indirect overcharge? How does the presumption work if there has been full passing on?

We would be happy to answer any questions BIS may have on this response and, indeed, to comment further on this or later iterations of the proposals.

Yours faithfully

  
CMS Cameron McKenna LLP

## 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](mailto: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.
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Representative Organisation
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Trade Union
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Interest Group
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Small to Medium Enterprise
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Large Enterprise
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Local Government
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Central Government
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Legal	√
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Academic
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Other (please describe):
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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?**

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?**

Generally supportive in principle but insufficient detail in consultation on how this will work.

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

We do not support cost-capping/waiving cross-undertakings.

**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?**

No. We strongly oppose this.

**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?**

No. The passing on defence properly reflects the principle that only loss suffered should be compensated.

**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.**

The current system appears to work effectively.



**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 the Consultation's proposals on these points are misguided and flawed.

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

This already exists.

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

Assuming (against our views) that the proposals be implemented – yes.

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

This already exists.

**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 strongly oppose opt-out.

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

Assuming (against our views) that the proposals be implemented – the list of issues appears sensible.

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

Yes. Damages should be compensatory only.

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

Yes.

**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?**

The court already has full discretion on costs, so no change needed.

**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.**

Assuming (against our views) that the proposals be implemented, then unclaimed sums should be returned to the defendant(s).

**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?**

Assuming (against our views) that the proposals be implemented, the defendant(s) should be able to nominate the recipient.

**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?**

Assuming (against our views) that the proposals be implemented, then no.

**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?**

Assuming (against our views) that the proposals be implemented, then only representative bodies should be officially designated.

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

There are constitutional (ECHR) difficulties with making ADR mandatory, but it should be encouraged.

**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?**

They have a value but there is a risk that they may become formulaic with parties simply going through the motions.

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

Yes.

**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.**

N/A

**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?**

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.**

We believe that the proposals, if implemented, may have some but only a very limited additional deterrent effect.

**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 documents put together in order to seek 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?**

Yes. Protection for other leniency applicants is less easy to justify.

**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.**

N/A

**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.

N/A

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**URN 12/742RF**

# **Commercial Litigation Funding Limited**

# Department for Business Innovation & Skills

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

*Consultation Response by The Access to Justice Group Limited (A2J). A2J is a holding company and the Group consists of Commercial Litigation Funding Limited (CLFL), a litigation funding organisation, and Litigation Management Limited (LML) which organises and manages groups of claimants pursuing litigation.*

List of Questions:

Q1 Yes

Q2 Yes

Q3 Yes, if 2 is to be effective

Q4 Not convinced that this is a good idea as anti-competitive behaviour needs to be carefully analysed and considered. However, if any allegation is supported by a QC Clause it is worth considering.

Q5 Proposals are appropriate but should be subject to review after two years and adjusted in the light of experience.

Q6 The current proposals should be tried and tested before further ideas are pursued.

Q7 It provides fast redress where neither side seeks to reduce or increase the figure. The figure of 20% is consistent with current economic literature and should be adopted. It should however be subject to a two yearly review.

Q8 Yes in order to remove the current uncertainty which has the effect of deterring claimants due to the complexity of establishing loss. How it should be done is more difficult but as a suggestion the starting figure should be the full amount of loss and this should be factored by 75%, 50% or 25% depending upon the overcharge that may have been passed on.

Q9 The current collective action regime is not working for cartel actions and as a result the deterrent effect on anti-competitive behaviour is largely being lost. It is also not working for claimants who have suffered loss.

NOTE:

The statement in Para 5.7 that “The government does not favour the introduction of a generic collective redress mechanism covering all sectors either in the domestic jurisdiction or at EU level.” is not entirely true. On 12 June 2012 the Financial Secretary to the Treasury announced that “Consultations were under way in a ‘range of proposals’ that would make it easier for mis-selling victims to bring legal challenges against the banks”. It is reported that this ‘range of proposals’ could include collective redress.

Q10 The proposed policy objectives are correct

Q11 Yes

Q12 No

Q13 Yes - this is essential

Q14 The introduction of opt-out collective actions is supported and is a superior method compared to opt-in procedures. LML has gained experience in recruiting, organising and managing groups engaged in a wide range of disputes and this has proved challenging.

Q15 Agreed except A.3 Point 1 which should require a QC clause.

Q16 No

Q17 Yes

Q18 No for the purposed of clarity

Q19 Yes

Q20 Simplicity

Q21 No. It should go to an appropriate body related to the claim

Q22 Yes. Most definitely. It requires a privately funded organisation to make things happen.

Q23 It would be hugely advantageous if the ability existed for private bodies to act as the representative claimants in conducting the action on behalf of a group of claimants. Litigation Management Limited was formed specifically to provide this service amongst others. It is accepted that in these circumstances, LML would be liable for adverse costs and meeting the criteria for 'adequacy'. Currently when involved in managing group actions, LML has formed an SPV or Committee to run the cases on behalf of opt-in group members. It is somewhat clumsy and would be far more efficient for LML to act in this role. The Funding element of our Group, CLFL is familiar with funding litigation under these arrangements.

Q24 Yes but one has to be cognisant of the attitude to ADR which is not totally supportive in particular in respect of collective actions.

Q25 It would make sense as collective actions are currently seen as 'unusual'.

Q26 Yes, as per 6.15

Q27 In the event that all these measures were introduced then A2J, through its subsidiaries would expect to facilitate a number of initiatives to enable claimants to bring their cases individually or more likely, collectively.

Q28 No. Difficult area. Defendants need to have finality.

Q29 No. Such infringers would not have the expertise to implement such a scheme.

Q30 No. They are separate offences under separate regimes.

Q31 The proposals are manifestly positive in driving out anti-competitive behaviour.

Q32 No but they should be taken into account in the judgement or settlement.

Q33 Are whistle-blowers corporate or individual? If the former, no. If the latter, yes.

Q34 No comment

# Competition Appeal Tribunal





## COMPETITION APPEAL TRIBUNAL

*President*

Tony Monblat  
Consumer and Competition Policy  
Department for Business, Innovation and Skills  
3<sup>rd</sup> Floor, Orchard 2  
1 Victoria Street  
London SW1H 0ET

19 July 2012

Dear Sir

### **Private Actions in Competition Law: A consultation on options for reform (“the Consultation Document”)**

I am writing to respond to the Consultation Document insofar as it concerns matters relating to the Competition Appeal Tribunal (“CAT”).

Broadly, I welcome the Consultation Document’s proposals for the expansion of the jurisdiction of the CAT to encompass all civil actions in respect of the infringement of competition law, and in particular to enable the CAT to entertain “stand alone” actions rather than merely “follow on” proceedings as at present. This current limitation on the CAT’s jurisdiction is anomalous and has resulted in unnecessary impediments to the optimal use of the CAT for private enforcement. I also welcome the proposal to enable the CAT to provide injunctive relief, including appropriate interim measures. This ability is vital in order to ensure the effective protection of the rights of potential victims of infringements of the competition rules. Also, the introduction of an opt-out class action, limited to competition claims brought in the CAT, is to be welcomed in that it would provide for the possibility of an effective procedure for suitable cases, where no such procedure currently exists.

I have argued for some time that such improvements were necessary to improve the coherence and effectiveness of the system and I fully anticipate that the proposed changes will have that effect.

Generally I support the idea of ensuring that SMEs are able to invoke competition law effectively when faced with genuinely anti-competitive practices. However I do not think it is necessary to establish a separate procedural track to achieve that aim since the CAT’s current procedures, bolstered by an ability to grant injunctive relief would provide most of the important features of the envisaged fast track route. The advantage of using existing procedures coupled with a wider power to grant injunctions is that they can be deployed speedily and flexibly to deal with a very wide array of circumstances. An attempt to devise a particular procedure in primary legislation runs the very great risk that it may ultimately prove too unwieldy and rigid to deal with cases in practice and that it would be difficult to adapt to particular circumstances. It will inevitably be arbitrary in nature since there are bound to be arguments as to such matters as whether the claimant is an SME for this purpose and whether financial thresholds have been met as well as whether a particular case is suitable for one particular track or another. I would therefore favour an approach where the CAT could use elements of the fast track approach as it thought appropriate in the circumstances, without being obliged to allocate particular cases to a particular procedural route.



COMPETITION APPEAL TRIBUNAL

I hope these comments are useful. I would be happy to provide the Minister with any further information he may need.

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a long horizontal stroke.

The Honourable Mr Justice Barling

# Competition Commission

Dear Tony

Thank you for the opportunity to comment on the Government's Private Actions in Competition Law: A Consultation on Options for Reform published in April 2012 (the Consultation Document).

The consultation is concerned with private actions arising out of breaches of the prohibitions in the Competition Act 1998 and Articles 101 and 102 ("the prohibitions" in the Consultation Document). The Competition Commission (CC) does not have responsibility for the enforcement of these prohibitions, but it has an interest in their effectiveness for two reasons. Firstly, the Government's proposal to combine the CC with the competition functions of the Office of Fair Trading (OFT) to create the Competition and Markets Authority means the CC will, in the near future, become part of a National Competition Authority which will lead on public competition law enforcement in the UK. Secondly, it has a general interest in ensuring that the overall competition law regime in the UK is efficient, including the interaction between the application of the prohibitions and the conduct of inquiries and implementation of remedies under the Enterprise Act 2002.

Accordingly, while the CC has no comments on the specific questions in the Consultation Document, it wishes to draw attention to two matters which it considers the Government might consider when forming its policy on private actions.

Firstly, in the interests of ensuring the overall competition law regime in the UK is efficient, the CC sees value in the Government considering the OFT's recommendation that UK courts and tribunals be required to 'have regard' to UK National Competition Authorities' decisions and guidance.

Secondly, the CC suggests the Government might review the extent to which CC reports under the Enterprise Act 2002 following a market investigation should be capable of being taken into account in private actions. CC reports are not produced for the purpose of deciding whether the prohibitions apply. However, they do contain a thorough and expert analysis of the working of competition in relevant markets (including matters such as market definition, market shares, etc) of potential relevance in litigation related to behaviour in such markets.

Considerable public resource is spent in producing them, and it would be inefficient if parties to litigation relating to behaviour affecting such markets could not expect to place some weight on analysis in the reports of relevance to issues in the litigation.

The current position is that the admissibility of CC reports as evidence in private actions, if requested by one of the parties, would be a matter for judicial discretion, according to the circumstances of the case. While it is clearly important that any case is decided on all the facts, the CC considers that there may be some value in developing guidance or rules concerning when it would be appropriate for the courts to have regard to material in CC market investigation reports.

We would be happy to discuss this issue further with you if that would be of assistance.

Kind regards  
Clare

Clare Fawcett  
Policy Adviser  
Competition Commission  
Tel. 0207 271 0342

# Competition Pro Bono Scheme

**The Competition Pro Bono Scheme:  
Response to Private Actions Consultation  
27 July 2012**

## Competition Pro Bono Scheme: Response to Private Actions Consultation 27 July 2012

In April 2012 the Department for Business, Innovation & Skills (“**BIS**”) launched “*Private Actions in Competition Law: A Consultation on Options for Reform*” (the “**Consultation**”). This note is the Competition Pro Bono Scheme’s (“**CPBS**”) response to that Consultation.

It should be noted that the CPBS is an administrative hub which coordinates pro bono enquiries on behalf of enquirers and allocates them to participating advisors. This response has been prepared by Greenberg Traurig Maher (“**GTM**”) in its capacity as administrators of the CPBS and does not, therefore, necessarily represent the views of the other advisors. As such, the scope of this response is relatively limited and focuses on the role played by the CPBS in the context of advising SMEs.

There are, however, a few areas in which the CPBS might, as a collective, be able to contribute further in the future. These are noted in this response and will be the subject of discussion amongst the participating advisors at the next meeting. The CPBS commits to keeping BIS up to date with any developments.

This response sets out:

- the background to the CPBS (**Section A**);
- general observations on the role of the CPBS in assisting private actions (**Section B**); and
- specific comments relating to the Consultation (**Section C**).

If readers have any questions, please feel free to contact the administrators of the CPBS: **Stephen Tupper**, Shareholder GTM (dd: 020 3349 8729 or [tuppers@gtmlaw.com](mailto:tuppers@gtmlaw.com)) or **Lisa Navarro**, Associate GTM (dd: 020 3349 8757 or [navarrol@gtmlaw.com](mailto:navarrol@gtmlaw.com)).

### **A: Background to the CPBS**

The CPBS was set up in 2006 by members of GTM’s Competition and Regulatory Group<sup>1</sup> as a means of facilitating access to competition law advice for all.

Whilst there are a number of other schemes which offer free legal advice covering a wide range of issues, such as the Free Representation Unit or Citizen’s Advice Bureau, the CPBS aims to provide advice exclusively in relation to one narrow band - i.e. competition law. The spirit of the CPBS seeks to reflect the underlying aspirations of competition legislation, that is to say helping to facilitate fair competition via free access to quality legal advice to all levels of the market.

The CPBS also recognises the “breadth” of the potential demand for advice and the “narrowness” of the service industry available to provide it. Assistance was required across the economy but only a small number of people were, at that juncture, capable of providing it. That imbalance needed to be addressed and in such a way that assistance was available to all, regardless of financial means - hence the CPBS.

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<sup>1</sup> The Scheme was set up by the current GTM team at their previous firm, Watson, Farley & Williams LLP.



The GTM team administers and runs the CPBS. They review any incoming queries from the public and then determine whether the query is eligible. The only criterion applied by the CPBS relates to the nature of the enquiry - only issues that, conceivably, are capable of being “regulated” by competition law are processed. If a query is “accepted”, it is then allocated to one of the 47 participating law firms and barristers’ chambers, on a rota basis.<sup>2</sup> The allocated advisor must then provide a minimum of two hours of free legal advice to the enquirer during which time he/she will inform the enquirer of his/her/its rights, whether the matter is worth pursuing, how, etc.

The 689 enquiries received by the CPBS to date provide eloquent testimony to its value. Given its somewhat unique nature, and therefore the absence of any exact comparators, it is difficult to know whether nearly 100 enquiries a year is an exceptional achievement or not. What is clear, however, is that it attracts a significant and constant demand. That being said, the CPBS still receives queries which have to be rejected on eligibility grounds (i.e. for failing to raise competition issues). A fact sheet setting out the basic statistics is attached at **Annex 2** to this response.

In the nearly five years of its existence, the CPBS has been able to help more than 400 individuals and small businesses to understand competition law. More specifically, the CPBS has helped to resolve many instances of anti-competitive conduct and, thereby, improve the competitiveness of this economy to the benefit of its consumers. There can be little doubt that it is an important adjunct to the activities of the UK regulators.

#### **B: The role of the CPBS in private actions**

As noted above, each advisor commits to providing two hours of free legal advice to each enquirer with an eligible query. Depending on the nature of the enquiry, that advice can take many forms.

For some queries, it is simply a case of talking the enquirer through the issues and explaining why competition law is unlikely to offer any resolution. For others with issues which do fall within the scope of the competition rules, the advisor may offer more concrete support in the form of drafting correspondence, or engaging in negotiations. In some instances, advisors have gone well beyond the initial two hours and represented the enquirer, whether on a purely pro bono basis or under an alternative fee arrangement, for a prolonged period. This is, however, a discretionary choice for each advisor.

As the Consultation notes at para. 4.29, the CPBS has been able to resolve the issues faced by some of its enquirers through relatively simple intervention. This demonstrates the importance for enquirers facing competition issues to have access to specialist advice which enables them to make informed and targeted representations to the entities engaging in anti-competitive conduct.

Unfortunately, however, there are still many instances of anti-competitive conduct which can not be resolved without the intervention of a regulator, or a court. The CPBS, therefore, welcomes the Consultation and the proposals which are aimed at facilitating access to justice.

#### **C: Specific comments relating to the Consultation**

##### **4.29 - The experience of the CPBS**

The Consultation states that the experience of the CPBS is that “*a significant number of SMEs who currently believe they are victims of anti-competitive behaviour actually have no strong competition case to bring*”. This is a mischaracterisation of the experience of the CPBS.

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<sup>2</sup> A list of the participating advisors is attached at **Annex 1** to this response.

It is true that there are a number of enquirers who mistakenly believe that competition law might offer a solution to issues they are facing in their markets. For enquirers falling in this category the CPBS performs a useful function by explaining why competition law is not applicable (e.g. conduct, whilst appearing unfair, does not fall within the parameters of the prohibitions contained in the Competition Act 1998 (“CA ‘98”)) and, therefore, preventing the enquirer from fruitlessly pursuing that line of thought any further.

There are, however, many enquirers who do have strong technical competition cases, but who are unlikely to meet the OFT’s prioritisation criteria. For those enquirers, therefore, a regulatory resolution is not a feasible option and nor, under the current system, is resolution before the courts - courtesy of the very problems that this Consultation seeks to address. These enquirers, therefore, are left in an unenviable position of having a genuine case, but not having an easy path to a solution.

For that reason, advisors have sought to assist enquirers by engaging in bilateral correspondence with the entity engaging in anti-competitive conduct. This has resulted in successful outcomes, and definitely supports the proposition that an informed letter, particularly if sent from someone with authority, can have significant results. There are always, however, situations in which the other party is unwilling to engage in discussions, let alone adapt its behaviour, in circumstances where there is no “stick” to convince them to do so. As such, it is important that such enquirers have access to viable alternative sources of assistance - whether from the regulator or in the form of improved access to the courts.

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

The CPBS notes that, at present, the Competition Appeal Tribunal (“CAT”) is unable to make *pro bono* costs orders. It has been suggested by various commentators that this can result in an imbalance between the parties, which would be particularly significant if, as a result of the proposed changes, the CAT is entitled to hear stand-alone cases.

The CPBS would, therefore, suggest that the CAT rules be amended to permit costs orders for *pro bono* costs.

#### **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.**

One of the participating advisors has raised the question as to whether the CPBS advisors might be able to play a more formal role in the provision of ADR in the future. Suggestions range from the advisors offering *pro bono* support for entities engaged in mediation, to actually acting as mediators on a *pro bono* basis.

The CPBS, as explained above, is merely an administrative hub and can not, therefore, commit its participating advisors to any future initiatives. The issue of ADR, and the role which the CPBS can play, will, however, be one of the topics at the next meeting of the advisors. The CPBS will keep BIS informed of any developments in this regard.

**ANNEX 1: LIST OF ADVISORS**

- 1) Greenberg Traurig Maher
- 2) Pinsent Masons
- 3) CMS Cameron McKenna
- 4) Miller Rosenfalck
- 5) Dundas & Wilson
- 6) MacFarlanes
- 7) Van Bael & Bellis
- 8) Taylor Wessing
- 9) Wragge & Co
- 10) Arnold & Porter
- 11) Maclay Murray & Spens
- 12) Herbert Smith
- 13) Maitland Walker Solicitors
- 14) TLT Solicitors
- 15) Simmons & Simmons
- 16) Ashurst
- 17) Reed Smith
- 18) McDermott Will & Emery
- 19) Baker & McKenzie
- 20) Clyde & Co
- 21) Orrick, Herrington & Sutcliffe
- 22) SJ Berwin
- 23) Wedlake Bell
- 24) Field Fisher Waterhouse
- 25) Shepherd & Wedderburn
- 26) Burges Salmon
- 27) Monckton Chambers
- 28) 13 Old Square
- 29) Denton Wilde Sapte
- 30) Hewitsons
- 31) Lovells
- 32) Foot Anstey Solicitors
- 33) Michael Hutchings
- 34) Bird & Bird
- 35) Farrer & Co
- 36) Singletons
- 37) Norton Rose
- 38) Osborne Clarke
- 39) Kemp Little
- 40) PROTOPAPAS Solicitors
- 41) White & Case
- 42) Clifford Chance
- 43) Pritchard Edwards Solicitors
- 44) Stevens & Bolton
- 45) Birketts
- 46) K&L Gates
- 47) Sheppard Smith

**ANNEX 2: CPBS FACT SHEET**

Set out below is basic statistical data covering the operation of the CPBS since its inception on **9 October 2006**. The data consists of information retained as a result of the ongoing applications process and is up to date as at **27 July 2012**.

Q1	How long has the CPBS been in operation?
A1	Five years and nine months.

Q2	How many requests for assistance have been received thus far?
A2	669 "hits" in total.

Q3	How many of the requests received thus far were actively placed with Advisors?
A3	449 requests have been placed. 229 were rejected on the basis that they did not fall within the scope of the CPBS, or were duplicate requests. 11 requests are awaiting further clarification.

Q4	How have applicants been referred to the CPBS?
A4	393 referred by Office of Fair Trading 73 referred by Competition Commission 87 discovered via Internet search 63 discovered by other means 23 referred by Ofcom 5 referred by Competition Appeals Tribunal 5 referred by Ofgem 3 referred by the Law Society 2 referred by Citizens Advice Bureau 2 discovered via consumerdirect.gov.uk 2 referred by Ofwat 2 referred by Trading Standards 1 referred by local council 1 referred by Cafcass 1 referred by Department for Business, Innovation and Skills 1 referred by High Court, Chancery Division

Q5	How many Advisors have agreed to participate in the CPBS?
A5	45 law firms, 2 sets of chambers.

# Confederation of British Industry

## **PRIVATE ACTIONS IN COMPETITION CASES**

### **Delivering effective redress to consumers**

#### **The CBI's response to the BIS consultation – 24 July 2012**

#### **SUMMARY**

Collective redress for consumers in competition cases should be delivered speedily and at minimum cost. Currently the system is not working and only one case has been brought in 10 years.

The Government recognises that collective redress can be delivered through a process of Alternative Dispute Resolution (ADR) but believes that this will only work if companies are faced with a sanction in the form of opt-out class actions. This is the “big stick” approach.

The CBI believes that:

- Collective redress for consumers should be delivered speedily and at minimum cost
- ADR can provide effective redress on its own
- Introducing opt-out class actions carries unacceptable risks, which must be avoided

At a time when the focus has to be on economic growth, the Government's proposals will add to business costs and make the UK a less attractive location internationally.

#### **COLLECTIVE REDRESS FOR CONSUMERS SHOULD BE DELIVERED SPEEDILY AND AT MINIMUM COST**

The target for any reforms should be the efficient and effective delivery of collective redress for consumers who have suffered loss through the actions of a cartel. A clear distinction should be made between the interests of consumers and those of businesses, including SMEs. Businesses will have diverse interests and positions in the supply chain. In contrast to consumers, they are not a homogeneous body. Furthermore, businesses are already using the current opt-in system to obtain effective redress.



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In the football shirts case the individual loss was around £15, which is an explanation of why so few consumers were prepared to join in litigation to recover such a sum. Evidently only 130 consumers, or 0.1% of those affected, joined the action. Substantial fines were imposed on the defendant companies and we suggest that in a similar case involving very small individual losses the appropriate remedy is fines coupled with a behavioural remedy similar to that adopted by the OFT (Office of Fair Trading) in the independent schools' case. In this case all 50 schools agreed to contribute a total of £3 million to an educational, charitable trust to benefit pupils who attended the schools during the relevant period.

As an example of a behavioural remedy in a consumer case, companies could be required to provide a cash refund against proof of purchase. It is clear that it is not economically justifiable to go through a lengthy and costly process of a class action in order to deliver redress of a few pounds per consumer. Rather than consumers, the major beneficiaries will be those providing and funding the litigation services.

## **ADR CAN PROVIDE EFFECTIVE REDRESS ON ITS OWN**

The CBI believes that ADR should be the principal means by which consumers can achieve collective redress and offers a better alternative than the Government's proposals for an opt out class action-style system, for the following reasons:

- ADR offers a quicker, cheaper form of redress with better outcomes
- The "big stick" approach is unnecessary as businesses can be incentivised to participate in ADR

Adopting ADR would avoid the risks of creating a new litigation industry and the development of US style class actions.

### **ADR offers a quicker, cheaper form of redress with better outcomes**

The Government is leading by example by committing to using better, quicker and more efficient ways of resolving legal disputes, "We want people to see court as a last resort rather than a first option, and cut down on the amount of unnecessary, expensive, painful and confrontational litigation in our society"<sup>1</sup>. The Government's "Dispute Resolution Commitment" is now being extended to business and the CBI supports this initiative.

Given the costs to society and business of introducing opt-out class actions, the CBI firmly believes the Government should build on its own initiative and implement an ADR solution to follow-on claims for consumers.

In the case of mass claims, precedents exist for an adjudication system where a panel can make awards which become binding once accepted. In the US, the Gulf Coast Claims Facility made awards of \$6.2 billion to over 220,000 individual and business claimants during the course of its 18 months of operations.<sup>2</sup> This enabled the victims of the disaster to obtain redress far faster than through a contested court case. In the second full month of operation claimants were paid over \$840 million in advance payments.

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<sup>1</sup> Justice Minister, Jonathan Djanogly – 21 June 2011

<sup>2</sup> US Department of Justice press release - 19 April 2012

In the case of follow-on claims, with a large number of claimants, a similar approach could be followed where the defendant company lodges a sum of money as global compensation. An independent panel, chaired by a senior figure with judicial or arbitration experience, would then make awards to the individuals or their representatives which would be administered by a third party administrator. The awards would be made based on the panel's assessment of the amount of the overcharge after receiving appropriately limited evidence. This simpler quicker process would avoid the need for disputed economic evidence in court proceedings.

In summary we believe that all participants gain through an ADR process. Consumers benefit through the delivery of effective redress and the OFT/CMA (Competition and Markets Authority) benefits through an earlier settlement of a case. Companies should also benefit through an earlier resolution of claims, enabling them to draw a line under their liability and move on. For this to happen, there needs to be a new mechanism by which a court could approve a collective settlement entered into by a company.

### **Businesses can be incentivised to participate in ADR**

Those who have caused significant loss to consumers should be required to provide compensation. However it is argued that companies will only enter into an ADR process if they are subject to an opt-out class action. This is the “big stick” approach which has unacceptable risks. Instead the CBI believes in the alternative approach of providing adequate incentives so that it is clearly in a company's self-interest to participate in ADR.

This means ADR needs to be integrated with the enforcement policies of the OFT/CMA so that the necessary incentives are in place for companies to participate in the ADR process. Incentives can be created both through a reduction in fines and by limiting further liability.

Companies will have a commercial interest in settling their liabilities in order to put right a wrong and maintain the strength of their brand. This is particularly the case with companies selling to consumers whose reputation can be severely damaged by contesting claims where liability for a competition law infringement has already been clearly established. To add to this natural motivation, the CBI suggests that:

- A reduction in fine is a logical and attractive incentive
- Changing the rules on joint and several liability would be a powerful incentive
- Approval by the Competition Appeals Tribunal (CAT) of a collective settlement scheme would provide an additional incentive

#### A reduction in fine is a logical and attractive incentive

Fines serve as a sanction and as deterrence. It appears too that there is some linkage to the profits gained through the illegal conduct. Fines are set in relation to turnover which can be regarded as a rough proxy for profits. Allocating some portion of the fine, which could be considered as confiscation of profits, to providing redress to consumers would be a reasonable objective. On another view it would avoid an element of double jeopardy, where the company has to pay a fine and provide compensation.



The reduction should be a standard fixed amount, similar to the reduction for leniency, which would avoid the competition authority having to make a detailed assessment of the likely profits earned. A sum equal to the reduction could be paid into an escrow account to ensure that it was paid out in redress to affected consumers. Any surplus remaining within a fixed timescale could be transferred to the competition authority.

The individual compensation must be commensurate with the costs of delivering it. In cases where individual consumers have suffered a loss of a few pounds, the appropriate redress may be limited to a fine and a behavioural remedy.

#### Changing the rules on joint and several liability would be a powerful incentive

This would provide a strong protection for the defendant providing the redress. It would also address the problem of the “free-rider”, the cartelist who decides not to participate in the ADR process. With joint and several liability it is open to the victims to sue any company in the cartel so a company paying compensation through an ADR process could still be liable for further claims from the customers of the other cartellists.

A large company may have brought the cartel to light through an internal audit and its compliance procedures before seeking leniency. Perceived to have a deeper pocket than other cartellists it is likely to be the natural target of litigation founded on joint and several liability. Protecting the company from such liability would be both an incentive to participate in ADR and a protection for the leniency programme. Additionally, it would increase the pressure on all cartellists to participate.

#### Approval by the CAT of a collective settlement scheme would provide an additional incentive

A court process similar to that of the Netherlands would enable the company to provide a collective redress scheme which had the support of the OFT/CMA and would then be approved by the CAT. This would enable the company to draw a line under its liability for any further claims in the UK and following the precedent of the Netherlands could serve to settle all non-US claims.

### **INTRODUCING OPT-OUT CLASS ACTIONS CARRIES UNACCEPTABLE RISKS, WHICH MUST BE AVOIDED**

The Government proposes to introduce the collective action which is the corner-stone of US class actions. This is the “opt-out action” and will enable a representative action to be brought on behalf of unnamed claimants. The “loser pays” rule would be preserved but as there are no named claimants, the action would have to be underwritten by a third party providing the necessary financial support in the event the claim fails.

This is the essential difficulty with the Government’s proposal since the risks of implementing opt-out are that it will create a new litigation industry based on funding and pursuing collective actions. For good reasons the Government has previously rejected introducing a generic opt-out action<sup>3</sup> but it now believes opt-out actions can be limited to competition cases. But analysis shows that the essential building blocks for these class actions would be put in place and logically there is no barrier to extending them to other sectors in the future.

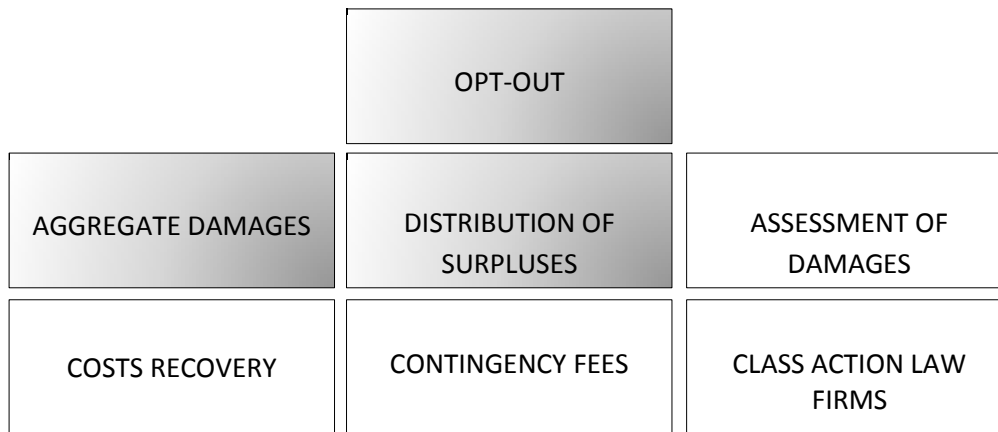
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<sup>3</sup> Ministry of Justice response to the Civil Justice Council report – July 2009

The CBI believes opt-out actions should be opposed for a number of reasons:

- They generate excessive claims for damages since damages are aggregated across the whole class of potential claimants. The number of these always exceeds the number of actual claimants. Consequently companies are faced with exaggerated claims which damage their reputation and financial standing.
- Aggregate damages breach the principle that a claimant should prove its actual loss, so can result in a windfall for some claimants and an under-recovery for others.
- Aggregate damages inevitably produce a surplus, as the number of actual claimants is less than the potential number. In the US, surpluses have been sufficiently large to encourage satellite litigation between competing parties seeking distribution of funds for their particular cause. If the surplus is not returned to the defendant, this will amount to an additional sanction. An Australian Law Commission report considered that this form of distribution was no longer compensatory but punitive and has consequently been rejected in Australia.
- The “loser pays” rule is fundamental to UK litigation and if this is rightly maintained, then the successful defendant must have recourse to funds under the claimants’ control to satisfy its costs claim. Since the nameless opt-out claimants have no financial stake in the litigation, their representatives must have access to third-party funding. If contingency fees have been rejected then the class action law firms will need to involve other investors, such as insurance companies, hedge-funds and specialist litigation funders looking to profit from investment in UK litigation. This creates a new business in class actions and will fuel litigation, which goes against the whole thrust of recent Government policy. We don’t believe this is the sort of new business that the Government should be encouraging.
- The current “opt-in” system is intrinsically fairer and is not broken. It is delivering redress now in competition cases and examples from other fields show that the courts have been able to deal with damages claims brought by thousands of claimants. As an example, one law firm’s website reports it is currently representing some 5000 claimants in respect of PIP implants.

The Government’s expressed intention is not to introduce US style class actions into the UK. But analysing the Government’s proposals in the light of other developments in UK civil litigation, three more essential elements of US class actions would be put in place. The outcome would be a class action system in the UK with very few differences to that of the US, as the following table demonstrates.



Features of class actions	US system	England & Wales
<b><u>Opt-out</u></b> Whereby a whole class of potential claimants can be identified without being named in the litigation. The effect is to magnify the amount of potential damages and create excessive claims.	Keystone of US system.	Currently an “opt-in” system operates under a General Litigation Order. Individual claimants have to be identified. <b><i>Proposal to move to opt-out for competition cases only</i></b>
<b><u>Aggregate damages</u></b> are awarded which are assessed on the basis of the total class, without requiring proof of individual loss	Essential feature of US system which operates alongside opt-out	Currently courts require proof of individual loss and damage. <b><i>Proposed that CAT will assess aggregate damages</i></b>
<b><u>Distribution of surpluses</u></b> As the number of actual claimants is fewer than the total class, the surplus can be distributed to third parties who may have a moral claim.	This can lead to satellite litigation when third parties compete for a share of the surplus	Surpluses do not exist under an opt-in system. <b><i>Proposed that surplus will go to charity providing access to justice.</i></b>
<b><u>Assessment of damages</u></b>	Damages are assessed by juries and punitive damages may be awarded depending on the case.	Damages are assessed by judges. Exemplary damages are very rare but were recently awarded by the CAT for the first time. <b><i>No change proposed</i></b>
<b><u>Recovery of costs</u></b>	There is no loser pays rule. Costs may be assessed by the court.	The loser-pays rule means that an unsuccessful claimant has to pay around 70% of the defendant’s costs. <b><i>Proposed that CAT rules can be more flexible</i></b>
<b><u>Contingency fees</u></b> enable a law firm to fund a class action on behalf of a class of claimants by recovering a percentage of the damages awarded to the class. This is often around 40%.	Fundamental feature of US system.	Permitted in employment tribunal proceedings and being introduced for personal injury cases with other categories likely to follow. <b><i>Proposed that contingency fees would not apply to collective actions in competition cases. But lawyers’ success fees possible.</i></b>
<b><u>Class action law firms</u></b> specialise in bringing class actions and in negotiating early settlements from defendants, which enables the funding of further actions.	Well-recognised feature of the US where law firms compete to represent the class. Recent legislation has curbed some excesses.	US class action law firms have recently set up in London. Other UK law firms are considering future possibilities introduced by alternative business structures.

## ANNEXE A

### Summary of CBI responses to BIS questions and proposals

#### CAT PROPOSALS

BIS PROPOSAL	CBI RESPONSE
Activate S.16 of the Enterprise Act to enable the courts to transfer competition cases to the CAT	<b>Support.</b> This will enhance the CAT as the UK's major competition court.
The CAT to be allowed to hear stand-alone as well as follow-on cases	<b>Support.</b> Expanding the CAT's jurisdiction will clearly establish it as the UK's central court for competition cases.
Whether the CAT should be able to grant injunctions	<b>Support.</b> Availability of injunctions is important in abuse of dominance cases
Whether to introduce a Fast Track procedure so SMEs can resolve simpler cases more quickly and at lower cost, including: <ul style="list-style-type: none"> <li>- Waiving or limiting cross-undertakings in damages</li> <li>- Target to hear cases within 6 months</li> <li>- No or limited court fees and costs capped at £25K</li> </ul>	<b>Proposal needs further thought</b> It is unclear what turnover threshold defines an SME and why a specific class of companies requires privileged status before the CAT. Our preference is for the CAT to use its inherent powers to redress imbalance between the parties in order to provide an equivalent access to justice. Speeding up cases can lead to increased costs and there must be adequate time for settlement discussions. The emphasis should be on enabling an early resolution of disputes. There needs to be clear criteria for waiving or limiting cross-undertakings, owing to the high potential impact on a defendant who may ultimately be successful. The criteria should be applied in a similar way to High Court proceedings. If this simpler procedure is aimed at abuse of dominance cases, these are not simple in nature and can raise complex issues of market definition. If costs are to be capped, it would seem proportionate to put some limit on recoverable damages.
Whether to introduce a rebuttable presumption of loss for cartel cases to shift burden to the defendant, who is most likely to possess the data to calculate the true damages <ul style="list-style-type: none"> <li>- Suggestion this could be 20%</li> </ul>	<b>Strongly oppose in principle.</b> This is contrary to the fundamental principle that a claimant has to establish his loss and would be radical departure in English law. This would tip the balance too far towards claimants and encourage spurious exaggerated claims.
Whether the passing-on defence should be addressed by legislation.	<b>Support conclusion to take no action</b>

## **COLLECTIVE ACTIONS QUESTIONS**

<b>BIS QUESTION</b>	<b>CBI RESPONSE</b>
Allow collective actions to be brought on behalf of businesses as well as consumers?	<b>Not necessary</b> as GLOs, using existing opt-in, allow businesses to obtain redress. Their commercial relationships with the defendants are likely to be specific and unlike those of consumers.
Allow collective actions to be brought in stand-alone as well as follow-on cases?	Should only be permitted under strict case management to review likely merits and encouraging ADR and provided collective actions are not on opt-out basis.
Allow opt-out collective actions to be brought in the CAT, subject to CAT's discretion?	<b>Strongly opposed to opt-out.</b> Cannot be limited in practice to competition cases, as shown by Financial Services Bill. This will fuel a litigation industry as opt-out is dependent on third-party funding
Allow opt-out collective actions to be brought by private bodies, using a strong certification regime so that the representative body was suitably representative of the claimants?	The US class action system, based on opt-out, shows that the right to represent claimants is strongly fought-over.
Are law-firms and third-party funders (TPFs) suitable representatives?	Third-party funding of some kind is an essential component of opt-out as the claimants are nameless. This is a major reason for opposing opt-out. We strongly agree that contingency fees should not be available to law firms in opt-out collective actions.
Should a public body be able to bring an opt-out collective action?	There are attractions in the Danish model of the Ombudsman being able to obtain redress in addition to applying sanctions. But this would require a significant change of mission for the OFT/CMA which we doubt is practicable. Instead we favour the OFT/CMA promoting an ADR approach described later.

## **ENCOURAGING ADR**

<b>BIS QUESTION</b>	<b>CBI RESPONSE</b>
Should ADR be made mandatory?	Support the maximum use of various incentives, short of making ADR mandatory.
Should a pre-action protocol be introduced for: <ul style="list-style-type: none"> <li>- The proposed fast track</li> <li>- Collective actions</li> <li>- All cases in the CAT?</li> </ul>	Support pre-action protocols for all cases in the CAT in order to focus on the key issues and promote early settlement.
Should the CAT rules governing formal settlement offers be amended to bring the CAT in line with High Court procedures?	<b>Support.</b>
Would the CBI establish any initiative to facilitate ADR in competition cases?	The CBI has put forward a proposed ADR scheme for follow-on cases, set out below.
Should the competition authorities be able to order a defendant to implement a redress scheme, or to certify such a voluntary redress scheme?	This form of direct redress has the attractions of being quicker and less costly. But it is not clear how it would relate to private actions in order to avoid double jeopardy. The OFT/CMA promoting an ADR scheme would be a preferable route.

Should redress be taken into account in setting the level of fine?	<b>Support.</b> If a defendant effectively yields up the profit gained through illegal conduct, this should be taken into account in the level of fine.
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## **COMPLEMENTING THE PUBLIC ENFORCEMENT REGIME**

<b>BIS QUESTION</b>	<b>CBI RESPONSE</b>
How can private actions complement public enforcement?	Private actions have a distinct and separate policy objective of providing redress. They should not be considered as a primary tool of enforcement. Double jeopardy should be avoided, to the extent that a defendant pays fines incorporating a measure of profit confiscation and then has to pay damages on top.
Should certain leniency documents be protected from disclosure in subsequent litigation?	<b>Support.</b> Protecting those documents which were fundamental to the leniency application and would not otherwise have been produced, is desirable.
Should whistleblowers and any other leniency recipients be protected from joint and several liability?	<b>Support</b> protecting whistle-blowers from joint and several liability by limiting their liability to damage they directly cause. This should be extended to participants in an ADR scheme of collective redress as it would provide a powerful incentive to participate.
Should decisions of other NCAs be binding in the UK?	Support conclusion that they should not be binding.

## **ANNEXE B**

### **Outline of ADR scheme for follow-on actions proposed by the CBI**

#### **Reasons for an ADR model ...**

The CBI supports the objective of providing effective redress to consumers who are the victims of cartels and believes this can most effectively be achieved through ADR. The objective is to ensure fair and early disposal of legitimate claims with minimal costs and without recourse to the courts.

This model of providing direct redress is designed to offer advantages to all the principal participants in a cartel case.

#### **Advantages for consumers ...**

- Compensation would be obtained sooner without the risks and costs of litigation.
- Compensation can be provided to consumers, who individually have low value claims, at lower cost than through a court based system.
- The compensation can be in a form having more appeal to the claimants, such as new products or vouchers.

#### **Advantages for the OFT/CMA ...**

- The OFT/CMA would enhance its role in advancing consumer welfare.
- There would be no cost to the OFT/CMA or direct involvement in delivering the redress.
- The OFT/CMA would still make the required decision on the existence of the cartel, its duration and the market affected.

#### **Advantages for companies ...**

- The exposure to follow-on claims can be quantified at an earlier stage and with more certainty than through protracted litigation. This would enable companies to draw a line under their involvement in a cartel at an earlier point
- There would be substantial savings in litigation costs and in internal resources. Companies would be freer to focus on future opportunities rather than past problems.
- Companies can repair their damaged image more rapidly and effectively through the earlier resolution of claims. This can help in rebuilding customer relationships.

### **The ADR model can be adapted flexibly ...**

- The ADR model would provide flexibility and could be adapted to each individual case, for business claimants as well as consumers. It would provide a model which can be developed and trialled by the OFT/CMA as part of its settlement procedures.
- Flexibility is needed, as redress following a cartel affecting thousands of consumers would require a different approach than one involving a smaller number of individual claimants.

### **The model would work as a form of private adjudication ...**

- Defending companies would agree to fund the process leading to awards of compensation.
- Awards would be made by a panel to specified claimants, or classes of claimants.
- The panel would be made up of a legally qualified chair, together with assessors having industry and financial/accounting expertise.
- The panel would determine the procedure to be followed in a specific case.
- The panel would hear limited evidence on the amount of overcharge and the level of pass-through at each level of the supply chain. The panel would make an assessment of the overcharge and relevant pass-through percentages, which would then form the basis of compensation.
- The award would be binding on the defending companies who agreed to participate but only binding on the claimants when accepted.
- The processing of individual claims with the companies concerned and the payment of the compensation would be carried out through a third-party administrator.
- The process would be under the supervision of a recognised ADR provider, such as CEDR, or ADR Group, to avoid direct involvement by the OFT/CMA.

### **Consumer and other representative groups can have a role ...**

- Under the process set up for the panel, it could invite submissions from representative groups able to provide views on the level of overcharge and pass-through issues.

### **If the claimant does not accept an award there can be a costs penalty ...**

- The claimant will be free to pursue its claim through the courts.
- But when making an award of litigation costs the court may consider the amount of compensation that was available through the ADR panel. The claimant may well therefore be subject to a potential costs penalty by pursuing litigation. This could include paying the defending companies' costs as well as its own.



**There are still advantages even if all the defending companies do not sign up to ADR ...**

- The process would still operate for the remaining companies and provide them with the advantages described above.
- The panel could make awards based on the overcharge paid by the customers of the individual companies.
- A company that did not participate would be at the risk of further litigation from its own customers and others under joint and several liability and through contribution claims. There would be additional pressure through publicity of the ADR scheme.

**A reduction in the fine would provide a strong incentive to participate in ADR ...**

- A reduction in the fine would be an important incentive for the defendants to agree to provide direct redress.
- On the basis that the level of the fine bears a relationship to the illegal profits gained, then an element of the fine could justifiably be returned to the victims rather than the state.
- The amount of the reduction in the fine could be placed in an escrow account to ensure that it is properly used for direct redress to consumers under the administration of the panel. This would be required during a fixed period and the panel would produce a report to the OFT/CMA at the end of the ADR process.

# Consumer Focus



**Consumer  
Focus**  
Campaigning for a fair deal

# **Consumer Focus response to the BIS consultation on Private Actions in Competition Law: A consultation on options for reform**

**July 2012**

# About Consumer Focus

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Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy, persuading businesses, public services and policy-makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers, and aims to give people a stronger voice. We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.

# Executive summary

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Consumer Focus welcomes the opportunity to respond to the Government's consultation document on private actions in competition law.

We are particularly pleased to note that the development of the competition regime is being considered alongside proposals for a collective redress mechanism. The lack of such an integrated approach has meant that those who suffer the most from competition infringement, consumers, have enjoyed no effective recourse to redress. Under these proposals, there is at least the possibility that consumers may have recourse to an effective regime which could put them back in the position they would have been in had the infringement not occurred.

Consumer Focus supports the Government's proposal to strengthen the Competition Appeals Tribunal (CAT). The power to hear stand-alone cases (including collective redress), prescribe injunctions, and the proposal to build in a fast track mechanism to the CAT, will bolster protection, and contribute to fostering a culture of compliance. However, we are disappointed that much of the design element focuses on the interest of Small to Medium Business and wish to see the balance redressed so that those who lose out the most, consumers, are put at the heart of the design principles and details.

We particularly welcome the progressive proposals around collective redress. There is little point in creating market rules if these cannot be effectively enforced, or if those who suffer loss cannot obtain redress. For too long those who have suffered harm as a result of competitive infringements have been denied an effective mechanism to receive recompense. Consumers will not have the confidence to participate in markets and fuel economic growth unless they are able to gain redress when firms cheat or make mistakes. Moreover, traders who break the law and escape paying compensation gain an unfair advantage over their fair dealing competitors. We have long-recognised collective redress as a process that can mitigate the factors that discourage consumers, especially disadvantaged consumers from going to court. Collective redress allows consumers to pool together and exercise group strength, while also benefiting from the expertise and support that organisations representing consumer interests can bring. Our principal argument in favour of collective redress is to extend access to justice for consumers, particularly, although not exclusively for those with low-value claims who are unlikely to pursue individual redress mechanisms. However, it is important to recognise that an efficient and effective collective redress procedure can also result in wider secondary benefits, for example encouraging business compliance with the law and improving judicial economy.

We note that proposals for a collective redress mechanism have often met with resistance from those who claim it will open a floodgate to America style class actions. Consumer Focus strongly believes that our judicial system is sufficiently different, robust and has inbuilt safeguards that will guard against vexatious or unmeritorious cases or abuses. Moreover, collective redress in other European countries has not led to the type of excesses which have plagued America. While we agree that safeguards should be built into the system, we are against any proposal which will make collective redress too restrictive and impractical to use.

# Competition Appeals Tribunal

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## Design principles and details of the CAT

Consumer Focus agrees that there are strong arguments and merits in having a specialist tribunal that deals with competition cases. We agree that the expertise and experience developed by the Competition Appeals Tribunal (CAT) will stand it in good stead and place it in a better position to develop case law, set precedence and supplement existing rules where these are inadequate to control undesirable practices.

### CAT should hear stand alone cases

We are strongly of the opinion that the Competition Act should be amended to allow the CAT to hear stand-alone as well as follow-on cases. As the Government rightly notes, enforcement agencies have competing interests which may not prioritise seeking compensation for consumers. Moreover, like all public sector bodies, enforcement agencies are facing dwindling budgets which would further impact on their prioritisation, and may push seeking consumer redress further down the agenda. Finally, in 2008, a study on representative actions and restorative justice by the University of Lincoln,<sup>1</sup> noted that most enforcement agencies see their role as achieving business compliance with the rulebook rather than to obtain compensation for consumers. There will clearly be meritorious cases which enforcement agencies cannot pursue as a result of their competing priorities. We are therefore in complete support of mechanisms which empower consumers and consumer organisations to take direct action.

### CAT should be empowered to order injunctions

We believe the CAT should have a full range of remedies available at its disposal, including the power to instruct a business to cease the offending act. However, we do not agree with the assertion that claimants simply want the act to stop, consumers also wish to be compensated for the loss they have suffered. However, we accept that there may be cases where an injunction alone will suffice, and indeed may be what is sought. Nevertheless, we think the CAT would be rendered fairly inefficient and or ineffective if it doesn't have the powers to impose injunctions. We therefore support the proposal to allow the CAT to order injunctions.

### Improvement on the current design proposal

While we are in broad support of the proposals to extend the powers of the CAT, we are disappointed at some design elements which purports to focus solely on procedural ease for Small to Medium Size businesses (SMEs). We believe consumers should be at the heart of these proposals, and suggest that there ought to be a rebalance in the design elements. For example, the fast track proposals should offer injunctions and monetary resolutions as a remedy, not just injunctions.

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<sup>1</sup> A Representative Actions and Restorative Justice: A report for the Department of Business Enterprise and Regulatory Reform (BERR) December 2008.

If a compliance culture is to be fostered and promoted, and if the court is to be empowered to evolve and keep up with illegal and or reckless practices, then its hand must not be tied in terms of what remedy it is allowed to prescribe. Moreover, any sanction which seeks to remove monetary compensation as a remedy will only serve to drive consumers and consumer groups out of the fast track process.

We support a fast track process in principle, however, we are against a mechanism designed and tailored to accommodate one type of claimant; in this case SMEs. The consultation document already acknowledges and accepts that competition infringements have an adverse effect on consumers and SMEs. We will argue that consumers disproportionately bear the brunt, because small business often pass on the cost of infringement to consumers. We propose the following changes:

- Allow swift granting of interim injunctions and monetary compensation
- Cap cost awarded to a limit pre determined by an expert panel
- Give the CAT the flexibility to set a lower or higher cap

### Innovative and practical solutions to the calculations of damages

We agree that there needs to be innovative and practical solutions to the calculation of damages. It is often an impossible task to calculate the exact loss caused by an infringement. We believe that it should be possible to rely on a reasonable estimate of an overcharge. However, any fixed amount such as the 20 per cent proposed should be arrived at after careful assessment by competition authorities with input from relevant stakeholders.

Finally, we agree that there should be a presumption that end consumers have borne the overcharges generated by the unlawful practices. This will negate the need for claimants to prove a causal link between the infringement and the individual damage suffered by consumers.

# Collective actions in Competition Cases

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A limited range of informal and formal mechanisms already exist to enable consumers to achieve redress, including individual-led group actions through the courts in England and Wales. It is well recognised that such procedures are rarely used, and a number of obstacles prevent consumers from effectively combining forces in situations where they collectively suffer harm:

- Consumer claims often involve relatively small amounts of money (although these may be significant for the person concerned) that, individually, it might not be economic to recover through litigation
- Some cases are high-value and involve complex argument or specialised evidence that is beyond the resources of individuals. These cases are expensive to pursue and difficult to win without support. The involvement of expert organisations can help consumers and also assist the court to achieve justice
- Many consumers, especially those who are disadvantaged, are discouraged from going to court. The available evidence suggests that generally speaking, most people would prefer to avoid becoming involved in legal and court processes. Most people are apprehensive about involvement with lawyers; they are very concerned about the potential costs, formality, delay and trauma they associate with legal processes.<sup>2</sup> People may be inarticulate or shy of attempting to express their grievances and may fear going to court or fighting large corporations. They might lack legal advice or simply may be unaware of their rights

The introduction of collective redress in competition cases has the potential to redress the balance and to empower the real victims of an infringement to take action. While we accept and would support mechanisms to safeguard against vexatious and unmeritorious cases, we are opposed to overly restrictive procedures which will make the redress mechanism unworkable. For example, we would not support continuation of collective redress as a 'follow on' to enforcement action by enforcement agencies or regulators. It is our view that:

- The power to bring collective action should be given to all consumer organisations
- The courts should decide whether a consumer organisation is suitable to bring collective actions for each case based on an indicative criterion
- Consumer organisations or individuals should be able to bring collective actions on behalf of consumers at large (opt out procedure) not just named consumers (opt in)
- Thorough consideration should be given to the funding of such cases, including the applicability of sensitive cost rule. Legislation should not constrain consumer organisations from using market mechanisms such as Conditional Fee Arrangements

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<sup>2</sup> See: Pascoe Pleasance, *Causes of Action: Civil Law and Social Justice*, 2<sup>nd</sup> edition, Legal Services Research Centre, 2006; Hazel Genn and Alan Paterson, *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Oxford University Press, 2001; and Scottish Consumer Council, *Civil Disputes in Scotland: a report of consumers' experiences*, 1997



- A written agreement of how damages will be distributed should be signed at the outset and the representative (under strict guidelines) should be able to take a slice of the damages to cover costs
- Any collective redress system should allow cy-pres<sup>3</sup> distributions that indirectly benefit consumers as a whole in some way relating to the purposes of the case, for example by funding a consumer education campaign or reducing prices over a defined period
- All early settlements should be judicially approved

## Why consumers need collective redress

Our starting point in why an effective collective actions mechanism is needed is access to justice. The rule of law is undermined if rights which prohibits illegal activities in markets or laws which give consumers protection cannot be enforced or recompense cannot be sought for the harm suffered. Moreover, on the competition side in particular, the use of collective redress procedures has key benefits: it encourages a compliance culture, deterring illegal behaviour by businesses which potentially harm many consumers.

A weak redress system inhibits competitive markets, since legitimate businesses lose out to rivals who are either inefficient or deliberately set out to gain an advantage through cartels or other anti-competitive practices. Public enforcement alone where ever more limited resources are confined to a small number of organisations, gives ill-intentioned firms reason to believe their activities might escape unnoticed or unpunished. But, a system that incorporates effective public enforcement, court procedures and a real possibility of private actions will increase the likelihood that anti-competitive behaviour is detected and addressed.

The limited and fragmented collective action procedures in the United Kingdom are simply not working. It is ineffective and out of touch with modern commerce and consumer redress, and those who seek to thwart the law know this.

The Group Action Litigation Order (GLO) available in England and Wales only – allows claims to be brought as part of a group, this procedure has seldom been used in consumer cases. One weakness of the procedure is that it only permits an opt-in route, which is simply unsuitable for many consumer claims. This key weakness, combined with the small number of cases and the absence of any similar mechanism in Scotland, suggests something different is needed, even if it is only in the competition framework.

We therefore agree with most of the policy justification and evidence put forward in the consultation document for extending and strengthening collective actions. We have long campaigned for a mechanism which effectively links enforcement with redress as the optimal approach to foster a culture of compliance with the law.

## Who should be empowered to bring collective action cases?

Consumers, consumer organisations, private and public bodies should all be empowered to bring collective redress cases.

Consumer Focus prefers an approach that allows action to be initiated by anyone who belongs to the actual class of persons who have sustained loss, or by consumer associations, trusts, or public bodies if the action falls within the scope of their purpose.

Consumer Focus is strongly of the view that there will be occasions when it will be perfectly valid and indeed appropriate for consumers groups, particularly small or single issue consumer groups to bring cases on behalf of consumers.

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<sup>3</sup> See <http://bit.ly/cy-pres>

These groups may have specific and specialist knowledge and may indeed be in the best position to represent consumers on occasions – a good example is highlighted in the box below

*In 2007 the energy group, npower changed the way it applied charges for the first block of higher priced gas units that households paid. These changes were not properly communicated to customers and some 1.8 million customers ended up paying for more of these high priced units than they had expected. Some customers complained to Ofgem, which launched an investigation, and in February 2009 npower was made to repay an average of £6 each to 200,000 customers.*

*Not everyone was happy. The concern was two-fold: that the amount paid was not sufficient, and that far more than 200,000 customers had been affected. It was at this point that Consumer Focus became involved.*

*We needed to see if npower had breached its contract with its customers, and then investigate whether Consumer Focus would be able to take part in legal proceedings against the energy group on behalf of all affected parties.*

*Counsel believed that under sections 11 and 23 of the Consumers, Estate Agents and Redress Act, Consumer Focus could indeed pursue legal action. At its most basic, Section 11 allows Consumer Focus to investigate serious consumer complaints, while Section 23 confers on the body a 'supplementary power to do anything (other than borrow money) which is calculated to facilitate, or is incidental or conducive to, the exercise of any of its functions'.*

*It was decided that the terms of Section 23 were broad enough to include commencing proceedings for a declaration that the tariff changes were unlawful, as well as taking out insurance against potential costs. The declaration could then be used on behalf of affected consumers to claim damages for breach of their agreements with npower.*

*Without-prejudice talks with npower were being held concurrently and in February 2010, a Sunday Times article came out which implied that litigation could be on the cards if an agreement was not reached between Consumer Focus and npower. After about four months, npower agreed to calculate each overpayment made by the affected customers. The individual payments ranged from £1 – £100 and the total figure to be repaid was £63 million plus VAT.*

It should be noted that our preferred approach is the one adopted in Denmark, Norway, Sweden, and Portugal and the Netherlands. Even in Finland where the more restrictive approach of designating a single actor is adopted,<sup>4</sup> individuals have a subsidiary right to act, namely when the Consumer Ombudsman has decided not to bring a case.<sup>5</sup>

Any approach which seeks to prevent consumers and consumer groups from taking action will be counterproductive to the Government's aim of securing a vibrant and competitive market.

Anti-competitive practices allow a company to illegally increase its profits by defining higher retail prices. It is consumers who ultimately lose out, and unlike small businesses, there is no opportunity for consumers to 'pass on the loss'. Therefore, we cannot accept any rationale which seeks to prevent victims from taking direct action.

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<sup>4</sup> In Finland the Consumer Ombudsman is the primary designated body empowered to bring class action cases

<sup>5</sup> Collective Redress Procedures – European Debates, Duncan Fairgrieve and Geraint Howels

The very people who lose out the most, consumers, should be empowered and not disabled from seeking redress. Perhaps more importantly, we believe that this will be counterproductive to the objective of fostering a culture of deterrence and for ensuring that competition infringements are effectively tackled. Those who profited from their wrongdoing must pay; injunctions alone will not suffice, consumers who suffered loss must be put back to the position they would have been in if the infringement had not occurred.

### Follow-on and or stand-alone

The limitation of follow-on action is well documented in the consultation document, by competition authorities, and in the real evidence of the limited cases taken by consumers or on behalf of consumers. We are opposed to the continuation of limiting collective redress cases to 'follow on' action. This will only serve to limit the number of cases that can be brought. We do not accept that this restriction will ensure that only credible cases go to court, it is more likely to prevent meritorious cases. Moreover, this proposal will greatly erode the independence, initiative and capability to challenge illegal actions as and when necessary.

As it has been noted, regulators do not have the resources to pursue every case where action is required. For instance, the UK's Office of Fair Trading, has in the past stated its intention to focus on a small number of high impact cases. It has stressed the need for partnership between private and public enforcement to allow more meritorious claims to be pursued. This in itself shows the need for multiple efforts in this area.

Moreover, in a study on representative actions and restorative justice by the University of Lincoln,<sup>6</sup> it was noted that most enforcement agencies see their role as achieving business compliance with the rulebook rather than to obtain compensation for consumers.

It is also important to note that fines obtained from infringements of rules or a regulation goes to the public purse and not to private individuals. Finally, the global financial crisis means that funding for enforcement agencies is dwindling; this means that enforcement bodies will be under increased pressure to prioritise, in this climate, it is highly unlikely that restorative justice will be a priority even where considerable consumer detriment occurs.

### Opt out or Opt in

Consumer Focus believes that an 'opt out' mechanism will provide the most effective form of collective redress. The option of allowing actions to be brought on behalf of consumers at large (opt out) as opposed to bringing a case for named consumers (opt in) is the most effective and efficient way of ensuring that collective redress makes a real difference.

The 'opt out' procedure is more suitable for low-value claims, where consumers are more unlikely to be aware that their rights have been infringed. The unnamed route also serves disadvantaged consumers better, who for various reasons face additional barriers to participating in legal actions. Therefore, it is a more inclusive approach and is the most consistent of the options of promoting access to justice. Moreover, allowing actions to be brought on behalf of consumers at large offers the best means to hold firms accountable for the harm they have caused. It cannot be right that errant businesses can escape their responsibilities because people are unaware of a problem or do not have sufficient incentive to take legal action.

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<sup>6</sup> *A Representative Actions and Restorative Justice: A report for the Department of Business Enterprise and Regulatory Reform (BERR) December 2008*

The common argument against the 'opt out' approach is that it is susceptible to abuse. But this approach is used in collective redress systems in other countries, without it causing a floodgate of unmeritorious cases. Moreover, procedural safeguards and active case management can overcome any risk of vexatious claims. Finally, to mitigate against the fear that an opt out procedure will open floodgates of unmeritorious cases, we support a court based approach; where judges determine the appropriateness of whether a case should be on an 'opt out or opt in basis'.

### Funding collective redress cases

Without adequate provision or creative ideas about the funding of collective redress cases we are doubtful whether the procedure will be used. An important principle of access to justice is that claimants should not be denied access to the courts because they do not have the means to litigate. Equally, lack of means should not disqualify consumer organisations or individuals from taking collective redress.

The use of collective redress is likely to be minimal without mechanisms to insulate consumer bodies from the cost consequences if they lose and to pay for disbursement costs, such as expert witnesses, which might be considerable. Consumer organisations that are willing to take on cases are likely to be reluctant to do so if they are left to bear the financial risk.

The standard model in the UK is that the losing party is exposed to the majority of the opponent's legal costs. We do not consider this a satisfactory arrangement in respect of collective actions. We think that a mixture of the following options should be considered:

- Establish a collective actions fund – this is a fund which takes a proportion of the money received by a successful claimant to meet claims on the fund by unsuccessful claimants. It is accordingly a form of mutual insurance, although the initial funding would need to be provided by the state. The administration costs of the scheme would be met by charging a registration fee to all applicants, and applicants would have to demonstrate that they had a good chance of success. The main advantages are that it protects consumer organisations from financial risk and ensures that all moneys paid into the fund are used for the public good
- Apply sensitive costs rules, for example 'no costs' agreements, whereby each party promises not to seek a costs order against the other, regardless of the outcome. However, the consumer organisation would still have to cover its own costs, which might be large. Alternatively, there might be a ceiling on the maximum costs of a losing representative claimant, similar to the small claims system
- Utilise existing market mechanisms, such as contingency fees, third party funding and insurance-backed conditional fee arrangements. This shifts the risk from consumer organisations onto lawyers, but a main drawback is that lawyers take a slice of claimants' winnings, and often this cut is considerable

### Should legal firms or third party funders be allowed to bring cases?

As a consumer organisation that campaigns for a fair deal for consumers across the whole economy, including the legal sector, we are concerned that the cost of obtaining civil justice, particularly in lower value claims, is disproportionately high. This has been a well recognised flaw in our judicial system for a number of years and while we note recent efforts to tackle this problem, it is too early to say whether the changes will bear fruit. And even if they do, it is highly likely that the current Conditional Fee Arrangement will become less attractive (as success fee and After the Event Insurance becomes irrecoverable).

This point is compounded by the fact that consumer organisations have no recourse to funding to enable them to represent consumers, and with the ever tightening of public purse it is unlikely that consumer organisations will be clamouring to take cases on behalf of consumers. We note that despite numerous anti-competition infringements, only one organisation, Which? has taken a case to date. We see no merit in further restricting others from helping consumers to bring these often expensive and complicated cases, even if this means taking a slice of the damages. We note that even small businesses may wish to take advantage of third party funders or contingency fee arrangements.

Therefore, we are broadly in support of third party funding as an alternative means of funding legal disputes. We note that the existing business model for third party funding is more suitable for collective actions as funders generally fund higher value claims, cases worth £100,000 or over. While this puts most ordinary consumer claims outside its remit, it does mean that collective action cases in competition cases would fall within its model and therefore serve to widen access to justice.

Our concern about alternative funding streams relate to the finer details of how these proposals would be transposed, adequate regulation and consumer protection where necessary. To this end, we are keen to ensure that consumers are afforded with adequate information, protection and safeguards. However, as a matter of principle, we are not oppose to third party funding.

# Alternative Dispute Resolution

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## Should ADR be mandatory?

As a matter of principle Consumer Focus is against any form of compulsory Alternative Dispute Resolution (ADR) schemes; this would be contrary to consumers right to access justice.

In 2004, an important UK court judgement in *Hasley v Milton Keynes* (delivered by Lord Justice Dyson) acknowledged the value and importance of ADR, but emphatically stated that parties should not be ordered to mediate against their will. He said, *"It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court."*<sup>7</sup>

Consumer Focus supports the views expressed by Dyson LJ, we note that where mediation is imposed, it leads to lower settlement agreements, as discovered by Hazel Genn in a research commissioned by the then Department for Constitutional Affairs<sup>8</sup> – now Ministry of Justice (MOJ). This research found that:

- In around 80 per cent of the cases, both parties objected to being referred to mediation
- The settlement rate followed a downward trend over the year, from 69 per cent to 38 per cent
- Parties who settled during mediation were generally positive about the process. Parties who failed to settle during mediation complained about compulsion, pressure, and the risk of revealing their hand to their opponents

The findings above are not a ringing endorsement for compulsory ADR. Moreover, any voluntariness must be full and true, in the sense that users must be clear that ADR is one option and a choice; they must be clear about what it can and cannot deliver. However, we are keen to ensure that consumers are informed about ADR as early as possible and as a matter of course it should be presented as a first option where appropriate

## Out of court settlement

Consumer Focus agrees with proposal to amend the CAT's rules of procedure in order to better facilitate the use of formal settlement offers. More generally, Consumer Focus is of the opinion that any collective redress mechanism should require judicial approval for out of court settlements.

Experience elsewhere shows that class action suits tend to be settled early out-of-court. Consistent with the norm in these countries, early settlements should be judicially approved. This protects claimants who are in a poor position so they know whether the settlement proposed by the defendant is fair and reasonable.

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<sup>7</sup> 2004, 1 W.L.R. 3002

<sup>8</sup> The Automatic Referral to Mediation (ARM) pilot scheme was set up to run for a year at Central London County Court, from April 2004 to March 2005. The intention was to randomly select 100 cases each month to be referred to mediation. If one or both of the parties objected, they had to justify their reluctance to a judge. The judge would have the power to override their objections if she felt the case was suitable for mediation. ([www.adrnow.org.uk](http://www.adrnow.org.uk))

It is tempting for lawyers acting on behalf of claimants to settle out-of-court to obtain their fee rather than risk losing all in the courtroom. It also protects defendants from being effectively blackmailed by claimants, who know that the reputation loss from the negative publicity that can result from a drawn-out case may actually outweigh the value of the claim. Judicial approval also has the advantages of binding the whole class, which could prove useful if similar claims emerged in future.





**Consumer  
Focus**

Campaigning for a fair deal

## **Consumer Focus response to the BIS consultation on Private Actions in Competition Law: A consultation on options for reform**

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# Court of Session Judges

**RESPONSE**

**By**

**THE JUDGES OF THE COURT OF SESSION**

**To**

**Private Actions in Competition Law – a Consultation on Options for Reform**

We note that many of the questions in the consultation paper relate to policy proposals on which it would not be appropriate for us to comment. Some of them relate, however, to procedures that may be adopted in litigation on competition law matters and we would offer some observations on those aspects.

**Q1 Transferring cases from the Court of Session to the CAT:**

We can see the usefulness of empowering the court, in its discretion, to transfer cases to the CAT. It may be, for example, that in an individual case input from the non legal “ordinary” members of CAT (not available under the court system) would be of value. If the court is to be given such a power, we would suggest that, since it is not possible to foresee all sets of circumstances in which such an application may be made, the court should have a wide discretion.

As regards the desire to enhance the opportunities for speedy, simple and efficient disposal, we would observe that any such action brought in the Court of Session would be brought as a Commercial Action and thus governed by Chapter 47 of those rules (apart from applications for warrants etc which are dealt with under Chapter 86 of the Rules of

the Court of Session). Chapter 47 affords commercial judges considerable discretion and flexibility as to the procedures to be adopted in an individual case with a view to achieving efficient and effective disposal and there is a strong emphasis on active case management. It works well in practice.

**Q2      Should the Competition Act be amended to allow the CAT to hear stand-alone as well as follow-on cases?**

We do not understand the proposal to be that claimants be obliged to litigate “stand-alone” cases in the CAT. Whilst we can see that there may be occasions when they would wish to do so, for example, to access the input of a panel which includes non-legal expertise, there does not appear to be justification for restricting what is often complex litigation to the CAT. The paper makes no mention of fee charging but if, for instance, fees in the CAT were to be set at a higher level than those charged by the relevant court, issues may arise particularly in relation to access to justice considerations.

**Q3      Should the CAT be allowed to grant injunctions?**

We note that the proposals relate both to negative and positive orders. In Scotland, the Court of Session has both the power to grant interim interdict and to ordain the performance of any act which could have been prevented by interdict (see: *Court of Session Act 1988 sections 46 and 47*). Interdict may be sought in the Sheriff Court. Failure to comply may be dealt with as in the case of any other breach of a court order by punishing it as contempt, the nature and extent of the punishment in a particular case being determined by judges who are trained and experienced in the imposition of

penalties. The paper is silent on the matter of enforcement in the event of this power being vested in the CAT. It may be because it is thought to be covered by the proposal that the CAT be named “a Superior Court of Record”. It should, however, be noted that that is a term which is unknown to the law of Scotland, as recently observed by Lord Hope of Craighead in *Eba, Petitioner* [2011] UKSC 29 at paragraph 29. The power to grant interdict and interim interdict is, in Scotland, restricted to the courts and the observance of such orders controlled and regulated by the courts. None of the tribunals which sit in Scotland are empowered to grant interdicts nor do they have a jurisdiction in relation to the enforcement of such orders. It would be highly unusual to empower a tribunal in this way and we do not see that it would be justified for the CAT.

We note the desire which underpins the proposal is to achieve speed and simplicity. Applications for interim interdict are, however, regularly dealt with expeditiously by the courts in Scotland both within and outwith normal court hours as are subsequent related applications such as for recall or in relation to enforcement. Any application for interim interdict to stop a proscribed anti-competitive activity would be dealt with under these procedures.

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

We cannot comment on what would be the likely outcome of the provision of such a route (which, in principle, looks very similar to what can be achieved under the rules governing commercial actions in Scotland). As to costs, we have two observations.

First, in the detailed report by the Costs Review Group to the Senior President of Tribunals dated 5 July 2011, it was stated in relation to the CAT, at paragraph 97, that :

“We know of no dissatisfaction with the current regime.”

Secondly, it is now recognised, in Scotland, that in an appropriate case, what is often referred to as a “protective costs award” i.e. a cap, may be imposed: *Fife Council v Uprichard* 2011 CSIH 77; *McArthur v Lord Advocate* 2006 SLT 170. If a power of the sort discussed in the paper is to be given to the CAT, it would seem to be important to afford the tribunal a wide discretion in the matter.

**Q8 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 make no comment as to whether or not this defence should be legislated for. All we would observe is that the paper confines its considerations to whether or not the defence is available under the common law of England and Wales. No thought appears to have been given to the issue of whether or not it would be available under Scots law.

**Q9/17 The Government seeks your views on how well the current collective action regime is working and whether it should be extended and strengthened? Should the loser – pays rule be maintained for collective actions?**

We would advise that current proposals for the reform of the civil courts in Scotland (see: Report of the Scottish Civil Courts Review chaired by the then Lord Justice Clerk,

Lord Gill) include consideration of this procedure at paragraphs 75 to 84 of Chapter 13 and a proposal to introduce a special multi-party action procedure in the Court of Session. Recommendation 173 of the report states that the general rule that expenses follow success should apply to multi- party actions and further recommendations about funding of such actions are set out at paragraphs 173 to 182.

**Q24 Do you agree that ADR in competition private actions should be strongly encouraged but not made mandatory?**

ADR may resolve a dispute but it should certainly not be made mandatory. It is not the equivalent of or a substitute for access to justice and a claimant must, because of Article 6 ECHR considerations if none other, be entitled to seek to vindicate his legal rights before the CAT. We, accordingly, welcome the proposal that resort to ADR should not be mandatory.

So far as encouragement of the use of ADR is concerned, we would have thought that it would not be necessary to legislate for it. It is not appropriate in all cases but can be encouraged as part of case management if the tribunal considers that it is right, in an individual case, to do so.

**Q26 Should the CAT rule governing formal settlement offers be amended?**

Regard is had in the paper to the position in the High Court in England and Wales. No consideration is given to the position in Scotland. We would advise that a system has long been in operation in Scotland whereby a defender can make a formal offer which

may turn out to provide some protection from expenses. The offer is made in a document called a “tender”; it is intimated to the pursuer and lodged in court in a sealed envelope which remains sealed until the end of the case, and if the tender is not “beaten” then the defender will not only not be liable for the pursuer’s expenses for the period from the date of the tender (usually the most expensive stage of the case) but will also be entitled to have his expenses paid by the pursuer for that period. A tender may be made and accepted at *any* time, which differs, we understand from the position under the CAT Rules. The system works well and it may be helpful to have regard to it when considering any amendment to the CAT Rules.

# Covington and Burling LLP



## 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](mailto: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 **X**

Academic

Other (please describe):

**This response is submitted by Covington & Burling LLP.**

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?**

Section 16 of the Enterprise Act should be amended as proposed. It would improve the efficiency of the judicial process to enable the High Court to transfer appropriate 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?**

We understand the arguments in favour of permitting the CAT to hear stand-alone claims, and that lack of jurisdiction in these claims necessarily limits the number of claims pursued in this forum. We would support extending the CAT's jurisdiction to include stand-alone claims, provided that its resources are increased to cope with the greater workload that will result.

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

Yes, the CAT should have the capacity to grant injunctions in appropriate cases.

Injunctions sought in the CAT should satisfy the same test and be subject to the same safeguards as those sought in the High Court. Applying a lower test to injunctions sought in the CAT would (i) result in significant uncertainty as to the circumstances in which injunctions would be granted, as the CAT would not avail itself of the substantial body of caselaw that guides the High Court; and (ii) potentially lead to abuse, as litigants may see the CAT as a "soft target".

It is also important that, if the CAT is permitted to grant injunctions, the party requesting the injunction give the usual undertaking in damages: whilst it is important that SMEs are not denied justice, they should be prepared to give the normal undertaking to discourage improper applications. Complying with injunctions can be enormously disruptive (and costly) for Defendants. Injunctions that are granted inappropriately are potentially as damaging to the economy and to competition as lack of redress for breach of antitrust law. The requirement to give an undertaking in damages is an essential protection to reduce the risk that injunctions are not sought in frivolous cases.

The consultation document identifies a disparity between some SMEs' perception of being wronged by antitrust breaches and the reality. Paragraph 4.29 of the consultation document provides, "*The experience of the Competition Pro-Bono Service (CPBS) indicates that a significant number of SMEs who currently believe that they are the victims of anti-competitive behaviour actually have no strong competition case to bring.*" In other words, there is a proven risk that SMEs will seek redress (injunctions, damages, etc.) in inappropriate circumstances, and appropriate safeguards are therefore essential.

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

Any proposed fast track route must be carefully balanced so as not to prejudice the rights of Defendants. Please see our reference to paragraph 4.29 of the consultation document, confirming that SMEs can be under the wrongful impression that they have suffered damages from antitrust breaches. Furthermore, even Defendants that have committed wrongdoing are entitled to a proper hearing.

An expedited process is likely inappropriate for deciding claims for monetary compensation. Any such process, by its nature, will provide less opportunity to examine and explore the relevant complex economic evidence. The likely lower values in issue does not address this concern as the economic factors can be just as complex in a low value claim as in a high value claim. Any process that does not properly examine the relevant evidence carries risk of prejudice to Claimants and Defendants.

Given the above, any fast track route should focus on granting injunctive relief. However, there is an existing and well-functioning route for seeking injunctive relief through the High Court (including for urgent injunctions where necessary). We therefore query whether there is any material benefit in designing and implementing a fast track process that's only available remedy is one that is already available through the High Court.

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

We recognise that there may be a case for cost capping (which we interpret as meaning the losing party's maximum exposure to pay the winning party's costs). Subject to our comments at question 4 above, if it were decided that a fast track route be available for monetary compensation, it is important that damages be capped at an equivalent level to any cost cap. This would ensure balance between Claimants and Defendants. This would not prejudice recovery for SMEs in more valuable cases, which they could pursue in the High Court and where they can seek third party funding or after the event insurance if they wish to mitigate against the risk of adverse cost consequences. On the basis of the foregoing, a cost cap and damage cap should be set at no higher than £25,000 each.

Even if cost capping is introduced, it should not apply where a party has behaved unreasonably. Absent this protection, there is a risk of Claimants, or Defendants (if they are to be protected by cost capping), behaving unreasonably and deliberately forcing opponents to incur legal cost purely as a tactical device.

Please see our response to question 4 above regarding injunctive relief and the importance of the usual protections and undertakings in damages.

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

This document details our responses to the proposals in the consultation paper. We would not recommend taking steps beyond those described in the consultation paper.

**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 are strongly against introducing a rebuttable presumption of loss in cartel cases for the following reasons:

- (i) it is of fundamental importance that any presumption of overcharge would be dislodged by any economic evidence available. It is far better for the Courts to have regard to the best available evidence than to an arbitrary presumption imposed by law. Paragraph 4.43 of the consultation document appears to confirm that a legal presumption would be rebutted by any economic evidence, "*The fact that the presumption would be rebuttable by either side would help to prevent any abuses of justice as...it will be able to present evidence to support this*";
- (ii) given point (i) above, the presumption would not act as any disincentive to seek economic evidence should proceedings be issued, so the presumption would not serve its intended purpose of reducing the need to collect and analyse economic evidence. In fact, once proceedings are issued, any party that disagrees with the legal presumption of overcharge (as either or both parties almost certainly will) would be additionally incentivised to seek bespoke economic evidence;
- (iii) prior to proceedings being issued, the presumption of 20% overcharge may be abused by Claimant or by Defendant. Prior to commissioning an economic analysis, either the Claimant or the Defendant may point to a legal presumption of 20% overcharge and demand a settlement calculated on that basis. This is an improper approach where the presumption is either higher or lower than the actual overcharge. We have experience of Claimants pointing to inappropriate proxies for an alleged overcharge. It is more difficult to persuade Claimants that their position is unrealistic where they are pointing to a proxy, and it would likely be more difficult still where there is a legal presumption of X% overcharge. This tactic is as likely to prejudice Claimants as Defendants at the pre-action stage where, for example, actual overcharge is higher than the legal presumption and the Defendant argues that the settlement should be calculated by reference to the legal presumption; and
- (iv) the analysis of damages caused to Claimants at differing levels of the distribution chain would not be simplified by a legal presumption of overcharge. Even if there is a legal presumption for the initial overcharge, in almost all damages claims economic evidence will be required to address the effect of the pass-on defence (if permitted). Therefore, even if a legal presumption as to overcharge, in of itself, reduced the likelihood of parties relying on economic evidence (which we doubt), economic reports of equivalent complexity would likely be commissioned in any event.

As an aside, we wish to comment on the extract from the consultation document at paragraph 4.43 that states, "...the current apparent presumption [is] that a cartel has caused no damage." There is no presumption in English Law of "no damage" in cartel cases. There is, instead, a burden on whichever party asserts a particular level of damage to lead evidence to prove their assertion. In other words, although there is a burden on the Claimant to lead evidence in support of the overcharge it alleges, this does not equate to a legal presumption against overcharge.

**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?**

Although the pass-on defence brings complexities, the most important thing to note is that where direct purchasers and indirect purchasers are allowed to sue in respect of the same

alleged wrongdoing, care must be taken to protect a Defendant from the risk of duplicative recovery. This concern is relevant to English Law as European Law permits both direct and indirect purchasers to bring claims (per. *Vincenzo Manfred v Lloyd Adriatico Assicurazioni SpA* (C-295/04), “*any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101 TFEU]*” (at paragraph 61)). As noted by the consultation document, judicial mechanisms may be available to limit duplicative recovery.

**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.**

The current collective action regime is more effective than is sometimes portrayed. For example, at paragraph 5.4, the consultation paper refers to the “Football Shirts” case, where the Consumers Association sought redress on behalf of purchasers of replica football shirts, pursuant to section 47B of the Competition Act 1998. The consultation paper states that only 130 Claimants opted-in to this action, and therefore argues that it was a relative failure. We think that pointing to this claim as “proof” that section 47B of the Competition Act 1998 is ineffective is inaccurate for two reasons:

- (i) solely focusing on the number of individuals who opted-in to this claim understates its effectiveness. Numerous potential Claimants who did not opt-in to this action reached direct settlement with JJB Sports. We are not aware of the precise number of direct settlements, but the cost to JJB was significant enough to result in a note in their 2006 accounts. JJB specifically state that they reached these settlements following the Consumers Association launching its claim, i.e., JJB may not have agreed to these settlement absent the Consumer Association claim. These settlements should therefore also be borne in mind where assessing the “success” of this claim; and
- (ii) the claim was brought several years after the claimed wrongdoing. The delay will naturally have led to lower participation than would otherwise have been the case. It would therefore be misleading to attribute low levels of participation in this claim solely due to its opt-in nature. It is important to recognise that delay (with consequential loss of evidence in the interim) would also be present in any opt-out system, and would likewise reduce participation.

We appreciate the arguments that redress is particularly difficult where very large numbers of individuals or businesses have suffered relatively small losses, and where the losses in the aggregate are large. However, by their very nature, redress in these actions brings marginal benefits to Claimants. The main beneficiaries of damages claims in these actions will be the legal advisors, both for the Claimants and the Defendants, and the supporting service providers such as economic experts. The only real benefit in these types of actions is to disincentivise breaches of competition law through forcing wrongdoers to pay damages. As, post deduction of costs, the wronged parties receive very small sums of compensation, the levy on the wrongdoer is broadly equivalent to a fine. In situations of small individual losses, public enforcement may be preferable to private claims for damages. Both routes achieve similar deterrent effect, but the former route arguably avoids unnecessary litigation where recoveries offered to Claimants are very small.

Finally, to the extent that changes are made to the current system, we would counsel for careful and incremental movement. Dramatic changes to the present system to collective redress (particularly the proposal of introducing an opt-out form of collective action) would be

very difficult to undo should the economic or other data militate in favour of reversal. Experience from the United States shows how difficult it is to reform the more damaging elements of their class action system.

**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 comments above.

We are also concerned that the Government's intention to introduce a collective redress mechanism, potentially independently of our European neighbours (paragraph 5.7 of the consultation document provides "*The Government does not favour the introduction of a generic collective redress mechanism... at EU level.*"), will lead to claims being brought in England that have little connection with England, in relation to conduct that has had no adverse impact on the British economy. This would be an inevitable consequence of a collective redress mechanism. The Government will be aware that the English Courts accept jurisdiction in relatively broad terms. One of the principal bases on which the English Courts will take jurisdiction in a given claim is where a Defendant is domiciled in England. A Claimant or Claimants can bring a claim in England against a number of Defendants, only one of whom is domiciled in England (known as the "anchor" defendant), in relation to conduct potentially occurring entirely outside of England and where the wrongdoing has had no adverse effect on British consumers or on the British economy. Permitting collective actions on an opt-out basis would further encourage Claimants to pursue redress in England, even where their claim has a tenuous connection with the UK. There is therefore a real risk that introducing collective redress, a proposal that is intended to benefit the British economy, may have the unintended effect of encouraging, essentially foreign claims, that have had no adverse impact on the British economy.

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

In light of the purpose of collective actions to incentivise private antitrust enforcement, we do not see a reason to draw a distinction between businesses and consumers; thus, both groups should have equal rights to bring collective actions for breaches of competition law, if a new mechanism is introduced.

As regards larger businesses, which are not the focus of the consultation paper, we don't see any need for their being able to access any new collective redress mechanism. By definition, these businesses have adequate resource to retain suitable advisors and pursue appropriate claims directly. And preventing larger businesses from accessing any new collective redress mechanism provides a necessary balance with the rights of Defendants.

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

No comment.

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

We are concerned that permitting collective actions in stand-alone cases, particularly if they can be brought on an opt-out basis, would have limited positive impact whilst disproportionately prejudicing Defendants under the current model described in Annex A.

Paragraph 5.11 of the consultation document recognises that a collective claims mechanism in stand-alone claims risks abuse, and points to its draft collective action regime at Appendix A, stating it contains protective mechanisms to avoid spurious claims. In fact, the proposed mechanism at Appendix A contains only a single tool to filter out spurious claims, being the proposal at the first bullet point of paragraph A.3 to have a preliminary merits test at the certification stage. We are unconvinced that this test would serve as an effective filter for undeserving claims. Any merits test would be applied at far too early a stage to examine any relevant evidence. More likely this test would focus on the Claimant's pleadings and attempt to consider viability of the claim on the assumption that the allegations made are accurate. There will unlikely be any opportunity to test or even examine the likelihood of the allegations being accurate. While this test would filter out certain claims with inadequate pleadings, it would not assist in blocking other undeserving claims, such as where the underlying facts are wholly unresponsive of a claim. The remainder of the proposed steps in the certification stage (sufficient commonality of issues between Claimants, adequate funding, etc.) focus on whether the dispute is appropriate for the collective redress mechanism, but they offer no assistance in determining whether the case is deserving. We are therefore concerned that the mechanism proposed by the Government has inadequate measures for filtering out undeserving claims if stand-alone claims are to be permitted.

We accordingly think that if stand-alone actions are permitted under a new collective redress mechanism, care must be taken to ensure that judicial mechanisms are present to protect the rights of Defendants against undeserving claims. At question 15 below we propose further safeguards to be applied at certification stage.

**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 think that the dangers of introducing an opt-out collective redress mechanism may outweigh the potential advantages. The consultation paper expresses concern at historically low levels of participation in opt-in mechanisms. But, as argued in our answer to question 9 above, the proportion of potential Claimants who opt-in to any given action is not the sole indicator of effectiveness, particularly if the opt-in action encourages the wrongdoers to reach direct settlement with other potential Claimants and discourages further wrongdoing.

Paragraph 5.20 of the consultation document identifies the situation of low individual damages to each consumer or business as particularly problematic in encouraging participation in opt-in claims. However, we do not think that this particular challenge, in of itself, justifies introduction of a new opt-out mechanism for collective redress. As stated in our answer to question 9 above, the benefits to wronged parties in these types of situations are extremely limited and it is typically legal advisors who are the primary beneficiaries.

Permitting opt-out actions raises a particular problem in applying the loser-pays rule. As is detailed below at our responses to questions 17 and 18, we think that the loser-pays rule is an extremely important tool in encouraging parties to approach litigation efficiently and encourages settlement in appropriate circumstances. In an opt-out system it is entirely unclear how Claimants who ultimately lose would contribute to an order for payment of the Defendant's costs (which it is rightly entitled to recover). It would seem unjust to impose obligations on

persons merely because they had not opted-out (perhaps because they were not even aware of the claim).

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

If a new mechanism for collective redress is introduced, it is essential that the certification stage be robust and effective in identifying and filtering out undeserving cases.

We are concerned that the factors listed at Annex A of the Consultation Document, to be addressed at certification stage, would be inadequate in blocking undeserving cases. Additional issues to be considered should include the following:

- (i) the Court should consider the economic utility of the case. If individual Claimants are likely to receive negligible damages, then there is limited benefit to society in pursuing the case;
- (ii) to protect the rights of the Defendant, the Court must conduct a rigorous analysis at the certification stage to ensure that the class can demonstrate injury on a class-wide basis and a commonality of issues. As has developed in the United States, the individual or body bringing the case should be required to show that each member of the collective action is injured (see *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2009)) and that common issues of law or fact are present (see *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011)). Further guidance should be taken from the United States where the Supreme Court has addressed the necessary rigor of the commonality analysis, holding that it requires that class members suffered the same injury and that class claims depend on a common contention that is subject to class-wide resolution. 131 S.Ct. at 2550-51;
- (iii) the Court should consider whether composition of the class will allow the Defendant to properly defend itself. In the United States, the general position is that only those Claimants who are named members in a class action are obliged to participate in the discovery process. Claimants who are members of the class, but are not named members, are not obliged to participate in discovery. This can cause problems for Defendants in accessing evidence that is potentially helpful to their case - both in terms of denying wrongdoing and in challenging the quantum of damages alleged by the Claimants. If an opt-out collective redress system were introduced in England, the Court should ensure at certification stage that the Defendant will have access to all relevant evidence to allow itself to properly defend itself; and
- (iv) the Court should carefully examine the adequacy of the Claimant's pleadings. Cases should be disposed of where the allegations in the pleadings fail to amount to a breach of competition law. Furthermore, the pleadings should contain sufficient factual allegations regarding the Defendant's allegedly wrongful conduct to enable the Defendant to conduct a proper investigation and fully respond to the claim it is facing. Pleadings with inadequate allegations of fact should not be allowed to progress. Indeed, in the United States, pleading standards have been clarified under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

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



Definitely. Even exemplary damages are extremely rare in English Law, being relatively anomalous in a system that primarily awards damages on a compensatory basis. Claimants should be compensated for their actual losses; no more, no less. "Punishment" should be in the sole purview of regulators, through their levying of fines and should not be a consideration for the Courts or for the CAT.

Treble or punitive damages would act as a disincentive to leniency applications that are critical to the detection and enforcement by public regulatory authorities. Without effective leniency programs and public enforcement, it would be far more difficult for private parties to pursue redress. We expand on the risk of disincentivising leniency applications in our response to question 31 below.

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

Yes, the loser-pays rule is a critical component of English litigation that encourages efficient litigating by punishing parties that refuse to consider their prospects of success. Where the Claimant has a strong case, the Defendant is incentivised to settle at an early stage to avoid the risk of paying costs. Where the Claimant has a weak case it (quite properly) is discouraged from bringing the case in the first place. In both scenarios, both by encouraging early settlement of strong cases and by discouraging weak cases, the burden on the Court system is reduced by encouraging parties to be realistic about their prospects of success.

Importantly, despite the incentives that cost-shifting brings, the parties still retain discretion to choose their own course. Where a Defendant faces a strong case and thus makes an offer, a Claimant who thinks the offer does not reflect fair value, is entirely able to proceed with the claim, either to attempt a higher settlement figure or to bring the claim to Court. Similarly, a Claimant who ardently believes in a claim that superficially appears weak is perfectly entitled to pursue it. If the Claimant is successful the Defendant will be ordered to pay his costs in the normal way.

It is therefore proper that the default position should be that the loser-pays rule is applied.

English law displaces the loser-pays rule in a number of discrete fields where special considerations apply. The two most significant fields are small claims and employment law disputes. Cost shifting does not apply in small claims because the risk of paying the Defendant's legal costs (which would almost invariably exceed the sum in dispute) would disproportionately disincentivise small claims. In addition, the Courts have a specific small claims procedure that encourages litigants to represent themselves and to keep legal costs to a minimum. The other main area where cost shifting doesn't ordinarily apply is in disputes between employees and current or former employers. It is particularly important that employees have full access to legal redress where disputes arise with employers. A significant reason is the typically very large asymmetry in bargaining position (which has been exacerbated by the decline in union membership over recent decades). Ordinarily there is no cost shifting in employment disputes because of the overriding policy concern that potentially wronged employees should have a right of recourse.

The above policy considerations do not apply in relation to breach of competition law. Even where there is inequality in bargaining between consumers/SMEs and large corporations, this is of a very different nature to the employer/employee relationship. In the former position the consumer/SME will usually be able to switch to a different supplier if they are dissatisfied with the behaviour of the alleged wrongdoer. In some situations they will be unable to switch supplier due to inadequate choice in the market. These are difficult situations where market

regulators should perhaps intervene, but this is not justification for discharging the normal loser-pays rule, which serves a very important role in encouraging efficient litigation by forcing parties to be realistic about the strengths of their cases.

**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?**

For the reasons detailed in our answer to question 17, we do not think there are any circumstance in claims for breach of competition law where the loser-pays rule should be displaced.

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

Yes, the adverse effects of contingency fees would be even more pronounced in collective actions. Allowing contingency fees is one of the key reasons why class actions have become so pervasive in the US. Contingency fees can contribute to a litigation culture, where Claimant lawyers aggressively pursue even weak claims, which can become extremely profitable for the advisors concerned due to the pressure on Defendants to settle non-meritorious claims. Proponents of contingency fees argue that they increase access to justice for less promising claims, but it is far from clear that encouraging “less promising” or weak claims is a desirable policy goal, given the judicial and economic inefficiencies that would result.

**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 comment.

**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 comment.

**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?**

We are opposed to the introduction of an opt-out collective redress mechanism. If a new mechanism were to be introduced there is an argument for restricting standing to representative bodies, such as trade associations. This should reduce the number of inappropriate claims brought by SMEs that incorrectly perceive themselves as having suffered harm (see our response to question 3 above, referencing the concern recognised at paragraph 4.29 of the consultation paper, that SMEs can inaccurately presume that they have a claim for antitrust infringement).

If direct standing is granted to private bodies (as opposed to representative bodies), only those that have suffered loss should have standing. The dangers of opt-out collective redress mechanisms would be multiplied if parties with an indirect financial interest were granted standing. Lawyers/third party funders should not be granted direct standing to bring opt-out collective claims. This proposal would lead to aggressive pursuit of weak claims and would

primarily serve to enrich the relevant lawyers and/or funders, with little benefit to SMEs, consumers or to the economy as a whole.

**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?**

Please see our response to question 22 above.

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

Yes. Furthermore, we doubt that any mandatory system of ADR can be made to work effectively where a party or parties are not committed to the process, so we doubt that any mandatory system would bring any practical benefits.

**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. Pre-action protocols are important for a number of reasons, including that:

- (i) they force Claimants to properly explore the factual and legal basis for their potential claim at an early stage;
- (ii) the potential Defendant is provided with a proper explanation of the likely case at an early stage thus reducing the risk of misunderstandings; and
- (iii) pre-action protocols are consistent with the modern “cards on the table” approach to litigation whereby strengths and weaknesses of respective positions can be more readily assessed, which can only assist mediated solutions or other approaches that avoid proceedings being issued.

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

Yes, the formal settlement “Part 36” procedure available in the High Court is a highly effective method for encouraging settlement that should be applied in similar terms to claims in the CAT.

**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.**

Not applicable.

**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?**

A mandatory redress scheme is unnecessary. First, the public enforcement authorities already have adequate powers to investigate and take proceedings against wrongdoers. Second, any mandatory redress scheme would be bureaucratic to implement and, particularly where individual losses suffered are small, would be of only marginal benefit to parties that suffered loss.

Account should be taken, both by the public enforcement bodies and by the Courts, where a wrongdoer makes voluntary redress. Recognition of such redress would likely act as a significant incentive for wrongdoers to take corrective action unilaterally. This should be fully encouraged as it relieves the public enforcement bodies, the Courts and private litigants of the burden of pursuit. Absent taking account of these steps, the only real advantage to a wrongdoer in taking proactive corrective action is in the “public relations” front, but this is of limited utility as publicity for corrective action inevitably also highlights the original wrongdoing to which the company will almost invariably prefer to avoid drawing attention. In short, full account should be taken of voluntary corrective steps, due to the significant benefits in encouraging this conduct.

**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. Please see our answer to question 29 above.

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

We are concerned that the changes proposed by the Government may significantly disincentivise leniency applications/whistleblowing. Any reduction in the effectiveness of the leniency program, whether at UK or European level, would significantly reduce the detection of wrongdoing, and accordingly reduce the scope for bringing private actions for damages. We agree with paragraphs 134 and 137 of the Impact Assessment to this consultation, which point to the leniency regime’s crucial role in detecting and ultimately reducing anticompetitive conduct. This is mirrored by the experience in the US, where in a speech on 16 February 2007 Gerald Masoudi, Deputy Assistant Attorney General, said, “[*Leniency policy is*] the greatest single driver of our success [*and*] our greatest source of cartel evidence.”

In our view the importance of the leniency program can hardly be overstated.

In our experience, potential leniency applicants perform a risk/benefit analysis in deciding whether to commit to a leniency application. One of the factors they consider is their potential exposure to private actions for damages. The opt-out collective redress mechanism prepared by the government would significantly increase their exposure to expensive litigation. Although difficult to quantify, it is inevitable that this proposal would, in certain situations, result in companies opting against a leniency application where, but for the proposal being implemented, they would have applied for leniency.

The suggestions at questions 32 and 33 of protecting leniency documents and waiving joint and several liability for whistleblowers from disclosure would go some way to allay the concerns of potential leniency applicants. However, the prospect of facing opt-out collective

actions from potentially thousands or millions of Claimants, with potentially enormous aggregate claims would act as a powerful disincentive for leniency applicants. This consideration, in of itself, is a strong argument against introducing an opt-out collective redress mechanism.

Any damage to the leniency program and consequent diminished probability of uncovering wrongdoing must be measured against the benefit of permitting collective opt-out actions. As mentioned, in our view these actions - particularly where individual losses are low - primarily benefit the lawyers concerned. We are unconvinced that the benefit of increased private litigation outweighs the risk of damaging the crucial leniency program.

**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?**

As mentioned in our answer to question 31 above, cartelists recognise that an application for leniency, in of itself, increases the risk of private actions for damages. Paragraph 135 of the Impact Assessment to this consultation recognises that the whistleblower is at particular risk of private actions. The risk that documents produced as part of the leniency program may be disclosed and used in Court actions against the leniency application would inevitably impact on how the applicant approaches the process, with consequent adverse effects on detection and enforcement.

This risk should be considered alongside the marginal benefit that access to leniency documents will typically bring in private damages claims. Where the investigation results in a finding of infringement Claimants can bring follow-on actions, thus reducing the need for evidence in leniency materials that points to liability. Where there is no finding of infringement, potential Claimants can take comfort from the fact that the public authority has fully investigated the alleged breach, with all the advantages of a leniency application (or leniency applications). Any marginal benefit in potential Claimants having access to leniency materials in these circumstances would not justify the likely adverse impact it would have in how leniency applicants approach the process.

In summary, we are strongly opposed to any materials connected with the leniency process being disclosed to potential or actual Claimants.

**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?**

Yes, excluding joint and several liability for leniency applicants would be beneficial for antitrust enforcement and redress. Cartelists that have had peripheral involvement in wrongdoing or that have made limited sales of a cartelised product are, at present, particularly disincentivised from seeking leniency. Whilst leniency status offers the attraction of a reduced (or potentially waived) fine, the risk of paying more in damages (through the application of joint and several liability) than was directly caused through their conduct militates against assisting investigative authorities.

Waiving joint and several liability for parties granted leniency would act as a powerful incentive for parties with limited sales or those less centrally involved to assist detection and enforcement. In one move leniency applicants could reduce the risk of fine and significantly reduce their exposure to claims in damages. While the evidence that these parties submit in leniency applications may have less probative value than the evidence in the hands of the

cartel's key movers, the first application for leniency is extremely significant as it can draw the regulator's attention to wrongdoing of which it was not aware, thus improving protection, and it can encourage rapid leniency applications (and thus revealing further evidence) from other cartel members as they race to secure reductions in fines.

The leniency process is so fundamentally important that there is a strong argument for waiving joint and several liability in claims for damages for all leniency applicants who significantly assisted the detection and/or prosecution of the wrongdoing.

Paragraph 7.8 of the consultation paper provides "*simply removing [joint and several liability] could have the undesirable consequences of injured parties being unable to gain redress despite there being cartel members with available funds.*" This overstates the risk in removing joint and several liability from wrongdoers granted leniency status. First, those granted leniency would still be liable for damage directly caused by their own conduct. In other words, they will still be severally liable in respect of their own wrongdoing. Second, any waiver of joint and several liability will only arise in follow-on actions (as there must have been an infringement decision for leniency to have been granted). Thus, Claimants will be on notice as to the identity of all wrongdoers. Ordinarily one or more (now identified) co-cartelists would remain joint and severally liable. Third, the likelihood of Claimants being adversely impacted are remote. Provided that at least one wrongdoer with joint and several liability remains solvent the Claimant will be able to seek full recovery. Even in the rare circumstances where this is not the case, the Claimant can bring a single action against all solvent wrongdoers to recover damages for which they are each severally liable.

**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.**

Please see our comments above.

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

No comment.

**Covington & Burling LLP**

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**URN 12/742RF**

# Cripplegate Foundation



Dear Sir/Madam,

Cripplegate Foundation is a small parochial grant making trust which works in Islington and the Cripplegate ward of the City of London. As part of our anti-poverty strategy we fund three outreach advice projects which provides independent advice on welfare rights, housing and debt. As a funder of advice services, we are concerned at the effect of Legal Aid reforms and local government cuts on the independent advice sector. We are concerned that without guaranteed funding and sources of income, the future of the independent advice sector is uncertain and this will prevent thousands of vulnerable people accessing the help they need to enforce their civil rights.

We support the proposal to use unclaimed client account funds and left over damages awards to be donated to a single recipient such as the Access to Justice Foundation, which can then ensure their distribution to the independent advice sector. This could prove to be a vital additional source of income. Access to Justice Foundation is a trusted national grant maker and has a trusted role in the advice sector and legal profession which would make it a wholly suitable recipient of the funds.

Regards

**Chris Hobbs**

**Grants Officer at Cripplegate Foundation Ltd  
&  
Almoner of Richard Cloudesley's Charity**

**Cripplegate Foundation Ltd  
76 Central Street, London EC1V 8AG  
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[www.cripplegate.org](http://www.cripplegate.org)**

*Cripplegate Foundation Helping since 1500*

# Devereux Chambers

Dear Mr Monblat,

Please accept this email as a response to the consultation on private actions in competition law, as I have been unable to find the response form to download from the BIS website.

The **option which best describes me as a respondent** is: 'Other (please describe): Self-employed barrister'.

I am responding only to questions 20 and 21 of the consultation, as follows:

**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?**

I have seen the Bar Council response to the consultation in draft, and agree with its answer to question 20.

**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 Access to Justice Foundation would be the most appropriate recipient, for the reasons given in the Bar Council response to the consultation, which I have seen in draft.

Best regards.

Alison Padfield

**Alison Padfield**  
Barrister

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# **Duncan Fairgreave et al.**

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**PRIVATE ACTIONS IN COMPETITION LAW :  
CONSULTATION ON OPTIONS FOR REFORM  
(DEPARTMENT FOR BUSINESS, INNOVATION & SKILLS)**

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**RESPONSE CONCERNING THE ISSUE OF COLLECTIVE SETTLEMENTS**

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## **Introduction**

1. The Department of Business, Innovation and Skills issued a consultation in April 2012 on reform of the regime for private actions in competition law in the UK, entitled ‘*Private Actions in Competition Law: A Consultation on Options for Reform*’ (hereinafter “the Consultation”) covering a range of issues relating to the reform of private actions in competition law.
2. This response, by a group of practitioners and academics with a particular interest in this area, focuses solely upon the issue of the need for a collective settlement mechanism in the field of competition law. In so doing, we will thus address the question raised by the Government in Question 28 of the Consultation, which was framed as follows :

***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?***

## **The Government’s Position on Collective Settlement in the Consultation**

3. In the Consultation, the Government considered whether it would be beneficial to introduce an opt-out collective settlement mechanism, over and above the proposed implementation of a collective action for breaches of competition laws.
4. The following benefits of a collective settlement procedure were identified in the Consultation :-

*A legally certified collective settlement has the advantage for the infringer in that it creates certainty, ensuring that it is able to draw a line under its losses without fear of future court action. There may also be strong reputational advantages to voluntarily providing redress to those that have suffered loss. For consumers, clearly, something that encourages an infringer to make redress will mean that they are more likely to be compensated for their loss.<sup>1</sup>*

5. Whilst the Government recognised these benefits of a collective settlement regime, it nonetheless ultimately concluded against the introduction of a collective settlement procedure on the basis that the existence of a proposed opt-out model of collective actions “*would obviate the need for a separate provision for collective settlement in the field of competition law.*”<sup>2</sup>
6. The undersigned believe that, on the contrary, it would be highly advisable for provision to be made for a certified collective settlement mechanism in the field of competition law, which would

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<sup>1</sup> Para 6.21 of the Consultation.

<sup>2</sup> Para 6.25

be complementary to the proposed collective action procedure. We will explain our reasoning below.

### **In favour of a Collective Settlement Mechanism**

7. There are a number of broad arguments in favour of a collective settlement procedure whereby parties find common ground so as to resolve a dispute affecting a plethora of different parties. We will briefly examine these justifications, before explaining why the Government's proposed collective action model **should also be accompanied** by a mechanism for collective settlement.
8. For defendants, a collective settlement procedure provides for a higher degree of finality and closure in respect of a dispute which otherwise would absorb management time and financial costs in defending, as well as generate uncertainty around potential costs exposure and damages liability. This can be a fundamental concern for defendants who, in the context of certain competition law disputes such as cartel damages claims, are faced with the prospect of multiple actions by multiple parties, both direct and indirect purchasers/consumers. There are also reputational advantages for a corporation in recognising voluntarily that mistakes have been made in the past and agreeing to a procedure whereby amends are made to persons who may well constitute a significant part of their current and future customer-base, as the well as ending disputes which could otherwise negatively affect their business / brand over a long period.
9. For claimants, a collective settlement procedure facilitates the granting of compensation without the additional costs, risk and time consumed in undertaking complex litigation (or being forced to start it so as to provide the procedural mechanism to achieve a settlement that is already the reasonably clear solution to the issue). It seems contrary to policy to oblige people to bring litigation (if the proposal were to become legislation, adopting an opt-out claim basis) if a consensual solution is available commercially but would be assisted by a legal framework and procedure to make it effective. It would waste parties' costs and CAT time resource, which is likely to be under pressure if the proposed reforms are adopted.
10. An opt-out settlement mechanism would also remove a number of 'barriers to compensation', particularly for claimants who may be unwilling or unable (e.g due to the small value of individual claims) to sue individually in respect of their grievances. The rates of claimant participation in opt-out regimes are far higher than the rates of participation evident under currently-available English opt-in procedural regimes (such as the Group Litigation Order, and s 47B of the Competition Act 1998).
11. Over and above the access to justice arguments, we believe that it is also important for the jurisdiction of England & Wales to be seen as being at the forefront of new dispute-resolution techniques. Collective settlements are an increasingly important tool for dispute resolution involving international players. This is shown by the success of the Dutch mechanism, established by the WCAM<sup>3</sup> legislation, which provides for the court approval of collective settlements whereby claimants, organised together in the form of a non-profit organisation or "representative entity", and one or more infringing parties can apply to the Court for a declaration that the settlement is fair and binding even on non-parties to the agreement, therefore on an opt-out basis.<sup>4</sup> Six collective settlements have been approved by the Amsterdam Court of Appeal,<sup>5</sup> and whilst the initial cases focused on domestic issues, the more recent cases have increasingly had an international focus. Indeed, in light of this development, the Dutch Ministry of Justice has been actively reviewing the WCAM legislation with a view to enhancing its appeal for cases with a cross-order dimension. By devising an instrument within the UK, a state of the art collective

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<sup>3</sup> *Wet collectieve afwikkeling massachade* 2005.

<sup>4</sup> Parties who do not wish to be bound by the settlement agreement can so declare within a term to be determined by the court.

<sup>5</sup> The cases of *DES*, *Dexia*, *Vie d'Or*, *Shell*, *Vedior* and *Converium*.

settlement mechanism could be developed. A home-grown solution in England & Wales would allow for a procedure which includes protections and safeguards specifically designed for the common law context. The introduction of such a mechanism into the UK would also bring along with it the associated skills sets, and experience in such matters, which are important for maintaining and developing the UK as a centre for excellence in the legal sphere and minimize the risk of losing international business to the Netherlands. It would be odd if matters with a connection to the UK were to be settled using the Dutch process (subject to the jurisdictional issues that remain to be resolved in that connection): why not have an effective functioning process in the UK?

### **Including a Collective Settlement Mechanism as part of the proposed reform in the competition sphere**

12. Within the context of the current Consultation, we believe that there are strong arguments in favour of including a collective settlement mechanism.
13. It would make sense for the proposed legislation to provide for a **choice of different mechanisms** for the resolution of disputes in competition law. Over and above the litigation option of an opt-out collective action, there should also be a separate mechanism allowing for collective settlements on an opt-out basis. Court certification (by the CAT) of such a settlement should be allowed as of an early stage of procedure. Judicial scrutiny would thereby ensure the fairness and reasonableness of a settlement which would apply in an opt-out manner so as to cover all absent class members who had not explicitly opted out of the settlement. Judicial scrutiny would also ensure that there is no abuse of costs rules by lawyers involved in such a procedure. Much of the elements for such a structure is available either from the settlement structures available in other jurisdictions that have opt-out litigation processes or in the WCAM procedures (and experience).
14. We believe that it is also important to explicitly **encourage and facilitate alternative means of dispute resolution**. Indeed, it has long been Government policy to encourage ADR measures over litigation before the courts. The judiciary and policy-makers continue to underline the need to achieve better judicial economy and use of court resources. In that regard, any collective settlement option will enhance judicial economy by means of a stream-lined procedure to court certification.
15. Moreover, a collective action procedure is an unattractive requirement for parties **who have already reached a settlement** : the former would be designed for the resolution of adversarial dispute rather than the accommodation of a judicially-certified procedure. Moreover, the modalities of collective settlements may not necessarily replicate the outcomes of litigation. One example of this is the potential for settlement by means of **non-financial compensation**, which may be agreed upon in lieu of, or as a supplement to, financial compensation. This could involve the grant of future commercial terms, which may be of particular importance to the effective resolution of competition disputes. This has been a feature of other legal systems which allow for collective settlements, and is of course very different to the damages award traditionally made in civil actions.
16. Given that under the proposed reform, the legislation and accompanying rules will have been put in place for a collective action procedure, virtually all of the skills, processes and structures will have been put in place. It would seem, therefore, to be a significant **missed opportunity** not to add the limited additional procedural tools for a collective settlement, thereby facilitating consensual resolution of competition disputes and enhancing the effectiveness of the proposed CAT process.
17. In sum, we do not believe that the mere fact of an introduction of an opt-out model of collective action obviates the need for a separate, but complementary, provision for collective settlement in

the field of competition law. We consider that this could be introduced at minimal cost and would be to the benefit of parties involved in competition disputes in the UK and would increase the effectiveness of the CAT related reforms.

18. Finally, this may be a useful opportunity to test in an important area of the law, and with the benefit of specialist tribunals (and often counsel), a mechanism that may be of wider use in the UK and which could be considered for wider implementation if the results were encouraging.

Duncan Fairgrieve, academic, barrister.

Jon Lawrence, solicitor.

Alex Layton QC, barrister.

Eva Lein, academic.

Paul Lomas, solicitor.

Rob Murray, solicitor.

Susannah Sheppard, solicitor.

Vincent Smith, solicitor.

23<sup>rd</sup> July 2012



# Eastern Legal Support Trust



The Eastern Legal Support Trust

Charity No: 114099

Registered Office: Francis House, 112 Hills Road, Cambridge, CB2 1PH

Email: [easternlegalsupporttrust@gmail.com](mailto:easternlegalsupporttrust@gmail.com)

29<sup>th</sup> June 2012

Dear Sirs,

We write in response to the consultation on *Private Actions in Competition Law: A Consultation on Options for Reform*.

The Eastern Legal Support Trust (LLST) is a charitable foundation which raises funds to support the provision of free legal advice in the East of England.

We also work closely with, the umbrella bodies of the Law Centres Federation, Advice Services Alliance and Citizens Advice as well as the National Pro Bono agencies such as LawWorks and the Bar Pro Bono Unit. Our experience of the sector and knowledge mean we understand fully the importance of the assistance legal advice agencies bring to the poorest and most disadvantaged people in our communities.

Our detailed responses to the particular questions concerned are contained in the attached document. We wish to emphasise three main points with which we strongly agree:

☐ ELST agree that collective actions should be introduced and unclaimed sums should be paid to a single specified body

☐ we agree that access to justice is the area of public service most appropriate for gaining benefit from these funds.

☐ we agree that the Access to Justice Foundation is the most appropriate recipient of these unclaimed funds due to their primary purpose of funding advice services throughout the UK and their independence from advice sector membership bodies.

We would welcome the opportunity to discuss this further.

Yours faithfully

Richard Harrison  
Trustee

**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.**

ELST 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.

ELST 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 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.
- 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?**

ELST views the Access to Justice Foundation as the most appropriate recipient for two main reasons:



The Eastern Legal Support Trust

**Charity No: 114099**

**Registered Office: Francis House, 112 Hills Road, Cambridge, CB2 1PH**

Email: [easternlegalsupporttrust@gmail.com](mailto:easternlegalsupporttrust@gmail.com)

### *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 Eastern 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.

# **Edwards Wildman Palmer UK LLP**

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By email and post

24 July 2012

Our ref BMG\99999\0003

Dear Mr Monblat

## Consultation on Options for Reform of Private Actions in Competition Law

Edwards Wildman Palmer UK LLP (formerly Edwards Angell Palmer & Dodge UK LLP) is pleased to have this opportunity to comment on the Consultation Paper issued by the Department for Business Innovation & Skills (BIS) *Private Actions in Competition Law: A Consultation on Options for Reform* (the **Consultation Paper**). Our comments, which reflect our experience representing clients before the UK competition authorities and courts of England and Wales, are provided in the interests of assisting Government with its reforms and do not necessarily represent the views of our clients.

### 1. GENERAL OBSERVATIONS

We welcome BIS's intentions to promote private actions as a means of enabling consumers and businesses to obtain redress for losses suffered as a result of anticompetitive conduct. We agree that a healthy private competition litigation environment is a desirable complement to enforcement by the state, particularly where public budgets are under pressure and the competition authorities are having to prioritise their resources on a small number of high impact cases. These are also legitimate objectives to pursue through the proposals.

We would suggest that, contrary to the impression given by some parts of the Consultation Paper, the UK already benefits from a relatively healthy private competition litigation environment. This is demonstrated by a growing number of claims being brought before the High Court and Competition Appeal Tribunal (CAT), in both follow-on and stand-alone actions. Although few have reached final judgment, this is to be expected, given the tendency of civil litigation to settle. The recent judgment of the CAT in *Travel Group plc v. Cardiff City Transport Services Ltd*<sup>1</sup> is a valuable reminder that the current regime is producing redress for claimants.

We agree that there is room for improvement, particularly with respect to the aggregation of widely dispersed claims. In addition, we agree that there is scope for a number of procedural improvements,

<sup>1</sup> Judgment [2012] CAT 19, of 5 July 2012.  
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including those designed to make the CAT a more attractive forum. We would emphasise, however, that there is much to be proud of in the current regime and it is important that any reforms do not endanger what has already been achieved.

We would also suggest that, while many of BIS's proposals in the Consultation Paper strike a balance between enhancing private actions and protecting the position of potential defendant companies, some of the proposals could unfairly favour claimants over defendants, which would run counter to the stated aim of promoting fairness. It should not be presumed that it necessarily follows from the fact that a small business is unhappy about the conduct of a rival that the conduct in question is undesirable, let alone unlawful. It is the nature of vibrant, competitive markets that some businesses will win business at the expense of others. Making it too easy for disgruntled competitors to bring claims against rivals before the courts could chill legitimate, and desirable, commercial behaviour and should be treated with care.

Below we summarise our views on BIS's proposals, before responding to the questions in the Consultation Paper in full:

- **Enhancing the role of the Competition Appeal Tribunal (CAT)** - We welcome the proposals to make the CAT the main forum for competition law litigation, while preserving the ability of the High Court to consider competition law arguments where appropriate. In our view, both enabling the transfer of competition cases to the CAT from the courts and allowing the CAT to hear standalone actions would be desirable to enhance the effectiveness of private competition enforcement.
- **Fast track procedures for small and medium enterprises (SMEs)** - We have a number of concerns regarding the proposals for a fast track procedure. While we understand the desire to encourage SMEs to pursue competition actions, BIS's proposals run the risk of skewing the playing field in favour of claimants, to the detriment of defendants. This could lead to the settlement of unmeritorious claims and would not serve the objective of promoting fairness. Such a system could also create a potentially arbitrary threshold, based on the size of the claimant, whereby firms falling below it would have access to means of redress that would not be open to firms falling just above the threshold. Furthermore, we are concerned that a fast track procedure may not allow for a sufficiently detailed analysis of cases which inherently involve complex legal, factual and economic arguments.
- **Presumption of loss and the passing on defence** – We see no need for any changes in this area.
- **Collective actions** - We welcome BIS's proposals to introduce opt-out collective actions for both consumers and businesses, either on a stand-alone or follow-on basis. We recognise the need to avoid a US-style "litigation culture" and to prevent claimants and any third parties funding litigation (which, in our view, should include law firms and third party funders) from being incentivised to bring unmeritorious claims, and believe this can be achieved by maintaining the loser pays rules and ensuring active judicial case management. Giving the CAT wide discretion in certifying collective actions could also help in preventing spurious claims.
- **Alternative Dispute Resolution (ADR)** - We agree that ADR should be encouraged, and indeed many competition disputes are settled without recourse to the courts. We do not believe that ADR should be mandatory, however. Similarly, while we see benefit in the Office of Fair Trading (**OFT**) (or, in the future, the Competition and Markets Authority (**CMA**)) certifying voluntary schemes, it should not be able to order such schemes, since this could lead to unequal results between defendants in the same investigation.

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- **Complementing the public enforcement regime** – We agree that it is important to support the public enforcement regime by protecting certain leniency documents from disclosure in related litigation. We consider that the High Court has demonstrated a welcome willingness to engage on the substance, by differentiating between documents that should and should not be disclosed in litigation. This development should be encouraged.

## 2. **RESPONSE TO CONSULTATION QUESTIONS**

### **Enhancing the role of the CAT**

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 strongly welcome the proposal to enable courts to transfer competition law cases to the CAT, as a means of introducing greater procedural flexibility. We note, however, that the High Court has developed significant competition law expertise, given the increasing pleading of competition law issues before the court (particularly in the Chancery Division) and as a result of judicial appointments. This may be lost if the CAT became the default forum for competition cases. As a result, it is important that there is no presumption in favour of the transfer of competition issues or cases to the CAT and that this remains at the discretion of the presiding judge in the High Court (or Court of Session).
  - 1.2. The CAT should remain sufficiently well resourced to fulfil its other functions, given its central importance as the appellate body for a range of decisions by the competition authorities and sectoral regulators. We recognise that a substantial increase in competition claims could lead to pressure on the CAT's resources at a time when public funding is limited, and suggest that this should be kept under close review.
2. **Should the Competition Act be amended to allow the CAT to hear stand-alone as well as follow-on cases?**
  - 2.1. In our view the CAT's jurisdiction should be expanded, to allow it to hear stand-alone cases. Given the limitations that the CAT has placed on its follow-on jurisdiction, and the resulting practical difficulties that have arisen from the need for CAT claims to fall entirely within the scope of a prior decision,<sup>2</sup> we agree that such a change is desirable. This experience has demonstrated that there is often little basis for distinguishing between stand-alone and follow-on claims on their substance. Circumscribing the CAT's jurisdiction to hear a claim based on such a distinction simply invites defendants use a narrow interpretation of the decision on which a claim is based to defeat claims on purely procedural grounds, rather than on the substance. This is undesirable.
  - 2.2. We would also recommend removal of the current requirement, set out in section 47A(5)(b) of the Competition Act 1998, that no follow-on claim may be made until all appeals against the decision on which it is based have run their course, except with the permission of the CAT. The need to seek the CAT's permission while appeals are underway, combined with the CAT's policy of not granting permission other than in exceptional circumstances, is a major drawback of the CAT's jurisdiction, compared with the High Court, and we are surprised that it is not addressed in the Consultation Document. As it stands, this requirement means that, in practice, a claim can be brought in the High

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<sup>2</sup> E.g. *Albion Water Limited v Dŵr Cymru*, [2010] CAT 30.



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Court well before it would be possible to bring a claim before the CAT. In addition, the ability to bring a claim immediately in the High Court reduces the scope for defendants to start proceedings in other jurisdictions as a means of preventing the English court from being first seized of the action (the so-called 'Italian Torpedo'). This remains possible before the CAT, even in the rare case where permission is ultimately granted, since defendants have plenty of time between an application for permission to bring the claim and the CAT's decision to allow it. While we acknowledge that it would not be just to proceed with a trial while an appeal is pending, the High Court has recently recognised that it is generally in the interests of justice to allow a case to proceed up to this stage, notwithstanding the existence of appeals.<sup>3</sup>

- 2.3. We also note that the CAT's rules of procedure require that a fully reasoned claim must be lodged before the CAT within a strict two year time limit<sup>4</sup> and that, unlike claims issued under the Civil Procedure Rules (CPR), the claimant cannot simply submit an endorsed Claim Form, stating that particulars of the claim will follow. The fact that an application to the CAT must be fully detailed and documented when it is initially lodged may act as a deterrent to lodging a claim with the CAT rather than a general court.

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

- 3.1. Allowing the CAT to grant injunctions would be consistent with the general courts' powers to grant injunctions in competition cases. For consistency, the CAT's powers to grant injunctions should be framed on the same basis as the courts' powers, and the CAT should also have the power to award damages in lieu of a prohibitory injunction in the same circumstances as a court would have that power.
- 3.2. As a general observation on interim injunctions, while we see the benefit in preventing harmful behaviour quickly and thereby protecting consumers, we would caution against an over-reliance on injunctive relief because it could in fact have harmful consequences for defendants who, at that stage in the proceedings, have not been found to have committed an infringement. This will be a particular concern for defendant companies operating in fast-moving markets, since a restriction on their normal business practices, even for six months, could have a significant and lasting effect on their ability to compete with rivals – and hence could ultimately be harmful for consumers. It should be clear that the CAT will follow the same procedural rules governing the power to grant interim relief in competition cases as those followed by the courts (CPR, rule 25.1(a)).

**Fast track procedures for SMEs**

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

- 4.1. We have a number of concerns regarding this proposal. One of the main reasons that stand-alone competition actions are slow and expensive is it is hard to prove an infringement of competition law. Such difficulties arise both from the lack of evidence of an infringement in many cases (cartels, for example, are by their nature secret) and from the complexity of distinguishing anticompetitive from benign conduct. The latter issue is particularly evident in abuse of dominance claims, which is the category of infringement that the Consultation Paper appears to be most concerned about, as far as

<sup>3</sup> See *National Grid Transmission PLC v ABB Limited and others* [2012] EWHC 869 (Ch.).

<sup>4</sup> See s.47A Competition Act 1998.

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the impact on SMEs is concerned. In such cases, it is necessary to prove both that the defendant is dominant on an economic market and that the conduct it engaged in was abusive. Usually both of these must be demonstrated by reference to extensive economic evidence, in the face of a defendant with the resources and incentives to resist an infringement finding. The proposals will not change the substantive test for anticompetitive conduct and hence not alter this basic reality.

- 4.2. By attempting to use procedural (rather than substantive) rules to tilt the playing field decisively in favour of SME<sup>5</sup> claimants against defendant businesses, these proposals are bound to lead to at least some unmeritorious claims and, through the granting of injunctions on limited evidence, to the prohibition of behaviour that may well be lawful. Although prohibition is intended to be temporary, an injunction is often a prelude to a permanent pre-trial settlement in the claimant's favour, given the immediate and ongoing cost to the defendant's business of the imposition of an injunction and the high cost of a trial.
- 4.3. Turning to the details of the proposed fast track model as set out in paragraph 4.30 of the Consultation Paper, we have some specific comments that we believe could be relevant if a fast track model were to be adopted:
- (a) Paragraph 4.30(i) refers to SMEs being "strongly encouraged" to seek (free) legal advice before bringing a fast track action. Given that the Competition Pro Bono Service's (CPBS) experience is that a "significant number" of SMEs who currently believe they are the victims of anti-competitive behaviour actually have no viable competition case, it would seem to be extremely important that advice is sought before bringing a case. A failure to seek such advice should therefore, at a minimum, have cost consequences for the claimant.
  - (b) Given the complexity of competition cases we are unconvinced that cost capping would be appropriate, even in fast track cases. In addition, we do not think that capping awards to a maximum of £25,000 (paragraph 4.31) is consistent with the principle of enabling victims to anticompetitive conduct to obtain appropriate redress. Recourse to a fast track procedure does not alter the fact that a party that can prove that it has suffered loss as a result of another's wrongful act should recover that loss, no more and no less. It is not appropriate to lower the burden of proof that such loss has been suffered, simply because the alleged victim is an SME, and reducing the possible award does not remove the risk of injustice that would arise from such a step.
- 4.4. In paragraph 4.31, the Consultation Paper states that in practice many cases will not need to proceed beyond the interim injunction stage. It would be helpful to clarify (if this is indeed what is meant) that the fast track model would cease in many cases at the interim injunction stage, and would then revert to the normal procedure. Given our concerns over the use of interim injunctions, it is even more imperative that the aim of resolving cases quickly which underpins the fast track proposal does not result in defendants facing unjust interim injunctions, which could in turn force them to settle even unmeritorious actions in order to minimise disruption to their businesses.
- 4.5. We do not support the notion that the fast track procedure could be started by the CAT or the OFT writing a letter to the alleged infringer. As noted in the Consultation Paper, this is inconsistent with the CAT's standing as a court, and could undermine the OFT's public enforcement activities, by undermining its ability to prioritise the use of its own resources. We see no reason why such a letter

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<sup>5</sup> We note that there is no definition of SME in the Consultation Paper. There is a risk that satellite litigation could arise around the meaning of SME for these purposes.

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cannot be sent by the claimant directly or its legal adviser, in the same way that letters before action are sent to defendants in court litigation proceedings.

- 4.6. A fast-track system for SMEs could also create a potentially arbitrary threshold, based on the size of the claimant, whereby firms falling below it would have access to means of redress that would not be open to firms falling just above the threshold. The CAT already has well-established case management procedures, and should be able to assess on a case by case basis whether a claim is suitable for a more streamlined process, without introducing such a distortion to the regime.
- 4.7. While we do not doubt that SMEs face challenges in enforcing their legal rights in situations where they have been the victim of anticompetitive conduct, it is not clear that these challenges are different in substance from issues that may be faced in any other area of business. Litigation is inherently expensive and uncertain. Government and the courts have dedicated significant energy to the impact of litigation costs on access to justice and we suggest that it would be preferable to consider facilitating competition claims by SMEs as part of this wider policy.
5. **How appropriate are the design elements proposed, in particular cost thresholds, damage capping and the emphasis on injunctive relief?**
- 5.1. As already noted in above in paragraph 4.3(c), competition actions are usually complex and require a detailed consideration of legal, factual and economic evidence. Hence, we do not believe these elements are appropriate for competition cases.
6. **Should anything else be done to enable SMEs to bring competition cases to court?**
- 6.1. As noted above in paragraph 4.4, SMEs should not be encouraged to bring unmeritorious claims, and it is important that they seek legal advice before launching proceedings. We recognise that SMEs may be discouraged from seeking legal advice on the basis that it would be costly, and hence would support any moves to reinforce the CPBS's role and/or to encourage other sources of pro bono advice.

#### **Presumption of loss and the passing on defence**

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. The introduction of a presumption of loss would represent a major departure from current practice, where the interests of justice require that a claimant bears the burden of proving its losses before it can recover. In the case of stand-alone actions in particular, a presumption of loss may lead to defendants choosing to settle unmeritorious claims in order to avoid the burden and expense of rebutting the presumption. This does not serve BIS's stated aim of promoting fairness.
- 7.2. In our experience, the current regime imposes a relatively low burden on claimants, as far as quantifying their loss at the outset of a case is concerned, while requiring greater precision once the case has progressed beyond the disclosure stage. This represents an appropriate balancing of the interests of the claimant with those of the defence. The courts have considered the difficulties of proving damages from competition law infringements with absolute precision and have shown

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themselves willing to follow the time-honoured approach of a "*Judge wielding a broad axe*"<sup>6</sup> to do justice in cases where damages are hard to prove. In such circumstances, and given the risk of injustice, we see no justification for introducing a presumption of loss.

**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 be done?**

- 8.1. We see no reason why specific legislation should be introduced regarding the passing on defence in a competition context, when there is no such legislation for other areas of litigation. Forbidding the passing on defence would, as the Consultation Paper notes, require standing to be removed for indirect purchasers, and introducing a rebuttable presumption of passing on would work to the detriment of direct purchasers. Hence, neither of these options would improve access to justice or help in enabling those who have suffered loss to seek redress. We therefore suggest that the position be left as it is under the general law.

**Collective actions**

**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. While we consider that the current regime works quite well for claims by small numbers of relatively well-resourced claimants, it is clear that the availability of collective actions in competition cases has not facilitated claims by large groups of small companies or individuals and hence has not empowered consumers to seek redress for anticompetitive behaviour. While there are a number of reasons for this failure, the key problem seems to be that, by the time that the harm from an anticompetitive agreement flows down to the ultimate consumer, individual losses are so small that it is simply not worth the affected individual opting in to an action. Extending the current collective action regime to allow opt-out actions seems to us the best way of addressing this.

**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. We agree with BIS's policy aim of "delivering restorative justice for consumers and small businesses", and strengthening the current regime to achieve this aim would be a positive move. As noted in the Consultation Paper, it is however important to protect defendants from unmeritorious claims which they will either have to settle (in the interests of convenience, rather than fairness) or defend at considerable cost and disruption to the business, as well as potential reputational damage even if the claim is shown to be unfounded.
- 10.2. We note that the text of the Consultation Paper (e.g. paragraph 5.6) refers only to the policy objective of restorative justice, whereas the question for consultation also refers to the objective of deterrence. It is important that BIS is clear about the policy objective(s) it intends to address through an extension of the collective actions regime. While we support changes to facilitate redress, in our

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<sup>6</sup> *Devenish Nutrition Ltd v Sanofi Aventis SA* [2008] EWCA Civ 1086, [2009] 3 All ER 27, para 110 *per* Arden LJ.

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view deterrence should *not* be a policy objective in this context, given the important deterrence role of public enforcement in the UK, through both the civil prohibitions and the cartel offence.

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

11.1. Given that the objective of collective actions is delivering restorative justice, we see merit in allowing businesses to bring collective actions. One of the arguments in favour of collective actions generally is that, where losses are widely dispersed, it is easier for claimants to pool losses. Losses can be widely dispersed for businesses as well as consumers, so there could also be benefit in businesses pooling losses.

11.2. This is particularly true for small businesses which would otherwise not have the resources to pursue litigation against an often larger defendant. The size of the businesses involved in a collective action is a factor that could be taken into account at the certification stage in assessing whether a claim is suitable for a collective actions. If this were to be the case, guidance on the types of businesses that would be likely to be permitted to bring collective actions would be useful.

11.3. We see less justification for allowing businesses with sufficient resources to bring their own actions to participate in collective actions, as this could unfairly skew the playing field in favour of the claimants. In practice, this may not arise as an issue because it is more likely that larger businesses would opt out of collective actions so that they are able to pursue their own claims independently of other parties.

11.4. We also note that there may be a greater level of difficulty in establishing commonality of interest in the case of businesses than consumers, particularly where a class combines direct and indirect purchases. However, this issue could also be addressed at the certification stage.

**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 see a case for any additional restrictions in this respect. A properly advised claimant will be aware of the risks of information sharing.

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

13.1. In our view collective actions should be allowed in stand-alone as well as follow-on cases in order to facilitate restorative justice in cases where civil action has not been pursued, for example because of the OFT's enforcement priorities and limited resources. As noted above, a distinction between stand-alone and follow-on claims can be artificial in practice and restricting collective actions to follow-on cases only is likely to prevent restorative justice for businesses and consumers affected by anticompetitive behaviour.

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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. Given the lack of collective actions brought to date under the opt-in model, in our view permitting opt-out actions would be the best way to encourage a substantial number of collective actions. We fully support the proposal that those who fail to opt out of an action will be bound by its outcome, as it is important for defendant companies to have this level of certainty in proceedings.
15. **What are your views on the proposed list of issues to be addressed at certification?**
- 15.1. In our view, the CAT should be given wide discretion to manage collective actions in accordance with its usual practice, and an initial assessment of whether the case is suitable for collective action could be carried out at a preliminary case management conference. As indicated in response to question 12, we do not consider that there is a case for any additional rules to prevent anti-competitive information sharing.
16. **Should treble or other punitive damages continue to be prohibited in collective actions?**
- 16.1. We consider that the current approach of the courts, which takes the compensatory principle as a starting point, is the right one. The possibility of awarding exemplary damages in competition cases has not been ruled out by the courts<sup>7</sup>, and indeed exemplary damages were awarded very recently by the CAT in the *Cardiff Bus* judgment<sup>8</sup>. We see no need to legislate on this point, whether for collective actions or any other form of competition claim.
17. **Should the loser-pays rule be maintained for collective actions?**
- 17.1. We agree that the loser pays principle should be maintained, but note that under current civil litigation and CAT rules deviation from this principle is permitted. This flexibility should remain, and we see no reason to create specific rules for collective actions that could affect this practice.
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?**
- 18.1. As noted above in response to question 17, the courts and the CAT already have broad discretion in assessing costs, and have developed detailed principles to address these issues. In our view there is sufficient flexibility in the current system and therefore no need for particular rules in relation to collective actions.

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<sup>7</sup> Devenish, *ibid*.

<sup>8</sup> *2 Travel Group plc v Cardiff City Transport Services Limited*, [2012] CAT 19.

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

19.1. As the Consultation Paper notes, contingency fees can distort incentives to bring cases for both claimants and their legal advisors. Although other forms of litigation funding, including conditional fee arrangements and after the event insurance, have been developed to facilitate claims, we note that they have their own drawbacks. We also note that the Jackson reforms will as a general principle allow contingency fees in most fields of litigation, although exceptions have already been made in some areas and could also be made for competition law claims. The interplay between the general funding regime and proposed changes to the competition regime is a complex issue and may justify further consideration.

**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. Experience in other jurisdictions suggests that many potential claimants will not make a claim following a successful opt-out action, even where the award has been well-publicised. As noted at paragraph A.18 of the Consultation Document, it is simply a fact of life that many people will not think it worth making such a claim, whether because they have lost their proof of purchase, inertia or because of a perfectly rational cost/benefit analysis. This may result in the majority of the potential fund identified as sufficient to compensate all victims of an anticompetitive agreement or conduct remaining unclaimed.

20.2. While a form of price roll back arrangement has its attractions, we agree that this will not be appropriate in all cases. We can also see the force in the findings of the Australian Law Reform Commission concerning the drawbacks of cy-près in general. In our view, there is little to recommend escheat to the Treasury or claimant sharing. Paying the funds to the Treasury would not result in redress, but rather would be more akin to an additional civil penalty, on top of any that has already been imposed if a civil case has already been pursued.

20.3. Given the overriding objective of restorative justice, we consider that there is merit in the proposition that unclaimed sums should revert to the defendant. The arguments for this are particularly strong in situations where a large proportion of the potential fund remains unclaimed, since this could indicate that the loss by class members has been over-estimated. We also consider that the arguments for reversion to the defendant are strong where the award results from a settlement, rather than from an adverse finding of infringement and judicial quantification of damages. In such circumstances, consumer harm has not been proved and the overall pool will have been calculated based on an estimate of total losses or even on a cost/benefit assessment by the defendant of the value of settling proceedings without proceeding to trial.

20.4. In situations where harm has been proved, or the portion of unclaimed funds is relatively small, there may be a case for distribution to a single named organisation, as a fall-back position, given the likely costs and time required for identifying alternative recipients.

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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. Given that access to justice and redress is a key aim of encouraging private competition litigation, we see merit in any recipient of unclaimed sums other than the defendant being an entity which promotes access to justice, such as the Access to Justice Foundation.
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. We agree with the proposal to enable representative private bodies to bring such claims. The OFT's (and, in the future, the CMA's) limited resources would be put to better use in pursuing its public enforcement functions.
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. Litigation in England and Wales can already be wholly or partly funded by law firms, for example through conditional fee mechanisms. The potential expense of bringing a competition claim, which will likely be complex and require considerable upfront preparation, may discourage representative bodies and even those who have suffered loss from bringing a claim. Allowing law firms and/or third party funders to bring claims may encourage a greater number of meritorious claims being pursued.
- 23.2. We recognise the concern that allowing lawyer-driven claims could result in a "litigation culture", which is clearly undesirable. However, the BIS proposals envisage that at the certification stage the court or CAT would carry out a preliminary merits test, which would filter claims without a reasonable possibility of success. In our view this creates a sufficient safeguard to prevent spurious claims being brought that are driven more by the interests of lawyers or third party funders (or, indeed, representative bodies) than the interests of the injured consumers and justice.

#### **Alternative Dispute Resolution**

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, and indeed it is widely used at present to resolve many competition matters. As the Consultation Paper notes, the CAT already has a power to encourage the use of ADR, and we note that the Commercial Court requires parties to inform the court about steps taken to resolve a dispute by ADR or why ADR was not thought appropriate.



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- 24.2. Resolving a dispute through ADR, or indeed less formal commercial negotiations, is entirely dependant on the parties' willingness to resolve the dispute without resorting to the courts, particularly in the absence of a contractual obligation to do so.
- 24.3. Hence, we see no reason to make ADR mandatory for competition cases where it is not mandatory in other areas. We note also that parties have a right to access to the courts and to insist that courts resolve their legal disputes, and this should not be undermined by making 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. We do not consider it appropriate to introduce a pre-action protocol in any case. As noted in the Consultation Paper at paragraph 6.9, the CAT already has powers to encourage ADR, and as noted above in paragraph 24.2 the use of ADR is entirely dependent on the willingness of the parties to pursue it. In our view, resolution through ADR cannot be forced, particularly if parties have already chosen to pursue a claim in the courts.
26. **Should the CAT rules governing formal settlement offers be amended?**
- 26.1. We would support steps to bring the CAT's rules of procedure into line with the CPR rules in the context of formal settlements.
27. **The Government would be interested to hear 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. This is not an area that we would specifically focus on should the reforms be carried out. However, our firm does have existing capabilities and experience in facilitating ADR both for competition law disputes and commercial disputes more generally. To the extent that we could use these capabilities to assist clients in achieving ADR, we would seek to do so.
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. We agree with BIS's conclusion that there would be no need to make separate provisions for collective settlement.
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 recognise that giving the OFT/CMA the power to certify voluntary redress schemes could be a creative and effective way to compensate victims, as was achieved in the OFT's *Independent Schools* decision. In addition, in some cases there will be little likelihood of third parties bringing a claim for

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damages, and in such situations a settlement would be the only means of achieving restorative justice. Hence, in our view it would be beneficial to allow the OFT/CMA to continue to have the power to certify, and actively encourage, voluntary redress schemes.

- 29.2. We foresee potential problems with giving the OFT/CMA the power to order redress, however. The Consultation Paper considers that a decision not to impose a scheme, or to refuse to certify a voluntary scheme, should not be appealable. However, as a matter of legal principle it appears unlikely that a decision to refuse to use a legal power could, or should, be insulated from legal challenge through judicial review.
- 29.3. We also do not believe that this would be a good use of the OFT's/CMA's resources, both in terms of potentially extensive negotiation of the scheme itself and in terms of monitoring the scheme. In particular, dealing with redress schemes should not divert resources from the OFT's/CMA's primary function of public enforcement. The Consultation Paper suggests adopting powers similar to those of the FSA<sup>9</sup> to impose a scheme that "corresponds to or is similar to a consumer redress scheme". However, as already noted, competition claims will often entail complex legal, factual and economic analyses. Even if the OFT/CMA would not attempt to quantify individual loss, even setting types of redress and directions is likely to involve a fairly detailed analysis of the facts, and therefore tie up resources.
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 BIS's proposed approach to this issue. If the OFT/CMA has the power to certify a voluntary redress scheme, it would also be appropriate to incentivise voluntary redress through a small reduction in the level of fine.
- 30.2. Taking redress into account as a matter of course may raise issues that could disadvantage certain defendants. A reduction in the fine for redress could only be applied if a company has agreed to redress at the time the fine is set. However, some defendants may choose not to enter to a redress scheme by that stage because genuine questions of liability or causation remain outstanding. Such companies would then be disadvantaged merely by dint of fully exercising their rights of defence.

#### **Complementing the public enforcement regime**

31. **The Government seeks your views on whether and how an extended role for private actions would positively complement current public enforcement.**
- 31.1. Competition law enforcement should have the effect of identifying and stopping anticompetitive conduct, deterring anticompetitive conduct, punishing infringing companies (a role that is mainly borne by public enforcement) and providing redress for the victims of anticompetitive conduct.
- 31.2. As noted above, we consider that the UK competition litigation environment is relatively healthy, with significant follow-on claims currently being heard by the CAT and the High Court and

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<sup>9</sup> The FSA is funded by the industry it regulates, whereas the OFT/CMA is funded by the public, which should be borne in mind when assessing whether this is a good use of the OFT's/CMA's resources.

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competition law arguments increasingly being deployed in dedicated standalone actions and wider civil disputes. While it is unclear how much impact private actions have had to date in terms of detection, deterrence and punishment, we would suggest that, under the prevailing public enforcement model that has developed across the EU, this is primarily the job of the competition authorities.

- 31.3. It appears that private actions and the threat of paying damages has little effect in terms of deterrence. The OFT's own research shows that private damages actions is rated low in a list of deterrent factors by businesses<sup>10</sup>. By contrast, financial penalties (through public enforcement) and reputational damage are rated highly as a deterrent factor. An extended role for private actions, with a correlating increase in financial penalties (through damages) and adverse publicity, is likely to increase the deterrence effect.
- 31.4. The OFT's current powers offer little opportunity for redress for victims of anticompetitive conduct. On our view, it is in this area that private actions, not public enforcement, should be the main focus. Enhanced private actions should increase the level of redress that is achieved generally, and we do not believe that it is appropriate for the OFT to play a significant role in the area through ordering redress, for the reasons set out in response to question 30.
- 31.5. A healthy private competition litigation environment should complement enforcement by the state, particularly where public budgets are under pressure and the competition authorities are having to prioritise their resources on a small number of high impact cases. However, we would caution against enhanced private actions undermining public enforcement, in particular by discouraging whistleblowing and leniency applications. We address this issue in more detail in response to questions 32 and 33 below.
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. Although this is an area where there is considerable uncertainty, which was not resolved by the ECJ's judgment in *Pfleiderer*,<sup>11</sup> the High Court in *National Grid*<sup>12</sup>, has demonstrated a welcome willingness to engage in the substance and to undertake a detailed review of documents, weighing up the respective interests of claimants and defendants.
- 32.2. A balance is clearly necessary between the need for disclosure for damages claimants and the potential impact of disclosure on leniency applicants. Enhanced private actions should not undermine the effectiveness of public enforcement, including the incentives for infringing companies to seek leniency.
- 32.3. In our view, claimants' ability to bring claims, particularly follow-on actions, would not be significantly inhibited by the protection of certain leniency documents since:
- (a) Pre-existing documents which are submitted with documents created for the purposes of the leniency application are likely to be of greater probative value than leniency submissions themselves. In any event, such documents would be disclosable under Part 31 CPR.

<sup>10</sup> *The impact of competition interventions on compliance and deterrence*, OFT1391, paragraph 6.10.

<sup>11</sup> Case C-360/09 *Pfleiderer v Bundeskartellamt*.

<sup>12</sup> *National Grid Transmission PLC v ABB Limited and others* [2012] EWHC 869 (Ch.).

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- (b) In follow-on cases, liability has already been admitted or established, thereby reducing the burden on claimants to demonstrate liability.
- 32.4. We therefore agree with BIS's suggestion that some, but not all, leniency documents should be protected from disclosure. The protection of documents created for the purpose of seeking leniency appears to us to be a reasonable balance. This would be consistent with Advocate General Mazak's suggestion in his opinion to the ECJ in the *Pfleiderer* case.
- 32.5. We agree with the court's ruling in *National Grid*<sup>13</sup> that any rules regarding the disclosure of leniency documents should apply to both the European Commission's (**Commission**) and national leniency programmes, and it would be helpful if this could be confirmed in any guidance on the enhanced private actions regime. In addition, we agree with the Commission's submission to the court<sup>14</sup> in that case that disclosure should not increase the leniency applicant's exposure to liability compared to the liability of parties that do not cooperate.
- 32.6. However, we note that the Commission has included a legislative proposal in its Work Programme for 2012 to clarify the interrelation of private actions and public enforcement by the Commission and national competition authorities, in particular with regard to the protection of leniency programmes<sup>15</sup>. If BIS decides not to take any legislative steps relating to leniency documents in light of the Commission's initiative, the above issues should nevertheless inform the UK Government's input into the Commission initiative.
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. If there were to be a substantial increase in the level and magnitude of private competition law damages claims, we agree that whistleblowers should be protected from joint and several liability. Whistleblowers are clearly at an increased risk of being the targets of damages actions, because they will be the first to admit liability for an infringement, and if they do not appeal an infringement decision will be the first member of a cartel that can be pursued by damages claimants. It is also easier for a claimant to bring an action against a single defendant rather than a number of defendants, after which the burden and costs for pursuing redress from other defendants is effectively shifted to the whistleblower.
- 33.2. This risk clearly threatens the incentives for immunity applicants, and it would likely enhance the effectiveness of whistleblowing if the whistleblower is protected from joint and several liability. We do not believe, however, that other leniency recipients should be protected in the same way. Generally, bringing a secret cartel to the attention of a competition authority is considered significantly more important than cooperation with an already ongoing investigation, and this is reflected in the fact that whistleblowers can expect full immunity from fines rather than a reduction in fines. Similarly, the incentive for whistleblowers could be diminished if the same protection from joint and several liability were extended to leniency recipients.

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<sup>13</sup> *Ibid*, paragraph 25.

<sup>14</sup> *Observations of the European Commission pursuant to Article 15(3) of Regulation 1/2003 - National Grid Electricity Transmission plc v ABB and others*, paragraphs 17 - 18.

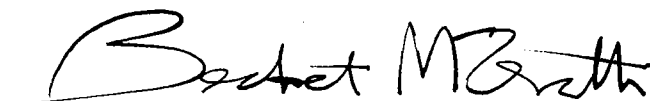
<sup>15</sup> IP/11/1344, *Commission Work Programme 2012*.

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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. Better coordination between the OFT/CMA and the courts (or CAT) in competition cases would reduce the risk of inconsistent practice and precedents between public and private enforcement. The Consultation Paper notes that the OFT currently has the ability to contribute to private cases and uses this where it sees fit. However, it is not clear whether the OFT actively monitors competition cases and whether its contribution is needed. We would therefore welcome a clarification of the role the OFT actively plays in this respects, and the circumstances in which it would consider contributing to private cases.

We trust that the above comments are of assistance to BIS and look forward to seeing its policy proposals in due course.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Becket McGrath', written in a cursive style.

**Becket McGrath**

# Edwin Coe LLP

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](mailto: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 × Edwin Coe LLP 2 Stone Buildings Lincoln's Inn London WC2A 3TH ref DMG

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?

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?

Fast track idea seems half baked and takes no account of the complications of competition cases. Time is not the major problem as long as the case is properly managed; the problem is the potential liability for costs.

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



Possibly but this idea really needs some thought.

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

Bringing a stand alone case is extremely difficult. SME's will continue to rely on the regulator and will pursue follow on cases. Collective actions on the proposed opt out basis could assist. Further the availability of documentation from the relevant regulator may assist.

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. It is difficult to determine a figure for these purposes. Perhaps better would be a presumption on costs so that the claimant does not bear a costs risk if the regulator has found there to be a cartel.

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. In the event of price fixing any person in the supply chain should be entitled to pursue the claim. In the event that the additional cost is passed down the chain the claimant should be entitled to pass the damages awarded down the chain.

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.

It does not work at all. The position is about to be made almost impossible by the Jackson reforms. Something needs to be done to alter the balance to ensure consumers and SME's can pursue claims.

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.

Yes they are.

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?

No. This can be managed by the tribunal by, for instance, confidentiality rings.

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.

With proper court control as gate keeper we believe the introduction of an opt out process is a sensible method of ensuring access to justice for consumers and SME's. We do not believe that this will introduce US style litigation because of the measure of court control and the cost shifting rules.

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

These seem sensible but the problem will be the cost risks of the application. This could be very substantial and will be highly dissuasive to the applicant. Defendants will fight the issue hard.

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

Yes but the rules on unjust enrichment may be expanded for this purpose.

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

No, subject to court management. We believe the rule to be very difficult in collective actions based on opt out because those being joined cannot be made liable for costs but the claimant claiming on their behalf should not bear all the burden of costs liability.

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?

Yes, in both.

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.

This seems sensible solution to the cy-pres model but we see no reason why the excess should not be paid back to the defendant. In collective actions we always return the excess to the defendant.

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?

Yes

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. The regulator does not have the resources to pursue many cases. Private bodies will fill the regulatory gap.

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?

There would be merit in allowing legal firms to pursue claims. We do not see this as a risk as long as there is proper case management. It must be recognised that the pursuit of acclain will always rely on the commercial viability of pursuit of the case to solicitors.

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?

No, we do not believe the pre action protocol process is appropriate. It leaves the claimant open to defence tactics of commencing proceedings in another jurisdiction.

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

No

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.

No

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 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. We cannot understand why the OFT should not have similar powers to the FSA in this respect.

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.

It will fill the gap left by the lack of public resources available to the OFT. We have run a number of cases against the OFT on their prioritisation policies including Cityhook and now ACS v OFT. We understand those policies but consumers or SME's should have an alternative method to pursue cartellists.

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?

No; this can be reflected in the fine

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?

No; this can be reflected in the 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.

Leniency in any criminal proceedings

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

The OFT, the European Commission and the FSA have talked about the introduction of limited opt out process for competition and consumer claims for many years without product. We hope on this occasion something will happen. Subject to some real progress being made we suggest that the Government may consider the introduction of a process similar to the Dutch process for settlement actions on an opt out basis. Following the Converium decision in the Netherlands we may be exporting cases for settlement to the Netherlands; we should introduce the same process in this jurisdiction

**David Greene**

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# Essex Street Chambers



## 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:

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Consumer and Competition Policy  
Department of Business, Innovation and Skills  
3rd Floor, Orchard 2  
1 Victoria Street  
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Tel: 0207 215 6982  
Fax: 0207 215 0235  
Email : [competition.private.actions@bis.gsi.gov.uk](mailto: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.
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Representative Organisation
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Trade Union
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Interest Group
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Small to Medium Enterprise
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Large Enterprise
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Local Government
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Central Government
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Legal <input checked="" type="checkbox"/>
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Academic
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Other (please describe):
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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?** No view

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

No view

**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

**Q.5 How appropriate are the design elements proposed, in particular cost thresholds, damage capping and the emphasis on injunctive relief?** Appropriate. In particular I think the threshold on costs is likely to do more good than harm.

**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?** No.

**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.**

Opt out is preferable to opt-in. There are major difficulties in engendering enough interest for opt-in litigation, particularly given concerns over costs, difficulties with getting insurance and third party funding for disparate and hard to control groups of litigants.

**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?** yes

**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.** A good idea

**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?** No

**Q.17 Should the loser-pays rule be maintained for collective actions?** For the time being, Yes. As the defendants can be disparate it would be unreasonable to introduce one way costs shifting or a no costs rule, at least until the new regime has been tried.

**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?** Try it first and see.

**Q.19 Should contingency fees continue to be prohibited in collective action cases?** No. To do so is completely inconsistent with LASPO. Part of the point of contingency fees is to enable actions like this to be brought.

**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.**

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.

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 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.
- 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.

**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?**

Access to Justice Foundation is 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 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.

**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?** Restrict it. The excesses of CMCs and related bodies in the personal injury field indicate what might happen if such actions can be brought purely for profit. Lawyers and TPFs should be able to finance litigation through contingency fees, but the conduct of the litigation should be dictated by a proper client with a real interest other than profit.

**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?**

**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.

I have not answered all the questions as I am not a competition expert, but an expert in the field of costs and litigation funding.

Jeremy Morgan QC

June 29<sup>th</sup> 2012

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# European Justice Forum

**European Justice Forum's Response to BIS' Consultation Paper:  
“Private Actions in Competition Law: A Consultation on Options for Reform”**

23 July 2012

European Justice Forum ("EJF") is a not for profit organisation incorporated in Brussels<sup>1</sup>, the purpose of which is to promote balanced civil justice systems in Europe that provide on the one hand rapid and effective compensation for meritorious claims and on the other hand equally rapid and effective dismissal of speculative or unjustified claims. Its members are some of the world's largest multi-national businesses and other organisations, with very significant investments in the UK and elsewhere in Europe<sup>2</sup>.

EJF's approach is based on independent legal research as the means to advocating practical solutions. That research has identified a model for redress based on non-court dispute resolution mechanisms supported by the role of public authorities in enforcing consumer protection laws with litigation as a very last resort. This applies as well to redress in a competition law context as it does to other forms of consumer redress. This Response elaborates on that model and is structured as follows:

- I. Summary
- II. Discussion
- III. EJF's position on specific proposals
  - Rebuttable presumption of 20% loss in cartel cases
  - Collective actions and Opt-out
  - Design details (Annex A)
- IV. Unasked questions
- V. Annex 1: EJF's Responses to the Consultation Questions – Response Form

**I. Summary**

EJF supports the need for effective compensation for breaches of competition law. A policy of reinforcing the UK's private competition regime to meet a need for redress might be sensible if the need were real and as long as changes to the existing system were proportionate to the benefit. In the context of the proposed introduction of a US style class action, for that is what the opt-out procedure would be, EJF considers there is neither a need nor a proportionate benefit. Such a change is unnecessary, and damaging.

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<sup>1</sup> <http://europeanjusticeforum.org/>

<sup>2</sup> The full EJF membership list can be found at <http://europeanjusticeforum.org>

EJF objects to the following proposals contained within the Consultation:

1. EJF regards the reversal of the burden of proof and adoption of a presumption of loss in cartel cases as fundamentally wrong. Consequently, the suggested level of 20%, or any level, does not arise. As a matter of practice, rather than economic theory, the level of 20% is arbitrary. It does not reflect our experience of the application of expert economic evidence to real cases.
2. The proposal for opt-out is profoundly business-unfriendly. Its implementation would be wholly disproportionate to the benefits gained (including the introduction of the unnecessary complications of aggregation of damages and distribution of surplus), damaging to the interests of defendants and would affect the investment decisions of our members. The nature of that damage is acknowledged by the necessity of the controls envisaged, which themselves underline the risks.<sup>3</sup>
3. EJF disagrees with the concept of allowing undesignated representative bodies to bring collective claims. The “adequacy” of designated bodies to conduct litigation (in terms of capacity and standing) should remain with the Secretary of State. However, the ability of a designated representative body to manage both the complexities of the merits of the particular claim (e.g. liability, applicable law and jurisdiction, quantum, issues) and the procedure (notifying its members and managing the distribution of funds) as well as its ability to fund the litigation in question, including potential liability for adverse costs, *are* matters for the Court, and should be factors the court considers at the certification stage.
4. As a matter of policy EJF disagrees with the introduction of a US style collective litigation procedure as a way of enhancing private redress in competition, without a far more robust evidence base than is provided. We say this for a number of reasons. Once introduced as an option, it may not be containable to competition cases alone. Secondly the policy runs counter to the consensus across European Member States against the opt-out principle and against importing US-style abuses into civil justice systems in Europe. Thirdly to be promoting it as a model for redress at a time of increasing austerity and stagnation at home, and heightened instability in the Eurozone, seems bizarrely counter-productive when the Government is intent on encouraging a business-led recovery.

Full EJF’s responses to all Consultation questions and the completed “Response form” are included in Annex 1 below.

## **II. Discussion**

Firstly, we observe that the proposals for reform as a whole suffer from internal inconsistencies. These are essentially a reflection of the attempt to balance the objective of facilitating litigation against ensuring that litigation is seen as a last resort. This difficulty is best illustrated by the tension between the proposal for opt-out collective actions (albeit under controls), and the risk of creating a litigation culture which those very controls anticipate.

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<sup>3</sup> There remains another issue for claimants: whether an opt-out mechanism fetters the rights of an individual member of the class to the protection afforded by Article 6 of the European Convention on Human Rights.

The proposal for allowing opt-out as a possible mechanism for collective action, subject to review at certification stage, will encourage speculative litigation and a litigation industry, precisely what the Government wishes to avoid. The proposed design details for an opt-out collective action driven by private representative bodies (Annex A) are a clear recognition of the serious risks of opt-out. We comment on those details in our response to Question 15.

Together with the presumption of loss in cartel cases of 20%, (para 4.40 - 4.43), opt-out introduces an obvious imbalance in the 'level playing field' between the parties. A level playing field was the cornerstone of the Woolf reforms.<sup>4</sup> The imbalance which would be caused by a presumption of loss and an opt-out mechanism seems to be offered up as an acceptable quid pro quo for reducing the information deficit experienced by claimants against defendants "holding all the cards". EJJF disagrees with that proposition as a fundamental principle. Furthermore, in claims by direct or indirect non-consumer purchasers, which will remain the majority of follow-on claims, (and for which no encouragement is needed) the claimants will have, or should have, their own evidence base on which to formulate a claim and estimate quantum; the decision of the regulator and their financial records of purchase and selling prices, if they still possess them. Cartel claimants frequently contend they are hampered by the lack or insufficiency of their own records blaming innocent loss or destruction over the passage of time before the infringing conduct becomes apparent. Such a contention always needs testing on the facts of a particular case; it should not form the basis of a systemic policy.

The proposals fail to reflect the difference between business claimants and consumers. The fact is that many commercial claimants in follow-on actions are themselves sophisticated, often large, businesses in the supply chain who are organised and sometimes repeat litigants, who group themselves together and manage the existing collective procedures perfectly well, using the follow-on damages claim to negotiate settlements from cartelists which may bear scant relationship to the losses they may have suffered at the hands of the cartel.

Creating an opt-out collective mechanism in competition cases distorts basic English legal norms – the essence of which are fairness and proportionality. The concept of opt-out, alien as it is to English law (and to most European legal cultures), is not transparent. The very essence of the concept is one-sided: claimants' identities and numbers are unknown. Will unknown claimants in jurisdictions beyond the UK be allowed into the class? Then there are the recognised difficulties in the proposal to open up the representative procedure to bodies that are not statutorily designated, leaving the decision as to standing ("adequacy") to the judge. It can reasonably be anticipated that early on in the proceedings disputes as to standing, constitution, financial backing, representativeness and capacity will be fought out, introducing the prospect of repeat and costly interlocutory skirmishing – some have said that the certification stage would itself become a mini-trial. There will always be a doubt, unless representatives must be specified in legislation as they are at present, that they are not truly representative - in the sense desired by BIS (para 5.53).

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<sup>4</sup> Though not trumping the CAT's procedural rules, which require it to "secure the just, expeditious and economical conduct of the proceedings", Woolf *is* to be applied to Chancery Division competition cases and is to be read into the CAT's own procedural rules except where inconsistent with them. In practice Woolf's spirit and ethic embodied in Part 1 of the Civil Procedural Rules 1998, as amended from time to time, apply for all purposes of all English civil litigation up to and including the Court of Appeal (Civil Division), and including the CAT.

There is the issue of awarding aggregate damages for the class, not actual loss, a novelty under English law, and particularly problematic where the infringer has already been fined or is facing the prospect of a fine; and the connected problem of unclaimed sums, again involving the introduction of another level of complexity (which does not serve to compensate those who have actually suffered loss) and one which merely uses the civil damages system as an unjust means of redistributing wealth from defendants to society at large.

This is a dangerous precedent not only for the rest of the UK legal system but for other European systems and for the development of a European wide collective redress instrument. Limiting opt-out collective actions to the CAT may not prove a feasible limitation; they will morph into other parts of the English legal system and as recognized by the European Parliament, opt-out is not consistent with the legal systems of many Member States.<sup>5</sup>

EJF's underlying concern is the prospect, in an age of increasing austerity at home and the worsening Eurozone crisis, of the Department for Business Innovation and Skills ("BIS") promoting litigation as a method for leading a business-led discovery out of the depths of a recession. In such a climate BIS should not be promoting litigation without the most compelling evidence that it will achieve its two stated aims of growth and fairness. Even if there were telling evidence on which to base such a policy for competition matters, and we do not see any such evidence, this seems to EJF to be counter-productive. It goes against the Government's own principles of reform of the regulatory systems<sup>6</sup>, including enforcement methods, in the UK. In that context the Government's reform agenda has, rightly, been promoted as an engine for assisting business, big and small, in entrepreneurial activity, risk taking and getting back on its feet.

The right of parties to litigate their disputes is not in doubt. However, litigation, for consumers as much as for SMEs, is not a panacea for the resolution of disputes; it is prone to large delays, tactical manoeuvring, expensive, risky, confrontational and, where the numbers and the merits justify it, increasingly (no less in competition matters as elsewhere) the province of large third party investors. The BIS proposals greatly increase these complexities and commercial incentives.

EJF endorses the Government's fear of encouraging a litigation industry by means of these reforms, but points out that there is already a litigation industry. And it is growing; indeed its growth is of concern to Government. Presently, outside the legal profession, it is unregulated<sup>7</sup>. The Government's fear should be about not adding fuel to the fire.

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<sup>5</sup> European Parliament Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)) stated: "a collective redress system where the victims are not identified before the judgment is delivered must be rejected on the grounds that it is contrary to many Member States' legal orders and violates the rights of any victims who might participate in the procedure unknowingly and yet be bound by the court's decision." And "the European approach to collective redress must be founded on the opt-in principle, whereby victims are clearly identified and take part in the procedure only if they have expressly indicated their wish to do so, in order to avoid potential abuses."

<sup>6</sup> 'Transforming Regulatory Enforcement: Government Response'. December 2011

<sup>7</sup> There is a voluntary code: The Association of Litigation Funders of England and Wales: Code of Conduct for Litigation Funders, November 2011.

### III. EJF's position on specific proposals

#### **Rebuttable presumption of 20% loss in cartel cases:**

The Government's proposal is that in cartel cases there should be a rebuttable presumption that the level of overcharge was 20%, in order to "reduce the disincentive for parties to start litigation against cartelists". The thinking is to rebalance the information deficit whereby the defendant holds all the evidential cards as to quantum. So if as a matter of law he stipulates an assumed level of overcharge, then, in the absence of evidence from the defendant to rebut it, the claimant does not have to take any steps to prove his loss, thus freeing him from the tedious obligation of investigating the evidence at the stage of commencing litigation. That obligation is thus presumably deferred until the defendant chooses, if he does, to provide disclosure of its accounting and management accounts data. The claimant may be freed from the obligation to make any effort to prove loss at all.

This figure is taken from the December 2009 Oxera report on Quantification of Damages in competition cases. This was intended to provide guidance to courts in Europe ("pragmatic, non-binding assistance in the difficult task of quantifying damages in anti-trust cases" according to the Staff Working Paper which accompanied the European Commission's White Paper on Damages Actions for Breach of EC antitrust rules).<sup>8</sup> We have a number of concerns about this proposal:

1. It is not clear whether the 20% benchmark is the loss presumed to be suffered by the consumer, or by suppliers higher up the supply chain. The overcharge, if any, suffered by the direct purchaser bears no relationship to the overcharge, if any, paid by the consumer. A 20% overcharge to the direct purchaser does not translate into a 20% overcharge to the consumer. All subsequent comments are subject to this point.
2. The 20% is not only before any expert evidence is adduced, but before application of the pass-on defence. If there is to be a rebuttable presumption of a level of loss (to direct purchaser) there also needs to be a rebuttable presumption of a high level of pass-on, depending on the level of competitiveness in the downstream markets and the type of market, but in most cases between 50% and 90%. This would mean effectively a rebuttable loss, at the direct purchaser level, of 2% to 10%, much less at the consumer level. Is there really any merit in changing English law for such minimal returns?
3. Taking 20% as a benchmark is a theoretical starting point but it bears no economic relationship to any particular case. It is purely a statistical synthesis of economic estimates from a specific cohort of historical cases, and far too simplistic. It might be said that allowing defendants, or claimants, to rebut this figure with their own evidence controls for any risk of abuse. The difficulty with this approach is that if 20% becomes the starting point, distortion creeps into the system. The standard, which on further analysis seems to be only for those cases where consumers or SMEs cannot afford to, or have insufficient evidence, to produce preliminary expert economic evidence in support of

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<sup>8</sup> Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, paragraph 199.

their alleged overcharge, will become the accepted norm; it will have the same status as 2% above LIBOR for a commercial rate of discretionary interest on damages in the Commercial Court. This should not be the case where many claimants will produce their own evidence of alleged overcharge, and where they do not, the defendants almost certainly will.

In 5 cartel cases in the last 10 years with which EJJ have been very closely connected, the spread of possible overcharge, before pass-on, has gone from an estimated below 0% (less than the counterfactual) to 30%. Pass-on has been estimated at between 50% and 90%.

4. The Oxera report (and economic theory) confirms that in a highly competitive downstream market at direct purchaser level, pass-on of any overcharge should be high, and can be almost total. There seems far more evidence and basis for making such an assumption as to level of pass-on, than there is for a one size fits all assumption of a 20% overcharge. If a 20% overcharge is assumed to be, say, 90% passed on, depending on the competitiveness of the market, then there will be minimal loss to direct purchasers. The end consumers will not be able to show they have suffered the same 90% of the 20% that the direct purchase passed on; because the product will then be totally different.

### **Collective actions and Opt-out:**

EJJ believes the current collective action procedure for competition damages actions should not be reformed

As the Consultation recognises, opt-in collective action mechanisms are already available to consumers and businesses in competition follow-on damages cases. For consumers the mechanism takes the form of a representative action in the CAT by a specified body; for businesses the action takes the form of what might be termed an ordinary multi-party action in either the High Court or in the CAT, or Group Litigation in the High Court. Stand-alone damages actions can also be brought collectively, in the High Court, but are rarely brought because as the Consultation recognises, (para. 4.8) they are inherently complex and expensive to run, with high litigation risk. Making stand-alone cases easier to commence will not make them easier to run. EJJ agrees that the CAT should have jurisdiction to hear stand-alone damages actions.

There is very thin evidence of need for changing the current procedure to one where opt-out may be permitted, even with court scrutiny. It is suggested (para 3.16) that introducing an “effective” private actions regime (which would include a number of the other suggestions in the Consultation as well as those to which EJJ objects) could be worth a further £66.1 million as well as providing an average of £26.2 million of redress each year to businesses and consumers that have suffered loss. The Impact Assessment does not suggest the impact of the reforms will be great: although the suggested increase in actions both stand alone and follow-on is estimated to be 25%, given the relatively small numbers of such actions in the first place and the very unspecific basis of that estimate, the suggested increase is not particularly credible. Coupled with the fact that reliance is placed on the statistic of rather historic Canadian stand-alone cases as a percentage (25%) of a very small number of cases overall, the conclusion that there would be one extra stand-alone case every 2.5 years, makes the case for the benefit of reform appear very slight. That level of benefit is very small and completely disproportionate to the potentially highly damaging results of introducing an opt-out class action, driven by private unregulated representative parties, with a presumption of loss in cartel cases.



There is little real evidence for the assumption that opt-out run by private bodies, under court scrutiny, would make the private action regime more effective, beyond the fact that Which? says it will not take on any further s47B Competition Act 1998 cases unless the statutory mechanism changes to being opt-out.

The problem with promoting opt-out and then trying to shut the stable door after the horse has bolted, using the suggested controls, will be apparent to anyone who has defended any collective action in the UK in the last 30 years. In fact, backing US-style class actions (in the UK) – and the suggested prohibition against contingency fees flies in the face of recent legislation designed to permit wider use of Damages Based Assessments, which are to all effects and purposes contingency fees – is backing the wrong horse: it is long, prolix, costly, inefficient. These characteristics of collective litigation are unavoidable – why encourage them? Experiments elsewhere suggest some of these disadvantages are not just an English problem - see the recent dismissal of the case against Deutsche Telekom in the German KapMug procedure, eleven years after it started.<sup>9</sup>

Under opt-in the bandwagon is a concerted effort by lawyers and identified claimants. It is imperfect, it often leads to spurious claims within the cohort but the litigant has some involvement, some sense of risk, and the control from the claimants' lawyer is based on a relatively simple and basic duty to each named claimant in the cohort either directly or via the representative; under opt-out, where third party funding is unregulated, it is a bandwagon for lawyers and litigation funders, the natural desire will be to swell the class to maximise the quantum, conflicts of interest are potentially always present; the litigants' interests risk being attenuated or overridden by the commercial returns available to funder and lawyer.

#### **Design details (Annex A):**

The dangers of opt-out are well known. They are openly recognised by the Government in the Consultation paper. The certification details in Annex A neatly underline the seriousness of the risks opt-out poses.

Those listed in A.3 are sensible and should be supplemented by the specific further steps advocated in our answers to Question 15.

#### **IV. Unasked questions**

A number of uncertainties lurk beneath the surface. These can conveniently be summarised as jurisdiction and applicable law issues derived from the possibility that the class is composed of consumers or purchasers in different Member States of the EU. They all imply an increase in forum shopping.

What jurisdiction would the UK courts have to consider a class action brought on behalf of consumers who are not resident in the UK?

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<sup>9</sup> It is said to be under appeal.



What standing would a private representative body incorporated outside the UK have, whose statutory capacity, under its own laws and those of its domicile, was to represent only consumers resident in its country of origin?

How is a class claim to be compensated? What is or are the applicable laws? Claimants and defendants will inevitably contend for an applicable law based on their most favourable outcomes, based on the applicable limitation period.

How to sort out claims brought by different sub-groups? Do different measures of damages and rules as to distribution of damages apply?

How should the funds be distributed to the class members and by whom?

How should the residue funds be distributed where members of the opt-out class are not domiciled in the UK?

V. Annex 1: EJJ's Responses to the Consultation Questions – 'Response Form'.



**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](mailto: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): Trade association	✓

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?**

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, but only when the Tribunal includes the President of the CAT or a member of its panel of Chairmen.

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

We have insufficient evidence on which to express a particular view on this question. Until much more detailed procedural rules were sketched out (for example, the criteria for allocation to fast track, how long would the “matter of days” for the substantive hearing actually be, how much factual and expert evidence would be permitted, what is the turnover threshold for a SME) we cannot comment on the proposed skeleton procedure. On the point of principle, as to whether there should be a fast track procedure in the CAT with a focus on injunctive relief, we have serious reservations about making any form of interim remedy the subject of a fast track procedure. The dangers for due process in rushing such claims through are obvious and are likely to be particularly present in competition cases, mainly in abuse of dominance cases, with their in-built potential for complexity. Injunctive and other interim relief should be capable of being granted, and should only be granted, in the context of the CAT’s existing case management powers amended to the extent necessary by giving the CAT statutory power to grant interim and permanent injunctions similar to that given by s.37 Senior Courts Act 1981 to the High Court.

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

We disagree with the concept of a fast track procedure focused on awards of interim injunctions in competition actions. Subject to that main point we find some of the design elements inappropriate. For example we disagree with the concept of capping the claimant’s liability for defendants’ costs in all cases. Capping them at £25,000 is grossly unrealistic.

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

No. Where possible, SMEs should be encouraged to take their competition cases to ADR first, with court a last resort. The proposals appear to recognise this (para 4.29).

**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?**

No. As a matter of legal principle, there is insufficient justification for the change to the burden of proof in tort that this proposition entails. We know of cases where, during the currency of the cartel, some periods of cartel activity were thought to have occasioned no loss; and indeed in one case, negative loss; that is, the alleged infringer himself suffered a loss expressed as a sum less than the counterfactual price, so the claimant actually received a benefit. As to the level, the facts behind cartel cases and the quantification of any loss suffered are often far too complex to justify the application of a standardised percentage benchmark. The effects of anticompetitive activity in different markets, and different sectors of one market, will be different, and will depend on case specific factors. There is no appropriate figure to set as a rebuttable level of loss. The level adopted from the Oxera report is an estimate based on economic theory using a synthesis of data across a number of unrelated cartels.

It is not clear at what level the presumed 20% is sustained. Direct purchaser or end-consumer?

**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?**

No, unless a rebuttable presumption of loss is introduced (which we do not support), in which case it is absolutely necessary to have a corresponding presumption of a high level of pass-on from the direct purchaser to his customer. Depending upon the level presumed, this would of course render almost pointless the presumption of loss. If the presumed loss were 20%, given classic economic theory and a competitive downstream market, actual loss – to direct purchaser – could well be around 2%.

**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 do not think the extensions of collective procedures proposed in the Consultation are needed or desirable. The current system is working effectively.

Our experience, from detailed knowledge of many cartel follow-on cases in the UK, both in the CAT and in the High Court, over the last ten years, is that there is no need for any reform of collective actions as far as concerns medium to large businesses. The system in CPR 19.10ff is working perfectly well, and there is no apparent obstacle to such cases being settled. Ordinary multi-party follow-on damages actions in the CAT are well managed by the Tribunal (which also has a power of consolidation under Rule 17) and likewise invariably end up being settled. We consider that in addition to transferring Group Actions from the High Court (para. 4.18) provision should be made for the CAT to have power to make Orders under CPR19.10ff. That is not intended to suggest that there is an avalanche of end-consumer claims just waiting to be brought.

As concerns SMEs making or defending competition claims, again, we doubt whether any reform of the present collective action procedures for ordinary multi-party actions or in CPR 19 is required. The existing Group Litigation Order (“GLO”) is quite sufficient for the numbers likely to be involved in any market affected by a cartel in one or more Member State of the EU. The GLO has been shown to be “fit for purpose” in cases involving many thousands of claimants.

As regards claims by consumers, we are not aware of any convincing evidence of consumer demand justifying the encouragement of litigation by extending the present representative action procedure under s 47B Competition Act 1998, or suggesting that the equally effective GLO procedure under CPR 19.10ff, is insufficient to cope with what demand exists. The perceived difficulties in the one case brought under section 47B may be inherent in the opt-in nature of the procedure (they may not) but one case is not an adequate basis for making the type of substantial changes envisaged to the legal system by BIS’ proposals.

The GLO procedure, which is an opt-in procedure relying on court sanctioned publicity to generate claimants, has been repeatedly shown to be effective in bringing consumer claims on behalf of thousands of claimants in respect of a common cause of complaint. Publicity in those claims has been shown to be effective where the legal firms responsible are experienced claimants’ lawyers with a track record in pursuing group actions. One has to ask why this is the case in numerous group actions but not apparently in the case of the one representative action brought by Which?. The perceived difficulties, referred to in paragraph 5.22, associated with individual claimants’ appetite for litigation risk and awareness of the process, are difficulties which claimants’ lawyers overcome.

Rather than changing the present system under s.47B, it would be preferable to take steps to encourage an ADR culture linked to regulatory oversight.

**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.**

The proposals to extend the CAT’s jurisdiction to include standalone collective actions by consumers and businesses, provided the mechanisms currently permissible under the conventional CPR provisions for multiple parties and consolidation, under the GLO procedure in CPR 19.10ff and s.47B Competition Act 1998 are the only ones used, would be perfectly satisfactory– in all cases, opt-in only.

We fundamentally disagree with the policy objectives of opening up the collective litigation procedure to opt-out (which materially changes the dynamics of collective litigation) and to private non-designated representative bodies. They are wrong in themselves and the wrong means to an end, namely encouraging litigation of precisely the sort that the Government seeks to avoid. Opt-out on its own, a fortiori with undesignated private representative parties, introduces imbalance, (an uneven playing field), speculative litigation, and unnecessary and artificial complexity in the form of aggregation of damages and distribution of surplus. In a highly unstable business climate it prioritises, as a policy, a form of redress which is not appropriate for speedy resolution of claims.

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

The right to bring collective actions is already available to businesses and consumers. We take this question to refer to the introduction of an opt-out “class action” brought by non-designated representative bodies. We do not agree that such a procedure should be made available at all.

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

Subject to our principled qualification that collective competition litigation does not need reform, yes.

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

Collective actions are already permissible in stand-alone actions under the normal procedural rules permitting multiple parties and consolidation, and under Group Litigation Orders (“GLO”) pursuant to CPR 19.10ff. We have seen no convincing evidence of a need for change in the system. Stand-alone actions are by their nature and extent highly complex cases, with high litigation risk. This is a matter of substance, not form, and redress in such cases cannot be made “more effective” by helping the claimant to the court door. The deliverability of redress in such a case will depend on the availability of evidence and resolution of the merits of the case. We do not see how the proposals will improve the resolution of stand alone 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.**

We believe the proposal to widen the scope of collective claims, whereby the CAT has power to certify opt-out claims, is dangerous in itself (for reasons explained) and also because the conjectural nature of opt-out produces unsatisfactory complications in the form of aggregation of damages and issues of how to distribute unclaimed surplus.

With regard to these last two features, the comparison between the merits of opt-in and of opt-out is stated to revolve around the higher participation rate under opt-out, based upon surveys in the UK and the US, and evidence from courts of other countries. In opt-in the participation rate (in the UK) – in the sense of a formal commencement of individual proceedings by each group member - is said to be no higher than 50%, whereas under opt-out (in certain opt-out jurisdictions) the median participation rate – in the sense of members of the class identifying themselves as entitled to a share of the damages - is said to be between 87% and over 99%. These latter numbers overstate the utility of opt-out. The Mulheron paper referenced on this point quotes an Ontario Court of Appeal judge, in an April 2004 judgement, saying: “I accept that it is rare that a class action has more than a 75% take-up rate. To date, despite a well-funded notification campaign and the notoriety of the trial judgement in this case only 500 class members [out of an estimated maximum of 1500 class members] have come forward.”

Mulheron’s paper in turn relies on the Thomas E Willging, Laural L. Hooper & Robert J. Niemic study, *Empirical Study of Class Actions in Four Federal District Courts: Final report to the Advisory Committee on Civil Rules*, US Federal Judicial Center, 1996. This shows, at 54, that in three cases where the class size was limited to those who opted in, the class size was reduced by 39%, 61% and 73%. One conclusion is that a relatively low participation rate in opt-in does not validate the superiority of opt-out, for which exclusion rates are relatively low, but instead suggests the parallel that both reflect inertia by

claimants. The failure to opt-out does not therefore necessarily mean a willingness and an interest to litigate a claim.

The fact is that opt-in and opt-out can be said to have imperfections but their participation rates are entirely fact specific, and opt-in is much fairer and much less susceptible to abuse. By limiting the class to those who affirmatively opt in, the amount of damages claimed by injured parties and the amount of damages paid are more closely aligned, which is the purpose of a just civil action.

No further steps should be taken to extend the existing regimes, namely those under the normal CPR provisions for multiple parties and consolidation, the GLO collective procedure provided for in CPR 19.10ff, or as provided for under s 47B of the Competition Act 1998 brought by statutorily designated bodies, in all cases opt-in actions. Group Actions should continue to be capable of being heard in the Chancery Division. Although Chancery Division judges are not usually associated with the now developed science of Group Actions, they are perfectly capable at managing them.

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

Whilst EJJ is against the concept of an opt-out class action, the list of issues to be considered at certification stage before a collective action in the sense intended by the proposals, that is, an opt-out collective action, is permitted, is sensible and indeed necessary. They need reinforcement.

In confirming that “a collective action is the most suitable means of resolving the common issues” (the fourth bullet point in Annex A.3) the CAT should also be required as a second step to consider and determine whether an opt-out, as opposed to an opt-in, procedure is the most suitable means of resolving the dispute applying its existing case management powers. The parameters listed in A.3 are relevant but are not exhaustive.

The Court should also be required to consider whether the parties have taken steps, without prejudice, to enter into ADR, what steps those are, and if not why not? In some cases there may well be good reasons for the parties not pursuing ADR but the possibility should at least be considered.

The criterion of *adequacy* for representative bodies needs to be specified with great detail and should be at a minimum what is required to gain authorised status under the Specified Body (Consumer Claims) order 2005/2365. In addition the representative body should satisfy the court that it is able to manage the complexities of the merits of the claim and the procedures involved in representing the class. This should be a requirement for the existing s.47B Competition Act procedure.

There should be a requirement upon the claimant at certification stage to provide the Court with a properly worked up budget of its/their likely costs to trial as part of its evidence of “sufficient funds”, as a control to avoid the type of abuse seen in the *Trafigura*<sup>10</sup> case. It will also assist the court in its assessment of the claimant’s ability to cover the costs of the defendant if unsuccessful.

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

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<sup>10</sup> Yao Essaie Motto v Trafigura Limited [2011] EWCA Civ 1150

Yes. Allowing the award of anything other than compensatory loss for breach of statutory duty would be another step towards bringing in the abuses seen in US class litigation.

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

Yes. Virtually all European systems have this as their costs regime and for good reason. It is almost universally accepted as the main deterrent against spurious claims.

However, its retention, though essential, is not on its own a sufficient safeguard against the risk that anti-trust, and then other areas of law, will not slide inexorably into a US style class actions litigation culture. As explained in the answer to Question 19 below, contingency fees in the form of Damages Based Agreements will soon be permissible in litigation in England & Wales, so without further legislation restricting the operation of s.45 of the Legal Aid, Punishment and Sentencing of Offenders Act 2012, (“LASPO”), contingency fees cannot be prohibited for competition damages actions as the proposals suggest. Retaining the loser pays rule, through critical, will not on its own guarantee the absence of speculative litigation, especially if opt-out is permitted.

**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?**

The court already has complete discretion as to which party bears which costs. No departure from that position is needed or appropriate.

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

Yes. However the result of s.45 LASPO, which will extend the possibility of Damages Based Agreements to all types of litigation in which Conditional Fee Agreements are available when it enters into force, is that such a prohibition is, without further legislation, ineffective.

**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.**

This question proceeds on the premise of there being an opt-out mechanism, which then necessitates putting in place a system for aggregating damages and then distributing unclaimed damages. None of these is at all satisfactory, and would not be necessary if opt-out was not introduced. Nor is the assumption acceptable that residue funds should go to some other body.

Subject to those points of principle, in paying residue funds to one specified body, on the one hand there are the merits of simplicity and predictability, avoiding the danger that lawyers or charities lobby the court on a case by case basis for their own benefit. On the other hand there are the demerits that (i) damages (whether money judgement or settlement sum) will be paid to a non-party that has not suffered any loss, a fundamental shift in English law; (ii) the distribution of unclaimed surplus to a non-claimant party is effectively an additional punitive sanction against defendants; (iii) where defendants have already been fined, and have made actual compensation, being kept out of the residue is effectively



another penalty. These demerits are grossly inequitable (all the more so by virtue of being manufactured as a result of opt-out) and greatly outweigh the merits.

Residue funds should be returned to the defendants. Any other option has relatively little merit. Civil justice is the attempt to remedy a wrong between parties. In the context of a private civil claim where private rights (for damages for breach of statutory duty) are alleged, and where the defendant/s will have already been fined by the authorities, and its officers or managers potentially face criminal prosecution, the process of estimating an aggregate of damages for phantom claimants is so imperfect and imprecise, that it should be not form the basis of any policy. It is impossible to contend as a matter of law that the residue funds belong to anybody other than those who paid them, and paid them in satisfaction of liability which has not materialised – the tort is not complete without proof of damage. The only rationale for depriving defendants of their right to return of surplus is that payment to a third party charity (eg the Access to Justice Foundation) represents a wider social purpose of redistributing wealth. That is inimical to encouraging growth.

Where there is more than one defendant, the re-allocation should not prove an issue. Either the aggregation of damages carried out by the court (a process we say stretches the power of the court beyond its present jurisdiction) to arrive at a total for which the defendants are jointly and severally liable will have had to take into account the addition of individual quotients of damages (or estimates thereof) referable to each defendant, or the defendants who participated in the settlement will have reached their own basis for allocation of share of funds prior to settlement.

**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 EJF's view, if (on the premise that opt-out, aggregation of damages and distribution of residue funds are all to become law, with which we fundamentally disagree) surplus funds are to be made available to a third party, a defendant should at the very least be able to choose its own charity from amongst a number of identified possible options, of which Access to Justice Foundation was one, which could include charities established to encourage or fund ADR, to which to pay its share of the surplus. That is an important discretion which should not be abrogated in favour of the Access to Justice Foundation.

**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?**

We disagree with the principle of opt-out, but subject to that point of principle, no.

**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?**

EJF rejects representative private bodies as a matter of principle. Subject to that, the only bodies that should be allowed to bring representative "class" actions should be those which are genuinely representative of the claimants and are designated by the Secretary of State. Law firms and third party funders should not be permitted as representative parties, not only because of obvious conflicts of interest if they are parties, but because it encourages a litigation industry. Furthermore, representative

bodies should undergo scrutiny by the court at the certification stage on their ability to manage the case in question and to fund the costs of such action, including an adverse award of costs.

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

Yes. The proposals rightly describe ADR as an important complement to collective redress which should be strongly encouraged and we agree with this view, but the function and efficacy of ADR, in follow-on cartel claims, as an alternative to litigation, is understated.

Whilst there is little evidence of how many follow-on claims in the UK settle, the reality (which practitioners throughout the UK will attest to) is that the overwhelming majority of such disputes settle out of court. They are usually about finding a number which meets both sides' commercial expectations. The only issue here is whether such claims can be settled before proceedings have got underway or whether they need to be pleaded out before they are properly the subject of ADR.

The resolution of most cartel follow-on claims eventually comes down to a negotiation over the following components of quantum, and their discount value:

- Adequacy of evidence to substantiate or refute loss (overcharge)
- Evaluation of level of overcharge and plausibility of economic methodology
- Probability of pass-on
- Level of pass-on
- And in a cross border context:
- Applicable law and limitation periods
- Applicable jurisdiction

The timing of settlement will be infinitely variable and will depend on the factual and procedural matrix (including the sector, type of market, the amounts alleged, availability of evidence and number of parties involved). But as liability will generally not be in issue (except where the defendant has appealed the infringement finding or the fine), a litigation model, with all the court administration involved, cost and procedural manoeuvring, is best deployed as a last resort to deal with points of law thought worth fighting over (likely to be few) and as a case management tool to ensure structure and timetable if the negotiations stall. All the features of a follow on claim can be dealt with in out-of-court settlement procedures provided that the parties know that limitation is not running.

Accordingly ADR is the obvious method for disposal of follow on claims, but when it is best undertaken depends on the case and on the parties. In answer to Q 27 below we put forward our proposals for some elements of a scheme for ADR within competition claims.

**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 are wary of pre-action protocols in principle because they tend to be too prescriptive at the wrong time and agree with BIS' observation (6.12) that pre-action protocols can encourage a bureaucratic tick box approach that becomes an end in itself, but on balance as a control and to authenticate a settlement-first philosophy, we can see some value in them, provided on the one hand the parties are excused some latitude but also that the protocols make it abundantly clear that the parties are expected to attempt, and be seen to attempt, to resolve their differences on a without prejudice basis before and during the litigation and that conduct found by the court to be contrary to these principles may be penalised in costs. In practice however conduct issues such as this are very difficult for the court to police effectively. And it is emphatically not bad conduct to refuse to consider ADR if there are reasonable grounds for doing so.

Our experience is that sensible lawyers understand the importance of attempting to settle their clients' cases at the appropriate time. Competition follow-on claims can be difficult to compromise before the claim is quantified properly. The proposal for a rebuttable presumption of loss putting the burden and expense of disproving the 20% figure on the defendant (with which we disagree) will inevitably lead to sensible starting offers being delayed further than they already are.

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

Yes. If by this it is intended to mean that the provisions of CPR 36, and an institutionalisation of Calderbank offers, are written into the CAT's own rules.

**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.**

As the Consultation recognises, there are a variety of types of ADR and ADR entities already operating in the competition area. The main way in which to facilitate the provision of ADR is to encourage the parties to a dispute to consider it as a preferable option for resolving most disputes than litigation, and to consider it as appropriate from before the inception of the dispute all the way through to its trial.

This encouragement does not need to await the reforms. The CPR and the CAT's Rules already stipulate that the court must consider ADR and its appropriateness to the case in hand, but facilitation can be further encouraged. This particularly applies to follow-on damages claims. Stand-alone cartel claims, and claims for injunctive relief based on abuse of dominant position or other competition law infringements will likely be less susceptible to ADR.

As explained above, follow-on cartel claims where the infringement decision is not under appeal are tailor-made for ADR. This is because the only real issues are the determination of the overcharge (which may be nil) and the level of pass-on (which may be 100%). Issues of liability in relation to one or more of limitation, proper law and jurisdiction may exist in such cases, but essentially they are discounting factors which affect the evaluation of quantum. They may need to be pleaded out, and discovery may need to take place, before ADR becomes feasible, but the necessity of these steps needs to be

interrogated very carefully and such liability issues will rarely, if ever, justify being taken to court. They can usually be negotiated on the strength of opposing counsel's opinions.

We therefore take the view that ADR in cases of an infringement decision which is not appealed should be encouraged at three different points in time, in all cases entirely voluntary.

The first is already envisaged by BIS' proposals. It would come after a statement of objections or a draft decision has been made but before any litigation is contemplated. The infringer is invited to settle based on disclosure of the Statement of Objections or the draft decision, and to engage with potential victims in an ADR process, which may be nothing more than a negotiation "across the table" but could be via an ADR entity. If the infringer agrees to enter into the process and comes back with a negotiated compensation settlement which is validated by OFT as being fair, that might be viewed as a mitigating factor.

The second ADR "window" of opportunity takes place with the letter before action and ends by the date (differently for the High Court and the CAT) for service of the response/defence, the time for service of which would be put back to allow for ADR if the parties chose to adopt ADR. In the CAT the ADR would be started on the Rule 32 and/or 33 information only, and be subject to the directions of an ADR panel as to the conduct of the ADR. Thus before any pleadings more than the claim form and evidence prescribed by Rule 32 (and where necessary by Rule 33) are served, and before any disclosure. The "window" would freeze the limitation period under the CAT Rules and at common law.

The third form of ADR is what is already routinely undertaken in follow-on claims, namely mediation. This may take place after pleadings are closed, expert evidence is served and any discovery required has been provided or, alternatively, at any other point in time.

As for stand-alone claims for declarations of infringement (for cartel and abuse of dominant position) and for claims for injunctive relief, the first phase of ADR is unlikely to work. These are in any event inherently problematic claims which do not fit easily within the framework of the proposals.

**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, but the converse is also true. If a collective settlement procedure by means of which an ADR result sanctioned by the court, in a manner similar in concept to the Dutch Mass settlement procedure, binding all members of the putative class, was built into the CPR and the CAT's Rules, there would be no need for a collective opt-out action. And this way round would be likely cheaper and faster. We do not endorse all the elements of the Dutch settlement procedure *per se*, which is known to have some problems.

**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. The Authorities should be given a discretionary power, in cases where an infringement has been found and will not be appealed, and before exercising their other enforcement powers, to instruct the

infringer to implement a redress scheme in favour of end-consumers; plus a power to certify a voluntary redress scheme proposed by the infringer, again only in respect of the end-consumer. These powers should not apply to business to business disputes.

**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?**

This should not happen automatically in case it effectively coerces businesses into making redress when redress was inappropriate or offering more redress than was appropriate, out of a concern that the OFT would then treat them more aggressively if they choose not to do so.

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

EJF's view is, and can only be, prospective. We believe that extending private actions by the means proposed, which must include all the certification controls in Annex A, as amended above, will have some but not significant added deterrence. Private actions are not a complementary part of deterrence. The better approach is to provide business with incentives to make restorative justice. A powerful way to do this is to give power to the OFT to require the implementation of a redress scheme and for businesses to have a reasonable expectation that such a scheme may be considered a mitigating factor.

**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. It is axiomatic that if the leniency procedure and its effectiveness are to be protected, the successful leniency applicant should be also protected from the obligation to disclose, in litigation based on any subsequent finding of infringement, its documents created for the purpose of seeking 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?**

Yes; whistle blowers in receipt of immunity should be protected from joint and several liability if sued by a claimant, but this should not prevent one or more other defendant joint tortfeasors who have paid, or settled for, more than their share of liability claiming a contribution from the whistle blower to the extent of its several liability. We see less reason to protect other leniency applicants 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.**

No further comment.

**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.**

No further comment.

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# **Eversheds LLP**



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

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Response by Eversheds LLP

24 July 2012

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## **INTRODUCTION AND SUMMARY**

We are grateful for the opportunity to respond to the Department for Business Innovation and Skills' consultation on Private Actions in Competition Law (the "Consultation"). We acknowledge the Government's rationale for introducing changes to the system of private actions for damages, and welcome changes that improve access to justice for victims of breaches of competition law where this is currently denied.

However, we are concerned that the extent of changes suggested by the Government goes further than required to facilitate access to justice in this area, and is likely to 'tip the scales' too far in favour of claimants, placing defendants at an unfair disadvantage. We consider that the proposed changes have a real risk of creating a "compensation culture" in the UK and could encourage frivolous or vexatious claims that defendants may commercially feel forced to settle, even in the absence of proven anti-competitive behaviour. In addition, we consider that the proposals may have a significant negative impact on the OFT's immunity and leniency regime.

We respond to each of the Government's questions in detail below. However, in summary, our key concerns relate to the following proposals:

- Expanding the role of the CAT. Specifically, we consider that the proposals raise the following issues:
  - (i) whether the CAT has sufficient resources to cope efficiently with a significantly increased workload, and the potential impact on its currently flexible and effective approach to case management ;
  - (ii) whether the CAT is the appropriate forum to decide the fundamental issue of legal liability; and
  - (iii) the fairness of the proposed one-way costs cap;
- Introducing a rebuttable presumption of loss in cartel cases; and
- Introducing an opt-out collective action regime.

## **DETAILED RESPONSES TO QUESTIONS**

### **A. The Role Of The Competition Appeal Tribunal**

We agree that, in principle, it is sensible for competition cases to be heard in the specialist forum of the CAT. As recognised by the Government, expanding the role of the CAT would allow it to strengthen its expertise in competition issues and take advantage of its flexible case management procedures.

However, we have a number of concerns about the proposed expansion of the CAT's role. These will be set out in detail in response to the specific questions below, but in summary:

- We are concerned about the CAT's capacity to take on significant levels of new cases, particularly if all of the proposed changes to the private action regime take effect. The benefits of the CAT's faster and more flexible case management powers will be lost if the Tribunal is swamped with cases, and particularly if it is expected to run a proportion of these cases in a "fast track" system, which will necessarily result in slower timetables for larger, more complex cases.
- We wonder whether the CAT (as a tribunal whose panels may comprise only one legally qualified member and where decisions may be taken by majority) is the appropriate forum to determine liability in matters where the consequences of a finding of infringement are so serious. Please see our comments in relation to Question 2 below.
- We can see no justification for departing from established English law principles relating to proving causation and quantum of loss by introducing a rebuttable presumption of loss in cartel cases.

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

In principle we agree that competition cases are best heard in the specialist forum of the CAT. As recognised by the Government, expanding the role of the CAT would allow it to strengthen its expertise in competition issues and take advantage of its flexible case management procedures.

Amending section 16 of the Enterprise Act to enable the courts to transfer competition law cases to the CAT would give the courts more flexibility to ensure that competition cases are heard in the most appropriate venue. We agree with the Government that any such power to transfer all or part of cases should be discretionary, to allow the presiding judge to determine whether such a transfer would be appropriate in the particular circumstances. However, it would be important to establish and maintain clarity in relation to the applicable limitation periods for both follow-on and stand-alone claims.

In addition, we note that the Government considers that the CAT currently has the capacity to deal with additional cases whilst still hearing appeals quickly and effectively. We query whether this will remain to be the case, should all of the Government's proposals be enacted in the proposed format. Apart from cases transferred from the courts, and the additional standalone cases that would be brought directly before the CAT, we consider that the Government's proposals on collective actions and fast track cases could result in an influx of claims, a significant number of which may not be meritorious (as discussed further below). The additional work required to certify collective actions, and to resolve appropriate SME cases within six months, could damage the CAT's currently effective and flexible case management procedures.

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

We wonder whether the CAT (as a tribunal whose panels may comprise only one legally qualified member and where decisions may be taken by majority) is the appropriate forum to determine liability in matters where the consequences of a finding of infringement are so serious. Determination of liability in matters of this nature is usually left to members of the judiciary. If the Government is minded to pursue this option, we would ask whether it might also be appropriate for Government to consider introducing rules in relation to the constitution of panels for stand alone cases, so that greater judicial weight sits behind judgments issued in these cases, and for an assessment to be made of the impact that the acquisition of new roles and functions might have on the CAT's capacity and much valued ability to discharge its existing functions.

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

If, following the Government's reforms, the CAT is permitted to hear stand-alone actions, then in principle we agree that the CAT should be able to hear injunctions. This would provide the claimant with an important remedy in the light of a breach of the Competition Act by a defendant, where such breach is causing irreparable damage to a business. As noted by the Consultation, such redress may be the key remedy required by the claimant, and the ability to award injunctions may stimulate the defendant to resolve the issue outside of the judicial process.

However, if the CAT is permitted to grant injunctions, we consider that the defendant must be able to seek a cross-undertaking in damages to protect it from unmeritorious claims and damage caused by such a claim. Those damages would have to be proven in the normal way and, if so proven, we see no reason why the defendant should be precluded from claiming them.

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

In theory, we do agree that a fast-track route in the CAT may enable SMEs to challenge potentially anti-competitive behaviour. However, we do not consider that the design elements proposed are realistic, particularly for stand-alone claims (should the CAT be permitted to hear these following reform) where it is hard to see how the complex issue of liability could be resolved without a full examination of the facts and economic markets involved. Please see the response to Question 5 below for more detailed commentary.

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

We question whether the complexities of competition law cases generally would make any such cases suitable for resolution on a fast-track basis (see, for example, the CAT's recent judgment in *2 Travel v Cardiff City Transport*, which reached over 200 pages<sup>1</sup>). In any event, we are concerned that the introduction of such procedures could have a countervailing negative impact on the CAT's prevailing flexible and effective case management procedures.

Subject to these overriding comments, we offer our views as follows on the specific issues raised, including cost thresholds, damage capping and injunctive relief.

*Damage capping*

Capping the level of damages available through any fast-track procedure seems sensible, as it would impose some form of readily determinable limit on the number of cases that may be brought using this procedure. However, we note that the value of a claim is not necessarily indicative of the complexity of a case.

*Costs capping*

We are concerned that a one way costs cap may encourage unmeritorious or speculative claims. In this vein we note that the Consultation itself recognises 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".

The Consultation seems to presume that where the claimant is a SME, the defendant will be a large company with unlimited financial resources. This may not be the case, and allowing a claimant to bring claims with very low financial risk could conceivably allow it to bring a tactical claim against a close competitor of equal financial standing.

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<sup>1</sup>

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

If a costs cap is to be introduced, then we consider that both parties should be subject to the same cap; this would encourage both parties to incur only reasonable costs and allow the claimant to predict the potential costs of any claim and balance them against the expected benefits.

In addition, we note that introducing a one-way costs cap would significantly affect the claimant's incentive to engage in ADR, as costs sanctions for failure to participate would be ineffective. Please see our response to Question 24 below.

The consequences of a finding of liability for infringement is such that the defendant will quite properly wish to mount an appropriate defence. We cannot conceive of a case where a costs cap of £25,000 would be sufficient to allow a defendant to do this.

#### *Injunctive relief*

Please see our response to Question 3 above in relation to the availability of cross undertakings in damages.

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

We have no relevant comments on this 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?**

It is a fundamental principle of English law that the claimant should prove that the defendant's conduct caused the alleged losses, and the level of those losses. We see no reasons for altering the burden of proof and departing from this established principle within the competition law arena.

Such a presumption of loss would, in our view, have two negative consequences.

First, it may encourage claimants to bring unmeritorious or vexatious claims, knowing that the burden of proof lies with the defendant to rebut the presumed level of overcharge. This issue would be particularly acute should the Government introduce an opt-out collective action regime (discussed further below). Rebutting such a presumption will necessarily involve significant time and cost through disclosure and expert evidence to demonstrate the actual impact of the cartel on market prices. If this is combined with the proposals for a one-way costs cap, such additional costs would not be recoverable even where the claimant's allegations are wholly disproved.

Second, it is entirely conceivable that the defendant may be unable to rebut the presumed level of loss, due to the difficulties of establishing with certainty what prices would have been charged in the counterfactual scenarios, in the absence

of the cartel. This may allow claimants to receive damages in excess of their loss, which contradicts the Government's aim of achieving compensation for victims of anti-competitive behaviour, rather than allowing such victims to receive a windfall payment as a result of a competition law infringement.

Separately, it is unclear whether the existence of a rebuttable presumption of loss would affect the ability of a defendant to invoke the passing-on defence. Contrary to the Government's proposals, this may make it harder for the defendant to invoke such an argument and, in that event, may allow the claimant to recover windfall payments that are unjustified.

As to the question of the level of any presumed loss, we consider that it is impossible to accurately set a standard figure for an overcharge, even for ostensibly similar breaches of the Competition Act such as cartels. The prevailing market conditions existing in different product and geographic markets will be completely different for each cartel. For example, even within a cartel for one product, it is possible that the impact of the restrictive agreement could be different in different geographic markets, some of which may be subject to stronger residual competition from local (non-cartelist) market participants. In addition, even where an overcharge has been agreed between cartelists, it is likely that each customer that has purchased products at cartelised prices will have paid different prices due to factors such as their size and negotiating strength or the quantities of product purchased.

**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?**

Whilst the principle of passing-on accords with standard English law principles that the claimant must submit evidence of actual loss and should therefore be permitted by the courts and the CAT, the lack of firm judicial pronouncement on the issue creates uncertainty for both defendants and claimants. We agree that there is a case for clarifying the position and consider that the passing-on defence should be expressly allowed via legislation. Negation of the defence could result in unjust enrichment of the claimant, who may have passed on all or most of its loss to its customers, and thus encourage unmeritorious claims.

## **B. COLLECTIVE ACTIONS**

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

As set out in the Consultation, it is clear that few collective actions are successfully brought in the UK for breaches of the Competition Act.

We consider that collective actions for consumers and collective actions for businesses (including SMEs) should be considered separately, as there will be significant differences between the two types of claim.

#### *Collective actions for consumers*

These claims will only focus on damage caused to the end consumer by anti-competitive conduct. As recognised in the Consultation, damage is likely to be small and widely dispersed. As all potential claimants will be at the same level of the supply chain, there can be no issues of whether a consumer has passed on its loss. Consumers generally do not have funds available to bring large, complex litigation, and the damages recoverable are likely to be dwarfed by potential legal costs.

It is clear that the regime for consumer collective actions is not currently working particularly well and should arguably be strengthened. However, we have doubts whether the proposed reform would resolve these issues, as set out further below.

#### *Collective actions for businesses (including SMEs)*

These claims would focus on damage caused to a variety of entities within the supply chain, including direct and indirect purchasers, plus intermediate and final users of the affected product. The level of damages suffered by each claimant may vary widely, and each claimant is likely to have some access to funding to finance a damages claim. Some claimants may have mitigated their loss by passing it on to its customers; others may have absorbed this loss and suffered a consequent drop in profits. The key point is that each claimant's interest is likely to diverge from the next, and this makes the introduction of class actions for businesses somewhat challenging.

This is not to say that the regime could not be strengthened in other ways. For example, it may be more appropriate to strengthen the use of Group Litigation Orders ("GLOs") under Rule 19.6 of the Civil Procedural Rules. Currently, use of GLOs is limited due to the restrictive interpretation of Rule 19 taken by the Court



in *Emerald Supplies Limited v British Airways plc*<sup>2</sup>. This held that for claimants to fall within the same class, and thus be represented by one lead claimant, they must have the same interests and it was therefore not possible to bring a claim on behalf of an undefined class where potential claimants may be both direct and indirect purchasers.

This rule could be relaxed via legislation, either with general application or specifically in relation to breaches of the Competition Act, to allow purchasers at different levels of the supply chain to bring a group action whilst acknowledging that their interests may not be identically aligned.

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 consider that the *policy objectives* are correct, in that the system for private redress and any reforms should be focused on ensuring fair compensation for consumers or businesses that are harmed by anti-competitive behaviour. However, private actions should not offer the opportunity for a windfall, either for the victims or for claims companies, legal firms or other third parties. Deterrence should come primarily from public enforcement, with only residual deterrent effects coming from increased actions for damages by private parties.

However, we do not consider that the proposals as drafted adequately meet these objectives, as they have the potential to swing the pendulum too far in the favour of claimants and thus use private actions as a deterrent in themselves.

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

Please see our response to Question 9 above.

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

Should this proposal be enacted, we agree that it would be sensible to ensure that groups of similar companies do not have access to each other's future cost data, negotiating strategies or other confidential or strategic information that could lead to anti-competitive behaviour. For example, any such information should be restricted to legal advisers or experts and not disseminated within the claimant group.

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<sup>2</sup> [2009] EWCH 741 (Ch.)

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

In cases where there is a true identity of interests, we see no reason to differentiate between follow-on and stand-alone 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.**

*Opt-out collective actions*

Opt-out collective actions are highly controversial in Europe, and the Consultation recognises many stakeholders' concerns that an opt-out regime could result in the excessive litigation culture seen in the USA. Opt-out collective actions are widely recognised as one of the key reasons for the excessive litigation in the US, as class sizes are potentially so large that "a defendant often may choose to settle a class action wholly lacking in merit rather than run even a miniscule risk of a catastrophic judgment"<sup>3</sup>. This in turn encourages spurious claims and the introduction of opt-out collective actions in the UK could ultimately foster the 'compensation culture' that prevails in the US.

We consider that the Government should wait to evaluate the results of its other reforms before returning to the issue of opt-out collective actions. If opt-out actions are to proceed, we consider that it is indispensable that representative bodies are limited to reputable bodies pre-certified by the Government, to prevent "ambulance chasing" and ensure cases have merit. This should be limited to bodies such as *Which?* or an ombudsman.

*Pre-damages Opt-In Collective Actions*

Of the Government's suggested alternative approaches in relation to collective actions, we would favour the pre-damages opt-in model as the best alternative. This would allow potential claimants to actively opt-in to a claim for damages at any stage up to quantification of loss, and then receive the damages calculated in that action. Any claimants that do not opt out during trial would be bound by the court's findings, although it is not clear from the Consultation whether they would be bound only as to liability or also as to quantum (e.g. determination of a percentage overcharge).

This approach seems to be an acceptable 'half-way house' between opt-in actions, which are clearly not functioning efficiently, and opt-out actions, which we consider would foster a compensation culture and potentially enable claimants to benefit from a windfall gain to which they are not entitled. The pre-

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<sup>3</sup> Beisner, J. and Borden, C., 'Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience' (2005) *Institute for Legal Reform*, p.22

damages opt-in route would essentially create a binding decision as to the liability and potentially quantum of any other claimants, who could then bring the equivalent to a follow-on action should they wish to pursue their claims. This would mean any future claims are managed faster and more efficiently than having to run through the entire case again.

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

We consider this is an appropriate list of issues for certification.

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

We consider that the focus of the private action regime in the UK should be on achieving fair compensation for victims of anti-competitive behaviour, not additional deterrence for defendants. As noted by the Consultation, punitive levels of damages encourage high volumes of litigation and should be avoided.

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

We see no reason depart from standard loser-pays rule. As noted by the Consultation, the preservation of the loser-pays rule is critical to ensure fairness for defendants and to provide a check on unmeritorious claims.

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?**

The loser-pays rule should only be adjusted in those situations currently provided for within normal civil litigation, such as vexatious or inappropriate conduct by one of the parties. Any exceptions to such rules should apply equally to both the claimant and the defendant.

We do not understand the Government's proposal in Question 18(b). If the claimant loses then there will be no damages fund. If, however, the defendant loses then it should pay damages plus costs, as is the usual scenario.

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

We consider that maintaining the prohibition on contingency fees is a good means of ensuring that claimants receive the compensation they deserve.

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 do not consider it is appropriate for unclaimed damages to be paid to another body without the consent of the defendant. As noted in our response to Question 14 above, the Government's proposals are apparently aimed at enhancing compensation for victims of anti-competitive behaviour, not increasing deterrence. Where damages lie unclaimed by affected purchasers, these should be returned to the defendant after a pre-determined period (including all applicable interest). This is consistent with the standard English law principle that loss must be proved before damages are payable. Failure to return unclaimed funds essentially means that the damages fund becomes an additional financial sanction for anti-competitive behaviour.

To ensure maximum monies are paid out from any fund established for potential claimants, the representative body could be given the right or perhaps the obligation to advertise that funds are available to those who can prove their eligibility. We see no reason why the defendant would have any influence over that advertising.

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?**

Please see our comments in relation to Question 20 above. We do not consider that unclaimed funds should be paid to any specified body but should be returned to the defendant.

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 in relation to Question 14 above. This power should be restricted to appropriate representative bodies who represent consumers, not profit-making organisations.

We agree that the competition authority should not bring such actions as it is important to maintain a divide between public and private enforcement. Bringing such actions may create a conflict of interest for the regulator as through their information gathering powers they have access to a greater range of information than would potentially be obtainable under civil disclosure rules, and this may consequently reduce companies' incentives to apply for leniency.

In addition, the competition regulators are unlikely to have the resource to pursue such actions.

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?**

Please see our comments in relation to Questions 14 and 22 above.

**C. ENCOURAGING ALTERNATIVE DISPUTE RESOLUTION**

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

As with all claims brought under the Civil Procedure Rules, we consider that exploring ADR options can be an efficient method of resolving claims prior to reaching trial. The most appropriate method of ADR is, in our view, mediation, as it allows the parties to put across their arguments and for the full set of facts to be taken into account and discussed in an objective manner.

We agree that ADR should not be made mandatory. It would be a waste of time and costs for a party that has no intention to settle to engage in any ADR process, as it will undoubtedly fail. However, as in normal civil cases, the parties are expected to consider all ADR options, and introducing costs sanctions for both the claimant and the defendant for any unreasonable failure to engage in ADR should be considered.

One important point to note is that the Government's suggestions as to capping the claimant's liability for costs could significantly reduce the claimant's incentive to genuinely engage in ADR of any sort.

**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 consider that a pre-action protocol for all competition law claims would be an effective method of ensuring effective management of cases. For example, we consider that introducing an obligation for the claimant to clearly set out the nature of its complaint, why it considers that the Competition Act/Article 101/102 TFEU has been breached, how it has been affected, and basic information on its alleged loss, would act as an effective method to (i) encourage early dialogue and potential resolution prior to formal judicial proceedings; (ii) focus the parties on the issues at stake; and (iii) discourage unmeritorious or vexatious claims.

As set out above, we note that any costs sanctions imposed for failure to follow any pre-action protocol should apply equally to both parties, and would be negated by any one-way costs capping in favour of the claimant.

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

We see no reason why the CAT rules on formal settlement offers should not mirror those in place under Part 36 of the Civil Procedure 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.**

We do not envisage any relevant initiatives at this time.

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?**

If opt-out collective actions are permitted, this would effectively permit collective settlement, so there would be no need to make separate provision.

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 do not consider that competition authorities should be given the power to order a redress scheme, as this is essentially allowing them to impose financial sanctions on the infringing company twice. This would raise questions in relation to the principle of *non bis in idem*. Competition authorities' fining guidelines already take into account the seriousness of the infringement, which can take into account the harm caused to consumers, and we consider it would be inappropriate to allow them to force an additional settlement.

We note that the Consultation is contradictory in respect of whether infringers of competition law should have the right to appeal a decision by the OFT to impose any redress scheme (paragraph 6.32 *versus* paragraph 6.37). We consider that any such decision must be appealable to the CAT as it is the equivalent of imposing an additional fine.

However, competition authorities should be able to accept a voluntary redress scheme, and we consider that they should be encouraged to use these more regularly as part of settlement negotiations as the offer of redress demonstrates a willingness on the part of the infringer to repair harm caused by its action. There is no reason why a company should not be able voluntarily to bind itself to try to redress any harm caused, although this should not affect injured parties' rights to bring actions should this redress not adequately cover their losses (we would expect normal rules to apply and any compensation received via the voluntary settlement to be taken into account when calculating quantum). We accept the Government's position that a decision not to approve a voluntary redress scheme should not be appealable, as any such appeal could simply allow the relevant company to delay the conclusion of the investigation.

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 consider that a voluntary offer to provide redress is a recognition of liability and demonstrates a desire to co-operate by remedying or reducing the harm caused by the anti-competitive behaviour. We consider this would be meritorious of a small reduction in fine (perhaps 5-10%), as it demonstrates a level of cooperation beyond that legally required.



**D. COMPLEMENTING THE PUBLIC ENFORCEMENT REGIME**

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

We consider that an extended role for private actions would complement public enforcement in the sense that public investigations and fines do not provide redress directly to the victims of anti-competitive behaviour. It would therefore fill the gap in terms of compensation, and increased activity levels may provide additional deterrence.

However, we consider that any steps taken to facilitate private actions should be taken for the purpose of filling this gap, mindful of the dangers of creating a compensation culture.

**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?**

We agree that leniency documents must be protected from disclosure in third party damages actions if the competition authorities are to preserve the efficiency of their immunity and leniency policies. A failure to protect such documents will undoubtedly serve as a significant disincentive to approach or cooperate with the regulators, as third party damages claims may represent a significantly larger financial liability than any reduction in fine received from the regulator, particularly in situations of "Type B" leniency applicants, who do not receive full immunity. We consider that this would have a significant negative impact on the efficiency of the public enforcement regime in the UK.

We propose that the following categories of documents produced or submitted in connection with an immunity or leniency application should be protected from disclosure by the competition authorities:

- Leniency applications and other documents created for the purposes of the leniency application: these documents would not have been created if the company had not applied for leniency and must stay confidential;
- Documents submitted to the competition authority that the company was not obliged to provide in response to a request for information;<sup>4</sup>
- Documents that list or describe the documents referred to in the previous bullet point; and

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<sup>4</sup>

Please note that we are not suggesting that this category of documents should be given protection from disclosure under the standard disclosure rules, just disclosure by the competition authorities.

- Responses to Statements of Objections or other communications that refer to information contained in the leniency applications.

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 consider that protecting whistleblowers and other leniency applicants from joint and several liability will encourage companies to cooperate with the competition authorities during investigations, and that a proposal to introduce such protection should be welcomed.

We consider that all leniency applicants should be entitled to the same protection, as this would add an additional incentive to make a leniency application if the company has evidence of anti-competitive behaviour, even if immunity is no longer available.

We consider that it would be unfair to limit this advantage to the immunity applicant, when the "second in line" may be only minutes behind the first. If all members of the cartel have applied for leniency or immunity, then each is still liable for its own conduct and claimants' rights to bring actions for damages would be unaffected. The point of the regime is to increase the incentives on companies to cooperate, to enhance the functionality and efficiency of the immunity and leniency regime that has been so valuable to date in allowing the OFT to seek out and bring to an end cartel activity.

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 additional comments on this Question.

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

We have no further comments at this stage.

If the Department for Business, Innovation and Skills wishes to discuss any of our comments further, please do not hesitate to contact Adam Collinson on 0845 498 4234.

**Eversheds LLP**  
**24 July 2012**

# Faculty of Advocates

**RESPONSE**

by

**THE FACULTY OF ADVOCATES**

to

**BIS-Department for Business Innovation & Skills**

on

**Private Actions in Competition Law**

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**COMMITTEE**

**Lord Davidson of Glen Clova, Q.C.**

**Jonathan C. Lake, Q.C.**

**James D. Mc. F. H. Mure, Advocate**

**Eoghainn Maclean, Advocate**

**Sean Smith, Advocate**

**Almira Delibegovic-Broome, Advocate**

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**The Faculty has been asked to formulate a Response to a Consultation Document by the BIS-Department for Business Innovation & Skills on Private Actions in Competition Law. The response is attached hereto.**

**Edinburgh  
10 July 2012**

**IN NAME OF THE LAW REFORM COMMITTEE**



**Convener**

## 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](mailto: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 <span style="float: right;">√</span>
Academic
Other (please describe):

## CONSULTATION ON PRIVATE ACTIONS IN COMPETITION LAW

### A CONSULTATION ON OPTIONS FOR REFORM

Response by

The Faculty Of Advocates

#### General remarks

We are very much in favour of the general aims and proposals set out in the consultation paper. In our view, it makes good sense to seek to complement reforms to the public competition framework with a stronger private actions system.

The one concern we do have – and it is a serious one - is that the substantive proposals do not seek to accommodate in any substantive way the fact that Scotland has a different legal and judicial system.

The consultation paper recognises that different legal terms are used in Scotland. The differences between the two legal systems are not merely terminological. The proposals do not address the question of how a stronger private action system could or should be encouraged in Scotland, through the proposals that focus on the CAT as a major venue for competition actions in the UK.

In particular we note:

- The CAT can sit as a Scottish tribunal where it decides that it has Scottish jurisdiction; it can also sit outside London.
- Nevertheless, the CAT has heard only three Scottish cases. In the last one (and the only one in which one of the parties was represented by dual English and Scottish qualified counsel), despite the request by the applicant for the hearings to be held in Scotland, CAT held that not to be possible considering, among other things, the pressure of time and the need for the tribunal to spend time reading the papers rather than travelling.
- The CAT Rules are modelled partly on the English CPR (CAT Guide to Proceedings 2005, para 3.2).
- With the exception of *Merger Action Group v Secretary of State for Business Enterprise and Regulatory Reform* where, as mentioned above, the applicants were represented by dual qualified counsel, all the other parties in that case and all the parties in the other two Scottish cases (*Aberdeen Journals v DGFT* and *Claymore Dairies v OFT*) were represented by English qualified barristers.

- In that context (i.e. rules of procedure modelled on the English CPR and parties' representatives being qualified under English law), the CAT has, although sitting as a Scottish tribunal, proceeded on occasions on the basis of legal submissions based purely on English, rather than Scots, law (see *Claymore Dairies Ltd v OFT* [2004] CAT 16, observing at para 107 that no Scottish authority was cited to it; or *Claymore Dairies Ltd v OFT* [2006] CAT 5, where expenses were awarded on a 'summary assessment' basis, even though such a basis does not exist under Scots law).
- The CAT does not seem to be prepared to insist, where parties do not propose to proceed on the basis of submissions under Scots law, that a hearing be adjourned in order that counsel can research properly the relevant points, or to advise the parties in advance of a hearing that reliance on purely English authorities would not be acceptable.
- It is interesting to note that in those cases, the OFT was also represented by English qualified barristers. That may have been seen as convenient, as both the CAT and the OFT are based in London. However, such an approach by a government body does not encourage the maintenance and development of competition law expertise outside London.
- Further, the OFT is the UK consumer and competition body, established by statute as a non-ministerial government department. As noted by Lord Rodger in *Tehrani v Secretary of State for the Home Department* 2007 SC (HL) 1, at pp 24 - 26, in Scottish proceedings, where an action is instituted against a government department, the Advocate General for Scotland is the appropriate person to sue (the Crown Suits (Scotland) Act 1857, as amended by the Scotland Act 1998). The involvement of the Advocate General for Scotland ensures that appropriate Scots law arguments are made, as necessary. And yet, in those proceedings where the CAT sits as a Scottish tribunal, there is no such assurance.
- All these points raise questions in relation to the present consultation proposals. What does it really mean when the CAT says that it sits as a Scottish tribunal? How are 'tribunal-type' applications from individuals or business in Scotland to be encouraged if the main venue for those applications is going to be a tribunal based in London, operating under rules of procedure familiar to English lawyers and where substantive legal points may also be decided under English law? On the basis of the circumstances which we have noted above, a Scottish SME might well consider the Court of Session in Edinburgh a more convenient and accessible venue than the CAT in London.

We did not think it was appropriate or possible for us to seek to formulate a detailed set of proposals to deal with these issues. They are, however, from the perspective of Scotland and Scots law, important issues. We hope that identifying them will prompt the Government to re-assess the present proposals from the perspective of all parts of the UK. One way of dealing with these issues might be for the CAT to operate in line with the way that other UK-wide tribunals operate - namely with a base in Scotland, served by Scottish judges, tribunal members and permanent personnel - so that parties are able to access the system in Scotland relatively cheaply and quickly.

Our comments on particular consultation questions below are all subject to our general comments. We express our views only in relation to some of the consultation questions.

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?**

- Yes, subject to our comments above about taking into account properly the Scottish aspects.

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

- Yes. However, in any Scottish case, the relevant Scots law should be applied.

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

- Yes, it would be 'toothless' otherwise. However, any Scottish application would need to be considered properly by reference to the relevant Scots law.

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

- We believe this would be appropriate for relatively simple and low value cases.

#### **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?**

- Yes, the suggested 20% figures seem appropriate.

#### **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?**

- We are in favour of such an approach.

**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?**

- 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.**

**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?**

- Yes.

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

- Yes.

**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?**

- 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.**

- In general, this seems to be an appropriate approach.

**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?**

- Judging by the information provided on their website, it does not look as if the Access to Justice Foundation has UK-wide coverage, but is limited to England & Wales only. That being the case, we do not think it would be the most appropriate recipient of the funds.

**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?**

- We are of the view that it should be restricted only to those who have suffered harm.

**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?**

- All cases.

**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?**

- We are in favour of the proposal.

**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 do not think that compensation to ‘victims’ and penalty for breach of legislation should be connected in that way.

**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?**

- We do not believe that parties should be able to avoid both civil liability and fine.
- We should also mention that leniency applications in Scotland are handled by the Crown Office.

**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.

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**URN 12/742RF**

# Financial Services Authority

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Tony Monblat  
Consumer and Competition Policy  
Department of Business, Innovation and Skills

24 July 2012

Dear Tony

## **BIS consultation: Private actions in Competition Law: A consultation on options for reform**

This is the Financial Services Consumer Panel's response to the BIS consultation on enhancing private actions in competition law.

The Financial Services Consumer Panel is a statutory body established by the Financial Services and Markets Act 2000 (FSMA) to represent the interests of consumers in the financial services industry. The core element of this role is to advise the Financial Services Authority (FSA) on its policy and practices, and monitor its effectiveness, but we also consider the impact on consumers of activities outside, but related to, the FSA's remit.

The Panel believes effective competition is fundamental to protecting consumers. Anti-competitive behaviour by firms can restrict choice, force consumers to pay unnecessarily high charges and lead to sub-standard service from financial services providers. We therefore strongly support the principles which underpin the Government's proposals. These proposals should allow inappropriate conduct to be addressed quickly and effectively, and increase deterrence by raising the prospect and cost of successful challenge by affected parties.

We strongly support proposals to encourage more cases to be resolved through an Alternative Dispute Resolution (ADR) process. We see significant consumer benefits associated with ADR in terms of enabling cases to be resolved swiftly and cost effectively. However, we agree that while ADR should be encouraged it should not be mandated. The success of an ADR process relies on the willingness of both parties to resolve a case before a final court ruling is made. Where one party is intent on going to court, requiring an ADR to be considered will create unnecessary delay and cost.

We also support the intention to allow consumers and businesses to seek collective redress through the courts. This should allow large scale failures in the financial market, which the regulator is unwilling or unable to tackle promptly, to be resolved in a timely manner. This power would have benefited the large number of consumers that were mis-sold Payment Protection Insurance (PPI) several years after the FSA had identified, but failed to take effective action to correct, significant market failures.

The Panel strongly supports the intention to give powers to the Office of Fair Trading (OFT), or its replacement organisation, to require firms to pay consumer redress

where their anti-competitive behaviour has led to losses. We agree the OFT should have discretion to determine whether to seek compensation for victims, considering the suitability of a case, but believe there should be a presumption in favour of seeking redress unless there are good reasons not to pursue this action.

We believe the Government should commit to undertaking a post-implementation review to assess how these reforms are being used in practice. This review should consider the degree to which consumers and firms are empowered to challenge anti-competitive behaviour and check whether there has been a rise in superfluous claims. Such a rise could be damaging to competition and economic growth as well as undermining the Competition Appeal Tribunal's ability to resolve genuine cases.

The Panel believes that strengthening public actions should not undermine or replace the role of a public competition authority. It is essential that the new Competition and Markets Authority (CMA) is well resourced and able to build on the important work undertaken by the OFT and Competition Commission (CC). This is especially important in the area of financial services as the draft Financial Services Bill does not provide for the new Financial Conduct Authority (FCA) to have concurrent competition powers like other industry regulators (such as the utilities regulator Ofgem). The CMA will therefore have a fundamental role in correcting any competition failures in the financial services market.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Adam Phillips', with a long, sweeping horizontal stroke extending to the right.

Adam Phillips  
Panel Chair

# **Firstassist legal expenses insurance**



## 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](mailto: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.

**Small to Medium Enterprise**

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?**

Yes, provided that CAT is reformed to overcome some of the current issues and problems that have arisen, including the following:

- Applicable law
- Limitation by Defendant – makes CAT very unattractive
- Pure follow-on actions – makes CAT very unattractive

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

Yes. As per answer to question 1 above, we believe that this would substantially increase the potential for the CAT to be a 'true' competition law forum, to which cases could be transferred.

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

Yes. Granting an interim injunction is an early remedy familiar in intellectual property disputes and experience of the Patents County Court will no doubt be of assistance here.

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

Yes. The fast track route would be most suitable in high volume, low value claims. It appears to be envisaged that a fast track route be applicable in cases where the Claimant contends that the Defendant has abused its dominant position. This may well require an early consideration of the Defendant's market position and that may best be achieved by a Court appointed expert who advises the Court of its view and such expert finding being binding on the parties, albeit allowing for representation by both sides to be made.

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

We support any change to the current regime that will promote access to justice and support the obtainment of redress for the claimant.

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

Yes. Better use should be made of case management by the court, to prevent the oppressive use of procedural and cost tactics to thwart legitimate claims. Costs management powers such as costs capping, protective costs orders and rule governing the costs of any Part 20 claims run in parallel should be used.

Case by case cost caps and cost protection orders may be appropriate and will allow the Court to make early decisions that are suitable to that particular claimant and case.

The use of Court appointed experts would reduce substantially costs and the ability to argue points without reducing fairness to both the Claimant and Defendant.

**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. Where there has been a finding by the OFT or the European Commission of cartel activity then there should be a rebuttable presumption of overcharge but not of specific loss to the Claimant. Accordingly, it is our belief that there is not a single generic appropriate figure.

**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?**

No submission is made.

**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 do not believe the current regime is working adequately and believe therefore that it should be extended and strengthened. Very few cases are able to be brought despite the number of investigations and findings. It is our belief that both individuals and SME's who are victims of price fixing cartel practices are often unable to obtain redress. There is an irony, which has been complained of for some time, that fines may be enforced by the government at their choosing but the victims are never adequately compensated. On the basis of this understanding and experience we believe that the current collective action regime is not working.

The current regime allows Defendants to use costs oppression and to argue on the basis of technical arguments that they should not be liable, which is an unjust position and offers no deterrent. Removing these obstacles would enable access to justice and would serve as an appropriate deterrent to prevent abuse of the law.

The current position in the CAT is that limitation is determined by each Defendant. Should that position remain then the CAT will be an unworkable forum allowing guilty parties to evade claims purely based on whether they made a substantive appeal of a Decision. Additionally those that continue to appeal cannot be pursued without leave of the CAT and thus actions for compensation will inevitably be delayed. This of itself will attract cartelists to appeal decisions simply to prevent compensation claims.

Additionally, named Defendants pursuing Part 20 Claims in parallel with defending action introduces the risk that an unsuccessful Claimant (possibly on a pure technicality) will inherit the Part 20 defendant costs which have been passed to the successful Defendant in the primary action and those costs so passed to the Defendant can then be passed to the Claimant albeit from separate proceedings. Separate consideration therefore is required to when contribution proceedings can be brought and whether those costs can be shielded from the Claimant.

Applicable law and therefore limitation arguments (albeit to a lesser effect in the CAT) need to be addressed as there is no reason why an equally guilty carteliser should be allowed to avoid liability simply because they committed their offence in a different jurisdiction. Once and for all clarification of joint and several liability needs codification to end the current debate on the said liability.

Further the uncertainty as to economic evidence means that settlement negotiations are weighted against the Claimant and make Part 36 offers an imprecise tool – costs consequences being one more of luck than judgment.

Given the costs obstacles, the number and breadth of solicitors who are able to act against cartelists is limited. Many law firms are also conflicted and therefore cannot act against a carteliser. These are often the larger more sophisticated firms. This should be addressed with tighter cost and case management.

**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.**

Yes. Where there are common issues to be decided then there should be a mechanism by which such issues that are common to a group of Claimants can be decided on behalf of all. That may dictate that there are elements of an action that can be dealt with on a collective basis and element which must remain individual to the Claimant. There is no reason why case management could not be used to decide which elements may be subject to a collective approach.

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

Yes. There is no reason why a collective approach for breaches of competition law should be restricted to consumers. From our experience, both individuals and SME's have rights they need to have a forum through which to enforce. Both individuals and SME's require a solicitor with skill and expertise to bring their case and insurance to protect from costs risk. Efficient use of CAT or Court time, the minimisation of legal expense to all parties, the prevention of irreconcilable judgments (including at interlocutory stage) must be in the interests of all parties. The law must be a sufficient deterrent to protect both small businesses and consumers who are equally affected.

Our experience is that both small businesses and individuals struggle to utilise the current regime and to bring a successful claim. Therefore, we believe reform should be applicable to both groups. All need a good law firm who is not conflicted and can make an economic case to bring the matter, plus ATE insurance to share the risk.

No two cases will be the same, some will be high damages and low costs and other will be the converse. Therefore the more funding options available to a Claimant the greater the prospect of effective private sector challenges to anti-competitive behaviour.

It is our view that the expansion of the themes of this consultation into broader collective redress should be welcomed.

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

No submission is made.

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

No submission is made.

**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 believe that an opt out regime will be a better deterrent to prevent cartellists from breaking the law and will promote access to justice. In our experience the "opt-in" regime places huge responsibility for finding victims and 'book building' upon the solicitor. It is therefore extremely

difficult in the vast majority of cases to get actions off the ground. This is a large financial and administrative burden without the certainty of financial reward. In some cases the solicitor might wait years before recovering any costs and doing so at all when acting upon a CFA is uncertain. The implementation of the Legal Aid Sentencing and Punishment of Offenders bill will inevitably exaggerate this issue. How then will the firms find the victims and book build.

Opt-out collective actions will require there to be commonality and certainly is appropriate where there are consumers who cannot have passed-on the overcharge.

In all other cases opt-out may only be appropriate for common issues which may or may not apply to the individual case. This then appears to be a case management tool that needs to be considered on a case by case basis.

These would appear to be consideration not dissimilar to the applicability of a GLO or use of a representative case management procedure.

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

No submission is made.

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

No submission is made.

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

Yes. The loser pays rules deter speculative or unmeritorious claims.

One has to bear in mind that where collective actions might be available for stand-alone as well as follow-on actions then costs should follow the event. The Claimant must still show that it has a legitimate claim for loss it has incurred.

Costs management powers such as costs capping, protective costs orders and rule governing the costs of any Part 20 claims run in parallel must be considered as discussed above.

**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?**

No. Please refer to response to Q17.

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

No, contingency fees should not be prohibited in collective actions cases. Damages based agreements (DBAs) will soon be allowed. Damages at the risk of the claimant will make good the shortfall in legal costs. We do not believe that competition law cases will be specifically excluded from the DBA regime.

The availability of new methods of funding should increase the number of cases being that can be brought. We agree with the findings of Lord Justice Jackson in his review of costs in civil litigation in this regard.

**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.**

One approach might be to look at using the pot of unclaimed sums to address the shortfall in legal aid. This would promote access to justice and enable legitimate claims to be brought.

**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 submission is made.

**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?**

No submission is made.

**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?**

No. It is our view that legal firms and/or third party funders should be able to bring collective actions. It must be in the interests of providing access to justice that claims are brought that could and would not otherwise be brought. The cartel is still deterred by the case being brought and compensation is still paid to those who have incurred loss. The solicitor is able to find and commit funds to 'book build'. Making the process easier would naturally encourage a broader depth of legal skill and expertise in this field, which must benefit the claimant.

There is no reason to suggest that legal firms and third party funders could not bring such actions indeed law firms with third party funding or with the benefit of After the Event Insurance already bring cartel compensation cases. The Claimant will be subject to the management powers of the CAT or Court and the Claimant still is required to prove its case and loss.

We can see no reason with the ability to bring collective actions should be restricted.

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

Yes. ADR should be strongly encouraged. If it were compulsory it may just add a layer of unnecessary cost where the parties were not minded to approach ADR with a view to settlement. ADR in any event will only be effective at a point where the parties each have sufficient data to form a view on the claim.

**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?**

No submission is made.

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

Yes. Consideration needs to be given to the point at which parties may constructively consider the value of the claim. If such reform were coupled with a single CAT appointed expert then this may be meritorious.

**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.**

No submission is made.

**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?**

No submission is made.

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

No submission is made.

**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?**

No submission is made.

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

No submission is made.

**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?**

No submission is made.

**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 believe that some but not complete protection should be offered to whistleblowers. We believe that whistleblowers should be treated with leniency with regards to the fines imposed upon them but should not with regard to the compensation that is rightly due to victims.

**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 submission is made.

**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.

Firstassist Legal Expenses Insurance Limited, an ATE insurance intermediary and part of the Burford Group (the world's largest litigation funder) make this submission as part of the consultation process. Our intention in making this contribution is to draw upon our significant experience and involvement in competition law cases.

Although we recognise that the consultation is focused upon competition law cases, it is the view in our experience that the same issues apply to broader collective redress outside of this arena. The comments we make in this response are equally applicable to collective redress in which we also have considerable experience.



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**URN 12/742RF**

# **Freshfields Bruckhaus Deringer LLP**

# **RESPONSE TO THE DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS' CONSULTATION ON OPTIONS FOR REFORM OF PRIVATE ACTIONS IN COMPETITION LAW**

## **1. INTRODUCTION AND EXECUTIVE SUMMARY**

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to respond to the Department for Business, Innovation and Skills' (**BIS**) consultation on options for reform of private actions in competition law, published on 24 April 2012 (the *Consultation*).

1.2 Our comments are based on our significant expertise in bringing and defending private actions involving competition law – both “follow-on” and “stand-alone” litigation – in the English courts, as well as across Europe and worldwide. Further information regarding our dispute resolution and antitrust, competition and trade practices can be found on our website.

1.3 The comments contained in this paper are those of Freshfields Bruckhaus Deringer LLP. They do not necessarily represent the views of any of our individual clients, or of all Freshfields Bruckhaus Deringer LLP lawyers.

1.4 For the reasons set out below, our views on the key issues raised in the Consultation are, in outline, as follows:

- (a) Many of the measures proposed to expand the Competition Appeal Tribunal's (**CAT's**) jurisdiction are to be welcomed. We support the proposal to allow the CAT to hear stand-alone claims in addition to follow-on claims, as well as measures allowing the CAT to grant injunctions (subject to appropriate safeguards). We also support allowing the transfer of competition cases to the CAT.
- (b) We are opposed, however, to the proposed “fast-track” procedure, insofar as it would grant SMEs a privileged status and enhance their procedural rights above those of other claimants in the CAT. We also oppose the proposal to introduce cost caps and to dispense with the usual requirement for a cross-undertaking in damages to be provided by SME claimants.
- (c) As regards collective actions, we favour an effective opt-in system that will allow those consumers who have a genuine interest in obtaining compensation to pursue their claim rapidly and cost-effectively. We are concerned that the introduction of opt-out collective actions, coupled with funding arrangements such as contingency fees or recoverable conditional fee agreements, will simply encourage expensive, lawyer-driven litigation.
- (d) We agree with the proposals to encourage voluntary ADR. We also consider there needs to be provision for collective settlements to allow defendants to resolve their liability before litigation commences. In addition, we believe that changes to the CAT Rules are needed in order to encourage effective

settlements to be made and accepted early on. In line with this objective, it is important also to address the difficulties of making Part 36 offers in the High Court in circumstances where defendants' liability is joint and several.

- (e) We agree that immunity and leniency applications should be protected from disclosure in litigation. We also consider that immunity applicants' liability in follow-on private damages actions should be limited to damages arising from their own sales.

1.5 We expand on each of these in the response below.

## **2. GENERAL OBSERVATIONS**

2.1 We welcome BIS's initiative to strengthen the UK's public competition enforcement regime by encouraging private-sector led challenges to anti-competitive behaviour in appropriate circumstances. To that end, many of the proposals in the Consultation will bring about improvements to the current private actions regime and, we anticipate, will help to achieve BIS's stated aims of benefitting consumers and promoting productivity, innovation and economic growth.

2.2 In particular, the proposals to expand the jurisdiction of the UK's specialist CAT are to be welcomed, as are several of the proposals to promote alternative dispute resolution (**ADR**) in competition cases, and the proposals to safeguard the public enforcement regime by protecting leniency statements from disclosure in private litigation.

2.3 We also recognise the need to ensure that consumers and businesses who are the victims of anti-competitive practices are able to obtain effective redress for their losses. However, we consider that BIS's proposal to introduce an opt-out collective actions regime for competition cases is not the preferable way to meet this objective, which should, in our view, instead be achieved by ensuring an effective opt-in system. The introduction of opt-out collective actions will encourage expensive, lawyer-driven litigation that will not achieve the best results for victims of competition law infringements. We explain these concerns below and propose an alternative model which, we believe, would better ensure that compensation is paid to victims in the most efficient way.

2.4 The Consultation presents four broad possibilities for reform (at paragraph 3.21 of the Consultation): option 1, to do nothing; option 2, to reform court jurisdictions, encourage ADR and protect public enforcement; option 3, to allow private opt-out collective actions in competition cases (both follow-on and stand-alone), in addition to the option 2 reforms; and option 4, to allow the OFT to take follow-on opt-out collective actions in competition cases, in addition to the option 2 reforms. BIS's stated preference is for option 3.

2.5 Our preference is for option 2 *plus* provisions regarding collective settlement and settlement offers, and possibly an alternative mechanism for compensating victims of anti-competitive conduct, as we explain below. We disagree with option 1, since in our view elements of the current regime are in need of reform; and we disagree with option 3 which advocates private opt-out collective actions, for the

reasons we set out in section 4 below. We also disagree with the option 4 suggestion of allowing the OFT to pursue follow-on actions. In circumstances where, as the competition regulator, the OFT would already have investigated and quite possibly imposed fines on the undertakings involved, we believe it would be inappropriate for the OFT to bring claims against the very same undertakings in the courts. To do so would, in our view, be to confuse the public functions of the competition regulator with the system of private enforcement, which should be driven by those suffering loss as a result of the anti-competitive conduct.

2.6 The Consultation is divided into four broad areas: the role of the CAT; collective actions; encouraging ADR; and complementing the public enforcement regime. This response follows the same structure, responding to the questions asked and providing further comments as appropriate at the relevant stage.

### **3. THE ROLE OF THE CAT**

3.1 We believe that the CAT is an under-used forum for the resolution of competition law disputes in the UK, and in recent years a number of judgments have limited or given rise to uncertainty regarding its jurisdiction. The CAT, staffed as it is with specialist competition judges, lawyers and economists, is in many ways the best-placed forum to hear competition damages claims. Measures to expand the CAT's jurisdiction to hear stand-alone claims in addition to follow-on claims are to be welcomed, as are measures allowing the CAT to grant injunctions (subject to appropriate safeguards), as the High Court does at present. Subject to sufficient procedural safeguards and transitional provisions, we also believe that provisions allowing the transfer of competition cases to the CAT would be sensible.

3.2 Some of the other proposals set out in the Consultation, however, raise concerns:

- (a) Implementation of the proposed “fast-track route” for SMEs would, in our view, be undesirable. In circumstances where the courts (including the CAT) have strong case management powers, provisions such as the imposition of statutory timetables requiring cases to be heard within six months risk prejudicing all parties, and particularly defendants: claimants will be able to prepare the claim before filing, without working to the deadlines of a fast-track timetable; defendants (or claimants, if a counterclaim is made) will be prejudiced if they are given insufficient time to gather evidence and prepare their defence.
- (b) The proposal to allow the CAT to grant injunctions is a positive initiative; but we would caution against dispensing with the usual requirement to give a cross-undertaking in damages. Cross-undertakings are key to ensuring that claimants seeking an injunction appropriately focus their applications, and are a necessary safeguard against unmeritorious applications and against injunctions that turn out to be incorrectly granted. The courts and the CAT have sufficient case management powers to limit applicants' exposure under a cross-undertaking where it is just to do so. A specific mechanism removing the requirement for SMEs to give cross-undertakings at all goes too far, and could give rise to abuse (to the detriment of legitimate commercial business

practices – including by other SMEs) if cross-undertakings are dispensed with as a matter of course.

- (c) Similarly, the proposal to cap SMEs' costs liability (to £25,000 or at all) is unjustified. The courts and the CAT always have the discretion to award costs as they see fit. Imposing a costs cap places an unnecessary costs burden on defendants, who may incur significant financial loss even if they successfully defend an unmeritorious claim. The courts and the CAT should be allowed to determine costs on a case-by-case basis – as they do at present – under their existing case management powers. While we understand the rationale for imposing a cost cap of £25,000 if fast track claims could be conducted in the way envisaged in the proposals, in reality this is unlikely to be the case: legal fees, economists' fees and other litigation costs will far exceed the proposed cap even in claims of modest value. To the extent that more active case management on this issue needs to be encouraged, this could be achieved by way of guidelines issued to judges, not by the introduction of cost caps.

3.3 We respond more fully to each of the questions in the Consultation in turn below.

**Question 1: should Section 16 of the Enterprise Act be amended to enable the courts to transfer competition law cases to the CAT?**

3.4 Yes. As the Consultation notes, the CAT is staffed with specialist competition judges, lawyers and economists who are particularly well-placed to hear private competition actions. We consider that allowing the transfer of competition cases to the CAT is a necessary part of bolstering the CAT's jurisdiction to hear these cases. Such transfer could be provided for by amending Part 30 of the Civil Procedure Rules (*CPR*) and the CAT Rules, and should follow the same process as Part 30.

3.5 We note that the Consultation does not address the question of how a case that concerns several areas of law – of which competition law is one – would be dealt with. Consideration will need to be given as to the correct forum in which to bring the claim; and to how to deal with competition issues arising for the first time in a counterclaim.

3.6 We note also that the Consultation does not address consequential issues that would, if this proposal were to be adopted, need resolving:

- (a) The need to align the limitation period applicable to cases brought in the High Court with the existing restriction on the CAT's jurisdiction to hear cases after certain periods of time (the latter in particular being the subject of uncertainty at present, following judgments of the CAT and the Court of Appeal in *Emerson*,<sup>1</sup> *BCL*<sup>2</sup> and *Deutsche Bahn*<sup>3</sup>).

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<sup>1</sup> [2007] CAT 28.

<sup>2</sup> [2010] EWCA Civ 1258.

<sup>3</sup> [2011] CAT 16.

- (b) Ensuring certainty as regards costs if the proposals such as costs capping are to be introduced in the CAT (addressed more fully at paragraph 3.17 below), which risk suddenly exposing defendants to higher unrecoverable costs if a case is commenced in the High Court and subsequently transferred to the CAT. The costs consequences of transferring from the High Court to the CAT could become significant from 2013 when the Jackson Reforms are implemented in High Court proceedings, in particular if contingency fees (Damages Based Agreements (**DBAs**)) are prohibited in CAT proceedings.
- (c) Adequate transitional provisions for cases already commenced.

3.7 While these issues may not be suitable for further discussion at this stage, they are important considerations and we would welcome a dialogue as to how they should be addressed.

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

**Question 3: should the CAT be allowed to grant injunctions?**

3.8 We agree that the CAT is particularly well-placed to hear competition cases, and in our view this includes determining whether an infringement has occurred as well as issues of causation and quantum. In our view, the CAT should also have the ability to grant injunctions in appropriate cases. The CAT has already proved – under its function as an appeal court against decisions of the competition regulators – that it has the expertise and resources to conduct ‘trials’ into allegations of competition law infringements. Against this background, it is entirely appropriate to grant the CAT jurisdiction to hear stand-alone claims and to grant injunctions.

3.9 The CAT’s power to grant injunctions should be exercised in accordance with the existing requirements for injunctions, including the usual requirement for the applicant to give a cross-undertaking in damages. The cross-undertaking is an important check on applicants seeking injunctions, intended to ensure that injunctions are sought only in cases where there is a genuine need. In particular, in circumstances where there is potentially no costs risk to the applicant (if other proposals in the Consultation, addressed in section 4 below, were to be adopted), removing this requirement for injunctions sought in the CAT risks opening the floodgates to unmeritorious applications sought as a matter of routine, and indeed to claims being brought for the sole purpose of seeking an injunction – multiplying the CAT’s case-load and unjustifiably burdening respondents having to defend such applications.

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

3.10 The Consultation’s proposals for a fast-track system applicable to SMEs include a waiver/limitation of SME applicants’ obligation to provide cross-undertakings in damages; capping SME claimants’ liability for defendants’ costs to £25,000; aiming to hear fast-track cases within six months and on paper wherever possible; and keeping oral hearings to a minimum, “normally a matter of days”.

3.11 We welcome attempts to address difficulties in obtaining redress faced by companies who have suffered loss and damage as a result of competition law infringements. The proposal to set up a ‘Plain English’ web page on the CAT’s website in order to ensure the fullest access possible to information about bringing claims, for example, is to be welcomed. Effective use of the Competition Pro-Bono Service (*CBPS*) for those with limited access to specialist legal advice should also be encouraged.

3.12 However, we are opposed to granting SMEs (or any other category of claimants) a privileged status and enhanced procedural rights above those of other claimants in the CAT. The Consultation does not define what is meant by the term “SME”; nor does it present convincing evidence of a need for SMEs (however defined) to be granted the privileged status proposed. The procedure for obtaining redress in the CAT should, in our view, be set up to ensure that redress is available to all claimants equally and that defendants’ rights of defence are fully protected.

3.13 Further, on a practical level we are concerned that some of the “fast track” proposals will place onerous burdens on defendants, will not ensure a fair trial, and are unnecessary. We also question whether some of the proposals would comply with the requirements of the European Convention on Human Rights and Fundamental Freedoms (*ECHR*), in particular Article 6, and the Charter of Fundamental Rights of the European Union (*EU Charter*).

3.14 The Consultation acknowledges that “[a]pplying these principles [of a cheaper, quicker and simpler process for SMEs] to competition cases will be a significant challenge”; that the experience of the Patents County Court (to which an analogy is drawn at paragraph 4.27 of the Consultation) is “not directly comparable to the proposal of a competition fast track”; and that “even simple competition cases would be too complex to be heard in the county courts”. In our view, a meaningful comparison between competition cases and those heard in the Patents County Court cannot be made. Competition cases tend to be complex, reliant on significant factual and (in particular for abuse of dominance cases) economic evidence from both sides (derived from sources going beyond the parties), which must be compiled and then tested in cross-examination. Attempting to resolve the issues on the papers and/or within six months would in many cases do justice to neither side of the dispute: there would be insufficient time properly to make out or defend a claim; insufficient time to conduct adequate disclosure exercises; and the quality of the evidence submitted would suffer as a result of the time constraints and the knowledge that it would not be subjected to cross-examination.

3.15 The fast track is, in particular, unworkable for cases involving market definition and dominance issues. Claimants, who will be able to prepare the claim with their lawyers, economists and experts before filing, will have a significant advantage over defendants, who will be required to defend according to the short timetable provided for. The CAT will also be faced with having to rule on complex issues such as these (which frequently take the competition regulators years to determine) in a very compressed timeframe.



3.16 In addition, seeking to limit hearings to “a matter of days” is likely to be counter-productive: it risks preventing defendants from being able adequately to defend themselves in the time available in the hearing, but could also operate to the detriment of both parties if there is insufficient time available, for example, for pleadings to be amended or evidence adequately to be considered. The recent *2 Travel Group Plc v Cardiff City Transport Services Ltd* damages claim<sup>4</sup> involved a two-week hearing with expert evidence on both sides (as well as witnesses of fact), and the *Enron v English, Welsh and Scottish Railway* case<sup>5</sup> involved a hearing lasting five days. Both were follow-on cases; where a stand-alone claim is brought and an infringement must therefore also be established, they are likely to take substantially longer.

3.17 We are also concerned that imposing a costs cap in favour of SMEs (whether limited to £25,000 or another amount) would remove an important safeguard for defendants – many of which themselves may have limited resources, and who may incur significant financial loss even if they successfully defend an unmeritorious claim. Costs caps could also have the unintended consequence of removing incentives for claimants to limit their pleadings to the strongest arguments – leading to longer (not shorter) trials. Further, by sheltering claimants from any significant costs exposure, cost caps remove incentives for claimants to enter into formal settlements (which provide for a costs-shifting mechanism) where reasonable settlement offers are put forward, ultimately increasing the use of judicial resources where cases might otherwise have settled.

3.18 Paragraph 4.34 of the Consultation notes that an alternative to the proposed fast-track procedure would be to give greater discretion to the CAT to decide outcomes, duration of the hearings, cost caps etc. on a case-by-case basis. In our view, this is the most appropriate way of enabling SMEs to bring claims while ensuring a fair trial for all parties. We believe the CAT’s case management powers are already sufficiently flexible to allow the active case management that might be required in order to ensure SMEs can bring claims; to the extent these case management powers need bolstering (e.g. with greater regard being had to the resources of either party), that could be achieved by amending the CAT’s Rules, or by way of guidelines issued to judges. We would oppose, however, the introduction of “recommended” caps, time-limits or case management directions that could become of default application. Claims must be managed on a case-by-case basis if a just and equitable outcome is to be achieved.

3.19 Alternatively, BIS could consider introducing some of the CPR costs rules regarding the provision of fee estimates at the outset of proceedings, which are then subject to judicial supervision. There could also be a set of recommended costs recovery limits dependant on the nature of the claim, duration of the hearing and amount of evidence involved – adopting an approach used in some continental jurisdictions. This would enable claimants to quantify their risk more precisely and at the same time set a framework within which the CAT decides how to exercise its discretion.

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<sup>4</sup> [2012] CAT 19.

<sup>5</sup> [2009] CAT 7.

3.20 Paragraph 4.35 of the Consultation also discusses possible involvement by the CAT and/or OFT at an early stage in proceedings, warning defendants of a “reasonable case” against them. For the reasons set out in that paragraph, we agree that this approach would be inappropriate, and inconsistent with the CAT’s and OFT’s respective roles as adjudicator and regulator.

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

3.21 The proposed fast-track procedure’s focus is on non-monetary resolutions such as injunctions (at paragraph 4.32 of the Consultation). To that end, claimants seeking damages would presumably not use the fast-track process, and in those circumstances we understand the logic that damages could be capped. We note, however, that SME claimants needing a speedy outcome can seek (interim) injunctions, and request the hearing of preliminary issues and split trials to defer, for example, complicated damages assessments until after key issues such as abuse of dominance findings (and consequential orders to bring the abuse to an end) have been determined.

**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?**

3.22 No presumption of loss should be introduced into cartel cases. It is fundamental to claims in tort (which include cartel cases) that the claimant must establish loss and causation. To assume any uplift, let alone a 20% uplift – as proposed in the Consultation – is contrary to this fundamental principle. Such a presumption would be unnecessary: may infringe defendants’ rights to a presumption of innocence under the ECHR and the EU Charter; and would be unjust.<sup>6</sup> We note in this regard that the study on which the reference to 20% uplift is based in fact acknowledges a wide variation and frequently very little (if any) overcharge in cartel cases.

3.23 As regards the necessity of introducing a presumption of a 20% uplift, it is key to note that the disclosure requirements in English litigation (whether in the courts or the CAT) give claimants access to all relevant documents in the defendant’s possession. As such, insofar as documents in the defendants’ possession may reveal the extent of any overcharge resulting from the cartel, they are disclosable to the claimant under the existing rules. Similarly, claimants can apply for specific disclosure of documents they consider are relevant but have not been disclosed. At trial, they have the opportunity to call and to cross-examine witnesses who may have information about the extent of any overcharge. In our view, the perceived inequality of arms between claimants and defendants insofar as determining uplift is concerned is therefore exaggerated. Following disclosure and witness statements, a claimant is effectively in the same or a very similar position to the defendant to calculate any damage.

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<sup>6</sup> BIS might consider balancing any such presumption with a presumption of 90% pass-through in all cases not brought by end users/consumers.

3.24 Further, a presumption of a 20% uplift in our view moves away from a compensatory regime and towards a private damages regime aimed at punishing infringing companies. In order to maintain the compensatory nature of private damages actions, they should be confined to compensating the claimant for its loss.

**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?**

3.25 We agree with the Government's position (at paragraph 4.49 of the Consultation) that there is not a strong case for new legislation explicitly addressing passing-on. Claimants must demonstrate that they have suffered loss in order to recover damages; where that loss has been passed on, the claimant should not be allowed to recover it – although claimants further down the supply chain may be able to do so. Preventing pass-on as an argument would potentially award a windfall to direct-purchaser claimants who do not suffer all/any of the loss themselves, and contradicts the compensating principle of damages. It would also act as an impediment to indirect-purchaser claimants: the judgment of the European Court of Justice in *Manfredi*,<sup>7</sup> which requires “any individual” to be able to seek compensation in respect of loss suffered as a result of infringement of Article 101 TFEU, is an important consideration in this regard.

#### **4. COLLECTIVE ACTIONS**

4.1 We comment below on the issues raised by the Consultation's proposals concerning collective actions.

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

**Question 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.**

4.2 We do not perceive particular difficulties inherent in the current system of private damages actions as set out in sections 47A and 47B of the Competition Act 1998 (other than potentially the jurisdiction provisions that have been the subject of a number of appeals, noted above). We therefore do not consider it necessary to implement fundamental changes to the present private damages regime to facilitate collective actions.

4.3 The ever-growing number of actions brought by businesses (of all sizes) is evidence that private redress is already being sought in the CAT on the basis of infringements of competition law. Many of these actions are brought by several claimants together, who are jointly represented, and funded by a combination of conditional fee agreements (*CFAs*) and after-the-event (*ATE*) insurance which significantly reduces their costs exposure – a consideration likely to be especially

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<sup>7</sup> Joined Cases C-295/04 to C-298/04.

relevant for SMEs.<sup>8</sup> We therefore do not perceive difficulties in the current system that would justify the introduction of collective actions, whether opt-in or opt-out.

4.4 As regards consumer claims, we note that the *Replica Football Kit*<sup>9</sup> action brought by Which? did not fail to agree a settlement with the defendant, but rather failed to conjure sufficient interest among consumers and therefore take-up of the settlement that was agreed. This indicates that the primary difficulty faced by those seeking to bring collective actions under the current regime appears to be insufficient consumer interest in such claims. To our mind, consumers who opt-*in* to an action are more likely to be interested in litigation (and therefore to claim under any settlement or damages award in their favour) than consumers represented in an opt-*out* system. We would therefore favour amending the current system to ensure an effective opt-in system that will allow those consumers who have a genuine interest in obtaining compensation to pursue their claim rapidly and cost-effectively. Some of the Consultation's proposals (e.g. extending the CAT's jurisdiction, allowing for transfer of cases, enabling effective settlement offers to be made in the CAT) could, in our view, address shortcomings in the present opt-in system; we would propose reviewing the effectiveness of those provisions over the coming few years before any move is made to shift to an opt-out system.

4.5 We also consider that an opt-out system would serve as an additional punishment for companies found to have infringed competition law. In circumstances where heavy fines can already be imposed by the competition regulators, there is in our view already sufficient punishment under the present system.

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

4.6 Section 47B of the Competition Act 1998 already enables consumer collective actions to be brought in the CAT by specified bodies (currently the Consumers' Association); and section 47A enables individuals, including businesses, to bring private actions, which they frequently do as a 'group' of claimants represented by a single law firm.

4.7 Subject to the comments above, we do not consider either consumers or businesses to be disadvantaged by the current restrictions on collective actions – requiring consumers to opt-in and requiring each business claimant in the 'group' to have its own claim against the defendant(s). As such, as noted above, we do not consider it necessary to reform these provisions in order for effective redress to be available to victims of competition law infringements. To the extent there are perceived difficulties by businesses in bringing claims, however, this could be addressed by amending the CAT Rules to facilitate the bringing of Group Litigation Orders in the CAT.

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<sup>8</sup> The entry into force of Part II of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, in April 2013, will prevent ATE insurance premiums and CFA uplifts from being recoverable; however, the Damages Based Agreements (contingency fees) that are introduced could have a similar effect of limiting claimants' cost exposure, at least in High Court proceedings.

<sup>9</sup> See 'Which? press release, 9 January 2008.

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

4.8 Where several claimants bring a claim jointly, or under the existing provisions for group litigation (CPR Part 19B), it is already incumbent on them to ensure that the claim is not used as a vehicle for anti-competitive information sharing. In our view, the usual application of competition rules to co-claimants and co-defendants is a sufficient deterrent to prevent such information sharing.

4.9 As regards information passing between claimants and defendants, the CAT (and, to some extent, the High Court) uses its case management powers to establish “confidentiality rings” into which commercially sensitive information is disclosed, as a mechanism for ensuring that parties have access to information relevant to the litigation while ensuring that it cannot be used for anti-competitive purposes by others within the business. We consider that the use of mechanisms such as confidentiality rings are sufficient to give the courts and the CAT power to prevent the use of competition litigation for anti-competitive purposes.

**Question 13: should collective actions be allowed in stand-alone as well as follow-on cases?**

4.10 Yes. We support expanding the CAT’s jurisdiction to hear stand-alone as well as follow-on claims; we would not distinguish collective actions from any other claims in this regard.

**Question 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.**

4.11 As noted above, we oppose the introduction of opt-out collective actions. While we support the Government’s twin objectives of increasing growth by empowering small businesses to tackle anti-competitive behaviour that is stifling their business, and promoting fairness by enabling consumers and businesses who have suffered loss due to anti-competitive behaviour to obtain redress (at paragraph 3.6 of the Consultation), we consider that opt-out collective actions could achieve these aims at too great a cost to businesses, by exposing them to lawyer-driven litigation. In our view, the Government’s objectives can be achieved through reforms that do not have the risk of such negative consequences (and which, as set out above, do not give small businesses a privileged status and enhanced procedural rights above other claimants).

4.12 We also consider that the Consultation over-estimates the difficulties of bringing private actions, and therefore proposes unnecessary ‘solutions’ of which an opt-out collective actions regime is one. In particular:

- (a) The Consultation states (at paragraph 3.12) that “[c]urrently it is rare for consumers and SMEs to obtain redress from those who have breached competition law”, citing in support a study finding that in the period 2005-08 “there were only 41 competition cases of any kind which came before the courts and where judgments were delivered.” This fails to take account, however, of all those cases which are commenced but which do not come to

court or result in a judgment – many of which are successfully settled. We also consider that the survey cited in the Consultation indicating that only 43 out-of-court settlements were reached during the period 2000-05 is likely to under-state the true figure, given that settlements tend to be confidential and might well be entered into before litigation is formally commenced. Moreover, the equivalent figures for 2006 onwards would, in our view, likely be significantly greater.

- (b) At paragraph 3.14, the Consultation cites consumers' lack of interest in the *Which? Replica Football Kit* litigation as evidence of the inadequacy of existing legal mechanisms. *Replica Football Kit* was simply a case where few people were bothered whether they were overcharged and consumers were no doubt either happy with the compensation arrangements offered by the infringers, or content to allow the regulators to punish with appropriate fines. There was a lack of interest in the litigation on that occasion. It is not illustrative of any general position. It is, moreover, not clear to us why the introduction of opt-out collective actions should be expected to increase consumers' interest in damages claims, as noted above.

4.13 We believe that the introduction of an opt-out collective actions regime, in addition to some of the other proposals in the Consultation, could in fact be damaging and counter-productive. Some of our principal concerns include:

- (a) Coupled with contingency fees/DBAs (to be introduced from April 2013, at least for High Court proceedings), an opt-out regime risks a shift towards unmeritorious, lawyer-driven claims being brought, leading to the "litigation culture" that exists in jurisdictions such as the US (and which the Consultation states the Government is seeking to avoid).
- (b) Faced with a raft of claims, early settlement becomes more difficult because of the extent of the defendant's exposure. This could lead to delays in settlement offers and therefore to delays in compensation being recovered.
- (c) Defendants may also be reluctant to settle large collective action claims at an early stage of the litigation if unclaimed sums are paid to a third-party, rather than reverting to them. If they know that all of the settlement fund is to be forfeited, lower settlement amounts may be offered, ultimately making less available per claimant than might be the case if defendants know that unclaimed funds will be refunded to them.
- (d) The availability, in principle, of claims by indirect as well as direct purchasers adds to the complexity of an opt-out collective actions regime, and to calculating the appropriate level of compensation to claimants at each level of the supply chain. This is a complexity not faced in the US, where class actions are limited to direct purchasers.

4.14 For these reasons, we instead support an effective opt-in collective actions regime. In our view, an opt-in regime is preferable as claimants will by definition have expressed some interest in the claim, meaning the likelihood of unmeritorious

claims is reduced and any settlement or compensation paid would go to those suffering loss as a result of the infringement rather than to a third-party.

**Question 15: what are your views on the proposed list of issues to be addressed at certification?**

4.15 If opt-out collective actions are to be introduced, we consider that strict procedural controls must be applied at the certification stage in order to protect businesses from unscrupulous claimant lawyers and funders, and to ensure that spurious, plainly unmeritorious claims cannot be brought.

4.16 We agree that a preliminary merits test and a minimum numerosity test should be applied, and that a sufficient commonality of issues should exist amongst claimants in the class. We also agree that a “superiority” test (i.e. that a collective action is the most suitable means of resolving the common issues) should be applied; that the CAT should ensure that the claim is brought by an adequate representative of the class; and that there are sufficient funds to meet the costs of the litigation (including the defendant’s costs). To this end, the Government could consider permitting only those designated consumer bodies entitled to file “super-complaints” with the OFT<sup>10</sup>, or otherwise Court-approved bodies, to bring opt-out actions on behalf of consumers.

**Question 16: should treble or other punitive damages continue to be prohibited in collective actions?**

4.17 Consistent with a compensatory damages regime, we believe that treble damages should continue to be prohibited: the availability of treble damages is an element of the US class action system that encourages the litigation culture the Government is seeking to avoid in the UK.

4.18 Similarly, punitive/exemplary damages should continue to be available only in extreme cases (where the CAT already has discretion to award them).

**Question 17: should the loser-pays rule be maintained for collective actions?**

**Question 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?**

4.19 The “loser pays” principle should be maintained. It is a fundamental principle in English litigation, acting as a check on otherwise spurious or unmeritorious claims being brought, and as an incentive for claimants to focus their claims. The loser-pays principle is also the platform by which Part 36 offers (in the High Court) can be made, which are crucial to keeping down court time spent on resolving disputes otherwise capable of settlement. This control over the claimant’s costs is already weakened by the availability of ATE insurance; we do not believe it is in the interests of justice to weaken it further.

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<sup>10</sup> Under ss.11(5) and (6) of the Enterprise Act 2002, and the *Guidance for bodies seeking designation as super-complainants* of March 2009.

4.20 We do not consider that the operation of this principle should depend on the nature of the claim, and so should apply to collective actions in the ordinary way.

**Question 19: should contingency fees continue to be prohibited in collective action cases?**

4.21 Yes. The driving force behind any collective actions regime should be obtaining compensation for losses suffered by the claimants. The Government should resist making windfalls available for law firms and litigation funders.

4.22 Further, allowing contingency fees in collective action cases risks driving financially-motivated claims by claimant lawyers or litigation funders whose first interest is in maximising their own return on the litigation rather than obtaining compensation for the claimants themselves. To this end, such actions give rise to significant conflict between lawyer and client.

4.23 In addition, contingency fees coupled with an opt-out collective actions regime have been identified as contributing to the litigation culture of the US that the Government is seeking to avoid in the UK, as noted above. Existing rules on ATE insurance and CFAs are already being abused to put undue pressure on defendants and to achieve potentially unjust outcomes to the benefit, primarily, of claimants' lawyers rather than the claimants themselves. We note the Jackson Reforms to be implemented next year will prevent these premiums from being recoverable from defendants. That should not be undermined by the introduction of contingency fees/DBAs that serve a similar purpose.

4.24 In our view, therefore, contingency fees should be prohibited in collective actions in order to minimise an abuse of the system by financially-motivated claimant lawyers and funders. In light of the forthcoming entry into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (in April 2013), which introduces contingency fees/DBAs, we would therefore advocate a carve-out from that provision in respect of collective actions.

**Question 20: what are the relative merits of paying unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums?**

**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?**

4.25 We are firmly opposed to cy-près. It is inconsistent with a system aiming to compensate those who have suffered losses as a result of competition law infringements that unclaimed funds should be paid over to a third-party body (be it the Access to Justice Foundation or any other organisation). To require this is to add a further layer of punishment to the competition regime, which already provides for penalties to be imposed on infringing companies by the regulators. Unclaimed funds should therefore revert to the defendant.



**Question 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?**

**Question 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?**

4.26 We do not agree that any form of opt-out collective action system should be brought by the competition regulators at all. The competition regulators fulfil the public function of enforcement of the competition laws, imposing fines to ensure deterrence (and, where applicable, remedies to ensure compliance in the future). It is not the function of the regulator to bring private damages actions. Aside from questions of limited resources and financing, it is not in our view appropriate for the regulator to act outside the public sphere in this way.

4.27 The bodies permitted to bring collective actions should be limited as set out in response to question 15 above.

## **5. ENCOURAGING ALTERNATIVE DISPUTE RESOLUTION**

5.1 We agree that dispute resolution outside of litigation will frequently provide the best outcome for all parties. There are many forms of alternative dispute resolution (*ADR*) – from arbitration to informal settlement discussions, as well as expert determinations, mediations and so on. The vast majority of commercial cases – of which competition cases are a part – settle before they reach trial. Many other disputes are never formally litigated: the threat of litigation, followed by commercial negotiations (with or without legal input), lead to resolution of the issue outside the court system. To this end, ADR already plays an important part in competition litigation.

5.2 We support the policy of encouraging parties to consider alternative forms of dispute resolution. However, to be effective ADR must be voluntary. Parties cannot be “forced” to negotiate or to settle.

5.3 Nor should the competition regulators become involved in ADR. We consider that their role of public enforcement should be kept separate from the private enforcement regime that is the domain of the CAT and the courts.

5.4 We comment below on some of the Consultation’s proposals as regards ADR. We would also, however, suggest (as we have for several years) that the Government consider a further possibility of introducing an “expert determination”-type ADR option, perhaps linked to the leniency regime, that could present an inexpensive and straightforward form of ADR. Under such an option, a panel of experts could seek to determine, on a rough-and-ready basis, issues of overcharge and pass-on, so that those applying for leniency (or otherwise seeking to participate in the scheme) might be awarded a further reduction in their fine in return for funding the ADR scheme and paying compensation based on the findings of the expert panel. Claimants choosing to litigate to try to recover more than the amount on offer through the ADR scheme

would be exposed to adverse costs awards if they failed to better the offer at trial (or on settlement later on). The details of such a scheme would clearly need to be considered in some detail, and we emphasise the need for a scheme of this type – as with all ADR – to be optional for defendants as well as claimants. We would be pleased to discuss this with BIS further should the establishment of such a scheme be of interest to the Government.

**Question 24: do you agree that ADR in competition private actions should be strongly encouraged but not made mandatory?**

**Question 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?**

5.5 As noted above, ADR has a key role to play in resolving disputes relating to competition law infringements. But ADR is only effective, in our experience, if both sides of the dispute are engaged in the process and are interested in resolving the dispute. To function effectively, ADR should therefore be voluntary but not mandatory.

5.6 We note that the Pre-Action Protocol under the CPR (applicable to High Court proceedings) requires parties to consider ADR prior to commencing proceedings, and that compliance with the Pre-Action Protocol can be taken into account by the Court in awarding costs. Our suggestion would be to adopt a similar requirement for parties litigating in the CAT.

**Question 26: should the CAT rules governing formal settlement offers be amended?**

**Question 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?**

5.7 The current rules governing formal settlement offers in the CAT are ineffective and provide little incentive for defendants to make early settlement offers or for claimants to accept them early on. Significantly, the CAT Rules (specifically, Rule 43, which enables the claimant to accept a settlement offer any time up to 14 days before trial) provide very little costs incentive for defendants to offer to settle a case, and the limited ability to withdraw a settlement offer once made in fact provides a strong disincentive to making an offer at all. We agree that the CAT Rules should therefore be amended to encourage defendants to make formal settlement offers and to incentivise claimants to accept them.<sup>11</sup>

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<sup>11</sup> We also note that the Consultation refers (at paragraph 6.14) to “Calderbank offers”, which allow defendants to offer to settle a case at a certain level of damages and which, if rejected by the claimant, can be used by the defendant at the end of the case to support an application for costs incurred after the offer was made to be shifted to the claimant. We consider that the CAT’s discretion in the area of costs already allows such Calderbank offers to be made and relied on, although formalising this in the CAT’s Rules would be helpful.

5.8 The hurdles faced by defendants seeking to make formal settlement offers are, however, not confined to the CAT. While Part 36 of the CPR provides a costs-shifting mechanism applicable to High Court proceedings that seeks to encourage claimants to accept reasonable settlement offers early on, that mechanism does not fit well in claims against joint tortfeasors whose liability is joint and several. As a result, it is difficult for defendants in the High Court as well as the CAT to make a formal settlement offer that will be effective to shift the costs risk and will, once accepted, extinguish the defendant's liability. We would strongly encourage the Government to amend the rules applicable to settlements in both the CAT and the High Court to address this issue.

5.9 We also believe there is a pressing need for provisions governing collective settlement. Many defendants want the ability to make an offer and achieve closure in respect of their liability before litigation commences and which, if accepted by the claimants, will be binding. We therefore support the introduction of a mechanism for concluding collective settlements that will be binding on the parties to them, with appropriate costs consequences to encourage claimants to accept reasonable collective settlement offers made pre-action.

**Question 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?**

**Question 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?**

5.10 The competition regulator's remit is public enforcement, with penalties imposed for reasons of punishment and deterrence. It is not appropriate for the regulators to become involved in private enforcement – whether to implement a redress scheme or to certify voluntary redress schemes; it is a matter for those who have suffered loss as a result of competition law infringements to seek compensation for their loss. Nor is it appropriate for the competition regulators to take account of any redress when determining fines, which in any event are frequently calculated before potential claimants are identified and therefore before an opportunity to make redress arises.

5.11 Moreover, given that the competition regulators are publicly-funded and have limited resources, we would question whether their efforts should be spent on securing compensation for those who might have suffered loss. We consider that the regulators' time and resources are better spent on their public-enforcement tasks of investigating competition law infringements.

## **6. COMPLEMENTING THE PUBLIC ENFORCEMENT REGIME**

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

6.1 We agree with the Consultation's emphasis on the need to avoid damage being caused to the public enforcement system by the use of private actions. Whilst we

acknowledge that private actions complement the public enforcement regime, they should not be allowed to jeopardise the effectiveness of public enforcement by, for example, deterring whistleblowers from coming forward to report cartels. We therefore agree with the Consultation's proposals to protect leniency applications from disclosure in order not to deter such applications being made in the first place, as set out below.

**Question 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?**

6.2 Immunity and leniency applications, whether made orally or in writing, should be protected from disclosure in litigation. Such protection should, in our view, be limited to documents prepared for the purpose of seeking immunity/leniency, and need not extend to contemporaneous documents that may be submitted to the regulator along with the immunity/leniency application (which would be disclosable in the normal course of litigation). This would strike the right balance between protecting the leniency regime by not dissuading companies from seeking immunity/leniency whilst enabling private actions to be brought following on from infringement findings made by the regulators.

6.3 We understand that, following the ECJ's judgment in *Pfleiderer*,<sup>12</sup> the EU is considering adopting legislation at EU level to protect immunity/leniency applications from disclosure in private litigation. It is unclear at present whether the EU will indeed adopt such legislation, but in any event we understand that it is unlikely to extend to immunity/leniency applications made to national regulators. We would therefore encourage the Government to adopt whatever measures it lawfully can, consistent with European law, to protect immunity/leniency applications so as to not undermine public enforcement.

**Question 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?**

**Question 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.**

6.4 We consider that immunity applicants' liability in follow-on private damages actions should be limited to damages arising from their own sales. The protection of immunity/leniency applications (as defined above) from disclosure is an important step. Consideration could also be given to the CAT's limitation rules, which (under *Deutsche Bahn*<sup>13</sup>) currently expose immunity applicants to claims at an earlier stage than other participants in the cartel in circumstances where those other participants appeal against the regulator's decision. If these two issues are addressed, much of the

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<sup>12</sup> Case C-360/09.

<sup>13</sup> *Supra*, note 3.

imbalance, in follow-on claims, between immunity applicants and other participants in the cartel would be mitigated.

6.5 Moreover, the potential application of foreign applicable laws, and claims in other jurisdictions, could undermine efforts in the UK to limit whistle-blowers' or leniency applicants' liability to losses stemming from their own sales to claimants. We would therefore encourage the Government to first review the provisions applicable to disclosure of immunity/leniency documents, and limitation, before implementing further changes whose effectiveness at protecting leniency/immunity applicants, and the public-enforcement regime, could be more limited.