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GC100

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24 July 2012

Dear Mr Monblat,

GC100 Response to the Department for Business, Innovation & Skills' Consultation on Private Actions in Competition Law: Options for Reform

Introduction

The GC100 welcomes the opportunity to respond to this consultation. As you may be aware, the GC100 is the association for the general counsel and company secretaries of companies in the UK FTSE 100. There are currently over 120 members of the group, representing some 80 companies. Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

The Consultation Paper covers a number of issues. The GC100 has concentrated on a number of specific issues which are particularly relevant to its members. It has not, therefore, commented in detail on a number of areas and has not sought to answer all of the questions.

The Competition Appeal Tribunal (CAT)

The GC100 supports the broad sweep of the proposals to give the CAT a more prominent role in competition law enforcement and in hearing private actions. It considers that the CAT has been effective at establishing itself as a specialist tribunal and relatively pragmatic in matters of procedure and approach to hearings.

However, business is interested in the efficient and fair resolution of disputes. It is therefore critical that an enlarged role for the CAT is backed by adequate resources to enable it to fulfil that role effectively.

The GC100 would, therefore, answer yes to Questions 1-3.

SME and fast track

As explained below, the GC100 supports the idea that there may be room for the CAT to adjust its procedure to assist the prosecution of certain types of claim, where this appears appropriate in all the circumstances, and that the CAT could be encouraged to do so quite actively (making use of its

already extensive existing case management powers). However, the GC100 does not support the proposal for specific remedies for SMEs.

First, it does not see why any particular part of the economy should have access to a privileged process. So far as possible, justice should be available on equal terms and it is fundamentally inappropriate to define specific classes of preferred litigants.

Further, it is unclear to the GC100 that SMEs face the problems attributed to them by the Consultation when seeking to bring private actions. SMEs have always had – and continue to have – the right to complain to the competition authorities, which is cheaper than bringing a private action. The competition authorities can also give directions for interim measures to be taken in cases of urgency, which are usually effective immediately. The GC100 understands that many feel that those authorities are slow to take up their cases. However, it seems better to address that issue than to create another route. To the extent that SMEs feel that they have been the victim of anti-competitive behaviour, but the facts are insufficiently clear-cut to allow them cheaply to persuade the competition authorities that there needs to be action, it is wrong that they should be able to impose substantial costs, including public costs, bringing an action on a privileged and protected basis.

Moreover, the GC100 notes that there does not appear to be a single, standard definition of the term "SMEs" in the UK – and that there is a huge range of different types of business that may fall into that group, ranging from micro-businesses at one end to some really quite large and sophisticated businesses at the other end. The GC100 is sceptical whether, in the context of the proposed new rules, the term "SMEs" could be defined in a clear way that limits it to those smaller businesses considered to be at a real disadvantage and which require additional help to bring claims. In any event, the GC100 has not seen evidence that certain categories of business face particular disadvantages under the current system.

To the extent that any particular litigant is disadvantaged, it is open to the CAT to adjust for that through cost capping orders and using the flexibility that it has in its procedures to ensure that a powerful defendant does not exploit that disadvantage so as to impede justice. If it is a matter of injunctive relief, such orders can be made on the merits, with the CAT exercising its discretion as necessary, without the need for prescribed rules to favour SMEs. Similarly, the decision whether to dispense with the usual requirement for a cross-undertaking in damages should be determined on a case-by-case basis, pursuant to the CAT's exercise of the discretion it already has.

The GC100 is also opposed to the idea of a fast track process offered on a default basis (even if not of right) to a given class of claimants (whether SME or others). It has no objection to a fast track process being available in principle. Indeed, in keeping with its wish to see the efficient and low cost resolution of litigation, the GC100 would actively support the CAT in using creative procedures including fast track methodologies in appropriate cases.

However, some competition cases can be extremely complex technically with difficult economic or behavioural evidence. This is not correlated with the size of the claimant. Those cases can have important precedent or other effects, including on the business model of the defendant. It is inappropriate for issues of such importance – which require proper consideration – to be decided on a fast track basis.

The GC100 appreciates that allocation to a fast track would be a decision for the CAT and not

available as of right. However, it is concerned that, in practice, such an arrangement would tend to become a norm or a default. It believes that there would be a far better and more just outcome by encouraging the CAT to exercise greater discretion as suggested under Alternative Options in paragraph 4.34 of the Consultation Paper to reflect the needs of each case.

The GC100 therefore considers that a SME fast track should not be introduced, but that the CAT should continue to maintain its discretion and extensive case management powers to manage claims on a case-by-case basis.

If the government nevertheless considers that it is necessary to introduce a fast track process for a particular class of claimants (however defined), the GC100 proposes that it be reserved for smaller enterprises, as many 'medium-sized' enterprises are quite substantial in size. It should also be subject to a superiority test, as suggested in the class action area, such that the fast track should only be available where the CAT considers that it is clearly superior to deciding the case under normal principles, in the interests of justice, having taken account of what the CAT can achieve through the flexible use of its own procedures. There should also be a *prima facie* assessment of merits before permitting any such SME based application to proceed, to control the risk of abuse. Care should also be taken to ensure that larger companies are not able to use smaller ones to 'front' claims in order to benefit from a fast track route.

There should also be an internal appeal procedure, perhaps to the President of the CAT, of any such decision, given its potential impact on defendants.

Moreover, the right balance should be maintained as regards risks. The GC100 would be very concerned if the discretion proposed in relation to fast track proceedings led to a regular decision to dispense with the requirement of a cross-undertaking in damages or to impose cost caps. The cross-undertaking and 'loser pays' principle are fundamental planks of the English court system to prevent abuse and the bringing of unmeritorious claims. The CAT already has discretion to vary these principles in the cases it deals with; it is unnecessary to change these principles in respect of any category of claimants, SME or otherwise. To the extent any changes are introduced, however, they should be limited to cases in which their application is particularly appropriate.

The GC100's answers to questions 4-6, therefore, are that these issues should be addressed through good and flexible case management techniques by the CAT adapted to the case in hand.

Presumptions on damages

The GC100 is fundamentally opposed to any presumption of damages.

Such an approach undermines the fundamental principle of English law that the claimant bears the burden of proving their loss. It also ignores the fact that disclosure in English litigation (including in actions before the CAT) gives claimants access to relevant documentary evidence held by defendants as to the uplift they might achieve that would assist in calculating loss, and ignores the pragmatic approach the courts have indicated they will take in determining loss (see e.g. *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch) and [2008] EWCA Civ 1086). There is no justification for departing from this fundamental principle in the context of competition damages actions.

Moreover, there appears to be no evidence why 20% (or any other figure) would be the correct

presumption. The very absence of any evidence demonstrates the arbitrary (and therefore dangerous and unfair) nature of such an approach. The statement that 20% is at the lower end of the range that some economists have estimated can be raised by a cartel, is no basis for such a radical step.

Moreover, it is fundamentally incorrect to say that the current system imposes a presumption that a cartel has caused no loss. There is no presumption that a breach of contract or an act of negligence has caused no loss. Rather the principle has always been that the claimant bears the burden of proving what that loss is. If liability is established, the CAT will likely be sympathetic to the effect that there is some loss, in principle; but that should not relieve the claimant from proving what it is.

The passing on defence is an inherent part of this process. English civil law works on the basis of compensation for loss suffered by the claimant, not punishment of the defendant. The prevailing view arising from cases to date is that, as a matter of law (see e.g. *Devenish* [2008] EWCA Civ 1086 per Longmore LJ at para 147 and the remarks of the Chancellor in *Emerald Supplies Ltd and Anor v British Airways plc* [2009] EWHC 741 (Ch)), the passing on defence is available. It would be wholly wrong in policy terms to undermine the whole basis of English civil law by changing this principle. English law should be allowed to develop in accordance with normal legal principles.

The GC100 would answer no to questions 7 and 8.

Collective Actions

The GC100 is deeply concerned as to the possible consequences of the extension of collective action processes, many of its members having been fully exposed to abuses of similar systems in the US. The ability of the claimant bar to exploit such systems for their own benefit is formidable, and controls to restrict abuse are not going to be fully effective. Moreover, the GC100 questions the conclusions the Consultation Paper draws from the *Replica Football Shirts* case. What was clear from that case was that, even where a good settlement was reached, consumers were not interested in obtaining compensation when the value to them of that compensation was relatively small. The GC100 is troubled by the absence of any evidence that, in other such claims involving widely-spread but relatively low-value losses, there is any genuine consumer need or interest in compensation. Any change allowing damage to society by these infringements to be pursued by representatives or agencies needs to be balanced against the risk of abuse by a profit-seeking claimant bar or representatives/agencies who are financially motivated.

In principle, the GC100 does not see philosophically why, if collective actions were available in follow-on actions, they should not also be available in stand-alone actions. Its issue is with the type of such collective actions.

The GC100 opposes the proposal for an opt-out collective action. This fundamentally distorts the position and is open to systematic abuse, in the context of the litigation funding structures that are available, by the claimant bar. This can easily lead to the CAT's procedures being abused to the unfair detriment of defendants.

Moreover, any collective action, of whatever kind, needs to be controlled by a representative claimant, or organisation, that is not operating for private profit but in the wider public interest. A mechanism would therefore need to be in place to scrutinise and rule out plainly profit-driven

claims by, for example, the claimant bar, litigation funders or specially created lobby groups. Restricting claimant representatives to a limited collection of bodies (such as those bodies currently able to bring super-complaints) could serve to limit the bringing of profit-driven claims, as could a requirement to disclose the class or representative's funding arrangements. Collective actions should also be subject to strong procedural controls, including enhanced controls on defining the 'class', a superiority test and a *prima facie* test to rule out plainly unmeritorious claims. While the GC100 does not object in principle to litigation funding, a critical consideration is that conduct of the litigation must be driven by those who have suffered loss, and not the financial aspirations of litigation funders or the claimant bar.

Moreover, if a collective action process is implemented, there should be some process to prevent claims being run where the individual loss is very small or impossible to calculate. There is no social utility in compensation based claims being run in such circumstances; those situations are rightly resolved by the agencies imposing fines in the public interest, rather than by the claimant bar making profits when claimants have suffered no material loss.

Equally, opt-out class actions should only be available to businesses in exceptional circumstances. In the usual course, a process equivalent to a group litigation order (GLO) would meet businesses' legitimate concerns and maintain an appropriate balance between all sectors of the economy, without allowing for abuse by the claimant bar. It should be necessary to have particularly strong evidence to justify the need for opt-out class actions for businesses, and to explain why a process equivalent to the GLO structure would not be sufficient to maintain an appropriate balance between the interests of entities at different levels of the distribution channel.

The GC100 would answer yes to questions 11-13. As to question 14, opt-out collective actions should not be permitted.

Consistent with its concerns as to the potential for abuse, the GC100 would answer as follows to the following questions:

15. Effective safeguards should be put in place at the certification stage, including an acceptable 'claimant representative' test with possible disclosure of the funding arrangements, as well as enhanced controls on defining the 'class', a superiority test and a *prima facie* test as noted above.

16. Treble damages should continue to be prohibited; and punitive and exemplary damages should continue to be available only in extreme cases (where the CAT already has discretion to award them: see the recent judgment in *Cardiff Bus* [2012] CAT 19) – they fundamentally undermine the compensatory nature of English civil litigation. Punishment and related policy issues are the responsibility of the competition authorities.

17 and 18. The 'loser pays' rule should be maintained for collective actions. Collective actions diversify and reduce costs risk. The rule is an important part of ensuring a fair balance between litigants and controlling abuse. The CAT has the power to adjust the impact of costs rules in appropriate cases.

19. Contingency fees should clearly be prohibited in collective action cases. Even the Jackson Report shied away from the explosive cocktail of class actions and contingency fees – two of the drivers of serious abuse in the USA.

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As to questions 20 and 21, the GC100 is fundamentally opposed to the payment of unclaimed damages to any single specified body (or any related cy près doctrine). Consistent with its view that the purpose of civil action is purely compensation, any surplus should be returned to the defendant. It would be demonstrative of the fundamental failure of a collective actions system (and particularly of an opt-out system) that claimants are not seeking to claim damages that they had been awarded: such compensation is precisely the purpose of a collective actions system, punishment being the domain of public enforcement by the competition agencies. Moreover, in circumstances where a penalty has been imposed by the regulator, it is fundamentally unfair that there should be a further, or alternative, penalty imposed by the failure to repay to a company damages that are not needed to provide compensation.

As to questions 22 and 23, the right to bring actions should not be granted to the competition authority. It should be available both to private bodies, but only to suitable not for profit organisations, and to other appropriate public bodies as detailed above.

ADR

The GC100 agrees that ADR in private actions should be encouraged but should not be mandatory. Adoption of a pre-action protocol similar to that applicable to High Court proceedings would address this issue.

The GC100 would, therefore, answer yes to question 24.

Agency Redress

The GC100 is fundamentally opposed to the competition agencies being able to require redress by any route. It fundamentally confuses the public enforcement role of the agency with the private compensation function. The agencies have neither the skills nor the processes to fulfil such a role. There is an inherent risk of the public/policy role being confused with the compensation role: the risk of the agency 'trading' between the two is unacceptable and would undermine confidence in the whole system.

Similarly, the competition agencies should not take account of redress offered by companies when determining the level of fines to impose in the context of their public enforcement role.

The GC100 would answer no to questions 29 and 30.

Protection of whistle-blowers

The GC100 believes that the desire to encourage private actions must be balanced effectively with the need to protect the public enforcement regime, and in particular companies blowing the whistle on cartel behaviour. Immunity and leniency applications are central to the competition agencies' detection and effective investigation of competition law infringements, without which many cartels may never come to light. The GC100 therefore considers it essential that immunity/ leniency applications (i.e. documents prepared for the purposes of seeking immunity or leniency) should be protected from disclosure in private actions. This would strike the right balance between encouraging companies to report cartel behaviour and ensuring the availability of redress through private actions in the courts or the CAT.

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Other matters

The Consultation Paper seems to be based on the actions of the OFT (or its successor). It is suggested that particular care needs to be taken to ensure that all regulators are treated equally and where concurrent powers are available there is no duplication or inconsistent use of those powers.

The Consultation also omits to address fundamental issues concerning matters such as the limitation periods that would apply to actions brought in the CAT or transferred to the CAT – currently the limitation periods in the CAT and High Court differ significantly, potentially creating significant uncertainty for both claimants and defendants.

Yours faithfully

Mary Mullally
Secretary, GC100
0207 202 1245

Greenwich Housing Rights

Dear Sirs,

Please accept the responses below to questions 20 and 21 of the above consultation:

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 single destination for unclaimed sums to a designated body would be of great benefit as:

- It would avoid the need for a periodic or repeated decision-making process to determine the recipient body. Such a process would be labour intensive and could place a drain on the resources intended for the recipient organisation(s).

- A charity or similar organisation could be designated with the intention of using the sums to increase access to justice or promote the cause of those affected by anti-competitive behaviour.

- It would be clear to anti-competitive companies that they would have to pay out the full amount of damages awards and that those awards could be used to increase awareness of anti-competitive behaviour or champion the rights of those affected by anti-competitive behaviour or other injustices.

- It would avoid the administrative complexity of an alternative system of allocating the sums to different bodies, making best use of the sums available.

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?

The Access to Justice (AJF) Foundation is the most appropriate recipient as:

- AJF is an independent charity and trusted national grant maker which acts in the public interest to improve access to justice. AJF has experience of receiving similar funds and distributing them through their grant making activities.

- AJF supports access to justice, which is a core purpose of the reforms, so it makes sense that the damages should be channelled to an organisation that will increase access to justice and help to promote the rights of those affected by anti-competitive behaviour and other forms of injustice.

- Reductions in funding for free legal advice are already severely hampering the ability of existing agencies to provide accessible services.

- AJF supports the free advice sector, which has developed to meet the needs of those who face barriers to legal advice and the justice system because of poverty, social exclusion or lack of education.

- Receipt and distribution of the sums matches AJF's purpose to support free legal assistance and to support access to justice.

Yours Sincerely,

Chris Minnoch
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Guy Beringer

Dear Sir

I refer to Question 21 of the consultation paper and confirm my strong belief that the Access to Justice Foundation would be an ideal recipient of any funds which might become available.

Regards
Guy Beringer

Hackney Community Law Centre

Hackney Community Law Centre

Response to Private Actions in competition law: a consultation on options for reform

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

Yes

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

Yes

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

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

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

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

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

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

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

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

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

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

Q.13 Should collective actions be allowed in stand-alone as well as in follow-on cases?
Q.14 The Government seeks your views on the relative merits of permitting opt-out collective actions, at the discretion of the CAT, when compared to the other options for collective actions.

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

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

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

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

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

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

HCLC 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.

NKLC 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?

HCLC 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

Sean Canning

23 July 2012

Hausfeld & Co LLP

HAUSFELD & CO LLP

CONSULTATION RESPONSE

To	**Department for Business Innovation & Skills (BIS)**
Date	**July 24th 2012**
From	**Hausfeld & Co LLP**
Topic	**Private Actions In Competition law : A Consultation On Options For Reform**

Hausfeld & Co LLP is a leading litigation practice, based in the City of London. We have a broad range of commercial litigation expertise, with particular experience in consumer and competition and antitrust (particularly follow-on damages claims). We currently act for hundreds of business claimants and individuals located throughout Europe and around the world who have incurred financial losses in relation to cartels operating across a range of industries. Among those represented by us are over 40 oil companies in the Marine Hose case[1], hundreds of shippers in the Air Cargo case[2], major European rail companies in the Carbon Graphite case[3] and the bulk of the EU's candle manufacturing industry in the Paraffin Wax case[4].

A number of the cases we are pursuing on behalf of our clients are currently in the High Court and Competition Appeal Tribunal ("CAT") or in confidential settlement. With respect to consumers, we are regularly instructed to advise on various consumer actions. In particular, we assisted Consumer Focus in its action against the energy provider Npower which resulted in a £63m settlement, with online refunds paid to individual consumers in a similar way to the UK air passengers in the BA/Virgin air passenger ticket surcharge case further extrapolated below. Among our competition follow-on group claimants are numerous small to medium enterprises ("SMEs"). We are very familiar with the sensitivities, legal and funding needs of SMEs.

Our particular expertise and commitment in acting for claimants, and long involvement both at the policy and legal practice levels of the design and practical application of various group action procedures both in England and abroad, has given us invaluable experience into the comparative

[1] *Waha Oil Company v Dunlop Oil & Marine Ltd* (HC-09-CO2388), *Waha Oil Company v Bridgestone Industrial Ltd & Ors* (HC-10-CO4218).
[2] *Emerald Supplies Limited and Others v British Airways Plc* (HC-08-C02648).
[3] *Deutsche Bahn AG & Others v Morgan Crucible Company Plc and Others* (CAT 1173/5/7/10).
[4] *Sintesi e Ricerca S.p.A & Others v Royal Dutch Shell plc & Others* (HC-09-C02672), *Carberry Candles Limited & Others v Royal Dutch Shell plc & Others* (HC-11-C03407).

efficacy of existing collective action procedures. We welcome the proposals in this consultation, and will continue through our casework and observations to support consumers and small medium enterprises to access affordable and effective collective redress mechanisms**.**

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

1. Yes; however, this needs to go hand-in-hand with other amendments.

2. Section 16 of the Enterprise Act 2002 makes provision for regulations to be brought into force to enable the transfer of any competition issue in the High Court to the CAT. At present this has not yet been brought into force. However, parties may apply for a follow-on claim in the CAT to be transferred to the High Court pursuant to s47 of the Competition Act. It is anomalous that the CAT should currently have jurisdiction to hear follow-on actions, which may but do not necessarily raise issues calling for the expertise of the CAT's lay membership, but should not have the ability to receive substantive competition law issues from the High Court for determination.

3. In our experience, we find that some cases have to be issued in different courts because of limitation issues. However, there are other reasons why it is advantageous for claimants to issue proceedings in the High Court as opposed to the CAT (e.g. a wider pool of potential defendants to sue, not confined to the four corners of the Commission Decision etc.). Whilst we agree in theory that it should be possible to transfer cases from the High Court to the CAT, as this would enable the High Court to take advantage of the CAT's expertise in appropriate cases, we believe that in order for this process to be utilised by litigation parties these inconsistencies would need to be addressed. Consideration would also need to be given to whether a case outside of the CAT's limitation period could be transferred to the CAT.

4. Even if section 16 were to be "activated", there would be no obligation on a High Court judge seized of a case to transfer the competition law issue(s) to the CAT, but if the judge felt that there was a benefit to the CAT deciding it, then that option would be open. We agree that the transfer should be discretionary and ideally upon the consent of the parties.

5. Generally, any amendment to s 16, and 16 (3) may also require further changes to the Civil Procedure Rules (the "CPR") to ensure consistency. New procedures will presumably need to be drafted which set out the procedures associated with a transfer of a competition case to the CAT as contemplated by s16(3) of the Enterprise Act.

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

6. Yes. We agree in principle that the CAT should be allowed to hear stand-alone as well as follow-on cases. As stated above, it is anomalous that the CAT should currently have jurisdiction to hear follow-on actions, which may but do not necessarily raise issues calling for the expertise of the CAT's lay membership, but do not have the ability to hear stand-alone actions whether transferred from the High Court or commenced in the CAT.

7. We do, however, believe that further consideration needs to be given to this matter. As the consultation document recognises competition may be only one of the issues raised as part of a stand-alone case. Consideration, therefore, needs to be given to the scope of the CAT's jurisdiction.

8. In our view, it would be inefficient and would potentially limit the use of the CAT as a forum for stand-alone actions if a claimant (or defendant by way of a counterclaim) was unable to plead causes of action which were not related to competition law. One practical solution might therefore be for stand-alone cases to be reserved, in terms of chairmanship, to Chancery Division judges[5] (all of whom are Chairmen of the CAT), sitting as usual with two wing members.

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

9. Yes. We agree that if the CAT is to be given a stand-alone jurisdiction, it should be able to entertain applications for injunctive relief.

10. As the consultation document recognises (para 4.2) claimants are frequently less interested in damages than in getting the anticompetitive behaviour to stop. If the CAT is to be properly used as a specialist Tribunal we think that naming the CAT a Superior Court of Record which would allow it to grant injunctions is a necessary condition. This would ordinarily include the power to injunct a defendant in such a proceeding against contract termination where this is found to be anti-competitive.

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

[5] If Commercial Court judges were to be similarly designated, they too could sit as chairman of stand-alone cases.

11. It is by no means certain that a fast track would enable SMEs to tackle anti-competitive behaviour.

12. We agree that SMEs may currently be dissuaded from using the courts to seek redress for breaches of competition law that cause them loss. At Hausfeld we have developed a unique funding arrangement (combination of CFA and ATE insurance) which enables companies to pursue follow-on damages claims at no financial risk to themselves. However, we do not think that this would be possible in stand-alone cases where liability as well as quantum has to be established. Stand-alone cases increase the risk exposure for ATE insurers and lawyers alike. Without ATE insurance, the potential cost exposure is often too large for SMEs to bear. Further, lawyers might be unwilling to undertake cases on a CFA where liability has to be proven as well.

13. Although cost capping goes some way to alleviating this problem, in our experience it would be very difficult to prepare and bring any competition case to court for less than £25,000. As such there may be reluctance for lawyers to take on fast track competition cases.

14. It might be possible to have fast track cases where damages was not a remedy requested (injunctive relief), or if the parties agreed that the overcharge was 20% in a follow-on action; however, even if there were a rebuttable presumption of 20%, if one of the parties challenged the presumption, the costs involved would probably take the case outside of the scope of the fast track.

15. In addition to the financial risk for an SME in bringing a competition claim there is also the issue of resources. Proving loss often requires a substantial amount of data which in turn often requires a lot of man hours searching for invoices, purchases orders etc. SMEs often do not have the human resources necessary to engage in this process of data mining.

16. Rather than seeking to impose a "one size fits all" fast track with pre-determined rigid cost caps, we would suggest that it is likely to be much better to give the CAT flexibility to apply the approach best suited to the case at hand. Practice Directions or a Guide to Proceedings could give claimants a degree of reassurance as to what they can expect, perhaps by reference to case studies, without imposing an unhelpful straitjacket that would either have to set the cost cap too high for some cases or, more likely, far too low for others.

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

17. We agree with the proposals set out in the consultation paper (the "CP"); having said that, we suggest that they should not be codified, but remain flexible, to accommodate variances that will surely arise once these proposals are tested.

18. Cost capping is vital for SMEs in a fast track procedure, and generally the £25,000 limit proposed in the CP is a workable figure in current times for cases claiming damages for anti-competitive conduct.

19. We suggest, however, from our experience in running consumer cases, that for individual consumer claims, this level of cost cap may still present an obstacle. We suggest that if the proposals are to also incentivise consumers with genuine claims to use the process there should either be no order on costs (so that both sides always pay their own costs), or that any adverse costs order should be capped to the amount the claimants has claimed in damages.

20. In terms of the point previously made on flexibility, we suggest that there should be no absolute limit on the amount of damages which can be claimed in the fast track procedure. If, however, a cap is desirable, we would support the proposed £25,000 limit per claimants as appropriate. Claims above that amount may be best referable to the High Court unless there are special circumstances or points of law which may be more appropriately heard in the CAT.

21. We agree also with the availability of injunctive relief as being the most significant form of relief sought for SMEs, and that the CAT is the best forum to grant this on an interim basis before the claim has been developed. There could however be a serious issue with respect to any automatic cross undertakings in damages. This could have the reverse effect of dissuading SMEs to apply for injunctions.

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

22. Yes, we find that the current rules discriminate against claimants in a competition case and we would propose that they be amended to allow a claim to be filed by way of notice. This would be followed by disclosure by the defendants of the confidential version of the Decision etc plus an agreement between the parties on the exchange of data for the purpose of economic analysis.

23. We find that SME claimants are often discouraged from bringing a claim due to potential

repercussions by recalcitrant cartelists. As such, we think that provision should be made in the regulatory decision for any retaliatory conduct to be punished by increased fines.

24. We suggest that there should be clearer rules on limitation, either forcing defendants to agree whether appeals are substantive or for the court to rule on this issue in order to avoid time wasted debating this point.

25. Where claimants or defendants do not possess the data to substantiate the entire claim, which in the claimants' case is often due to the inherent asymmetry of information between the parties, the court should endorse the claimants' estimates. This would ensure that defendants do not exploit the fact they have destroyed or not retained all of the evidence. We would also suggest that the court secure an undertaking from the defendant(s) that evidence has not been destroyed or retained.

26. As stated in the response to Q. 29, we would suggest that a portion of fines be carved out for follow-on action claims so that defendants do not become insolvent or put assets out of reach.

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?

27. Yes. We believe there should be a rebuttable presumption of loss but that this should be available to direct purchasers only. This would make it easier for those most likely to have suffered from the cartel to obtain redress. It would also simplify matters: extending the presumption to indirect purchasers would have overcomplicated matters given they are further removed from the initial overcharge and proving causation and quantification of loss becomes ever more difficult the further down the supply chain they are. Such indirect purchasers would still be able to bring a claim against direct purchasers if they could show that the overcharge, or part of the overcharge, was passed on to them. Any legislation would need to be drafted so as to provide for this possibility.

28. In terms of the level of loss that is to be presumed, we refer to the study carried out for the European Commission by Oxera "Quantifying antitrust damages: Towards non-binding guidance for courts" and to a paper by Connor and Lande "Cartel overcharges and optimal cartel fines". Oxera found that the median overcharge was 18% of the cartel price - not far from the 20% found by Connor and Lande.

29. We, therefore, recommend that a figure of 20% be used as a rebuttable presumption for

direct purchasers.

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?

30. Yes. Although a number of judgments have addressed the issue of pass-on, we believe that it makes sense for this to be put on a statutory footing.

31. In *Devenish Nutrition Ltd v Sanofi-Aventis SA*[6] Tuckey LJ said at para 151:

> "...Devenish is claiming the overcharge as if it were the defendants' net profit so as to avoid having to take into account the fact (if true) that it passed on the whole of the overcharge to its customers. I can see no way in which it could avoid taking this "pass on" into account in any compensatory claim for damages

32. Likewise, in *Emerald Supplies v British Airways*[7], which concerned the question whether an action could be brought under CPR 19.6 by a "representative" of both direct and indirect purchasers, Mummery LJ said:

> "After all the applications, arguments, authorities, amendments and adjournments, it is a straightforward Bear Garden kind of case that falls outside the rule on representative actions. Emerald and those they purport to represent do not all have "the same interest" required by the rule. The persons represented are not defined in the pleadings, either initially or in the proposed amendments, with a sufficient degree of certainty to constitute a class of persons with "the same interest" capable of being represented by Emerald. The potential conflicts arising from the defences that could be raised by BA to different claimants, such as direct purchasers who have "passed on" the inflated price and would not want BA to run that passing on defence to their claims and those indirect purchasers to whom the inflated price has been passed on and who would want BA to raise the pass on defence to claims by direct purchasers, reinforce the fact that they do not have the same interest and that the proceedings are not equally beneficial to all those to be represented."[8]

33. Both of these statements are, however, obiter as to the availability of the passing-on defence. In any event we see no harm in enacting legislation which sets out the scope and availability of the defence.

Q.9: Views on how the current collective action regime is working and whether it should be extended and strengthened?

34. There have been a series of authoritative reports which have highlighted the shortcomings of the current collective action regime and made recommendations for change. Following

[6] *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086.
[7] *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284.
[8] See also the Chancellor's judgment at first instance [2009] EWHC 741 (Ch) at para 37.

lengthy consultations, the reports have provided considerable evidence that the test case, consolidation, and representative actions procedures were inadequately designed to enable the court to properly and effectively manage large numbers of claims with a common factual basis.

35. The GLO procedure which was designed to address the gap following the Lord Woolf report has partially worked for such areas as large personal injury claims where it is argued that special client care needs arise, therefore a GLO opt-in system which requires personal contact with the client is arguably an adequate model. The GLO mechanism as it currently stands as an opt-in system is woefully inefficient however as a redress mechanism for breaches of competition law. Notable, in this regard, has been the lack of a group litigation order for a competition law infringement, despite an (opt-in) regime being available since May 2000.

36. Typically, in the competition sphere, mass claims of consumers and small businesses which follow on from a regulatory conviction may have a high overall value, but will be made up of small individual claims of common fact and similar value. Utilising the GLO system to recover damages on this scale attracts hugely disproportionate costs, with considerable upfront investment in gathering and processing claimants. The fact that it has never been used for claims of this type stands testimony to its dismissal by legal experts as an avenue for redress.

37. Similarly, the spectacular lack of interest in the s 47B statutory mechanism introduced to try to fill this redress gap indicates that it suffered the same fate. Following the outcome of the "football shirts" case, the Consumer organisation Which? publicly stated that it would never bring another such action until an opt-out system was in place.

38. Empirical research illustrating the significant gaps in redress for consumers and SMEs in the competition law sector includes the report of Deloitte and Touche LLP, the Deterrent Effect of Competition Enforcement by The OFT (Nov 2007); and Mulherron, Reform of Collective redress in England and Wales: A perspective of Need[9]. The consultation paper at 3.11 further highlights the low numbers of private actions taken on behalf of consumers and SMEs to recover damages for anti-competitive conduct between 2005 and 2008 which supported the 2007 and 2011 OFT research confirming that companies and advisors viewed private actions as they currently stand as the least effective aspect of the competition regime in achieving compliance.

39. Recent case examples of note with which members of this firm have had direct experience

[9] Research paper for the Civil Justice Council, Feb 2008) pp 64& 65.

are:

40. The unsuccessful attempt by the victims of the Air Cargo cartel to use the English representative rule in *Emerald Supplies Ltd v British Airways plc* when that particular cartel has been the subject of litigation in other major common law countries (i.e., Canada, US and Australia).

41. The representative statutory action available under s47B of the Competition Act 1998 which has been of extremely limited utility, as evidenced by the "football shirts" case, *the Consumers Association v JJB Sports plc*[10] (in addition to other factors such as only one "specified body").

42. In *Itnl Air Transportation Surcharge Antitrust Litig*[11] our sister firm in the US was able to negotiate a settlement in the US courts for British victims of the air passenger cartel by joining the US Federal class action as an add-on sub-class, albeit that the add-on sub-class was formed on an opt-in basis not as an opt-out class. This has enabled 5.2 million tickets holders who purchased their tickets in Britain during the relevant period to recover small refunds (£80 for a family of four) through completing a simple online questionnaire and attaching requisite evidence up until the expiration of the claim period of September 2012. Other beneficiaries have included businesses, regulators and other public bodies, who would never have recovered those losses otherwise.

43. Clearly the competition law enforcement regime has seen robust development in the past 12 years; redress however for consumers and small business has lagged behind. National and global cartels by their nature can affect consumers and small businesses on a mass scale as seen in the air passenger case, sustaining millions of pounds in lost revenue. Accordingly, as a result of our direct experience in competition group follow-on actions we believe that an effective opt-out mechanism embedded within the Court procedural rules, subject to the requisite checks and balances, will be a significant step forward.

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.

44. Yes. We agree with the stated aims set out in the policy objectives.

Q.11: Should the right to bring collective actions for breaches of competition law be granted

[10] The Consumers Association v JJB Sports plc (CAT 1078/7/9/07).
[11] *Itnl Air Transportation Surcharge Antitrust Litig* ND Cal 2008, Case No M:06 –cv-01793-CRB.

equally to consumers and businesses.

45. We agree there is a need for both consumers and small businesses to have access to a low cost and effective collective redress mechanism in appropriate circumstances. The case for SME access is aligned closely with the needs of consumers in that they suffer the same issues with respect to access to affordable and efficient judicial remedies. These needs, however, are distinguishable from those of big business.

46. The CP suggests a number of avenues for simplifying and fast tracking the process for SMEs. We agree with those recommendations. The needs of SMEs, however, are clearly demarcated from big business in the cases we are currently conducting. It is clear that businesses with turnovers roughly over £5miilion have in-house teams that are able to advise and facilitate support through what is largely unknown and sensitive legal territory. Further, big businesses have the resources to bring actions against large cartelists defendants, and are generally less fearful of reprisal although they will always seek to settle out commercially.

47. We as claimant lawyers invest considerable time and resources into assisting SMEs to understand basic competition law principles and the economic impacts of cartel behaviour on their businesses. We have communicated this to SMEs in particular sectors by way of in-house seminars. This serves the dual purpose of keeping upfront costs proportionate (as far as is possible in an opt-in system) and allows an opportunity for SMEs to meet others in the group where desirable, and to ask questions about the process and how best to meet their needs.

48. The fast track pathway recommended for SMEs is proposed mainly for injunctive relief to ensure their ability to compete more fairly. We would endorse this solution but we would suggest widening this to SMEs opt-out damages actions. While that may have been the experience of the Competition Pro Bono Service, we disagree with their view "that SMEs do not have legitimate competition actions". We have quite a number of SMEs included in our current group damages actions. One example of a competition damages case drawn from a large group action which we are currently preparing involves some 200 business claimants who suffered financial loss over the period of that cartel. Of those, 20 businesses are SMEs. From their standpoint the benefits of joining the group action are:

    a. there is little or no real alternative to securing redress;

    b. they are able to bring their actions under cover of a CFA arrangement; and

    c. the comfort of being part of a group affording greater protection from reprisal from

suppliers with whom they may still trade.

49. In exchange for creating a fast track procedure, the CP suggests a system of cost capping and a commensurate level of capping of damages. Cost capping is a key element to facilitating affordability, but we would by the same token be wary of capping damages at any particular level. Claim values are often not readily determinable at the outset of a case but are dependent on data and information as to the loss suffered. There is a danger of seriously undervaluing the damages awards and a risk of deterring both ATE insurers who will remain key to protecting claimants from adverse costs awards irrespective of whether costs are capped and thus ultimately protecting SMEs.

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

50. No. We do not think that there is any requirement to introduce restrictions to prevent competition cases being used as a vehicle for anti-competitive information sharing. In our experience we find that defendants already confer with each other on defence strategy. Provide that there is a legitimate reason to do so, we see no reason to be concerned.

51. We think that the concern is misguided for at least two reasons:

a. Historical data. In our experience much of the sales and purchasing data that is shared is historic data and of little or no relevance to current trading strategies.

b. Confidentiality Ring. Where current prices are used for the purposes of calculating post-cartel overcharge, this information can be protected through information barriers and confidentiality rings. Confidentiality rings are already widely used in economic regulatory matters and we see no reason why they cannot be used effectively in competition cases as well.

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

52. Yes. We do not see any real difference in having an opt-out procedure available for both follow-on and stand-alone actions. The same principles apply with regard to procedurally facilitating a group to access redress. We agree that restricting cases in the CAT to follow-on actions alone has the dampening effect of limiting the numbers of cases brought, which in turn diverts stand-alone cases to the High Court. In addition, as a specialist competition claimant firm we are aware of cases which could be brought even though there has been no

regulatory decision. As the research has indicated, our counterparts in Canada (which has an opt-out system), regularly bring stand-alone actions – some 25% of competition cases were stand-alone actions between the years 1997 and 2008, which in turn would bolster deterrence and boost confidence in SMEs and others that they could recover legitimate losses without being dependant on the scarce resources and enforcement priorities of regulators.

Q.14: 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.

53. No, we believe that a fast track opt-out procedure should be available generally in the CPR rather than be restricted to the CAT which is currently bound by the limits of regulatory decisions in the EC and UK. The jurisdiction of the CAT has been routinely targeted by defendants dragging out the costs and delay (e.g. Carbon Graphite[12]). To be effective, we would argue claimants should have a real choice as to venue with fast track opt-out procedures consistently available across the High Court and CAT jurisdictions with respect to competition actions.

Q.15: Views on the proposed list of issues to be addressed at certification

54. In our experience the chances of bringing a vexatious and/or unmeritorious claim are remote indeed given the existing regime of the loser pays rule, and the sign-off with leading counsel before an ATE insurer will agree to cover any proposed case. We recognise however that defendants have a perception borne largely out of the excesses of the old US class action regime that further checks and balances should be embedded into any proposed opt-out procedure to prevent similar abuses. As the CP correctly notes, the excesses alluded to in the US were not as a result of the opt-out procedure itself, but of the different model in the US allowing for treble damages, jury trials, and the lack of loser pays rules. The Government seeks to bring in a certification system attuned to UK interest which may adopt some of the judicial filters, active case management and judicial controls that are successfully utilised in Australia and Canada for example.

55. We would be wary however of a certification system that is overcomplicated and vulnerable to attack by large defendants. A suitably balanced certification system should not create another layer of deterrence to claimants. We essentially agree with the proposed regime in Annex A – however we submit that two areas would unnecessarily weaken the position of claimants.

[12] *Deutsche Bahn AG & Others v Morgan Crucible Company Plc and Others* (CAT 1173/5/7/10).

56. First, if an opt-out procedure is introduced there should be no need for the requirement of "numerosity" as this element would be subsumed into eligibility. An early case management conference could determine the eligibility requirements of the class for example, if this has not already been agreed between the parties. Those consumers or SMEs identified in the sales or purchasing data of the defendant and/or receipts, or other identifying codes which would be required to obtain a refund, would effectively require claimants to opt in at the time of submitting applications for refunds.

57. Second, with respect to any proposed "preliminary merits" threshold test, which may survive strike out but be deemed too weak to progress the claim, due regard would need to be had to the timings of such a decision. Indeed, this has not been a feature of the US certification process: "it is clear the certification process is not designed or intended to require claimants to preliminary establish it will prevail at trial on the merits. It is conceded however, that the commonality of the claimants and its class members claims may, to some extent, overlap with a merits enquiry"[13]. Generally, data gathering and the analysis of overcharge and pass-on rates in individual competition cases will continue until well past the filing of a claim. Often finding the right personnel within companies who may know of historic data and material may take some time. A case which may be filed before it is fully prepared to preserve limitation or other reasons, may differ at the filing stage from one that is some months down the track when the data extraction exercise is complete and the economics refined. If merits are to be considered and certification granted, then in fairness, interim payment should follow immediately.

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

58. The Court should retain the discretion to award punitive damages in appropriate circumstances, e.g. in an abuse of dominance case where the defendant has not been fined (see *2 Travel Group plc v Cardiff City Transport Services Ltd* [2012] CAT 19. Where exemplary damages are unavailable, we believe that a claimant's ability to claim interest on a compound basis will help address the gaps in cost recoverability. We refer to the judgment in *Sempra Metals Limited v HM Commissioners of Inland Revenue and anr* [2007] UKHL 34 where the House of Lords found that interest (simple or compound) should in principle be recoverable as a head of damages. Recognition of the House of Lords' judgment in this case should be extended to claims under competition law.

[13] ABA submission to the BIS Consultation 2012: at page 9.

Q.17: Should the loser pay principle apply

59. Yes. As set out above, the principle of two-way cost shifting or "loser pays rule" offers an inbuilt screen to filtering unmeritorious cases in any kind of action. This is as much helpful to the claimant as it is the defendant and we endorse it.

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 claimants could be more appropriately met from the damages fund?

60. Yes. We agree that there are circumstances when cost capping can offer meritorious claimants access to the courts, where there are no other means of redress. In any event, the court rules do allow for considerable judicial discretion on costs. Any cost arrangement would either typically be agreed between the parties or be the subject of application at the outset of the case. To some extent this question may need to be dealt with on a case by case basis depending on the facts, i.e., whether there is a damages fund, how it was set up and the circumstances of the case.

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

We are aware and duly note the general concerns expressed in relation to contingency fees for opt-out collective damages actions. These seem to be based partly on the view that contingency fees will incentivise lawyers to focus on the biggest cases, and partly on the idea that spurious cases will be brought causing disproportionate costs on the defendant. These concerns underpinned the rigorous examination of Lord Justice Jackson in his full enquiry into civil legal costs and his subsequent report.

On the basis of that report, we disagree with the Government's initial view which sits at odds with the recent legislative provisions governing contingency fees resulting from that report, and now enshrined in the *Legal Aid, Sentencing and Punishment of Offendors Act* 2012 s45 ("LASPO"). In particular, the Government brought forward legislation to legalise "damages based agreements" ("DBA"s), so that lawyers can now be remunerated according to a percentage of damages recovered in other areas of redress[14]. In addition the Civil Justice Council, in its November 2008 report, noted that collective actions before the CAT could allow contingency fees. It relied upon the combined effects of s 12 of the *Enterprise Act* 2002 and the definition of non-contentious business in the *Solicitors Act* 1974. Ultimately, this concern

[14] As of April 2013, a DBA may be entered into by a lawyer ,for any contentious business.

could be addressed if the CAT, subject to certain criteria, were granted the power to certify the reasonableness of the fees of the lawyers or the representatives acting for the group (as happens in other jurisdictions), before the damages were distributed to the group. Such a move would in our view, be compatible with current Government intentions as per the LASPO, and lessen inconsistencies across the current fees regimes, which must enhance choice for court users.

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.

61. Typically in large group actions there may be at best a 50% take up rate by claimants during the refund period. This will often leave a healthy sum of hard fought settlement funds to be distributed. Currently in the UK, money leftover goes back to the wrongdoer which gives them a windfall benefiting from money it gained unjustly despite the fact that it may have been convicted of a competition offence. In 2008 two UK-based charities travelled to the San Francisco Court which was signing off on the settlement fund in the Air passenger case. They submitted that any leftover funds from the British settlement funds should be distributed to them as they were charities which reflected as near as possible some nexus with the facts of the primary case. The two charities were the Air Ambulance Association and the British Disabled Flying Association.

62. The court took the view that as there was no equivalent procedure for such distribution in the UK, the funds were to be returned to the wrongdoers in accordance with current English law, in this case British Airways and Virgin Atlantic. Notably, the US funds outstanding have been allocated to the Miracle Flights for Kids who work with terminally ill children. In stark contrast, the UK settlement fund was £73 million, and so we can expect around half of that to be returned to the airlines. Potentially, granting the whole of the surplus funds to one specified body may not necessarily be the best outcome where the surplus is so considerable.

Q.21: If unclaimed sums were paid to a specified body in your view would the access to justice foundation be the most appropriate recipient, or, would another body be more suitable?

63. We would continue to robustly support the Cy Pres doctrine, which had its origins in the Roman law of Charitable Trusts, and related Ecclesiastical law, and first appeared in common law via the Chancery Division. We agree that designating the funds to an Access to Justice Fund is socially desirable and beneficial for all, but that a percentage for example 10% should,

in keeping with its equitable beginnings, be allocated to charities or funds with a nexus to the facts of the case.

64. There are at least two good arguments to distribute surplus funds in this way. The first is that we have seen the effects on the organisations who are involved in cases such as these. They are positive, enduring, educational and awareness-raising. Organisations engaging in a positive aspect of the legal process have an important role in explaining basic competition principles to their committees and boards, and to the wider public. There are few opportunities for the broader community and charities to participate in this way.

65. The second is that monies being poured into a quasi-Government fund – no matter how worthy – may in part go towards its intended activities but may also be distributed for other purposes or be reallocated by Government agencies; eventually it risks just being part of consolidated revenue. There is also the underlying question of Government responsibility to afford access to justice to its citizens, without depending on private actions to fund what is essentially a Government function.

66. For these reasons we would strongly recommend a percentage of leftover funds be allocated early in the settlement process to those charities and bodies who have a nexus to the facts of the case, and that the balance be granted to 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?

67. Yes. We broadly agree with the Government's observations as to the reasons why solely granting opt-out collective actions to the competition authority is not a workable or desirable course.

68. In our experience, the priorities and strengths of the competition authority are concentrated on investigation and decision making, prevention, administrative and reform activities. It has been previously noted that its drawbacks include:

69. Budgetary constraints on the case management side: these cases are typically expensive and time/labour-intensive to conduct. This factor, along with prioritisation criteria, is likely to result in a low number of recovery cases being run – the danger being that enforcement would lag and many victims would not recover their losses.

70. The inherent conflict of interest where the competition authority is balancing the very disparate interests of leniency applicants in cartel cases with providing a judicial remedy to cartel victims.

71. It may lead to a perception of a second-class tier of justice where SMEs and consumers who have been the victims of anti-competitive behaviour do not get the same level of expertise as other victims of cartel behaviour who can afford to hire leading legal experts.

72. Law firms who run these cases day to day have the relevant know how and expertise to deliver the best outcomes with clean hands.

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 a case?

73. The claims should be bought by those directly affected and who have an interest in the claim. Funders, legal firms and claims management companies should not be extended the right to be claimants in the stead of the injured parties. In reality, representative bodies or trade associations are likely to instruct a law firm who has a proven track record of assisting consumers, and has the experience and expertise to ensure the best outcome.

74. Competition infringements which impact on consumers to the point where they may have an actionable claim are very uncommon. There may be more impact for SMEs but generally the chances of creating a "litigation culture" in this area are negligible. The term "litigation culture" is often applied to personal injury claims sector ("ambulance chasers") where claims management companies (unlike solicitors) proliferate and advertise their services on a "no win no fee" basis, and charge a contingency fee from claimants' damages for running often hundreds of simple low value consumer claims in the personal injury or financial ombudsman service areas.

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

75. Yes. We do not consider that it is necessary or appropriate to make ADR mandatory – amongst other reasons, it raises the risk of an Italian torpedo (dealt with in the response to Question 25). We do, however, agree that it should be encouraged and indeed this is the approach that we take with our clients, as we believe that the best way of achieving redress is to settle cases

before trial.

76. The promotion of ADR occurs in the CPR rules (see paragraphs 4.4.3 and 8 of the practice direction on pre-action conduct) and in the Commercial Court Guide (at part G), and we see no reason why the CAT rules should not be amended to encourage the use of ADR in that regime also. For instance, parties could be required to file a statement of reasons as to why they do not believe ADR is appropriate and this could be reviewed at periodic stages of the case. Alternatively, a party's unreasonable refusal to engage in ADR could be taken into account by the CAT in assessing costs.

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?

77. No. We are concerned that a pre-action protocol may not be appropriate given the particular characteristics of competition litigation claims, namely that there are often multiple defendants and that not all will be domiciled in the UK. There are a number of other jurisdictions that one or more of the defendants could argue would be more appropriate, and hence leave the claimants open to the risk that, if the defendant is made aware of a potential action before one is filed, it may launch an Italian torpedo. This was precisely what occurred in the context of the litigation arising out of the Synthetic Rubber cartel[15].

78. To avoid these risks, we would propose instead that a "post-issue" protocol be introduced. This would set out a procedure to be followed after the claim form is filed and served on the defendants, and would involve the proceedings being stayed. This would ensure that there is no risk of an Italian torpedo but would also allow for the claimant and defendant to disclose documents, discuss the claim and attempt to settle before proceeding to court. Both the CPR and the Commercial Court Guide provide for proceedings to be stayed while the parties attempt to settle matters by ADR. This is an approach that Hausfeld & Co LLP currently follows with regards to its clients and it has proven to be very effective both in ensuring that clients' access to the court is ensured and in reaching settlement with defendants.

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

[15] One of the defendants, on receiving pre-action letters from tyre manufacturers, filed non-infringement proceedings against them in the Italian courts. The aim was to: (a) to ground the claim in another jurisdiction and (b) to exploit the notoriously slow litigation procedure in Italy. A number of the other defendants were attempted to exploit the fact that this defendant had begun an action before the Italian courts, seeking a stay of the proceedings pending the outcome of the Italian proceedings pursuant to Article 27.1 of the Brussels Regulation.

79. Yes. We propose that the CAT rules on formal settlement offers be brought in line with Part 36 of the CPR. At present, Rule 43 provides that claimants before the CAT may accept a claim any time up to 14 days before trial whereas a Part 36 offer must be accepted within 21 days. The latter seems more reasonable, given that the CAT rule could lead to defendants incurring costs that could have been avoided had the claimant accepted the offer sooner.

80. Another disadvantage to defendants arises out of the fact that each defendant is being sued on a joint and several basis for the entire loss suffered as a result of the cartel. However, a defendant would be unlikely, when making an offer to settle, to offer to settle the entire claim. Rather, they would offer to settle for the loss that they believe is attributable to their conduct. However, any amount awarded by the court would be the full amount, on a joint and several basis, and therefore much higher than the defendant had offered. This would mean that costs would inevitably be awarded to the claimant, which seems unfair. To address this, we propose that the CAT rules be amended to provide for an apportionment of losses as between the defendants, possibly as part of the "post-issue" protocol. The amount awarded in the judgment could also be apportioned for the purposes of assessing costs only (i.e, it would still be awarded on a joint and several basis).

81. Any amendment to the CAT rules should take into account the inherent and disproportionate disadvantage that the claimants face in assessing the loss incurred. This is due to the information asymmetry between the parties and the defendants' refusal to provide the documents necessary to evaluate the claim. This asymmetry must in the interest of justice be considered by the judge and must play a role in the determination of costs liability.

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.

82. As stated above, we always seek to settle cases with the defendants before proceeding to trial. In particular, in 2009, we successfully negotiated a global settlement agreement with Parker ITR of the claims arising from the marine hose cartel. The terms of the settlement were that it set up a fund against which all those who purchased marine hose anywhere in the world other than US Commerce, could make claims against any of the cartelists including Parker ITR. We also succeeded in achieving a settlement fund of £73 million in the Air Passenger cartel referred above, for those who purchased tickets from the UK. ADR is already a well entrenched feature of the normal litigation process.

Q.28: Do you agree that, should a right to 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?

83. No. The two schemes can operate entirely separately. There would, however, be less need for primarily legislation if the same ends could be achieved through a court reviewed and approved collective settlement procedure. As we indicated in our response to Q13, we submit that confining any opt-out and collective settlement procedure to the CAT may defeat the purpose, as lengthy delays and even strike out applications may succeed on the basis that the regulatory decision is deficit in some way as we have seen in the cases of Cooper Tire and Carbon recently.

84. To be meaningful and effective, we would urge that the opt-out and collective settlement procedures be embedded in the normal CPR rules, so that judges will have the discretion to approve the procedure should it satisfy certification.

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?

85. No. We think that giving such responsibility to the competition authorities would over-stretch already limited resources that are better spent on their primary role of enforcement. We understand that this is the view shared by competition authorities, who freely admit that, not only are resources already stretched, their strengths do not lie in monitoring redress schemes. Additional staff would need to be recruited and trained, thus diverting resources away from enforcement which would serve only to reduce the number of cases that can be investigated. This in turn would have a negative knock-on effect on deterrence and on follow-on actions.

86. The only exception to this rule would be where the company is in danger of becoming, or where it is claiming it is likely to be made, insolvent after paying the fine. Under these circumstances, we would suggest the competition authorities could set aside a proportion of the damages or ring-fence a separate fund to cover follow-on or stand-alone claims.

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?

87. Yes. If a company has made voluntary redress to the satisfaction of the aggrieved parties, we think there should be a reduction in the fines. However, the issue may be one of timing. At the

point at which a fine is being imposed, claims have often yet to be brought. It would take longer still to assess the extent of loss for those claimants and to claim damages. An alternative to a reduction in the fine might therefore be a two-stage process whereby a negotiable second instalment of the fine would not be payable if the company has settled claims within 1 or 2 years of the first instalment of the fine.

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

88. Public enforcement is designed to punish the wrong-doer and to act as a deterrent. However, it cannot punish all wrong-doers as resources would not stretch so far as to investigate and carry out enforcement against all cartels. It also fails to punish cartelists' profit margin and therefore fails to act as a deterrent. Research carried out at the Sorbonne University in Paris assessed the fines imposed by the European Commission between 1975 and 2009 and concluded that half of these were less than the illegal profit made from the cartel, meaning that the cartelists made a net profit despite the fines[16]. Fines set at this level fail to act as a deterrent.

89. Most fundamentally of all, public enforcement does not result in compensation to those who suffer loss. We believe that private enforcement plays a multifaceted role in that it can both compensate those who have suffered loss and act as a deterrent as the sums involved affect the profit margin, especially when combined with the fines. We refer to the research published in The Competition Law Review, which found that consumer involvement in private enforcement adds value by (1) increasing the deterrent effect of competition norms, (2) providing compensation to affected consumers, (3) aligning practice and rhetoric, (4) cultivating a "competition culture" and increasing legitimacy of European competition policy, and (5) raising consumer "empowerment" and approaching the "informed consumer" ideal as a spur to competitiveness[17]. We would also refer to the judgment of the European Court of Justice in *Courage v Crehan* which stated that "actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community"[18] and that of *Manfredi* where the Court stated that:

[16] E. Combe and C. Monnier, *Fines against hard-core cartels in Europe: the myth of over-enforcement*, Antitrust Bulletin, Vol. 56, No. 2, Summer.
[17] M. Ioannidou, *Enhancing the Consumers' Role in EU Private Competition Law Enforcement: A normative and practical approach*, The Competition Law Review, Volume 8 Issue 1 pp 59-85, December 2011.
[18] [2001] EUECJ C-453/99 (20 September 2001), at paragraph 27.

"the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (*Courage and Crehan*, paragraph 26)... It follows that 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 81 EC"[19].

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?

90. Yes, we understand and support the protection of certain leniency documents as a failure to do so would deter companies from requesting leniency, which is an important tool in detecting and punishing wrong-doing. However, we believe that all underlying documentation provided by the company should be disclosed with confidential information redacted. The definition of confidential information should be limited to trade secret or proprietary information only and should be subject to a sensible time limit. We propose that, in keeping with the European Commission's Notice on the rules for access to the Commission's file[20], this limit should be 5 years as data older than this can no longer have an effect on commercial strategy. The General Court referred to this in *EnBW Energie Baden-Württemberg AG v Commission* as helping to provide an indication of what the Commission would consider commercial interests. Following the Commission's approach in this way would be an improvement on the current regime where the protection of historical data is being exploited by defendants to thwart private claims. We suggest that the Information Commission should issue clearer guidelines to this effect.

91. Further to the recent decision by the General Court to overrule the European Commission's decision to refuse access to documents in the gas insulated switchgear case (Case T‑344/08 - EnBW Energie Baden-Württemberg AG v Commission), we would advocate an approach that does not assume the protection of documents but instead calls for the disclosure of documents to be justified on a document-by-document basis.

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

[19] *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) Joined cases C-295/04 to C-298/04, Judgment of the Court (Third Chamber) of 13 July 2006.

[20] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (2005/C 325/07).

recipients?

92. We believe that a distinction must be made between whistleblowers and leniency recipients.

93. We agree that the whistleblower should be protected, not only from joint and several liability, but from being pursued in contribution proceedings and against interest also, where appropriate. This would protect whistleblowers and act as an incentive to come forward.

94. We do not believe that this should be extended to other leniency recipients. The whistleblower is only one company, without whom the cartel would not have been discovered. The other leniency recipients may have come forward only once the cartel has been discovered and there is no limit on how many may come forward and request leniency. To grant protection from joint and several liability to leniency recipients would severely hamper the ability of claimants to gain redress from wrong-doers, and therefore fundamentally impede the regime of private enforcement. On this basis, we believe that leniency recipients should not be protected from joint and several liability, contribution proceedings or interest.

95. We believe that claimants should not be deprived of interest – this is a basic right under English court rules and should not be open to debate. To deprive claimants of interest is to deny them the proper compensation that is their right. As stated above, we believe recognition of the House of Lords judgment in *Sempra Metals*[21] - that interest (simple or compound) should in principle be recoverable as a head of damages - should be extended to competition law claims.

Questions Arising

During the course of responding to consultation we thought there were two important areas which needed further clarification:

1. The interplay between these reforms and the Jackson Reforms should be clearly set out. At present, the consultation suggests that contingency fees should continue to be prohibited in collective actions, expressing a preference for CFAs instead. The Jackson Reforms, on the other hand, suggest the prohibition of CFAs and ATE generally. It is unclear whether there will be a carve-out from the Jackson Reforms for opt-out collective actions brought by consumers and SMEs using a CFA/or contingency arrangement, and whether ATE would be

[21] *Sempra Metals Limited v HM Commissioners of Inland Revenue and anr* [2007] UKHL 34.

available?

2. We are aware of the difficulties that faced Which? in attempting to bring the Section 47B action. The opt-out procedure was only one hurdle: the significant costs threat of litigating against Wigan played a significant role in how the action played out to its conclusion.[22] We recommend either (a) a carve-out from the Jackson Reforms for collective actions in competition law, meaning that CFAs and ATE would continue to be permitted or (b) the removal of the prohibition of contingency fees suggested in the consultation. A failure to do so, or to clarify the issues, risks undermining the entire basis for this consultation, which is to facilitate damages actions by consumers and SMEs, which are precisely the entities that would most likely need to make use of such funding arrangements.

3. What types of consumer redress is envisaged?

We look forward to engaging further with BIS on the consultation, specifically, participating in any meetings or roundtables so that we can contribute our considerable experience of bringing private enforcement actions on behalf of claimants.

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[22] Ingrid Gubbay (co –author of this response) brought the "Football Shirts" case on behalf of Which? in 2007.

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Herbert Smith LLP

Herbert Smith

Department for Business, Innovation & Skills consultation: *Private actions in competition law: a consultation on options for reform*

Response of Herbert Smith LLP

INTRODUCTION

1.1 Herbert Smith LLP is grateful for the opportunity to respond to the Department for Business, Innovation & Skills ("**BIS**") in respect of its consultation document *Private actions in competition law: a consultation on options for reform* ("**Consultation Document**"). We would welcome the further opportunity to comment on any more detailed proposals in due course.

1.2 The comments contained in this response are those of Herbert Smith LLP and do not represent the views of any of our individual clients.

EXECUTIVE SUMMARY

1.3 We welcome the initiative of BIS to consider carefully the issue of competition law private enforcement, and its relationship with the public enforcement regime, in particular to determine the UK's position on various points of policy/principle (such as the question of access to leniency documents) in advance of the anticipated EU-level proposals in this area.

1.4 We also firmly support some of the reforms proposed, such as: the proposal to establish the Competition Appeal Tribunal ("**CAT**") as the principle venue for competition law claims in the UK, and in particular the extension of the CAT's jurisdiction to hear stand-alone claims (subject to ensuring sufficient additional resourcing is available to CAT to reflect its additional remit); proposals to overhaul the rules applicable in the CAT on settlement offers and costs; and the suggested approach to the issue of the disclosability of leniency documents.

1.5 However, we have serious concerns in relation to some of the other proposals which have been raised for consultation. Whilst the aims of some of these proposals are understandable, we have concerns in particular about the proposed design details, including as to whether the appropriate balance has been achieved between facilitating private actions, and ensuring that the rights of defence are protected and that an undesirable "litigation culture"

is not created. We also have concerns that some of the proposed design details appear to be underlain by a desire to increase deterrence, which is the function of the public enforcement regime[1], rather than to facilitate redress for those who have been harmed by anti-competitive behaviour, which is the function of the private enforcement regime. These concerns centre around the far-reaching reforms proposed to the collective redress regime, and the introduction of a "fast track" procedure for small and medium sized businesses ("**SMEs**") in the CAT.

1.6 Finally, we consider that some of the proposals are simply inappropriate. For example we are firmly opposed to the introduction of a presumption of overcharge in cartel cases (which is also unworkable in practice), and, if a form of opt-out collective action were introduced, to dealing with unclaimed funds through payment to an entity such as the Access to Justice Foundation (or any form of distribution other than reversion to the defendant).

1.7 Overall, we would also query whether the concerns expressed by BIS about the current level of private competition law actions are justified. [2] The UK is in fact becoming one of the jurisdictions of choice for follow-on claims from EU Commission decisions in particular, and we have seen a significant increase in such claims over the last few years (including "mixed" claims with both a stand-alone and follow-on element, and "early" claims brought prior to the resolution of a Commission or Office of Fair Trading ("**OFT**") investigation).[3] All of this suggests that in fact the private enforcement regime in the UK is effective.

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1 In relation to which the competition authorities have a number of tools, including the power to impose very significant fines, as well as criminal prosecution and director disqualification in the UK.

2 In this respect it is noted that the statistics cited at paragraph 3.12 of the Consultation Document are not sufficiently recent, and are not reflective of either the current level of competition claims we are seeing in the UK courts, or of the number of out-of-court settlements, of which there is a high and ever-increasing number.

3 For example, follow-on claims have been brought (in some cases multiple claims) in relation to EU Commission cartel decisions in respect of (non-exhaustively) *Cooper Tubes, Vitamins, Synthetic Rubber, Gas Insulated Switchgear, Paraffin Wax, Carbon and Graphite Products, Car Glass, Copper Plumbing Tubes*, and *Methionine*. Follow-on claims have also been brought in respect of decisions of the OFT/sectoral regulators, including in relation to the *Cardiff Bus, Genzyme, Schools, Replica Football Kits, EWS*, and *Harwood Park Crematorium Limited* decisions (and also the decision of the CAT in *Albion Water*). "Early" or "mixed" claims have included those in respect of *Air Cargo, LCDs, Gaviscon*, and *Les Laboratoires Servier*. A claim has also been brought in the High Court in respect of the subject

1.8 We also note that it is essential that the impact of the proposed reforms is considered in aggregate, and that due consideration is given to the risk that, in particular when taken together, the proposed reforms will significantly tilt the private enforcement landscape in favour of claimants to an extent which is not justified, and which gives rise to a real risk of the creation of the type of "litigation culture" which BIS states in the Consultation Document it is seeking to avoid.

1.9 Finally, we note that it should be ensured that any reforms to the private enforcement regime in the UK do not lead to any reduction in the levels of enforcement of Competition Act 1998 ("**CA98**") cases by the OFT (and the Competition and Markets Authority ("**CMA**") in due course) and the sectoral regulators. Public enforcement should remain the key avenue through which anti-competitive behaviour is detected and dealt with.

1.10 We expand on these points and set out our detailed responses to the questions within the Consultation Document below.

matter of an Italian national competition authority ("**NCA**") decision (the claim by Ryanair against Exxon in respect of the *Italian Jet Fuel* decision).

RESPONSE TO INDIVIDUAL QUESTIONS

ROLE OF THE COMPETITION APPEAL TRIBUNAL

1. QUESTION 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 support BIS's proposal to expand the role of the CAT so that it becomes the principal forum for competition litigation in the UK, subject to appropriate resourcing to ensure that its appellate function is not undermined. The CAT has extensive specialist expertise and a recognised track record in dealing with complex competition issues, and in managing large and complex litigation efficiently.

1.2 In this context we agree that Section 16 of the Enterprise Act 2002 ("**EA2002**") should be activated in order to allow the presiding judge in the High Court (or the Court of Session[4]) to transfer to the CAT cases dealing with competition issues, or relevant parts of cases.[5] We also agree that the provision should be amended as necessary, for example to ensure the definition of "infringement issue" clearly provides for the issue of damages to be resolved by the CAT in such a case as well as the question of whether there has been an infringement. We also support the proposed flexibility to allow CAT chairmen to continue to hear cases in the High Court whilst making use of the procedures and resources of the CAT.

1.3 However, in order to ensure that these tools can be best used and to prevent the type of procedural and jurisdictional skirmishes as to the scope of the CAT's jurisdiction which have been seen to date, both the issue of limitation periods and the impact of an appeal

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4 Throughout this response, references to the High Court include references to the Court of Session where applicable.

5 The question of how to deal with cases which raise issues wider than competition law will need to be resolved (the proposals for which are not entirely clear from the Consultation Document) – i.e. whether it is only ever the competition aspect of a case which can be referred to the CAT, the remainder to be addressed by the High Court, or whether the CAT (with a Chancery judge sitting as Chairman) would in appropriate circumstances (for example where the non-competition issues are minor or where the same evidence is likely to be relevant to both the non-competition and competition issues) also be able to deal with the entirety of the case including non-competition issues, which flexibility would in our view be beneficial in appropriate cases.

being on foot will need to be addressed, reconciling the differing positions as between the CAT and the High Court.

1.4 Moreover, we consider that these tools will only operate effectively if the CAT's jurisdiction is widened to include stand-alone claims. See further our response to Question 2.

2. QUESTION 2: SHOULD THE COMPETITION ACT BE AMENDED TO ALLOW THE CAT TO HEAR STAND-ALONE AS WELL AS FOLLOW-ON CASES?

2.1 We support the proposal to expand the CAT's jurisdiction by amending Section 47A CA98 to permit claimants to bring competition law stand-alone competition claims in the CAT directly. [6]

2.2 The current limitation on the CAT's jurisdiction to follow-on claims has led to complex and time-consuming litigation as to the scope of the CAT's jurisdiction, such as that in the *Enron v EWS*[7] case. It has also led to claims being brought in the High Court which could more appropriately have been brought in the CAT, where the infringement and damages claimed do not fall completely within the four corners of the infringement decision, for example where there is a "mixed" stand-alone and follow-on claim, or if the claimant is claiming in respect of a time period which is wider than that covered by the infringement decision. The proposed amendments would allow such claims to be dealt with efficiently in the CAT, and would also enable the specialist court best placed to deal with liability issues to hear pure stand-alone claims, which in many cases will raise the most complex and difficult competition law issues.

2.3 If any other elements of the BIS proposals, for example the proposed "fast track" procedure and/or the proposed expansion of the collective action regime (for our comments on which see below), are adopted, then it would be preferable for the CAT to have full jurisdiction to hear all such claims and to determine the most appropriate route or track for the claim in each case.

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6 The question arises of how to deal with stand-alone cases which may raise issues wider than competition law. In this instance we agree that claimants should be restricted to bringing competition law only claims in the CAT, wider claims needing to be brought in the High Court, which cases or relevant aspects of which could then be subject to a Section 16 EA2002 transfer if appropriate.

7 *English Welsh & Scottish Railway Limited v Enron Coal Services Limited* ([2009] EWCA Civ 647); *Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd* ([2011] EWCA Civ 2).

2.4 However, in order to ensure that claimants are not disincentivised from bringing a claim in the CAT, and in order to ensure that cases can be flexibly transferred between the CAT and the High Court, the position as to limitation needs to be resolved. Whilst the Court of Appeal is expected to shortly resolve the vexed question of when the CAT's two year limitation period starts to run[8], it does not make sense for two separate limitation periods to apply in competition law cases depending on where the claim is brought. Such a two-speed system is confusing and will undermine the aim of establishing the CAT as the primary venue for competition actions in the UK.

2.5 We would therefore support the introduction of a single limitation period for competition claims, regardless of whether they are brought in the CAT or in the High Court, and regardless of whether they are follow-on or stand-alone. We would favour an approach based on the well-established tortious 6 year limitation period under Section 2 Limitation Act 1980 currently applicable to High Court claims, running from the later of when the cause of action accrued or the date of the claimant's knowledge.

2.6 If there are any concerns about uncertainty as to when the court would decide knowledge arose in follow-on cases, for example where the claimant had been the recipient of an information request as part of the administrative proceedings, then a rebuttable presumption could be introduced into the Competition Appeal Tribunal Rules ("**CAT Rules**") that knowledge would be imputed as from the date of the infringement decision.

2.7 In addition, we consider that the prohibition in Paragraph 31 of the CAT Rules on commencing proceedings in follow-on claims until determination of the appeal process should be deleted. This not only leads to satellite litigation as to the type of appeal to which the prohibition applies, but also disincentivises claimants from bringing an action in the CAT. We submit that the approach of the High Court in determining whether to order a *Masterfoods* stay is sufficient to deal with any concerns about conflicting decisions and/or about what steps should be taken in the proceedings prior to the resolution of an appeal of the underlying infringement decision.

3. QUESTION 3: SHOULD THE CAT BE ALLOWED TO GRANT INJUNCTIONS?

3.1 We support the proposal to designate the CAT as a Superior Court of Record such to permit it to hear applications for injunctions and to grant injunctions. The ability to grant injunctive relief will be particularly important in stand-alone cases, where the claimant is

[8] *Deutsche Bahn AG and others v Morgan Crucible Company plc and others* [2011] CAT 22 (Case Number 1173/5/7/10), appeal pending in the Court of Appeal.

often seeking to prevent or to compel certain behaviour, such as the prevention of certain contractual or pricing practices or the mandating of the provision access to an input or infrastructure, rather than seeking damages.

3.2 We therefore consider that this step would be essential to achieve the aim of making the CAT the primary venue for competition actions, and to make the proposed power to hear stand-alone cases effective.

4. QUESTION 4: DO YOU BELIEVE A FAST TRACK ROUTE IN THE CAT WOULD HELP ENABLE SMES TO TACKLE ANTI-COMPETITIVE BEHAVIOUR?

Overview

4.1 We understand BIS's aim in putting forward the proposal for a "fast track" route for claims in the CAT to assist SMEs.

4.2 We agree that it appears likely to be more difficult, generally, for SMEs to challenge anti-competitive behaviour than well-resourced large businesses, both through complaints to the OFT and through private competition actions.[9] We also agree that at least some SMEs may be more vulnerable to being forced out of the market by anti-competitive behaviour.

4.3 However, we have serious reservations about the form of action proposed, both in terms whether it would in fact allow claims by SMEs to be brought more cheaply, quickly and simply, and in terms of whether, on the basis of the current proposals, rights of defence would be sufficiently safeguarded.

4.4 We therefore consider that, if any form of fast track procedure were introduced, the proposed design elements would require very significant adjustment to those set out in the

[9] We note, however, that we are not aware of any studies or surveys as to the level of unmet need in this respect amongst SMEs. We also note that there are a material number of examples of smaller businesses having brought competition law claims to date (and there are no doubt further examples of settlements having been reached before the stage of proceedings). In addition to *Purple Parking Limited and Meteor Parking Limited v Heathrow Airport Limited* ([2011] EWHC 987 (Ch)) as cited by BIS, examples include *SEL-Imperial Ltd v The British Standards Institution* ([2010] EWHC 854 (Ch)), *AAH Pharmaceuticals Ltd & Ors v Pfizer Ltd & Anor* ([2007] EWHC 565 (Ch)), *Attheraces Limited v The British Horseracing Board* ([2005] EWHC 3015 (Ch), [2007] EWCA Civ 38) and *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited* ([2012] CAT 19), as well as numerous examples of competition law arguments being raised as a defence in contractual or intellectual property disputes.

Consultation Document, in particular to (i) identify those cases which would be appropriate for the fast track, which will be challenging, and (ii) provide the CAT with sufficient discretion in terms of case management, timing and costs measures to ensure an appropriate balance between access to justice, and the safeguarding of both the rights of defence and the quality of the CAT's decision making.

4.5 Finally, we note that the introduction of any new form of procedure designed to increase the volume of claims in the CAT must be subject to appropriate additional resourcing for the CAT to ensure that its other functions are not undermined.

Inevitable complexity of competition cases

4.6 Underlying the BIS proposals for a fast track route appears to be an assumption that cases involving SMEs, and in particular abuse of dominance cases where a claimant is seeking injunctive relief rather than damages, are likely to be simpler and easier to resolve than other cases. Respectfully, we consider this to be misplaced.

4.7 Competition cases, in particular abuse of dominance cases, where difficult issues of market definition and the assessment of market power come into play even prior to the vexed question of whether particular conduct is abusive, are often very complex, raise questions of fact, law and economics, and regularly require expert evidence. This is not altered in a scenario where the claimant is an SME – whether it is an SME or a larger business challenging, for example, a distribution model, pricing terms, or refusal of access to infrastructure or intellectual property, the issues will be very similar and just as complex.

4.8 This can be illustrated by considering the time and effort which it takes for the OFT, a sectoral regulator or the Commission to investigate and determine an abuse of dominance case, and for the CAT to determine an appeal on liability, or a follow-on damages claim, in an abuse of dominance case. By way of example:

4.8.1 In relation to the OFT's *Cardiff Bus* decision, as case which had an SME complainant, it took over 4 years from the complaint until the OFT's decision. In relation to the follow-on damages claim in the CAT, this took over 1 ½ years from application to judgment, and involved a 10 day hearing (requiring extensive witness evidence), this on causation and quantum alone.[10]

4.8.2 In relation to Ofgem's abuse of dominance finding against *National Grid*, the period between the Statement of Objections being issued and decision was in

[10] OFT Case No. CA98/01/2008; *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited* ([2012] CAT 19).

itself nearly 2 years, and the appeal in the CAT involved a hearing of 11 days and extensive expert evidence. This is before considering the further appeal to the Court of Appeal on liability and level of penalty (and the application for permission to appeal to the House of Lords which was denied). [11]

4.8.3 In relation to the *Genzyme* case, the OFT investigation took 2 years from the third party complaint to the OFT's decision, followed by a period of over 2 years from Genzyme's application to the CAT to the resolution of its appeal on liability and consequent remedies, together with a further lengthy period in which a damages action was brought and ultimately settled.[12]

4.8.4 In the High Court, even when only the trial period is considered, *Purple Parking Limited and Meteor Parking Limited v Heathrow Airport Limited*[13] required 13 hearing days, and involved evidence from numerous witnesses. *Attheraces Limited v The British Horseracing Board* required 3 hearing days for the interim injunction application, and 12 hearing days for the substantive hearing, plus 4 days for the successful appeal to the Court of Appeal.[14]

4.8.5 Other examples of very lengthy and very complex investigations and appeals, involving the type of issue which might well be raised by an SME in a fast track claim, are of course those which have come before the EU Commission and the European Courts, such as the *Intel*[15], *Microsoft*[16], and *Astra Zeneca*[17] cases.

4.9 Given the time, legal representation, and expert assistance required in all of these cases, they are likely to have given rise to varying degrees of very high costs.

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11 Ofgem Case CA98 STG/06; *National Grid plc v Gas and Electricity Markets Authority* ([2009] CAT 14); *National Grid plc v Gas and Electricity Markets Authority* ([2010] EWCA Civ 114).

12 OFT Case No. CA98/3/03; *Genzyme Limited v Office of Fair Trading* ([2004] CAT 4); *Genzyme Limited v Office of Fair Trading* ([2005] CAT 32); Case Number 1060/5/7/06 *Healthcare at Home v Genzyme Limited*.

13 [2011] EWHC 987 (Ch).

14 [2005] EWHC 3015 (Ch); [2007] EWCA Civ 38.

15 Case 37.990 *Intel*; appeal to General Court pending in Case T-286/09 *Intel v Commission*.

16 Case 37.792 *Microsoft*; Case T-201/04 *Microsoft Corporation v Commission*.

17 Case 37.507 *Generics/Astra Zeneca*; Case T-321/05 *AstraZeneca v Commission*; appeal to ECJ pending in Case C-457/10P *AstraZeneca v European Commission*.

4.10 Although there may be some categories of case – for example where dominance is not in doubt (e.g. due to previous administrative findings) and where the behaviour complained of falls into a clearly established category of abuse – which might be less complex, the vast majority of competition cases are likely to be difficult to resolve cheaply, quickly and simply. This applies to the examples given within Box 1 of the Consultation Document, which are far from clear on their face.

Patents County Court

4.11 This unavoidable complexity of competition cases can be compared with some of the categories of claim which are brought in the Patents County Court ("**PCC**") under the procedure referred to in paragraphs 4.26-4.27 Consultation Document.

4.12 Although some disputes as to patent validity, for example, are undoubtedly complex, the PCC procedure tends to be used for the simpler patent disputes, and other forms of intellectual property dispute, such as copyright disputes, which can be significantly less complex than the type of competition case discussed above (and can be resolved in many cases without expert evidence).

4.13 In relation to the PCC procedure it is noteworthy that:

4.13.1 The procedure is designed for "*smaller, shorter, less complex, less important, lower value actions*" whereas "*Longer, heavier, more complex, more important and more valuable actions belong in the High Court*".[18]

4.13.2 This is therefore not a procedure limited to SMEs or designed to deal with actions by SMEs against larger better resourced parties (although the size of the parties is relevant to determining whether this is the appropriate route)[19] , but is designed to deal with smaller/less complex claims. Such claims are identified as those which fall below the £500,000 damages cap (or where the parties agree)[20], discretion

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[18] See the PCC Guide (http://www.justice.gov.uk/downloads/courts/patents-court/patents-court-guide.pdf/).

[19] As per the PCC Guide, "*If both sides are small or medium sized enterprises then the case may well be suitable for the Patents County Court. If one party is a small or medium sized enterprise but the other is a larger undertaking then again the case may be suitable for the Patents County Court but other factors ought to be considered such as the value of the claim and its likely complexity*."

[20] The Patents County Court (Financial Limits) Order 2011 and the Patents County Court (Financial Limits) Order (No. 2) 2011.

being exercised in relation to claims for injunctive relief to determine whether these are appropriate for the PCC or should be transferred to the High Court.[21]

4.13.3 The (two-way) cap on recoverable costs applicable in the procedure is higher than that proposed in the Consultation Document (£50,000), although it is recognised that actual costs are very likely to exceed this.

4.13.4 There is very active case management, which in particular leads to the limiting of issues between the parties.

4.13.5 Questions as to disclosure, expert evidence, cross-examination and so on are dealt with on an issue by issue basis so as to limit both the time and costs involved.

4.13.6 Pleadings are required to be fuller than those in the High Court, the PCC Guide providing that statements of case "*must set out concisely all facts and arguments relied on*", and can be relied on as evidence, so that both the issues between the parties and the level of complexity of the case are clearer at an earlier stage.

4.13.7 Decisions on whether a case should proceed in the PCC or should be transferred to the High Court (where a party requests this) are not dealt with at the outset, but at the first case management conference stage once statements of case have been submitted, and therefore the relative merits of the case are somewhat clearer.

4.14 It is also worth noting that the success of the small claims procedure in the PCC appears to be in part predicated on active engagement of the parties' lawyers, for example in terms of the full pleadings and limitation of issues. If a claimant were unrepresented, such a procedure may not be as effective.

Interim injunctions

4.15 The other assumption underlying the BIS proposal appears to be that an interim relief application can be dealt with easily, and that when this has been resolved, the parties will agree a resolution amongst themselves and the case will not need to proceed further (paragraphs 4.31-4.32 Consultation Document).

4.16 Where the case involves a fundamental challenge to the business model of a defendant or an element thereof (for example, a pricing model, distribution system, or network of

[21] The PCC Guide states that: "*As a general rule of thumb, disputes where the value of sales, in the UK, of products protected by the intellectual property in issue (by the owner, licensees and alleged infringer) exceeds £1 million per year are unlikely to be suitable for the Patent County Court in the absence of agreement*".

contracts), with an impact wider than the specific case in hand, it is not clear that such resolution is in fact likely.

4.17 Moreover, under a system in which costs are capped at a very low level as proposed, incentives to settle also appear low on the part of the claimant (as has been the experience in the PCC).

Form of fast track action proposed

4.18 In light of the above, we consider the proposed fast track in its current form to be unrealistic, and therefore unlikely to assist SMEs in tackling anti-competitive behaviour. It is not clear, for example, that the emphasis on dealing with matters on the papers rather than orally will actually assist SMEs, nor that such a system would be workable or effective for unrepresented claimants.

4.19 Moreover, we consider that the proposals as currently formulated pose real risks to the rights of defence, and that they do not contain sufficient safeguards against unmeritorious, unfounded or vexatious claims. Further, a claim by an SME may raise fundamental challenges to a defendant's business model as a whole, which in the interests of justice it should have the right to have properly heard, including to adduce appropriate expert evidence. This may simply be impossible within the time limits and cost caps proposed.

4.20 Finally, we consider that the proposed design details, in particular as to timing, would give rise to concerns about the CAT's ability to receive sufficient argumentation and to give sufficient consideration to the issues before it. Given that the cases in question may give rise to important questions of principle (both legal question in and terms of application to the facts), both for the defendant in its dealings with other customers or competitors, and more widely, and due to the precedent value of the CAT's rulings, it is essential to ensure the CAT's ability to properly consider the claims before it is not undermined within any fast track process.

4.21 These concerns arise in particular in the following areas.

4.21.1 Firstly, as is evident from the discussion above, cases brought by SMEs are not necessarily simpler or of lower value/impact than any other sort of competition claim, and it therefore cannot be assumed that SME claims are appropriate for a fast track procedure.

4.21.2 Secondly, it may not be possible to judge at the time of application for the fast track whether a claim is so appropriate, and the proposals as set out in the

Consultation Document do not seem to envisage the possibility for the claim to be transferred to the "normal" track at a later date.

4.21.3 Thirdly, there does not appear to be any form of preliminary merits threshold envisaged as part of the application process, despite the serious consequences for the defendant which would arise if a case were allocated to the fast track (see further below). This is particularly concerning given the comment by BIS that the experience of the Competition Pro-Bono Service ("**CPBS**") is that a significant number of SMEs who believe they are victims of anti-competitive behaviour in fact have no strong competition case to bring (paragraph 4.29 Consultation Document). It is in our view doubtful that simply access to a "Plain English" web page on the CAT site and strong encouragement to make use of pro bono advice bodies (paragraph 4.30(i)) would in itself be sufficient to deal with this concern.

4.21.4 Fourthly, the proposal to have a fixed cost cap applicable in all cases is inappropriate given the great variety in the type, size and complexity cases which could be brought.

4.21.5 Moreover, the level of cap proposed - £25,000 in total - is manifestly inadequate in respect of even the early stages of the simplest type of competition claim that can be envisaged. If such a low cap were introduced, there would be serious risks of unmeritorious, unfounded and vexatious claims being brought, leading the defendant to incur significant irrecoverable costs, in addition to management time, in defending such claims. The concern is magnified by the apparent lack of reciprocity in the proposal – it appears from paragraph 4.28 Consultation Document that BIS does not envisage that the defendant's exposure to the claimant's costs would be so limited.

4.21.6 Fifthly, as demonstrated by the cases referred to above, 6 months is an unrealistic target for the claim to be heard in the vast majority of cases, as is the proposed limitation on oral hearings to a few days in many cases, although this will obviously depend on the points at issue.

4.21.7 Finally, we believe that the proposal to waive the requirement for cross-undertakings in damages in respect of interim injunctions is problematic and poses serious risks for the rights of the defence. This would remove an important safeguard from unmeritorious claims, in particular where the relief sought would impact the entirety of a defendant's business model. It is notable that this design

element is not a feature of the PCC procedure (and our understanding is that in fact interim relief is not regularly sought in the PCC).

Alternative approach

4.22 In light of the considerations set out above, if BIS is minded to introduce a separate procedure, rather than relying on the existing and already flexible case management powers of the CAT and its ability to apply its discretion in relation to the award of costs, we consider that a more appropriate and workable approach could be along the following lines, rather than a "one size fits all" fast track.

Selection of cases

4.23 An appropriate filter to identify which cases are suitable for the fast track is key. Suitable cases in these circumstances must mean those of sufficient simplicity such that they are capable of being resolved through an expedited process, and those which are appropriate to be considered for measures designed to facilitate access to justice. As demonstrated above, the fact that a case is brought by an SME is not a sufficient filter to select these cases, as a claim being brought by an SME is not a proxy for simplicity, or for low value. An appropriate filter to identify simpler cases would also have the advantage that claimants wishing to take advantage of the fast track procedure would be incentivised to simplify their claims (for example in terms of the issues raised).

4.24 We would therefore propose that, upon an application for a claim to be heard in the fast track, the CAT chairman would determine whether this is appropriate based on a series of factors to be set out in the CAT Rules, modelled on those applicable in the High Court under CPR 26, and the factors applied in the PCC, as adjusted for issues specific to competition claims. The parties' representations would be sought at this stage.

4.25 There could be a default presumption that the fast track would be the appropriate route if certain thresholds[22] were met (and not appropriate if these were not met), for example:

- The value of the claim is lower than a specified figure, for example £500,000 (as per the damages cap in the PCC).
- Where injunctive relief is sought the value of sales impacted would be lower than a specified threshold, for example £500,000.
- The hearing is likely to last for no more than a specified number of days.

[22] Which could be re-assessed over time once experience of selecting and hearing these type if cases is gained.

- The amount of expert evidence required is relatively limited, for example that there are likely to be no more than a specified number of fields in which expert evidence will be required and/or that there are likely to be no more than a specified number of experts.

4.26 However, the CAT chairman would be obliged to also consider other relevant factors in considering whether to depart from the default position either way, such as:

- The size and status of the parties.
- The financial value of the claim relative to the resources of the claimant and the defendant.
- Whether the claim could be brought more appropriately as part of a collective action with other claimants or a representative action (for example in the case of a follow-on damages action), depending on what, if any, amendments are made to the collective redress regime in the UK as a result of the consultation.
- The nature of the remedy sought.
- Whether the outcome of the case would have wider effects than as between the parties.
- The likely complexity of the facts, law and evidence.
- The likelihood of conflicting factual evidence and the amount of oral evidence and cross-examination likely to be required.
- The existence or otherwise of related administrative findings.
- Whether the claimant is prepared to limit the issues raised in order to benefit from the fast track.
- The views of the parties.
- Whether the claimant has first sought to engage in ADR or otherwise reach a negotiated solution.
- Whether the claim meets some form of preliminary merits threshold.

4.27 In order to assess these matters, we consider that a claimant would need to provide a relatively detailed amount of information about its case and the evidence either relied on or sought, rather than a simplified version of a normal application as currently proposed within the Consultation Document.

4.28 We believe that, in addition to consideration of this at the application stage, the parties should also have the ability to apply for transfer out of the fast track at the first case management conference.

Design details

4.29 In relation to cost caps, we oppose the introduction of a fixed cap in all cases, and instead would propose that:

- The CAT would be obligated to consider cost caps in all fast track cases, with a presumption that a degree of (two-way) cost capping will be applied, unless circumstances (including the CAT's preliminary view on the merits, and whether the claimant has entered into funding or ATE insurance arrangement) require otherwise.
- There be no presumption as to the level of any cost cap, this to be determined by the CAT within its discretion. Illustrative examples could be given within the CAT Guide to Proceedings as to likely appropriate caps in certain types of cases.
- The CAT would have the ability to impose individual cost caps for different stages of the proceedings, including up to and including an interim relief application, and/or until after statements of case and the first case management conference, when greater details about the case will be known.
- The CAT would have the ability to require certain issues, or disclosure requests, be narrowed if cost caps are to be granted.

4.30 As indicated above in relation to the selection of claims, we consider that damages should be capped (unless the parties agree otherwise). It is difficult to determine an appropriate level, but we would suggest that this could be £500,000 in the first instance as in the PCC.[23] This, however, clearly does not deal with the issue that injunctive relief could have a much greater impact on the defendant, and therefore this must be a key factor in assessment of whether a claim is suitable for the fast track.

4.31 In relation to other design details, we suggest that the CAT be under an obligation to exercise its case management powers in fast track cases to ensure an appropriate balance between the objectives of expeditious access to justice and safeguarding the rights of defence, but that the details be largely left to its discretion. In particular we would suggest that:

- No fixed time period be imposed from application to trial, but target time periods be set and included in the CAT's Guide to Proceedings.

[23] Which could be re-assessed over time once experience of selecting and hearing these type if cases is gained.

- No fixed time period be imposed for hearing length, but a default position apply that this would be no more than a specified number of days, unless circumstances require otherwise.
- The CAT exercise active case management, including in respect of the issues on which disclosure and expert evidence are to be allowed.

4.32 In respect of interim injunctive relief, whilst we agree that the CAT should have the flexibility in principle to waive or limit cross-undertakings in damages, we do not consider that there are sufficient grounds to depart from the applicable principles followed in the High Court for determining whether a cross-undertaking in damages will be waived or limited.

Relationship with collective redress proposals

4.33 We note that it is not clear from the Consultation Document whether BIS envisages that collective actions could be brought using the proposed fast track procedure. For the avoidance of doubt we note that we consider that this should not be possible and that the two routes should be mutually exclusive (which would not prevent the CAT consolidating similar claims as part of a fast track procedure in accordance with the CAT Rules in appropriate cases).

"Warning letter"

4.34 For completeness, we note our serious opposition to the possible proposal set out in paragraph 4.35 Consultation Document for the CAT or the OFT to write "warning letters" to alleged infringers.

4.35 The CAT, as a judicial body, should clearly have no role in in such a scheme. Similarly, the OFT should only take any action having appropriately investigated the alleged infringement in accordance with its obligations under the CA98 and its general public law duties, i.e. it should follow its normal investigation procedures.

5. QUESTION 5: HOW APPROPRIATE ARE THE DESIGN ELEMENTS PROPOSED, IN PARTICULAR COST THRESHOLDS, DAMAGE CAPPING AND THE EMPHASIS ON INJUNCTIVE RELIEF?

5.1 See our response to Question 4 above.

6. QUESTION 6: SHOULD ANYTHING ELSE BE DONE TO ENABLE SMES TO BRING COMPETITION CASES TO COURT?

6.1 If the, adjusted, procedure proposed above were adopted we do not consider that further reforms would be needed or desirable in respect of the processes by which competition

claims can be brought by SMEs, in particular if some of the other proposals set out in the Consultation Document (such as those as to collective redress) were adopted.

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?

Should a rebuttable presumption of loss be introduced into cartel cases?

7.1 We are firmly opposed to the introduction of any presumptions of loss, whether in cartel cases or otherwise.[24] This would be a radical departure from the general English law position that loss must be proven and that claimants can only claim for loss which has actually been suffered. It is unnecessary, inappropriate, and in any event unworkable in any just manner.

7.1 As a matter of principle, if there is no longer a requirement to prove loss, then the regime would move away from a compensatory model to one with a punitive element, which is not in our view justifiable.

7.2 Levels of loss will vary widely, as with any tort, which requires detailed consideration of both the question of causation and of quantification. Each cartel is different: in simple terms, some may never be implemented (or participants may "cheat") and therefore have little or no impact on prices, others may give rise to a significant overcharge. In other cases some customers may suffer a cartel effect, for example those which purchase on the basis of list prices (if that is what the relevant agreement related to), whereas other customers of the same supplier may not be impacted at all (for example if they were supplied pursuant to a long term contract entered into prior to the cartel period).

7.3 Whilst a rebuttable presumption of loss may encourage claimants, as it would be likely to provide a focal point for settlement discussions (albeit one which is unlikely to be accepted by defendants), this is not clearly not necessary for such claims to be brought. Moreover, as well as encouraging unmeritorious claims and raising issues of justice (considered further below), introducing such a presumption may make settlements less likely, as claimants may focus on the 20% level, whilst in many cases defendants would be unlikely to make any settlement offer in this region.

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[24] We note that the proposal within the Consultation Document would more accurately be described as a presumption of *overcharge*, rather than loss, the level of loss depending also on various other factors, such as the level of pass-through, the volume of sales, as well as factors relevant to the question of causation, such as when and how contracts were awarded or sales made.

7.4 Claimants can and do obtain expert evidence (in relation to which expert economic advice is readily available) as to the level of overcharge, as evidenced by the numerous follow-on claims brought to date, and the greater number of out of court settlements reached on the basis of claimants having adduced just such evidence.

7.5 Whilst competition cases do raise complex issues of quantification, including the establishment of the appropriate counter-factual, other types of claim in other areas of law can raise equally complex questions of quantification, which claimants can and do deal with regularly, as do the courts. Just two examples are intellectual property cases and contractual cases in which loss of profits needs to be assessed. There is no reason why competition law claims should be treated differently.

7.6 Whilst a cartelist may in theory have some informational advantage over the claimant in terms of evidence of what factors influenced the setting of prices for example (although in many cases given the time period between the infringing conduct and the damages action that is simply unavailable), the disclosure rules applicable under English law mean that claimants will have equal access to such evidence, and in practice are often able to obtain a significant degree of data during settlement discussions before any disclosure process has commenced. In addition, certain economic techniques to model the impact of a cartel can in any event be employed on the basis of information equally available to the claimant – such as that on price, product specification, input costs and so on.

7.7 Moreover, when it comes to the question of passing-on, which is as fundamental part of quantification of cartel damages as the level of overcharge, the claimant will have the informational advantage over the defendant, as it will have the evidence of its own pricing decisions.

7.8 In any event, we note that as both claimants and defendants would adduce expert evidence in both litigation and in settlement discussions, as a matter of practice it is unclear how much value the introduction of a rebuttable presumption would add.

7.9 Further, we do not consider that such a presumption could be workable in practice.

7.10 The Consultation Document appears to assume that the presumption of overcharge would be applied at different levels along the distribution chain. This is illogical, and would cause injustice to the defendant if applied. If it is presumed that an indirect purchaser has suffered a 20% overcharge, this assumes that the direct purchaser has passed on the increase in price to its customers. Yet under the proposal it would be presumed that the direct purchaser had suffered a 20% overcharge, and therefore had not passed on the increase in price. If a defendant were to be ordered to pay damages essentially many times over for the same loss,

this would be manifestly unjust. This is even before the issue of how the overcharge presumption would be applied to components incorporated into other goods throughout the value chain is considered.

7.11 Such a presumption may also lead to a presumed competitive price which is below the costs of supplying the relevant goods or services.

7.12 Finally, we note the reference in paragraph 4.40 of the Consultation Document to a presumption of loss being referred to in the EU Commission's draft guidance on the quantification of harm.[25] Respectfully, the relevant paragraph referred to[26] does not in any way support the introduction of such a presumption. The Commission recognises that in some national systems empirical studies are taken into account by courts, which may lead to an inference in some Member States that cartels do normally lead to some overcharge. However, the Commission does not propose that any form of inference or presumption is introduced, and rightly concludes that "[Insights from empirical studies] *into the effects of cartels do not replace the quantification of the specific harm suffered by claimants in a particular case*".

What would be the most appropriate figure to use for the presumption?

7.13 As to what the most appropriate figure to use would be, as is evident from the above, no such figure is appropriate.

7.14 We would note however that great care needs to be taken in relying on the type of empirical studies referred to within the Consultation Document as evidence of average or median overcharge rates. For example, a number of the instances relied on within the Connor and Lande study referred to are simply examples of overcharge estimates put forward by claimants' experts, or the amount by which the documentary evidence records the cartelists agreed to raise price (rather than the comparison between the cartelised price and what the price in the counter-factual would have been), not judicial findings of overcharge. Moreover, such studies are likely to exclude cartels resulting in low overcharges, as these are less likely to have led to litigation.

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25 Draft Guidance Paper Quantifying Harm in Actions For Damages Based on Breaches of Article 101 or 102 of The Treaty on The Functioning of The European Union, June 2011.

26 Paragraph 123, which reads: "*According to this study, there is thus a considerable spread of the overcharges observed (with some cartels even having an overcharge of more than 50 %). About 70 % of all cartels considered in this study have an overcharge of between 10 % and 40 %. The average overcharge observed in these cartels is around 20 %.*"

7.15 If BIS were to adopt a presumption of overcharge, contrary to the position advocated above, we consider that it would need to be much lower than 20%, and that BIS would need to seek expert economic advice before forming a view on the appropriate level.

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?

8.1 We do not consider that there is any need to address the issue of passing-on in legislation, nor in our view would any change to the current position be desirable.

8.2 Although the question has not been definitively resolved by the English courts, the passing-on "defence" must be permitted as part and parcel of the principle that loss must be proven and that claimants should only receive compensation for losses they have actually suffered.

8.3 Moreover, a number of decisions to date indicate that defendants will be permitted to raise passing-on in competition cases under English law. For example, one of the reasons for the rejection of the use of the CPR 19.6 representative action in *Emerald Supplies Ltd v British Airways plc*[27] on behalf of both direct and indirect purchasers was that the members of the class would have different interests, as BA may plead the passing-on defence in relation to some claimants.[28]

8.4 See also the obiter comments of the Court of Appeal in *Devenish Nutrition v Sanofi-Aventis*[29]: "*I can see no way in which it could avoid taking this "pass on" into account in any compensatory claim for damages*".

8.5 Any legislation prohibiting reliance on passing-on, which would not be appropriate in the light of the comments above, would need to be accompanied by the removal of standing for indirect purchasers in order to avoid double jeopardy. However, this would be contrary to principles of English and EU law.

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27 [2010] EWCA Civ 1284.

28 In addition, in a number of other cases indirect purchasers have brought claims, for example *Moy Park Limited & Ors v Evonik Degussa GmbH and Degussa Limited* (Case 1147/5/7/09).

29 [2008] EWCA Civ 1086.

COLLECTIVE ACTIONS

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.

Introductory comments

9.1 Before addressing the current collective action regime, we set out in the following paragraphs some initial observations about the role and purpose of, and policy justification for, collective actions in the competition law sphere.

9.2 Firstly, as with any other private enforcement action based on a competition law infringement, the objective of a collective action is compensation for losses suffered (or the prevention of losses in cases where injunctive relief is sought). This compensatory objective should underlie all consideration of whether, and if so how, to reform the current regime for collective actions; any revisions should only be made if they have the purpose and effect of facilitating those harmed by anti-competitive behaviour to obtain redress.

9.3 Although an ancillary consequence of an increase in the number of claimants bringing private actions to obtain redress may be to increase deterrence and/or to increase the level of detection of anti-competitive behaviour, deterrence and detection are the realm of public rather than private enforcement, and therefore should not be policy objectives or motivating factors underlying any reforms to the collective redress regime. Similar considerations apply to punishment objectives, to an even greater extent, which should have no place in a private enforcement regime.

9.4 Secondly, any reform of the collective action regime must take proper account of the rights of defence. In particular it must provide adequate safeguards to prevent unmeritorious claims being brought, avoiding the excesses of the US class action system and the compulsion on defendants to settle claims in light of the costs and risks of the litigation, even where they have a reasonable defence, that exists within that system (as recognised by BIS in the Consultation Document).[30]

9.5 Thirdly, any reform must ensure that principal-agent problems, for example conflicts of interest as between claimants and their lawyers, are not created.

9.6 Finally, given that there are many areas of law which demonstrate similar or greater obstacles and risks to the bringing of claims, the justification for introducing wide-ranging

[30] For example paragraphs 3.19, 5.6, 5.29 and 5.32-5.33 Consultation Document.

special mechanisms for competition claims over and above those available to other deserving claimants (for example in relation to personal injury and other mass tort claims, product liability, unfair contract terms, securities litigation) is not entirely clear. Introducing overly-favourable mechanisms for competition claims also gives rise to the risk of claimants seeking to shoe-horn claims which in reality do not concern a breach of competition law into a competition claim in order to take advantage of such mechanisms, in particular given competition cases often arise out of wider commercial disputes. In relation to any revisions to the regime this risk will need to be controlled.

Current collective action regime

9.7 The Section 47B CA98 representative follow-on action, in its current form, has clearly not led to numerous cases, given that the claim brought by Which? against JJB Sports in relation to *Football Replica Kits* is the sole case to have been brought.

9.8 However, this should not automatically lead to a conclusion that the current regime is failing, and in particular that any opt-in form of action must fail. The reasons for the low number of cases must be considered.

9.8.1 Firstly, there are obstacles to bringing civil claims of any sort in any area which must in part be responsible for the low level of claims under Section 47B CA98.

9.8.2 Secondly, many infringement decisions issued to date have not necessarily been conducive to end consumer claims. For example in many cases, unlike in the *Football Replica Kits* case, consumers have been indirect purchasers, including of products incorporating an upstream cartelised product. As a result difficulties arise around the question of the extent to which any overcharge was in fact passed on to the ultimate consumer, which may have militated against claims being brought in such cases.

9.8.3 Furthermore, in the UK the overall number of infringement decisions issued by the OFT and the sectoral regulators has been in any event low.

9.8.4 Thirdly, the fact that only one representative body, Which?, has been designated to bring Section 47B CA98 claims, and that *ad hoc* designation of representative bodies on a case by case basis is not possible, has arguably hindered use of this form of action.

9.8.5 Finally, in all areas of law/litigation it is common that claims for very small individual losses are typically not litigated, not necessarily because of unjustified risks and obstacles in doing so, but simply because claimants are not sufficiently

concerned to do so (in the words of BIS, they "*may simply consider it too much hassle to be worth claiming*"), and therefore the low use of the representative action may to a degree simply be a result of this fact rather than flaws in its design. Questions therefore arise as to whether it is socially useful/efficient to encourage such claims to be brought where the potential harm is so insignificant that those who suffer the harm may not be sufficiently concerned either to bring a claim, or to claim a share of damages in an opt-out scenario. (In a follow-on case, the perpetrators will, of course, have already been fined.)

9.9 In relation to participation rates in the *Football Replica Kits* claim, again, whilst the level of participation in the Which? action was low, this is not necessarily determinative of the question of whether such actions could ever result in widespread redress being obtained in other cases.

9.10 For example the level of damages was relatively low and is likely to have influenced consumer inertia coming forward, compounded by difficulties in evidencing purchases given the time that had passed. The action was also limited to those who had made personal purchases of replica shirts.

9.11 Moreover, the fact that JJB Sports made an earlier offer of a free England away shirt and a mug for those who had purchased a shirt in the relevant period is likely to have reduced incentives to participate in the Which? claim. To the extent that the potential claim prompted this compensation offer this ought to be regarded as a success. To the extent that consumers did not opt in to the claim or take advantage of the offer, given the publicity involved in this case it seems unlikely that an opt-out claim (see further Question 14 below) would have ultimately led to any greater redress being obtained by those harmed. It is unclear why a greater number of claimants would claim their share from an opt-out fund post-quantification than had done so here (either because they do not have the necessary proof of purchase and loss, or because of the hassle-factor). Applying an opt-out model to this scenario would not therefore lead to enhanced redress for consumers, but only to a "windfall" for the Access to Justice Foundation, or other body, under the current proposals (see further the response to Question 20 below).

9.12 Therefore we are not persuaded that the failure, if indeed it was a failure, in this case justifies a conclusion that the design of the current regime itself is fundamentally flawed.

9.13 It must also be borne in mind that the Section 47B CA98 representative follow-on action is not the only existing mechanism for competition collective actions to be brought (even

taking account of the rejection of the use of the CPR 19.6 mechanism to bring a case on behalf of a class in this area in *Emerald Supplies Ltd v British Airways*[31]).

9.13.1 Firstly, there is the possibility for Group Litigation Orders under CPR 19.10-19.11. There is no reason why this mechanism cannot be used in competition claims, and indeed this was suggested by the Chancellor at first instance as a more appropriate route to deal with the *Air Cargo* claimants in the *Emerald Supplies* case.[32] This mechanism would clearly avoid the concern expressed by BIS that the same issues would have to be litigated in each case if claims were pursued individually.[33]

9.13.2 Secondly, claimants can and do group together on an *ad hoc* basis to bring consolidated actions in individual cases, for example the claim brought by Deutsche Bahn and other train operating companies in respect of *Carbon and Graphite Products*.[34] This enables claims to be brought in an efficient and cost-effective manner without any need for a specific mechanism.

9.14 Notwithstanding the above comments, some revisions to strengthen the competition collective action could still usefully be made. However, in light in particular of the comments set out in paragraphs 9.2-9.6 above, this is subject to any reform being proportionate and balanced, only being implemented where there is demonstrable need, and taking full account of the appropriate policy objectives (both securing redress for victims of anti-competitive behaviour, and ensuring that defence rights are protected and that a "litigation culture" is not created). We consider that the full-scale reform currently proposed does not meet these criteria and that a more measured and proportionate response would be appropriate.

9.15 In our view the current proposal within the Consultation Document for an opt-out collective action available in follow-on and stand-alone cases, to consumers and all businesses, with standing not being limited to representative bodies but extending to private individuals and undertakings, is overly far-reaching, to an extent not justified by obstacles and risks actually faced by claimants. The proposal is likely to have unwelcome consequences (see further below).

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31 [2010] EWCA Civ 1284.

32 See paragraph 38 [2009] EWHC 741 (Ch).

33 Paragraph 5.1 Consultation Document.

34 Case No: 1173/5/7/10 *Deutsche Bahn and others v Morgan Crucible Company plc and others.*

9.16 Moreover, the proposed opt-out action appears designed not solely to facilitate obtaining redress for victims of competition law breaches, but appears motivated in part to increase deterrence and to strip out a perceived "windfall" from defendants and therefore crosses the line between compensation and punishment.

9.17 If, despite the risks which arise, BIS remains of the view that significant reform is required, a more proportionate and measured approach should be adopted to address concerns raised about the ability of, in particular, consumers to obtain redress, whilst seeking to minimise some of the problems associated with the proposed opt-out action. Such an approach is discussed in greater detail below, but in summary could include incremental revisions extending the scope of the Section 47B CA1998 representative action, potentially including allowing such claims to be brought either:

- on a pre-damages opt-in basis; or
- on an opt-out basis, if BIS remains of the view that this is necessary, provided that this was subject to a strict certification procedure and to unclaimed funds reverting to the defendant.

9.18 We note that it is not clear from the Consultation Document whether BIS envisages that collective actions could be brought using the proposed "fast track" procedure for SMEs in the CAT, if adopted. As noted above, for the avoidance of doubt we note that we consider that this should not be possible and that the two routes should be mutually exclusive (which would not prevent the CAT consolidating similar claims as part of a fast track procedure in accordance with the CAT Rules in appropriate cases).

9.19 Finally, we note that the Consultation Document does not address the issue of transition in relation to the collective action proposals (or indeed more generally). Careful consideration would need to be given to appropriate transitional provisions for any new form of collective action, including in relation to claims yet to be commenced, for example given that the likelihood and extent of private actions is a factor in any assessment by an undertaking of whether to apply for leniency.

10. <u>QUESTION 10:</u> 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 Ensuring that victims of anti-competitive behaviour can secure redress is clearly a correct and important policy objective which should underlie any extension to the collective action regime.

10.2 The need for a balanced system, which does not lead to an undue litigation culture, is also an important policy objective: any reform must ensure that the rights of defence are protected, including the avoidance of unmeritorious and vexatious claims. Any expansion of the regime must be considered against this objective and matched by safeguards (including a firm maintenance of cost-shifting/"loser pays" rules) to ensure that only legitimate claims for redress are allowed to proceed and defendants do not feel compelled to settle spurious claims.

10.3 As outlined above, whilst increased deterrence and therefore compliance may be an ancillary by-product of an expanded private enforcement regime, deterrence is not the purpose of private actions. We consider that there is therefore no justification for its inclusion as a policy objective. Deterrence and punishment as policy objectives are the function of the public enforcement regime, as reflected by the significant fines imposed by the OFT/sectoral regulators and the EU Commission, and the ability of the OFT to take additional action in the form of criminal prosecution of individuals and the disqualification of directors.

10.4 The, misplaced, inclusion of deterrence as a policy objective by BIS (see for example paragraph 5.10, Box 3, paragraphs 5.13, 5.24-5.25 and 5.47 of the Consultation Document, and paragraphs A.26, A.34 and A.36 of Annex A) leads BIS to dismiss opt-in or pre-damages opt-in models and reject the option of reversion to the defendant of unclaimed funds in an opt-out model, without sufficient focus on the implications of this for redress as isolated from deterrence. This leads to some elements of the proposals not aiming at redress for victims but crossing the line between compensation and punishment.

10.5 If, contrary to the position outline above, deterrence were to constitute a policy objective underlying these reforms, then this would necessitate a re-consideration of the public enforcement regime and its relationship with private enforcement, to ensure that the principle of *non bis in idem*/against double jeopardy is not infringed. This was recognised at first instance in *Devenish Nutrition v Sanofi-Aventis SA*[35] in respect of the issue of whether exemplary damages should be awarded where a fine had been imposed or commuted due to a successful leniency application.

11. <u>QUESTION 11:</u> SHOULD THE RIGHT TO BRING COLLECTIVE ACTIONS FOR BREACHES OF COMPETITION LAW BE GRANTED EQUALLY TO BUSINESSES AND CONSUMERS?

35 [2007] EWHC 2394, [2008] EWCA Civ 1086.

11.1 In accordance with the comment above that reform must be proportionate and only occur where there is demonstrable need, it is submitted that the business community generally does not require access to any enhanced collective action regime in order to bring private claims to obtain redress for breaches of competition law.

11.2 Many businesses that may be affected by anti-competitive behaviour can, and do, bring such claims already. This is reflected in the significant and increasing number of follow-on claims brought by businesses in both the CAT and the High Court, as discussed above, with many more claims settling without proceedings (in particular where there is a continuing commercial relationship between the prospective claimant and defendant), and also a material number of stand-alone claims.[36]

11.3 For such businesses, competition claims are no different from any other claims: as with other litigation, they have the ability, access to advice, and resources to bring such claims, and can weigh potential costs exposure and other risks against the likelihood of success. BIS has not put forward evidence that such businesses are deterred from bringing private law competition actions, in appropriate cases, over and above bringing claims in other areas. Such businesses are also in many cases more likely to have suffered higher individual losses, due to a greater volume of purchases for example: therefore in the hypothetical example given by BIS of an overcharge for printer cartridges (Box 3), in reality, many business customers would have purchased multiple units, which may make bringing an individual claim cost-effective.

11.4 As noted above, existing mechanisms such as Group Litigation Orders can be used to prevent the same issues being litigated by or on behalf of businesses in multiple cases.

11.5 In addition, extending collective actions to businesses would, unlike with end consumers, give rise to the complicating factor of dealing with the issue of passing-on. For example, how to deal with different categories of purchaser – direct and indirect – would need to be dealt with, as would the issue that passing on levels may differ depending where the respective businesses sit in the value chain and to what use they put the cartelised product.

11.6 However, we acknowledge that, for small businesses, the difficulties identified by BIS for consumers in bringing competition law claims, and which led to the creation of the Section 47B CA98 representative action, may also apply. For example small businesses may

[36] In respect it is noted that the statistics cited at paragraph 3.12 of the Consultation Document are not sufficiently recent, and are therefore not reflective of either the current level of competition claims we are seeing in the UK courts or of the number of out-of-court settlements.

equally be deterred from bringing a claim due to the risk of a costs liability in excess of a low level of individual loss, and may suffer similar difficulties in financing a claim.

11.7 Therefore there may be justification for extending any enhanced competition collective action regime to allow claims to be brought on behalf of small businesses/SMEs.

11.8 There may, however, be difficulties in defining an appropriate class of SMEs to whom the collective action regime would apply (including as to what point in time this question is to be addressed), which may result in extensive preliminary/interlocutory proceedings to determine the claimants' status as SMEs, and in some instances unfairness in individual cases due to arbitrary lines needing to be drawn for definitional purposes.

11.9 Moreover, if a revised collective action regime were extended to businesses, in appropriate cases there may be efficiencies in allowing claims by larger businesses to be brought together, for example with similar claims brought by SMEs, rather than multiple claims being brought.

11.10 We therefore propose that the size and status of the undertakings within a proposed class should be specified as a factor to be considered on certification when the CAT assesses whether a collective action is necessary and/or appropriate for the case at hand, with appropriate guidance being given accordingly as to when the collective action should and should not be available.

11.1 Given the BIS Consultation Document itself focuses on the potential difficulties for consumers and small businesses in bringing competition law claims, concluding that the current regime is "*inadequate in delivering restorative justice for consumers and small businesses*" (see paragraphs 3.12, 5.1 and 5.6 Consultation Document), this may have been the BIS intention in any event.

12. <u>QUESTION 12</u>: SHOULD ANY RESTRICTIONS BE INTRODUCED TO PREVENT SUCH CASES BEING USED AS A VEHICLE FOR ANTI-COMPETITIVE INFORMATION SHARING?

12.1 We do not consider this issue to be of particular concern, and therefore not a reason in itself not to extend collective actions to businesses.

12.2 It may be the case that the bringing of an action by or on behalf of multiple businesses would require competitively sensitive information to be adduced as evidence, although in many cases the information may be historic, and business claimants may not in all case constitute competitors.

12.3 However, the undertakings involved can and should obtain legal advice on whether any concerns exist and, if so, how these can be dealt with to ensure competition law compliance.

12.4 The issue already arises in relation to private competition actions where there are multiple competing claimants or defendants, and regularly arises in other forms of competition litigation and competition investigations (such as appeals to the CAT of regulator decisions, Ofcom's dispute resolution procedures, and merger investigations).

12.5 Undertakings and practitioners are familiar with the issues which may arise, and the arrangements which can be put in place to deal with any concerns. For example, in the CAT, arrangements such as confidentiality rings and counsel-only disclosure are regularly utilised (see for example the extensive confidentiality arrangements put in place in respect of the various *Pay TV* appeals in the CAT).[37] Such arrangements have also been used in damages cases – confidentiality rings having been established by the High Court in *National Grid Electricity Transmission plc v ABB Limited and others*[38] for example.

12.6 The CAT is therefore alive to the issues which may arise and accustomed to policing arrangements to deal with these issues. It could and would also manage such issues in a collective actions context as part of its case management powers. In addition, the implementation and adequacy of such arrangements could be an issue dealt with on certification.

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

13.1 In principle, in accordance with the policy objective to facilitate redress for those who have suffered harm as a result of anti-competitive behaviour, there would be logic in allowing collective actions in stand-alone actions as well as follow-on cases.

13.2 The competition authorities cannot investigate each and every suspected infringement, and therefore allowing collective actions to be brought in stand-alone cases could facilitate access to justice and allow redress to be sought where competition authorities have been unable/unwilling to pursue a case due to administrative priorities or finite resources.

13.3 Moreover, excluding stand-alone claims from a revised collective action regime may give rise to difficulties and issues in respect of the jurisdictional scope of such an action, such as

[37] See, *inter alia*, Case No: 1158/8/3/10 *British Sky Broadcasting Limited v Ofcom.*

[38] Case No. HC08C03243.

have arisen in relation to the limitation on the CAT's current Section 47A CA98 follow-on jurisdiction.

13.4 However, whereas in follow-on cases there is generally a reasonable basis for a claim given an infringement finding exists, in stand-alone cases there is a clear risk of unmeritorious or spurious claims or "fishing expeditions" being brought, giving rise to significant costs and other burdens for defendants, and the resulting risk of defendants being pressured to settle a case despite the likelihood of a successful defence.

13.5 The level of these risks will vary depending on the form of collective action adopted, and would appear greatest in relation to the form currently proposed – i.e. full opt-out actions which can be brought by private individuals/undertakings as well as representative bodies – as well as with the various proposals outside the collective action sphere, such as the proposed presumption of loss. The various proposals therefore need to be considered cumulatively, with BIS assessing the risks of the proposed reforms leading to unfounded claims in aggregate. It is submitted that these risks militate against allowing the opt-out action proposed and favour a more proportionate approach being adopted (for both stand-alone and follow-on claims).

13.6 In addition, procedural safeguards would need to be available and utilised to ensure that spurious stand-alone claims are detected and struck out at an early stage, including:

- Rigorous application of a preliminary merits test as part of the certification process, stricter thresholds to be applied in stand-alone cases.
- Active case management post-certification.
- No departure from cost-shifting/"loser pays" cost rules; in particular it is submitted that cost caps should not be imposed on defendants in stand-alone cases.
- Rigorous testing of the claimants'/funder's ability to cover the defendant's costs on certification, and/or security for costs being ordered in appropriate cases.

(See further the response to Question 15 below on other factors to be considered on certification).

14. <u>QUESTION 14:</u> 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 Please see also our responses to Questions 9, 11 and 13 above.

14.2 In relation to at least large businesses, the case for the introduction of opt-out actions has not been made out, as such businesses can and do bring competition law private actions on an individual basis like any other claim.

14.3 In relation to consumers and small businesses/SMEs, possible revisions to the current representative regime for such claimants do merit some consideration (although as discussed above we do not consider that the low opt in rate in the *Football Replica Kits* claim in itself warrants a conclusion that opt-in actions cannot be successful in securing redress in appropriate cases).

14.4 However, there are a number of concerns and downsides to an opt-out model which in our view militate against the BIS proposal.

14.4.1 Firstly, an opt-out action raises particular risks of unmeritorious/spurious claims, and/or unfounded inflation of claims, leading to excessive pressure on defendants to settle.

14.4.2 An opt-out action, at least if not carefully circumscribed and managed through rigorous certification, is likely to lead to the creation of the "litigation culture" which BIS states it is concerned to avoid.

14.4.3 Secondly, it is difficult to estimate accurately the total size of the class of potential claimants, especially where the conduct complained of is historic and therefore documentary records of sales may be limited. Opt-out actions therefore lead to uncertainty about the scale of liability, and with that the risk of potential inflation of claims, making settlements more difficult to achieve and the whole system more costly and unpredictable for business.

14.4.4 Thirdly, an opt-out action raises the problem of how to deal with unclaimed sums, which may be very significant.

14.4.5 An opt-out action combined with any option for the distribution of unclaimed funds other than reversion to the defendant, such as that currently proposed by BIS, in our view crosses the line from compensation to punishment. An action on behalf of claimants who do not necessarily wish to be compensated resulting in cy-près distribution or distribution to a named fund does not aim at or result in compensation/redress, but at punishment and deterrence, which should not be policy objectives in the private enforcement realm.

14.4.6 This is particularly the case given that from the US experience the size of the unclaimed funds pot, and therefore the level of the damages awarded which does

not in fact compensate those wronged, can be very high, as discussed in the response to Question 20 below.

14.4.7 Fourthly, an opt-out system also results in greater incentives for lawyers and funders to bring/sponsor large claims on which their remuneration can be based, leading to potential divergences of interest between those in reality driving the litigation and those who have suffered the loss, regardless of whether law firms or funders (or a combination) are formally entitled to act as representatives for a class. This also makes settlements more difficult due to the need to deal in any settlement with the issue of the claimants' costs and the claimants' lawyers expectations of costs arising from the prospect of a large hypothetical damages pot.

14.4.8 Fifthly, an opt-out action would give rise to difficult and complex questions of jurisdiction and applicable law in cross-border cases (which regularly arise in follow-on claims from EU Commission decisions). A key question, which does not appear from the Consultation Document to have been considered by BIS to date, is how claimants not domiciled in the UK would be treated:

- Would those who suffered the same loss in other Member States automatically form part of the class of claimants?
- If so, would those claimants be bound by any judgment or settlement of the action, even if they took no part in it (and may even have been unaware of it), and therefore be prevented from initiating separate actions in respect of their losses in other Member States (which may well lead to issues of sovereignty)?
- If not, would the defendant face multiple "copy-cat" claims in other Member States?

14.4.9 It is useful to note on this point that the Civil Justice Council ("**CJC**") in its draft rules for collective actions published in 2010 sought to by-pass some of these issues by providing that any would-be members of the class resident outside England and Wales must specifically opt in.

14.4.10 Sixthly, an opt-out action available in the competition sphere but not in other areas would give rise to jurisdictional skirmishes even in purely domestic matters, with claimants seeking to shoe-horn what are in reality non-competition cases into a competition law case to take advantage of the regime.

14.4.11 Finally, an opt-out action as currently proposed would also raise difficult questions about the appropriate boundaries of the potential class in addition to the non-UK claimants point raised above – for example would it include consumers as well as businesses in the same class, and would it include direct and indirect purchasers?

14.4.12 The CAT would have to consider the possibility of separate representatives for different sub-classes of claimants, and possibly accommodate multiple class claims and/or determine who should be the lead claimant. All this would mean that certification is likely to be complicated and costly (and claimants may have difficulty in funding claims until certification).

14.5 If, despite these concerns, BIS remains of the view that changes to the current competition collective action regime to move away from a pure opt-in model are justified, this should be done in a measured and proportionate manner, including circumscribing the identity of those who would be entitled to bring a collective action (see also the responses to Questions 22 and 23 below).

14.6 A more proportionate approach could involve revisions to the Section 47B Competition Act 1998 representative action to:

14.6.1 Increase the number of representative bodies capable of bringing such actions and provide for the *ad hoc* certification of representative bodies by the CAT in appropriate cases.

14.6.2 Extend the categories of claimants on whose behalf claims can be brought to include SMEs and potentially other businesses in appropriate cases (see the response to Question 11 above).

14.6.3 Extend the scope of the action to stand-alone as well as follow-on actions subject to safeguards (see the response to Question 13 above).

14.6.4 Potentially, allow such claims to be brought either:

- On a pre-damages opt-in basis (subject to the safeguards noted below); or
- On an opt-out basis, if BIS remains of the view that an opt-out action is necessary, despite the factors outlined above, provided that this was subject to:
  - A strict certification procedure (as discussed further in the response to Question 15 below), including a preliminary merits

test, and consideration by the CAT of whether (i) a collective action is the most fair and appropriate means for resolution of the issues, and, if so (ii) whether an opt-out or opt-in approach was the most fair and appropriate model in the particular case.

- Unclaimed funds reverting to the defendant (see the response to Question 20 below).
- Further safeguards through active case management and costs rules (see further the responses to Questions 17 and 18 below).

14.7 These would not solve all of the issues identified in relation to the form of opt-out action proposed, for example the jurisdictional complexities would still need to be addressed, but would remove or lessen a number of the concerns raised, whilst achieving the objectives of BIS.

14.8 For example, a pre-damages opt-in model would inter alia:

14.8.1 Be likely to result in an equivalent level of redress achieved in practice as opt-out actions, given the publicity of the proceedings (which could be enhanced by publicity/case management requirements on certification) allowing identification of additional claimants.

14.8.2 Be likely to provide an equivalent level of finality to defendants in practice (thus also facilitating settlements).

14.8.3 At the same time avoid the difficulty of estimating total damages for all potentially affected parties, as claimants must come forward prior to quantification, and the difficult policy and practical issues of how to deal with unclaimed funds.

14.9 As discussed further in the responses to Questions 22 and 23 below, circumscribing those who can bring such claims would reduce the risks of unmeritorious/spurious actions being brought, and lessen to some extent the risks of the self-motivated interests of law firms and/or funders driving the litigation.

14.10 Finally, in relation to any form of competition specific collective action, in follow-on cases this should be strictly limited to decision of the OFT/sectoral regulators and the EU Commission, and should not extend to decisions of other NCAs (as recognised by BIS within its discussion on the relationship between public and private enforcement).[39]

[39] Paragraph 7.11 Consultation Document.

15. <u>QUESTION 15</u>: WHAT ARE YOUR VIEWS ON THE PROPOSED LIST OF ISSUES TO BE ADDRESSED AT CERTIFICATION?

15.1 As BIS recognises, the "design details" of any enhanced collective action regime are crucial in ensuring that sufficient safeguards are in place to ensure that defence rights are protected and unmeritorious claims and claims not suitable for collective actions are filtered out as early as possible. This is particularly the case if any form of opt-out model is adopted, but also if the current regime is simply extended, to encompass stand-alone claims for example.

15.2 The precise detail of the issues to be addressed at certification (and subsequently through active case management) will of course depend on the form of action ultimately adopted, and therefore the comments below are made generally without prejudice to a preferred form of action.

15.3 We agree with BIS that all of the issues listed in paragraph A.3 of Annex A would need to be addressed at certification.

15.4 However, further consideration will need to be given as to the precise application of these considerations (and the extent to which the detail of these will be specified in the CAT's Rules, or left for determination within the CAT's discretion). For example:

15.4.1 When commonality of issues is considered, a relevant factor will be whether the class can contain both direct and indirect purchasers, and if so whether separate representatives are required for sub-classes (if so requiring in addition an assessment of the adequacy of the sub-class representative).

15.4.2 The CAT would need to consider how to deal with multiple claims brought by multiple claimants/multiple counsel.

15.4.3 In relation to the adequacy of the representative, in addition to the factors listed, including importantly that the representative has sufficient funds/funding in place to cover the defendant's costs, other factors would need to be taken into account. The precise nature of these will depend on resolution of the question of who can bring a claim (representative bodies v individuals, advance specification of representative bodies v *ad hoc* certification of such bodies etc) but should at the least include assessment of: whether the representative claimant possesses qualities such as proper management; the existence of proper governance arrangements/systems for conduct of the claim (for example who would give

instructions and how individual class members could participate in decisions); and whether the representative claimant has any pecuniary interest in the case.

15.4.4 When the question of whether the representative has sufficient funds/funding in place to cover the defendant's costs is considered this should include consideration of whether security for costs should be ordered (in relation to which the applicable test may need to be adjusted to take account of the collective action context).

15.4.5 Should collective actions be extended to businesses then the CAT would need to assess whether the businesses within the class were appropriate businesses to participate in the proposed collective action (see the response to Question 11 above).

15.4.6 In relation to the proposed preliminary merits test, which we agree is essential, further consideration will need to be given to the form this could take and any other possible formulations, for example the summary judgment test of whether there is a "real prospect of success", and to what level/type of evidence will be required to assess this. In addition, it should be considered whether the test should differ between opt-in and opt-out claims, and follow-on and stand-alone claims. As noted in the response to Question 13 above, in our view a stricter merits test should in our view be applied in respect of stand-alone cases, given the risks to the rights of defence of defendants are greater.

15.4.7 There may also be benefit in including as part of the preliminary merits test a threshold question as to whether there is a reasonable basis for a UK court taking jurisdiction over the claim (in light of the issues which have arisen in the *Provimi*, *Cooper Tire* and *Toshiba Carrier*[40] line of cases for example).

15.4.8 In relation to the question of whether a collective action is the most suitable means of resolving the common issues (or the "*most appropriate means for the fair and efficient resolution of the common issues*" in the language of the CJC draft rules), the CAT should be required to consider the costs and the benefits of the proposed collective proceedings (as proposed by the CJC). It should be considered whether this should include some express form of cost/benefit

[40] *Provimi Ltd v Roche Products* [2003] 2 All ER (Comm) 683, *Cooper Tire v Dow Deutschland* [2010] EWCA Civ 864, *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2011] EWHC 2665 Ch (appeal to Court of Appeal pending).

analysis or social utility threshold, for example whether the costs of distribution of the damages, or the costs of the claim, would exceed the anticipated damages, in addition to the general requirement.

15.5 In addition, the factors listed in paragraph A.3 Annex A are the minimum requirements and further issues will likely need to be addressed. For example (on a non-exhaustive basis):

15.5.1 In addition to consideration of whether a collective action is the most suitable means of resolving the common issues, should any form of action other than an opt-in model be introduced the CAT should also be required to consider whether a claim would most appropriately be brought on an opt-out basis (or pre-damages opt-in basis as the case may be), or whether an opt-in action would be a more fair and efficient basis on which to bring the claim. BIS indicate in paragraph 5.31 of the Consultation Document that the CAT would have discretion to consider this issue on certification[41], but this does not appear to be addressed within Annex A. Relevant factors to the exercise of this discretion may include whether it is relatively easy to identify the likely number of affected claimants and whether the scale of damage is likely to be similar for each party.

15.5.2 Whether the claim is appropriately characterised as a competition claim, given the risk that the availability of special procedures in competition cases would lead to claimants seeking to shoe-horn other forms of claim (contractual claims, IP claims) into a competition case in order to take advantage of a specific competition collective action regime.

15.5.3 Whether any cross-border jurisdictional issues need to be addressed.

15.5.4 Whether the claimants have been willing to engage in an ADR process.

15.5.5 Whether any funder of the action is appropriate, for example whether it has signed up to the Association of Litigation Funders of England and Wales's *Code of Conduct for Litigation Funders*, and whether it has sufficient funds to meet any adverse costs order against the claimants.

15.5.6 Whether the claimant has reasonable grounds to consider that the claim is within the relevant limitation period.

15.5.7 In respect of any claims in relation to which there is an OFT or EU Commission investigation under-foot but not yet resolved, the question of whether it is appropriate to allow a collective action at this stage would also need to be

[41] This was also proposed within the CJC's draft rules.

considered (which we suggest would not be desirable in anything but exceptional circumstances).

15.6 In addition to certification, active case management would be required, including the ability for security for costs to be ordered at a later stage if doubt arises about the representative claimant's ability to meet any costs order.

16. QUESTION 16: SHOULD TREBLE OR OTHER PUNITIVE DAMAGES CONTINUE TO BE PROHIBITED IN COLLECTIVE ACTIONS?

16.1 We agree with BIS' conclusion that treble or other punitive damages should be prohibited in collective (and indeed any other form of) competition actions.

16.2 As outlined in the response to Question 10 above, the proper objective of collective redress (and any form of private competition action) is compensation for losses suffered, not to punish defendants. Punishment/deterrence is the realm of public enforcement systems, and is sufficiently provided for by the ability of the OFT/sectoral regulators and the EU Commission to impose significant fines, and the OFT's criminal prosecution and director disqualification powers.

16.3 The existence of such punitive damages would infringe the principle of *non bis in idem*/against double jeopardy. This issue was recognised at first instance in *Devenish Nutrition v Sanofi-Aventis SA*[42] 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*." [43] As also raised in that case, allowing the imposition of punitive damages in respect of an infringement found by the EU

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42 [2007] EWHC 2394.

43 We note for completeness that in our view 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, given that it concerned a narrow category of case where the OFT had found an infringement but had not imposed penalties due to the defendant benefitting from the CA98 "conduct of minor significance" immunity. We note that the award of exemplary damages in this case was arguably inconsistent with the public policy position under the public enforcement regime; in order to deal with this issue and ensure that punishment remains the domain of the public enforcement regime, BIS may wish to consider whether there would be merit in legislating to provide that exemplary damages cannot be awarded in any follow-on cases where fines have been imposed or have not been imposed for any public policy reasons (whether as a result of a leniency application or the conduct of minor significant immunity or other).

Commission could be regarded as running counter to the Commission decision, in prohibition of Article 16 Regulation 1/2003, as it could imply that the level of punishment/deterrence determined by the Commission was insufficient.

16.4 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.

16.5 In addition, if treble or other punitive damages were available this would 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.

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

17. QUESTION 17: SHOULD THE LOSER-PAYS RULE BE MAINTAINED FOR COLLECTIVE ACTIONS?

17.1 It is in our view essential that two-way cost shifting/the loser pays rule be maintained for collective actions. This is an important safeguard against unmeritorious, unfounded and vexatious claims, as BIS recognises (paragraph A.9 of Annex A to the Consultation Document). The absence of such cost-shifting is a clear factor leading to the volume of litigation and instances of blackmail litigation in the US system.

17.2 Currently, however, 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 in its decisional practice noting that it should retain the flexibility to deal with costs on a case-by-case basis and that the CAT has discretion whether to award costs in particular set of circumstances and what amount to award. This can be contrasted with the position in the High Court where CPR 44.3 provides that the basic rule is that costs follow the event (with discretion to make a costs order on a different basis).

17.3 Allowing too much flexibility would in our view 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.

17.4 If a revised collective action in the CAT were to be introduced, in particular involving any move away from opt-in claims and/or extending collective actions to stand-alone cases, we consider that the CAT Rules should be amended to provide that in private enforcement cases the basic rule is that costs follow the event, as under the CPR.

17.5 Connected with the maintenance of the loser–pays rule is the need for the representative claimant's ability to meet the defendant's costs to be a key factor on certification, and for the CAT to order security for costs where appropriate (in relation to which we submit that consideration be given to applying an adjusted test given the increased risks involved), as noted in the response to Question 15 above.

17.6 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*.[44]

18. QUESTION 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?

(a) In the interests of access to justice

18.1 We consider that cost-capping should only occur in exceptional cases in this context.

18.2 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.

18.3 However, given the brake this exerts on unmeritorious claims, the default loser pays principle should only be departed from with great caution and cost capping should only be ordered in clearly appropriate cases on an exceptional basis, 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 cases. It should be noted that claimants can still seek ATE insurance (despite the premium being irrecoverable once the

[44] [2005] EWCA Civ 655.

relevant provisions of the Legal Aid, Sentencing and Punishment of Offenders Act come into force) in appropriate cases, which assists with costs certainty.

18.4 If any cost-cap were imposed, the CAT would need to ensure that its level was realistic, in light of the inevitable technicality and complexity of competition cases.

18.5 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.

18.6 Finally, BIS does not indicate whether it considers that cost-capping would be one way 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.

18.7 Currently we do not have a strong view as to whether the factors to be considered by the CAT when determining whether to cap costs should be codified or left to judicial discretion. However, as noted above, cost-capping should not occur in stand-alone cases.

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

18.8 We do not understand the reference in paragraph A.11 of Annex A to the Ministry of Justice response to the Jackson Review of Costs in this context.

18.9 If this refers to the abolition of recoverability for success fees under Conditional Fee Arrangements ("**CFAs**") now being implemented by the Legal Aid, Sentencing and Punishment of Offenders Act, it should be noted that a successful claimant will still recover its base costs from the defendant. It is only the additional success uplift that will be met from the damages awarded.

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

19. <u>QUESTION 19:</u> SHOULD CONTINGENCY FEES CONTINUE TO BE PROHIBITED IN COLLECTIVE ACTION CASES?

19.1 This is a complex question, as, on one view, allowing contingency fees/Damage Based Awards ("**DBAs**") would provide an additional source of potential funding for claimants and therefore potentially facilitate greater access to justice.

19.2 However, we agree with BIS that allowing DBAs in collective competition actions would give rise to 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.

19.3 As BIS notes, allowing DBAs in collective competition 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 of those stand-alone cases where the main relief sought is injunctive).

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

19.5 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. In particular, if opt-out actions are introduced, the funder will have an incentive to inflate the size of the class in order to maximise the potential damages and therefore its percentage cut (which is likely to make settlements more difficulty, in particular in a form of opt-out action where unclaimed funds do not revert to the defendant).

19.6 The Consultation Document does not address whether DBAs will also be prohibited for individual competition 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 potentially disincentives in utilising the collective action regime).

19.7 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.

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?

20.1 If an opt-out action is introduced, we are firmly of the view that 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.[45] It would also risk distorting incentives on defendants to reach settlements.

20.1 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. Such a result would not be in accordance with established principles of English law (and is not required by EU law, the ECJ judgment in *Courage v Crehan*[46] making it clear only that it must be "*open to any individual to claim damages for loss caused to him*" (emphasis added)).

20.2 The concerns expressed by BIS over a perceived "windfall" to the defendant (paragraph A.26 of Annex A to the Consultation Document) under the defendant reversion option 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 to us why one of the reasons given for rejecting defendant reversion is that it would reduce funds that would otherwise benefit society (paragraph A.26 Annex A). Society is best benefitted in this context by an efficient and rational litigation system, not one which creates unhelpful tensions and blurred objectives.

20.3 Reversion to the defendant is the only option consistent with the compensatory objective of private actions.

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45 As noted by the Court of Appeal in *Devenish Nutrition Limited v Sanofi-Aventis SA (France) & others* ([2008] EWCA Civ 10), albeit considering a different point, "*Neither the law of restitution nor the law of damages is in the business of transferring monetary gains from one undeserving recipient to another undeserving recipient even if the former has acted illegally while the latter has not*".

46 Case C-453/99.

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

20.4.1 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 paragraph 5.26) 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.

20.4.2 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* 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* the redemption rate was around 12%.[47]

20.5 We also consider that an option under which the defendant did not receive unclaimed funds in the case of a claim litigated to trial would distort settlement dynamics in various ways.

20.6 There are incentives on defendants to settle competition cases – to the benefit of the claimant/claimant class – including reputational issues (in particular where consumers are involved) and the need to protect continuing commercial relationships where the claimants are direct purchasers. Understandably, however, defendants will wish to settle on the basis that they compensate actual claimants only and can ultimately retain amounts which are not claimed (and may be more willing to settle at a higher rate than they would if they were also forced to "compensate" purely hypothetical claimants and therefore the cy-près recipient). Therefore any opt-out action regime would need to allow for settlements to be reached (and approved by the CAT) on this basis, i.e. that unclaimed amounts revert to or remain with the defendant.

20.7 However, if where a case was litigated to trial unclaimed funds were to be distributed in a different manner, for example to the Access to Justice Foundation as currently proposed, this mis-match may in some cases raise disincentives to settle, for example due to the interest of the claimants' funders in the size of the damages pot, and/or the claimants'

[47] See Thari/Blockovich, "Coupons and the Class Action Fairness Act" (2005) 18 Geo. J. Legal Ethics 1443.

lawyers in taking the case further due to the potential difference in terms of the ultimate size of the damages pot, which may justify higher fees.

20.8 In other cases, such a mis-match may put untoward pressure on a defendant to settle unmeritorious claims where they may have a reasonable defence, as is the case with the similarly punitive treble damages position in the USA.

20.9 In addition, depending on how the issue of non-UK claimants is resolved (see the response to Question 14 above), 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.

20.10 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.

20.11 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.

20.12 It is worth noting in this regard that in the *Air Passenger* settlement - in which British Airways and Virgin Atlantic settled with US claimants on the basis that unclaimed funds were paid to a charity on a cy-près basis, and with UK claimants on the basis that unclaimed funds reverted to the airlines - the UK model did not lead to any under-advertisement[48] and according to information published by the claimants' lawyers the majority of claimants applying for refunds were UK rather than US customers.[49]

21. <u>QUESTION 21:</u> 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?

[48] See the approach of the UK and US claims administrators as follows: https://www.airpassengerrefund.co.uk/ ; https://www.airpassengerrefund.com/ .

[49] http://www.hausfeldllp.com/pages/press_releases/258/ba-virgin-price-fixing-case_-record-uk-customer-refunds-announced

21.1 Please see our response to Question 20 above. It is in inappropriate 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.

22. <u>QUESTION 22:</u> 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?

Competition authority

22.1 There may be some advantages in a competition authority – i.e. the OFT (and CMA in due course) – being the specified body to bring collective actions, for example in light of its specialist expertise and knowledge. A power for the OFT to bring claims might also lead to voluntary redress schemes being agreed as part 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).

22.2 In addition, restricting collective actions to the OFT would be a safeguard against unmeritorious/spurious claims.

22.3 However, 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 be unlikely to bring claims in light of resource constraints and competing priorities. This is particularly the case in relation to stand-alone claims and EU Commission follow-on claims.

22.4 Moreover, such an approach may raise questions of fairness, given that, at least in UK follow-on cases, it would be the same body which has investigated and adjudicated on the question of infringement bringing the action. Therefore if the OFT were to have the ability to bring damages actions, this may also reduce incentives on undertakings to seek leniency.

Private bodies

22.5 However, rejecting a public collective action model does not automatically lead to a conclusion that individual consumers and businesses should be able to bring private actions in their own right.

22.6 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.

22.7 We recognise that it may accord with BIS's self-empowerment concerns to allow individuals and businesses to bring collective actions in their own right. However, on balance, we consider that, if collective actions were to be brought on an opt-out (or pre-damages opt-in) basis, given the risks involved of unmeritorious claims and claims being in reality driven by law firms and/or funders, it would be preferable to tightly circumscribe the right to bring actions.

22.8 We therefore consider that it would be preferable if standing were limited to authorised representative bodies, such as Which? or other consumer groups or trade associations, rather than extending to each and any consumer or business which is said to have suffered harm. Such bodies could either be authorised on a permanent basis, as with the current Section 47B CA98 action, or on a case by case basis by the CAT where appropriate (which would allow greater flexibility). Such bodies would need to meet specified minimum criteria as discussed in the response to Question 15 above.

22.9 Limiting representative claimants to such legitimate bodies would allow claims to be conducted with greater efficiency and reduce the risks of unmeritorious claims being brought.

22.10 Such an approach would also reduce the prospect of the litigation being driven by law firms and funders, which would likely occur even if such bodies are denied standing, as in practice if private individuals and businesses were permitted to bring claims law firms/funders could simply identify a nominal figurehead claimant to front an action. The incentives for funders to do so would be particularly great, given that they could stand to receive a percentage of any damages awarded, even if law firms are not permitted to act on a contingency fee basis. This would be likely to foster the type of "litigation culture" which BIS states it is concerned to avoid.

22.11 Careful consideration would still 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/businesses, direct/indirect purchasers).

23. <u>QUESTION 23:</u> IF THE ABILITY TO BRING COLLECTIVE ACTIONS WERE GRANTED TO PRIVATE BODIES, DO YOU AGREE THAT IT SHOULD BE RESTRICTED ONLY TO THOSE WHO HAVE SUFFERED HARM AND GENUINELY REPRESENTATIVE BODIES, OR WOULD THERE BE MERIT IN ALSO ALLOWING LEGAL FIRMS AND/OR THIRD PARTY FUNDERS TO BRING CASES?

23.1 We 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.

23.2 However, as noted above, these concerns may still arise, in particular if claims are not limited to representative bodies, 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.

ENCOURAGING ALTERNATIVE DISPUTE RESOLUTION (ADR)

24. QUESTION 24: DO YOU AGREE THAT ADR IN COMPETITION PRIVATE ACTIONS SHOULD BE STRONGLY ENCOURAGED BUT NOT MADE MANDATORY?

24.1 We agree with the proposal that ADR, which has a key role to play in resolving disputes in the competition area as elsewhere, should be encouraged.

24.2 We agree that ADR should not, however, be made mandatory in competition actions, in particular given that, unless there is willingness to engage in discussions, an attempt to force parties to engage in ADR processes is only liable to give rise to costs and delay.

24.3 As a first comment we note that ADR in various forms – whether mediation or direct without prejudice discussions between the parties – is already a feature of the UK competition private enforcement landscape. In particular where the parties have an existing commercial relationship, many cases are simply resolved by commercial settlement without a claim ever having been brought, and others are settled following the commencement of proceedings but well before trial.

24.4 However, this is more likely in the case of a follow-on claim from a cartel decision, and may not be the case for all forms of claim.

24.5 In general terms, we note that the most effective way to promote ADR is to: (i) increase awareness of the availability of ADR processes, including through judicial encouragement of the parties to consider ADR; and (ii) impose cost consequences where parties proceed with litigation, having unreasonably refused to engage in ADR procedures. As flagged above, whether the parties have sought to have recourse to ADR may be a relevant factor in determining whether to certify a collective action, or whether to allocate a case to the proposed fast track.

24.6 We note, however, that the key aim should be avoiding the continuance of litigation, not necessarily in all cases the commencement of litigation. In this regard we note that in some types of cross-border competition claims an attempt by a claimant to engage in ADR processes prior to issuing a claim, and thus putting the defendant(s) on notice of the claim, may cause a defendant to seek to bring negative declaration proceedings in other jurisdictions, in order to seek to oust the jurisdiction of the English courts (e.g. the "Italian

torpedo").[50] In this type of case, it may be reasonable for a claimant to, for example, bring a claim, but then agree to stay this pending ADR processes.

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?

25.1 We do not have a strong view as to whether pre-action protocols should be introduced in the CAT (where currently there are no provisions in the CAT Rules dealing with pre-action conduct), with appropriate cost consequences.

25.2 Introducing appropriate pre-action protocols may have merit in particular in relation to the proposed fast track procedure, and the proposed collective action regime. This may act as a filter against unmeritorious claims, impose some pressure on claimants to articulate their claim, and assist in identification of some of the likely issues between the parties at an early stage. In addition, if an OFT/CMA voluntary redress scheme was in place (see Question 29) in relation to the relevant infringement, then use of a pre-action protocol might encourage take-up of such a scheme.

25.3 However, in reality in many cases the parties will be likely to seek first to agree a negotiated solution in any event.

25.4 If specific pre-action protocols were introduced, it would need to be ensured that they would be sufficiently flexible and avoid prescribing overly-rigid steps which would increase delay to no real end.

25.5 They would also need to be sufficiently flexible to ensure that adverse costs consequences would not follow where a claim was brought without first engaging in contact with the defendants in circumstances where this was reasonable due to a risk of an "Italian torpedo" type issue (see the response to Question 24 above) arising. In such a case, then the protocol could be adjusted to provide for post-issue steps to be taken (including agreement to a stay to enable these to be carried out).

26. QUESTION 26: SHOULD THE CAT RULES GOVERNING FORMAL SETTLEMENT OFFERS BE AMENDED?

26.1 We agree that the ability to make formal settlement offers with costs consequences is an important method to incentivise the parties to engage in ADR and to reach a settlement at an appropriate stage in the proceedings.

[50] See for example the use of this tactic in relation to *Synthetic Rubber* follow-on claims.

26.2 The provisions of rule 43 of the CAT Rules are not currently sufficient to achieve this. For example:

26.2.1 It only provides for offers by defendants, not claimants.

26.2.2 The claimant can accept the offer at any point up to 14 days before trial, a late stage in the proceedings by which very significant costs would have been incurred, and the default position is that the claimant is entitled to its costs up to the date of acceptance. This disincentivises defendants from making formal offers (compounded by the fact that, if the claimant fails to beat the offer, it will only be required to pay the defendant's costs from the last date on which it was permitted to accept the offer – i.e. from the 14 day before trial point), and provides no incentives on claimants to accept an offer before the 14 days point.

26.2.3 The defendant's offer cannot be withdrawn or reduced until 14 days before trial unless the CAT Registrar's permission is obtained.

26.2.4 It requires a cash payment to be made into court.

26.3 The CAT Rules should therefore be amended to bring them more in line with the position in the High Court under Part 36 CPR. However, we do not consider that the provisions of Part 36 should simply be applied to the CAT in respect of all cases, as Part 36 is not well designed to deal with the typical situation which applies in follow-on cartel cases.

26.4 For example, in cartel cases the cartelists/defendants are all jointly and severally liable for the same loss, but a defendant will only wish to make a settlement offer in relation to its share of the loss, i.e. represented by its sales. Such an offer may not give rise to costs protection under Part 36 as the claimant was technically entitled to pursue the defendant for the entirety of the loss, and therefore the court may find the defendant's offer was beaten.

26.5 The application of Part 36 to claims which evolve through the addition of further claimants, or the removal of certain parties after settlements are reached, is also not straightforward. Further questions may arise if BIS's collective action proposals are adopted.

26.6 Therefore, a tailored solution will need to be constructed in order to ensure appropriate incentives to settle are promoted.

27. <u>QUESTION 27</u>: THE GOVERNMENT WOULD BE INTERESTED TO HEAR OF WHETHER, SHOULD THE REFORMS IN THIS CONSULTATION BE CARRIED OUT, YOUR ORGANISATION WOULD INTEND TO ESTABLISH ANY

INITIATIVES THAT MIGHT FACILITATE THE PROVISION OF ADR FOR DISPUTES RELATING TO COMPETITION LAW.

27.1 This is not applicable to Herbert Smith LLP. As legal advisers, our role is in each case to advise clients on what is best course of action for them to adopt.

28. <u>QUESTION 28:</u> 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 The response to this question will depend on how BIS proceeds in respect of its collective redress proposals.

28.1 We agree that in many cases there may be no need for a stand-alone collective settlement mechanism, as either a claim would have already been brought and the CAT's role would then be to approve the settlement, or if a settlement was already agreed with the representative claimant then a claim could be brought uncontested and then settled and approved.[51]

28.2 Situations may remain, however, where it would be desirable for parties to be able to apply to the CAT for approval of a collective settlement without prior issue of proceedings, and the certification steps that this would involve, even if uncontested.

28.3 We note that whether a defendant could use an opt-out collective settlement provision to truly drawn a line under its losses, in a cross-border case, depends on whether the settlement could include non-UK parties and on what basis, and if so its enforceability outside the UK (see our response to Question 14 above). As BIS will be aware, the Dutch courts have approved settlements under the Dutch mass settlements procedure extending to non-Dutch claimants (subject to suitable notice having been given and other such conditions), but whether courts in other jurisdictions will find such settlements to be binding on claimants who have not opted out, but have commenced an action elsewhere, remains to be seen.

[51] However, we note that if, contrary to our submissions, an opt-out action were introduced with a method to deal with unclaimed funds other than reversion to the defendant, then provision would need to be made for settlements to be approved on the basis of such reversion.

28.4 It is therefore important that defendants are able to settle on the basis of amounts for which affected parties actually step forward and claim/where unclaimed amounts are retained by the defendant following expiry of the relevant period of time, to ensure no double jeopardy arises.

28.5 As per our response to Question 20 above, it is therefore essential that, if an opt-out action were adopted, unclaimed funds revert to the defendant, to minimise incentives (e.g. for funders and lawyers) to pursue litigation rather than settlement, due to the potential differences in the size of the damages pot.

29. <u>QUESTION 29</u>: SHOULD THE COMPETITION AUTHORITIES BE GIVEN A POWER TO ORDER A COMPANY FOUND GUILTY OF AN INFRINGEMENT OF COMPETITION LAW TO IMPLEMENT A REDRESS SCHEME, OR TO CERTIFY SUCH A VOLUNTARY REDRESS SCHEME?

Power to mandate a redress scheme

29.1 We do not consider that the OFT/CMA should be granted a power to impose a redress scheme. This is inappropriate for a number of reasons, in particular raising justice questions where there would be no independent judicial control. This is *a priori* the case if there were no right of appeal from a decision to impose redress, as suggested in paragraph 6.32 Consultation Document (although contrast paragraph 6.37 where it is indicated that a right of appeal would be available).

29.2 Moreover, it is simply not clear how such a power would or could operate, in circumstances where the OFT "*could not attempt itself to quantify loss*" (paragraph 6.39 Consultation Document), but the firm had not been willing to enter into a voluntary settlement and agree the level of payments/how these should be calculated/quantified.

29.3 From a practical perspective, it is not clear on the basis of what information or analysis the OFT would or could assess questions of causation and loss, given that in many cases this type of issue will not have been addressed during the infringement proceedings. This is even more the case in relation to EU Commission decisions, which BIS appears to consider should be included in any such scheme (paragraph 6.41 Consultation Document), despite the absence of any efficiency gains here. There are also likely to be issues around equality of arms, if the OFT has access to information/data which the defendant does not.

29.4 We note that the OFT is different from the FSA and other sectoral regulators, as acknowledged in the Consultation Document, as it does not regulate access to the market through licence for example, and the type of issues on causation and quantification etc are

likely to be very different here than the circumstances in which other regulators can impose redress schemes.

29.5 Finally, there is also the key point that compensation is the realm of private enforcement (hence all the other reforms proposed by BIS), and detection and deterrence of public enforcement. The two should not be elided, and the OFT should not be directing time and resources away from its enforcement role into a role which it is not designed or suited for. This is aside from the practical question of whether the OFT would in fact ever choose to pursue such a contested case.

Power to certify a voluntary redress scheme

29.6 The position in respect of voluntary redress schemes is less clear-cut.

29.7 In relation to a voluntary scheme, the first question is what the OFT's role would be (other than to encourage the parties to put forward redress proposals) - would it simply rubber stamp a proposed scheme? This does not seem appropriate - consumers would likely rely on an OFT certification as confirmation that a redress scheme was fair, and therefore it would need to undertake *some* form of analysis of the proposed approach to and application of the causation and quantification issues.

29.8 In the most part, therefore, many of the considerations set above apply in equal measure to the certification of a voluntary scheme – what would the OFT actually be doing/how would the OFT do this, is most suited to do so, on what information would it rely, would it actually ever do so in practice, what about the impact on resources?

29.9 The suggestion that the OFT could be involved in certifying a redress scheme in relation to a Commission decision is equally, if not more, odd here, given that the OFT will have no power to award a reduction in fine.

29.10 Moreover, this type of power would be likely only ever to be engaged if a party had accepted liability (for example where it was entering into a settlement in respect of the investigation), as if it was considering an appeal on infringement then it would be highly unlikely to propose and redress scheme.

29.11 However, there may be some, particular, sets of facts, on which a role for the OFT may be appropriate, for example where a defendant was entering into an early resolution settlement with the OFT, and there was an obvious, relatively defined, set of potential claimants, likely to have suffered only a low level of damage. A party may in those circumstances be willing to offer to set up a redress scheme both in return for some reduction in fine, and also for reputational reasons. The OFT might be particular well placed to assist where the

facts were such that non-monetary redress or another a novel solution may be the most appropriate form of resolution, like in the *Schools* case.[52]

29.12 In sum, we are not necessarily in principle opposed to a voluntary power for the OFT in appropriate cases, but do not consider it appropriate for the OFT to be undertaking such a role regularly. Furthermore, a clearer proposal on exactly what the OFT's role would be would need to be developed in order for the proposal to be assessed properly.

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?

30.1 The level of fine imposed in respect of an infringement should be determined by reference to the need to punish and to ensure deterrence. In principle therefore levels of redress should not be a factor within a fining calculation.

30.2 However, in some cases a reduction in fine in return for a binding commitment to enter into an appropriate form of redress scheme may be appropriate, in order to incentivise participation in an expeditious voluntary redress scheme.

[52] Case No. CA98/05/2006; this did not prevent a claim for damages being brought in the CAT, see Case No. 1108/5/7/*08 N J and D M Wilson v Lancing College Limited*.

COMPLEMENTING THE PUBLIC ENFORCEMENT REGIME

31. <u>QUESTION 31</u>: THE GOVERNMENT SEEKS YOUR VIEWS ON WHETHER AND HOW AN EXTENDED ROLE FOR PRIVATE ACTIONS WOULD POSITIVELY COMPLEMENT CURRENT PUBLIC ENFORCEMENT.

31.1 As per our response to Question 10, the policy objectives underlying the private and the public enforcement regimes are different, and there should remain a clear distinction between the two. The deterrent and penal objectives underlying public enforcement should not be taken into account when designing the appropriate private enforcement regime.

31.2 However, in practice, enhanced private actions are also likely to have the ancillary effect of increased deterrence, although to what extent is not yet clear, and will in that way complement public enforcement.

31.3 In addition, a key area in which increased private actions can potentially complement public enforcement is in relation to stand-alone actions. As per our response to Question 13, the competition authorities cannot investigate each and every suspected infringement, and therefore private actions in stand-alone cases could facilitate access to justice and allow redress to be sought where competition authorities have been unable/unwilling to pursue a case due to administrative priorities or finite resources. This could have the effect of complementing public enforcement by providing for increased detection of suspected anti-competitive behaviour, and, where found to be so anti-competitive, the bringing to an end of such behaviour. However, currently the majority of competition actions brought are follow-on, and it is not clear as yet the extent to which this would change if the proposed reforms were implemented, given the comparative difficulty in bringing such claims.

31.4 We note, however, that increased private enforcement should not be used as a reason for decreased public enforcement by the OFT/CMA and the sectoral regulators (including in relation to tools such as director disqualification orders, which have not been used to date).

31.5 Moreover, we agree with BIS that there are risks of increased private enforcement jeopardising some elements of the public enforcement regime, in particular the leniency programme, and that this should be guarded against (although the problem should not be overstated, given that there are strong incentives in many cases to apply for leniency even with a potential enhanced risk of private actions).[53]

[53] Incentives may be more finely balanced, and therefore more liable to be impacted by an increase in private enforcement, in respect of Type B leniency applications.

32. <u>QUESTION 32</u>: DO YOU AGREE THAT SOME LENIENCY DOCUMENTS SHOULD BE PROTECTED FROM DISCLOSURE, AND IF SO WHAT SORT OF DOCUMENTS DO YOU BELIEVE SHOULD BE PROTECTED?

32.1 We agree that following the *Pfleiderer* decision[54] and the lack of clear guidance provided to NCAs and courts therein, the question of the disclosability or otherwise of leniency materials needs to be addressed on a legislative basis, so that leniency applicants are clear at the time of considering whether to whistle blow what categories of documents may or may not be potentially disclosable.

32.2 However, given the potential for divergent approaches to this issue between Member States, and the importance of this in relation to cross-border cartels where damages actions may be brought in various Member States, we consider that, if the aim of providing certainty to potential leniency applicants that certain documents will not be disclosed is to be achieved, this issue needs to be dealt with on an EU level. An equivalent approach could then be adopted for OFT leniency applications, if NCA regimes would not covered by the EU proposal, which is not yet clear.[55]

32.3 We agree with the broad distinction proposed by BIS between documents created for the purposes of a leniency application (non-disclosable) and other documents, i.e. pre-existing documents (disclosable). In any legislation, however, we consider that the issue of secondary material – in particular the regulator's Statement of Objections and confidential version of the decision, as well as documents created by the parties such as responses to information requests, which may refer to leniency materials – also needs to be dealt with clearly.

33. <u>QUESTION 33</u>: DO YOU AGREE THAT WHISTLE-BLOWERS SHOULD BE PROTECTED FROM JOINT AND SEVERAL LIABILITY, AND TO WHAT DEGREE, IF AT ALL, DO YOU THINK THIS SHOULD BE EXTENDED TO OTHER LENIENCY RECIPIENTS?

33.1 We consider this proposal to be finely balanced.

33.2 There is some merit in limiting a leniency recipient's liability to damages arising from their own share of sales (which is in any event the basis on which most settlements are made), in order to counter-balance the risk that claims are more likely to be brought against leniency

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54 Case C-360/09 *Pfleiderer AG v Bundeskartellamt.*

55 However, if in due course it transpires that EU legislation on the issue will not be introduced for some time, it may be appropriate to consider implementing measures in the UK in the meantime.

applicants, given for example they would not tend to appeal an infringement decision (although we note that, even if leniency recipients were protected from joint and several liability, claimants may still prefer to bring claims against them, for example jurisdictional factors, or due to a belief that the leniency recipient may have better documents available for disclosure)/

33.3 However, this would give rise to risks to claimants – for example in the case of impecuniosity of other defendants – which it does not seem fair for the claimant to bear the burden of. This may undermine the UK's attractiveness as a venue for competition claims. Risks of unfairness also arise for the other participants in the cartel, who may end up being penalised, and where there may be an issue of proportionality where the leniency recipient is the largest supplier.

33.4 In any event, it is clear that in action in this area would only really make sense at EU level. There would be limited value in terms of providing comfort to leniency applicants on joint and several liability in the UK if they could be held jointly and severally liable in another jurisdiction.

33.5 We therefore are of the view that no action in this area should be taken at the UK level at this point in time.

34. <u>QUESTION 34</u>: THE GOVERNMENT SEEKS YOUR VIEWS ON WHETHER THERE ARE MEASURES, OTHER THAN PROTECTING LENIENCY DOCUMENTS OR REMOVING JOINT AND SEVERAL LIABILITY, WHERE ACTION SHOULD BE TAKEN TO PROTECT THE PUBLIC ENFORCEMENT REGIME.

34.1 We do not consider that at this stage other measures are necessary.

34.2 We agree that decisions of other NCAs should not be made binding on UK courts.

<u>Herbert Smith LLP</u>

<u>24 July 2012</u>

Hogan Lovells LLP

Hogan Lovells

DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS

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

RESPONSE OF HOGAN LOVELLS INTERNATIONAL LLP

24 JULY 2012

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1. INTRODUCTION

1.1 This document contains the responses of Hogan Lovells International LLP to the Department for Business Innovation and Skills' consultation paper *Private Actions in Competition Law: A consultation on options for reform* (the "Consultation Paper").

1.2 The Consultation Paper addresses significant issues of concern to potential defendants and claimants in competition law actions. We therefore welcome the opportunity to respond to the Consultation Paper.

1.3 In the light of the scope of the Consultation Paper, we have not sought to address every proposal that has been put forward. Rather, we have focused our comments on those areas that are, in our view, of key importance. If there are any issues that we have not commented upon but in relation to which you would like our views, or if there is anything that you would like us to elaborate upon, please contact Christopher Hutton in the first instance.

2. THE ROLE OF THE COMPETITION APPEAL TRIBUNAL

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

2.1 We agree that section 16 EA2002 should be activated so as to enable the High Court upon application to transfer competition law cases to the CAT.

2.2 However, we make the following observations:

(a) It should not be presumed that cases involving competition law should in all cases be transferred to the CAT. The parties to a case should be permitted to make representations to the presiding judge as to the appropriateness of taking such a step.

(b) A decision to transfer a case should only be made if one of the parties has applied for a transfer. If all parties consider that the High Court is the appropriate forum, it should not be for the presiding judge to determine otherwise.

(c) Cases that do not exclusively involve competition law should not be transferred in whole or part. Competition law issues often arise in specific legal contexts (such and landlord and tenant law, or intellectual property law). Such cases are more appropriately within the competence of the High Court.

(d) It is clear that contribution claims can be brought between co-defendants in private damages actions bought before the High Court, but it is not entirely clear that a contribution claim could be brought in the CAT or, if so, what the time-limit for bringing such a claim would be. This ambiguity would need to be addressed before it would be appropriate for matters to be transferred to the CAT.

(e) As the time limit for bringing claims in the CAT and the High Court are different there is, in theory at least, a possibility that a case that is not time-barred in the High Court might be transferred to the CAT where it would be time-barred. Rules in relation to the different limitation periods applicable in the High Court and the CAT would therefore need to be harmonised.

(f) As a practical matter, transfer to the CAT of stand-alone claims should only be permitted if the CAT's jurisdiction is expanded to include stand-alone claims (see response to Question 2, below). Otherwise the ability to transfer claims would, presumably, have to be limited to purely follow-on claims.

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

2.3 Provided that claimants would still have the choice as to whether to bring claims before the High Court or the CAT, we agree with the proposition that the CAT should be able to hear stand-alone and follow-on cases.

2.4 However, in our view, if this change is to occur, a number of changes have to be made as to how the CAT operates in order to ensure that cases are dealt with in an effective and timely manner. In practice:

(a) Rules in relation to the different limitation periods applicable in the High Court and the CAT should be clarified and/or harmonised.

(b) The CAT's procedural rules are not as comprehensive or as well suited to heavy commercial litigation (which is what antitrust damages claims are, and certainly what stand-alone claims would be) as the rules applicable in the High Court. In particular, there are areas where the CAT's Rules are silent or vague, or where there is no clear procedural practice yet established. For example, there is a complete absence of any provision in relation to challenges to the jurisdiction of the CAT, there is inadequate provision for contribution claims, and there is real ambiguity as to time limits within which any contribution claims must be made. Unless the CAT's rules are expanded and tightened, and brought in to line with the CPR, there is a risk of a good deal of satellite litigation concerning procedural issues that would be more likely to occur in the CAT than in the High Court.

(c) The CAT should be provided with adequate resources to deal with its expanded jurisdiction. In particular, more High Court judges should be made available to hear cases at the CAT.

2.5 In relation to the latter point, we query whether it is necessary for more than one person to hear damages cases, and would suggest that thought is given to dispensing with the need for "wing members" in such cases. This would, in our view, allow for a more streamlined and cost-effective procedure.

Question 3 - Should the CAT be allowed to grant injunctions?

2.6 Stopping the offending conduct is often of more importance to those affected by competition law infringements than obtaining damages after the event. We therefore consider that the CAT should be allowed to grant injunctions.

2.7 However, in order to ensure consistency, the CAT should be required to follow the same procedural and substantive rules and safeguards as the High Court (eg, in line with CPR Part 25). In particular, given the potential implications for defendants subject to applications for injunctive relief, defendants should be given a full opportunity to respond to applications for injunctive relief.

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

2.8 We do not consider that a fast-track route should be put in place.

2.9 The complexity of issues that arise in competition cases – irrespective of the size of the claim or the party bringing the claim – is such that cases could not be dealt with in an efficient or just manner under a fast-track procedure.

2.10 In particular:

(a) Stand-alone claims require the claimant to prove that there has been an infringement of competition law. In most cases, this is not an easy task, and distinguishing anticompetitive agreements and conduct from legitimate agreements and conduct can be extremely difficult and, inevitably, take time (as the OFT's experience attests). Getting that assessment wrong has serious consequences for the parties concerned, and the wider economy as a whole.

(b) Equally, in relation to follow-on and stand-alone claims, proving the existence and quantum of loss is not straightforward.

(c) Competition cases of all types generally involve extensive disclosure, factual witness evidence, detailed economic assessment and evidence, and complex legal argument. It is inconceivable that a hearing could be brought within six months, or that hearings will last only for a "matter of days".

(d) Furthermore, it would be a mistake to conclude that, because a dispute is brought by an SME and involves small sums of money, a less stringent approach to the case would be appropriate:

(i) The consequences of the CAT's decisions in such a fast track process (for example, a finding of dominance) could have very wide and significant ramifications for the defendant well beyond the case in question and the relatively small sum at stake.

(ii) The CAT's decisions, unless overturned on appeal, would constitute precedents that would be binding on third parties (including competition authorities). A finding by the CAT that particular conduct is unlawful (or indeed lawful), without a full examination of the facts and evidence, could therefore have significant ramifications beyond the case before the CAT.

It would be inappropriate, therefore, to impose on that defendant a heavily curtailed procedure and not afford it the full opportunity to defend itself.

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

2.11 We do not consider that the design elements proposed are at all appropriate in the context of competition cases:

(a) Cost thresholds. As indicated above, competition cases generally give rise to a number of complex issues. Defendants should be able to defend themselves fully against claims brought by claimants, and should be able to recover those costs reasonably incurred if the claims against them fail. Limits on the ability of defendants to recover costs, particularly if the threshold is set as unrealistically

low as £25,000, would encourage the bringing of vexatious and unmeritorious claims in the hope that the defendant would settles rather than incur the substantial costs of fully defending itself, which it would be unable to recover even if successful.

(b) Damages cap. Given the nature of competition law claims, and an particular the fact that it may not always be clear when a claim is launched what the level of damages might be, we do not consider that it would be appropriate to cap the level of damages that could be awarded.

(c) Emphasis on injunctive relief. Any interference with the commercial freedom of defendants is a serious matter and should be subject to stringent procedural safeguards. We do not consider that a fast-track procedure, if introduced, should focus on injunctive relief. Although we consider that the CAT should be allowed to grant injunctions, injunctive relief can have potentially harmful consequences for defendants, and therefore the arguments for and against injunctive relief involve complex issues which should be considered fully and fairly. We doubt this could happen alongside a timetable for hearing the case within 6 months of the claim being brought. It would therefore be inappropriate for injunctive relief to become the focus of a fast-track procedure.

Question 6 - Should anything else be done to enable SMEs to bring competition cases to court?

2.12 We do not consider that any further steps should be taken in this regard. SMEs have the ability to bring competition cases in the same way that they are able to bring cases in other contexts - there is nothing unique about competition damages claims that would justify further action in this regard.

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?

2.13 We strongly oppose the introduction of a rebuttable presumption of loss in the context of cartel cases. The approach of the courts has always been to use the best available information to assess a loss, however rough and ready that may be. What courts will not do is assume that there has been loss where none can be proved. Any erosion of that approach should be avoided. There is nothing unique about competition damages claims that justifies the proposed approach, which would constitute a stark and unjustified departure from the basic tenet of the civil damages system that the claimant must prove it has suffered a loss.

2.14 Perceived difficulties in bringing antitrust damages claims do not provide a justification for reversing the burden of proof in cartel cases:

(a) The issue of information asymmetry could be addressed to a large extent by making provision for adequate disclosure of documents, and through other appropriate rules of evidence (for example by allowing cross-examination of witnesses) rather than by changing the burden of proof.

(b) Similar issues are faced by claimants in relation to other economic torts, and there is no justification for giving claimants bringing claims in competition actions the benefit of such a presumption.

(c) A company can be found to have engaged in cartel activity without any examination as to whether the cartel had any impact on customers (ie,

infringements "by object"). Indeed, a company can be found to have infringed the Chapter I prohibition and / or Article 101(1) TFEU without having implemented the cartel. It would be inappropriate to add to this a presumption that losses were caused (however rebuttable), otherwise defendants would be exposed to significant damages claims without either the competition authorities or the courts having considered whether the cartel activity had any impact on customers in practice.

(d) In relation to "follow-on" cases, claimants already have an advantage over claimants in other types of case, as liability will have been admitted or established. The only issues for determination in such cases are therefore causation and quantum. A presumption of loss in those circumstances would tilt the position too far in the favour of claimants. Again, it is not clear why claimants in competition cases should be given such an extraordinary indulgence. We would note in this context that a number of competition cases brought to date exemplify why a presumption of loss would be inappropriate - of those competition cases going to trial it has been determined that there was no recoverable loss or the recoverable loss was *de minimis* in relation to the losses claimed.

(e) It is unlikely that in any substantive case parties would not put forward economic evidence to rebut the presumption, and therefore in practice a presumption of loss is unlikely to save either time or costs, but places an unfair onus on the defendant. Furthermore, if the presumption is easily rebutted, it would serve no purpose, and if it was not easily rebuttable it would represent a gross infringement of the defendant's rights of defence.

(f) This proposal needs to be considered alongside the other proposals put forward in the Consultation Paper. For example, if a fast-track process and a presumption of loss were introduced, this would slant matters too far in favour of the claimants, as would a opt-out class action with a presumption of loss. Extreme caution is required before altering radically the current procedural checks and balances between the interest of claimants and defendants that have been established over many years in all areas of tort law.

(g) It is not clear how such a presumption would interact with the passing-on defence. For example, would the presumption apply to indirect purchasers, so they need not prove that any overcharge was passed on to them? If it did not apply to indirect purchasers, it would in most cases not benefit end consumers. If it did, the defendant is at risk of paying damages twice.

2.15 In summary, introducing a rebuttable presumption of loss might make it easier for claimants to launch cases, but would impose an unwarranted and unnecessary burden on defendants. However, if such a presumption were to be introduced, the context in which it would be applied would have to be clearly defined (including what cases fall within the concept of a "cartel case" for these purposes).

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?

2.16 It is for the claimant to establish the extent of its loss under the usual rules. We therefore agree with the Government's position that it is not necessary to introduce legislation addressing the passing-on defence.

3. 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.

3.1 Only one case has been brought since the introduction of the current collective action regime. This suggests that the regime is in need of careful review. However, we do not agree with the introduction of an opt-out system, as proposal in the Consultation Paper (see the response to Question 14 below), and consider that particular care should be taken if any reforms are to be introduced, in order to avoid unintended consequences.

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.

3.2 The stated policy objectives are understood to be "*restorative justice for consumers and small businesses*" and "*making it easier to bring such cases, whilst striking the right balance between the need for an effective system for collective claims and protecting defendants from having to settle unmeritorious claims*" (Consultation Paper, paragraph 5.6).

3.3 To the extent that these objectives are focused on compensation for losses incurred, we agree with those objectives. However, we are concerned that parts of the Consultation Paper appear to be directed at deterrence, which is not an appropriate objective in this context.

3.4 In our view compensation should remain the primary purpose of private damages claims. If such claims can also play a role in deterring breaches of competition law, that is an important, but collateral, benefit. Deterrence is, in our view, better achieved through the imposition of fines, director disqualification and, in some cases, criminal sanctions. The risk of having to pay compensation as a result of an antitrust damages claim is, of course, a deterrent in itself, but modifying antitrust damages claims simply to make them a greater deterrent runs the risk of unduly favouring the claimant and creating injustice.

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

3.5 It would not be appropriate to allow representative actions to be brought on behalf of businesses, not least since claims by businesses are likely to be more complex (involving issues such as passing on) and less homogeneous. This concern would become particularly acute if an "opt-out" system were introduced. The main difficulties with representative claims on behalf of businesses are likely to be issues of causation and assessing damages, and these could vary significantly for different businesses even where they are victims of the same competition law infringement.

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

3.6 In our view, no further restrictions are necessary.

3.7 Legal advisers, and the courts, are aware of the need for parties to comply with competition law, and will be familiar with the way in which confidential information is managed in multi-party proceedings.

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

3.8 We consider that it may be appropriate to extend the scope for representative actions to allow both follow-on and stand-alone actions on behalf of named consumers. There appears to be no justification for limiting representative actions to situations where there has been civil enforcement by the competition authorities, particularly as many cases are a hybrid of follow-on and stand-alone claims.

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.

3.9 We consider that it would not be appropriate to introduce an "opt-out" system that allows representative claims to be brought, and make the following observations:

(a) Such a system would set the hurdle for bringing a representative claim too low, thereby increasing the risk of speculative claims. By contrast, an "opt-in" system that requires representative claims to be brought on behalf of named individuals has the in-built safeguard that at least a number of potential claimants have to be persuaded of the merits of the claim in order for it to be launched.

(b) Where the amount lost by a potential participant in a collective action is so small that it does not warrant their taking the effort to opt-in to a claim there is, in our view, no real public policy benefit in facilitating such a claim from the point of view of compensation (there might be from the point of deterrence, but that is not an appropriate consideration in this context). We note in this context that the thrust behind the Woolf reforms of the 1990s was the public policy need to avoid litigation, particular when the loss alleged to have been suffered is disproportionately small.

(c) The Consultation Paper suggests that opt-out class actions are not a factor that has been directly responsible for the high volume of litigation in the US, and instead it identifies treble damages, a lack of a loser pays rule and jury trials. However, class actions are self-evidently a major factor in abusive litigation in the US.

(d) The Consultation Paper does not address the impact of opt-out class actions in conjunction with other proposed reforms, for example the presumption of a 20 per cent overcharge in cartel cases. Such a combination, when one considers the potential size of some of the classes, would certainly be sufficient to cause defendants to settle even the most unmeritorious claims. This would also be the case if contingency fees are permitted which, absent a specific exclusion, will be the case from April 2013. This would be a significant shift in the position in England and Wales such that there would be a real risk that the kind of unattractive excesses of the US system could be replicated.

(e) The Consultation Paper does not address what the scope of the class represented would be. It has to be borne in mind that to date most private damages actions bought in the UK concern European or world-wide cartels identified by the European Commission. It would appear to be the assumption that the class that would be part of the opt-out collective action would be the class of direct and indirect purchasers of the cartelised product anywhere in Europe or worldwide. The Consultation Paper fails to address how members of the class, both in

Europe and outside, would be bound by a decision of the CAT, or how defendants would be protected from parallel proceedings in other jurisdictions. Nor does it address why it would be appropriate for the English courts to have such exorbitant exterritorial reach.

(f) We note that the Government considers that such claims should be heard only in the CAT, on the basis that the CAT is an appropriate place to deal with complex specialised competition cases. However, we note that the CAT has no significant experience of dealing with collective actions or mass tort claims, and very limited experience of dealing with multi-jurisdictional issues.

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

3.10 If an "opt-out" system is adopted, we consider that strict certification criteria should be put in place, and that the process of certification should be thorough, and high standards set.

3.11 In particular, there must be a thorough process of certification to establish that the class of persons bringing the claim is coherent and that their claims are capable of being heard in a single process. Lack of commonality should result in the action being disallowed. For example, claims raising passing on issues are not suitable for collective redress as they require separate consideration of the extent of passing on by the direct purchaser of the cartelised product. This cannot be addressed on a generalised basis. Such passing on issues do not only arise as a defence to a claim by commercial direct purchaser, but also in claims by any indirect purchaser, who will have to establish that any overcharge on the cartelised product was passed on to them. Unless the class of indirect purchasers all purchased from the same direct purchaser, the assessment of any pass on will vary and cannot be dealt with as a common issue.

3.12 The certification process should also allow claims to be narrowed in appropriate circumstances. In particular, we consider that, if an opt-out system is adopted, claims should be limited to claimants suffering damage caused in the UK. Otherwise, a collective action brought (for example) following a European Commission decision in relation to a cartel that covered sales to consumers in UK, France and Italy could result in a damages fund that encompasses losses suffered in France and Italy, even though it is highly unlikely that consumers in those countries will be aware of the claim being brought ostensibly in their names.

Question 16 - Should treble or other punitive damages continue to be prohibited in collective actions?

3.13 We would submit that there is no good reason for allowing treble or punitive damages in the context of collective actions. Compensation should remain the primary purpose of private damages claims.

3.14 Furthermore:

(a) The availability of treble or other punitive damages would distort the incentives of potential claimants to launch claims.

(b) It is the role of the civil and criminal enforcement regimes to punish and deter anticompetitive conduct – this should not be replicated within the private actions regime.

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

3.15 We strongly oppose the removal of the loser-pays rule in the context of collective actions.

3.16 We consider the general loser-pays principle encourages settlement and deters unmeritorious claims. These are important policy objectives. It should be left to the courts to decide, on a case by case basis, whether it is appropriate to depart from the general rule that costs follow the event. In our view the courts have adequate powers already and no special case for competition cases has been made out – we note in particular that the CAT already has a broad discretion in relation to costs awards.

3.17 If claimants were given cost protection, there would be a very real risk that claimants would threaten unmeritorious and inflated claims, safe in the knowledge that they were unlikely to have to meet any costs.

3.18 Furthermore, we strongly believe that a rule that imposed a costs burden on a successful defendant, even when his defence of the claim has been entirely reasonable, is an undesirable outcome, imposing a costs burden on business and potentially deterring innovation.

Question 18 - Are there any 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?

3.19 As stated in response to Question 17, we believe that courts already have sufficient flexibility in applying costs, and that there is no reason to depart from the loser-pays rule.

Question 19 - Should contingency fees continue to be prohibited in collective action cases?

3.20 There should be an absolute ban on contingency fees in collective action cases.

3.21 Financial motivation is the principal cause of abuse in collective litigation. It is the opportunity to make profit offered by the US contingency fee system that has driven civil litigation in that country and has led to weak and abusive claims being brought. We therefore regard it as imperative that there should be no equivalent motivation allowed in the UK. Consequently, in our view there should be an absolute ban on contingency fees.

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?

3.22 In our view compensation should remain the primary purpose of private damages claims. This principle is undermined if unclaimed sums do not revert to the defendant.

3.23 Although we understand the logic of comments made at paragraph A.26 of the Consultation Paper (that reversion to the defendant would amount to unjust enrichment) in practice the defendant is likely to be subject to financial penalties (imposed either by national or European competition authorities). As a result, the reversion of unclaimed damages to the defendant is unlikely to result in the defendant being unjustly enriched.

3.24 It is also unclear why the claimants, the Treasury, or any other organisation should obtain a windfall in the event that damages are unclaimed.

3.25 If reversion to the defendant is not made by default, it should be left to the court to exercise its discretion as to what would be the most equitable distribution of any unclaimed damages.

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?

3.26 We have no views on this issue.

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?

3.27 The OFT (or, in due course, CMA) should not, in our view, have the ability to bring opt-out collective actions:

(a) The proper role of the OFT is as a public enforcer. Responsibility for bringing private actions should be left to businesses or individuals who have suffered loss. Indeed, we consider that if the OFT were to bring private actions on behalf of consumers, this would risk creating a serious conflict of interest with the OFT's public enforcement duties.

(b) The fact that the OFT would have access to leniency material would be a significant issue (particularly given the concerns expressed about the availability of leniency documents deterring leniency applications), even if the OFT were not permitted to use that material for the purposes of bringing a damages action.

3.28 Clearly the parties themselves must be allowed to bring an action. To do so they will need to appoint an individual or a group of individuals to speak on their behalf and to agree the conduct of the case with their lawyers. As a result, if opt-out collective actions are to be allowed, in our view the ability to bring such actions should be granted to appropriate private bodies in order to give coherence to the claimant's group (see our response to Question 23 below).

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?

3.29 The ability for other "representative organisations" to bring collective action on behalf of others needs to be treated with considerable care. On the one hand there are organisations that provide valuable representation: on other hand, it is essential that such organisations are independent, meet objective criteria of competence and do not have financial or other motivation to bring collective action.

3.30 In our view, it should only be possible for collective actions to be brought by appropriate bodies that will act purely in the interests of the consumers they represent. In particular, we consider that:

(a) Such bodies should be not-for-profit organisations with no financial interest in the outcome of the proceedings;

(b) Representative bodies should be subject to approval by the Secretary of State, but that the court should be able to grant permission on an *ad hoc* basis in particular cases. As a counter-balance, it may be appropriate to strengthen the provisions for removing representative body status if the relevant body misuses its role or brings unmeritorious claims.

(c) Law firms should not be permitted to bring collective actions. It is already clear that, under the current regime, certain claimant lawyers are very active in putting together groups of potential claimants, and the claimants subsequently play a very small role and have very little interest in the claim being pursued.

3.31 As stated, representative organisations should be certified as being independent and competent. They must demonstrate that they are not controlled or directed by third parties that have a particular interest in bringing collective action. Examples of organisations that are effective in bringing collective cases on behalf of consumers are the German and Austrian consumer organisations. However, these are effectively extensions of their national governments. As such, they are both independent and objective, and they have the resources and expertise needed for their role. This is not the case with all consumer organisations, nor do all such organisations want to have to take the role of representing their members by bringing litigation on their behalf.

3.32 What needs to be avoided is that representative organisations have a financial incentive to bring collective actions. There is every reason for them to be able to recover their direct costs, but they should not be able to profit by taking a share of any damages awarded: to do so would put them in the same position as litigation funders and analogous to contingency fee lawyers. Nor should they be able to use representative litigation to subsidise their other activities.

4. ENCOURAGING ALTERNATIVE DISPUTE RESOLUTION

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

4.1 We agree that ADR in competition actions should be encouraged, but not made mandatory.

4.2 In practice, most commercial disputes settle and there are a number of cogent reasons why competition damages claims might settle more often and at an earlier stage than a number of other disputes (for example, the potential significant harm to the defendant's reputation if a claim becomes public knowledge, the risk that others may also be encouraged to claim and the risk of attracting regulatory attention). Indeed, it is notable that most cases involving competition law issues settle before trial.

4.3 ADR offers the speed, low cost and low risk that litigation generally cannot. That said, it should not be made mandatory - there are occasions when one or other party needs to establish legal rights and obligations through the certainty of a court procedure, and it is essential that their right to do so is preserved.

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?

4.4 We agree with the suggestion that a pre-action protocol should be introduced to encourage settlement before legal proceedings are launched. However, we do not agree that a party should be penalised in any way for failing to agree to settlement or ADR.

Question 26 - Should the CAT rules governing formal settlement offers be amended?

4.5 In our view, the CAT's rules should be brought in to line with those contained in CPR Part 36.

4.6 In particular, we note that the CAT's current rules currently contain a number of oddities which need to be addressed:

(a) Rule 43(5) of the CAT's rules provide that a payment to settle can be accepted any time up to 14 days before the substantive hearing. Furthermore, unless the Tribunal directs otherwise, where a claimant accepts a defendant's payment to settle, the claimant is entitled to its costs up to the date of acceptance (rule 43(6)). As a result, a claimant has no incentive to settle at an early stage – he can wait to until almost the last moment before accepting a payment to settle, in the knowledge that he will get his costs, even if (for example) he has known for some time that he cannot rebut the defendant's evidence.

(b) A payment to settle may be withdrawn or reduced only with the permission of the registrar of the CAT (rule 43(4)). No rules are in place as to when the registrar will allow or refuse permission. There is no justification for this position: parties should be able to amend or withdraw payments to settle without having to seek permission to do so.

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.

4.7 We do not foresee that we would establish any such initiatives.

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?

4.8 We agree that, if a right to bring opt-out collective actions for breaches of competition law were to be introduced, it would not be necessary to provide separately for collective settlement. However, our strong view is that the introduction of a class settlement mechanism is preferable to the introduction of opt-out collective actions.

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?

4.9 The OFT (or, in due course, CMA) should not, in our view, have the power to order a company to implement a redress scheme, or certify a voluntary redress scheme. The proper role of the OFT is as a public enforcer. It should not, in our view, force the issue of redress or be involved in the verification of voluntary redress schemes. We also consider that OFT is not suitably equipped to deal with these issues. However, the OFT could

encourage voluntary redress by, for example, reducing the level of any fines imposed (see response to Question 30 below) in situations where redress has been achieved prior to an infringement decision.

4.10 If the OFT is to be given a role in requiring the implementation of redress schemes, such a decision must be capable of being appealed. The Consultation Paper suggests that such a decision would not be subject to challenge, other than by way of an appeal against the infringement decision. Such a position would constitute a serious impairment of a defendant's right of defence.

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?

4.11 In our view, competition authorities should take into account the fact that a company has made redress when calculating financial penalties, possibly as a mitigating factor.

4.12 Although there may be some practical difficulties in doing so, a means by which compensation offered or paid by parties prior to an infringement decision is reflected in the penalty imposed, would encourage private settlements, and would represent a positive means by which the public enforcement regime could be used to develop the private enforcement regime.

5. 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.

5.1 Public and private enforcement of competition law are complementary to the extent that they pursue different aims: public enforcement is principally aimed at identifying, punishing and deterring anti-competitive conduct, whereas private enforcement is aimed at remedying the damage caused by anti-competitive conduct.

5.2 There is, nevertheless, a close link between the two:

(a) Without an effective public enforcement regime, there would be fewer infringement decisions, and therefore fewer follow-on claims. Care should therefore be taken to ensure that an extended role for private actions should not harm the effectiveness of the public enforcement regime.

(b) The risk of damages claims acts as an additional deterrent to anticompetitive conduct.

(c) The possibility of bringing damages claims provides an incentive to potential claimants to look for signs of potential anticompetitive activity, and take a more active role in bringing complaints to the attention of competition authorities.

5.3 However, an extended role for private actions could have a negative impact on the incentives for parties to apply for leniency, thereby reducing the number and quality of leniency applications. Steps therefore need to be taken to avoid this outcome and protect the integrity of the leniency regime, which are now well-established as a key means of uncovering anticompetitive conduct.

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?

5.4 There is a clear tension between the need for full disclosure and the potential impact of full disclosure on the number and quality of leniency applications:

(a) Claimants should arguably have access to all documents containing pertinent information within the control of the defendant, irrespective of when, why or for whom a document was created, in order to meet the overriding objective that cases should be dealt with justly (CPR 1.1.1).

(b) However, the routine disclosure of all leniency documents could act as a disincentive to leniency applications.

5.5 On balance, we agree with the principle that some leniency documents (ie, documents created for the purpose of a leniency application or otherwise created as part of a leniency applicant's on-going duty of cooperation) should be protected from disclosure. We also agree with the proposed distinction between those documents actually created for the purpose of leniency (which should be protected from disclosure) and pre-existing documents used for leniency applications (which should be disclosed), and we note that this accords with the suggestion made by Advocate-General Mazak in his opinion to the ECJ in the *Pfleiderer* case. This protection should apply to:

(a) all leniency applications, not just those that are successful, and not just in those cases where the leniency application has resulted in an infringement decision; and

(b) other documents (or parts of documents) containing material derived from leniency documents. For example, such material is often repeated in Statements of Objections and subsequent documents, requests for information, and correspondence between the OFT and the leniency applicants. If such material were not also protected, the protection afforded in relation to the leniency documents would be worthless.

5.6 However, the position is less clear where evidence is created and submitted as part of a leniency application, or in compliance with a leniency agreement (for example witness evidence explaining the context or meaning of documents, or expert evidence detailing the impact of a cartel). Such documents are more likely to be relevant to issues of causation and loss, and therefore more directly relevant to a follow-on claim. However, in our view, the scope of the protection should extend to <u>all</u> documents that would not have been created had the company not sought leniency, including witness and expert evidence. The disclosure of such documents would undermine the quality of leniency applications by dis-incentivising parties from making leniency applications, or inhibiting the provision of non-contemporaneous supporting evidence.

5.7 We would also observe that protecting leniency documents will not put claimants at a disadvantage, inhibit their ability to bring claims, or jeopardise the ability of courts to deal with cases effectively:

(a) Pre-existing documents, including all contemporaneous documents, will be disclosable in any event. These documents are likely to be of greater probative value in relation to issues of causation and loss than leniency submissions.

(b) Although documents created for the purposes of applying for leniency are likely to be relevant in proving liability, in most cases such documents are unlikely to be of direct relevance to issues of causation and loss.

(c) Claimants in follow-on cases are already at an advantage in comparison to claimants in other types. In follow-on cases, liability will have been admitted or established, and the claimant will have the benefit of a detailed decision setting out findings on liability and (in most cases) pertinent facts.

5.8 In any event, we would welcome certainty in relation to this issue, as leniency applicants are currently faced with considerable uncertainty as to whether leniency documents will be disclosed in future proceedings following the judgments in *Pfleiderer*[1] and *National Grid.*[2]

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

5.9 We agree that "*joint and several liability as it stands threatens incentives for leniency applicants*", and consider that whistle-blowers should be protected from joint and several liability.[3] In particular, joint and several liability means that any one party can be found liable for the entire loss suffered by a claimant, and whistle-blowers are at an increased risk of being the party targeted by claimants as the party against whom to bring a claim against. The whistle-blower is thereby exposed to the additional costs of pursuing other parties for recovery. This is not a theoretical possibility: claimants have brought actions against a single defendant in a number of recent cases, leaving it to that defendant to bring contribution claims against other parties. Such an approach is attractive to claimants, as it allows them to leave the costs of pursuing other potential defendants to the original defendant.

5.10 However, this protection should not go too far. In particular:

(a) A whistle-blower should remain liable for those losses that its conduct did cause, even if this necessitates making a contribution to the other defendant parties. Otherwise, the whistle-blower would be able to conclude a deal with the claimants, whereby it settles a claim for a very low figure and agrees to provide co-operation to the claimants, leaving the other defendant parties to compensate for the losses caused by the whistle-blower. In such a situation, there would be a risk that a leniency applicant could get away with paying very little compensation, despite the fact that it participated in (and possibly benefited from) a competition law infringement and caused loss. Such an outcome would constitute an entirely perverse incentive.

(b) For the same reasons, a whistle-blower should also be liable for its share of umbrella damages (ie, those not directly caused by purchasing the cartelised product, for example lost sales or profits) as well as losses directly arising from sales it made.

5.11 On the issue of whether this protection should extend to other leniency recipients, our view is that it should not. A decision to make a competition authority aware of anti-competitive agreement that they are not already aware of requires a complex assessment on the part of the potential applicant. The incentive to blow the whistle provided by a

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1 Case C-360/09 *Pfleiderer AG v Bundeskartellamt.*

2 *National Grid Transmission PLC v ABB Limited and others* [2012] EWHC 869 (Ch).

3 We note that the proposal to protect whistle-blowers from joint and several liability has parallels with the US Antitrust and Criminal Enforcement and Reform Act 2004, under which leniency applicants may be found liable to pay only single (as opposed to treble) damages. The introduction of this provision has been successful in increasing the incentives for parties to make leniency applications - see Hammond *Recent developments, trends and milestones in the Antitrust Division's criminal cartel enforcement program*, 56th ABA Antirust Section 2008.

protection from joint and several liability would be diminished if recipients of Type B or Type C leniency received the same protection.

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.

5.12 In principle, exemplary damages can be awarded against defendants in the context of a "follow-on" claim – see, for example, the recent decision of the CAT in *Travel Group plc v. Cardiff City Transport Services Ltd.*[4] In our view, the public enforcement regime would be further protected if it were made clear that, in the context of a follow-on claim, exemplary damages cannot be awarded where a defendant has either:

(a) been fined; or

(b) not been fined, or a fine imposed has been substantially reduced, as a result of a successful leniency application.

A clear statement on this issue would provide a further incentive for parties to apply for immunity or leniency.[5]

5.13 Furthermore, in our view both the public and private enforcement regimes would be assisted by encouraging parties to pay compensation to those suffering damage as a result of breaches of competition law before an infringement finding is made (see response to Question 30, above).

HOGAN LOVELLS INTERNATIONAL LLP
24 JULY 2012

[4] [2012] CAT 19.

[5] Although in *Devenish v. Sanofi-Aventis* [2007] EWHC 2394 (Ch), paragraph 52, it was stated that "*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 European Commission*", it was also stated (at paragraph 64) that "*the fact that a defendant has been fined for his conduct is a powerful factor against the award of exemplary damages, although it may not be conclusive in itself*". Although this judgment was appealed ([2008] EWCA Civ 1086), the Court of Appeal did not address this issue.

International Chamber of Commerce

ICC UK response to the consultation on “private actions in competition law”

1 INTRODUCTION

1.1 The International Chamber of Commerce ("ICC") is a global business organisation which works to support international trade and investment through the promotion of open markets, sound regulation and the rule of law. Our members in the UK include 17 of the top 20 FTSE companies, many other multinational firms, business associations and SMEs.

1.2 ICC UK welcomes the opportunity to comment on the Government's consultation "Private actions in competition law: a consultation on options for reform". Whilst we support the underlying policy objectives of the consultation, we have a number of fundamental concerns about key aspects of the proposals. Of particular note, we remain unconvinced about the need for a new framework for business-to-business actions: BIS has not produced evidence that businesses are deterred from bringing private law competition actions, in appropriate cases, over and above bringing claims in other areas. Moreover, it is our view that any enhancements to the existing consumer framework must contain robust checks and balances to avoid frivolous claims and a US-style litigation culture.

1.3 Responses to the questions in the consultation are set out below. Given the detailed nature of some of the answers, an appendix is provided summarising key issues/messages under each question in the document.

2 THE ROLE OF THE COMPETITION APPEAL TRIBUNAL

2.1 ICC UK supports the objective of making the Competition Appeal Tribunal ("CAT") better able to handle private competition litigation. It was always the intention that the CAT would act as a specialist tribunal for handling competition issues and it is unfortunate that circumstances have conspired to limit its role in private litigation. The concept of a tribunal with both legal and economic expertise, and with specialist referendaires to support it, is ideal for the handling of competition issues. It makes good sense for the CAT's jurisdiction to be extended so as to make the best use of the resources at its disposal.

2.2 There are, though, a number of issues that would need to be dealt with in giving effect to the proposals in the consultation and these are discussed further in the answers to the consultation questions below.

QUESTION 1: SHOULD SECTION 16 OF THE ENTERPRISE ACT BE AMENDED TO ENABLE THE COURTS TO TRANSFER COMPETITION LAW CASES TO THE CAT?

2.3 We support the creation of a power to enable the High Court to transfer competition law cases to the CAT.

2.4 As paragraphs 4.16-17 correctly recognise, Section 16 of the Enterprise Act empowers the Lord Chancellor to make regulations to enable the High Court to make certain

transfers to the CAT. To that extent, therefore, the consultation question may be slightly misleading in questioning if there is a need to "*amend*" Section 16.

2.5 In fact, though, there may be a need to amend Section 16 in order to give full effect to the substance of the proposal. Section 16 only allows for the transfer of proceedings insofar as they relate to an "*infringement issue*" or insofar as they "*relate[] to a claim to which section 47A of the 1998 [Competition] Act applies*". This formulation would appear to have two unhelpful consequences:

- It will not be possible to transfer the whole of a case to the CAT if there is any element that extends beyond a claim that competition laws were infringed or a claim for damages arising from a previous binding finding of a breach of competition law, even if the remaining element or elements are very much of secondary importance.

- It arguably will not be possible to transfer the whole of a stand-alone case for damages for breach of competition law. The definition of "*infringement issue*" in Section 16(6) limits it to "*any question relating to whether or not an infringement of*" competition law has occurred or is occurring. Whilst there may be scope for debate about what "*relating to*" encompasses, it would seem to be far from certain that it would include the question of what losses flowed from a breach of competition law. Nor would that question be one relating to a claim to which Section 47A applies since Section 47A requires a prior infringement finding by a competition authority or the Tribunal on an appeal from a competition authority.

2.6 The consultation question envisages a transfer of whole cases rather than splitting cases between different *fora* and ICC UK agrees that is likely to be preferable in most situations. The CAT is able to sit with Chancery Division judges as Chairmen (since all Chancery Division judges are also Chairmen of the CAT) so there is absolutely no reason why the CAT could not deal with all the same issues that could be dealt with by the Chancery Division rather than just competition issues. Moreover, as discussed below, many stand-alone claims will involve issues going beyond infringement of the competition laws and there would be an anomalous inconsistency if the CAT were able to determine such issues in stand-alone claims started in the CAT but not where a transfer was made from the High Court.

2.7 For these reasons, ICC UK would favour amending Section 16 to give High Court judges greater flexibility to transfer the whole of a case where there is any part of it that relates in any way to competition issues. If this were to occur, there would be no obligation on the High Court judge seized of a case to transfer the whole or any part of the case but the judge would have the flexibility to decide on the best approach in the particular circumstances of the case.

QUESTION 2: SHOULD THE COMPETITION ACT BE AMENDED TO ALLOW THE CAT TO HEAR STAND-ALONE AS WELL AS FOLLOW-ON CASES?

2.8 ICC UK considers that the Competition Act should be amended to allow the CAT to hear stand-alone claims.

2.9 Experience to date, in the UK and elsewhere, suggests that there are likely to be far fewer stand-alone claims than follow-on claims but the proposed amendment has value in relation to both types of claim.

2.10 One of the more significant difficulties with the existing position is that it has caused problems bringing actions even where they are, in a non-technical sense, follow-on actions. The decision of the Court of Appeal in *EWS Railway Ltd v Enron Coal Services Ltd* [2009] EWCA Civ 647 has the effect of strictly limiting follow-on claims to damages flowing from conduct expressly identified by the competition authority as amounting to an infringement of competition law. In practice, even where there has been a competition authority decision, the claimants' claims will often go beyond the express findings of the infringement decision. Thus, for example, it may be unclear whether the infringement extended to a particular time period, market or product. At best, the existing rule provides scope for unproductive satellite litigation about the meaning of the decision and, at worst, it risks barring part of the claimants' claim. The net effect is that it represents a significant disincentive to the bringing of private antitrust claims in the CAT even where the claims relate to prior infringement findings.

2.11 If the CAT is to have the power to hear stand-alone claims, it needs to be borne in mind that such claims will often involve issues going beyond competition law. For example, there may be counterclaims for breach of contract in situations where a claimant relies on competition law as a reason for not performing a contract. It may be advisable to require any claims with issues extending beyond competition law to be heard by a panel with a Chancery Division judge as chair given that other CAT panel constitutions may not necessarily have legal expertise outside the competition field.

QUESTION 3: SHOULD THE CAT BE ALLOWED TO GRANT INJUNCTIONS?

2.12 We agree that the CAT should be allowed to grant injunctions. The CAT's utility as a forum for stand-alone claims would be limited if it could not grant injunctions.

QUESTION 4: DO YOU BELIEVE A FAST TRACK ROUTE IN THE CAT WOULD HELP ENABLE SMES TO TACKLE ANTI-COMPETITIVE BEHAVIOUR?

2.13 We appreciate that one of the policy imperatives for the Government is to find a way to make it easier for SMEs to tackle anti-competitive behaviour. As an organisation whose membership includes SMEs as well as larger enterprises, ICC UK fully supports that policy objective

2.14 Moreover, no business would object in principle to the ambition that competition claims should be cheaper, quicker and simpler. It is notable that other European jurisdictions are able to deal with competition claims more quickly and cheaply than the UK.

2.15 It must also be the case that the current cost and complexity is a particular disincentive to the bringing of claims by SMEs albeit also in relation to other types of litigation as well. At the same time, though, ICC UK is not aware of any particular evidence from its membership or otherwise that SMEs would bring more competition claims if it were cheaper and quicker to do so. It is not obvious that there is a real obstacle to access to justice that needs to be removed.

2.16 Assuming that there is or might be a need for action, the critical issue is how to balance fairly the interests of both claimants and defendants, SMEs and larger enterprises. ICC UK would support the creation of a fast-track in the CAT if a fair balance could be struck.

2.17 An excessively truncated process and rigid, low costs caps may be unfair to larger defendants who may face claims that involve considerable complexity and implications far beyond the case at hand. For example, a small competitor may challenge a rebate scheme offered by a defendant to try to win its customers. If the CAT were to rule in the claimant's favour, the defendant might be forced to change its pricing to all its customers. The implications and costs involved may tend to lead defendants to settle unmeritorious cases and thereby have a chilling effect on competition to the benefit only of unscrupulous claimants.

2.18 We believe that there will be competition cases where it is appropriate to give a claimant certainty that its costs are limited and where the issues (or some of them) could be resolved expeditiously by the CAT. It is our view, however, that it is not practical to specify in advance a rigid category of cases in which that will be so. It considers that the better approach is to require the CAT to allocate cases to tracks in much the same way as does the High Court.

2.19 In the High Court, Rules 26.6 to 26.8 of the Civil Procedure Rules establish the "normal" tracks for particular types of case (based on the amounts in issue, evidence required and likely length of the trial) and then set out issues to be considered in deciding whether to adopt a different track instead. A similar approach could be adopted in the CAT but with higher monetary limits for the fast track and with criteria for adopting different tracks that are more specifically tailored to the circumstances of competition claims.

2.20 We would suggest that the CAT fast-track should be the normal track for claims where:

- The value of the claim is less than £500,000[1] (where value is defined in the same way as in the High Court);

[1] The maximum for the fast-track in the High Court is much lower, at £25,000.

- The trial is likely to last for no more than three days[2]; and

- There are unlikely to be more than four experts between the parties[3].

2.21 Building on the approach in Rule 26.8 of the Civil Procedure Rules, we would suggest that the matters to be considered by the CAT in allocating the case should include:

- the financial value, if any, of the claim both in absolute terms and relative to the resources of the claimant and defendant respectively;

- the nature of the remedy sought and, in particular, whether an injunction is sought to prevent ongoing allegedly anti-competitive conduct;

- 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 (to use the terminology of the Civil Procedure 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.[4]

2.22 It is our view that it would be better to take account of the SME status of the claimant as a relevant consideration rather than as a strictly necessary or sufficient condition for entry

[2] As compared to one day in the High Court.

[3] 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, instead, to four experts allows for the possibility that the CAT might require the use of joint experts.

[4] These nine factors are all included in a more limited form in Rule 26.8 of the Civil Procedure Rules. 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.

to the fast-track because there will otherwise be anomalies and satellite litigation around the question of whether a particular claimant is an SME. It also does not make sense to allocate cases to the standard track if they could be dealt with more efficiently on the fast-track even if all parties are large enterprises.

QUESTION 5: HOW APPROPRIATE ARE THE DESIGN ELEMENTS PROPOSED, IN PARTICULAR COST THRESHOLDS, DAMAGE CAPPING AND THE EMPHASIS ON INJUNCTIVE RELIEF?

2.23 ICC UK considers that it is appropriate to limit the fast-track to relatively low value claims. Rather than imposing a fixed maximum and artificially limiting claims, however, we would favour simply having a presumption that the fast-track will normally be for claims below £500,000. As discussed in response to Question 4, we suggest that it should be left to the CAT in its discretion to decide whether a case is nevertheless suitable for the fast-track despite potentially involving damages of more than £500,000.

2.24 We do not believe that it would make sense or be just to dictate that a specific, rigid cost cap be applied to every case that is allocated to the fast-track.

2.25 For such a cap to work, it would either have to be too high to be of any comfort or would have to apply to such a narrowly defined sub-class of cases that it would make the fast-track unusable for the vast majority of cases. ICC UK suggests that it would be better to give the CAT Chairmen discretion as to what caps to set but to give them firm and clear guidance on how they should approach matters. The 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 (in much the same way that a court hearing a summary judgment application may allow the defence to proceed but require payments into court if it believes the merits are doubtful); 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.

2.26 Illustrations could be provided of what an appropriate cap might be in particular cases. ICC UK respectfully doubts that it would ever be fair to impose a cap of £25,000 for the

whole of a case. For a very simple case, though, a cap of £50,000 might be reasonable. For example, if the defendant was very obviously dominant and there was a question of whether it was entitled to refuse to supply a wholesale input previously supplied to the claimant, the issues might be quite narrow and might not necessarily have ramifications beyond the particular relationship. Cases where dominance is more of an issue are likely to involve greater costs.

2.27 ICC UK appreciates that claimants may be reluctant to incur the cost of launching proceedings without greater certainty on their costs exposure than it would ordinarily be the case where they were dependent on a subsequent allocation decision. For that reason, we would propose that the allocation decision and imposition of cost caps occur at a very early stage and that the claimant be shielded from any adverse costs liability until after the allocation decision and only then if it decides to proceed.

2.28 The CAT procedure for damages claims currently requires the filing of a claim form together with documents relied on by the claimant. We suggest that the CAT might wish to reconsider the requirement for filing of documents relied on by the claimant so as to reduce the burden on the claimant. If the claimant only had to incur the cost of preparing a claim form before allocation, the costs could be kept very low. It should be left to the defendant to decide whether or not to contest the allocation sought by the claimant and, if it does wish to contest it, to do so at its own expense with no opportunity to seek the costs back from the claimant.

2.29 In the meantime, if a non-confidential summary of the claimant's claim is placed on the CAT website in the ordinary way, it may be that other potential claimants may come forward and that it may be possible to share the burden of the claim and/or it may become apparent that it would be justified to use a collective action model.

2.30 As regards the question of injunctive relief, ICC UK can see no objection to the CAT having flexibility in respect of cross-undertakings in damages. At the same time, though, the CAT will need to consider similar factors to those outlined above in relation to cost caps and allocation. It needs to be borne in mind that cross-undertakings are generally required because injunctions *are* damaging to defendants. It is unlikely to be just to require, on an interim basis, far-reaching changes to a defendant's business on the basis of no more than an arguable case and no prospect of compensation if it were later held that the claimant's case was without merit.

2.31 Finally, ICC UK wishes to express its strong disagreement with the suggestion of giving the OFT (CMA) or CAT the power to write letters to alleged infringers warning them that there is a reasonable case against them (as is mooted in para 4.35), for the reasons set out in the Consultation. Nor do we consider that it helps for the Competition Pro Bono Scheme to do so. The scheme is not a neutral ombudsman in some sense. It advises those who approach it in just the same way as other lawyers advise their clients. It also advocates for its clients. A letter from the Competition Pro Bono Scheme should not have any more or different weight than a letter from any other lawyer on behalf of its client.

QUESTION 6: SHOULD ANYTHING ELSE BE DONE TO ENABLE SMES TO BRING COMPETITION CASES TO COURT?

2.32 ICC UK advocates the adoption of a fast-track regime along the lines set out above. If the Government wished to further promote action by SMEs to combat anti-competitive behaviour, it could either give the CMA a specific remit and resources in that respect or it could extend some form of Legal Aid to cover such claims. We do not believe that any other measures are necessary or appropriate.

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?

2.33 ICC UK would be strongly opposed to the introduction of a rebuttable presumption of loss in cartel cases.

2.34 There are a number of different reasons why a presumption of loss either would not work or would be unjust.

2.35 First, the proposed presumption would not actually give much guidance as to the recovery that the claimants ought to expect. Although the question talks about a presumption of "*loss*", it is clear from paragraph 4.40 of the Consultation that is actually a presumption of overcharge that is being suggested. The loss suffered by any particular claimant depends not only on the overcharge but also many other factors including the extent to which loss is passed-through, the extent of any dead-weight loss, the impact (if any) on so-called "umbrella sales" made by persons outside the cartel, the volume of purchases made within the scope of the cartel and the pre-judgment interest rates applicable. All of these issues can dramatically affect the ultimate recovery made. Thus, for example, pass-through may wipe out the loss entirely whilst interest may more than double it. It would not be appropriate to change the presumption to one of overall loss because the supposed justification for having a presumption (namely, that the necessary information is not available to the claimant) does not extend to all the various elements. For example, the extent of pass-through or dead-weight loss is likely to depend on data held only by the claimant. The volume of sales affected may be determined by data held by both claimants and defendants but it will vary as to who has the better data in that regard.

2.36 Second, application of a presumption self-evidently does not make sense in a situation where the cartel affects both direct and indirect purchasers (which will almost inevitably be the case). If the same overcharge is presumed to apply to each level of purchaser, it effectively presumes that the overcharge to the direct purchaser depends on and increases with the number of levels of direct purchaser. It also creates a presumed level of pass-through that, again, varied depending on the number of levels of indirect purchaser. None of this makes any economic sense whatsoever and would be incredibly unjust on defendants who may end up paying several times over for the same loss.

2.37 Third, it is likely to have little or no value in circumstances where all parties will still adduce their own expert evidence and provide disclosure of their data. There will be no saving of costs because the same work will still be done and the court or tribunal is likely to give far more weight to the opinions of the experts and the data specific to the case than to the rather random presumption applied in a uniform manner to all cases. Rather more nuanced presumptions are applied in some civil law systems because there is less scope for disclosure and defendants therefore need to be incentivised to produce relevant evidence - the same considerations do not apply in a common law system.

2.38 Fourth, a presumption is likely to make it harder to settle cases - to the detriment of claimants. Claimants and their lawyers are likely to harbour unrealistic and sometimes sub-conscious expectations set on the basis of the presumption. This follows from the notion of "*anchoring*" identified in the work of psychologists including Kahneman and Tversky.[5] Defendants and their lawyers will, by contrast, place confidence in a professional judge not being unduly swayed by the presumption. The result is that the parties will remain too far apart to settle.

2.39 In any event, the figure of 20% has no reasonable basis and is likely to be excessive. The most well publicised studies of cartel overcharges is that conducted by Professor John Connor, a US economist renowned for his work for the US plaintiffs' Bar acting for claimants in the vitamins follow-on litigation. There are limitations to the work done by Professor Connor and others who have attempted the same sort of research (some acknowledged by Professor Connor himself).[6] One of the most significant issues is that such research is likely to under-report unsuccessful (unprofitable) cartels since it is less likely that damages claims will be brought where the cartel had little or no effect on prices, and the studies possibly have an inherent reporting bias, in that the work is based on research undertaken for the US plaintiffs' Bar.

<u>QUESTION 8:</u> 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?

2.40 ICC UK considers that there is not any need to address the question of passing on. Contrary to the suggestion in the case law, all the indications are that defendants will be permitted to plead passing-on in English courts. See, for example, the comments of the Court of Appeal in *Devenish Nutrition v Sanofi-Aventis* [2008] EWCA Civ 1086 at [151] and in *Emerald Supplies v British Airways* [2010] EWCA Civ 1284 at [69].

[5] See, for example, Tversky, A. & Kahneman, D. (1974). "*Judgment under uncertainty: Heuristics and biases*". *Science*, 185, 1124–1130

[6] For a discussion of the merits of Professor Connor's research, see Francesco Rosati, Christian Ehmer, "*Science, myth and fines: Do cartels typically raise prices by 25%?*", *Concurrences*, N° 4-2009, n°28832, www.concurrences.com (October 2009). Professor Connor has responded to this article: John M. Connor, "*About cartel overcharges : Kroes is correct*", *Concurrences*, N° 1-2010, n°30040, www.concurrences.com (February 2010).

2.41 Moreover, ICC UK considers that the approach adopted by the Courts is plainly correct. Passing-on is not really a "defence" at all but simply a reflection of the fact that claimants should only be compensated for losses they have actually endured; i.e. they should not receive windfall gains.

2.42 Moreover, the Consultation correctly notes that any legislation prohibiting reliance by a defendant on passing on would have to be accompanied by a removal of standing for indirect purchasers if it were to avoid the prospect of a defendant paying twice for the same loss. However, as the Consultation also notes, this would undoubtedly be contrary to EU law.

3 COLLECTIVE ACTIONS

3.1 We set out in this introductory section some initial observations about the role and purpose of, and policy justification for, collective actions in the competition law sphere, as background to our response to the individual consultation Questions.

3.2 First, as with any other private enforcement action based on a competition law infringement, the objective of a collective action should be compensation for losses suffered (or the prevention of losses in cases where injunctive relief is sought). This compensatory objective should underlie all consideration of whether, and if so how, to reform the current regime for collective actions.

3.3 Although an ancillary consequence of an increase in the number of claimants bringing private actions to obtain redress may be to increase deterrence and/or to increase the level of detection of anti-competitive behaviour, deterrence, detection and punishment are the realm of public rather than private enforcement, and therefore should not be policy objectives or motivating factors underlying any reforms to the collective redress regime.

3.4 Secondly, any reform of the collective action regime must take proper account of the rights of defence. In particular it must provide adequate safeguards from unmeritorious claims being brought, including to avoid some of the excesses of the US class action system and the compulsion felt by defendants to settle claims in light of the costs and risks of the litigation, even where they have a reasonable defence, that exists within that system (as recognised by BIS in the consultation document).[7]

3.5 Thirdly, any reform must ensure that principal-agent problems, for example as between claimants and their lawyers, are not created.

3.6 Fourthly, it should be recognised that there are risks and obstacles which apply to all forms of litigation, not only competition litigation, which impact on the appetite of potential claimants to bring actions, in particular where losses are low and dispersed and

[7] For example paragraphs 3.19, 5.6, 5.29 and 5.32-5.33 consultation document.

costs are potentially high. Any reform in this area should be focussed only on any obstacles and risks specific to competition law claims.

3.7 Finally, and interrelated with the above comment, given that there are many areas of law which demonstrate similar or greater obstacles and risks to the bringing of claims, the justification for introducing wide-ranging special mechanisms for competition claims over and above those available to other deserving claimants is not entirely clear. Introducing overly-favourable mechanisms for competition claims also gives rise to the risk of claimants seeking to shoe-horn claims which in reality do not concern a breach of competition law into a competition claim in order to take advantage of such mechanisms. In relation to any revisions to the regime this risk will need to be controlled.

3.8 In light of the above we consider that, whilst some level of revision and extension to the existing collective redress regime might appear sensible, this should be done in a measured and proportionate manner.

3.9 In our view the current proposal within the consultation document for an opt-out collective action available to consumers and all businesses, with standing not being limited to representative bodies but extending to private individuals and undertakings, is overly far-reaching, to an extent not justified by obstacles and risks actually faced by claimants. The proposal is likely to have unwelcome consequences (see further below). Moreover, we believe that the proposed opt-out action is not designed solely to facilitate obtaining redress for victims of competition law breaches, but appears motivated in part to increase deterrence and to prevent defendants from retaining potentially any economic benefits of an overcharge and therefore crosses the line between compensation and punishment.

3.10 We continue to believe that a pure opt-in model is more appropriate to the model of litigation before the courts in England and Wales and to the system of Justice in this jurisdiction, whilst avoiding the worst excesses of US-style litigation. If, however, despite the risks which arise from moving away from individual claims and an opt-in consumer representative model, BIS remains of the view that significant reform is required, a more proportionate approach which would address concerns raised about the ability of, in particular, consumers to obtain redress, but which would deal with some of the problems associated with the proposed opt-out action would be

- a revision to the Section 47B CA1998 representative action to
  - increase the number of representative bodies capable of bring such actions and provide for the ad hoc certification of representative bodies by the CAT in appropriate cases,
  - or otherwise extend the categories of claimants on whose behalf claims can be brought by including a defined category of SMEs. Further consultation is required as to the criteria for such certification and/or the definition of SMEs in this context. The criteria for determining valid

claimants should include an ability to meet costs liability, either independently or through the representative.

3.11 This option is discussed in more detail below.

3.12 Finally, we note that the consultation document does not address the issue of transition in relation to the collective action proposals. Careful consideration would need to be given to appropriate transitional provisions for any new form of collective action.

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.

3.13 The Section 47B CA98 representative follow-on action, in its current form, has clearly not successfully led to numerous cases, given that the claim against JJB Sports in *Football Replica Kits* is the only case to have been brought.

3.14 However, this should not automatically lead to a conclusion that the current regime is failing, and in particular that any opt-in form of action must fail. For example, the fact that only one representative body, Which?, has been designated to bring Section 47B CA98 claims, and that *ad hoc* designation of representative bodies on a case by case basis is not possible, has (arguably) possibly reduced use of this form of action.

3.15 In addition, many infringement decisions issued to date have not necessarily been conducive to consumer claims, given for example in many cases consumers have been indirect purchasers. As a result difficulties arise around the question of the extent to which any overcharge was in fact passed on to the ultimate consumer, which may have militated against claims being brought in such cases.

3.16 Finally, in all areas of law/litigation it is common that claims for very small individual losses are typically not litigated, not necessarily because of unjustified risks and obstacles in doing so, but simply because claimants are not sufficiently concerned to do so (in the words of BIS, they "may simply consider it too much hassle to be worth claiming"), and therefore the low use of the representative action may to a degree simply be a result of this fact rather than any flaws in its design. Questions therefore arise as to whether it is socially useful/efficient to *encourage* such claims to be brought where the potential harm is so insignificant that those who suffer the harm may not be sufficiently concerned either to bring a claim, or to claim a share of damages in an opt-out scenario. (In a follow-on case, the perpetrators will of course have already been fined).

3.17 In relation to participation rates in the *Football Replica Kits* claim, again, whilst the opt-in rates for the Which? action were undeniably low, this is not necessarily determinative of the question of whether such actions could ever result in wide-spread redress being obtained in other cases.

3.18 For example, the fact that JJB Sports made an earlier offer of a free England away shirt and a mug for those who had purchased a shirt in the relevant period is likely to have reduced incentives to participate in the Which? Claim, but the potential claimants may have been equally happy with the free offer as with any monetary compensation, and in that sense may have felt "compensated" for any loss.

3.19 It is unclear why a greater number of claimants would claim their share from an opt-out fund post-quantification than had opted-in to the Which? claim (either because they do not have the necessary proof of purchase and loss, or simply because of the hassle-factor). Applying an opt-out model to this scenario would not therefore lead to enhanced redress for consumers, but only to a "windfall" for the Access to Justice Foundation, or other body, under the current proposals (see further the response to Question 20 below).

3.20 Therefore we are not persuaded that the failure, if indeed it was a failure, in this case in itself justifies the wide-ranging reforms proposed.

3.21 It must also be borne in mind that the Section 47B CA98 representative follow-on action is not the only existing mechanism for competition collective actions to be brought (even taking account of the rejection of the use of the CPR 19.6 mechanism to bring a case on behalf of an undefined class in this area in the *Emerald Supplies Ltd v British Airways* case[8]).

- First, there is the possibility for Group Litigation Orders under CPR 19.10-19.11. There is no reason why this mechanism cannot be used in competition claims. This mechanism would clearly avoid the concern expressed by BIS that the same issues would have to be litigated in each case if claims were pursued individually.[9]
- Secondly, claimants can group and do group together on an *ad hoc* basis to bring consolidated actions in individual cases, for example the claim brought by Deutsche Bahn and other train operating companies in respect of *Carbon and Graphite Products*.[10] This enables claims to brought in an efficient and cost-effective manner, at least by businesses, without any need for a specific mechanism.

3.22 Notwithstanding the above comments, some revisions further to improve the competition collective action regime could still usefully be made. However, this is subject to any reform being proportionate and balanced, only being implemented where there is *demonstrable* need, and taking full account of the appropriate policy objectives. We consider that the full-scale reform currently proposed does not meet these criteria.

3.23 As outlined above and discussed in more detail below in response to Questions 11, 13 and 14 below, if some move away from the current consumer representative opt-in collective

8 [2010] EWCA Civ 1284.

9 Paragraph 5.1 consultation document.

10 Case No: 1173/5/7/10 *Deutsche Bahn and others v Morgan Crucible Company plc and others*.

action regime is considered necessary, we consider that a more measured and proportionate responses would be appropriate.

<u>QUESTION 10:</u> 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.

3.24 Ensuring that victims of anti-competitive behaviour can secure appropriate redress is clearly a correct and important policy objective which should underlie any extension to the collective action regime.

3.25 The need for a balanced and proportionate system which does not lead to an undue US style litigation culture, is also an important policy objective: any reform must ensure that the rights of defence are appropriately protected, including the avoidance of unmeritorious and vexatious claims. Any expansion of the regime must be considered against this objective and matched by safeguards (including a firm maintenance of cost-shifting/"loser pays" rules in these cases) to ensure that only legitimate claims for redress are allowed to proceed and that defendants do not feel compelled to settle spurious claims.

3.26 As outlined above, whilst increased deterrence (and – potentially at least - compliance) may be an ancillary by-product of an expanded private enforcement regime, deterrence is not the purpose of private actions. There is therefore no justification for its inclusion as a policy objective. Deterrence and punishment are properly dealt with through the public enforcement regime, as reflected by the significant fines imposed by the OFT (CMA), the EU Commission and the sectoral regulators, and the ability of the OFT (CMA) to take additional action in the form of criminal prosecution of individuals and the disqualification of directors.

3.27 The (in our submission misplaced) inclusion of deterrence as a policy objective by BIS (see for example paragraph 5.10, Box 3, paragraphs 5.13, 5.24-5.25 and 5.47 of the consultation document, and paragraphs A.26, A.34 and A.36 of Annex A) leads to BIS to dismiss opt-in or pre-damages opt-in models and reject the option of reversion to defendant of unclaimed funds in an opt-out model, without sufficient focus on the implications of this for redress as isolated from deterrence. This leads to some elements of the proposals not aiming at redress for victims but crossing (in our view wrongly) the line between compensation and punishment.

<u>QUESTION 11:</u> SHOULD THE RIGHT TO BRING COLLECTIVE ACTIONS FOR BREACHES OF COMPETITION LAW BE GRANTED EQUALLY TO BUSINESSES AND CONSUMERS?

3.28 In accordance with the comment above that reform must be proportionate and only occur where there is demonstrable need, it is submitted that the business community generally

does not require access to any enhanced collective action regime in order to bring private claims in order to obtain redress for breaches of competition law.

3.29 The large majority of businesses who may be affected by anti-competitive behaviour can, and do, bring such claims already, as reflected in the significant and increasing number of follow-on claims brought in both the CAT and the High Court (in relation to which the UK is becoming a jurisdiction of choice for claims following on from EU Commission cartel decisions), with many more claims (and pre-claim disputes) settling without proceedings or through ADR.

3.30 For such businesses, competition claims are no different from any other claims: they have the ability, access to advice, and resources to bring such claims, and can weigh potential costs exposure and other risks against the likelihood of success, as with any other form of litigation. BIS has not produced evidence that businesses are deterred from bringing private law competition actions (or otherwise settling competition law disputes by ADR), in appropriate cases, over and above bringing claims in other areas. Such businesses are also more likely to have suffered higher individual losses, due to a greater volume of purchases for example.

3.31 As noted above, existing mechanisms such as Group Litigation Orders, can be used to prevent the same issues being litigated by or on behalf of businesses in multiple cases.

3.32 In addition, extending collective actions to businesses would, unlike with consumers, give rise to the complicating factor of dealing with the issue of passing-on.

QUESTION 12: SHOULD ANY RESTRICTIONS BE INTRODUCED TO PREVENT SUCH CASES BEING USED AS A VEHICLE FOR ANTI-COMPETITIVE INFORMATION SHARING?

3.33 We do not consider that this issue to be of particular concern, and therefore not a reason in itself not to extend collective actions to businesses.

3.34 It may be the case that the bringing of an action by or on behalf of multiple businesses would require competitively sensitive information to be adduced as evidence, or in order to assess potential damages, although in many cases the information may be historic, and business claimants may not in all case constitute competitors.

3.35 However, the issue already arises in relation to private competition actions where there are multiple competing claimants or defendants, and regularly arises in other forms of competition litigation and competition investigations (such as appeals to the CAT of regulator decisions, Ofcom's dispute resolution procedures, and merger investigations). Undertakings and practitioners, as well as the CAT, are familiar with the issues which may arise, and the arrangements which can be put in place to deal with any concerns, such as confidentiality rings.

3.36 The CAT is therefore alive to the issues which may arise and accustomed to policing arrangements to deal with these issues. It could and would also manage such issues in a collective actions context. The implementation and adequacy of such arrangements could be an issue dealt with on certification.

QUESTION 13: SHOULD COLLECTIVE ACTIONS BE ALLOWED IN STAND-ALONE AS WELL AS IN FOLLOW-ON CASES?

3.37 In principle, in accordance with the policy objective to facilitate redress those who have or may have suffered harm as a result of anti-competitive behaviour, it would make sense to allow collective actions in stand-alone actions as well as follow-on cases.

3.38 The competition authorities cannot investigate each and every suspected infringement, and therefore allowing collective actions to be brought in stand-alone cases could facilitate access to justice in relation to the cases which are most difficult to bring, and allow redress to be sought where competition authorities and been unable/unwilling to pursue a case due to administrative priorities or finite resources.

3.39 Moreover, excluding stand-alone claims from a revised collective action regime may give rise to difficulties and issues in respect of the jurisdictional scope of such an action, such as have arisen in relation to the limitation on the CAT's current Section 47A CA98 follow-on jurisdiction.

3.40 However, whereas in follow-on cases there is generally clearly a reasonable basis for a claim given an infringement finding exists, in stand-alone cases there is a clear risk of unmeritorious, spurious or vexatious claims or "fishing expeditions" being brought, giving rise to significant costs and burdens for defendants, and the resulting risk of defendants being pressured to settle a case despite likely success.

3.41 The level of these risks will vary depending on the form of collective action adopted, and would appear greatest in relation to the form currently proposed – i.e. full opt-out actions which can be brought by private individual/undertakings as well as representative bodies – as well as with the various proposals outside the collective action sphere, such as the proposed presumption of loss. The various proposals therefore need to be considered cumulatively, with BIS assessing the risks of the proposed reforms leading to unfounded claims in aggregate.

3.42 It is submitted that these risks militate against allowing the full opt-out action and favour a more proportionate approach being adopted (for both stand-alone and follow-on claims).

3.43 In addition, procedural safeguards would need to be available and utilised, including:

- Rigorous application of a preliminary merits test as part of the certification process, stricter thresholds to be applied in stand-alone cases.
- Active case management post-certification.

- No departure from cost-shifting/"loser pays" cost rules in stand-alone cases; in particular it is submitted that cost caps should not be imposed on defendants in stand-alone cases.
- Rigorous testing of ability of claimants'/the funder's ability to cover the defendant's costs on certification, and security for costs being ordered in appropriate cases.
- Imposition of court fees.

(See further the response to Question 15 below on other factors to be considered on certification).

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

3.44 Please see also our responses to Question 9, 11 and 13 above.

3.45 In relation to the large majority of businesses, the case for the introduction of opt-out actions has clearly not been demonstrated, in particular in light of the concerns which arise from opt-out actions discussed below, as such businesses can and do bring competition law private actions on individual basis like any other claim.

3.46 In relation to consumers and small business/SMEs, the Section 47B CA98 has not to date facilitated such parties in obtaining redress for competition law breaches, and as indicated above, the possibility for revisions to the current regime for such claimants, including the potential for departure from the current opt-in model, does merit consideration. In addition, a form of action which moves away from a pure opt-in model would provide a greater level of finality for defendants as to the potential for future claims.

3.47 However, there are a number of concerns and downsides to an opt-out model which in our view militate against the BIS proposal in its current form.

3.48 First, an opt-out action raises particular risks of unmeritorious/spurious claims, and/or unfounded inflation of claims, leading to excessive pressure on defendants to settle.

3.49 An opt-out action, at least if not carefully circumscribed and managed through rigorous certification, may inevitably lead to the creation of a US-style "litigation culture" which BIS states it (quite rightly) is concerned to avoid.

3.50 Secondly, it is difficult accurately to estimate the total size of the class of potential claimants, especially where the conduct complained of is historic and therefore documentary records of sales may be limited. Opt-out actions therefore lead to uncertainty about the scale of liability, and with that the risk of potential inflation of claims, making settlements more difficult to achieve and the whole system more costly and unpredictable for business. Thirdly, an opt-out action raises the problem of how to deal with unclaimed sums, which may be very significant.

3.51 An opt-out action combined with any option for the distribution of unclaimed funds other than reversion to the defendant, such as that currently proposed by BIS, in our view crosses the line from compensation to punishment, since unreturned funds would amount to a type of disgorgement, and so is punitive rather than compensatory, in nature.

3.52 This is particularly the case given that from the US experience the size of the unclaimed funds pot, and therefore the level of the damages awarded which does not in fact compensate those wronged, can be very high, as discussed in the responses to Questions 20-21 below.

3.53 Fourthly, an opt-out system also results in greater incentives for external law firms and funders to bring/sponsor large claims on which their remuneration can be based, leading to potential divergences of interest between those in reality driving the litigation and those who have suffered the loss, regardless of whether law firms or funders are formally entitled to act as representatives for a class.

3.54 Fifthly, an opt-out action would give rise to difficult and complex questions of jurisdiction and applicable law in cross-border cases (regularly the case in follow-on claims from EU Commission decisions). A key question, which does not appear from the consultation document to have been considered by BIS to date, is how claimants not domiciled in the UK would be treated:

- Would those who suffered the same loss in other Member States automatically form part of the class of claimants?
- If so, would those claimants be bound by any judgment or settlement of the action, even if they took no part in it (and may even have been unaware of it), and therefore be prevented from initiating separate actions in respect of their losses in other Member States?
- If not, would the defendant face multiple "copy-cat" claims in other Member States?

3.55 It is useful to note on this point that the CJC in its draft rules for collective actions published in 2010 sought to by-pass some of these issues by providing that any would-be members of the class resident outside England and Wales must specifically opt in.

3.56 Sixthly, an opt-out action available in the competition sphere but not in other areas would give rise to jurisdictional skirmishes even in purely domestic matters, with claimants seeking to shoe-horn what are in reality non-competition cases into a competition law case to take advantage of the regime.

3.57 Seventhly, an opt-out action as currently proposed would also raise difficult questions about the appropriate boundaries of the potential class – for example would it include consumers as well as businesses in the same class, and would it include dircet and indirect purchasers?

3.58 The CAT would have to consider the possibility of separate representatives for different sub-classes of claimants, and possibly accommodate multiple class claims and/or determine who should be the lead claimant. All this would be likely to mean that certification is likely to be complicated and costly (and claimants may have difficulty in funding claims until certification).

3.59 Finally, we note that the view in the consultation paper that opt-out actions will overcome obstacles to bringing successful claims for small individual losses may not be warranted. It may remain the case even in an opt-out action that total losses, and therefore potential damages, remain too low to justify the costs and risks of litigation and/or to obtain funding (in particular in stand-alone cases).

3.60 If despite these real concerns and our concerns for the economy at large, BIS remains of the view that changes to the current competition collective action regime away from a pure opt-in model are justified, this should be done in a measured and proportionate manner, in particular carefully circumscribing the identity of those who would be entitled to bring a collective action (see also paragraph 3.10 above and the responses to Questions 22 and 23 below).

QUESTION 15: WHAT ARE YOUR VIEWS ON THE PROPOSED LIST OF ISSUES TO BE ADDRESSED AT CERTIFICATION?

3.61 As BIS recognises, the "design details" of any enhanced collective action regime are crucial in ensuring that sufficient safeguards are in place to ensure that defence rights are protected. This is particularly the case if any form of opt-out or pre-damages opt-in model is adopted, but also if the current regime is simply extended to encompass stand-alone claims.

3.62 The precise detail of the issues to be addressed at certification (and subsequently through active case management) will of course depend on the form of action ultimately adopted, and therefore the comments below are made generally without prejudice to a preferred form of action.

3.63 We agree with BIS that all of the issues listed in paragraph A.3 of Annex A need to be addressed at certification.

3.64 However, further consideration will need to be given (and possibly more consultation is required) as to the precise application of these considerations (and the extent to which the detail of these will be specified in the CAT's Rules, or left for determination within the CAT's discretion). For example:

- When commonality of issues is considered, a relevant factor will be whether the class can contain both direct and indirect purchasers, and if so whether separate representatives are required for sub-classes (if so requiring also assessment of the adequacy of the sub-class representative).

- The CAT would need to consider how to deal with multiple claims brought by multiple claimants/multiple counsel.

- In relation to the adequacy of the representative, in addition to the factors listed, including importantly that the representative has sufficient funds to cover the defendant's costs, other factors would need to be taken into account. The precise nature of these will depend on resolution of the question of who can bring a claim (representative bodies v individuals, advance specification of representative bodies v *ad hoc* certification of such bodies etc.) but should at the least include assessment of: whether the representative claimant possesses qualities such as proper management; the existence of proper governance arrangements/systems for conduct of the claim (for example who would give instructions and how individual class members could participate in decisions); and whether the representative claimant has any pecuniary interest in the case.

- Should collective actions be extended to SMEs (only) then the CAT would need to assess whether the SMEs within the class met the specified criteria/thresholds for SMEs.

- In relation to the proposed preliminary merits test, which we agree is essential, further consideration will need to be given to the form this could take and other possible formulations, for example the summary judgment test of whether there is a "real prospect of success". In addition, it should be considered whether the test should differ between opt-in and opt-out claims, and follow-on and stand-alone claims. As noted in the response to Question 13 above, in our view a stricter merits test should clearly be applied in respect of stand-alone cases, where the risks to the rights of defence of defendants are greater.

- There may also be benefit in including as part of the preliminary merits test a threshold question as to whether there is a reasonable basis for a UK court taking jurisdiction over the claim (in light of the issues which have arisen in the *Provimi, Cooper Tire* and *Toshiba Carrier*[11] line of cases for example).

- In relation to the question of whether a collective action is the most suitable means of resolving the common issues, the CAT should be required to consider the costs and the benefits of the proposed collective proceedings (as proposed by the CJC).

3.65 In addition, the factors listed in paragraph A.3 are the minimum requirements and further issues will likely need to be addressed. For example:

[11] *Provimi Ltd v Roche Products* [2003] 2 All ER (Comm) 683, *Cooper Tire v Dow Deutschland* [2010] EWCA Civ 864, *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2011] EWHC 2665 Ch (appeal to Court of Appeal pending).

- Whether security for costs should be ordered (in relation to which we submit that a stricter test on security of costs should be applied in a collective action context given the risks involved).

- In addition to consideration of whether a collective action is the most suitable means of resolving the common issues, should any form of action other than an opt-in model be introduced the CAT should also be required to consider whether a claim would most appropriately be brought on an opt-out basis (or pre-damages opt-in basis as the case may be), or whether an opt-in action would be a more fair and efficient basis on which to bring the claim. BIS indicate in paragraph 5.31 of the consultation document that the CAT would have discretion to consider this issue on certification[12], but this does not appear to be addressed within Annex A.

- Whether the claim is appropriately characterised as a competition claim.

- Whether any cross-border jurisdictional issues need to be addressed.

- Whether the claimants have been willing to engage in an ADR process.

- Whether any funder of the action is appropriate and whether it has sufficient funds to meet any adverse costs order against the claimants.

3.66 In addition to careful consideration over certification, active case management would be required, including the ability for security for costs to be ordered at a later stage if doubt arises about the class representative's ability to meet any costs order.

QUESTION 16: SHOULD TREBLE OR OTHER PUNITIVE DAMAGES CONTINUE TO BE PROHIBITED IN COLLECTIVE ACTIONS?

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

3.68 As outlined above, the proper objective of collective redress (and any form of private competition action) is (and should remain) *compensation* for losses suffered, not to punish defendants.

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

3.70 Moreover, the existence of treble or punitive damages would infringe the principle of *non bis in idem*/against double jeopardy.

[12] This was also proposed within the CJC's draft rules.

3.71 We agree with BIS that to allow such damages would encourage unmeritorious/spurious/ vexatious claims and would clearly place undue compulsion on defendants to settle unmeritorious actions; 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).

3.72 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.

3.73 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 claim into a competition framework in order to benefit from treble or other punitive damages.

QUESTION 17: SHOULD THE LOSER-PAYS RULE BE MAINTAINED FOR COLLECTIVE ACTIONS?

3.74 We consider that it is very important that two way cost shifting/the loser pays rule be maintained for collective actions. 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.

3.75 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.

3.76 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, it is submitted that the CAT Rules should be amended to provide that in such private enforcement cases the basic rule is that costs follow the event, as in the High Court.

3.77 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 for the CAT to order security of costs where appropriate (in relation to which we submit that a stricter test on security of costs should be applied in a collective action context given the risks involved) (as discussed in the response to Question 15 above).

3.78 In addition to the above, funders should also be liable for the defendant's costs in such cases if the claim is unsuccessful to the extent of the funding provided, in accordance with the decision in *Arkin v Borchard*.[13]

<u>QUESTION 18:</u> 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) In the interests of access to justice

3.79 We consider that cases cost-capping may only be appropriate in exceptional and appropriate cases.

3.80 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.

3.81 However, given the brake this exerts on unmeritorious claims, the default loser pays principle should only be departed from with very great caution. It should be remembered that claimants can still seek ATE insurance (despite the premium being unrecoverable) 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 - and subject to a merits test.

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

3.83 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.

3.84 Finally, BIS does not indicate whether it considers that cost capping would be one way 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.

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

3.85 We do not follow the reference in paragraph A.11 of Annex A to the Ministry of Justice response to the Jackson Review of Costs in this context. If this refers to the lifting of

[13] [2005] EWCA Civ 655.

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)).

3.86 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.

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

<u>QUESTION 19:</u> SHOULD CONTINGENCY FEES CONTINUE TO BE PROHIBITED IN COLLECTIVE ACTION CASES?

3.88 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.

3.89 However, allowing DBAs in collective competition actions would give rise to 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.

3.90 Allowing DBAs in collective competition 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).

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

3.92 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.

3.93 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.

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?

3.94 If an opt-out action is introduced, 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.

3.95 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. Such a result would not be in accordance with established principles of English law (and is not required by EU law).

3.96 The concerns expressed by BIS over a "windfall" to the defendant (paragraph A.26 of Annex A) 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).

3.97 Reversion to the defendant is the only option which would be consistent with the compensatory objective of private actions, since any unreturned funds would amount to a type of disgorgement, and so is punitive rather than compensatory, in nature

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

3.99 The US experience shows that claim rates can be very low and therefore unclaimed fund amounts very high. For example, in *Re Domestic Air Transportation Antitrust Litigation* 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* the redemption rate was around 12%.[14]

3.100 Allowing reversion to the defendant would also ensure that incentives to settle are not undermined (which would breed inefficiency in the system).

3.101 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.

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?

3.102 Please see our response to Question 20 above. It is in 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.

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?

Competition authority

3.103 There would be some advantages in a competition authority – i.e. the OFT (or going forward, the 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 actins). In addition, restricting collective actions to the OFT (CMA) would be a safeguard against unmeritorious/spurious claims.

3.104 However, we agree with BIS' conclusion that 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 constraints and competing priorities. This is particularly the case in relation to stand-alone claims and EU Commission follow-on claims.

[14] See Thari/Blockovich, "Coupons and the Class Action Fairness Act" (2005) 18 Geo. J. Legal Ethics 1443.

3.105 Moreover, 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

3.106 However, we do not agree that 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, whatever the form of action.

3.107 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

3.108 However, if collective actions were to be brought on an opt-out or pre-damages opt-in basis, as outlined above we consider that the right to bring such actions should be tightly circumscribed. Standing should therefore be limited to authorised representative bodies, such as Which? or other consumer groups or trade associations, rather than extending to each and any consumer or small business which has suffered harm. Such bodies could either be authorised on a permanent basis, as with the current Section 47B CA98 action, or on a case by case basis by the CAT where appropriate.

3.109 Limiting representative claimants to such legitimate bodies, which would need to meet specified minimum criteria as discussed in the response to Question 15 above, would allow claims to be conducted with greater efficiency and reduce the risks of unmeritorious claims being brought.

3.110 Such an approach would also reduce the prospect of the litigation being driven by law firms and funders, which would likely occur even if such bodies are denied standing, as in practice if private individuals and businesses were permitted to bring claims law firms/funders could simply identify a nominal figurehead claimant to front an action. This would be likely to foster the type of US style "litigation culture" which BIS states it is concerned to avoid.

3.111 Careful consideration would still 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 – consumers/SMEs, direct/indirect purchasers).

<u>QUESTION 23</u>: 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?

3.112 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.

3.113 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.

4 ALTERNATIVE DISPUTE RESOLUTION

QUESTION 24: DO YOU AGREE THAT ADR IN COMPETITION PRIVATE ACTIONS SHOULD BE STRONGLY ENCOURAGED BUT NOT MADE MANDATORY?

4.1 Yes, we believe that alternative dispute resolution ("ADR") has (both currently in practice now and going forward) a key role to play in resolving disputes relating to competition law infringements, and should therefore be encouraged.

4.2 There are many forms of ADR – from arbitration to informal settlement discussions, as well as expert determinations, mediations etc. The vast majority of commercial cases, of which competition cases form a part, settle before they reach trial and in many cases, even before a claim has been lodged in court. Many other business disputes based on competition law complaints are never formally litigated: the mere credible threat of litigation, followed by commercial negotiations (with or without external legal input), will (and already do) in many cases lead to resolution of the issue without the need to litigate at all. As such, ADR already plays an extremely important (but somewhat "invisible" and therefore under-estimated) part in competition litigation / obtaining damages or other forms of compensation for loss as a result of competition law infringements.

4.3 ICC UK supports the Government's policy of encouraging parties to consider alternative forms of dispute resolution. However, to be effective ADR must be voluntary. It is not realistic to require companies to mediate or attempt settlement unless there is willingness to do so on both sides, and to impose ADR in those circumstances is likely only to cause delay. ADR should definitely be positively encouraged by Government (and the OFT / CMA), but should be voluntary not 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?

4.4 We agree that the introduction of a pre-action protocol applicable to damages actions in CAT proceedings would be sensible. As noted elsewhere, however, we do not agree that a fast-track should be established and therefore do not consider it necessary to adopt a pre-action protocol specific to a fast-track procedure.

4.5 It is noted, however, that certain issues specific to competition litigation would need to be considered by the CAT when assessing parties' compliance with the pre-action protocol. In particular, in circumstances where a so-called "Italian torpedo" is feared, claimants may be less willing to engage in pre-action correspondence or put the proposed

defendant(s) on notice of the litigation at all before it is filed. Similarly, defendants may in some cases, or at certain times, be reluctant to correspond in detail with potential claimants if they are the subject of an investigation by antitrust regulators.

QUESTION 26: SHOULD THE CAT RULES GOVERNING FORMAL SETTLEMENT OFFERS BE AMENDED?

4.6 It is our view, that the present CAT Rule 43 is inadequate to incentivise defendants to make formal settlement offers at an early stage in the litigation (or at all). In particular, Rule 43 provides that the offer cannot be withdrawn until 14 days before the substantive hearing unless the Registrar's permission is obtained, and affords insufficient costs protection to defendants who can only recover their costs from "*the latest date on which the payment or offer could have been accepted*". This leaves defendants exposed to claimants' costs where claimants delay acceptance of a settlement offer until the last possible moment.

4.7 If meaningful settlement offers are to be encouraged in the CAT, the CAT Rules should be amended to bring them into line with the protection afforded to formal settlement offers made under Part 36 of the CPR.

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.

ICC UK will consider whether this is necessary or appropriate when the results of the consultation are more clearly understood, but the ICC as an organisation is very clearly in support of ADR as the best and most economically appropriate and sustainable means to facilitate the settlement of private competition law disputes between businesses.

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?

4.8 ICC UK does not agree that opt-out collective actions should be introduced in competition litigation in the CAT (please refer to our earlier submissions). Should an opt-out collective actions regime be introduced, however, that regime should enable defendants to settle the litigation as they would any other litigation. There would then be no need to make separate provision for collective settlements, provided that settlement of the opt-out collective action binds the entire claimant class.

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?

4.9 No, we do not think that this is the right approach. The competition regulators' *public* enforcement role is inconsistent with granting them the power to mandate redress to *private* individuals or companies. The role of public enforcement of competition law by the competition regulators, which aims to punish companies that infringe competition law and to deter other companies and future infringements, should be kept separate from the private enforcement regime, which seeks to compensate those who suffer loss as a result of the infringement. This dichotomy is important in order to ensure that the two elements of competition law enforcement co-exist effectively. However there may be a role for the OFT (CMA) in encouraging voluntary redress schemes.

4.10 We would also question whether public resources and funding should be used to obtain redress for private individuals and companies.

4.11 Further, from a practical or operational perspective we believe that competition regulators are not well-placed to require or certify redress schemes in any event. The OFT (CMA) and sectoral regulators' decisions finding infringements of Chapters 1 and 2 or Articles 101 and 102 rarely attempt to quantify losses, and indeed sometimes do not even seek to find that the infringing conduct has had an effect on prices at all. The information available to them tends not to allow them to make such calculations. They are therefore not well-placed to assess loss or to become involved in the implementation or certification of redress schemes in any event.

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?

4.12 No. As noted above, the public and private enforcement regimes should remain separate. The purpose of the fine is to punish and deter undertakings that infringe competition law; redress is paid to compensate those that suffer loss as a result. In any event, in circumstances where fines would usually be paid in advance of any redress being agreed, it is impractical to provide for fines to take account of redress.

5 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.

5.1 We believe that a clear distinction should be drawn between the objectives of private actions and public enforcement. Public enforcement is rightly targeted first and foremost at punishment and deterrence, and should also properly be focussed (primarily) on encouraging voluntary compliance. By contrast, as acknowledged in the Consultation and

in previous statements by the European Commission, the primary goal of private actions should be to provide compensation. ICC UK would be concerned if punishment or deterrence were to be pursued as in any way independent objectives in the promotion of private actions.

5.2 Nonetheless, we believe that facilitating compensation for victims and encouraging ADR may perhaps have some role in positively complementing public enforcement. But the role of extending private actions in complementing public enforcement should not be over-stated.

5.3 The impact of potentially increased financial exposure on those considering infringing behaviour should not be over-stated, since there are already extremely strong deterrents to at least hard-core infringements, and most companies now also have an active compliance programme intended to avoid such infringements in the first place. The scale of fines imposed in the EU and US alongside potential criminal sanctions, disqualification of directors, personal loss of employment and existing civil liability are such that few rational decision-makers would engage in infringing behaviour anyway and senior management are already incentivised to engage in extensive compliance efforts. Furthermore, the increase in corporate governance and shareholder expectations means that most companies want to (and want to be seen to) act ethically in compliance with the law. This compliance driver must not be under-estimated or minimised.

5.4 We would also caution against overstating the possibility that extending the scope for stand-alone private actions might result in the detection and termination of infringing behaviour that might not otherwise be dealt with by public enforcement. Experience in the US suggests that "true" stand-alone claims unconnected at all with public investigations remain very much the exception rather than the norm even where there are very strong incentives to engage in private actions. Stand-alone claims are always going to be more difficult than follow-on actions and less attractive to claimant lawyers or funders.

5.5 So the role of private actions in deterring anti-competitive conduct must not be over-stated, and it should be understood that there are many more – and much stronger – incentives for a company to comply (including "softer" issues such as reputation and ethics).

5.6 We agree, with the comments in paragraph 7.3 of the Consultation that there are ways in which promoting private actions could actually be <u>detrimental</u> to public enforcement. In particular, if leniency submissions are in any way deterred.

<u>QUESTION 32:</u> 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?

5.7 We agree that potential leniency applicants may be (and increasingly are being) deterred from applying for leniency if they believe that doing so is likely to increase their vulnerability to private actions to such an extent as to outweigh the benefits of leniency.

5.8 Whilst most of those eligible for complete immunity (i.e. "Type A" leniency applicants) have so much to gain in terms of immunity from fines and criminal sanctions that might be thought to be unusual for any increase in civil liability to outweigh that gain, in practice there will be (and are) cases where that happens. If follow-on litigation becomes an increasing likelihood (as is happening now) it is also likely that companies will take that into account when deciding whether to go for leniency at all.

5.9 The clearer impact will be on potential Type B leniency applicants. Those who know they are already too late to get full immunity have much less to gain from cooperation and the gain is purely a reduced financial exposure to fines. In that situation, an increased exposure to civil claims may quite easily outweigh the gain from leniency.

5.10 Given the significant role of the leniency regime in increasing the likelihood of detection and successful prosecution – and ultimately prevention – of cartel conduct, we strongly support proposals to protect leniency documents from disclosure in private actions. Whilst there appears to be no justification for protecting (clearly) pre-existing documents from disclosure, any documents created for the purposes of investigating the conduct internally and / or making a leniency application should be protected from disclosure. Furthermore, any references to the content of those documents in other documents such as the Statement of Objections and the confidential version of the infringement Decision should also be carefully protected.

5.11 As a practical matter, defendants to a private action often will not have copies of corporate leniency statements because they are delivered orally to the competition authority and no party is permitted to take possession of a copy of the transcript (i.e. all parties must view the transcript at the premises of the competition authority). Unless and until there is full protection from disclosure in all relevant jurisdictions, ICC UK would favour extension of this practice to all leniency submissions and reproductions of the same in documents produced by the competition authority. We are aware that the

European Commission has adopted the practice in some decisions of consigning some recitals to confidential annexes that can only be viewed at its premises. The same approach would be beneficial in the UK.

5.12 ICC UK recognises that the UK Government is likely to want to wait for action by the European Commission and / or convergence through the ECN rather than implementing reform unilaterally at this point given that this is an issue that the Commission has indicated it is likely to address in the autumn. This would seem to be sensible in the interests of ensuring a consistent approach as between national competition authorities

and the Commission (assuming that the Commission's proposals do not directly extend to national leniency programmes).

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?

5.13 As a general matter ICC UK believes that protecting whistle blowers from joint and several liability would generally encourage leniency applications and therefore should (generally) be encouraged. However there may be circumstances where one or more of the other cartelists may be insolvent or effectively judgment-proof for other reasons (e.g. place of domicile, location of assets or possibly even sovereign immunity). It is entirely possible to conceive of circumstances in which there could be considerable unfairness to victims and/or other participants in the cartel, although it is also unfair to place joint liability on the whistle blower merely because other defendants are insolvent or are out of the jurisdiction.

5.14 The current rules on joint and several liability undoubtedly do risk putting the leniency applicant at a disadvantage to other participants in the cartel in the context of private actions.

5.15 Claimants may well be tempted to pursue the leniency applicant for damages ahead of (and in preference to pursuing) other participants in the cartel since the leniency applicant cannot deny liability for the cartel as, almost by definition, it will have admitted liability by making the leniency application in the first place, and almost always will not be appealing against the infringement finding.[15] By contrast, the other alleged participants may resist liability consequent on their pending infringement appeals and the claimants risk an adverse costs order against themselves if the infringement appeals succeed.

5.16 At least on the basis of the current interpretation of the rules, the claimants may not be able to pursue the other parties in the CAT without permission from the CAT. In circumstances where it may be necessary to seise jurisdiction before a negative declaration can be sought by the defendant overseas, it may not be practical for the claimants to seek permission and the leniency applicant may be a much more attractive target for that reason.

[15] Albeit that a question mark remains over the status of the infringement finding against the leniency applicant if it is left in the curious position of being the only addressee of the decision following successful appeals by the other alleged participants. This issue may be addressed in the pending appeal in the Court of Appeal appeal against the CAT decision in *Deutsche Bahn v Morgan Crucible* [2011] CAT 16.

5.17 There may be less risk of a *Masterfoods* stay being imposed where the defendant is not itself appealing (albeit that most courts have so far imposed, or indicated their willingness to impose, stays in favour of all defendants where any of them are appealing).

5.18 The leniency applicant must have had at least enough evidence to cross the threshold of benefitting from leniency. Some potential defendants may not actually have any evidence to disclose in civil proceedings.

5.19 For all these reasons, the leniency applicant may be a more attractive target than other alleged participants in the cartel and, under current rules on joint and several liability, may find itself as the only party sued for the whole liability of the cartel. It then faces all the costs, risks and potential delay of trying to recoup a share of that liability from the other alleged participants.

5.20 If private actions continue to grow in incidence and value, there must be a risk – and perhaps a very substantial risk - that leniency applications will be deterred by these considerations.

5.21 We believe that a solution may be found along the lines of an approach adopted in Hungary. We understand that the model adopted in Hungary (Art 88D Hungarian Competition Act) is to prohibit claimants from pursuing the successful Type A leniency applicant unless and until they have already unsuccessfully pursued all the other addressees of the infringement decision. The other addressees can still pursue the successful leniency applicant for contribution but the effect of the rule is to avoid the situation where the leniency applicant is seen as an easier target for claimants.

5.22 The rule could perhaps be modified to only require pursuit of solvent, EEA-domiciled addressees ahead of, or even *with*, the leniency applicant (and, on that basis, could perhaps be extended to Type B as well as Type A leniency applicants). The objective is simply to avoid claimants suing the leniency applicant(s) alone where they could relatively easily pursue others.

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.

5.23 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.

If you have any questions, or would like further information, please contact the ICC UK secretariat: Dorothée Heinze; Senior Policy Advisor (Competition): +44 (0)20 7838 7453; dheinze@international-chamber.co.uk

ANNEX 1 – Summary of key messages

Questions	**ICC UK response**
Question 1:	Support of the creation of a power to enable the High Court to transfer competition law cases to the CAT
Question 2:	Support for amending the Competition Act to allow the CAT to hear stand-alone claims.
Question 3:	Support for the CAT to be allowed to grant injunctions.
Question 4:	Support of the policy objective to find way to make it easier for SMEs to tackle anti-competitive behaviour. No clear evidence that current cost and complexity is a particular disincentive to the bringing of claims by SMEs. It is not obvious that there is a real obstacle to access to justice that needs to be removed. We support the introduction of a fast track route for certain cases with SME involvement, but we oppose a fast track route as a rule for all SMEs. (Further details under 2.13 – 2.22 in our response).
Question 5:	We consider it appropriate to limit the fast-track to relatively low value claims. However, rather than imposing a fixed maximum and artificially limiting claims, we would favour simply having a presumption that the fast-track will normally be for claims below £500,000. We oppose rigid cost caps to be applied to every case that is allocated to the fast track. We suggest to leave it to the CAT's Chairmen discretion as to what caps to set and to provide clear guidance on how to approach these matters. We disagree with proposal to give powers to OFT (CMA) or CAT or the Competition Pro Bono Scheme to write letters to alleged infringers warning them that there is a reasonable case against them.
Question 6:	We would support the adoption of a fast-track regime along the lines set out in our response to question 5.
Question 7:	We strongly oppose the introduction of a rebuttable presumption of loss in cartel cases.
Question 8:	We do not consider that there is any need to address the question of passing on.
Question 9:	We acknowledge that Section 47B CA98 representative follow-on actions, in its current form, has not successfully led to numerous

	cases. However, there are various reasons for this, and we oppose the view that this is proof of the failure of the current regime. (Please see relevant sections under question 9 in our response for further explanation.)
Question 10:	We strongly support the Government's objective to ensure that victims of anti-competitive behaviour can secure appropriate redress. It is our view that this objective should underlie any extension to the collective action regime. Further, it is important to provide for a balanced system which does not lead to an undue US style litigation culture, and which ensures protection of the rights of defence. We strongly oppose the inclusion of deterrence as a policy objective for reforming the private actions regime. We are convinced that deterrence is not the purpose of private actions (but dealt with through the public enforcement regime and through the encouragement of compliance activities).
Question 11:	We strongly believe that any reform must be proportionate and only occur where there is demonstrable need, and to the extent necessary to meet that need. It is our view, that the existing private actions regime (and ADR) works very well for business in the UK, however, we acknowledge that the private actions regime for consumers may benefit from a limited/well balanced / proportionate and targeted reform.
Question 12:	We do not consider that this is an issue of concern, and therefore is not a reason for reform.
Question 13:	We consider it to be sensible to allow appropriate collective actions in stand-alone actions as well as follow-on cases. However, we would highlight that in stand-alone cases, there is a clear risk of unmeritorious, spurious or vexatious claims of "fishing expeditions" being brought. It is our view that these risks militate strongly against allowing the full opt-out action and favour a more proportionate approach being adopted. In addition, procedural safeguards are necessary. (Further details in our response).
Question 14:	In addition to response to Qs 9,11,13: In relation to the large majority of businesses, the case for the introduction of opt-out actions has clearly **not** been made out, in particular in light of the concerns which arise from opt-out actions (Please see paragraphs 3.44 – 3.60). In relation to consumers and small business/SMEs, as indicated above, the possibility for revisions to the current regime for such claimants, including the potential for departure from the current opt-in model, does perhaps merit consideration, but needs to be very carefully scoped and defined in order to avoid the real drawbacks of a litigation culture. However, there are a number of serious concerns and downsides to

	an opt-out model which in our view militate against the BIS proposal in its current form. ICC UK is in favour of an opt-in model, or perhaps a carefully designed hybrid model (Please see response to Q 14 for more detail.)
Question 15:	The precise detail of the issues to be addressed at certification will depend on the form of action adopted, but will need to be very carefully defined. Please refer to the detailed response.
Question 16:	We strongly agree with BIS' conclusion that treble or other punitive damages should continue to be prohibited in collective competition actions. We reiterate that the proper objective of redress is (and must remain) compensation for losses suffered, not to punish defendants.
Question 17:	We consider it very important that the two way cost shifting/the loser pays rule be maintained for collective actions to safeguard against unmeritorious/spurious claims. (Please see paragraphs for further detail).
Question 18:	We consider that cases cost-capping may only be appropriate in truly exceptional cases. (Please see relevant paragraphs).
Question 19:	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 concerns: - The interest of lawyers can create perverse incentives - 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 actions may also in fact undermine wider access to justice aims. Overall therefore we would agree that contingency fee arrangements/DBAs continue to be prohibited in such cases.
Question 20:	If an opt-out action is introduced, we oppose the option of paying unclaimed funds to a single body which we consider unjustifiable and inappropriate, resulting in an unjustified windfall to the Access to Justice Foundation or other specified body, and will effectively constitute a form of disgorgement. 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.
Question 21:	Please see response to Q 20.
Question 22:	There would be some advantages in a competition authority – i.e. the OFT (CMA) – being the specified body to bring collective actions, however, we agree with BIS' conclusion that that granting the right to

	bring collective actions only to the competition authority would not increase access to justice/ability to obtain redress. However, we do not agree that 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, whatever the form of action. In short: For opt-in regime: we do not think that private individuals and business should be allowed to bring actions in their own right For opt out or pre-damages opt-in: Whilst we do not support an opt out regime as a matter of principle, if such were to be adopted, the right to bring such actions should be tightly circumscribed. Standing should therefore be limited to authorised representative bodies, such as Which? or other consumer groups or trade associations Limiting representative claimants to such legitimate bodies, which would need to meet specified minimum criteria as discussed in the response to Question 15 above, would allow claims to be conducted with greater efficiency and reduce the risks of unmeritorious claims being brought
Question 23:	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.
Question 24:	We believe that alternative dispute resolution ("ADR") has a key role to play in resolving disputes relating to competition law infringements – both currently in practice now and going forward, and should therefore be encouraged. For ADR to be effective, it should be kept voluntary.
Question 25:	We agree that the introduction of a pre-action protocol applicable to damages actions in CAT proceedings would be sensible.
Question 26:	It is our view, that the present CAT Rule 43 is inadequate to incentivise defendants to make formal settlement offers at an early stage in the litigation (or at all). If meaningful settlement offers are to be encouraged in the CAT, the CAT Rules should be amended to bring them into line with the protection afforded to formal settlement offers made under Part 36 of the CPR.
Question 28:	ICC UK does not agree that opt-out collective actions should be introduced in competition litigation in the CAT. Should an opt-out collective actions regime be introduced, however, that regime should enable defendants to settle the litigation as they would any other litigation.

Question 29:	We do not think that giving competition authorities a power to order a company found guilty of an infringement to implement a redress scheme, is the right approach. The competition regulators' *public* enforcement role is inconsistent with granting them the power to mandate redress to *private* individuals or companies. We would also question whether public resources and funding should be used to obtain redress for private individuals and companies. Further, from a practical or operational perspective we believe that competition regulators are not well-placed to require or certify redress schemes in any event.
Question 30:	As noted above, the public and private enforcement regimes should remain separate. The purpose of public enforcement should be to encourage compliance with the law (first and foremost), combined with an ability to punish and deter undertakings that do not comply. Redress is paid to *compensate* those that suffer loss as a result, not to punish. In any event, it is impractical to provide for fines to take account of redress.
Question 31:	As stated before, we believe that a clear distinction should be drawn between the objectives of private actions and public enforcement. Facilitating compensation for victims must be balanced carefully to ensure it does not undermine public enforcement, since promoting private actions could actually be detrimental by deterring leniency submissions. (Further detail on this in our responses to questions below).
Question 32:	We agree that potential leniency applicants may be deterred from applying for leniency if they believe that doing so is likely to increase their vulnerability to private actions. There is a clear impact also on potential Type B leniency applicants. Those who know they are already too late to get full immunity have much less to gain from cooperation and the gain is purely a reduced financial exposure to fines. In that situation, an increased exposure to civil claims may quite easily outweigh the gain from leniency. We strongly support proposals to protect leniency documents (and documents relating to the investigation of the potential violation, which lead up to the leniency application being made) from disclosure in private actions.
Question 33:	The current rules on joint and several liability undoubtedly do risk putting the leniency applicant at a disadvantage to other participants in the cartel in the context of private actions. Claimants may well be tempted to pursue leniency applicants for damages ahead of other participants in the cartel for various reasons laid out in detail on our response. A solution may be found in the Hungarian Model as explained in 5.21/ 5.22 in our response.
Question 34:	We do not consider that there are any other measures other than those discussed above which are necessary to protect the public enforcement regime.

International Small Business Alliance

INTERNATIONAL SMALL BUSINESS ALLIANCE

Promoting Best Business Practice

COMMENTS ON UK GOVERNMENT'S PROPOSALS ON PRIVATE ACTIONS IN COMPETITION LAW: A CONSULTATION ON OPTIONS FOR REFORM PUBLISHED IN APRIL 2012 BY THE DEPARTMENT FOR BUSINESS INNOVATION & SKILLS

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1. Introduction

International Small Business Alliance welcomes the opportunity to comment on the UK government's recent proposals aimed at developing a framework that will enable victims of cartels to obtain damages either by way of "follow on" or "stand alone" legal action.

We have already submitted Comments on the European Commission's White Paper on Damage Actions for breach of European Community Anti-Trust Rules to the Commission in July 2008 and for completeness, we include a copy as part of our present submission to BIS.

Our people have been at the coal face of international violations of competition law across several continents, including Australasia, Africa, North America and Europe for over three decades. For that reason, we intend to give some sector specific comment. The catalyst for our Alliance being formed was the anti-competitive behaviour of the Cement / Concrete / Quarry / Asphalt sector internationally. Several National Champions were born with what appears to have been a carte blanche from National Governments to eliminate smaller competitors and penalise final consumers alike, using the super normal profits obtained on home markets to fund massive global expansion to the extent that a handful of global giants now dominate the sector in most countries. Examples of such Major Integrated Companies are:

France: Lafarge
Germany: Heidelberg
Mexico: CEMEX
Switzerland: Holcim
Ireland: CRH Plc
Italy: Italcementi

In the UK, a once thriving industry where hundreds of efficient producers competed and innovation was considered the key to survival and growth, has been almost totally swallowed up by four global giants, CEMEX, Heidelberg, Lafarge and Anglo American / Tarmac. Market dominance and profit maximisation through a host of anti-competitive practices has become the norm, taking over from innovation, competition and consumer welfare.

These harmful structures and practices are of course not confined to the heavy building materials sector; rather they have become the norm across many sectors of modern day economies, e.g. London Interbank Offered Rate (Libor), chemicals, pharmaceuticals, ink, motor vehicle distribution, insurance, animal feed, fertiliser, lifts / escalators, steel, ports of entry, ferries, cargo transport, agricultural produce, technology and thread to name but a few.

If these harmful practices are not countered through effective enforcement of competition law both publicly and privately, the result for an economy is an artificially high cost base, an erosion of efficiency, less incentive for innovation and increased unemployment, all in turn leading to a rise in socio-economic problems.

2. Europe and the UK's track record in Competition Law Enforcement

There are in effect three strands to Competition Law Enforcement in Europe, the European Commission, National Competition Authorities and Private Enforcement.

a) The European Commission has a somewhat enviable track record in unearthing cartels, e.g. Car Glass, Lifts and Escalators, Hydrogen Peroxide, Intel, Paraffin Wax, Bitumen.

b) Member States have however a very poor track record with some notable exceptions, German cement cartel, French mobile phone fines, Polish cement cartel, UK's Air Cargo.

c) "***Private Enforcement has absolutely failed***". This quote is from Dr. John Fingleton's address to Ireland's Public Accounts Committee in 2004 and could well be applied throughout European Community Member States.

Taken in the round, Competition Law Enforcement in Europe has failed. We must ask ourselves why? Who makes the law? Who creates the enforcement framework? More important, who influences law makers? One only has to look at the powerful lobbies or industry associations that invest heavily in influencing policy and law makers e.g. EuPIA (European Printing Inks Association) and Cembureau (European Cement Makers) to gain an understanding of the sort of influence that can be brought to bear.

We are struck too by the enormity of the "defence bar" throughout Europe and by extension the enormity of its power to influence policy and law makers. This contrasts sharply with the fledging "plaintiff bar". It is widely accepted by the legal profession in Europe that private enforcement of competition law is next to impossible. There are countless obstacles that together make it impossible for cartel victims to succeed in obtaining damages.

- Time taken to bring an action through the Courts – unconscionable.
- Seemingly unlimited procedural hurdles available to defence lawyers.
- Effects of Corporate Abuse on Victims in more serious Chapter 1 and Chapter 2 / Article 101 and 102 offences.

- Lack of clarity e.g. passing on defence.
- Access to Evidence.
- Standing.
- Security for Costs.
- Prohibitively High Legal and Expert Witness Costs.
- Legal issues with regard to 3rd party funding e.g. Maintenance and Champerty.
- Availability of 3rd party funding.
- Business victims of cartels are usually unavoidable trading partners of one or more of the cartel members and as such are rightfully fearful of reprisal action should they initiate proceedings to recover overcharges.

The failure of Competition Law Enforcement throughout Europe might well be summed up by the comment of a key cement executive to one of our people in the aftermath of the German Federal Cartel Office's fine of €702m on the German Cement Cartel in 2003:- ***"we view these fines as mere parking tickets".*** In the event, this particular parking ticket was halved on appeal.

3. Aims and Aspirations of Competition Law Enforcement

The European Commission stated in its Green Paper that:- *"Competition Law Enforcement is a key element of the "Lisbon Strategy" which aims at making the economy of the European Union grow and create employment for Europe's citizens".*

The two key ingredients required to bring about Competition Law Compliance are Adequacy of Deterrence and Adequacy of Redress. It is clear that the European / UK framework for private competition law enforcement falls a long way short of achieving either of these aims. In particular, Member States have been incredibly passive in relation to Competition Law Enforcement.

The Commission's aspiration for redress is stated as follows:- *"that all victims of infringements of E.C. Competition Law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered".*

Against this background, we have studied the BIS Consultation on options for reform in private competition actions. Below, we make some comments that we hope will assist the Department in bringing about the radical and urgent reform of private enforcement that is required in the UK.

4. BIS Consultation Paper on Private Actions in Competition Law

In general, the consultation document is a most encouraging step forward and in our view provides a solid basis for the development of an effective private enforcement regime in the UK. The process has been open and transparent and a wide cross section of stakeholders has been consulted.

The existence of the Competition Appeals Tribunal [CAT] in the UK already sets the UK out as a leader in the field of Competition Law Enforcement. We agree that the CAT has unfilled potential and fully endorse expanding its remit in order to strengthen its position as a centre of competition expertise. The expanded role should allow the CAT to:-

- Hear standalone claims under Competition Law
- Grant injunctions
- We especially support the idea of introducing a fast track procedure for SME's in the CAT.
- Much has been written on the passing on defence. As with all areas that lend themselves to procedural deadlocks, it is important that new legislation eliminates procedural hurdles and provides a mechanism for swiftly dealing with anomalies that arise in the future.

5. Passing on Defence

For the purpose of calculating losses, there should be an assumption that the overcharge was not passed on or alternatively that victims are entitled to recover in full the overcharge notwithstanding that they have passed on all or part of the overcharge. However, defendants should have the right to challenge the assumption but the burden of proof should lie firmly with defendants. This will provide for clarity in the apportionment of damages between direct and indirect purchasers with costs of the determination being rightly borne by the cartelist.

6. Rebuttable Presumption of Loss in Cartel Cases

This is an innovative and vital proposal that recognizes the difficulties facing victims of cartels in assessing / calculating damages. However, we believe this proposal requires much

consideration and fine tuning in order to ensure a proper balance for both plaintiff and defendant. ISBA has collectively a good deal of experience in quantifying damages. Victims do not have in their possession or power of procurement the necessary information to assist in the calculation of losses. By way of example, in the Framus Ltd & othrs V CRH Plc & othrs (Republic of Ireland) case, no documentation whatsoever was obtained that could assist in the calculation of damages after almost five years of Court hearings including a lengthy High Court and Supreme Court hearing.

Our experience would strongly support the view that a rebuttable presumption of 20% would in reality be a cap, as victims simply do not have the resources to quantify an additional 5, 10, or15%. The O'Connor and Lande report has found that cartels in Europe overcharge between 28 and 54% so why make it easy for cartelists by effectively capping their exposure at 20%. For example, a rebuttable assumption of 30-35% would provide a much needed and very effective deterrent to cartelists. Cartelists do not like opening their books to accountants, lawyers and victims alike.

The Government should note that there are some industries where the overcharge can be significantly more than the top end of O'Connor and Lande's estimate of 54%. Take for instance the cement, concrete and aggregates sector which is dominated in the UK by four global giants that are vertically integrated. It is believed that overcharges in the UK market for cement could run to 100% or even more in some cases. By controlling downstream markets e.g. concrete and upstream markets e.g. aggregates, cement companies can virtually charge what they like for cement where there is effectively no competition in the market. This situation is exacerbated by the extremely high barriers to entry and the lack of product differentiation.

Depending on the level of independent competition in a given downstream concrete market, cement producers can pursue a policy of predation or margin squeeze subsidised by super normal cement profits. If competition has been effectively eliminated in a given downstream market the vertically integrated producers are free to pass on high cement prices to their own downstream concrete producers who in turn pass on the overcharges to indirect purchasers.

Whilst we understand that the rebuttable presumption of loss is primarily directed at Chapter 1 infringements, we believe that some form of framework for losses should be devised for Chapter 2 (Abuse of Dominance) infringements. In many cases, damage arises to direct victims under both Chapter 1 and 2 and hitherto no account has been taken of the existence of duel or secondary damages. This is perhaps best explained by the European Commission's decision: - Cases IV/33.126 and 33.322 – Cement, November 30th 1994. The Commission found that 42 Associations and Undertakings had participated in a price fixing and market sharing pan-

European cement cartel and imposed fines accordingly. However amongst the dissuasive measures found to have been implemented against victims were:-

- Penalising of costumers using imported cement – i.e. predatory pricing or margin squeeze downstream.
- Influencing banks not to support competitors or to withdraw funding facilities.

These secondary actions facilitated by vertical integration give rise to secondary or dual damages. We raise this issue because it is important that firms breaching Competition Law do not profit from such behaviour. Where secondary damages arise, we propose that punitive measures be introduced for the benefit of victims and as an added deterrent.

To summarise, the proposed rebuttable presumption of 20% appears grossly underestimated in relation to vertically integrated industries where the product is homogeneous and there are significant barriers to entry. Moreover, given the fact that it is the cartelists who have broken the Law, on the balance of fairness, should it not fall to them to prove the overcharge is less than the rebuttable presumption, rather than the victim having to prove it is greater. Given the varying nature of industries across the UK, a number of distinct rebuttable presumptions could be introduced into legislation e.g. 20%, 25%, 30%, 35%, 40%, 50%, etc up to 100%. It would therefore be at the discretion of the Competition Commission when delivering a finding as to which one was used for victims' future damage claims, depending on the nature and characteristics of the industry in question.

7. Opt Out Collective Action Regime

We welcome the proposal to introduce an "opt out" regime to facilitate collective redress for consumers and business alike. Private enforcement needs a massive shot in the arm and the U.K.'s experience with "opt in" procedures has been disastrous. We have already discussed the myriad of impediments to both small business and final consumers taking action for redress. However, the failure of the "opt in" regime which was introduced to alleviate difficulties with private enforcement merits serious consideration. We believe that many of the characteristics attributable to "opt in" also apply to "opt out" schemes.

People in general are very reluctant to become involved in legal proceedings as there is an underlying fear that they could be ruined if the case fails and there is a stigma attached to legal proceedings that most wish to avoid. In very many cartel cases, particularly with SME's, there are close personal relationships involved between the buyer and seller which the buyer (victim) is reluctant to damage. Often, victims are captive customers of cartels and fear retaliatory

action from the cartel if they attempt to institute proceedings to recover damages. Also, most people are happy to go about their business and do not want the distraction of being involved in litigation even "opt out" litigation.

8. Mechanism for SME's (and final consumers) to Assign Damage Claims

We therefore believe that in certain circumstances the most appropriate option for achieving redress is through claims assignment. From our interaction with SME's, a claims assignment model would be the most favoured. A claims assignment model will counteract all of the above perceived difficulties. SME's everywhere seem very at home with the idea of assigning their claims to a third party that is prepared to carry the risks and substantial costs involved in complex competition litigation. A competent third party will have the necessary financial, legal and economic resources at its disposal to allow it purchase claims from a large number of cartel victims and to parcel these claims into a single package. The assignment model brings with it excellent economies of scale and also facilitates better preparation and gathering of relevant data.

We have spoken with very many SME's in the UK (and other jurisdictions) in relation to potential damage claims and the available options. In virtually all cases the assignment model is the one that triggers the interest of SME owners. For these reasons, we recommend that an assignment of claims model should be incorporated into any new private redress framework.

9. Summary

We welcome the present proposals and believe that with some additions and fine tuning the UK is on the way to having the most effective private enforcement regime in Europe. In finalising the new framework, the Government should take cognisance of the present dire state of private enforcement in the UK. Where options are being weighed up such as the rebuttable assumption, the balance of fairness, justice and convenience should always be with cartel victims and the burden of proof with the cartelists. This coupled with providing victims with as many options for obtaining redress as possible will achieve the two central aims of competition law enforcement, redress for victims and meaningful deterrence.

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Seamus F. Maye

For and On Behalf of I.S.B.A.

Enclosure:

Islington Law Centre

Islington Law Centre
free access to specialist legal help for our community

Response to BIS consultation - Private actions in competition law

Introduction

Islington Law Centre is a charity providing free legal advice, casework and representation in social welfare law to those on a low income.

We currently take on approximately 1,500 substantive cases in a year, and assist with an average 1,100 enquiries each week.

We work closely with a number of City law firms, who provide pro bono assistance to our clients via the "LawWorks" programme.

We have restricted our responses to the section of the consultation paper relating to the potential distribution of unclaimed sums.

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

We consider that there are significant merits in paying unclaimed sums to a single specified body.

A single destination that is set out in statute would be beneficial for the following reasons:

- The difficulty 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 consider that there are a number of disadvantages in relation to the other possible options set out in the consultation paper, namely:

Cy-près

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

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

- The second major option to pay the residue funds to an organisation, usually a charity, considered the next best beneficiary to the harmed individuals involves the need to decide who the most appropriate recipient is. This may again place undue demands on the time and funding available.

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

Escheat to the Treasury

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

Reversion to the defendant

- The guilty party benefits from an unjust windfall.

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

- This would not be likely to be viewed by the public as a fair or just approach.

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

We consider that the the Access to Justice Foundation would be 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 one of our funders, 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.

Joint Working Party

Department for Business Innovation & Skills

Private Actions in Competition Law
A Consultation on Options for Reform

Comments of

The Joint Working Party
of the Bars and Law Societies
of the United Kingdom
on Competition Law

24 July 2012

Private Actions in Competition Law
A Consultation on Options for Reform

Comments of the
Joint Working Party

1. INTRODUCTION

1. The JWP[1] 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"* ('Consultation Paper').

2. The JWP focuses its response on the specific questions raised by the Consultation Paper but has two preliminary comments.

3. First, as indicated in response to question 10, the JWP takes the view that the primary objective of any amendment of the regime for private actions in competition law cases should be directed to improving "restorative justice" for individuals and undertakings suffering loss, rather than issues of deterrence or unjust enrichment. If that is accepted by BIS then it has significant implications for the general approach to be adopted and also in respect of specific issues, for example the design issues addressed in Annex A, presumptions as to liability and quantum, and the correct approach to exemplary or punitive damages.

4. Secondly, the question of how best to extend the regime for private actions is a complex one because of its possible impact on incentives for all parties. For example, a regime that facilitates private actions should have a deterrent effect on anticompetitive behaviour but could also undermine enforcement activity if it has a dampening effect on applications for leniency by increasing the exposure of leniency applicants to civil claims. Likewise, a scheme design for collective actions that is intended to ensure that defendants to civil actions disgorge the full amount of their profits from anticompetitive conduct, even where claimants are not able to prove an

[1] The Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law. Members of the JWP comprise barristers, advocates and solicitors from all three UK jurisdictions with particular experience and expertise in competition law; it includes those in private practice and in-house. There is extensive collective experience within the JWP of all aspects of UK competition law. The JWP has not sought to include comment in this paper on issues that may be particular to Scotland or Northern Ireland.

equivalent loss to them individually or collectively, may again increase deterrence to engage in anti-competitive action but may also deter reasonable offers of settlement of such claims.

5. The following specific responses reflect our views as to the best way to achieve the objective of improved "restorative justice" without undermining the existing enforcement regime or creating perverse incentives for litigation. These are difficult issues where we consider that it is inevitable that a significant discretion will need to be left to the judicial authorities responsible for administering the system, whether the High Court (or Court of Session) or the Competition Appeal Tribunal.

2. RESPONSE TO CONSULTATION QUESTIONS

6. In this part of the Response, the JWP follows the structure of the Consultation Paper and provides answers to the specific questions raised.

4. THE ROLE OF THE COMPETITION APPEAL TRIBUNAL (CAT)

7. The JWP agrees with BIS that the CAT is a key strength of the UK regime but that it has unfulfilled potential, due to shortcomings in the current regime. The JWP also agrees with the thrust of the changes proposed in the Consultation Paper, subject to the reservations raised below.

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

8. The JWP strongly agrees with this proposal, as a means of introducing greater procedural flexibility. The JWP notes, 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 might 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.

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

9. 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, the JWP considers that such a change is desirable. For the reasons cited above, claimants should remain free to determine themselves whether to bring proceedings in the CAT or the High Court. The JWP 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 the JWP is surprised that it is not addressed in the Consultation Document.

10. As it stands, this requirement means that, in practice, a claim can be brought in the High 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 the JWP acknowledges 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.[2]

[2] See, e.g., *National Grid v. ABB and others*] [2009] EWHC 1326 (Ch)

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

11. Allowing the CAT to grant injunctions would be desirable, as it would provide consistency with the general courts' powers to grant injunctions in competition cases. To maintain this consistency, the CAT's powers to grant injunctions should be framed on the same basis as the general courts' powers. The JWP would suggest that the CAT should also have the power to award damages in lieu of a prohibitory injunction in the same circumstances as a general court.

12. As a general observation on interim injunctions, while the JWP sees their potential benefits in preventing harmful behaviour quickly, we would caution against an over-reliance on injunctive relief, due to its potentially harmful consequences for defendants who 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. At a minimum, except in the most urgent cases, interim injunctions should be granted only after defendant companies have had a proper opportunity to present arguments as to why there is no basis for the relief sought by the claimant. It should therefore be made clear that the CAT will need to 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)).

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

13. The JWP has significant reservations about this proposal, which raises many questions. The main reason that standalone competition actions are slow and expensive is that it is often 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 BIS appears to be most concerned about, as far as 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 in which it engaged 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. BIS's proposals will not change the substantive test for anticompetitive conduct (which the JWP considers is rightly set at a relatively high level) and hence not alter this basic reality.

14. By attempting to use procedural (rather than substantive) rules to tilt the playing field decisively in favour of SME 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.

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

15. We do not consider that these elements are appropriate for competition cases, which inevitably require consideration of difficult and complex questions of fact and law.

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

16. To the extent that SMEs face difficulties in bringing cases to court, the JWP considers that these should ideally be dealt with in general terms, since access to justice is not desirable in the competition law field alone. To the extent that competition specific measures are wanted, the JWP would suggest enhancing, promoting and formalising the Competition Pro-Bono Service. More generally, the JWP considers that the CAT has sufficient flexibility in its procedures to enable it to balance the interests of SMEs in a relatively quick and cheap form of redress with the rights of defendants to be heard before their commercial interests are adversely affected.

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?

17. 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. The JWP does not consider that the case for such a departure has been made out, either in principle or at any specific level.

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?

18. The JWP favours the existing position, namely that it is for the claimant to prove its loss and that it should be compensated for this loss and no more. While a court or tribunal may have to take a broad approach to issues of quantum in this as in other areas of law, the JWP does not consider that the case has been made out for a wholesale departure from these basic principles.

5. COLLECTIVE ACTIONS

19. The measures introduced by the Enterprise Act 2002 now appear, with the benefit of hindsight, to have been unduly cautious. If the Government remains committed to facilitating a greater number of such actions as part of the overall commitment to a vigorous competition law regime in the United Kingdom, then the JWP considers that a bolder approach will be needed, although there are a number of difficult judgments to be made as to the correct balance to be struck and the likely impact on incentives of the various parties affected by such changes.

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.

20. The JWP agrees with DBIS's conclusion at ¶5.6 that the current collective action regime is inadequate. As indicated in this part of the Consultation Paper, the incentives for claimants and their representatives to bring claims are in many cases

too weak, even where a major case can be said in principle to have caused substantial harm to customers and/or end users.

21. As the policy behind the introduction of the current collective action regime under the Enterprise Act 2002 has not been achieved, it follows that the regime should be strengthened so that adequate redress can be made available.

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.

22. The policy aim set out by DBIS at ¶5.6 is to deliver "restorative justice for consumers and small businesses". Thus the stated objective is "to strengthen the regime by both extending the types of cases that can be brought and making it easier to bring such cases, while striking the right balance between the need for an effective system for collective action claims and protecting of defendants from having to settle unmeritorious claims."

23. This aim and objective appears correct. Although it appears to the JWP that there are elements of deterrence and also of the prevention of unjust enrichment underlying some of the proposals in the Consultation Paper, the JWP is of the view that the better achievement of "restorative justice" should be the central objective in amending the current regime.

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

24. As the policy aim referred to by DBIS at ¶5.6 is to deliver "restorative justice for consumers and small businesses", it follows that the right to bring collective actions should be granted equally to consumers and to small businesses.

25. The Consultation Paper does not propose any limitation to exclude large businesses from bringing collective actions – the JWP agrees with this approach: although some large companies will clearly wish to pursue their own litigation strategy, it would introduce unnecessary complexity to try to set a threshold above which the collective mechanism would not be available

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

26. No case is made out in the consultation document for additional restrictions.

27. The JWP does not believe this to be a concern requiring further regulation in addition to that provided by the Ch I prohibition under the Competition Act 1998. In any event, the collective mechanism will be subject to judicial control at all stages – the CAT and any court likely to be involved in the administration of such cases are already familiar with the management of confidentiality arrangements in a multi-party setting and any concerns that may arise in individual cases can be addressed by the CAT or court as required.

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

28. The JWP believes that collective actions should be allowed in stand-alone as well as follow-on cases.

29. It should be noted that 'follow-on' is not a term of art, a point made in argument by Sales J during the hearing leading to the judgment in *Nokia v AU Optronics* [2012] EWHC 731 (Ch). Sometimes the defendants are members of the same undertaking as an addressee of an infringement decision. In the wider sense, that is a follow-on claim, but because the defendants are not the specific addressees of the decision, in the narrower sense those are stand-alone claims. Therefore, if the narrow sense is used, a claim can be follow-on in so far as the defendants are addressees, but stand-alone for other members of the same undertakings which are not addressees of the relevant decision.

30. Therefore, there is good reason not to draw a distinction between follow-on and stand-alone claims. If such a distinction were made, there would be considerable scope for preliminary procedural skirmishing, which would diminish the effectiveness of collective actions.

31. More generally, although some and possibly the majority of collective actions are likely to follow on from civil enforcement action by the UK or EU competition authorities, the JWP does not consider that this should be a necessary precondition.

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.

32. In the JWP's view, opt-out collective actions are the only realistic option, if collective redress is to be made to work in practice.

33. The current options for opt-in collective actions under section 47B of the 1998 Act and representative actions under CPR r 19.6 have clearly proved ineffective in practice to achieve the policy of promoting collective action which underlay the relevant provisions of the Enterprise Act 2002.

ANNEX A: DESIGN DETAILS OF AN OPT-OUT COLLECTIVE ACTION REGIME

34. As indicated in response to question 10, the JWP considers that the focus of the amended regime should be to improve "restorative justice" for consumers and small businesses, which necessarily means the creation of better incentives for such claimants to pursue meritorious claims without generating a "litigation culture" forcing defendants to meet and settle unmeritorious claims.

35. The design details of an opt-out collective action regime are critical in achieving the correct balance of these objectives. In respect of ¶A.2, the JWP notes that this assumes that the CAT will have exclusive jurisdiction over collective actions – the remainder of the comments on individual questions raised by Annex A make the same assumption.

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

36. In general, the JWP considers that the CAT should be given a wide discretion to give directions for the future management of a collective action in accordance with its usual practice of holding a preliminary case management conference shortly after the commencement of proceedings. At that stage, it will wish to form a preliminary view that the case is suitable for a collective action but the JWP does not think it is necessary for detailed criteria to be laid down.

37. In particular, the JWP does not consider that there is any need for special costs rules, as it is open to the defendant to seek appropriate security under the existing rules. Likewise, as indicated in response to question 12, the JWP does not consider that there is a need for special provisions to deal with the possibility that the action could be used as a mechanism to facilitate anti-competitive information sharing.

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

38. The JWP does not consider that punitive damages should be available in collective actions. That would conflict with the overriding objective of these proposals and would threaten to distort incentives. The civil enforcement regime has the primary function of punishing and deterring anti-competitive action.

39. The JWP is aware that there are cases pending before the CAT involving claims for "exemplary damages" for breaches of competition law[3] – the JWP does not consider that any specific provision needs to be made in this respect for collective actions.

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

The CAT already has a broad discretion in respect of costs. Although "loser pays" is the normal starting point for such an assessment, it is not a rigid rule and the JWP again does not consider that there is a need for a special costs rule 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?

40. The JWP does not consider that there is any need for a special costs rule for collective actions. Both the civil courts generally and the CAT in particular have developed detailed principles to address these issues and the JWP considers that those principles are sufficiently flexible to accommodate the specific characteristics of collective actions. The CAT will no doubt develop suitable principles as its jurisdiction develops. The JWP would not however be opposed to it being made clear that the CAT could, on appropriate facts, order that the costs of a claim were to

[3] See the recent judgment in *Travel Group plc v. Cardiff City Transport Services Ltd* [2012] CAT 19.

be borne out of the damages fund in broad analogy to a "*Beddoe*" application in the trust context.[4]

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

41. The JWP does not consider that the case has been made out for a different approach to be taken to this issue in respect of collective actions for competition law as against other forms of collective litigation. However, the JWP does recognise a risk that the introduction of contingency fees for collective actions would threaten to distort the incentives of parties and their legal advisors whereas a significant uplift conditional on success provides a financial incentive to reflect the fact that collective actions frequently involve a substantial amount of up-front work at a stage where the merits and scale of any claim may be uncertain.

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.

42. The JWP considers this to be the most difficult issue raised in this part of the Consultation Paper. In general, the JWP considers that the allocation of damages in a collective action would necessarily involve a significant element of discretion for the CAT and that the distribution of any unclaimed sums would also need to be subject to judicial control.

43. In principle, as the Consultation Paper recognises, some form of Cy-Pres distribution avoids either the retention of the proceeds of unlawful conduct for the defendant or a windfall benefit to claimants, if they receive an additional payment beyond that which the CAT has awarded in damages. Likewise, there seems no good reason why the Treasury should obtain a windfall benefit in addition to receipt of fines imposed by the competition regulators.

44. However, the JWP also recognises that these "equitable" considerations are more directed against the unjust enrichment of the defendant than the proper compensation of claimants, and also sees the force in the policy considerations set

[4] See *RE Beddoe; Downes and Cottam* [1893] 1 Ch 547.

out at ¶¶A.20-A.24 both in relation to "price roll backs" and payment to a "next best" recipient. There also appears something arbitrary in making payments to the Access to Justice Foundation out of undistributed damages awarded for infringements of competition law.

45. One other possibility would be to have a two stage system whereby a "next best" distribution could be ordered by the CAT by consent if the parties could agree on the identity of such a person but a fallback recipient to be identified if no such agreement proved possible. Overall, the JWP considers this is an area where a significant discretion should be vested in the CAT (or court) to fashion a just solution reflecting all the circumstances of the case.

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?

46. The JWP does not have any views on this subject beyond those expressed in response to Q.20. In general, it appears preferable for the CAT to retain control not only over the award of any damages but also the distribution of any unallocated surplus.

5. COLLECTIVE ACTIONS (continued)

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?

47. The JWP agrees with this proposal. Any competition authority will inevitably be constrained by its resources. It is difficult to see why opt-out collective actions should be rationed in this way, if there are appropriate representative bodies or other third parties (see Q23) able to bring such claims.

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?

48. The aim of DBIS as set out at ¶5.6 is to deliver "restorative justice for consumers and small businesses". Opt-out collective actions brought on behalf of consumers and small businesses funded by law firms and/or by third party funders would be a means to this end.

49. Litigation in England and Wales may already be funded in whole or in part by law firms through a variety of conditional fee mechanisms. Third party funders have an increasingly large role to play in enabling claims to be brought. It is difficult to see why opt-out collective actions should be excluded from such funding, although the JWP does not consider that it would be desirable for law firms or funders to be the representative claimant in such cases.

6. ENCOURAGING ALTERNATIVE DISPUTE RESOLUTION

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

50. We agree with this approach. As noted in the Consultation (paragraph 6.9) the CAT already has a power (in r.44(3) of its Rules) to encourage and facilitate the use of ADR: we would add that the Commercial Court – where competition law claims in England and Wales may be heard – requires parties to inform the court about steps taken to resolve a dispute by ADR or why ADR was not thought appropriate: the Commercial Court can also order parties to use ADR and order a stay of proceedings for that to be done.

51. It is worth noting that in our experience a large number of competition claims are resolved by ADR, often before but also after the start of legal proceedings. Particularly where parties have had, and wish to maintain, a commercial relationship, ADR offers an attractive way of resolving disputes, because of the flexibility of remedies that can be achieved and the absence of publicity.

52. We do not believe that resort to ADR should be mandatory in competition case. There is no field of commercial litigation in which parties are required to pursue ADR and we do not see why competition law should be an exception. If a party is determined not to use ADR, and has no obligation to do so (for example a

contractual obligation) it is a waste of time to force parties to explore that option. In principle, parties have a right to access the courts and to insist that the courts resolve their legal disputes.

53. There is also a further difficulty with any attempt to force parties to use ADR before starting legal proceedings, in that where there are a number of possible jurisdictions where a claim could be brought, a defendant could take advantage of the gap between being told about the proceedings for the purposes of ADR and actual issue to avoid facing an action in a UK jurisdiction by starting an action in a jurisdiction which it believed would be more favourable (because of more defendant-friendly quantification or procedural rules, or because of likely delays) – this is the so-called "Italian torpedo", which works because it is the court first seized of an action that, under the Brussels Regulation, takes priority where the action could have properly been brought in a number of different jurisdictions.

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?

54. For the reasons we have just given, we see difficulty with a rule requiring a claimant to pursue ADR before starting legal proceedings. However, there may be scope for requiring parties to explore the possibility of ADR, after the start of proceedings but before substantial costs have been incurred (for example in giving disclosure).

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

55. There are a number of difficulties with r.43 of the CAT Rules. It makes no provision for offers by the claimant. It requires a cash payment into court (without making any provision for the mechanics of that). It is not clear on what basis the CAT should grant or refuse permission to the defendant to withdraw a payment into court. Because a claimant may accept a payment at any time up to 14 days before trial, and have his costs paid to that date, there is no incentive for a claimant to accept an offer earlier rather than later. There is no requirement on the CAT to take into account any offer not made under r.43, though it may do so (r.43(10)).

56. We would therefore support bringing r.43 into line with CPR Part 36.

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.

57. We do not see that as an appropriate activity for the JWP.

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?

58. We agree with the analysis in the Consultation Paper on this point.

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?

59. As a preliminary point, we do not consider that (once a power is granted to competition authorities to implement or approve redress schemes) it would be possible to insulate a refusal to use that power from the possibility of legal challenge. It is of course possible to provide that decisions by the CMA on this issue are not appealable to the CAT: but any decision not to use a power granted by statute will be subject to challenge by way of judicial review on grounds of unreasonableness. We also note that if exercise of the power gives rise to a penalty reduction, then a failure to use the power could be raised in the course of an appeal against penalty.

60. In general, we do not think that the resources of the CMA are best used in determining the amount of compensatory payments. Even determining how payments should be calculated (as the Consultation Paper suggests) is an exercise that inevitably involves reaching views on quantification of loss issues not normally relevant to the question of liability.

61. We also note that in cases such as milk and football shirts (the examples mentioned) the problems that make those cases difficult to litigate would also apply to an FSA-type compensation scheme: the consumer is likely to have difficulty proving

purchase (many such purchases being made for cash or as part of a larger shop), the supplier will have no record of who the final purchasers are, and the amount at stake is unlikely to be seen by consumers as worth even a minimal effort to claim. FSA compensation schemes do not, typically, suffer from those problems.

62. The JWP considers that a power to order implementation of a redress scheme would be likely to run into problems under Article 6 of the ECHR unless there is either a full right of appeal (with consequent resource implications for the CMA) or the extent of compensation is determined under the scheme in a manner that is itself Article 6 compliant (in which case it may offer few advantages over ordinary litigation, particularly if the other reforms contemplated in the consultation paper are implemented).

63. However, we have no objection in principle to a power to accept binding voluntary undertakings as to a compensation scheme: such a power may prove useful in some cases where litigation is unlikely ever to be feasible, and may allow the use of creative solutions to the problem of finding a means of compensating victims, such as that devised in the *Independent Schools* case.

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?

64. We share the Government's caution on this point. One key difficulty is timing: the penalty can take account, only, of settlements (or binding commitments to settle) entered into at the time penalty is imposed. But that creates an unfairness as between businesses that organise a scheme early and those that do not (perhaps because they have an entirely reasonable defence on liability). It will also be difficult for the CMA – without undue use of resources – to be sure that the settlement offer made is reasonable in the circumstances.

65. However, if it is proposed to give the CMA a power to approve a voluntary settlement scheme in at least some cases, it would in our view be appropriate to incentivise entering into that scheme with a modest reduction in penalty. The JWP would not be opposed for the CMA to indicate that participation in such a scheme

could was a factor that could be taken into account as a mitigating factor in the setting of a penalty.

7 COMPLEMENTING THE PUBLIC ENFORCEMENT REGIME

66. As indicated in the preliminary remarks in this response, there is an important balance to be struck between the policy objective of reinforcing or complementing the public enforcement regime by facilitating private actions and the risk that the public regime could be undermined by changes that altered the incentives of undertakings to support the public regime, particularly in the context of leniency applications. This part of the response sets out the JWP's views on this issue.

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

67. The public and private enforcement of competition law are clearly complementary. In general terms, public enforcement is aimed at identifying, punishing and deterring anti-competitive conduct. By contrast, private enforcement is aimed at remedying the damage caused by anti-competitive conduct.

68. However, there is a clear connection between public and private enforcement. That is particularly the case in relation to "follow-on" claims, where private enforcement depends on successful public enforcement. As a result, without a well-functioning public enforcement regime (including a successful leniency programme) there would be fewer infringement decisions, and therefore fewer "follow-on" damages claims. It is therefore important that an extended role for private actions does not undermine the effectiveness of the public enforcement regime.

69. It is also the case that an extended role for private actions could positively assist in achieving the principal aims of public enforcement. For example:

    a. **Deterrence**. The risk of damages claims acts as an additional deterrent to anticompetitive conduct. Private enforcement therefore positively complements public enforcement in this regard.

b. **Identifying anti-competitive conduct**. The possibility of bringing damages claims provides an incentive on potential claimants to look for the signs of potential anticompetitive activity, and to take a more active role in bringing complaints to the attention of the OFT or the European Commission.

70. Despite this, there is a risk that an extended role for private actions could impair effective public enforcement. In particular, an extended role for private actions could have a negative impact on the incentives for parties to apply for leniency, thereby reducing the number and quality of leniency applications. In order to guard against this, steps need to be taken to protect the integrity of the leniency regime.

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?

71. This is a complex issue, and clarity would be welcomed. In particular, following the ECJ's judgment in *Pfleiderer*[5] and the High Court's judgment in *National Grid*,[6] leniency applicants are faced with considerable uncertainty as to whether or not leniency documents will be disclosed in future proceedings.

72. Part of the current complexity and uncertainty appears to be the result of the tension between the need for full disclosure in civil litigation and the potential impact of full disclosure on the number and quality of leniency applications. On the one hand, it could be argued that claimants harmed by a breach of competition law should have access to all documents containing pertinent information within the control of the defendant, irrespective of when, why or for whom a document was created. Anything less than full disclosure could arguably undermine the overriding objective that cases should be dealt with justly (CPR 1.1.1). On the other hand, there is a real risk that the routine disclosure of all leniency documents could act as a disincentive to leniency applications, thereby undermining leniency programmes and the public enforcement regime more generally.

73. On balance, we agree that some (but not all) leniency documents should be protected from disclosure, so as not to discourage potential leniency applicants.

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5 Case C-360/09 *Pfleiderer AG v Bundeskartellamt.*

6 *National Grid Transmission PLC v ABB Limited and others* [2012] EWHC 869 (Ch).

74. Protecting leniency documents will not put claimants at an unfair disadvantage, or unduly inhibit their ability to bring claims, especially in relation to "follow-on" claims. In particular, such protection will not cause any undue prejudice to claimants' interests, nor will it jeopardise the ability of courts to deal with cases effectively. We suggest the following principles:

    a. Pre-existing documents that form the basis of leniency documents, and/or are submitted alongside leniency documents, will be disclosable in any event. This includes all contemporaneous documents. Such documents are likely to be of greater probative value in relation to issues of causation and loss, and therefore of more use to claimants, than leniency submissions.

    b. By contrast, we consider that documents created for the purposes of applying for leniency should be protected from disclosure. Although such documents are likely to be relevant in proving an infringement of competition law, in most cases such documents are unlikely to be of direct relevance to issues of causation and loss.

75. In striking the balance in this way, we note that claimants in "follow-on" cases are already at an advantage in comparison to claimants in other types of case where a claimant would have to prove liability. In "follow-on" cases, liability will have been admitted or established, and the claimant will have the benefit of a detailed decision setting out findings on liability and (in most cases) pertinent facts. As a result, we do not think that protecting leniency documents from disclosure would unduly restrict the ability of claimants to bring claims.

76. In addition, we do not think that the protection against disclosure should extend to all documents submitted as part of a leniency application. The proposed limitations as to the scope of the protection as suggested in the Consultation Document – i.e. that protection should be limited those documents that would not have been created if a company had not sought leniency – appear reasonable. Protection should not be afforded to pre-existing documents submitted by leniency applicants that would, in the absence of a leniency application, become fully disclosable pursuant to Part 31 CPR. We note that a similar limitation was suggested by Advocate General Mazak in his opinion to the ECJ in the *Pfleiderer* case.

77. The position is less clear where *evidence* is created and submitted as part of a leniency application, or in compliance with a leniency agreement. This could, for example, include witness evidence explaining the context or true meaning of documents, or expert evidence detailing the impact of a cartel on customers. It could be argued that such documents should not be protected, as they are more likely to be relevant to issues of causation and loss, and therefore more directly relevant to a "follow-on" claim. However, in our view the scope of the protection should extend to all documents that would not have been created had the company not sought leniency, including witness and expert evidence. The disclosure of such documents would dis-incentivise parties from making leniency applications, or would inhibit the provision of non-contemporaneous supporting evidence to support leniency applications, thereby undermining the quality of leniency applications (and ultimately the effectiveness of leniency programmes). In any event, in practice the pertinent contents of such documents are likely to have been referred to in the relevant infringement decision, and therefore be available to claimants.

78. One further point is that not all leniency applications are successful. It should therefore be made clear that the protection extends to all leniency applications, not just successful leniency applications, and not just in those cases where the leniency application had resulted in an infringement decision.

Q. 33 – Do you agree that whistle-blowers 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?

79. We agree that whistle-blowers should be protected from joint and several liability. As the Consultation Document recognises, "*joint and several liability as it stands threatens incentives for leniency applicants*" on the basis that:

    a. The principle of joint and several liability means that any one party can be found liable for the entire loss suffered by a claimant, and whistle-blowers are at an increased risk of being the party targeted by claimants as the party to bring a claim against.

b. The whistle-blower is thereby exposed to the additional costs of pursuing other parties for recovery.

80. This is not a theoretical possibility. In a number of recent cases, claimants have brought actions against a single defendant, and have left it to that defendant to bring contribution claims against other parties. This may be for a number of reasons, including the fact that, if a whistle-blower has not appealed against an infringement decision but the other parties have, an earlier claim can be brought against the whistle-blower. It is also more attractive to claimants to sue only one party, rather than a series of parties, as they can thereby leave the costs of pursuing other potential defendants to the original defendant.

81. We note that the proposal to protect whistle-blowers from joint and several liability has parallels with the US Antitrust and Criminal Enforcement and Reform Act 2004, under which leniency applicants may be found liable to pay only single (as opposed to treble) damages. The introduction of this Act has been successful in increasing the incentives for parties to make leniency applications.[7]

82. As to whether this protection should extend to other leniency recipients, ie, parties other than the whistle-blower, our view is that it should not. A decision to make the OFT or European Commission aware of anti-competitive agreement that they are not already aware of is a big step, and requires a complex assessment on the part of the potential applicant. In addition, from a public policy perspective, the most important element in any leniency programme is the incentive offered to a participant in anti-competitive arrangement to be the first to inform the authorities of that arrangement. The incentive to blow the whistle provided by a protection from joint and several liability would be diminished if recipients of Type B or Type C leniency also received that protection.

[7] See Hammond *Recent developments, trends and milestones in the Antitrust Division's criminal cartel enforcement program*, 56th ABA Antirust Section 2008.

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?

Immunity from exemplary damages

83. In principle, a claimant can be awarded exemplary damages in the context of a "follow-on" claim. although in *Devenish v. Sanofi-Aventis*[8] it was stated that "*the fact that a defendant has been fined for his conduct is a powerful factor against the award of exemplary damages*" it was stated that this "*may not be conclusive in itself*".

84. In our view, the public enforcement regime would be further protected if it were made clear that, in the context of a follow-on claim, exemplary damages cannot be awarded:

    a. where a defendant has been fined; or

    b. where a defendant has not been fined, or a fine imposed has been substantially reduced, as a result of a successful leniency application or early settlement with the European Commission or the OFT.

85. The former would make it clear that the primary deterrent/punitive role under UK (and EU) competition law is for the competent regulatory body, at least in cases where it exercises its statutory power to impose a fine, while the latter would be a further incentive for parties to apply for immunity or leniency, or otherwise to admit liability at an earlier stage.

Proposed changes to the OFT's penalties guidance

86. Both the public and private enforcement regimes would be assisted by encouraging parties to pay compensation to those suffering damage as a result of breaches of competition law *before* an infringement finding is made.

87. In the OFT's Consultation Papers "*OFT's guidance as to the appropriate amount of penalty*", the OFT raises the question of whether it should include in the illustrative

[8] [2007] EWHC 2394 (Ch), paragraph 64. Although this judgment was appealed ([2008] EWCA Civ 1086), the Court of Appeal did not address this issue.

list of mitigating factors taken into account when calculating penalties the fact that compensation has been offered or paid to those who have suffered loss as a result of an infringement.

88. As indicated in response to Q30, the JWP sees various practical difficulties in this area but is not opposed in principle for the payment of compensation to those adversely affected by anti-competitive conduct to be taken into account by the CMA as a mitigating factor. This could in some cases provide a useful encouragement of private settlements, reinforcing the public regime and avoiding the need for follow on litigation.

Judges of the Chancery Division of the High Court of England and Wales

THE CHANCELLOR
OF THE HIGH COURT

THE RT. HON. SIR ANDREW MORRITT
THE CHANCELLOR OF THE HIGH COURT

Tony Monblat
Consumer and Competition Policy
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23rd July 2012

Dear Mr Monblat

Private Actions in Competition Law: A consultation on options for reform

I enclose a copy of the response of the High Court judges of the Chancery Division to the consultation paper issued under the above title. I am copying this response to the Master of the Rolls so that in his capacity as Head of Civil Justice he may be aware of the possible consequences of the Government's proposals and to the President of the Competition Appeal Tribunal (CAT), Barling J.

I am aware that Barling J wrote to the Director General of BIS, Bernadette Kelly, in May regarding the current restriction on Chairmen of the CAT serving longer than eight year terns, and the impact that this was having on access of the CAT to judges of the Chancery Division. Please be aware that the Lord Chief Justice of England and Wales and I are strongly in support of the removal of that restriction.

Yours sincerely

Andrew Morritt

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

RESPONSE BY THE JUDGES OF THE CHANCERY DIVISION OF THE HIGH COURT OF ENGLAND AND WALES

Introduction

1. The Chancery Division is the division of the High Court to which competition actions are assigned, save that such actions relating to certain specified areas may be assigned to the Commercial Court.[1] In practice, almost all such actions are now brought in the Chancery Division and not the Commercial Court. Every Chancery judge, on his or her appointment as a High Court Judge, is also separately appointed a chairman of the Competition Appeal Tribunal (CAT). Many of the current Chancery judges have accordingly sat in the CAT.

2. The majority of the proposals in the Consultation raise issues of policy on which it would not be appropriate for sitting judges to comment. This response therefore addresses only a few particular issues. It also does not address the question of how the proposals may impact on the courts in Scotland or Northern Ireland, or the implications for the CAT if it is to hear private actions from Scotland or Northern Ireland.

The role of the CAT

(a) Expansion of the jurisdiction of the CAT (Q.1 to Q.3)

3. The CAT's current jurisdictional position as regards private actions is anomalous and clearly requires reconsideration, as the Court of Appeal has pointed out: *Enron Coal Services Ltd v EW&S Railway Ltd* [2011] EWCA Civ 2, para 143 (per Lloyd LJ) and para 149 (per Jacob LJ). The CAT is a specialist tribunal. It can hear follow-on actions for damages, where the issues largely concern causation and quantum. However, it is not able to hear stand-alone actions and thus cannot examine whether

[1] Practice Direction : Competition Law - Claims Relating to the Application of Articles [101] and [102] of the [TFEU] and Chapters I and II of Part 1 of the Competition Ac t 1998, paras 2.1-2.4.

or not competition law has been infringed, although it adjudicates on that very issue when hearing appeals from the OFT and sectoral regulators

4. Accordingly, as a matter of principle we see no problem and considerable benefit in the general proposal to expand the role of the CAT for private actions. Furthermore, in practice this would bring the advantage of the CAT's ability to adapt its procedures specifically to suit competition actions, along with the multi-disciplinary constitution of the Tribunal, in particular the inclusion of one or more economists as wing members in cases that involve difficult economic issues. We expect that this would lead to a greater demand for Chancery judges to sit as a chairman in the CAT, but the additional strain which this may impose on the Chancery Division should be mitigated by cases being heard in the CAT that previously would have been heard in the Chancery Division.

5. If the CAT is to be given jurisdiction to hear stand-alone actions, then we consider that it should also be given the power to grant injunctions since injunctions may be sought in such actions. It would cause considerable practical and procedural difficulty if an interim injunction could be granted only in the High Court in an action which then proceeded in the CAT; alternatively, if the CAT had no jurisdiction to grant such injunctions that may lead claimants to continue to bring private actions in the High Court, thereby undermining the basic proposal.

6. If that course is adopted, then we consider it is logical also to bring Section 16 of the Enterprise Act 2002 into force, thereby enabling a competition case to be transferred from the High Court to the CAT. However, it is important to recognise that a competition issue may well not be the sole issue in a case, and indeed may arise only by way of defence, eg to a contract or intellectual property claim. Section 16, on that basis, permits a transfer to the CAT of only the competition issue, where the court considers that appropriate. We agree with para 4.17 of the Consultation as regards the benefit of having the same judge who started to hear a case in the High Court then continuing to hear that case after transfer as a chairman of the CAT.

7. Both the likely increase in demand for Chancery judges in the CAT and the operation of Section 16 as just described mean that there would be serious practical inconvenience if not all Chancery judges were chairmen of the CAT. At present,

every Chancery judge is appointed a chairman but the appointment is for a fixed period of 8 years that is not renewable: Enterprise Act, Schedule 2, para 2(2). In consequence, three of the current 17 Chancery judges have already ceased to be chairmen and 10 more will drop out within the next 4-5 years. Although new Chancery judges may of course be appointed in that period, if any of those new judges should be someone who is now serving as a chairman of the CAT, and thus has particular competition law expertise, he or she will obviously then be able to hear competition cases in the High Court but paradoxically may well be unable to hear them in the CAT because his or her 8 years has expired. If the proposals in the consultation to expand the CAT and implement Section 16 are adopted, we hope that this problematic and unsatisfactory situation can be remedied. For at least all judges of the Chancery Division of the High Court, appointment as a chairman of the CAT should be co-terminous with appointment as a High Court judge.

(b) Fast track model (Q.4 to Q.6)

8. As regards the proposed fast track route, we understand that this is particularly directed at the provision of swift interim relief: see para 4.32 of the Consultation. However, we would point out that very urgent relief is currently available in the High Court without any designation of cases to a "fast track". There is an "out of hours" judge, a duty judge over the weekend, and injunctions can be (and are) granted over the telephone. We doubt that relief of such extreme urgency is likely to be necessary in competition cases, and usually a hearing in court the next working day will be sufficient or, preferably, a hearing on a few days' notice to enable the respondent to attend. Such a hearing is to the advantage of SMEs since otherwise relief can be granted only for a very short time until a further hearing which the respondent can attend, thereby necessitating a second hearing with consequently increased costs. Therefore, if the CAT is given equivalent power to the High Court to grant injunctions, we can see no practical need or benefit in establishing a separate procedural track. The experience in the High Court demonstrates that this would not result in any greater speed for interim relief. On the contrary, we consider that it might only lead to procedural rigidity, complication and potential argument between the parties as to whether a particular case is or is not suitable for such a fast track. It

would also involve selecting a financial threshold: fixing the amount of that threshold is inevitably somewhat arbitrary.

9. Similarly, while we agree that the option of cost-capping should be available, we consider that this should be available in any case and not limited to those in a "fast track". Provision can be incorporated into the CAT rules accordingly.

10. We acknowledge that the requirement to provide a cross-undertaking in damages in order to obtain an interim injunction may serve as a deterrent to an SME seeking interim relief. Although not a statutory requirement, such a cross-undertaking is almost invariably required of private claimants as a condition for an interim injunction. Accordingly, there may be practical benefit in incorporating a provision into the CAT rules that enabled dispensing with a cross-undertaking in an appropriate case. However, experience has shown that the grant on an interim application of an injunction which subsequently proves to have been unjustified can do considerable damage, and in a competition case an interim injunction could be used for illegitimate commercial advantage by an unmeritorious claimant. Therefore, we urge that the decision of whether to dispense with a cross-undertaking should be left to the discretion of the CAT to be exercised on a case-by-case basis.

Encouraging ADR (Q.26)

11. We make no comment on the specific issues raised in the Consultation, save that if the CAT is given the power to hear private actions then we agree that the CAT rules should be amended to make better provision for formal settlement offers. However, we consider that it would be preferable if the CAT rules were more flexible regarding the effect on costs of such offers than the current provisions of CPR Part 36. This is appropriate, having regard in particular to the uncertainty and almost complete lack of precedent regarding the quantification of damages in competition claims.

Complementing the public enforcement regime (Q.32)

12. As regards the protection of leniency documents from disclosure, as discussed in paras 7.4 to 7.6 of the Consultation, we note that this is said to arise in particular in

the light of the ECJ's recent judgment in *Pfleiderer*. The issue obviously arises only in follow-on actions. In many of those, the claim will be for a breach of both EU and domestic competition law. It follows that a domestic rule restricting disclosure that differed from the EU rule as laid down by the ECJ in *Pfleiderer* would cause enormous practical difficulty. Since the ruling in *Pfleiderer* clearly applies to the leniency policy of a national competition authority (as was the case in *Pfleiderer* itself), disclosure for the purpose of a claim under EU competition law would be governed by the *Pfleiderer* ruling. It is difficult to see how a more restrictive approach could be applied to disclosure of the same documents in the same proceedings for the purpose of a parallel claim under domestic competition law. Accordingly, if any change were to be made now, we consider that it should be only so as to ensure that the same principles which apply in a purely EU competition law case should apply to a claim based on UK competition law[2]. If any more fundamental change is envisaged, then that should come at EU level.

13. Moreover, we note that the ruling in *Pfleiderer* calls for a balancing exercise to be conducted by the national court, having regard to the circumstances of the case. We believe that, so far, there had been only one decision applying *Pfleiderer* in the UK courts.[3] In that case, only a limited degree of disclosure of leniency materials was permitted. Accordingly, it seems prudent to wait for a few more cases to be decided to see how this is working out before rushing into legislative change.

Appendix A: Design details of an opt-out collective action regime (Q.15 and Q.20)

14. We note the suggestion at para A.4 that at the stage of certification for a collective action, there could be "an assessment of whether there is a significant risk that the action might become a vehicle for anti-competitive information sharing and, if so, how this can be mitigated". If it is decided that this should be a relevant consideration in the certification process, we apprehend that this may be a very difficult assessment for a judge to make on the basis of submissions from only the parties to the proceedings. If it is thought desirable for such an assessment to be

[2] Arguably, this would be the result in any event by reason of section 60 of the Competition Act 1998; but the position is not altogether clear.
[3] *National Grid Electricity Transmission PLC v ABB Ltd & ors* [2011] EWHC 1717 (Ch)

made, we think it is important that the UK competition authority should be able to make representations in that regard to assist the CAT.

15. As regards the distribution of unclaimed sums, the choice between the various options set out at paras A.17 *et seq* is essentially a matter of policy. However, as regards the option of cy-près, if that finds favour then we urge that the decision as to who should be the beneficiary should not be left to the CAT. In many competition claims, there would be no single or obvious candidate; the choice in a case of that nature may be more a policy decision than a question suitable for judicial determination; and if the unclaimed fund was significant this would be likely to generate costly satellite litigation which should be avoided. Accordingly, any such determination should rather be made by the Charity Commission[4], although their decision might also be challenged by judicial review. For these reasons, if neither escheat to the Tresurery nor reversion to the defendant is adopted (as to which we express no view), we consider that the identification of a named scheme or schemes in primary or secondary legislation is preferable to a general cy-près approach.

20 July 2012

[4] Presumably the Charity Commission for England and Wales in an English case, for Scotland in a Scottish case, and for Northern Ireland in a Northern Irish case.

Knighton White

Dear Sirs,

I am writing to provide a response to the consultation on Private Actions in Competition Law, specifically relating to Questions 20 and 21. My firm has, in the past, provided fundraising advice to the Environmental Law Foundation (ELF), which provides pro bono legal advice to disadvantaged members of local communities on matters affecting their quality of life. ELF itself received grant support from the Access to Justice Foundation and we feel that this is the appropriate body to receive unclaimed sums for subsequent distribution.

Our responses are set out below.

Yours sincerely,

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RESPONSES TO CONSULTATION on Private Actions in Competition Law – Q20 & 21

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.

Lambeth Law Centre

We are writing as a small Law Centre in respect of two parts of the consultation on reform of private actions in competition law. The substantive areas of the consultation do not relate to our areas of expertise but we write to support the proposals regarding payment of unclaimed monies to the Access to Justice foundation. We cannot pretend to be impartial on this point as organisations like our own would benefit massively from this source of funding.

The proposal is of far more benefit than similar proposed sources of finance of thee Access to Justice Foundation or legal aid, such as dormant client accounts or abandoned bank accounts. If the proposals contained in the consultation were put into practice than the funds would effectively be a fine on the anti-competitive company that would otherwise have been the profits from their anti-competitive behaviour. The sorts of actions that have been identified are those where there is often significant public anger and the knowledge that where individuals have not benefited from the actions wider society has done would do much to strengthen public confidence in law enforcement against corporate offenders.

The Access to Justice Foundation is a highly suitable recipient due to its core role as 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. It has a trusted role in the advice sector and legal profession and we understand it to be practically minded and lacking in red tape. As a national grant maker the Foundation is able to support the whole advice and pro bono sector in providing free legal help. 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. From outside the sector the Foundation has been 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.

In conclusion we welcome the proposal and support the Access to Justice foundation as the best recipient of the funds identified.

Michael Tarnoky
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Law Centres Federation

Dear Sir/Madam,

I am writing to convey the opinion of the Law Centres Federation regarding proposals for the use of unclaimed sums from collective action damages in competition cases. This relates broadly to questions 20 and 21 in the consultation on Private Actions in Competition Law.

The Law Centres Federation is the national peak body for Law Centres, which are independent not-for-profit legal practices, offering free legal advice on civil law to poor and disadvantaged clients in their localities. There are currently 55 Law Centres, with the earliest having been in continuous operation since 1970. Law Centres are committed to access to justice for all, and are concerned that this important constitutional principle continue to be backed and funded. It is in this context that we make our suggestions below.

When damages are awarded in competition law collective action, it is the Law Centres Federation's position that there is a distinct advantage to channeling unclaimed sums to a single specified body specified in statute. This solution would be simple to administer and have the merit of clarity about the destination of unclaimed funds. The certainty of a a single body specified in statue would obviate possible wrangling over unclaimed sums and spare judges the burden of associated lobbying or satellite litigation. A single recipient would also retain its independence as it would not need to be involved in litigation in order to secure the unclaimed sums for itself. All of these would free the single specified recipient of unclaimed funds to act independently and efficiently in the public interest.

The Law Centres Federation supports the specification of the Access to Justice Foundation (AJF) as the single recipient of unclaimed residual damages sums, as we believe it to be the most appropriate body for this purpose. The AJF is a registered charity, which means it is by definition independent and obliged to act in the public interest. AJF is an established body in the legal advice sector: the legal profession had helped set it up; and it routinely collaborates with legal pro bono bodies to help not-for-profit advice organisations in England and Wales. Importantly, AJF already receives pro bono costs under the Legal Services Act 2007, so is already set up to receive

funds from litigation, also anticipating the ebb and flow of such an unpredictable source of income. It is also the body recommended as suitable for receiving collective action residual funds by several other high-level panels: the Treasury Financial Services Rules Committee, the Civil Justice Council, and the Jackson Review of Civil Litigation Costs.

The specification of the Access to Justice Foundation as the single recipient of unclaimed funds is particularly appropriate because it was set up to support access to justice. It would therefore be exemplary use of residual damages from collective actions in which individuals challenge illegal anti-competitive practices, if they were used to help yet more people access justice through legal advice which they would not otherwise be able to afford. The Access to Justice Foundation distributes additional funds to support free legal assistance, and has established itself as a trusted national grant maker that uniquely works across national, regional and local levels to take account of all legal needs. At a time when not-for-profit advice agencies are badly hit by public funding cuts, AJF plays a vital role in providing legal assistance to people disempowered by social exclusion, by poverty and by lack of education.

Yours sincerely,

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Private Actions in Competition Law: a Consultation on Options for Reform

Law for Life

Law for Life is a legal education charity that aims to provide ordinary people with awareness and understanding of their rights together with the confidence and skills to assert them. We provide learning and information about rights and the law so that people can be empowered in their every-day lives.

- We promote more effective and better quality public legal education for all.
- We take a lead in continuing to develop a coherent identity for public legal education (PLE) and in collaboration with others identify and promote excellence in its research, design and delivery.
- We work to ensure that public legal education is widely accepted, used and embedded in the work of many professionals, including educators, lawyers, advisers, and youth and community workers.

Consultation response

We support the proposal that collective actions be introduced for competition cases, because they will enable access to justice where individuals would otherwise have no or little ability to litigate against anti-competitive companies.

Private bodies, whether consumers or business should be allowed to bring stand-alone actions. The Competition Appeal Tribunal would be the appropriate venue. Opt-out

actions should be permitted to enable the whole class of affected people to potentially benefit, and so the anti-competitive company can be ordered to pay damages for the full amount of their illegal behaviour.

Pro bono costs under Section 194 Legal Services Act 2007 should be extended to cover cases in the CAT.

Q20

We believe that unclaimed sums from collective actions should be directed to a single named body. This will ensure the defendant company has to compensate for the total harm from their anti-competitive acts. It will avoid the problems and uncertainty of finding a suitable destination in each case such as lobbying of judges. It will provide certainty of an independent destination to receive the funds in the public interest, in order to support further access to justice.

Q21

In our view the Access to Justice Foundation would be the most appropriate recipient, as it will distribute the funds to organisations and projects that provide free legal help to those in need. This will support the ultimate aim of collective actions which is to enable access to justice.

The Foundation is already the recipient of pro bono costs and therefore has experience of receiving and distributing funds from litigation.

The Foundation will receive funds on behalf of the whole advice and pro bono sector, whose ability to provide help to the public is being endangered by the legal aid and local authority cuts. The Foundation can take a strategic view the distribution of funds that can include public legal education initiatives that strengthen individual's ability to deal with law-related issues and assist them to avoid costly court action.

Yours faithfully

Martin Jones
Director
Law for Life

Law Society of England and Wales

The Law Society

Private Actions in Competition Law

Response of the Law Society of England and Wales

July 2012

Introduction and General Comments

The Law Society is the representative body for over 145,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others. This response has been prepared on behalf of the Society by members of its Collective Redress Reference Group, which is made up of senior and specialist lawyers practising in this field.

The Law Society welcomes this opportunity to comment on the consultation paper.

As a general observation, we commend the laudable aim of the proposals in seeking to widen access to justice and redress for SMEs and consumers, and largely agree in principle with the key recommendations of the consultation. However, we have some concerns about some of the design details currently proposed in respect of a number of the recommendations, which we note below together with some suggested adjustments

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?

The Society strongly agrees with these proposals, which would seem a pre-requisite to expanding the role of the CAT. We note however that the CAT will need to be appropriately resourced to deal with the increased workload these changes will entail.

Consideration should be given to unifying the position on limitation periods as between the High Court and the CAT if the recommendations are introduced, to ensure that parties are not discouraged from bringing claims in the CAT, and so that transfer between the High Court and the CAT can operated effectively

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

Yes, this would be highly desirable, as most SMEs simply require immediate injunctive relief from anti-competitive behaviour, and do not have the will, resource or need to pursue a full case for damages. Its powers of injunctive relief should however be made on the same terms as those of the high court, in particular, the requirement for the claimant to provide cross-undertakings in damages. Our understanding is that this requirement has not deterred SMEs from bringing actions in the Patent County Court, and it provides an important safeguard for defendants against frivolous or vexatious claims.

We would also suggest that using a full tribunal panel for decisions on injunctions would be likely to produce better decisions.

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

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

We agree that a fast track procedure would be desirable, but can see many obstacles to its implementation in practice. The consultation rightly recognises the complexity of most competition cases, which tend to be document heavy and require expert economic evidence.

In this context, some elements of the proposals are unrealistic; for example, a six month timeline is perhaps realistic for an injunction-only case, but not where a claimant is seeking damages. The fact that a claimant is an SME will not typically affect the complexity of the case, which often depends on the nature and size of the defendant and the relevant industry. Even in an injunction case where complex issues of market definition, for example, are raised, or where the challenge affects the defendant's business model as a whole, six months may also be overly ambitious. For example, a number of abuse of dominance cases (which the consultation paper appears to envisage are the most suitable for the proposed fast track) took a long time to resolve both at the level of the sectoral regulator investigation, or at the CAT appeal or damages action stage[1].

Similarly, we do not think a strict cap on costs would be appropriate, as it is unlikely that 'one size' will fit all cases that could benefit from a fast track procedure. The consultation proposes a cap of £25,000, but realistically costs could easily range to up to ten times that amount, depending on complexity. We do however note the importance of faster decisions and keeping costs low.

The CAT already makes active and appropriate use of it case management powers. We consider a more appropriate solution would be to create an obligation upon the CAT to consider cost capping and timetabling at beginning of each case, thereby forcing consideration of these important issues at an early stage, without imposing unrealistic or impractical limits on more complex cases (which would nevertheless benefit from the fast track).

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

The definition of which businesses would qualify as SMEs and therefore for the fast track will be critical. The thresholds of the number of employees and turnover found in European law definitions are relatively arbitrary. We can see merit in the prospect for extending the fast track to all small claims; the OFT does not possess the resources to deal with every case, particularly smaller ones, and we suspect that there are many potential small claims that are simply not pursued under the existing system.

Quantifying small claims in a competition law context could however be problematic. In most other contexts, the value of a claim is effectively used as a proxy for judging its simplicity, but this is not always the case for competition claims, where low value claims often require the same document preparation and expert evidence as higher value cases. We would therefore support the use of a similar upper limit of £500,000 to that used in the Patents County Court,

[1] For example, 2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited, 1178/5/7/11 [2012]

where many of these same considerations apply. We would also suggest that all simple cases with a value of up to £25,000 should automatically fall into the fast track system.

It can also be difficult to calculate the full value of a competition law claims at the outset of proceedings. Some claimants will simply not announce themselves and join an action until the litigating claimant has experienced some success, and having additional claimants join a case can rapidly multiply its value. If a wider small claims fast track were implemented, it would be appropriate to create milestones within the procedure for assessment of whether the case should be transferred to the normal track, for claims which become substantially larger or more complex.

We would stress that regardless of how broadly or narrowly the fast track procedure is introduced, the effective enforcement of competition law will continue to rely heavily on the active involvement of the regulator (currently the OFT), and we would not wish to see a reduction in its activity as a consequence of these reforms.

The UK competition law regime (as in other European countries) is primarily an enforcement regime – the primary tool for ensuring its observance is the OFT pursuing an active caseload of individual cases. OFT resources should not be unduly distracted into deciding policy issues which may more normally be the remit of the Department for Business, Innovation and Skills or for the Competition Commission arm of the new merged authority. The OFT's whole reputation and effectiveness is underpinned by successful casework.

Further thought should be given to the link between the OFT's active involvement in individual cases and the role of the court. The OFT has considerable experience in applying competition law with skilled staff. If, for example, an SME brings an action for injunction against a powerful undertaking, knowing that the OFT is not 'sitting on the fence' but at least publicly declaring that the SME's case has some merit could help early settlement of difficult cases. The OFT's role therefore as "amicus curiae" of the court in individual cases therefore requires further thought.

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 appreciate the basis of the proposal as seeking to remedy the fact that in such cases, the information regarding the extent of harm caused (for example, evidence of what factors influenced the setting of prices) will typically be in the hands of the defendants.

It should be recognised that the presumption, and specifically, the level of damage assumed under it would essentially act as a penalty against defendants. If implemented, any such departure from the normal English law position that loss must be proven and that claimants can only claim for loss which has actually been suffered, should only be done in the context of a conscious public policy decision to facilitate settlements for consumers, and as a further incentive to encourage the defendant to engage in ADR.

We note however that the presumption is only likely to function fairly and effectively in consumer claims with direct purchasers. If it had wider applicability, the presumption would give rise to unjust risks of double jeopardy, as it would assume a 20% overcharge in relation to each step in the supply chain (with no presumptions as to passing on).

We also note that the evidence for the 20% figure used in the consultation for the presumption of damage is based on relatively sparse economic analysis. Regardless of the figure used for the presumption, it is likely to become a point of further argument between claimants and defendants, with each seeking to either raise or lower the estimation of damage respectively. This is likely to add significant further cost to cases due to the additional expert evidence required, and the ensuing disputes over economist's reports only serves to worsen any inequality of arms between the parties.

One solution could be use a similar principle to Part 36 Offers, whereby a party would be liable for both their costs and those of the other party if they sought to challenge the figure used for the presumption, but subsequently failed to prove it different by more than an amount specified by the court. This would encourage parties to strongly consider the merit of challenging the presumption without good reason to believe the estimation of damage should be substantially different.

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

We agree with the consultation that there is not a strong case for the passing-on defence to be addressed in domestic legislation at this stage. The indications from case-law are that such a 'defence' would already be available under English law[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.

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 do not consider the existing collective action regime is functioning effectively for SMEs and consumers. In the absence of any changes, the outlook for consumers and SMEs for obtaining redress is likely to deteriorate even further with the implementation of the Jackson reforms due in April 2013, as these groups will in all likelihood not be able to secure After The Event insurance to protect them from adverse cost orders when bringing a claim.

The proposed policy objectives as set out above are therefore laudable. Any reforms should however be proportionate, measured and ensure that there are sufficient safeguards against the risks of unmeritorious claims and the excesses of a US-style class action system.

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 any rationale for creating a distinction between businesses and consumers in this context.

[2] For example, *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284 and *Devenish Nutrition v Sanofi-Aventis* [2008] EWCA Civ 1086

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

No. This should be a matter for defendants to assess and implement appropriate measures to prevent anti-competitive information sharing in relevant cases. The CAT has experience of monitoring such measures in other competition cases (for example, confidentiality rings in regulatory appeals) and there is no reason to suppose it could not do so here.

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

We agree that both types of actions should be permitted, subject to suitable protections on certification to safeguard against unmeritorious claims. Some rare cases are likely to be a mix of both stand-alone and follow-on - for example, the *Air Cargo*[3] case was started as a stand-alone in parallel to the EU Commission investigation. We would however expect that stand-alone cases would typically be stayed until the relevant regulatory body had made a decision.

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.

The Society supports the introduction of opt-out collective actions, provided there is a suitably rigorous certification system. The ability to bring opt-out collective actions is essential for consumer cases to be successfully brought; as observed in the consultation, only one consumer case has been brought under the current regime, and the representative body involved has indicated it is unlikely to consider pursing similar cases under the existing system.

The CAT should retain the power to act as gatekeeper in deciding whether cases can be brought as opt-out, with a contested application procedure for defendants available to permit the challenge of such applications.

Guidelines covering the principles the courts would use when deciding a case should be heard as opt-out or opt-in (for example, Civil Justice Council draft rules) would be very useful for both parties, and their legal advisors.

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

We agree with all the precautions listed in Annex A of the consultation, although we would stress that they should not be considered exhaustive, and that the court should remain free to develop additional requirements as required on a case-by-case basis. We would suggest that the final element concerning 'sufficient funds' should be rephrased to 'sufficient resources', which would take into account those claimants protected against adverse costs by insurance or third party funders.

[3] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1487

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

We agree that such damages should continue to be prohibited, although we would emphasise that the option of exemplary damages should be maintained to prevent unjust enrichment, subject to ensuring that double jeopardy is avoided in follow-on cases, as per the decision in *Devenish Nutrition* v *Sanofi-Aventis*.

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

Yes, although the allocation of costs should be considered at the certification stage. If an opt-out standalone case fails, the defendant should not have to pay costs.

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?

Where the behaviour of one party has caused unnecessary costs, the opposing party should be able to challenge them. We do not however consider the CAT would require any special costs rules for these situations, as it already has amply-developed costs principles governing them.

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

We cannot see sufficient reason for contingency fees to be prohibited in collective action cases when they are being introduced in every other are of civil justice, and will provide an important additional route to accessing justice following the implementation of changes to conditional fee agreements made by the Legal Aid, Sentencing and Punishment of Offenders Act.

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

We agree with the consultation that other methods of distribution (in particular cy-près) have a number of disadvantages. We note the arguments for reverting unclaimed funds to the defendant, but consider that this could effectively reduce the risk of engaging in anticompetitive practices for parties, and is therefore undesirable. We can also see the attraction of leaving this as a matter for judicial discretion, although if a presumption for one method were to be implemented, we would consider the paying any unclaimed sums to a single specified body as the most preferable option. While doing so would in effect be punitive, we consider it could provide an important incentive for defendants to settle. Defendants should however be free to settle (and have settlement approved by the CAT) on a reversion to the defendant basis as otherwise incentives to settle would be distorted.

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?

If this option were taken, we strongly agree that the Access to Justice Foundation would be the most appropriate 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?

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 that the competition authority and representative bodies are unlikely to have the resources to consider all viable opt-out actions, as the latter in particular are not primarily litigating organisations. Representative bodies could also run into difficulty in relation to bringing actions by being placed in a position where they were bringing an action on behalf of one set of their members against another set of their members. The CBI for example, represents both SMEs and large firms. In such circumstances it would be unlikely a representative body would bring an action – defeating the public policy goals these reforms seek to address.

As a minimum, a wider range of representative bodies would need to be empowered to bring actions. It would also be highly desirable in the interests of widening access to justice to broaden the representative net further, while ensuring that the court is not overwhelmed with trivial, vexatious or speculative claims. To maximise access to justice and recognise the inherent bottleneck effect of having relatively few representative bodies appointed, law firms should be permitted to bring actions. Law firms would be an appropriate additional body type for bringing claims, as legal professionals bringing actions will be officers of the court operating under a strong code of conduct, both of which act to inhibit the types of claims described above. It may be desirable for non-approved bodies bringing claims to undergo a more thorough certification process, to reinforce the likelihood that claims are brought appropriately.

We would not however support extension of the ability to bring claims to third party funders, as it would not be appropriate for CAT cases to become direct private equity investment opportunities - although it is likely that third party funders will fund some cases on behalf of directly affected claimants.

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

The Society in principle supports the use of ADR for collective claims. This is especially the case in the field of consumer law, where the Society considers that collective ADR can resolve issues of consumer detriment in a more consensual way without recourse to the courts.

However, we do not consider that collective consensual dispute resolution should be a mandatory step before a collective redress action. The freedom to bring a case to court is fundamental and parties should not therefore be bound to participate in a dispute resolution scheme. In particular, where the claim is being brought by a representative organisation a decision to use ADR would have the effect of binding the represented individuals into that procedure. This gives rise to particular difficulties as regards the freedom to bring an action.

Furthermore, requiring mandatory ADR would leave claimants vulnerable to defendants using an 'Italian torpedo' (discussed in our answer to Q.25, below), with the potential to fatally delay cases beyond the will and resources of the claimant, and prevent the claimant from bringing a claim in the jurisdiction of its choice (in accordance with the Brussels Regulation). The aim of ADR should be to avoid trial, not necessarily *proceedings*, which can act as an important tool for claimants in getting defendants to the negotiating table.

If parties do choose the ADR route, then we consider there is a case for the decision to be binding on the defendant, if any offer or decision arrived at by the ADR body or through the ADR process is accepted by the claimant. Therefore the defendant would not be able to withdraw the offer and pursue the case through the court. However, there should be the option that if the offer from the defendant is not considered sufficient by the claimant, then they should be able to proceed to action through the court. Any binding element of ADR must be made clear to both parties before they embark down the collective ADR route. By following this model collective ADR should follow the current operating model of many consumer ADR schemes.

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?

The Society is generally very supportive of the use of pre-action protocols in civil justice proceedings, although there is a significant barrier to their effectiveness in competition law cases.

The *Rubber* follow-on cartel damages case[4] established the ability for defendants to start an action in another EU jurisdiction before proceedings had been issued by the claimant in the relevant domestic court, which would cause any subsequent proceedings issued by the claimant to be stayed until the former case had been resolved. Defendants may seek to engage in such satellite litigation in order to use a more favourable forum, or to delay a matter and so impose greater pressure on the claimant to settle on the defendant's terms (this latter effect granting the tactic its 'Italian torpedo' moniker, for the reputed speed of the Italian courts).

We would therefore oppose the mandatory use of pre-action protocols (i.e. with penalties for non-compliance) or pre-proceedings ADR in this instance. A possible solution would be to permit the claimant to issue without penalty in order to allow them to seize jurisdiction, but then have the court stay proceedings while both parties effectively go through the pre-action procedure. While this might eliminate some of the benefits of typical pre-action protocols (e.g. in limiting front-loaded costs), it would recognise the reality that claimants are likely to issue immediately anyway where being 'torpedoed' is a risk.

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

We would welcome the CAT rules governing formal settlement offers being brought into line with Part 36 Offers, as there are several problems with the former that inhibit their use for encouraging early settlement.

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[4] See Commission press release at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/78&format=HTML&aged=&language=EN&guiLanguage=en

Further thought will however be required on how the procedure could be adapted to better suit the nature of competition actions. For example, claimants will often not have key pieces of information (such as how much consumers have overpaid by) at early stages in proceedings (as this will be in the hands of the defendant), making it difficult to know whether an offer to settle under Part 36 is reasonable. This has the potential to cause claimants to under-settle their claims rather than risk an adverse costs order due to a subsequent failure to beat the offer. The Part 36 regime could also encounter problems with cartel cases where there is joint and several liability and multiple parties. The Government may wish to consider adjustments to the regime to deal with these issues when amending the relevant CAT 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.

The Law Society continues to encourage solicitors to make clients aware of ADR as an option where appropriate to their client's case.

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?

There is also a pressing need to introduce a complementary collective settlement process. Collective settlement permits defendants to reach a settlement with every claimant in a case across several jurisdictions (for example, across the EU) - such a system already exists in the Netherlands. Introducing collective settlement provisions would ensure cases could be resolved in their entirety within the UK.

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 agree that both powers should be given to the competition authorities. Certification of voluntary redress schemes could provide an important incentive for defendants to settle via voluntary redress in return for potential discounts from the applicable fine.

We would consider a mandatory power would in practice be used only rarely, due to the difficulty of quantifying damages and the risk of any imposed scheme being judicially reviewed. However, it would remain a useful power of last resort that would serve an important function in encouraging would-be defendants to the negotiating table for voluntary redress schemes. A mandatory power should however be subject to appeal.

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, although it should only act to reduce penalties by a modest extent.

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

We agree that extending the role of private actions will help to fill the regulatory gap in competition law, but we reiterate that the OFT should maintain its prominent role in 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?

We agree with the proposals in the consultation, but are conscious that the EU Commission is already developing proposals and consider that this issue will need to be tackled at an EU level to be resolved.

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 consider this to be another issue that will need to be resolved at an EU level, as there are limits to what can be achieved by parties at a national level.

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.

Proper staffing of the enforcement body will be similarly important to securing the right legal machinery. The OFT's primary role as the main body responsible for, and method used for, enforcement of competition law is directly linked to the need to ensure that it is properly staffed and trained and that its staff are properly remunerated for the job that they do. Working for the OFT should always be an attractive career option for able competition lawyers, economists and administrators, and a rotation with private sector experts should be encouraged to make for an effective enforcement agency.

Law Society of Scotland

THE LAW SOCIETY of SCOTLAND
www.lawscot.org.uk

BIS Consultation: Private actions in competition law

The Law Society of Scotland's Response

July 2012

INTRODUCTION

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession.

Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Law Society of Scotland Competition Law Sub-Committee (the "**committee**") welcomes the opportunity to consider and respond to the BIS consultation: Private actions in competition law.

The committee has the following responses to put forward:

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 2002* would, if activated, empower the Lord Chancellor to make rules for the transfer of certain cases (but not yet including standalones) to the Tribunal from the English High Court or the Court of Session. So far as the Court of Session is concerned such Rules ought, in the view of the committee, to be made by Act of Sederunt, not by the Lord Chancellor, in so far as they relate to Scotland.

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

The committee considers from a Scottish perspective, the transfer of stand-alone claims raises an issue of compatibility with *Article XIX* of the Act of Union with England. If the proposal did find favour it would need to be viewed alongside the current intra-UK adaptation of *Regulation 44/2001* found in the current version of *Civil Jurisdiction and Judgments Act 1982 at Schedule 4.* The solution might be to provide that "*a person domiciled in a part of the UK may be sued in the Tribunal sitting in another part of the UK only in circumstances under which Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 would render such person liable to be sued in the courts of another Part of the United Kingdom*.".

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

The committee believes that if stand alone were extended to the CAT then the facility to grant interdicts would follow.

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

No. The committee believes that there is no reason why an SME can not bring an action for interim interdict. There may be a need in Scotland to address the issue of the ready availability of "positive" orders such as an order to resume supplies but this need not involve the CAT. The Consultation Paper mentions cross-undertakings in damages, which are used in England and Wales to compensate for the absence of a doctrine of *periculo petentis* (interim orders are at the risk of the person obtaining them) This is a fundamental principle to ensure that such orders are not sought lightly.

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

The committee believes that these are appropriate.

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. Such a presumption necessarily involves a shift from compensatory to penal. Only a public authority should be involved in a penal process (Note that in Scotland private criminal prosecutions are virtually unknown and require the leave of the court. The privatisation of penalty imposition is viewed with distaste here).

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?

The committee agrees that a solution to this issue should be at EU level. It should be noted that facts founding a private action may relate to behaviour that is forbidden by both national and EU law. All EU states now have national laws that have been aligned with the principles of articles 101 and 102 of the Treaty on the Functioning of the EU, a very necessary *de facto* harmonisation. It is imperative that any private action should be capable of covering breaches of EU (and EEA) competition laws as well as national law and that any remedies should be coherent and compatible.

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 committee has no comment.

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 committee believes that it is imperative that the national dimension should not be considered in isolation but be dovetailed with European Commission initiatives.

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?

Yes.

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.

Opt-out provisions would confer considerable power upon representative organisations, which are neither public authorities nor subject to regulation. The committee favours the Nordic model as in paragraph 5.36 second bullet, whereby only a public authority would be eligible for the role of representative organisation.

Regarding paragraph 5.4 , the committee believes there may be a case for establishing a public authority as an non-departmental public body in its own right, separate from the Competition Commission and the OFT.

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

See answer to Q 14.

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

Yes. Punitive damages are a penalty not compensatory. The committee believe that they are wrong in principle.

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

Yes. The committee cannot see any obvious reason why a person should bear the cost of defending an unsuccessful claim.

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 committee has no comment.

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

No-win-no-fee should continue to be permitted but not agreements for a share in damages recovered. The illegality of the *pactum de quota litis* is the primary barrier against the triumph of the "litigation culture".

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

The committee has 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?

Yes. Provided that the Access to Justice Foundation made necessary adjustments to operate in Scotland, the committee believes it would be an appropriate recipient for unclaimed 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?

No. See answer to Q.14.

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?

The committee believes that the ability to bring such actions should be restricted to only to those who have suffered harm and bodies that are genuinely representative of those persons.

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

The committee agrees.

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.

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

The committee has no comment.

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.

The committee would wish to consider this further.

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 committee agree.

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

Yes.

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

Yes.

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

The function of private actions is and ought to remain only to obtain redress for those who have suffered damage. On no account should it become a privatisation of the public function of law 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?
Further consideration required.

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?
The difficulty is in providing incentives for whistleblowers while taking into account their culpability relative to that of non-whistleblowers. It will not always be that case that, overall, the culpability of the whistleblower will be less than that of the non-whistleblower.

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.
The committee has no comment.

Q. 35 Do you have any other comments that might aid the consultation process as a whole?
The committee has no comment.

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

For further information and alternative formats please contact:

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LawWorks

For the attention of Tony Monblat

Dear Tony

I am responding only in relation to questions 20 and 21 of the consultation paper.

20
A single named destination is preferable because it avoids not only the conflict but the bureaucracy of attempting in each case to identify the most appropriate recipient. Moreover, the determination of a single destination itself assists with the promotion of the policy and raises awareness, whilst saving resources. It is likely that a single name destination will be one most likely to bring an independent strategic insight to the distribution of funds, which no single court of party will be able to determine. This means that the greatest number of those most in need will benefit from the funds which result. Above all, the message will be simple and the administration will be straightforward and therefore effective in terms of use of both private and public sector funds. It will also avoid the negative publicity which attaches to the expenditure of resources in the administration of charitable funds, whilst providing greater certainty that the funds will benefit those who are intended to benefit from them.

21
The Access to Justice Foundation was established under section 194 of the Legal Services Act to provide the destination for funds resulting from pro bono costs orders. This, the result of an almost unprecedented cross-sector collaboration, has resulted in a high calibre, high profile, well respected, successful and professional charity which is well positioned to have a significant impact on strategic fundraising and distribution of funds for access to justice. The Foundation has had early successes in establishing regional legal support trusts and in other areas. It is strategic, respected, independent, experienced, with strong governance and with a beneficiary group which is entirely appropriate for the recipient of funds generated by this policy. No additional administrative resources would be required and the Foundation is itself making the most effective use of resources available by inhabiting premises at the National Pro Bono Centre in Chancery Lane, where additional support and collaboration is available to the charity. The Foundation was recommended as suitable body to receive funds from collective actions by the Jackson Review.

Many thanks
All best wishes
Rebecca

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18 July 2012

Dear Mr Monblat

Private actions in competition law: Response to consultation on options for reform

I am a Director of Legal Voice, a Not-for-Profit initiative set up in May 2012 to assist all organisations providing publicly-funded legal advice in the UK. Specifically, we run an online magazine about access to justice providing commentary and news information and which seeks to operate as a forum for legal professionals and legal representative groups to exchange ideas (www.legalvoice.org.uk).

I am submitting this response to the consultation on behalf of Legal Voice.

Response

We would specifically like to submit the following response to questions 20 and 21 of the consultation.

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 feel that paying unclaimed sums to a single specified body would be highly beneficial.

It could act as a full and proper deterrent to companies engaged in anti-competitive behaviour. Companies practising such behaviour would be required to compensate for the total amount of harm suffered by individuals as a result of their anti-competitive action (as decided by the court) regardless of the number of individuals who came forward to collect their damages.

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

The problem of trying to find a suitable recipient for each case would be 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 organisation would receive funds in the public interest and would retain its independence having not been involved in the litigation.

We could not see that the system would be difficult to manage, administratively, and we feel that this could in fact save time and cost for the parties and the court, maximising the funds available from such actions.

In terms of the other possible options suggested, we feel that they have many disadvantages.

Cy-près

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

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

The second major option to pay the residue funds to an organisation, usually a charity, considered the next best beneficiary to the harmed individuals involves the need to decide who the most appropriate recipient is. This may again place undue demands on the time and funding available.

Escheat to the Treasury

We consider that 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

With this option, the guilty party would benefit from an unjust windfall.

We feel that reversion would create 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 consider that the Access to Justice Foundation would absolutely be the most appropriate recipient.

As the recipient of pro bono costs under the Legal Services Act 2007, the Foundation already has experience of 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.

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

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, we consider that it would be 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.

We believe that 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.

We are grateful for the opportunity to respond to the consultation and thank you in advance for considering our response.

Yours sincerely

David Gilmore
Director
Legal Voice Limited

Linklaters LLP

Linklaters

Response to the BIS consultation paper (the "Consultation"): Private actions in competition law: a consultation on options for reform

1 Introduction

We note the Consultation's general theme of promoting the effectiveness of private damages actions in the UK. The ability of parties to seek compensation for breaches of competition law in appropriate cases, alongside the deterrent and more punitive role of public enforcement, is of course an important aspect of any effective competition law system. It is, however, crucial that the mechanisms for providing redress strike the right balance between effective enforcement and appropriate protections for defendants against unmeritorious claims. It is also important that any reforms in the private damages sphere are consistent with and complement the public enforcement regime and do not distort or reach beyond the general basis on which compensation is sought and awarded in civil litigation more generally.

2 The Role of the Competition Appeal Tribunal

We consider the suggestions regarding the possible transfer of cases involving allegations of competition law breaches from the High Court to the Competition Appeal Tribunal (the "CAT"), and the expansion of the CAT's jurisdiction to hear such cases without the need for a prior administrative decision, to be sensible.

Whilst the procedures and expertise of the High Court have to date resulted in the efficient progress of the competition cases before it, the determination of more of these cases before a specialist tribunal with broader experience of competition law and the economic and other technical issues that they typically raise is likely to be beneficial to both claimants and defendants alike and will obviously reduce the case load burden of the High Court.

Should the CAT's jurisdiction be extended beyond cases seeking "follow-on" damages, it would also be appropriate for the CAT to have the power to issue injunctions. Whilst in most cases it will be clear whether interim or other injunctive relief is required at the outset of any proceedings, it is not inconceivable that circumstances may arise only after the claim has been commenced which necessitate an injunction application. It would be unfortunate if parties were barred from seeking this form of remedy if they had chosen to bring proceedings before the CAT.

We note, however, that an important aspect of any court or tribunal system is efficiency and, particularly in cases where injunctions are sought, expediency. There are an increasing number of damages claims being issued in the High Court, some of which are brought before any final administrative decision at UK or EU level has been given. Providing a mechanism for these to be transferred or commenced before the CAT will inevitably add to the tribunal's caseload. It will be important for the CAT to use its case management powers to strike an appropriate balance between progressing claims efficiently and ensuring that procedural timetables include all those steps necessary to ensure that the merits of any particular claim are properly assessed. It will also be

essential that, in the case of transfers from the High Court, the presiding judge considers carefully the resourcing and timetabling impact of any decision to transfer to the CAT.

As regards the proposal to develop a fast track model, we would caution against the taking of a "one size fits all" approach even if this is limited to certain types of alleged infringements involving only SMEs. It will be important to ensure that the discretion as to whether to allocate specific cases to this procedure is exercised appropriately. By way of example, whilst a case might involve what appears to be a relatively simple allegation of breach of competition law, the determination of quantum of damages may nevertheless raise complex factual or economic issues. Whilst the specific elements proposed (such as cost and damages capping and the waiver of cross-undertakings in damages in injunction cases) may be appropriate in very simple cases, they will not enable a proper balance between the need to provide redress with the defendants' interests in having the merits properly determined in cases where one or more of the issues raised require detailed legal or economic analysis.

3 Proof of loss and "passing-on" in cartel cases

In our view, it would not be appropriate to introduce a rebuttable presumption of loss for cartel cases.

It is important to recognise, as noted above, that the role of the civil damages regime in this context is to compensate those who have suffered loss as a result of anti-competitive behaviour. Punishing those who have been found to have engaged in such behaviour and raising deterrence is, by contrast, the role of the OFT, other National Competition Authorities and European Commission through the imposition of fines.

Damages actions brought in the High Court or CAT in relation to anti-competitive behaviour are generally framed as claims for damages for breach of statutory duty. The well-established principles of the English law of tort, and, in particular, the tort of breach of statutory duty, are perfectly apt to deal with damages claims of this nature. There is no need to create a specific regime for competition cases.

In common with most tort claims, a claimant seeking to recover damages from a defendant which has engaged in anti-competitive behaviour must show that it suffered some actual loss, that the loss was in fact caused by the defendant's tortious anti-competitive conduct, and that the loss is not, in law, too remote. If, contrary to the ordinary principles of English tort law, the requirement for a claimant to prove loss is dispensed with or relaxed, it is likely that the regime will produce a "windfall" benefit for the claimant, which bears no relation to the harm suffered as a result of the alleged wrong. From the defendant's perspective, the risk of its potential liability to pay damages would be out of proportion to the harm caused by its anti-competitive conduct.

It is not at all clear why claimants in competition cases should be selected for more advantageous treatment than claimants who allege to have been harmed by other types of conduct. There is a very real concern that unmeritorious claimants which have suffered little or no actual loss would seek to profit from an advantageous regime for competition claims by bringing such claims as a revenue-raising measure. This would inevitably impede the ability of the courts and CAT to compensate claimants which have genuinely suffered loss as a result of anti-competitive behaviour.

We agree that there is not a strong case for new legislation explicitly addressing the passing-on defence. It is our view that the well-established principles of English tort law already provide a suitable framework for dealing with this issue.

Under the existing rules relating to the tort of breach of statutory duty, a claimant cannot recover damages unless it can prove that it suffered loss as a result of the wrongful conduct of the defendant. Although not yet tested before the courts, it seems clear as a matter of English law and correct as a matter of principle that a claimant cannot recover damages in respect of overcharge caused by the anti-competitive conduct of the defendant to the extent that the claimant passed on that overcharge to its own customers. There is accordingly no need to introduce the complexity of a new legislative regime to address this issue.

4 Collective actions

We agree that the existing provisions for collective redress in the competition sphere have their limitations. However, whilst an opt-out model might potentially increase the effectiveness of private damages actions given the sometimes substantial number of potential claimants in these cases, it would be imperative that any such model ensures that defendants are protected from fighting and/or settling unmeritorious or frivolous claims.

For example, in our view punitive damages and contingency fee agreements ("damages based agreements" under the Legal Aid, Sentencing and Punishment of Offenders Act 2012) should not be permitted in competition claims and we support the maintenance of the "loser pays" principle. A vigorous certification process would also be necessary prior to a collective action being commenced, with locus to bring collective actions limited to those representative bodies, whether public or private, who can demonstrate genuine loss or interest.

Whilst we agree that payment of a fine does not excuse a wrongdoer from making reparation to those who have suffered loss as a result of the wrongdoing, safeguards will be necessary to ensure that a wrongdoer is not over-penalised in the damages it is forced to pay, for example by an over-assessment of those likely to have been affected. The experience of the United States has demonstrated that an inappropriately structured collective redress scheme benefits plaintiff lawyers far more than individual claimants.

The advantages and disadvantages of collective actions have been well-rehearsed in previous years, both at UK and EU level. We note that a proposal for an EU-wide collective redress provision is currently before the EU Commission, which deals specifically with breaches of EU antitrust law and which would potentially apply to domestic and cross-border litigation. (Linklaters responded to the EU Commission's consultation in April 2011, available here.) It would be unfortunate if the UK were to introduce a procedure for collective actions in the context of breaches of UK competition law which was not in tune with that ultimately emanating from the EU. Conversely, any regime introduced in the UK may in fact influence the shape of any eventual EU procedure, given that legislation at domestic level may move more quickly.

We also note that the government has previously indicated its support for collective actions in appropriate sectors and circumstances but that it is unwilling to endorse a generic right of collective action, despite the publication of a draft set of generic procedural rules that could apply to collective actions by the Civil Justice Council in January 2010. The competition arena would be the first sector to introduce a collective actions regime.

Proposals for collective actions provision in financial services sector have been rejected twice, most recently in the light of, and pending the outcome of, the present consultation.

Since any regime introduced as a result of this consultation may well be followed in other sectors, it will be imperative to ensure that appropriate principles and safeguards are established from the outset.

5 Alternative Dispute Resolution

We agree that whilst alternative dispute resolution should be encouraged in private actions, it should not be made mandatory. The benefits of mediation in any particular case depend on the facts. For example, there may well be particular benefit in mediation at an appropriate stage in certain "follow-on" damages actions in which the key issues between the parties may be limited to quantification and the technical differences between the expert evidence submitted by the parties on these points.

We think the current approach taken by the High Court, in which the parties' willingness to mediate and reasonableness in the conduct of any mediation are taken into account when awarding costs in civil litigation, is an appropriate starting point for any approach to be taken by the CAT.

We also agree that the use of specific pre-action protocols for the CAT and the inclusion in its procedural rules for formal settlement offers could go some way to facilitate the early resolution of disputes involving alleged breaches of competition law where that is an appropriate outcome for the parties. We note that other mechanisms are also available to encourage alternative dispute resolution further. One example is the Court of Appeal Mediation Pilot Scheme relating to personal injury and contract claims worth £100,000 or less pursuant to which parties are automatically referred for mediation once permission to appeal to the Court of Appeal has been given.

In terms of public enforcement, we see some merit in the competition authorities taking at least some account of the extent to which a party under investigation has already voluntarily provided a form of redress for losses arising from any alleged competition law infringement as a "mitigating factor". However, any provision for the compulsory provision of redress would blur the distinction between the deterrent and punitive aims of public enforcement and the compensatory elements of private litigation.

6 Complementing the Public Enforcement Regime

As a general matter, we recognise the tension between the desire to ensure effective compensation for competition law infringements and the maintenance of the incentives raised by leniency regimes (in relation to both applications for immunity and applications for a reduction in fines) in the public enforcement context.

We agree that the protection of certain leniency material is appropriate in striking the right balance between effective compensation and efficient public enforcement. The European Commission has previously considered proposals to protect all corporate statements submitted by leniency applicants and we agree that this would be a sensible approach. Whilst the documentary evidence provided in some private damages cases may require further explanation and expansion (particularly in cartel cases in which the scope of documentary evidence may be very limited) this can usually be provided through other means such as witness evidence or adverse inferences from a failure to provide such evidence. There should therefore be little need to provide wide ranging disclosure of

leniency materials. Limiting such disclosure would provide a clear and consistent balancing of the competing interests of the public and private enforcement regimes.

As for the proposal to protect whistle blowers from joint and several liability, we do not consider it necessary to amend this rule (assuming it applies in private damages actions in the UK as a general matter, although this has not yet been determined in the competition context). The rule forms part of the more general tortious principles relating to quantification of damage that apply in civil litigation and the proposal would confuse the separate public and private enforcement roles.

Linklaters LLP

24 July 2012

Lloyds Banking Group

Group Legal Department

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24 July 2012

Dear Mr. Monblat,

RESPONSE OF LLOYDS BANKING GROUP PLC TO "PRIVATE ACTIONS IN COMPETITION LAW: A CONSULTATION ON OPTIONS FOR REFORM"

INTRODUCTION

Lloyds Banking Group ("**LBG**") welcomes the opportunity to respond to the consultation published by the Department for Business, Innovation and Skills ("**BIS**") in April 2012 on options for reform of private actions in competition law (the "**Consultation Document**"). Rather than answering every question, LBG had decided to focus its response on what it considers are the key issues for debate. The questions and question numbers below relate to the questions and question numbers in the Consultation Document.

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

LBG welcomes the proposal to implement regulations under section 16 of the Enterprise Act 2002 to enable the High Court to transfer competition law cases to the Competition Appeal Tribunal ("**CAT**") where appropriate. LBG agrees that transfers to the CAT should not be automatic for every competition law case, and supports the proposal that the presiding judge in each case should determine whether, in the particular circumstances of that case, the transfer of the case (or part of it) to the CAT would be appropriate.

It would be particularly useful if such regulations were accompanied with detailed guidance setting out, for example:

- the factors to be taken into account when determining whether a particular case should be transferred and the procedures to be followed; and
- clarifications on how a transfer to the CAT would operate in a case involving both competition law aspects and other aspects. In this regard, LBG considers that it may not always be possible for competition law aspects of a case to be heard separately from the rest of a case.

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

LBG agrees that the competition law and case management expertise and experience of the CAT is well suited to it becoming the main venue for private actions in the UK. LBG does not oppose the proposal to amend section 47A of the Competition Act 1998 to permit stand-alone civil actions to be brought before the CAT in addition to follow-on actions, provided that the CAT can allocate sufficient resources to these extra cases. LBG considers that this would help ensure consistency between private enforcement stand-alone judgments and follow-on judgments.

3. Should the CAT be allowed to grant injunctions?

Consistent with the idea that the CAT would become the main venue for private competition law actions in the UK, LBG notes the argument that the CAT should have the ability to grant both interim and permanent injunctions in competition law cases with the same level of discretion as the English courts. However, this should not result in unmeritorious and vexatious claims halting legitimate business conduct of defendants. Competition law cases can be very complex (in terms of law, facts and economic analysis) and there is a risk that granting the CAT the ability to grant interim injunctions may lead to legitimate conduct being unjustly halted without the appropriate time needed to conduct a proper competition law analysis (in particular if the fast track process is introduced). Measures should therefore be put in place to ensure that injunctions are only awarded in exceptional cases where there is a clear prima facie case of a breach of competition law.

In addition, the Consultation Document suggests that the CAT should have discretion to determine whether cross-undertakings are required to be given for each injunction

awarded and the level. In our view, the CAT would need to be very cautious in exercising this discretion and ensure that its approach to waiving the requirement for a cross-undertaking in damages does not encourage unmeritorious and vexatious claims. In this regard, if such discretion is awarded to the CA, it should be applied in a similar way as in High Court proceedings (see further under Question 5 below).

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

LBG would make the following submissions with regard to the Consultation Document's proposal to introduce a fast track route to the CAT.

- First, LBG questions whether a new fast track process is necessary to enable the CAT to deal with appropriate cases quickly. Ensuring that a hearing takes place quickly or setting a cap on recoverable costs can already be achieved under the CAT's current case management powers. In this regard, the Consultation Document notes[1] that the proposed model could be replaced by giving greater discretion to the CAT, allowing them to decide possible outcomes, length of case and cost capping, for example, on a case by case basis. This is not fundamentally different to what currently exists and it is not clear to LBG why the proposed SME fast track model is preferred.

- Second, it is currently not clear what factors would be taken into account when determining if an undertaking is an SME. For example:

    - would the definition be dependent on the activities/turnover/profits of the specific enterprise or would it also include the same characteristics of the enterprise's parent and/or group? and

    - would the definition be dependent on the enterprise's sales or number of employees regarding its activities in the *relevant market* impacted by the alleged claim or all its *activities as a whole* (whether or not within the relevant market)?

- Third, any SME fast track procedure, if introduced, should not necessarily apply automatically to every SME claim. This is because there is not always a correlation between the size of the claimant and the complexity of the competition law, economic or factual matters relevant to the claim. In other words, it is not necessarily the case that a claim made by an SME will always be simple

[1] See paragraph 4.34 of the Consultation Document.

and can always be dealt with quickly by the CAT. Any SME fast track procedure should therefore, if introduced, be limited to appropriate cases which can realistically be properly dealt with under the proposed fast track model.

- Fourth, the time scales of any fast track procedure should still allow for adequate time for settlement discussions to be reached between the parties. A fast track model which facilitates too "fast" a process risks undermining the early resolution of disputes and the cost savings associated with such resolutions.

- Fifth, further guidance on the factors to be taken into account by the CAT chairman in deciding whether to allocate a case to the fast track would be needed, particularly given the risk of such a proposal leading to more vexatious claims being brought before the CAT and in light of the suggestion that the chairman's decision would not be appealable by either party.[2]

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

Any new SME fast track route, if introduced, should be used primarily for non-monetary resolutions such as injunctions: the CAT's strong case management process should allow appropriate cases to be processed more rapidly in this regard.

It is LBG's view that the proposed costs award cap of £25,000 is far too low for competition law cases, particularly regarding cases which involve complex infringement allegations, complex facts or novel areas of competition law. In practice, this may result in defendants agreeing to settle cases allocated to the fast track route, even when they consider they have a good defence to the claim; this is due to the risk of being unable to recover a significant proportion of their legal costs even if they successfully defend themselves against the claim. This would lead to a distortion of the process and introduce some of the disadvantages of the US system as highlighted by BIS. If a cap is to be introduced, it will be important to ensure that it is appropriately counterbalanced by extremely tight control of unmeritorious or vexatious claims. In particular there should be an effective possibility of striking out such claims with the CAT being granted greater flexibility to determine the appropriate level of any cap in a particular case subject to a higher maximum level. LBG also suggests that any decision regarding the level of any cost cap taken by the CAT should be taken when the CAT has had an opportunity to consider the merits of the case, rather than at the outset of proceedings.

[2] See paragraph 4.30 of the Consultation Document.

Paragraph 4.28 of the Consultation Document proposes that the CAT should have "a discretion as to waiver or limitation of any obligation on the part of the claimant SME to provide a cross-undertaking for any damage that might be suffered by the defendant (should it transpire that the interim order was inappropriate in the circumstances)". This would seem to be a departure from the usual approach under Part 25 of the Civil Procedures Rules ("**CPR**"). Whilst under Part 25 the court has discretion not to order a cross-undertaking, the case law makes clear that it would have to be in the most extraordinary circumstances for a court to exercise this discretion not to order a cross-undertaking. To set up a route to obtaining injunctions which is different from the CPR would be undesirable and LBG questions why a respondent should bear the consequences of an "inappropriate" order. The purpose of the cross-undertaking is to protect respondents from potential injustice and to emphasise to claimants the seriousness of the remedy sought.

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

LBG notes that this proposal is targeted at helping SMEs tackle anti-competitive behaviour. However, LBG considers that this proposal is contrary to the fundamental principle that a claimant has to establish its loss. The shifting of the burden of proof onto the defendant by introducing a presumption of loss into cartel cases is not an appropriate or proportionate measure of achieving these benefits for SMEs.

LBG would highlight the following concerns in this regard:

- First, the proposal that the presumption could be rebutted does not justify the disproportionate shifting of the burden of proof on to the defendant;
- Second, imposing such a presumption would ignore the possibility that the infringing conduct may have had no impact at all on prices or that any impact may differ between different customers or products;
- Third, it is not clear to LBG that a presumption that prices will usually rise by around 20% where a *price-fixing* cartel is in operation would also be an appropriate test for determining loss resulting from other forms of cartel (such as a market sharing agreement, information exchange, or output restricting cartel);
- Fourth, LBG disagrees which the Consultation Document's claim that a 20% loss presumption would reduce the costly and time consuming process

[3] This is because, in practice, the 20% figure will not provide an accurate reflection of any actual damage caused, resulting in the defendant having to assemble detailed economic evidence in any case, which the claimant is also likely to want to respond to with its own economic analysis;

- Fifth, in LBG's view it would encourage spurious claims.

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?

LBG agrees that the passing-on defence has the potential to play a significant role in private actions in competition law, the key principle in this regard being that no unjust enrichment should be awarded to those who have not suffered loss. Although LBG agrees with the principle, it shares the Government's view that there is no need for specific legislation to address the details of how this issue is assessed, especially given how complex passing-on analysis can be. Rather, the CAT (and the courts) should simply endeavour to work out as accurately as possible who has suffered what loss, and damages should then be awarded accordingly, in accordance with the general principle under English law, and under competition law in the UK specifically, that damages should be compensatory and not punitive.

LBG agrees that, should the proposals in relation to collective actions be taken forward, further consideration should be given to judicial mechanisms for consolidation of cases and apportionment of damages between direct and indirect purchasers.

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

LBG notes the Government's proposals to extend and strengthen the collective action regime. Although LBG notes the general consensus to avoid the excessive collective action claims culture of US system, LBG is still concerned that extending the collective action regime (for example, by introducing an opt-out collective actions regime) may open the flood gates for increased unmeritorious and costly claims brought by private bodies such as claims management companies.

[3] See paragraph 4.41 of the Consultation Document.

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

LBG notes the potential benefits of the proposal to extend collective actions to stand-alone as well as follow-on cases and agrees that extending collective actions to stand-alone cases (as long as these are not on an opt-out basis) has the potential to aid deterrence and reduce the amount of anti-competitive behaviour in the economy by tackling cases which are unlikely to be taken up by the competition authorities on prioritisation grounds.

As recognised in the Consultation Document, there is an increased risk that extending collective actions to stand-alone cases could result in spurious cases or "fishing expeditions", where a case is brought to try to pressure a company to settle.[4] An appropriate certification process, therefore, should be introduced for stand-alone collective actions to minimise the increased risk of vexatious or unmeritorious claims being made.

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 regard to opt-out proposals, in principle, a properly managed opt-out collective actions regime might deliver redress to the greatest number of consumers and businesses who have suffered loss caused by an infringement of competition law, particularly given the relatively small individual loss suffered in many cases. However LBG does have material concerns. As explained above, an opt-out regime may open the flood gates for increased unmeritorious and costly claims brought by private bodies such as claims management companies, as has occurred in the US

We consider that the following are important safeguards which should be features of any significant extension of existing collective redress procedures in order to discourage abusive or misguided litigation:

- opt-in procedures only should be allowed and all individual claimants participating in a collective process must be specifically identified. They must have expressly

[4] See paragraph 5.11 of the Consultation Document.

agreed to join the collective procedure either at its commencement or within a short but reasonable time limit;

- there should be a preliminary certification hearing, prior to the commencement of any collective process, to certify that the proceeding can go ahead. This certification hearing should include a number of criteria among which must be proportionality and a determination of the merit of the claims (on an individual and collective basis). The hearing must also verify that the claims and claimants are sufficiently homogeneous for them to be handled in a single collective mechanism;

- unmeritorious claims should be filtered out at the outset by reviewing, so far as possible, the merits of the case and by verifying that every claimant that is party to, or represented in the collective action has a “prima facie” legitimate individual claim;

- the “loser-pays” rule should apply to any judicial process and claimants must have the resources to comply with this rule if they lose their case;

- organisations representing claimants and/or lawyers acting either for claimants or for such representative bodies must not have a financial or any other beneficial interest in the outcome of the action beyond recovery of their direct legal costs or their normal legal fees as the case may be;;

- if third party funding is permitted, it must be strictly controlled by means of statutory regulation to ensure in particular that undertakings providing third party funding: (i) are registered with, and subject to the supervision of, the financial service authority of the relevant Member State; (ii) have no means to control or influence the conduct or settlement of proceedings; and (iii) only receive fees or profits that have been reviewed by the court and found to be reasonable and not liable to give rise to abusive claims. In addition, any costs associated with third party funding should be borne by the party entering into that arrangement and must not be recoverable from the other side;

- if claimants are represented by any representative organisation, that organisation must: (i) be officially designated in advance by the government of the Member State in which it is established to bring representative actions; (ii) be certified by an independent body against strict objective criteria set by the law in order to ensure that they are independent, impartial, competent and have the resources

- any compensation awarded must cover only actual loss or damage proven to have been suffered (including loss of profit and interests). Any type of punitive or multiple damages (including any type of uplift in damages for whatever reason) must not be permitted.

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

If the collective actions regime is ultimately extended, LBG would welcome all six of the conditions set out in paragraph A3 of the Annex A to Consultation Document to be included in the preliminary certification process. In particular, LBG strongly supports the inclusion of a preliminary merits test at the certification stage to minimise the risk of unmeritorious claims (and the associated costs for the defendant) arising.

However, further clarification is required with regard to a few of the Annex A conditions:

- with respect to the proposed requirement that "the individual or body bringing the case is an adequate ... or a suitable representative of the claimants' interests", LBG supports the proposal that collective actions should only be permitted to be brought by those who have suffered harm or bodies which are genuinely representative of those who have suffered harm such as a trade association or consumer group, rather than by legal firms or third party funders (as suggested in paragraph 5.53 of the Consultation Document); and

- with respect to the condition that "a collective action should be the most suitable means of resolving the common issues", written guidance should be prepared setting out how the CAT would determine this question.

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

LBG agrees that treble or other punitive damages should continue to be prohibited in collective actions in the UK for the same reasons set out at paragraphs A6 and A7 of the Consultation Document. LBG believes that damages in competition law cases should remain limited to compensatory damages. In follow-on cases in particular, there is no justification for awarding a punitive element of damages, as the infringing undertaking has already been "punished" by the fine imposed by the relevant competition authority.

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

LBG does not see any reason why the loser-pays rule should be dropped in the cases of collective actions. The loser-pays rule encourages only claims in which the claimant thinks they have a reasonable chance of winning and dropping this rule could lead to a significant increase in vexatious claims being brought. Although the certification processes discussed above should prevent many of such vexatious claims from proceeding, accessing the merit of these claims during the certification processes would be an inefficient use of resources when they can easily be discouraged through maintaining the loser-pays rule.

Yours sincerely

Paolo Palmigiano
Head of Competition Law, Group Legal
Lloyds Banking Group plc

London Solicitors Litigation Association

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
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Tel: 0207 215 6982
Fax: 0207 215 0235
Email : competition.private.actions@bis.gsi.gov.uk

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

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

Consultation questions

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

Yes. We consider that the expertise available in the CAT is under-utilised, and that amending Section 16 in the manner proposed will rightly place the CAT in a more central role in resolving competition disputes.

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

Yes. The CAT is adept at assessing liability for breach of competition law. There is no reason, for this purpose, to distinguish between stand-alone and follow-on actions.

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

Yes, but only on the basis that the threshold for granting injunctions is not lowered from that currently adopted by the Courts.

The reason for this is that the Courts are, quite correctly, willing to grant injunctions only where strict criterion are satisfied, for example that damages will not be an appropriate remedy. Those criterion have been adopted by the Courts, over many years, in recognition of the fact that injunctions are obtrusive and a restraint on the normal operation of business. Although we support the vesting of injunctive powers in the CAT, those powers should not be exercised differently to the equivalent powers possessed by the Courts.

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

We have concerns about vesting powers in the CAT to grant swift interim injunctions to claimants. Whilst it is important that SMEs (whom we agree are perhaps more vulnerable to anti-competitive behaviour) have access to justice, safeguards must exist to ensure that a fast track route cannot be abused by SMEs to bring unmeritorious claims.

We consider that the CAT should have greater discretion to deal with cases brought by SMEs. We would support the CAT making decisions, where appropriate in individual cases, to cap costs. We do not agree that the OFT or CAT should write to the alleged infringer at the beginning of the fast track procedure, for the reasons set out in the consultation paper.

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

We support costs thresholds in appropriate cases. We consider that damage capping presents real practical difficulties, as the appropriate maximum damages award will depend entirely on the facts of each individual case.

We have discussed our views on injunctive relief above.

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

We are of the view that the measures proposed by the Government are sufficient to enable SMEs to bring competition damages actions.

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 consider that a rebuttable presumption is unsuitable for two reasons. The first reason is that the Courts are already adept at adjudicating on issues of loss: we do not see any need to alter the approach. The second reason, related to the first, is that we anticipate a rebuttable presumption may itself add complexity to damages actions, as questions as to the effect and parameters of the presumption are highly likely to themselves be the source of argument and litigation.

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

We do not consider that there is a case for directly addressing the passing-on defence in legislation. We believe that existing principles of English law adequately address this issue. It is for an individual claimant to establish loss. If a claimant has not suffered loss, or has passed that loss on, then that claimant should not in effect be compensated for a loss it has not suffered.

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.

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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.

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

Again, whilst we do not comment on the need for an expanded collective actions regime, if one is introduced, restrictions of the type postulated will be necessary. The need to create such restrictions highlights why standing should not be extended to businesses capable amongst themselves of bringing about a concerted practice contrary to the competition rules.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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.

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

Yes. We consider policy objectives relating to punishment should be addressed through public enforcement.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

It seems to us inevitable, in view of the forthcoming abolition of recoverability of premiums for After The Event insurance, that if collective actions of the type contemplated are introduced, they would require the involvement of litigation funders on the side of claimants. We do not object to that, but note that both claimants and defendants need protection against funders attempting to avoid liability for a successful defendant's costs on the basis that the funder was misled by the claimants.

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?

As to (a), we consider that this is a matter for the Court or CAT hearing a particular case. Both have wide powers to deal with costs. For similar reasons outlined above in relation to the loser-pays rule, we do not support the introduction of effectively risk-free litigation (even save in relation to fraud) by the introduction of qualified one-way costs shifting.

As to (b), we do not support this. The damages fund itself should comprise only the compensation sums payable to victims. Claimants who pursue unfounded claims should be at risk of paying the defendants' costs, in the same way that defendants who resist settling good claims should be at risk of paying the claimants' costs.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

We suggest that the issue as to whether there should be any prohibition or limitation on contingency fees in collective action cases should await the outcome of the current Civil Justice Council review of whether there should be caps on recovery of contingency fees in large cases.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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?

If sums are to be paid to a single specified body, then the Access to Justice Foundation does appear to be an appropriate 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?

If opt-out collective actions are to be introduced (on which we have expressed no comment), we do not support a right to bring them vesting in the Competition Authority. The role and function of the Competition Authority should be kept separate and distinct from the pursuit of private actions for damages, which should be pursued privately (if at all).

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

Yes. As an organisation we are supportive of ADR, but we do not see any need to make it mandatory. We consider that forcing parties unwilling to engage in ADR, to engage nonetheless, is likely at least frequently to lead to unsuccessful ADR, and accordingly to wasted cost on both sides (or in multiparty litigation, on many sides).

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. We consider that pre-action protocols serve a useful purpose and should be used in all of the situations proposed. We note, however, that there are circumstances where adverse costs

consequences should not be visited on claimants who do not comply with the proposed protocol (for example claimants avoiding expiry of limitation, or where there is a race (or risk of a race) between parties to seize their preferred Court of jurisdiction – the well-known 'Italian torpedo' situation).

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

Yes. In view of the proposals at Question 1 above, we see benefit in aligning the rules on formal settlement procedures between the CAT and the High Court.

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?

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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?

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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, but only to a limited extent. In our view, compensation and punishment should remain ideologically distinct. However, we acknowledge that there should be some incentive for companies who have broken competition rules to engage voluntarily in redress schemes, and that small reductions in fines, in limited circumstances, may be appropriate to achieve that incentive.

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

Again, compensation and punishment are and should remain ideologically distinct, albeit that they achieve complementary objectives.

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?

We do agree that some leniency documents should be protected from disclosure. Leniency programmes clearly serve an important purpose and companies should be incentivised to seek leniency. We consider that leniency applicants should not be disadvantaged when compared to those who do not cooperate with competition authorities. We therefore support protecting documents that were created solely for the purpose of being granted immunity or a reduction in fines under an EU or

national leniency programme. We suggest that the documents protected from disclosure include Corporate Statements and responses to requests for information where that request was related to information first provided in a leniency statement. It follows that extracts from Corporate Statements should also be protected where they appear in Statements of Objections or in confidential versions of final decisions.

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 consider whistle-blowers should receive such protection. There are strong reasons to incentivise whistle-blowing. There is an obvious conflict where a whistle-blower is the only person against whom a private claimant can seek redress (most likely because the whistle-blower is the only solvent co-cartelist). In those circumstances, we propose that the whistle-blower's protection be removed only insofar as necessary to compensate the private claimant (and not to provide rights of contribution to co-cartelists).

We see the arguments in favour of protecting other leniency recipients as less strong. By definition, their value in terms of revealing cartels is less. The more co-cartelists who are protected from liability, the fewer who will remain available to meet damages awards. This may lead in some cases to either unsatisfied judgments, or Courts creating exceptions to the protection where necessary to achieve full payment on judgments to claimants. The more such exceptions that are created, the less the benefit to leniency recipients from the protection proposed.

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

We do not see a need for any such measures. Where necessary reforms are identified, these should be judged on their own merits, but at this stage we see no obvious risks to public enforcement that require immediate action. We consider that the Courts of England and Wales are competent to assess what weight should be accorded to rulings of national competition authorities (or review courts), and do not need to be prevented from taking decisions that are different to them.

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.

London Solicitors Litigation Assocation
24 July 2012

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Maclay Murray and Spens LLP

1. INTRODUCTION

1.1 Maclay Murray & Spens LLP ("**MMS**") welcomes the opportunity to comment on the Department for Business Innovation and Skills' (the "**BIS**") discussion paper on "Private Actions in Competition Law: A Consultation on Options for Reform" (the **"Discussion Paper"**). Our comments are based on our experience of acting both for companies involved in cartel investigations and for parties seeking redress for breaches of competition law, under the Treaty on the Functioning of the European Union and national competition rules. We begin by addressing a number of issues raised in the Discussion Paper but also consider some areas of concern not currently addressed.

2. GENERAL

2.1 In our view, increased use of private enforcement of competition law should aim to provide appropriate redress to those who can properly be shown to have suffered loss as a result of the conduct of infringing bodies. A secondary issue is strengthening future compliance and deterrence. The system should maintain balance between the rights of the claimant and those of the allegedly infringing party. As recognised by both the Office of Fair Trading (the "**OFT**") and the European Commission (the "**Commission**"), MMS would not support the creation of a "culture of litigation" but rather a "culture of compliance" with complementary public and private arms. The fines imposed by competition authorities seek to punish and deter anti-competitive conduct. Currently, victims of anti-competitive conduct face significant barriers when seeking compensation. For victims, the loss incurred needs to be large to merit the time and risk involved in seeking redress. The uncertainty in the law (and therefore the potential for procedural or preliminary skirmishes) is a substantial deterrent for victims seeking redress,

2.2 Private actions have steadily increased in recent years despite the many uncertainties faced by potential litigants. It may not be possible to address all of these uncertainties by domestic legislation, but the position could be clarified in respect of some. We address these at the end of this submission.

3. Question 1 – Should section 16 of the Enterprise Act 2002 be amended to enable the courts to transfer competition law cases to the CAT?

3.1 We agree that section 16 of the Enterprise Act 2002 be amended to allow the courts to transfer competition law cases to the Competition Appeal Tribunal (the "**CAT**"). One possible issue is that whereas the CAT requires that the claimants provide a statement of the amount claimed in

damages supported by evidence of loss[1], whereas the High Court requires the claimant to set out whether they expect to recover more than £25,000 (or more)[2]. The Court of Session rules are somewhere in between: they require that a claim demonstrate the 'reasonableness'[3] of averments or measurements relating to quantification. If a case were transferred from the High Court to the CAT, would the Competition Appeal Tribunal Rules 2003 (the "**CAT Rules"**) would apply from that stage, including the higher rule about quantification.

3.2 In our experience, the CAT is on the whole an effective forum in which to bring an action in relation to competition law, and we would support a proposal to allow courts to transfer competition law cases.

4. **Question 2 – Should the Competition Act be amended to allow the CAT to hear standalone cases as well as follow-on cases?**

4.1 We support the proposal to amend the Competition Act 1998 (the "**1998 Act**") to allow the CAT to hear both standalone and follow-on cases[4]. As matters stand, a case where the scope of the OFT or EU Decision is unclear, so that part of the claim may or may not be standalone (depending on the interpretation of the scope of the Decision), could be brought in the High Court only. Similarly, it is unsatisfactory that a UK implementing subsidiary of an addressee of a Decision cannot be sued in the CAT (and used as anchor defendant) as the law currently stands. Presumably the proposed change would alter this. Clearly the CAT would need additional capacity in order to deal with this change.

4.2 The different limitation periods which exist between the High Court and the CAT would need to be addressed by the legislation. Plainly the current CAT limitation does not work for a standalone case; but equally the High Court/Court of Session time limits often prove difficult to apply in competition cases since it is uncertain when awareness[5] or knowledge[6] arose.

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

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[1] Rule 32(3)(c) of the Competition Appeal Tribunal Rules 2003; see also *Albion Water Limited v Dwr Cymru Cyfyngedig* [2011] CAT 18, at para 7

[2] Civil Procedure Rules 1998, Practice Direction 7A, rule 3.6(1)

[3] Damages claimed must be reasonable and not excessive; see *MacArthur v Chief of Strathclyde Police* [1989] SLT 517

[4] The Government may also wish to consider the question of whether follow-on claims should be allowed against a company where an individual employed by that company has been convicted of the criminal cartel offence. In principle, where a competition authority has made findings of fact in respect of an infringement, it would seem to be correct that follow-on actions should be allowed irrespective of whether the findings were of a criminal or civil nature

[5] The test for Scotland involves the pursuer becoming 'aware' (Prescription and Limitation (Scotland) Act 1973, sections 2 and 5). The limitation period is 5 years of the 'appropriate date' which commences at the date on which the loss follows from the breach. There is no equivalent provision for 'concealment' in Scotland. However, s.11 (3) of the 1973 Act provides that time runs from when the pursuer first became aware of the damage. This would suggest that the awareness is triggered only when discovery of the harm occurs.

[6] In contrast, the test in England & Wales is 6 years of the 'date of knowledge' which is normally the date the claimant knows, or ought reasonably to have known, about the damage. In England, concealment becomes an issue in cases of fraud or deliberate concealment, in which case the 6-year period does not begin to run until the claimant discovers the fraud or concealment or could, with reasonable diligence, have discovered it (s.32 of the Limitation Act 1980).

5.1 We agree that if the CAT is to hear competition cases, and standalone claims particularly, it needs to have the ability to grant injunctions.

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

6.1 We recognise the real difficulties that SMEs face in challenging anti-competitive behaviour and agree that these proposals are worth exploring. However, as noted in the Discussion Paper, even simple competition cases are often complex so cost capping at low level (one which in practice a defendant will almost certainly exceed) is likely significantly to alter the dynamics of litigation. We would be concerned if this led to poorly argued cases, resulting in poor precedent. That said, provided the process is only applied in appropriate cases and is actively case managed we would support it. This procedure may, for example, work in an abuse case where the outcome sought is ongoing supply.

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?**

7.1 Introducing a rebuttable presumption of loss is superficially attractive as a means of overcoming the problem claimants face in obtaining documentary proof of loss. We think this should be limited to cases where there is a decision which finds there to have been an effect. This could also be limited only to the products which were the subject of the investigation and not any umbrella overcharge.

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?**

8.1 In our view, the issue is not so much the existence or otherwise of the passing-on defence but rather whether it is an issue of quantifying loss, which is a burden on the claimant, or a defence, which is a burden on the defendant (who typically lacks the information required for a rebuttal).

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

9.1 We support the proposals to allow collective actions to be brought on behalf of businesses and to allow collective actions to be brought in standalone as well as follow on cases. In both cases, this should be subject to an assessment on the merits of the action at certification.

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

10.1 Presumably these concerns might include that on disclosure information is disclosed to all claimants which might promote tacit collusion. We would have thought that provided the court is alive to this issue, it could actively ensure that the information is sufficiently historic and aggregated so as not to infringe competition law. The defendants in these circumstances would presumably take the point in order to resist disclosure. Another issue which might arise is information exchange about prices by claimants when quantifying loss. Here, claimants need to be alert to the risk of infringing the law, but typically the price data will be quite historic and unlikely to be competitively sensitive.

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

11.1 We do not support any proposal for punitive damages in collective actions outside the rules established by the CAT (in *2 Travel*[7]) and the High Court (in *Devenish*[8]*,* accepted in *2 Travel*). A fine imposed by the Commission or national competition authority is intended to punish and deter, whereas a damages claim is for redress, except in exceptional circumstances. Exemplary damages are not generally permitted under Scots law.

11.2 In standalone claims, however, we recognise that there has been no Commission or national competition authority punishment so it is less clear that a punitive element should be ruled out since there is no '*ne bis in idem*' concern. However, the claimant would be enriched, and the question arises whether this is appropriate.

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

12.1 We support the loser-pays rule in collective actions. It helps to discourage spurious claims. The discretionary cost power contained in Rule 55 of the CAT Rules already acts as an exception to the loser-pays rule in appropriate circumstances.

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

13.1 We do not see any reason to treat collective actions differently from existing cases which involve several claimants in a non-collective action. We agree there is a risk of encouraging a culture of litigation rather than compliance if contingency fees were to be permitted.

[7] 2 Travel Group plc v Cardiff City Transport Services Lt d [2012] CA T 19

[8] Devenish Nutrition Ltd v Sanofi-Aventis SA [2003] EWHC 2394 Ch. : the High Court declined to award exemplary damages in a follow-on case where the Commission had imposed a substantial fine (before reduction to zero under leniency)

14. **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?**

14.1 We favour an "opt-in" system rather than an "opt-out" one for private bodies. The development of private actions should not be made at the expense of individual freedom to take appropriate action, or not to do so, to redress a wrong. An opt-out system has the potential to increase the number of claims, but at a price. It is not necessarily a failure of the system that no action is taken with regard to a particular cartel. There are perhaps other cases which better merit the time and resources involved in their pursuit. In many cases, the damage suffered by a customer will be addressed through a price re-negotiation and customers should be free to use this means of redress if it is available to them.

14.2 This type of system would be anomalous in the Scottish legal system. Once this sort of process becomes available for one type of litigation, it is difficult to see how this can realistically be restricted from spreading to others (e.g. pensions litigation has been suggested as a further candidate for an opt-out approach).

15. **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?**

15.1 We take the view that in a compensatory regime, it is only those who have suffered harm and genuinely representative bodies that should have the ability to bring collective actions.

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

16.1 We support the proposal to encourage voluntary ADR in competition private actions in order to reduce costs and achieve early settlement. The costs exposure is normally sufficient incentive to seek a settlement if at all possible. The court can and should encourage ADR but a mandatory approach risks introducing unnecessary procedure and costs in cases where parties are unlikely to reach settlement.

17. **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?**

17.1 Complying with pre-action protocols can help to narrow the issues and could in some instances avoid litigation altogether. We support their introduction and use. However, we are also aware

that in multi-jurisdictional cartel cases, there is an incentive for claimants not to follow pre-action protocols in order to avoid the risk of "torpedo" actions in other jurisdictions.[9] That does not however mean that their use should not be encouraged generally.

18. **Question 26 – Should the CAT Rules governing formal settlement offers be amended?**

18.1 We support the proposal to align the CAT's formal settlement procedures with those of the High Court. We would welcome, in particular, mechanisms to grant consent orders to facilitate collective settlements.

19. **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?**

19.1 The proposal to introduce a power to order a company to implement a redress scheme is in our view preferable to an opt-out litigation system, but has a similar effect of making redress more straightforward for victims who have suffered a small loss. However, this scheme has the potential to deprive some parties of access to justice where the damages fund is insufficient to cover the entire claim.

19.2 We note that on one view the competition authority's role in ordering such a redress scheme is arguably at odds with the policy objectives behind the maintenance of a 10% turnover cap on financial penalties. Nevertheless overall we would support a scheme of this sort.

20. **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?**

20.1 We agree that this should be a factor taken into account. In practice, however, this would require the infringers to offer redress before being found liable. If there were an incentive in the form of a reduced fine, it would encourage infringers to propose an offer of redress.

21. **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?**

21.1 The approach adopted by Roth J in National Grid[10] seems to strike an appropriate balance between the protection of the leniency programme (and the consequent benefits to society of

[9] See for example *Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK* Ltd [2010] EWCA Civ 864

[10] *National Grid Electricity v ABB Ltd and Others* [2012] EWHC 869 (Ch)

increased and more effective law enforcement) and the rights of victims of cartels to pursue claims for redress. In any event, the key information for claimants in cartel damages actions are typically sales records, which will not generally be included in leniency applications. Most leniency information will be irrelevant to a damages claimant.

22. **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?**

22.1 The leniency programme has proved highly effective in incentivising companies to come forward; but the increase in private damages claims risks upsetting this delicate balance and removing the risk of joint and several liability from first in leniency applicants could help re-establish that balance. We recognise that it may make it somewhat more difficult for a claimant to obtain full redress from a single defendant, but it is uncommon to sue one cartel member only anyway.

22.2 Presumably, this protection would also apply where the first-in leniency applicant is brought into the litigation as a Part 20 contribution defendant or under Rule 38 of the CAT rules as an additional defendant.

Other Issues

23. **Limitation Periods**

23.1.1 Whilst the Court of Appeal's recent ruling in *Deutsche Bahn* has to a certain extent helped simplify the position for claimants in the CAT, they nevertheless have to work out (sometimes without much information) whether an appeal against a Decision is on substance or fine.

23.1.2 Further, there is some uncertainty regarding whether section 47A(3) of the 1998 Act trumps foreign limitation rules where foreign law is applicable law. The limitation period for claims under section 47A of the 1998 Act is set out in Section 31 of the CAT Rules and is a period of two years beginning with the relevant date (as defined in section 47A(7) and (8)). Section 47A(3) of the 1998 Act states that any other limitation rules are to be disregarded. It is clear that where the proper law applicable to the claim is English or Scots law, the two year limitation period in the CAT Rules is to be applied in place of the Limitation Act 1980 (or the Prescription and Limitation (Scotland) Act 1973). It may be that Parliament also intended s. 47A(3) of the 1998 Act to disapply the Foreign Limitation Periods Act 1984 in respect of such claim so that the CAT's 2 year rule applies here also.

23.1.3 Another area of uncertainty is with respect to the application of Section 32 of the Limitation Act 1980 in follow-on actions in the civil courts: when is a claimant to be regarded as having been able, with reasonable diligence, to acquire knowledge that facts relevant to the existence of cartel which had been deliberately concealed from him? It is unclear whether that deemed knowledge arises when a leniency applicant discloses the fact of its leniency application in its accounts, when the Decision is adopted or when the redacted Decision is published. The risk of time limit issue being taken against a claimant presents a significant disincentive for claimants bringing claims in the High Court.

23.2 **Interest**

23.2.1 There is uncertainty regarding whether compound interest may be claimed as part of the measure of the claimant's loss in private actions. Compound interest is commonly claimed on the basis of *Sempra Metals Limited v Inland Revenue Commissioners*[11]. Economists typically consider that compound interest is the proper measure of loss (the cost of being out of the money). Defendants commonly argue that only judgment interest (on a simple basis) is available. Currently, the CAT may order the defendant to pay interest on all or any part of the damages awarded. According to Rule 56 of the CAT Rules the rate of interest attached to a damages award shall, unless directed otherwise, not exceed the rate specified in any order by the court made pursuant to section 44 of the Administration of Justice Act 1970 (currently 8%). The CAT Rules are silent as to the power to award compound interest on the basis of *Sempra Metals.* Given the duration of many cartels, and the long period that typically elapses before a claim is made, the effect of interest is often very great and the difference between simple and compound interest very significant.

23.2.2 The current position is unsatisfactory since, in a negotiated settlement, interest is a significant element which affects the outcome of any dialogue.

23.3 **Conditional Fee Arrangements**

23.3.1 It is unclear whether recovery of the success fee and any ATE premium is permitted by the CAT Rules in respect of claims brought before the CAT in Scotland. Rule 65 of the CAT Rules provides that in proceedings before the CAT, the (English) Civil Procedure Rules on conditional fee arrangements apply. However, paragraph 17.9 of the CAT Guide to Procedure states that when the CAT is sitting as a tribunal in Scotland, the

[11] [2008] 1 AC 561

costs or expenses recoverable are those which are recoverable in Scotland. It is therefore unclear whether the relevant parts of the Civil Procedure Rules will apply to conditional fee arrangements when the CAT is sitting as a tribunal in Scotland, and it would be helpful for the current proposals to address this dual regime issue in more detail.

23.4 **Consequences for Publically Listed Companies**

23.4.1 There are additional considerations in respect of publically listed companies involved in private damages actions, particularly with respect to collective actions where there is considerable uncertainty regarding the level of liability. In designing any scheme for collective actions and/or redress schemes consideration should be given to the issues arising from this.

Maclay Murray & Spens LLP
3 August 2012

Midland Legal Support Trust

MLST

Midland Legal Support Trust

Our ref: RCG/ 15 January 2013

Dear Sirs

Response to Consultation

We write in response to the consultation on *Private Actions in Competition Law: A Consultation on Options for Reform*.

The Midland Legal Support Trust ("the MLST") is a charitable foundation which raises funds to support specialist legal advice provision in the Midlands. By "specialist" we mean those that take on serious and often lengthy social welfare cases and which will act at all levels of the system, including Courts and tribunals.

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 and the Chartered Institute of Legal Executives (CILEX). 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:

- MLST agree collective actions should be introduced and unclaimed sums should be paid to a single specified body;

- we agree access to justice is the area of public service most appropriate for gaining benefit from these funds; and

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- we agree 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 sincerely

Rachel Gwynne
Company Secretary
The Midland Legal Support Trust

THE MIDLAND LEGAL SUPPORT TRUST : DETAILED RESPONSE TO QUESTIONS 20 AND 21 OF THE PRIVATE ACTIONS IN COMPETITITON LAW – A CONSULTATION ON OPTIONS FOR REFORM.

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

The MLST 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; and

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

The MLST 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?

The MLST 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 the illegal anti-competitive activities 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 Midland 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.

Mihial Danov and Stephen Dnes (Brunel University)

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

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

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

This response form can be returned to:

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

Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.
Academic - Mihail Danov (Brunel University, UK)
Academic - Stephen Dnes (Brunel University, UK)

We are responding as individuals. Our joint response is influenced by our very recent research undertaken in the context of a research project funded by the European Commission Civil Justice Programme (JLS/2009/JCIV/AG/0034-30-CE-0350182/00-68). The research project, which also involves Prof. Dr. Becker (Kiel University, Germany) as a research partner, aims to consider whether the European Union should use the current EU private international law framework with regard to cross-border EU competition law claims brought by private parties, or rather whether the EU legislator should set up a Special Regulation dealing with EU competition law proceedings arising in the European context. As a part of this project, we have also conducted qualitative interviews which have allowed us to take into account the opinions of leading legal practitioners in England as well as the opinions of policy-makers in Brussels. The research methodology is explained in the attached/annexed article, in which we analyse the data collected by the UK research team. We should note that the views expressed are our own views, and are not the views of the European Commission.

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?

An amendment of Section 16 of the Enterprise Act which enables the courts to transfer competition law cases to the CAT should be encouraged. There is a strong case for the CAT to be a major venue for competition actions in the UK in order to improve the current institutional structure of antitrust enforcement. However, the enforcement pattern which is developing in Europe and England in particular must be considered in this context. Research shows that the limited private litigation which occurs normally proceeds as a follow-on action based on a public enforcement action.[1] In view of that, one might wonder how efficient it is to have one set of proceedings before the OFT (or the European Commission) in order to establish a breach of competition law, and another set of proceedings before the CAT in order for a claimant to prove that damage has been caused to him. Mechanisms allowing for some form of consolidation of the two sets of proceedings before the Competition Appeal Tribunal might be desirable to reconcile some of the conflicts identified between public and private enforcement in the current system, while retaining the desirable features of both systems of enforcement to the greatest possible extent. In other words, it would be crucial to devise an institutional architecture of competition law enforcement which encourages the claims, where there is really harm to the market and the process of competition, and creates safeguards against claims where companies might be using the system for a variety of purposes not necessarily beneficial to the market and the process of competition. The Competition Appeal Tribunal seems well placed to be a major venue for competition actions in the UK as well as to mediate in the resolution of the tensions between private and public enforcement. Such a proposal may be further justified if one considers that the OFT decisions finding an infringement may be appealed before the CAT (under Section 46 of the Competition Act 1998), so that the CAT would have a final say on this anyway. Of course, the picture would be complicated by the cross-border nature of many competition law infringements, in which damages would often be suffered by businesses and consumers in a number of jurisdictions.[2]

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

This should be an important step which must be taken if the Competition Appeal Tribunal (CAT) is to be established as a major venue for competition law actions in the UK. But, allowing the CAT to hear stand-alone actions, while being an important step, might not promote private-sector led challenges to anticompetitive behaviour unless the reform addresses a number of other institutional concerns. It should be noted that the primary means of enforcement in the EU (and England) has to date been through public enforcement, usually in the form of a fine after a complaint and investigation.[3] The investigations often involve the use of the European Commission's leniency policy, which is designed to provide incentives to whistleblowers by excusing them from some or all of the liability resulting from their conduct.[4] Given that the public enforcers are unlikely to have the resources to investigate all the complaints they

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[1] See Annex I – M, Danov and S. Dnes, 'Cross-border EU Competition law actions: New evidence from England and Wales' paper presented at the "Cross-border EU competition law actions" conference which was held at the London School of Economics on 20th April 2012, p. 31.
[2] See Annex I - Danov and Dnes (n. 1) p. 3.
[3] Commission (EC), 'Report on Competition Policy 2010,' COM (2011) 328, 14-18.
[4] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, O.J. 2006 C298/17.

receive, private litigation might therefore provide extra resources to assist enforcement, which at present seems underdeveloped.

Although our recent research appears to suggest that competition litigation is picking up in England, it seems to us that the increase is only in respect of follow-on actions which are dependent on a regulator's decision detecting an infringement.[5] A case that the limited private litigation will continue to proceed as a follow-on action can be easily made, if one takes account of the prevalent strategy employed by the victims of EU competition law infringements at the moment. Although research shows that going to the competition authority first would be a normal strategy at the moment, there are some concerns about the role of National Competition Authorities, in particular the Office of Fair Trading.[6] On the one hand, National Competition Authorities have access to public resources, making them attractive venues as far as a plaintiff needs not meet the full costs of his action.[7] On the other hand, the institutional limitations of NCAs are notorious (a complaint may not be taken up due to their limited resources; time; the inability of a regulator to award damages or injunctive relief).[8] However, the choice, whether to bring a stand-alone action before the courts or launch a complaint with the OFT, is only available to big companies with deep pockets.[9] Hence, the consumers and SMEs would rather rely on the regulator to look after their interests. The assertion that the weak or diffuse interests of such claimants are to be addressed by public enforcement may understate the political constraints faced by public enforcers,[10] which may dictate against the application of resources to smaller cases in regional markets where private litigation may have the greatest promise to assist consumers and SMEs.[11]

As already noted, a system in which limited private litigation proceeds as a follow-on action based on a public enforcement action may not be able to promote private-sector led competition law actions. The major problem appears to be linked to the current institutional structure of antitrust enforcement. As the Court noted n *Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Ltd.*[12], 'since a finding of infringement does not require proof that damage has in fact been caused to a rival undertaking, the fact that an infringement has been established does not show, as a necessary implication, that such damage has been caused.'[13] This re-affirms the need for setting up some mechanisms to allow for some form of consolidation of the two sets of proceedings before the CAT.[14] Indeed, the outcome in the

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[5] See Annex I - Danov and Dnes (n. 1) p. 27.
[6] See Annex I - Danov and Dnes (n. 1) p. 27.
[7] See Annex I - Danov and Dnes (n. 1) p. 27.
[8] See Annex I - Danov and Dnes (n. 1) p. 28.
[9] See Annex I - Danov and Dnes (n. 1) p. 29.
[10] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty O.J. 2004 C101/65 para8. Statistical analysis suggests that the politicisation of competition enforcement is a serious problem and may lead to the overrepresentation of politically mobile parties such as large businesses. For a summary of the literature from an American perspective, see W. Shughart and F. McChesney, "Public choice theory and antitrust policy," (2010) 142(3) *Public Choice* 385.
[11] E.g. *J.J. Burgess v OFT* [2005] CAT 25, concerning access to a single crematorium in Stevenage, Hertfordshire.
[12] [2011] EWCA Civ 2.
[13] ibid para. 130.
[14] Compare: Department for Business Innovation & Skills, *A Competition Regime for Growth: A Consultation on Options for Reform,* 16 March 2011 < http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-758-competition-regime-for-growth-impact-assessment.pdf > paras 241-243.

follow-on action would be highly dependent upon on the evidence gathered in the course of the proceedings establishing the infringement.[15]

Furthermore, the interaction of the European Commission, National Competition Authorities (NCAs) and national courts present problems which may need to be addressed by reforms increasing the role for private enforcement. At present, the interaction between the European Commission and NCAs is well-defined in Regulation 1/2003, which provides for a balance of power based on oversight and soft-law guidance. The relative jurisdictions of an NCA located in one Member State and a court located in another Member State are not defined by the Regulation, however.[16] Such a reform may be best undertaken at EU level, but would certainly be an important issue to consider in reforming the scope of that CAT's role.

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

The CAT should be allowed to grant injunctions. However, it should be re-iterated that allowing the CAT to grant injunctions, while being an important step, might not promote private-sector led challenges to anticompetitive behaviour unless the reform addresses the other concerns regarding the institutional structure of antitrust enforcement which appear to be shaping the parties' tactics at the moment.[17] Despite a recent and prominent case,[18] our research appears to indicate that stand-alone actions before English courts would be preferable only when someone needs a quick fix (or an injunction). It also appears that very few undertakings would bring such actions as the chances for success may be slim and the incurred costs substantial.[19] In other words, allowing the CAT to grant injunctions should be seen as one in a number of measures which are meant to encourage private antitrust enforcement in England and Wales.

At the same time, any move towards the grant of injunctions would need to consider the relative role of injunctions and damages. It is important not to lose sight of the status of competition law infringements as tort actions aimed primarily at compensation and, from an economic perspective, the internalisation of costs otherwise borne by society at large. The primary mechanism by which this occurs tends to be damages claims to "price" the externality, rather than injunctions, which may be at their most useful only under relatively exceptional circumstances. Ensuring optimal compensation and/or deterrence involves considering all of the penalties and remedies applied in the case, including damages awards, injunctive relief, and public fines, and the proper ambit of each. Reform to the CAT's ability to grant injunctions might need to address this interplay.

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[15] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] 5 CMLR 219; *National Grid Electricity Transmission PLC v ABB Ltd & Others* [2012] EWHC 869 (Ch). See also: Case: 1077/5/7/07, *Emerson Electric Co v. Mersen UK Portslade Limited (sued as LE Carbon (Great Britain) Limited* [2011] CAT 4.

[16] M. Danov, "EU Competition Law Enforcement: Is Brussels I suited to dealing with all the challenges?" (2012) 61 *ICLQ* 27.

[17] See Annex I - Danov and Dnes (n. 1) pp 21-26.

[18] *Purple Parking Ltd and Meteor Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987 (Ch).

[19] See Annex I - Danov and Dnes (n. 1) p 29.

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

Research shows that delaying would be quite a common strategy to be employed by a defendant in a cross-border EU competition law action.[20] A fast track system would be helpful to be used in such cases, but it would hardly address the major problems the SMEs are facing at the moment. It seems clear that the cost risks, which could be fuelled by the high level of uncertainty, would be an important factor to be considered in claims brought by consumers and SMEs who may prone to economise on the costs.[21] There is a high level of uncertainty[22] surrounding procedural points, especially concerning the level of national procedural autonomy and assessment of damages. If the uncertainly stems from the institutional structure of antitrust enforcement, which appears to be shaping the parties' tactics,[23] then, on the one hand, the fast track route would not be very helpful for SMEs as the difficult issues would have to be resolved over a shorter period of time and, as a result, the high litigation costs would be still incurred over this short period of time.[24] Indeed, SMEs may often be indirect purchasers, and, as a result, they may face even more evidential hurdles which means further uncertainty (i.e. delay and costs.) On the other hand, the high level of uncertainty may encourage large undertakings to bring such actions as a potential exposure to high costs by the defendants could drive their settlement behaviour. The costs would be less of an issue for large/sophisticated claimants who would rather gain some procedural (and/or substantive law) advantages by bringing their claim in one jurisdiction rather than another. To the extent that current problems derive from uncertainty, a fast track procedure might simply amplify current problems. In this way, there is a chance that it would only be helpful for large/sophisticated claimants with deep pockets. If consumers and SMEs are to benefit from a fast track system, other reforms may be needed to address uncertainty and the diffusion of claims. Although a fast track has the potential to speed up and strengthen redress, it might need to be combined with other measures, such as enabling direct purchasers to bring competition law actions as representatives for all the companies down the chain unless the concrete companies down the chain have explicitly opted out from such an action. Consolidating claims into a predictable and workable mechanism, making a fair estimation of damages in a reasonable period of time, may prove to be the fundamental point.

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

Cost thresholds. Research shows that costs can be very high in all litigation,[25] but may be especially high in competition law claims[26] where defendant companies tend to employ very

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[20] See Annex I - Danov and Dnes (n. 1) p 29.
[21] See more: Annex I - Danov and Dnes (n. 1) p 23. See also: C. F. Beckner III and A. Katz, "The Incentive Effects of Litigation Fee Shifting When Legal Standards Are Uncertain," (1995) 15 *International Review of Law and Economics* 205, 207.
[22] J. E. Calfee and R. Craswell, "Some effects of uncertainty on compliance with legal standards" (1984) 70 *Virginia Law Review* 965; R. Craswell and J. E. Calfree, "Deterrence and uncertain legal standards" (1986) 2 *Journal of Law, Economics and Organisation* 279; A. M. Polinsky and S. Shavell, "Legal error, litigation and the incentive to obey the law" (1989) 5 *Journal of Law, Economics and Organisation* 99.
[23] See Annex I - Danov and Dnes (n. 1) pp 21-26.
[24] Jon Lawrence – BIICL Fast Response.
[25] See C. Hodges, M. Tulibacka and S. Vogenauer, "The Oxford Study on Costs and Funding of Civil Litigation," in C. Hodges, M. Tulibacka and S. Vogenauer (eds.), *The Costs and Funding of Civil Litigation* (Hart Publishing, Oxford 2010) 139. For example, repayment to a consumer of €200 price paid for a product not delivered in the UK cost £105 in the study.

expensive law firms, and where economic experts are frequently employed at considerable expense.[27] The cost of competition law litigation may be fuelled by the high level of uncertainty which appears to be surrounding the competition law actions at the moment.[28] Given the high level of uncertainty surrounding procedural points, especially concerning the level of national procedural autonomy and assessment of damages, one should consider if there is a need for a more efficient enforcement structure being adopted across Europe which would hopefully minimise the claimants' costs. However, cost capping should not be recommended. It is submitted that increased private enforcement without attention to the role of cost-shifting in sifting out abusive claims could potentially lead to weak or unsubstantiated claims being brought in jurisdictions without appropriate safeguards in the hope of favourable settlements, a well-known strategic abuse of litigation.[29] As ever, it is important to keep in mind an optimal level of damages, derived from an optimal number of actions: the system should aim to encourage those genuinely harmed by anticompetitive conduct to bring an action, while discouraging claims aimed at overcompensation, or even rent-seeking (e.g. competitor complaints about efficient and innovative practices). Remedial rules have a key role to play in sifting these claims.

Damages capping. Research shows that the level of damages and their quantification is an important issue to be considered by a claimant in a cross-border EU competition law action.[30] Crucially, however, the procedural rules appear to be dominating substantive rules at the moment because the potential damages which could be awarded would often be pre-determined by the procedure rules.[31] In other words, the institutional structure of antitrust enforcement laying clear procedural rules should be at the heart of any reform which is meant to encourage private-led challenges of anti-competitive behaviour. Nevertheless, one should note that the level of damages and their quantification will always be an important issue, and their capping may have a chilling effect on competition litigation overall. Indeed, given that there appears to be an enforcement gap at the moment, one would have thought that there might be a case for incentivising claims by awarding punitive damages in appropriate cases, instead, providing that this does not lead to rent-seeking claims.

In this regard, an important question surrounding damages more generally is the compatibility of increased damages claims with public fines: it may be necessary to offset one against the other to a degree, to ensure that the optimal level of damages is not exceeded. Admittedly, this seems unlikely in the present system,[32] but there may be real scope for overcompensation or overdeterrence in the limited class of cases where public fines have been extremely large, such as the €1.06 billion fine imposed on Intel by the European Commission for discounting practices. It is important to distinguish these classes of cases, and the nature of the economic harm alleged, rather than to assume that all competition enforcement is

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[26] Case No: 1178/5/7/11, *2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited.* [2011] CAT 30, 14 October 2011 para. 17. See also: *Yeheshkel Arkin v Borchard Lines and Others* [2005] EWCA Civ 655.
[27] See Annex I - Danov and Dnes (n. 1) p 19.
[28] See Annex I - Danov and Dnes (n. 1) p 20.
[29] See Annex I - Danov and Dnes (n. 1) p 21. So-called 'nuisance' suits might be brought in some jurisdictions. See S. Shavel, "Suit, settlement and trial: A theoretic analysis under alternative methods for the allocation of legal cost" (1982) 11 *Journal of Legal Studies* 55, 72. See also: D. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press, 2011) p. 58. See more: K. G. Elzinga and W. C. Wood, "The Costs of the Legal System in Private Antitrust Enforcement" in in L. White (ed), *Private Antitrust Litigation, New Evidence, New Learning* (MIT Press, Cambridge, Mass 1988) 107, 134; E. A. Snyder and T. E. Kauper, "Misuse of the Antitrust Laws: The Competitor Plaintiff" (1991) 90 *Michigan Law Review* 551.
[30] Annex I - Danov and Dnes (n. 1) p 18.
[31] Annex I - Danov and Dnes (n. 1) p 18.
[32] See our response to question 30 below.

necessarily beneficial in all cases, and at all levels of damages: the picture is more subtle and complicated.

In cases such as *Intel*, there is the danger that excessive enforcement could chill innovation, and widespread follow on litigation has the potential to increase this risk. In many cases, the fines and damages claims might simply be passed on to consumers through higher prices: if they do not represent the efficient deterrence of genuinely anticompetitive conduct, they might amount simply to a tax on consumers, for the benefit of less efficient competitors. A damages cap has the potential to exclude rent-seeking damages claims to a degree. That said, many cartels are extremely damaging to consumer welfare, and the case for increased enforcement where the harm is clear would seem to be strong. In those cases, a damages cap seems less appropriate. In other words, it is hard to see why a cap set at a particular level would amount to the optimal level of damages in a given case.

It is an open question whether fines in cases such as *Intel*, and any associated follow on claims, represent efficient deterrence working in the interests of consumers, or overdeterrence working against them, and research shows that underdeterrence is more likely in the present system. However, unless careful attention is paid to the nature of the claims being encouraged, there is a real risk that the failures of the current system of public enforcement would simply be transplanted to private damages actions. Should this occur, the likely outcome would be that rent-seeking claims currently made to regulators via administrative complaints, possibly to the harm of consumers, are followed through with additional claims by similar parties before the courts.

This suggests that a rule on quantum, rather than being a cap, should look to the substantive nature of the harm asserted (sometimes called the "antitrust injury": e.g., is it a cartel with clear consumer harm resulting from increased market power, or a more speculative allegation of abuse of dominance against an efficient rival?). Rules on quantum could reflect the underlying economics in the case by compensating more where the economic harm from the practice is at its clearest (e.g., hardcore cartels). Such a rule would take some of the heat out of concerns that increased private enforcement could overcompensate or overdeter, which may lie at the root of much opposition to an expanded role for the courts.

Injunctive relieve. Research shows that there might be different tactics depending on whether it is abuse of a dominant position case or a cartel.[33] The courts may be the better place to go especially in abuse of a dominant position cases.[34] Given the time which a competition authority would need to proceed with a complaint, research indicates that someone who needs a quick fix (or an injunction) would be better off to go to the courts.[35] This can be further illustrated by the recent judgment of the High Court in *Purple Parking Ltd and Meteor Parking Ltd v Heathrow Airport Ltd*,[36] which addressed the use of injunctive relief in dominance cases. Despite this recent and prominent case, the prospects of success will be quite low: *Purple Parking* appears to be very much the exception, which is why we witness only a few dominant position cases.[37] As with damages claims, it may be argued that the institutional structure of antitrust enforcement should be changed if the legislator wants to promote such actions and deter weak or unsubstantiated claims being brought, safeguarding the right of fair trial to

[33] Annex I - Danov and Dnes (n. 1) p 29.
[34] ibid.
[35] ibid.
[36] *Purple Parking*, (n 18).
[37] Annex I - Danov and Dnes (n. 1) p 29.

defendants. In this regard, it should be noted that an injunction is potentially a very sweeping remedy, which could operate in effect to transfer investment or knowhow from one competitor to another. Thus the concerns that overly-broad remedies could serve rent-seeking claims may be even stronger where an injunction is awarded. As with the question of quantum, the appropriate use of injunctive relief depends critically on the strength of the theory of harm alleged, and the link between antitrust injury and remedy should be strictly observed.

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

A case for the existence of an enforcement gap could be made if one tries to identify the class of the parties bringing the actions in at the moment.[38] Research shows that it is normally the large companies that tend to bring EU competition law actions. A review of the reported cases would show that there appears to be only one claim which was brought on behalf of the consumers in the UK.[39] Few claims are brought by SMEs.[40] Several participants appear to indicate that there is an enforcement gap as there is no redress for consumers and SMEs who are not particularly active in bringing competition law actions at the moment.

An opt-out regime combined with a clear rule on standing might enable SME and consumer interests to be taken account of to a greater degree. Given that it is normally large companies that tend to bring EU competition law actions, one could argue that these direct purchasers should be entitled to bring the competition law actions as representatives for all the companies down the chain unless the concrete companies down the chain have explicitly opted out from such an action. (See our Answer to Question 8.) Such a regime would have addressed the pass-on defence problem which exists at the moment. However, it would depend crucially on rules on quantum to ensure that the level of damages thereby awarded is optimal. There might even be a deterrent element to the award, which would be likely to exceed the loss suffered by the direct purchaser unless all the downstream companies come forward to claim their share. Provided that the award is linked to a concrete and proven theory of economic harm, however, this result does not necessarily seem objectionable. Setting up an appropriate institutional structure of competition law enforcement would be crucial to discourage rent-seeking claims in this context.

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 – a rebuttable presumption of loss should not be introduced into cartel cases. It is a well-established principle that everyone must prove what he is claiming for. It should also be noted that recent attempts to introduce a presumption of loss by other competition law systems have not been well received. The figure often quoted for the presumption (20%) results from a paper that had noted shortcomings, is usually quoted out of context, and was probably never intended to become the basis of public policy in the first place. Additionally, such a presumption would strengthen further the position of only one group of claimants, namely large companies (e.g. large and direct purchasers). Research shows that such large companies are able to force

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[38] Annex I - Danov and Dnes (n. 1) pp 33-34.
[39] Case No: 1087/7/9/07, *The Consumer Association v JJB Sports PLC,* [2009] CAT 2, 30 January 2009.
[40] *Purple Parking,* (n 18). See also: Case No: 1088/5/7/07, *ME Burgess, JJ Burgess and SJ Burgess (trading as JJ Burgess & Sons) v W Austin & Sons (Stevenage) Limited and Harwood Park Crematorium Limited*, pending – registered 3 August 2008; Case No: 1178/5/7/11, *2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited.* [2011] CAT 30, 14 October 2011.

settlement even now as the potential exposure to high costs by the defendants could drive their settlement behaviour especially with their customers, and a presumption of relatively limited loss might further strengthen their position.[41] On the other hand, if the concern is about access of the SMEs and other claimants to evidence, then one should consider, if, in an appropriate case, the court hearing the claim (possibly the CAT following reforms) should not be allowed to request the OFT to take evidence for use in private EU competition law actions brought in England. In this way, the institutional advantages of a judicial process could be harnessed where appropriate, while also taking advantage of evidentiary powers held by competition authorities, which would seem desirable to the extent that claims are to be encouraged. Although it may be true that the CAs enjoy intrusive powers, these powers may be justified by the difficulties encountered in detecting cartels[42] and the importance for the EU internal market to provide for a system that ensures that competition is not distorted.[43] There seems to be a good balance between these powers and the EU interests that they protect on the one hand, and the EU policy to protect fundamental rights on the other.[44] It is well established that all NCAs must respect all procedural rights of the investigated undertakings in the context of proceedings under Articles 101 and 102 TFEU.[45] This has been clearly confirmed by the Court of Justice, which held that 'the rights of defence must be observed in administrative procedures which may lead to the imposition of penalties'.[46] Moreover, the rights of defence would be well protected if the evidence collected by a competition authority were used in judicial proceedings in which parties have the right to legal representation and enjoy legal professional privilege. Such evidence would be used together with any evidence collected in the course of the civil judicial proceedings in order for the court to determine whether there was infringing conduct and as to how the infringing conduct affected a concrete claimant.

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?

There is indeed a case for directly addressing the passing-on defence in legislation. Research shows that the availability of the passing on defence appears to be a very political and practical question which seemingly requires some attention by the legislator.[47] A single anti-competitive overcharge may ripple through a production chain, increasing prices of many products and affecting parties across the EU. Allowing each party to claim for the diffuse damage could therefore result in overcompensation, and might even compensate those who managed to pass on the overcharge to their purchasers with no substantial loss.[48] It has been noted by the

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[41] Annex I - Danov and Dnes (n. 1) p. 25.
[42] M. Araujo, 'The Respect of Fundamental Rights Within the European Network of Competition Authorities' in BE Hawk (ed), *International Antitrust Law and Policy: Fordham Corporate Law Institute: Annual Proceedings 2004* (Juris Publishing 2005) 511, 512.
[43] The TEU Protocol on the internal market and competition.
[44] Danov ICLQ (n. 16).
[45] WPJ Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing 2008) 20. See also Article 6 TEU; Case C–292/97 *Kjell Karlsson and Others* [2000] ECR I–2760, para 37.
[46] Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137, para 26. See also Case 322/81 *Michelin v Commission* [1983] ECR 3461, para 7.
[47] Annex I - Danov and Dnes (n. 1) p. 19.
[48] This is sometimes referred to as the 'Illinois Brick' problem after a major American case addressing it, *Illinois Brick Co. v Illinois*, 431 US 720 (1977). The problem is especially severe in the increasingly prominent case of the 'hub-and-spoke' conspiracy, in which several levels in a distribution chain are involved with the communication

Commission in the White Paper that 'infringers should be allowed to invoke the possibility that the overcharge might have been passed on. Indeed, to deny this defence could result in **unjust enrichment** of purchasers who passed on the overcharge and in undue **multiple compensation** for the illegal overcharge by the defendant.'[49] On the other hand, if a windfall (or unjust enrichment) results from the pass on defence not being available, it is hard to understand why the ***infringer*** is more deserving of this windfall than the direct purchaser who was buying the cartelised product.[50] The Commission itself has previously submitted that 'passing on does not necessarily result in the unjust enrichment of the claimant because it can equally result in a reduced volume of sales as the trader has to raise prices.'[51] In view of the foregoing, there is a case for directly addressing the passing-on defence in legislation. Substantive differences appear to be a key issue, not least because the EU courts have held such issues as for example the availability or non-availability of a pass on defence to be aspects of national procedural autonomy when they are probably best described as substantive.

Given that it is normally the large companies that tend to bring competition law actions, one should say that if the pass on defence were denied such direct purchaser may gain significant advantages by recovering damages for loss they would have passed down the distribution chain. On the other hand, if the pass through were available, then the ***infringer*** would not compensate the victims of the EU competition law infringement and would receive an windfall as not all indirect purchasers of the cartelised product would be seeking damages. The latter deduction is supported by research which shows that there is an enforcement gap at the moment.[52] The foregoing concerns would be addressed if the direct purchasers were allowed to bring opt-out competition law actions as representatives for all the indirect purchasers down the chain unless the concrete entities down the chain have explicitly opted out from such an action. Indeed, such direct purchasers would normally be large companies which will have the funds to bring the actions, and they would also have more information to prove that there was infringement/damage. Moreover, by being direct purchasers, such larger companies would be in position to distribute the unclaimed damages by making discounts which could easily passed through down the chain (i.e. they would increase their sales etc). However, any move towards an opt-out system would depend crucially on safeguards to ensure that the class is well informed, and compensation appropriately distributed. Additionally, if the direct purchaser made no move to bring the claim, or distribute the proceeds of any settlement, it would be important to preserve the ability of another party in the distribution chain to bring the consolidated claim on behalf of the class of claimants, possibly after consultation with the direct purchaser.

Realistically, some consolidation of otherwise diffuse claims via rules addressed at the passing on defence would be needed for them to be claimed. As noted above, whether an increased level of claims is desirable depends on a number of related issues, including

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required for a cartel. See O. Odudu, "Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion", (2011) 7(2) *Euro Comp J* 205.

[49] Commission (EC), 'White Paper on Damages actions for the breach of the EC antitrust rules', COM (2008) 165 para. 2.6 (emphasis in original).

[50] See M. Rush, *The Defence of Passing On* (Hart Publishing, Oxford 2006) 21. See more: O. Odudu and G. Virgo, "Remedies for Breach of Statutory Duty," (2009) 68 *Cambridge L J* 32 (discussing gain-based remedies).

[51] Commission Staff Working Paper, Annex to the Green Paper on Damages Actions for breach of the EC rules SEC(2005) 1732 para 169. The text is also cited in V. Milutinovic, 'Private Enforcement: Upcoming Issues' in G. Amato and C-D. Ehlermann (eds), *EC Competition Law: A Critical Assessment,* (Hart Publishing, Oxford 2007) 725, 744.

[52] Annex I - Danov and Dnes (n. 1) pp 33-34.

quantum and the nature of the economic injury in the case, which would need to be addressed in concert with passing on and/or an opt out procedure. An appropriate antitrust enforcement institutional architecture would be very important in this context.

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.

Research shows that there is an enforcement gap as there is no redress for consumers and SMEs who are not particularly active in bringing competition law actions at the moment.[53] A review of the reported cases would show that there appears to be only one claim which was brought on behalf of the consumers in the UK.[54] Few claims are brought by SMEs.[55] An opt-out regime would be welcome, provided that appropriate safeguards are in place. See our response to Q8 above.

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 certainly agree that "the current collective actions regime in competition law is inadequate in delivering restorative justice for consumers and small businesses." However, one could question whether consumers' actions should be the main concern here.[56] Businesses are often more directly affected by an anticompetitive practice than consumers, and will always have a central role in bringing claims. If competition law is adequately enforced and businesses, who are victims of competition law infringements, are compensated, then one would have thought that those benefits would be passed on to consumers.

It is important to keep in mind the underlying aim of competition law enforcement throughout the system as a whole. In recent decades, this has come to mean a focus on economic efficiency, rather than distributional concerns *per se*. It is important that this stance is maintained, as compensation for its own sake via competition law can amount to a costly form of protectionism of inefficient rivals, at the expense of consumers and growth. This means that it is central to demonstrate a relevant "antitrust injury," showing that the harm in the case is truly economically damaging (e.g. a hardcore cartel), rather than merely the operation of the competitive process, which quite naturally affects the fortunes of rivals from time to time.

A serious and noted shortcoming of many competition law systems, at one stage or another in their history, is that they have arguably focused too much on harm to competitors in certain cases, rather than harm to consumers, although this picture has changed in recent years and is necessarily a simplification. In the case of the European model, which relies more than others on competitor complaints to administrative enforcers, the interests of competitors may have been overstated at the expense of the interests of society at large. For example, a less efficient (but politically mobile) competitor might be able to portray a rival's efficiency as an attempt to dominate the market, and it has not always been clear that the regulator has been

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[53] Annex I - Danov and Dnes (n. 1) pp 33-34.
[54] *JJB Sports*, (n 39).
[55] *Purple Parking,* (n 18). See also: *Burgess,* (n 40); *Cardiff City Transport*, (n 40) (still pending – registered 18 January 2011).
[56] Annex I - Danov and Dnes (n. 1) p 33.

successful in screening these abuses, which harm consumers by attacking the very competition the laws are supposed to encourage.

Increased use of private enforcement represents a welcome shift in enforcement culture away from this model, as it may be less prone to this type of distortion. A judicial approach may be more objective, and can compensate parties actually harmed, unlike fines paid to the public purse (which may sometimes be passed on to consumers via price increases, perhaps harming the very parties a judicial approach would compensate). It would also foster economic growth if carefully applied, and would be less prone to delay, uncertainty, and politicisation. However, it would be crucial to ensure that private enforcement would not simply replicate the shortcomings experienced with public enforcement: unless care is taken, the courts might simply become another venue for rent-seeking competitor claims. For this reason, close attention would need to be paid to the nature of the injury in the case to sift genuinely anticompetitive conduct from the normal operation of the competitive process. It is not clear that any such filter currently exists under the EU rules as they stand, but a workable proxy would be a rule on quantum awarding more damages where the theory of harm is strongest, and less (or none) where it is weak.

These issues reflect a more fundamental institutional point. A central difficulty in the move towards increased private enforcement lies in the institutional stance of the EU competition rules themselves, which were primarily designed as broad empowerments for public regulators involving a considerable exercise of discretion, rather than as rules designed for adversarial litigation. In fact, the EU rules do not address head on the issue of "antitrust injury" to an appreciable extent, or related questions such as a concise and workable test for market power, even though these are crucial points for courts looking to distinguish pro- and anticompetitive conduct. The element of discretion the EU rules contain therefore introduces a risk that pro-competitive practices could be covered, unless rules are developed to filter the cases. As the EU law leaves considerable discretion as to what counts as anticompetitive conduct, however, it would appear to be open to the UK to articulate clearly what counts in the case of UK competition litigation, in line with global best practices. Indeed, the experience of other common law systems on these points would seem particularly relevant, especially where this experience reflects a mixture of adversarial and administrative approaches – not just the American experience, but also those of other relevant jurisdictions, notably Australia and Canada. In this regard, it should be noted that the position of a number of important EU institutions is to favour an element of "subsidiarity" between different civil justice systems, to reflect their diversity of backgrounds and approaches. The UK should not therefore be shy of limiting any arguably undesirable effects through appropriate rules, such as measures on remedies, to accommodate fully the change from a primarily administrative to a more mixed model of enforcement. In fact, this change would bring the UK closer to the model of competition litigation it founded, in cases such as the *Case of Monopolies*, which subsequently spread throughout the common law world and continues to operate, elsewhere, to this day.

The foregoing suggests that private enforcement in the UK should focus on incentivising a workable system to allow claimants to bring a consolidated action on the basis of deterring genuinely anticompetitive conduct. This may be preferable to focusing on compensation as an independent aim, which may lose sight of the type of antitrust injury it is appropriate to compensate. The key point is that increased enforcement could potentially harm or help consumers, depending on the effects on incentives and the nature of the interests served. Keeping to an optimal level of enforcement, in order to serve consumers, would also require some attention to the interplay between public and private sanctions, perhaps decreasing the role for public enforcement as private enforcement takes root. Thus collective actions for

competition law claims can be seen as a key development in the rebalancing of the competition law system away from a system that has not served a number of stakeholders, including consumers and innovative enterprises, particularly well.

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

Research shows that that businesses generally (encompassing large businesses and SMEs) are more active in bringing competition law actions than consumers.[57] One way forward is to devise a mechanism which allows for a representative action to be brought by direct purchasers on behalf of all the indirect purchasers down the chain. See our response to Q8 above.

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

We agree that any risk for such cases to be used as a vehicle for anti-competitive information sharing could be appropriately mitigated by the courts. The prospects of this may be somewhat limited, however, to the extent that most claims would occur between vertically related parties, who do not pose the same issues as horizontally related parties when it comes to information exchange.

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

Research shows that although competition litigation is picking up, follow-on actions outnumber stand-alone ones.[58] It also shows that, in the case of cross-border EU competition law actions (and possibly others), there is an enforcement gap at the moment.[59] Therefore, a case can be made to argue that stand-alone actions might provide extra resources to assist enforcement, which at present seems underdeveloped. In other words, we think that collective actions should be allowed and indeed encouraged in stand-alone as well as in follow-on cases, provided that the necessary safeguards are in place.

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.

In general, collective actions would allow for the consolidation of diffuse claims to make them realistically workable. This should be encouraged in principle where the claims are sufficiently strong, and appropriate safeguards are in place to ensure notification of interested parties and dispersion of compensation. As noted above, there is a strong argument that direct purchasers (or, in their absence, another designated representative) should allowed to bring opt-out competition law actions as representatives for all the indirect purchasers down the chain unless the concrete entities down the chain have explicitly opted out from such an action. However, it

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[57] Annex I - Danov and Dnes (n. 1) p 33.
[58] Annex I - Danov and Dnes (n. 1) p. 26.
[59] Annex I - Danov and Dnes (n. 1) p. 33-34. See also: P. Buccirossi, M. Carpagnano, L. Ciari and others, *Collective Redress in Antitrust* < http://www.europarl.europa.eu/document/activities/cont/201206/20120613ATT46782/20120613ATT46782EN.pdf > (last accessed 28 June 2012).

is hard to see why such a procedure should be reserved to the CAT's discretion. Many of the problems faced by consumers in bringing competition law claims, especially uncertainty, stem directly from the very high level of discretion involved in the system as it stands. Consumer interests might be better served by concrete rules and precedents on which meritorious claims can be brought, rather than by increasing the already large amount of discretion they face.

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

The list is adequate. However, given that fact that many competition law infringements could affect businesses and consumers in several Member States 'the granting of access to the courts in one State leads to denial of access in another State because of mechanical rules on *lis pendens* and related actions'.[60] In other words, if the opt-out regime were adopted in England, then the English collective redress proceedings might also bind members of the plaintiff class who were domiciled abroad and wished to sue the defendant at their home state, for example, on the basis of Art 16 of Brussels I. For example, a plaintiff class domiciled in Germany might well prefer to bring their collective redress action before the German courts.[61] Would a German court accept jurisdiction over a collective redress action brought by a plaintiff class who have neither opted out nor opted in to English proceedings, if England were to adopt the opt-out regime in respect of the class actions as recommended by the CJC? Would the Member State court's judgment rendered against the absent plaintiffs under the opt-out regime be recognised under Brussels I?[62] Cross-border implications of an opt-out regime might need to be very carefully considered in the context of ongoing reforms to the applicable private international law instruments at EU level.

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

It is generally accepted by the Court of Justice that it is possible for a Member State court to award exemplary or punitive damages.[63] In England, there are instances in which the plaintiff can recover not only the compensatory loss, which will put the injured party in the same position he would have been in had he not sustained the wrong,[64] but also exemplary damages.[65] Punitive damages would be available in England if the infringements of EU competition law was deliberate and carried out with full knowledge of the illegality of the actions leading to an important distortion of competition, which is of exclusive benefit to the infringers.[66] The OFT has submitted that doubling damages could be an appropriate starting point in cases

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[60] J Fawcett, 'The impact of Art 6(1) of the ECHR on private international law' (2007) 56 *ICLQ* 1, 7.

[61] M. Danov, 'Awarding exemplary (or punitive) antitrust damages in EC competition cases with an international element – the Rome II Regulation and the Commission's White Paper on damages' (2008) 29 *European Competition Law Review* 430. See also: M. Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Hart Publishing, Oxford 2010)

[62] M Danov, 'The Brussels I Regulation: cross-border collective redress proceedings and judgments' (2010) 6 *Journal of Private International Law* 359-393. See also: M. Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Hart Publishing, Oxford 2010).

[63] *Manfredi* (n 110) [93] and [99].

[64] *Livingston v Rawyards Coal Co* (1880) 5 App Cas 25, 39.

[65] *Rookes v Barnard* [1964] AC 1129; *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394; [2008] 2 WLR 637 (Ch) [18] [44] aff'd *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086; [2009] 3 WLR 198 (CA) (n 115) [143]. See also V Wilcox, 'Punitive damages in England' in H Koziol and V Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer, Vienna/New York, 2009) 7.

[66] *Devenish* (HC) (n 65) [44].

where an English court was considering an award of exemplary damages for breaches of competition law.[67] It has been submitted that:

> …Victims who claim damages in essence serve the social goal of deterrence. However, starting a lawsuit entails costs, which are privately borne. This might lead to too few lawsuits being brought. Increasing the expected damages of victims by awarding punitive damages may solve this problem.[68]

Therefore, there may be a case for awarding punitive damages in stand-alone actions.[69] In fact, a punitive or deterrent element is the only way to assist consumers who did not buy the product as a result of the overcharge, and who therefore lost the most (most claims for compensation come from parties who bought the product anyway, and therefore had consumer surplus). Of course, such a proposal would be controversial, and has the potential to increase incentives for unmeritorious claims, as well as meritorious ones. For this reason, a focus on the nature of the antitrust injury involved would be crucial. Where the economic damage is particularly clear, there would seem to be little to object to in incentivising a claimant, or class of claimants, to bring their case. If the claim amounts to protectionism of a less efficient rival, however, punitive damages could also incentivise these undesirable claims. There may be scope, therefore, to apply punitive damages only in those cases where the harm is clearest (generally speaking, hardcore cartels).

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

As already noted,[70] increased private enforcement without attention to the role of cost-shifting in sifting out abusive claims could potentially lead to weak or unsubstantiated claims being brought in jurisdictions without appropriate safeguards in the hope of favourable settlements, a well-known strategic abuse of litigation.[71]

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?

I could not think of such circumstances.

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

Contingency fees could be useful as the costs of the claimant would be met by the lawyer. The concern here appears to be primarily that contingency fees encourage unmeritorious claims. However, that concern might be better addressed by the substantive law governing the claims, rather than procedural rules relating to costs. As such, provided that the competition law rules only encourage meritorious claims, there would seem to be no objection to increasing the flows of capital available to fund claims.

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[67] Office of Fair Trading, *Response to the European Commission's Green Paper, Damages actions for breach of the EC antitrust rules* (2006) OFT 844.
[68] LT Visscher, 'Economic analysis of punitive damages' in Koziol and Wilcox (n 199) 220, 224–25.
[69] For the cross-border implications of such actions, see Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Hart Publishing, Oxford 2010).
[70] See our response to question 5 above.
[71] Annex I - Danov and Dnes (n. 1) p 21.

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

The unclaimed sums should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit and the interests of class members. If a cartelised product were sold at an inflated price, then it would be fair for any unclaimed sums to be circulated back into the market to finance a discount on the purchase of the product in question. For example, the cartelist could be ordered to finance discounted sales for a limited time (with due regard to the prospect for competitive harm from predatory pricing that might arguably be involved). This approach also takes account of the fact that the biggest losers are those who could not buy the product after its price was inflated, rather than those claiming compensation, who bought the product regardless of the overcharge. Businesses down the chain would also benefit as they would potentially generate higher sales etc.

By comparison, payment to a single specified body may be less appealing. Although the body involved is likely to be charitable, and have a public interest focus, it is not immediately clear that such a body would accurately represent the preferences of the consumers who were harmed.

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

In our view, it would not be the most appropriate recipient. The most appropriate recipients would be the direct and indirect purchasers of the cartelised product (including the potential purchasers that stopped buying the product once the price was inflated). Even if they have not claimed, it is still possible to devise remedies tailored to their interests, rather than a payment into a general fund.

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?

As noted above, private actors and direct purchasers in particular may be better placed to bring the action as they would have more information about the market structure and conditions as well as the means to meet the litigation costs. Therefore, we think that the ability to bring opt-out collective actions for breaches of competition law should be granted to private bodies.

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

Rules on standing should clearly be used to locate concrete claimants with a legitimate claim (i.e., direct purchasers suffering from a hardcore cartel or similar clear example of competitive abuse). It is not clear that there is any particular need to limit whom the purchaser may use as a representative, or whom they may enter into funding agreements with, in bringing their claim. So long as the claimant meets the standing rule, the decision on how to run the case, and finance it, would seem to be properly left to the claimant. Certainly the experience with

privileging certain bodies to bring collective actions has been somewhat mixed (e.g. the *Replica Football Shirts* litigation).

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

Research indicates that ADR when used on a voluntary basis could be an appropriate and helpful mechanism to be used for settlement of some cross-border EU competition law actions and follow on actions in particular.[72] However, one might wonder whether ADR is likely to develop before court actions themselves develop further from their very low base. In view of this, it appears that encouraging the competition law action is the pre-requisite for promoting ADR, which could be a good solution once the body of case law has been developed.

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?

A pre-action protocol can be a useful tool to encourage the early settlement of claims, and might helpfully be introduced in all cases in the CAT. However, the protocol would need to be reasonably limited in scope to avoid placing unnecessary additional burdens onto claimants and defendants.

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

Overall, settlement has functioned reasonably well throughout competition litigation, and plays a very large role in providing the small measure of redress taking place at present. However, there is a lack of information on whether these settlements are taking place at the optimal level, or may be over or underestimating damages on the basis of shortcomings in the legal system (for example, if it is difficult to get to court because of the operation of a particular rule, settlements might systematically undervalue damage). There may be a case to require settlements offered at an advanced stage of formal proceedings to be published to improve flows of information, and to encourage the consolidation of diffuse claims. However, the potential chilling impact on settlements would need to be carefully considered.

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?

We do agree with that, but, as already noted above, there would be some complex issues arising in a cross-border context as related actions may brought by (or on behalf of) other victims of an EU competition law infringement in other Member States.

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[72] Annex I - Danov and Dnes (n. 1) pp 35-36.

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?

This would be very controversial unless the power to establish a competition law infringement was conferred from the administrative completion authority to the CAT. While the CAT proceedings would presuppose respect of due process, an NCA would apply administrative procedure rules that could potentially raise concerns as to the undertaking's right to a fair trial and hearing.[73] Furthermore, as already noted, one might wonder how efficient is to have one set of proceedings before the OFT (or the European Commission) in order to establish a breach of competition law, and another set of proceedings before the CAT in order for a claimant to prove that damage has been caused to him. Mechanisms allowing for some form of consolidation of the two sets of proceedings before the Competition Appeal Tribunal might be desirable to reconcile some of the conflicts identified between public and private enforcement in the current system, while retaining the desirable features of both systems of enforcement to the greatest possible extent.

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?

The fine is meant to punish and deter the infringer. The redress is meant to compensate the victims of the competition law infringement. To date, these have been altogether different goals of the enforcement policy. However, the total level of the damages and fines paid would determine the incentives faced by infringing parties. If competition policy is to encourage growth by optimal deterrence of the most harmful infringements, it is important that these incentives are maintained close to an optimal level (neither too high nor too low). If damages claims became larger, fines may need to be adjusted. Although with the current state of competition law enforcement, this point may be some way off, it should be noted there is no scope for offsetting fines and damages in the current system. A public enforcement action would normally precede a damages action. The level of damages would be far from certain at the stage when an authority decides on the level of fines. Similarly, in a follow-on action, the court is supposed to award damages which would compensate the victim/s irrespective of the fine imposed by the competition authority. This shows once again that it is inefficient to have one set of proceedings before the OFT in order to establish a breach of competition law, and another set of proceedings before the CAT in order for a claimant to prove that damage has been caused to him. In other words, there is limited scope for consolidation of the fines and the damages in the current system, and consolidating both procedures before the CAT might be a good way to achieve this.

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[73] IS Forrester, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) 34 EL Rev 817; J Killick and P Berghe, 'This is Not the Time to Be Tinkering with Regulation 1/2003—It is Time for Fundamental Reform—Europe Should Have Change We Can Believe in' (2010) Competition Law Review 259. The due process issue may receive renewed attention after the entry into force of the Lisbon Treaty. See Article 6(1) TEU. See also Article 6(1) ECHR and Article 47(2) of the Charter of Fundamental Rights of the European Union [2000] OJ C364/1. See further, J Kuhling, 'Fundamental Rights' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2010) 479–514; P Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP, 2010) 193–245.

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

Research[74] shows that the current administrative solutions appear at present to have failed – there are concerns with the cost and delay of cumbersome administrative systems. There seems to be an enforcement gap as the public enforcers across Europe are unlikely to have the resources to investigate all the complaints they receive; private litigation might therefore provide extra resources to assist enforcement, which at present seems underdeveloped. Indeed, 'the fact that a complainant can secure the protection of his rights by an action before a national court'[75] may be factored in by the public enforcers when deciding if they would take a complaint or not. In other words, if the private enforcement system, which is in its nascent form in Europe, is not adequately reformed to safeguard the rights of individuals derived from Articles 101 and 102, then there would be an enforcement gap.[76] The most effective way to improve antitrust enforcement is likely to involve elements of both public and private enforcement, and it is difficult to argue that private litigation has no role to play.[77]

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?

The essential role of leniency applications in the initial detection of cartels suggests that an important issue which must be considered relates to the incentives created by the leniency programme, and the possible friction between the incentives created by leniency programmes and damages actions, as widely discussed at present.[78] Research shows leniency programmes create incentives for the infringing undertakings to submit leniency applications and that the possible friction between leniency programmes and damages actions may be overstated to a degree.[79] One should note, however, that there may be a strategic use of leniency application. Indeed, creating more incentives for leniency applicant may result in more non-genuine leniency applications being made. We think that more evidence should be gathered before protecting from disclosure any leniency documents. If we witness a strategic use of leniency applications, then the incentives to submit leniency applications would appear to be so strong that there is little prospect for private damages claims materially to diminish them. Far from civil damages undermining the incentives, parties appear to be willing to pretend to have breached competition law simply to make strategic use of the leniency programme, even though this exposes them to the risk of potential civil liability.[80]

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[74] Annex I - Danov and Dnes (n. 1) p 35.
[75] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty O.J. 2004 C101/65 para. 17.
[76] Compare: Notice on the handling of complaints, (n 75) para.18.
[77] Annex I - Danov and Dnes (n. 1) p 35.
[78] J. Almunia, 'Policy Public enforcement and private damages actions in antitrust' (European Parliament, ECON Committee Brussels, 22 September 2011) at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/598&format=PDF&aged=0&language=EN&guiLanguage=en (last accessed 18 Jan. 2012). See also: J. T. Rosch, "Does the EU Need a System of Private Competition Remedies to Supplement Public Law Enforcement?" (Remarks at the 2011 LIDC Congress, Christ Church, Oxford, England, September 23, 2011), 32 at http://www.ftc.gov/speeches/rosch/110923privatecomp.pdf (last accessed 21 Mar. 2012).
[79] Compare Resolution by Heads of European Competition Authorities < http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf >.
[80] Annex I - Danov and Dnes (n. 1) p 31.

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?

The first question which needs to be answered is whether the principle of joint and several liability, which is discussed in the Green and White Paper on Antitrust Damages Actions, is derived from European law or from domestic law.[81] If it is derived from EU law, then the domestic legislator would not be in position to change it. In any case, as already noted, it would be a relatively safe assumption that if the leniency applicants receive even more incentives, then we could witness even more often a strategic use of leniency programmes. One would have thought that the leniency applications should be only a complimentary tool (by no means the main tool) for anti-cartel enforcement. Additionally, there is significant scope for undercompensation if leniency applicants were to escape civil liability as well.

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.

It would be best if one considers how to make the enforcement regime more effective. The current pattern might suggest that there could be an enforcement gap as the public enforcers across Europe are unlikely to have the resources to investigate all the complaints they receive; private litigation might therefore provide extra resources to assist enforcement, which at present seems underdeveloped. As already noted, we think that the real concern is that the pattern which is developing in Europe and England in particular appears to indicate that the limited private litigation which occurs normally proceeds as a follow-on action based on a public enforcement action. As illustrated above, it may be far from efficient to have one set of proceedings before an NCA in order to establish a breach of competition law, and another set of proceedings before Member State courts in order for a claimant to prove that damage has been caused to him. Mechanisms allowing for some form of consolidation of the two sets of proceedings before national courts might be desirable to reconcile some of the conflicts identified between public and private enforcement in the current system, while retaining the desirable features of both systems of enforcement to the greatest possible extent. Courts seem well placed to mediate in the resolution of the tensions between private and public enforcement, provided that they receive clear guidance from the legislator and case law. Indeed, if the institutional structure of antitrust enforcement which appears to be shaping the parties' tactics is generating uncertainty,[82] then making the CAT the major venue for establishing competition law infringements and bringing antitrust damages actions would be the way forward.

[81] Pierre Bos, 'Joint and several liability in Europe' in M. Danov, F. Becker and P. Beaumont, *Cross-border EU Competition Law Actions,* (Hart Publishing, Oxford, forthcoming).
[82] Annex I - Danov and Dnes (n. 1) pp 21-26.

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

A national solution with regard to EU competition law issues may indicate that private international law would have to play an increasingly important role in cases where damages have been suffered by businesses and consumers in a number of Member States. Although it is justifiable to employ private international law when allocating jurisdiction and identifying the applicable law in cross-border private EU competition law actions brought against defendants who are not domiciled in a Member State, it might be questioned whether the EU should use the current EU private international law framework with regard to EU competition law brought in the European context. Indeed, Articles 101 and 102 TFEU, which form part of each Member State's legal order, are at the heart of an EU competition law claim. Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)[83] is not suited to dealing with the specific issues which arise in the context of cross-border enforcement before Member State courts and NCAs.[84] In other words, the EU legislator may wish to consider whether the European Union should use the current EU private international law framework with regard to cross-border EU competition law claims. This element might profitably be considered in the context of UK reforms, as many cases in the UK are likely to have a significant international element.

Indeed, concerns about the international elements of these claims have been discussed for some time. The need for institutional reform was first signalled by a Report by the Working Party on the Future of the European Communities' Court System.[85] The report clearly stated that '… the Working Party considers that preliminary questions concerning judicial cooperation should be withdrawn from the Court of Justice and assigned to a Community court with members drawn from specialist private international lawyers.'[86] Similarly, Hill has submitted that: 'The suggestion that, within the ECJ, there should be established a specialist chamber (of PIL experts) to deal with references under the Brussels I Regulation (and other PIL instruments) has been knocking around for well over 30 years. Such reform is seriously overdue.'[87] The current institutional architecture might need to be reviewed if the EU legislator decided to employ private international law when allocating jurisdiction and identifying the applicable law in cross-border private EU competition law actions, which seem to pose particularly acute problems under the current system. Reforms to the UK system would be a welcome step towards dealing with many of the issues that have emerged in this debate, but might also benefit from considering any relevant cross-border impact from the reform.

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[83] O.J. 2001 L12/1.
[84] Danov (n 16).
[85] 'Report by the Working Party on the Future of the European Communities' Court System' (Working Party for the European Commission, January 2000) at http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf (last accessed 21 Mar. 2012).
[86] Ibid 33.
[87] J. Hill, 'Comments on the Review of the Brussels I Regulation' at http://conflictoflaws.net/2009/brussels-i-review-jonathan-hill/ (last accessed 21 Mar. 2012).

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CROSS-BORDER EU COMPETITION LITIGATION: NEW EVIDENCE FROM ENGLAND AND WALES

Mihail Danov and Stephen Dnes*

Key words: *EU Competition law; cross-border litigation; antitrust damages actions.*

Abstract: *The authors have undertaken a qualitative research project examining key questions concerning competition litigation in England and Wales, with special reference to those cases with a cross-border element. The most significant problem appears to lie in the uncertainty facing claimants under the current system. Procedural points, especially concerning the level of national procedural autonomy and its tension with the effective enforcement of EU law, need to be looked at carefully. Damages claims, in particular regarding the defence of passing-on, should be addressed. The high level of uncertainty surrounding those issues leads to excessive expense, which is compounded by evidentiary problems and costs. The high costs, litigation risks and uncertainty taken commutatively could be regarded as creating inadequate incentives for a claimant to bring an EU competition law action which would be socially desirable to compensate losses and deter future infringements of EU antitrust rules.*

1. Introduction

The aim of competition law enforcement, stated very simply, is to deter infringements and provide redress to those who have suffered losses from them.[1] The primary means of enforcement in the EU has to date been through public enforcement, usually in the form of a

* Respectively, Senior Lecturer in Law, Brunel University, London, and Research Assistant, Brunel University, London and Associate, Sidley Austin LLP, Brussels, Belgium. This study is undertaken in the context of a research project funded by the European Commission Civil Justice Programme (JLS/2009/JCIV/AG/0034-30-CE-0350182/00-68). The research project, which also involves Prof. Dr. Becker (Kiel University, Germany) as a research partner, aims to consider whether the European Union should use the current EU private international law framework with regard to cross-border EU competition law claims brought by private parties, or rather whether the EU legislator should set up a Special Regulation dealing with EU competition law proceedings arising in the European context. The authors are very thankful to the interview participants. The paper was presented at the "Cross-border EU competition law actions" conference which was held at the London School of Economics on 20th April 2012. The authors are also very thankful to the conference participants as well as to the participants in a workshop which took place at Brunel University on 12th November 2010. The usual disclaimer applies.

[1] See more: W. J. Wils, *Principles of European Antitrust Enforcement,* (Hart Publishing, Oxford 2005), pp. 116-118; A. P. Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*, (Hart Publishing, Oxford 2008), pp. 7-8.

fine after a complaint and investigation.[2] The investigations often involve the use of the European Commission's leniency policy, which is designed to provide incentives to whistleblowers by excusing them from some or all of the liability resulting from their conduct.[3] The aim of the EU legislator is "to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement."[4]

The appropriate role for private competition law claims in Europe has been widely discussed in the literature.[5] The economic literature suggests that private enforcement may further both pro- and anti-competitive aims, depending on application, just as with public enforcement.[6] There have been persistent calls to encourage increased private litigation of competition law claims in Europe for some years,[7] although these have sometimes proven controversial[8] just as they have in discussions of similar reforms in other jurisdictions.[9] A major aim of modernisation implemented under Regulation 1/2003 was to encourage private claims, in part by replacing the centralised enforcement system, which was set up by Regulation 17,[10] with a directly applicable exception system. National Competition Authorities and Member States' courts were therefore given the power to apply not only Article 101(1) TFEU (ex Article 81(1) TEC) and Article 102 TFEU (ex Article 82 TEC), which had been deemed to have direct effect by virtue of the Court of Justice case law,[11] but

[2] Commission (EC), 'Report on Competition Policy 2010,' COM (2011) 328, 14-18.
[3] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, O.J. 2006 C298/17.
[4] Commission (EC), 'White Paper on Damages actions for the breach of the EC antitrust rules', COM (2008) 165, section 1.2 final paragraph.
[5] Wils (n 1); J. Basedow (ed.), *Private Enforcement of EC Competition Law*, (Kluwer, 2007); Komninos (n 1); K. Gotts (ed.), *The Private Competition Enforcement Review*, 3rd ed, (Law Business Research, 2010); J. Basedow, J. P. Terhechte and L. Tichy (eds), *Private Enforcement of Competition Law*, (Nomos, Baden-Baden 2011).
[6] This possibility is noted throughout economic analysis of antitrust enforcement. See W. Landes, "Optimal Sanctions for Antitrust Violations", (1983) 50 *U. Chi. L. Rev.* 652; W. Baumol and J. Ordover, "Use of Antitrust to Subvert Competition", (1985) 28(2) *J Law & Economics* 247; W. Breit and K. Elzinga, "Private Antitrust Enforcement: The New Learning", (1985) 28(2) *J Law & Economics* 405; F. Easterbrook, "Detrebling Antitrust Damages", (1985) 28(2) *J Law & Economics* 445.
[7] Commission (EC), 'Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty' (White Paper) Programme 99/027.
[8] W. J. Wils, "Should private antitrust enforcement be encouraged in Europe" (2003) 26 *World Competition* 473 (arguing against private enforcement).
[9] K. Roach and M. Trebilcock, "Private Enforcement of Competition Laws", (1996) *Osgoode Hall Law Journal* 461, 472.
[10] Council Regulation (EEC) 17 of 6 February 1962: first Regulation implementing Articles 81 and 82 of the Treaty O.J. 1962 L13/204.
[11] Case 127/73, *BRT v SABAM*, [1974] ECR 51 paras. 14-16; Case C-282/95, P *Guerin Automobiles v Commission*, [1997] ECR I-1503 para. 39; Case C-453/99, *Courage Ltd v Crehan*, [2001] ECR I-6297 para 23.

also the exemption in Article 101(3) TFEU (ex Article 81(3) TEC), whose application had previously been reserved to the European Commission.[12]

Since 1 January 2004, Member States' courts have therefore been in a position to provide redress for competition law claims much more fully than before. Private enforcement seeks to complement public enforcement by allowing those who have suffered from a competition law infringement to bring a legal action before a court.[13] Thus a downstream supplier, consumer, or even a competitor might bring a claim to recover for losses suffered from the anti-competitive conduct[14] or to enjoin future anti-competitive conduct.[15] The UK Government has very recently launched public consultations seeking to reform the UK regime for private actions in competition law.[16] The contemplated reform is meant to "allow consumers and businesses to obtain compensation for losses they have suffered as a result of anticompetitive behaviour [...]."[17] The cross-border nature of most European competition law infringements, in which damages would often be suffered by businesses and consumers in a number of jurisdictions, could complicate the picture, however. It is well-known that one of the underlying aims of the European Union, perhaps even the primary aim, has been the creation of an internal market in which the same terms of trade prevail throughout the EU.[18] This is likely to have been a major factor in the increase in cross-border trade in European countries.[19] Despite being a testament to the success of the European Union at breaking down barriers to cross-border trade, this aspect of the internal market poses a challenge for competition litigation which increasingly must take on a cross-border element. In these cross-border cases, the current EU private international law

[12] See Recital 4 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty O.J. 2003 L1/1.
[13] Commission Staff Working Paper, Annex to the Green Paper on damages actions for breach of the EC antitrust rules SEC(2005) 1732 paras. 1-3.
[14] *Courage* (n 11); Joined Cases C-295/04–C-298/04, *Manfredi v Lloyd Adriaticco*, [2006] 5 CMLR 17.
[15] *Purple Parking Ltd and Meteor Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987 (Ch).
[16] Department for Business Innovation & Skills, *Private Actions in Competition Law: A Consultation on Options for Reform*, 24 April 2012 < http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf > (last accessed 12 May 2012). The BIS's proposed options for reform were discussed at a BIICL seminar, "Rapid-Response Seminar: Private Actions in UK competition law: BIS's proposed options for reform", British Institute of International and Comparative Law, London, 9 May 2012.
[17] ibid p. 3.
[18] See Article 2 TEU; Article 3 TFEU.
[19] Exports as a percentage of Gross Domestic Product increased in France from 14.65% in 1960 to 23.27% in 2009; in Germany, from 20.21% in 1960 to 40.83% in 2009; and in the Netherlands from 48.89% in 1960 to 69.22% in 2009. World Bank, *World Development Indicators* (Washington, DC: World Bank, 2012). In the case of the UK, trade with the EU has increased from 35% of all trade in goods and services upon UK accession to the European Economic Area in 1973 to over half today, and the EU now accounts for 54% of foreign direct investment into the UK. See A. MacDonald and C. Bryan-Low, 'UK's Ambivalence on Europe,' *The Wall Street Journal Europe*, 10 January 2012, 6.

framework should be used to allocate jurisdiction and identify the applicable national laws.[20] Given that the relevant private international law rules may not be suited to deal with the challenges of private antitrust enforcement,[21] the authors demonstrate that the level of national procedural autonomy and its tension with the effective enforcement of EU law will need to be looked at carefully by the EU legislator as the level of variation across Europe brings for even more legal uncertainty, which seemingly affects litigants strategies in particular deterring SMEs and consumers from bringing actions.

In this context, the authors have undertaken a qualitative research project examining key questions concerning competition litigation in England and Wales, with special reference to those cases with a cross-border element. In large part because the reported cases are so few (and there is not at the time of writing an antitrust damages award in England), it was necessary to turn to the views of practitioners and policy-makers. Accordingly, as a part of their research, the authors conducted qualitative interviews[22] with legal practitioners from England and Wales and policy-makers from Brussels. Qualitative interviewing has allowed the authors to take into account the opinions of policy-makers and practitioners who design and operate the rules, so that we can consider their views on how private EU competition law actions are functioning at the moment and how they could and should be developed.

This article summarises the authors' findings in the hope of shedding some light onto the litigation process, how it is functioning, and whether and how it might be reformed. To this end, the article will open with a summary of the employed research methodology. Then, the authors will examine the issues of the legal certainty and consistent application of EU competition law across Europe in order to indicate how these issues would affect litigants' strategies under the current system. In this context, the important role to be played by the European courts as well as the level of variation in the enforcement of EU competition law across Europe will be analysed. Then, the current litigation pattern in England and Wales will be carefully considered with a view to demonstrate that there is an enforcement gap at the

[20] See: Recitals 22 and 23 of the Rome II Regulation; M. Monti, 'Competition Law Reform', Speech made at the *CBI Conference on Competition Law Reform* London, 12 June 2000 at http://ec.europa.eu/comm/competition/speeches/text/sp2000_008_en.html (last accessed 21 Mar. 2012). See also: M. Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Hart Publishing, Oxford 2010); J. Basedow, S. Francq and L. Idot (eds), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart Publishing, Oxford 2012).

[21] M. Danov, "EU Competition Law Enforcement: Is Brussels I suited to dealing with all the challenges?" (2012) 61 *ICLQ* 27. See also: Danov (n. 20).

[22] H. J. Rubin and I. S. Rubin, *Qualitative Interviewing: The Art of Hearing Data* (SAGE Publications, Thousand Oaks, Cal 1995) pp. 3-4.

moment. Finally, some tentative conclusions about the appropriate direction of reform will be put forward.

2. Research Methodology

In addition to engaging critically with the relevant primary sources and academic publications, the authors thought that it would be useful to have the opinions of policy-makers and legal practitioners, to consider their views on how private EU competition law actions are functioning at the moment and how they could and should be developed. Thus, the interview participants were divided into two broad categories: legal practitioners and policy-makers. The inclusion of these two categories can be justified as follows.

First, practicing lawyers are well placed to be asked questions regarding both consumer claims and claims by undertakings. Consumers and businesses normally need to use lawyers to litigate. Thus, the lawyers by being litigators would know *inter alia* what the concerns of consumers and businesses are. Indeed, given the fact that the Georgetown project on private antitrust litigation appears to suggest that 'the vast majority of cases, possibly as many as 88 percent in [their] sample, settle before trial', it seems clear that the legal practitioners would have some useful insights as to how EU competition law litigation is functioning at the moment.[23] Indeed, legal practitioners were well placed to provide us with information about the four phases of litigation as identified by the academic literature.[24] In particular, it was interesting to find out how the business conduct of potential litigants would affect the suing decision of the potential plaintiffs. The other factors which would influence the suing decision of the potential claimants were also of interest. Additionally, legal practitioners were well placed to suggest why so many of the initiated EU competition law disputes settle as they have experience of settlement negotiations that are by their nature confidential and not reported. Finally, we wanted to take account of the litigation strategies used when a settlement cannot be reached.[25]

[23] See S. Salop and L. White, "Private Antitrust Litigation: An Introduction and Framework" in L. White (ed), *Private Antitrust Litigation, New Evidence, New Learning* (MIT Press, Cambridge, Mass 1988) 1, 23. See also: B. Rodger, "Private enforcement of competition law, the hidden story: competition litigation settlements in the United Kingdom, 2000-2005", (2008) 29 European Competition Law Review 96. See also: B. Rodger, "Competition law litigation in the UK courts: a study of all cases 2005-2008: Part I", (2009) 2 *GCLR* 93; B. Rodger, "Competition law litigation in the UK courts: a study of all cases 2005-2008: Part II", (2009) 3 *GCLR* 136.

[24] It is well established that 'private litigation is part of larger overall system consisting of four distinct phases: the business conduct of potential litigants, the suing decision of potential plaintiffs, the settlement offers of the litigants once a dispute has arisen, and the litigation strategies and expenditures of both parties if settlement cannot be reached.' Salop and White, (n 23), 16.

[25] ibid.

Secondly, the project examines possible proposals for the reform of the European Civil Justice system the best to accommodate the post-2003 policy of the EU favouring private law enforcement of EU competition law, as discussed above. The views of EU officials are therefore very important; indeed, it has been submitted that the EU would have competence to legislate,[26] and in view of the cross-border nature of EU competition law actions any legislative reform might be most effective at the EU level. In some regards, only EU-level reform may be appropriate, again suggesting that the perspectives of policy makers and practitioners engaged at the EU level would be most valuable.[27]

The authors randomly[28] selected participants from each class (legal practitioners and policy-makers), ensuring that the views of respondents were representative. Lawyers were randomly selected from the legal directories where they have feature on the basis of their experience in competition law. Although the legal directories are not themselves free of bias, they presented an opportunity to sample randomly which seemed preferable to other methods such as selection based on reputation, which might be prone to subjective bias. In the UK, the authors wished to involve both barristers and solicitors. There was of course a risk that the sample would over-represent defendants' interests, as most competition practice is heavily focussed on defence, although this trend is certainly changing. To attenuate this risk, a number of plaintiff-focussed firms were also included in the sample. Additionally, there is also no reason in principle to assume that practicing lawyers would not wish to see reform, as practice lost on the defence side might be made up for by claimant suits. Lawyers might reasonably be expected to be neutral between working for defendants or claimants, and the effect of reform on the overall amount of practice remains unclear. The sample of UK solicitors and barristers was drawn from the relevant sections of the *Legal 500*[29] and *Chambers and Partners*.[30] From the European Commission, the sample was drawn from the relevant sections of the published personnel list. We included officials from the Legal

[26] F. Rizzuto, "Does the European Community have legal competence to harmonise national procedural rules governing private actions for damages for infringements of European Community antitrust rules" (2009),*GCLR* 29. Compare: From the Board, "Two steps forward and one step back: harmonizing the unharmonizable", (2011) 38 *Legal Issues of Economic Integration* 207-211.
[27] See Article 81 TFEU. See also: P. Beaumont and P. McEleavy, *Private International Law, Anton* (SULI/W Green, Edinburgh 2011) pp. 16-17.
[28] W. J. Goode and P. K. Hatt, *Methods in Social Research* (McGraw-Hill Book Company, New York 1952) p. 214.
[29] *Legal 500*, editorial on London solicitors' EU and Competition practice at http://www.legal500.com/c/london/corporate-and-commercial/eu-and-competition (last accessed 21 Mar. 2012).
[30] *Chambers and Partners*, list of London solicitors practicing in Competition/European Law at http://www.chambersandpartners.com/UK/Editorial/38977 (last accessed 21 Mar. 2012).

Service within the European Commission as well as from both DG Competition[31] and Justice,[32] as the issues in the project concern both competition policy and cross-border civil justice. This resulted in a sample of 338 people working as European Commission officials or legal practitioners in the area of EU and competition law, and 192 individuals were randomly selected as potential participants. Safeguards were observed to ensure the best possible data quality and compliance with good research practices and ethical norms.[33]

The non-schedule standardised (or unstructured schedule) type of interview was employed for the purposes of this research project. This allowed us to take into account the specific experience and the viewpoint of each participant. It has been submitted that "the 'nonschedule standardised interviewer works with a list of the information required from each respondent.'[34] This form most closely approximates what has been called the *focused* interview,[35] in which certain types of information are desired from all respondents but the particular phrasing of questions and their order are redefined to fit the characteristics of each respondent."[36] To this end, the authors identified questions to be asked from plaintiffs' and defendants' perspectives. Thus, the potential participants received a list of tentative interview questions designed to gather data and test hypotheses about competition law disputes.[37]

[31] DG Comp personnel directory at http://ec.europa.eu/staffdir/plsql/gsys_www.branch?pLang=EN&pId=313&pDisplayAll=0 (last accessed 21 Mar. 2012).

[32] DG Justice personnel directory at http://ec.europa.eu/staffdir/plsql/gsys_www.branch?pLang=EN&pId=9151&pDisplayAll=0 (last accessed 21 Mar. 2012).

[33] Each potential participant was informed of the aims, methods, sources of funding and institutional affiliations of the researchers. Participants' informed consent was always sought before each interview; participants also signed a consent declaration. Participants were all over the age of 18 and engaged in a professional occupation, and were therefore in a position to decline a request for informed consent if they so wished. To ensure that participants could speak freely, they were also informed of the right to abstain from participation in the study or to withdraw consent to participate at any time without penalty. Every precaution was taken to respect and safeguard the privacy of each participant, and the confidentiality of each participant's information. All personal information was rendered anonymous as far as is possible and consistent with the needs of the study, and as early as possible in the data processing. Even though several participants were employed by large law firms, they could be expected to provide a fair account because of this anonymity, and their professionalism.

[34] S. A. Richardson, B. S. Dohrenwend and D. Klein, *Interviewing: its forms and functions* (Basic Books, New York 1965) p. 45.

[35] R. K. Merton and P. L. Kendall, "The Focused Interview", (1946) 51 *American Journal of Sociology* (1946), 541, 541-2.

[36] N. K. Denzim, *The Research Act: A Theoretical Introduction to Sociological Methods* (Prentice Hall, Englewood Cliffs, NJ 1989) 105.

[37] These provided a structure to interviews, although the interviewer and/or interviewee were always free to depart from the structure if the participants' viewpoints and experience were thereby better expressed. These focused on six key areas: 1) General questions about competition law disputes; 2) Jurisdictional issues – plaintiffs' tactics regarding cross-border EU competition law infringements; 3) Considering a successful defence and settlement; 4) Follow-on actions and quantification of and access to damages; 5) Procedural issues; 6) Policy issues.

22 interviews involving 28 participants were conducted with legal practitioners in England and Wales as well as with policy-makers in Brussels from March to September 2011.[38] The data so gathered were analysed with the qualitative research software, NVivo 9, to give an overall impression of competition litigation as it stands and its potential reform. The summary of the data will be presented below, after briefly considering the aims of competition law litigation, the main issues confronting competition law claims, and how this affects bringing an action with reference to reported cases.

3. Legal certainty and consistent application of EU competition law: significant issues under the current system

The cross-border nature of many competition law actions poses the question whether it would be possible to improve antitrust enforcement by increasingly relying on private parties to bring claims, while maintain certainty and predictability in the rules to prevent the system becoming swamped with costs and delay. Another point of crucial importance in the EU system is whether this could occur without undermining the consistency of the rules and their application between different Member States.

The main EU competition law Articles, Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereafter TFEU), do not indicate how the defendant's liability is to be determined and how the assessment of antitrust damages is to be made by national courts. The Court of Justice has held that a person who is injured by anti-competitive practice or conduct must be able to seek compensation for actual loss and loss of profit plus interest.[39] It is well established that an EU competition law damages action is a mixture of EU law and Member States' laws. First, a claimant must show as a matter of EU law that there is a breach of Articles 101 and/or 102 TFEU. Secondly, it must be shown, as a matter of national law, that the defendant, by committing the particular EU competition law infringement, has caused damage to the concrete claimant.[40] It has been submitted that '[t]he principle of national procedural autonomy means that in considering the issues of causation and quantum, it is appropriate first to apply the ordinary domestic rules applicable to claims of breach of statutory duty.'[41] The Member States' courts procedural rules (e.g. standard of

[38] Although some of the interviews involved more than one respondent, we decided that it would be only fair to count each interview as one case for data analysis purposes, although the separation of responses from different participants was always maintained.
[39] *Manfredi*, (n 14), para. 26.
[40] *Provimi v Aventis Animal Nutrition* [2003] EWHC 961 (Comm), [2003] ECC 29 para. 25.
[41] D. Beard, "Damages in competition law litigation" in Ward and Smith, *Competition Litigation in the UK* (Sweet & Maxwell, London 2005) 257, 270.

proof, disclosure rules) could have an important role to play in this context. Furthermore, depending on the applicable substantive laws there could be different amounts of damages awarded as, for example, different countries may have different rules with regard to remoteness of damages; and/or availability/non-availability of exemplary or punitive antitrust damages; and/or availability/non-availability of the pass through defence.

3.1. Consistent application

Although the participants were not asked to specify the Member States which appear to be attracting more EU competition law actions, six participants volunteered that England and Wales, Germany and the Netherlands are amongst the leading jurisdictions at the moment. Another participant also mentioned England and Wales, Germany and the Netherlands as well as Spain. This appears to suggest that some Member States may be attracting more cross-border EU competition law actions than others, which is in line with the data available on the European Commission web site.[42]

In view of the cross-border nature of competition litigation, a fundamental question concerning our enquiry is whether there is any advantage to suing in one jurisdiction over another. Interview questions therefore raised the issue of jurisdictional selection, with regard to the risk of inconsistent application and enforcement. 20 respondents thought that claimants could gain some procedural (and/or substantive law) advantages by bringing their claim in one jurisdiction rather than another.[43] However, two participants drew our attention to the fact that lawyers would normally be qualified in one jurisdiction only, and as a result they may have a bias towards their own jurisdiction. Nonetheless, on 17 occasions the disclosure rules were mentioned as a very important procedural aspect which could influence a claimant's decision where to bring an EU competition law action.[44] Only one participant was of the opinion that it would not matter where the claim is brought, and even there the participant in question appeared to think that a lawyer should take a client to the best forum to get the result for the concrete claimant. The collected data[45] clearly indicate that there would be an advantage for a claimant to bring his claim in one country instead of another, so the cross-border aspects of competition law litigation would be an important factor to be taken into account by the policy-makers. There would be at least two important issues to be

[42] See more: EUROPA – European Commission – Competition, "National Judgments" < http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/ > (last accessed 21 Mar. 2012). See also: S. Peyer, 'Myths and Untold Stories - Private Antitrust Enforcement in Germany' (2010) < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695& > (last accessed 1 May 2012).
[43] See more: Sections 3.3, 3.4 and 3.5 below
[44] See more: Section 3.4 below.
[45] See more: Sections 3.3, 3.4 and 3.5 below.

considered in this context. First, there would be cost implications[46] for claimants who wish to gain advantages by bringing their claim in another Member State. It is well established that a "cross-border litigant may, as a practical matter, require two lawyers, one in his Home State to give preliminary advice, and one in the Host State to conduct the litigation."[47] Thus, the cross-border litigation costs would be an important factor to be considered by consumers and SMEs who may prefer to sue in their home states[48] which seems to indicate that only large/sophisticated claimants could afford to be selective when deciding where to bring their claims.

Secondly, if claimants could gain advantages by bringing their claim in one jurisdiction rather than another, then it appears that jurisdictional differences would matter. In the European context, this would be a very important issue as jurisdictional differences might lead to inconsistent application of EU competition law. In view of that, the next question was whether these jurisdictional differences are leading to inconsistencies in the application of EU competition law. On 15 occasions, participants have submitted that there is a risk that the Member State courts apply EU competition law inconsistently at the moment. Two of them even thought that this is fact of life. Six participants, however, thought that despite the fact there is some risk, such a risk could be managed through national appeals, and using the Commission's guidance and assistance. One of the latter group, nonetheless, was highly concerned at the possibility of widespread recognition of NCA decisions, for fear that this would privilege consistency at the expense of quality and probity at the hands of some less-experienced regulators.

These concerns suggest that the increased private enforcement of European competition law suggests an increased role for the European Courts in dealing with preliminary references,[49] as well as appeals from public enforcement[50] which may accompany increased private claims.

3.2. The role of the European Courts: Is there a need for reform?

The Court of Justice would therefore seem to have an important role to play in order to ensure uniform application and interpretation of EU competition law.[51] In a report dated

[46] See more: Section 3.5 below.
[47] Green Paper from the Commission, *Legal Aid in Civil Matters: The Problems Confronting the Cross-border Litigant* COM(2000) 51 final p. 9.
[48] See more: Section 4.1 below.
[49] Article 267 TFEU.
[50] Articles 256 and 263 TFEU.
[51] Adaptation of the provisions of Title IV of the Treaty establishing the European community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection ('Communication

January 2000, the Working Party has observed that if there is a significant increase in EU competition law cases before the European Courts, in future, jurisdiction to rule on preliminary references in this area might be assigned to the General Court.[52] In view of this, certain questions sought to take account of participants' views on how the current EU courts are currently functioning, and how the EU legal system could be improved to accommodate cross-border EU competition law actions. On nine occasions, participants thought that the current system is not wholly adequate. Four major shortcomings were put forward by the respondents.

First, delay was a major concern as the participants thought that it takes far too long for the European Courts to deliver judgments. The authors think that this delay could lead to concern that the preliminary reference system may be abused by defendants to delay, possibly leading to an unfavourable settlement for claimants. Defendants might also cease the competitive abuse long before the case is remitted to a national court, rendering the case moot, but possibly undermining a complete remedy. The problem is compounded by the *periculum in mora* requirement for interim relief in the waiting period, which in some circumstances means that undertakings may face bankruptcy before interim relief is available.[53] This is especially problematic for competition law claims, because the structure of a market could be severely distorted by a competitive abuse without any single company nearing bankruptcy. For example, an inefficient competitor might be able to expand at the expense of a more efficient rival through anti-competitive means during the waiting period, but *ex post* relief may not be as effective as a carefully applied interim remedy. This presents a lacuna: although it is difficult to restrain inefficient abuses using interim measures, delay prevents effective redress even if the case reaches full trial.

Secondly, it was thought that sometimes the Court of Justice may avoid dealing with the most difficult issues. The authors think that it is doubtful that clear and consistent principles will emerge under the current system forbidding dissenting judgments. It would be naive to think that clear principles of competition enforcement and procedure will arise given the difference of opinion over the ambit of the substantive rules. Although any reform here would certainly be very controversial, and the current rules on unified judgments may serve

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from the Commission') COM(2006) 346 final. See also: Information Note on references from national courts for a preliminary ruling O.J. 2009 C297/1.

[52] 'Report by the Working Party on the Future of the European Communities' Court System' (Working Party for the European Commission, January 2000), 34-35 at http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf (last accessed 21 Mar. 2012).

[53] See e.g. Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, [1991] ECR I-415 para. 29.

other purposes, one consequence may be that relatively vague principles borne of compromise emerge from the cases.

Thirdly, on four occasions, the ability of some of the Members of the Court to deal with competition law issues was questioned. Each Member State is entitled to representation in the European judiciary. However, Member States vary dramatically in their experiences of competition law, especially in the post-socialist countries.[54] Many judges may therefore have limited exposure to competition law claims compared with, for example, the judges enforcing the federal competition laws in jurisdictions with more experience of competition law claims, whether in Europe or overseas.

Fourthly, even if the Court of Justice were to deal with the issues head on, four participants thought that Member State courts might not be willing to refer to the Court of Justice. Nevertheless, on six occasions it was submitted that the current EU legal system is (or is probably) adequate. Another five participants had a mixed view on the adequacy of the current system. One of them thought that it was unsatisfactory that so few cases have reached the Court of Justice, but was of the opinion that preliminary references would be helpful and adequate to deal with some of the issues which were put forward in the Green and White Papers. Another three of them were not happy with the delay, but one thought that the preliminary references were a necessary and satisfactory solution in some cases, whilst the other two thought that the current system (despite the delay) allows Member States' legal orders to develop their own solutions in order the best to accommodate cross-border EU competition law actions. Another participant noted that the preliminary reference system was not perfect because of its limited ability to review the correct application of law where significant questions of factual findings are involved, which is often the key question.

Participants were further asked whether a possibility for private parties to make an appeal on a point of EU competition law before any of the European Courts (e.g. the General Court) could solve the problem (or some of the problems). 11 participants appear to share the view that such a right of appeal 'would on the whole be to the detriment of effective and timely justice being done.' In particular, the increased delay which would result from such an appeal was a major argument raised *inter alia* by nine participants who were against private parties being allowed to have direct access to the European courts. The experience of the judges sitting in the Court was once again raised as another objection against having such a

[54] Although several Warsaw Pact countries did have a competition law on the books, it appears rarely to have been enforced. See T. Varady, "The Emergence of Competition Law in (Former) Socialist Countries," (1999) 47(2) *American Journal of International Law* 229.

right of appeal. The potential increase in the workload of the judges was another argument against the possible solution. One participant who was against it nonetheless went further to suggest that the possibility might be interesting if 'complete blue sky thinking' led to a competent and efficient separate new chamber, although this seemed unlikely.

Six other participants thought that it would probably be an attractive possibility. However, they raised some concerns which would need to be addressed. As noted, the competence of judges and their ability to deal with competition law issues was raised by five of them as an important issue to be addressed. Three participants went further to state that such a reform would require a special competition court or a special chamber.

Four other participants did not take a side, but shared very interesting views. One thought that this could go ahead only if there are no delays. Another one made the following observation:

> 'It's tricky. I mean the courts are already overloaded. Sure, instead of having once in a while a preliminary question if you have a more systematic and more frequent review, even though it does come at a certain cost as I said earlier, there's a certain virtue to have more of a federal court system, at least at the peak of it. I can see the charm of it, but whether it should be at number one spot of our priority list. Besides [it's] hardly sellable politically; that's probably for the next generation. Maybe.'

Another participant noted that there would be some coherence to changing the 'judicial architecture' so that references go to the General Court as well as direction actions, but that making the change would add too much to the General Court's already heavy workload. Finally, another view was that the current system was only practically to a case as a rare 'last possible option' when 'left with a series of judgments in the national courts which weren't to your liking ... effectively putting an end to your claim.' In such a case, taking a point 'to the European courts' could 'breathe life back into the claim,' but the participant thought that 'in most cases it's a tactic that wouldn't be used ... too expensive, too time consuming, probably too uncertain as well.'

The authors share many of these views and think that there is a growing case that the growing demands on the European Courts implied by an increased role for private litigation might pose a problem if the Courts retain their current form. An illustrative example of the issue is the recent, controversial judgment of the Court of Justice in *Pfleiderer*.[55] In this case the Court of Justice was asked to determine if someone who is adversely affected by a cartel may, for the purpose of bringing a damages claim, be given access to documents voluntarily submitted in that connection to an NCA by leniency applicants. The Court held that EU law

[55] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] 5 CMLR 219.

must be interpreted as not precluding such a person from being granted access to such documents: 'It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.'[56] With respect, the difficult issues were not addressed head on by the European judges, but instead the matter was referred back to the national courts. Although there is some appeal in leaving the matter to the EU legislator, as did the judges in *Pfleiderer*, this places a heavy responsibility on the legislator which may face limitations of its own.

On the very next day, a similar issue to be addressed by the English High Court[57] involved a disclosure application in a follow-on damages action for an EU competition law infringement which was established by the Commission.[58] *Pfleiderer* appears to suggest that it is the national court which should conduct the weighing exercise referred to above, but Judge Roth nonetheless thought that it was necessary for the court to make an Article 15[59] request to the Commission. Although informal communication is encouraged under the Regulation, it is troubling that one of the most active and experienced jurisdictions for competition litigation appeared to have inadequate guidance under the European case law.

The Court of Justice decisions in *Pfleiderer*[60] and its subsequent application by the German court in *Pfleiderer*[61] and by the English court in *National Grid*[62] could therefore be seen as yet another indication of the possible deficiencies in the current European Courts' structure, suggesting that it may be ill-suited to ensure uniform application and interpretation of EU competition law. Crucially, the deficiency is not fully offset by the legislative and oversight capacity of other institutions: With the Commission's powers curtailed following Regulation 1/2003, there are few checks and balances in the system to act as a control mechanism. There is a risk that increased private competition litigation in Europe might therefore lack adequate EU-level oversight. The result could be inconsistent application of EU competition law across Europe, and increased uncertainty over the outcome of EU

[56] Ibid at para 32.
[57] *National Grid Electricity Transmission PLC v ABB Ltd & Others* [2011] EWHC 1717 (Ch).
[58] Commission Decision of relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement Case Comp/F/38.899 - *Gas Insulated Switchgear* - C(2006)6762.
[59] Regulation 1/2003.
[60] *Pfleiderer,* (n 55).
[61] In the *Pfleiderer* case, "the German court ruled against disclosure of leniency documents". The High Court referred to the judgment of the Amstgericht Bonn of 30 January 2012 in the *Pfleiderer* case. See *National Grid Electricity Transmission PLC v ABB Ltd & Others* [2012] EWHC 869 (Ch) para 60.
[62] *National Grid,* (n 61) paras 56 - 60.

competition law cases, which appears to drive the very problems reforms have been supposed to address.

In this context, it should be noted that a high level of uncertainty surrounding competition law actions at the moment was noted on 15 occasions. According to participants, uncertainty may affect the willingness of the claimants to bring actions and deter SMEs and/or consumers from bringing actions as the uncertainty will increase the costs of competition litigation.[63] In particular, one participant has submitted:

> 'I've seen several cases where we've gone through some analysis of a potential claim and the clients have either given up or been apathetic because, yes, you might get half a million at the end of the day, but is it worth all the effort with all the uncertainty that you might lose or not [be] able to prove and so on and so forth?'

Uncertainty may also allow defendants to prevent claims by employing delaying strategies.[64] The legal uncertainty which surrounds these actions in Europe taken together with the cross-border litigation risks might make the defendant more aggressive as he might escape liability even if he does not comply with EU competition law rules.[65]

On five occasions, participants went further to state that the current state of uncertainty may also drive settlement behaviour.[66] Furthermore, the fact that different Member States' legal orders may deal in different ways with such matters as disclosure, standard of proof, costs (e.g. the availability of contingency fees), the availability (or rather non-availability) of a pass-on defence, and the availability of punitive damages appears to suggest that there are some other important issues to be factored in by claimants when deciding whether and where to bring their EU competition law action. Such a deduction finds support in the literature which appears to suggest that these factors drive litigation and settlement patterns: the 'net expected values [of litigation] consist of four components: the benefit (or harm) of the business conduct at issue, the potential award, the costs of litigation, and the likelihood that the plaintiff prevails.'[67] It appears that claimants and defendants are engaged in nuanced weighing of these factors, which in turn affect the expected value of litigation, whether considered from the perspective of the welfare of an individual claimant, or the socially optimal level of litigation.

Therefore, it appears that there may be a case for legislative intervention in order to address the level of variation and the inherent uncertainty in the enforcement of EU

[63] See more: Section 3.5 below.
[64] See more: Section 4.2 below.
[65] Salop and White, (n 23), 22.
[66] See more: Section 4.3 below.
[67] Salop and White, (n 23), 18.

competition law. Indeed, the principle of national procedural autonomy suggests that similar claims might be dealt with in different ways depending on the jurisdiction in which the claim is brought. Although the Member States' courts are under a duty to apply the same substantive rules, they may differ on crucial procedural points, which sometimes may determine the claim. Divergences on procedure, damages and costs all appear to play a leading role in competition litigation, and their relative importance may strengthen further the case for a reform, as well as inform approaches to reform.

3.3. Procedure

The authors were particularly interested in whether there were procedural advantages for a claimant to conduct a trial in one Member State rather than another. On 20 occasions, it was submitted that a (sophisticated) claimant would normally consider Member States' procedural rules when deciding where to bring his EU competition law action. There was even the suggestion that procedural rules might be dominating the amount of damages awarded in the choice of jurisdiction, with one participant submitting that 'the procedural rules... are much more important than the quantum of damages you will eventually get,' 'because ... getting something is better than getting nothing at all. And the procedural rules determine whether you get something at all, and when.' On that occasion, damages were referred to as a mere chimera number' compared with the 'paramount importance' of procedural rules.

The most important aspects of procedure put forward by the participants could be summarised as follows. First, disclosure and discovery of evidence were considered to be very important considerations. As already noted,[68] on 17 occasions, the disclosure rules were mentioned as a very important procedural aspect which could influence a claimant's decision where to bring an EU competition law action. Disclosure would also benefit a defendant, especially if an action was brought in a jurisdiction where the pass on defence is available. Secondly, the speed of the procedure (i.e. the time it takes for an award to be made, or for a claimant to force a settlement) was considered to be an important factor; this was submitted on 12 occasions. Thirdly, standing was mentioned as a possible problem on 10 occasions. However, it is only fair to note that, on five occasions, this was not regarded as the determinative problem. Nevertheless, five participants thought that standing could be an issue in cases involving consumer associations.

[68] See Section 3.1 above.

Seven participants submitted that the jurisdictional issue would be important: it seems that jurisdictional challenges could result in further delay and expenses.[69] Limitation periods also seemed important: seven participants outlined that limitation periods could be an important factor. The experience of the judiciary was an important factor put forward by four participants, and three noted that the standard of proof is particularly important in many EU competition law damages cases. The multiplicity of courts was considered another important factor on two occasions. Finally, the method of proof, specifically whether there is scope to challenge a written report with oral questions, was also considered to be a relevant factor.

Overall, the prevailing view was clearly that the procedure rules are among the most important factors, if not the most important factor, to be considered by both claimants and defendants in an EU competition law action, and a wide range of procedural considerations dominated most responses. This can be explained by the fact that key procedural questions such as standard of proof and the availability of disclosure, which may be of fundamental importance to the success of a claim, vary depending on the Member State in which the claim is litigated. This may encourage strategic use of particular jurisdictions where rules are the most favourable to claimants, or even pre-emptive applications to jurisdictions where procedure most favours defendants. This could well result in the same competition law infringement being dealt with inconsistently depending on where the action is brought, even in the case of a pan-European cartel with claimants and cartelists scattered throughout the EU.[70]

3.4. Damages

Under the European case law, damages awards must not discriminate between European and domestic claims, and European claims must in some sense receive an effective remedy.[71] The level of award can vary substantially, however, the only guidance being that punitive damages *may* be available.[72] This could lead to different awards of damages for the same violation of European competition law if, for example, some jurisdictions reject punitive damages in private antitrust claims while others endorse them.[73]

[69] *Provimi*, (n. 40); *SanDisk Corporation v Koninklijke Philips Electronics NV* [2007] EWHC 332 (Ch); [2007] Bus LR 705; *Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd* [2010] EWCA Civ 864, [2010] Bus. L.R. 1697.
[70] *Provimi*, (n. 40); *Cooper Tire*, (n 69).
[71] *Courage*, (n 11), paras. 26-29; *Manfredi*, (n 14) para. 72.
[72] *Manfredi*, (n 14) para 26.
[73] For example, the general rejection of punitive damages where a public fine has been imposed in *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394; [2008] 2 WLR 637 (Ch).

The participants' views as to the importance of the level of damages which could be awarded in the various Member States were sought in order to find out whether the level of damages could affect forum selection. The participants' answers appear to indicate that the level of damages and their quantification is an important issue to be considered by a claimant in a cross-border EU competition law action. This is indeed submitted on 20 occasions, and is in line with literature suggesting that estimated damages are an important consideration at numerous points in the litigation pattern.[74]

A closer look at the data, however, indicates that there are two things that should be noted in this respect. First, at the moment, the potential damages which could be awarded would often be pre-determined by the procedure rules. One participant made the interesting observation that damages awards are usually determined in litigation by access to information, a procedural matter which will determine the demonstrable loss. Another went so far as to state that "the amount of damages is of almost ... academic relevance" because 'the hurdles at the moment are such that you would advise someone to go for the procedural environment which is the most suitable to the claim' rather than the jurisdiction with the highest level of potential compensation. Thus, the procedural rules appear to be dominating substantive rules at the moment.

The availability of a passing on defence was nonetheless highlighted by several respondents. The importance of knowing whether a passing on defence was available was put forward on thirteen occasions. One participant also flagged up the importance of the pass-on defence to the decisions of litigation funders over whether to fund litigation. The availability of a pass-on defence would therefore seem to enter into the choice of forum.

Inconsistency on this point would be a particular problem for EU competition law claims, because a single anti-competitive overcharge may ripple through a production chain, increasing prices of many products and affecting parties across the EU. Allowing each party to claim for the diffuse damage could therefore result in overcompensation, and might even compensate those who managed to pass on the overcharge to their purchasers with no substantial loss.[75] It has been noted by the Commission in the White Paper that 'infringers should be allowed to invoke the possibility that the overcharge might have been passed on. Indeed, to deny this defence could result in **unjust enrichment** of purchasers who passed on

[74] B. Cornell, "The Incentive to Sue: An Option-Pricing Approach", (1990) 19(1) *Journal of Legal Studies* 173.
[75] This is sometimes referred to as the 'Illinois Brick' problem after a major American case addressing it, *Illinois Brick Co. v Illinois*, 431 US 720 (1977). The problem is especially severe in the increasingly prominent case of the 'hub-and-spoke' conspiracy, in which several levels in a distribution chain are involved with the communication required for a cartel. See O. Odudu, "Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion", (2011) 7(2) *Euro Comp J* 205.

the overcharge and in undue **multiple compensation** for the illegal overcharge by the defendant.'[76] On the other hand, if a windfall (or unjust enrichment) results from the pass on defence not being available, it is hard to understand why the ***infringer*** is more deserving of this windfall than the direct purchaser who was buying the cartelised product.[77] The Commission itself has previously submitted that 'passing on does not necessarily result in the unjust enrichment of the claimant because it can equally result in a reduced volume of sales as the trader has to raise prices.'[78] In view of the foregoing, the availability of the passing on defence appears to be a very political and practical question which seemingly requires some attention by the legislator. Substantive differences appear to be a key issue, not least because the EU courts have held such issues as for example the availability or non-availability of a pass on defence to be down to national procedural autonomy when they are probably best described as substantive.

3.5. Costs

Interview questions attempted to explore the role of costs in the decision to bring a competition law case, and whether different cost rules play a role in forum selection.

On 12 occasions, it was submitted that competition law litigation is expensive. One participant went further to clarify that the primary factor is the evidentiary stage, where expensive discovery motions obtains evidence requiring further analysis by both lawyers and economists. More specifically, 11 participants thought that the high cost of the cross-border EU competition litigation could potentially deter some claimants from bringing EU competition law actions. Costs can be very high in all litigation,[79] but may be especially high in competition law claims[80] where defendant companies tend to employ very expensive law firms, and where economic experts are frequently employed at considerable expense. The

[76] White Paper, (n 4) para. 2.6 (emphasis in original).
[77] See M. Rush, *The Defence of Passing On* (Hart Publishing, Oxford 2006) 21. See more: O. Odudu and G. Virgo, "Remedies for Breach of Statutory Duty," (2009) 68 *Cambridge L J* 32 (discussing gain-based remedies).
[78] Commission Staff Working Paper, Annex to the Green Paper on Damages Actions for breach of the EC rules SEC(2005) 1732 para 169. The text is also cited in V. Milutinovic, 'Private Enforcement: Upcoming Issues' in G. Amato and C-D. Ehlermann (eds), *EC Competition Law: A Critical Assessment,* (Hart Publishing, Oxford 2007) 725, 744.
[79] See C. Hodges, M. Tulibacka and S. Vogenauer, "The Oxford Study on Costs and Funding of Civil Litigation," in C. Hodges, M. Tulibacka and S. Vogenauer (eds.), *The Costs and Funding of Civil Litigation* (Hart Publishing, Oxford 2010) 139. For example, repayment to a consumer of €200 price paid for a product not delivered in the UK cost £105 in the study.
[80] Case No: 1178/5/7/11, *2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited.* [2011] CAT 30, 14 October 2011 para. 17. See also: *Yeheshkel Arkin v Borchard Lines and Others* [2005] EWCA Civ 655.

cost of competition law litigation may be fuelled by the high level of uncertainty which appears to be surrounding the competition law actions at the moment.[81]

The problem is particularly acute for consumers or their representatives, who often lack the means to finance the risk presented by bringing a claim,[82] or for small and medium enterprises which may lack the resources to take on dominant players in 'bet-the-company' litigation.[83] The assertion that the weak or diffuse interests of such claimants are to be addressed by public enforcement may understate the political constraints faced by public enforcers,[84] which may dictate against the application of resources to smaller cases in regional markets where private litigation may have the greatest promise to assist consumers and SMEs.[85]

The respondents' position on costs was not entirely clear-cut, however. Two participants thought that even though costs play a role, they would not generally deter the big companies that appear to be bringing the actions at the moment. Three other participants noted that claimants who have strong claims would have ways to deal with the costs, as such claimants could enter into Contingency Fee Agreements or refer to litigation funders, hedge funds etc. On three other occasions, participants thought that cost risks and potential damages claims would be weighed. In terms of the consistency between cost rules, one respondent went so far as to suggest that cost rules could determine the choice of jurisdiction even between those jurisdictions where competition litigation is the most developed, citing Germany, the Netherlands and the UK. This suggests that inconsistencies in the cost rules are indeed distorting jurisdictional choices, even where the systems have had the most chance to develop.

On the one hand, it should be noted that the high level of uncertainty surrounding EU competition damages claims taken together with high costs may be seen to provide inadequate incentives to bring claims when it would be socially desirable.[86] Indeed, it should

[81] See Sections 3.1 and 3.2 above.
[82] Third party funding from for-profit litigation funders may be available for these claimants: See J. Peysner, 'England and Wales,' in Hodges, Tulibacka and Vogenauer (eds.), (n 79), 294.
[83] See discussion below of types of claimants.
[84] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty O.J. 2004 C101/65 para8. Statistical analysis suggests that the politicisation of competition enforcement is a serious problem and may lead to the overrepresentation of politically mobile parties such as large businesses. For a summary of the literature from an American perspective, see W. Shughart and F. McChesney, "Public choice theory and antitrust policy," (2010) 142(3) *Public Choice* 385.
[85] E.g. *J.J. Burgess v OFT* [2005] CAT 25, concerning access to a single crematorium in Stevenage, Hertfordshire, England.
[86] S. Shavel, "The social versus the private incentives to bring suit in a costly legal system", (1982) 11 *Journal of Legal Studies* 333, 336. See also: J. A. Ordover, "Costly litigation in the model of single activity accidents" (1978) 7 *Journal of Legal Studies* 243.

be noted that EU competition law damages actions are intended to 'produce beneficial effects in terms of **deterrence** of future infringements and greater compliance with EC antitrust rules'.[87] On the other hand, cost-shifting rules may discourage the bringing of weak claims, while the absence of cost-shifting may encourage them, although economic models of litigation suggest that the interplay between cost-shifting and substantive rules is complex.[88] Increased private enforcement without attention to the role of cost-shifting in sifting out abusive claims could potentially lead to weak or unsubstantiated claims being brought in jurisdictions without appropriate safeguards in the hope of favourable settlements, a well-known strategic abuse of litigation.[89] Once again, because of the pan-European nature of many of the infringements, unscrupulous claimants could pursue this tactic following cartel enforcement: after public or private enforcement begins in a 'leading light' jurisdiction where enforcement is common, such as Germany or the Netherlands, weak claims could begin to pour in jurisdictions lacking the necessary control mechanisms in the hope of favourable settlement, based on the fact that the cartel affects consumers across the EU. This distinguishing feature makes the role of cost rules especially important if reform is to expand the role of private competition litigation without exporting nuisance litigation.

Therefore, it appears that despite the fact that the overwhelming view appears to be that the rules on procedure are the most important factor for a claimant to consider, the laws on damages and costs also influence a claimant's choice of forum as well as their tactics. On the other hand, the high level of uncertainty surrounding EU competition damages claims taken together with high costs might affect the defendants' tactics.[90]

4. Legal uncertainty and its effect on the litigants' tactics

The above analysis appears to suggest that there is a high level of uncertainty[91] surrounding procedural points, especially concerning the level of national procedural autonomy and

[87] White Paper, (n 4), para 1.2. Emphasis in original.
[88] See H.S.E. Graville, "The Efficiency Implications of Cost Shifting Rules", (1993) 13 *International Review of Law and Economics* 3; C. F. Beckner III and A. Katz, "The Incentive Effects of Litigation Fee Shifting When Legal Standards Are Uncertain," (1995) 15 *International Review of Law and Economics* 205.
[89] So-called 'nuisance' suits might be brought in some jurisdictions. See S. Shavel, "Suit, settlement and trial: A theoretic analysis under alternative methods for the allocation of legal cost" (1982) 11 *Journal of Legal Studies* 55, 72. See also: D. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press, 2011) p. 58. See more: K. G. Elzinga and W. C. Wood, "The Costs of the Legal System in Private Antitrust Enforcement" in White (n 23), 107, 134; E. A. Snyder and T. E. Kauper, "Misuse of the Antitrust Laws: The Competitor Plaintiff" (1991) 90 *Michigan Law Review* 551.
[90] Beckner III and Katz (n 88) 207.
[91] J. E. Calfee and R. Craswell, "Some effects of uncertainty on compliance with legal standards" (1984) 70 *Virginia Law Review* 965; R. Craswell and J. E. Calfree, "Deterrence and uncertain legal standards" (1986) 2

assessment of damages. In view of that, it seems that the specific points concerning the tactics of claimants and defence would be key to determining whether there is a need for addressing the existing level of variation in the Member States' laws, and what the appropriate direction of possible reforms would be. In this context, it would be important to determine if there is a link between the high level of uncertainty and behaviour of the litigants by looking at their tactics.

4.1. Claimants' tactics

As already indicated, seven participants submitted that the jurisdictional issue is particularly important given that jurisdictional challenges can result in further delay and expenses.[92] Given the cross-border nature of many EU competition law actions, another tactical question upon which participants' views were sought was whether claimants would find it beneficial to sue in their home state. In providing their answers, many participants made a distinction between claims brought by consumers and SMEs, on the one hand, and claims brought by big companies, on the other hand. On some occasions, it was submitted that it would be beneficial especially for SMEs or consumers to sue in their home states (9 cases). The authors think that suing before the courts in their home state could be an important consideration for consumers and SMEs, especially if factored in together with the increased litigation costs and risks in a cross-border case, which could potentially increase the level of uncertainty.

Some participants, however, thought that although it would usually be beneficial for a claimant to sue in the home state, this would not always be the key factor as it would also depend on the home state in question (10 cases). Other participants went further to state that suing at home would not be greatly beneficial for a claimant as there are more important factors to be considered: indeed, the home turf factor seems to be less important for big or sophisticated claimants (10 cases).

Since many EU competition law cases, and cartels in particular, could potentially involve a number of defendants, the respondents' views were sought on whether it would be advantageous for a plaintiff to bring an EU competition law action against several defendants. On five occasions, it was submitted that it would be advantageous to bring multiple defendants actions. Such a tactic was justified by several factors. The most common factors that were put forward could be summarised as follows: (1) bringing the case in a jurisdiction which is more appropriate from claimants' perspectives; (2) increasing claimants' chances of

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Journal of Law, Economics and Organisation 279; A. M. Polinsky and S. Shavell, "Legal error, litigation and the incentive to obey the law" (1989) 5 *Journal of Law, Economics and Organisation* 99.

[92] See above, Procedure. See also: *Provimi,* (n. 40); *SanDisk,* (n 69); *Cooper Tire,* (n 69).

getting a payout; (3) increasing the difficulties on the defence side of having to coordinate what they are doing procedurally; (4) accessing required information and/or documents through a disclosure order.

Nonetheless, the majority of the participants appear to prefer to go after one infringer initially, and then to go after another and, possibly, after that, to go after yet another. The latter approach has been favoured on 11 occasions. The main justifications that were put forward are as follows: (1) the defendant against whom the action was brought would normally bring in the other infringers; (2) the cost risk of suing one defendant is lower; (3) a settlement may be reached with the first, gaining compensation and possibly even useful evidence before moving on to the second defendant. The overwhelming majority of participants (including participants who would favour one approach over another) nevertheless say that the best approach would always have to be determined on a case-by-case basis by taking into account the factors enumerated above.

Therefore, it seems clear that the cost risks, which could be fuelled by the high level of uncertainty, would be an important factor to be considered in claims brought by consumers and SMEs who may prone to economise on the costs.[93] The costs, however, would be less of an issue for large/sophisticated claimants who would rather gain some procedural (and/or substantive law) advantages by bringing their claim in one jurisdiction rather than another.

4.2. Defendants' tactics

The defence strategy questions sought to take account of respondents' opinion as to: (1) whether a defendant, who is threatened with an EU competition law action, would initiate a pre-emptive strike by bringing the case in a defendant-friendly jurisdiction before the claimant has the chance to bring it in a claimant-friendly one; (2) whether a defendant would employ any delaying strategies; (3) whether a more effective private enforcement system could undermine the leniency programme.

The majority of the participants have submitted that after the judgement in *Cooper Tire,* pre-emptive strikes would be a less attractive strategy for a defendant to employ. This was submitted on 15 occasions. Four participants observed that pre-emptive strikes would require a very specific case. Admittedly, pre-emptive strikes could be used in order for a defendant to have the case litigated where he wants it to be, this being submitted on five occasions. Another interesting view, painting an interesting scenario, was that although it may seem 'very odd' 'to bring a declaration that you are not guilty of something,' one might

[93] See more: Sections 3.2 and 3.5 above. See also: Beckner III and Katz (n 88) 207.

'try to influence the situation' using 'the threat of parallel actions in different member states.' It should however be noted that seven participants submitted that defendants threatened with a strong EU competition law case would rather try to settle.

On 15 occasions, it has been submitted that delaying would be quite a common strategy to be employed by a defendant in a cross-border EU competition law action. One respondent made the following candid submission:

> 'when [claimants] have filed their claim, make it as difficult as possible for them by picking a series of preliminary issues for interlocutory battles, so that will test the will of the claimant, spend their money, perhaps put them off and beat them down into some kind of settlement that they otherwise wouldn't have accepted.'

Not all preliminary matters raised by the defence are abusive, however: five participants noted that preliminary matters are often raised simply because liability, and therefore damages, often hinge on a preliminary matter. Therefore, as already noted,[94] on the one hand, the high level of uncertainty may potentially deter claims brought by consumers and SMEs if they have no funding scheme in place. On the other hand, the high level of uncertainty may encourage large undertakings to bring such actions as a potential exposure to high costs by the defendants could drive their settlement behaviour. These tentative conclusions clearly indicate that the settlement as a tactical device should be carefully considered.

4.3. Settlements as a tactical device

As already noted, previous research has shown that a substantial number of the claims which were brought in the UK would eventually settle.[95] Indeed, it is established that parties would have strong incentives to settle because a 'settlement avoids the costs and uncertainty associated with further litigation.'[96] In view of that, the authors thought that legal practitioners would be best placed to suggest why so many of the initiated EU competition law disputes settle. Participants divided when asked whether the high level of settlements reflected the weakness or strength of claims. Nonetheless, five participants thought that uncertainty, which would increase the litigation risks, could drive settlement behaviour in cross-border EU competition law cases. Five other participants were of the opinion that the high cost of competition litigation is the reason claimants settle. One participant thought that claimants 'take a view on what overcharge and pass through is, and try to avoid the costs of

[94] See Section 3.2 above.
[95] Rodger, (n 23). See also: Salop and White, (n 23), 23.
[96] Salop and White, (n 23), 23.

litigation and all the delays and all the rest of it, and quietly settle,' 'the costs of litigation ... often dictat[ing] that that is the appropriate approach.'

Different reasons may drive the settlement behaviour of the defendants. On four occasions, it was submitted that the defendants would normally want to 'put it behind them' and therefore enter into a settlement which indicates that a 'nuisance' factor may be taken into account in some suits. In other words, one might think that the high level of uncertainty may encourage large companies (e.g. large purchasers) to bring such claims in order to force a settlement, for example, with their suppliers (especially in follow-on cases where an infringement has been detected by the Commission or an NCA). Nonetheless, four participants thought that the strength of the claim would be an important factor to be considered by the claimant as a weak claim has no chance to settle. One participant noted that funding may sometimes be a factor which a defendant would consider before entering into a settlement which confirms once again that there may be a link between uncertainty, on the one hand, and costs and litigation risks, on the other.

This deduction finds support in the economic analysis of litigation, which appears to suggest that 'under the British system [of cost shifting], there will be a trial if and only if the plaintiff's estimate of the expected judgment exceeds at least the sum of their expected legal costs.'[97] Moreover, some claimants may be risk averse when faced with these costs.[98] Given the high cost of competition litigation,[99] which is fuelled by uncertainty, it should not therefore be surprising that so few cases proceed to trial. Taken commutatively the costs, litigation risks and uncertainty may be the main reasons for claimants and defendants to settle. It has been submitted that 'the possibility of economising on litigation costs by settling can have adverse effects on the legal system when one or both parties use the threat of costly suit as a mechanism for inducing an adversary to submit to a costly settlement.'[100]

Widespread settlements do, however, pose an important question: there are many settlements, but one cannot say in isolation whether they are satisfactory.[101] A well-functioning settlement regime would provide cheap and speedy redress with an appropriate

[97] Shavel, (n 89), 64.
[98] K. Binmore, *Fun and Games: A Text on Game Theory* (Heath and Company, 1992) 193-4; A. Farmer and P. Pecorino, "Pretrial Negotiations with Asymmetric Information on Risk Preferences," (1994) 14 *International Review of Law and Economics* 273.
[99] *Cardiff City Transport*, (n 80), para.17. See also: *Arkin*, (n 80). See more, above.
[100] Salop and White, (n 23), 27.
[101] For a summary of the law and economics literature, see R. Cooter and D. Rubinfeld, "Economic Analysis of Legal Disputes and Their Resolution," (1989) 27 *Journal of Economic Literature* 1067. The interplay of settlements and trials, especially regarding screening and information issues, suggests caution in analysing the efficient level of settlements.

level of compensation. As things stand, there are very few indicators of whether the current state of settlements represents an efficient level of compensation, which might be an interesting area for future research. That said, it seems clear that the high costs, litigation risks and uncertainty taken commutatively could be regarded as inadequate incentives for some claimants (consumers and SMEs) to bring EU competition law actions which would be socially desirable to provide compensation and to deter future infringements of EU antitrust rules. This raises the question whether there is an enforcement gap under the current system.

5. Litigation pattern in England and Wales: is there an enforcement gap?

The essential claim of those favouring more private litigation is that enforcement would improve with increased reliance on private parties to bring claims, whether as follow-on or stand-alone actions. In this context, it should be noted that private litigation across the world has certainly increased over recent decades. The most prominent jurisdiction to rely heavily on private enforcement is of course the United States, where private claimants are awarded treble damages and costs to represent the public interest in bringing their actions as "private attorneys general."[102] Since procedural reforms in the 1970s, private antitrust cases have come to outnumber public enforcement in the United States by approximately a ten-to-one ratio.[103] In recent years, other jurisdictions have moved towards greater reliance on private litigation.[104]

The hybrid public and private nature of competition enforcement presents two important issues which need to be addressed in the context of the qualitative interviewing. First, it is worth considering whether claimants are actively bringing cross-border EU competition law actions in England and Wales. Secondly, respondents were asked whether a claimant would go first to the national competition authority and then proceed with a follow-on action before national courts or whether they would rather bring a stand-alone action before the courts. The answers to this question are particularly important in an EU context, as

[102] *Hawaii v Standard Oil Co. of Cal.*,405 US 251, 262 (1972). Section 4 of the Clayton Antitrust Act of 1914 provides 'threefold' damages with interest and a reasonable attorney's fee for 'any person ... injured in his business or property' by an antitrust violation. 15 USCA §15(a). Section 16 further provides that 'any person, firm, corporation or association shall be entitled to sue for and have injunctive relief ... against threatened loss or damage' resulting from such a violation. 15 USCA §26.

[103] The ratio dropped from 20:1 in the late 1970s to 10:1 in the mid-1980s. See Salop and White, (n 23), 3-4. See also: Crane, (n 88) p. 1.

[104] For example, private antitrust litigation in China has increased markedly in recent years and may now be more important than public enforcement in some contexts: See H. Ha, J. Hickin and G. O'Brien, "Civil Actions Under China's Anti-Monopoly Law - Five Major Cases, Five Major Lessons (Part II)" at http://www.mayerbrown.com/public_docs/ClientUpdate_CivilActions.pdf (last accessed 21 Mar. 2012).

the current enforcement pattern of litigation in Europe appears to blend aspects of private and public enforcement, and this is especially noticeable in England and Wales.

5.1. Rise in competition litigation

The responses overwhelmingly suggest that competition litigation is picking up, and that follow-on actions outnumber stand-alone ones. In the vast majority of cases (18 out 22), the participants are of the opinion that there are more EU competition law actions than there used to be; several participants went further to note that the number of actions may not disclose a significant number of settlements occurring as well. In this context, one participant noted that 'more of the litigation is getting to a trial, whereas previously the pattern was that the litigation came to an end fairly early on in the proceedings, usually because there was a settlement.' It was noted that the subject matter of the litigation has changed, with the same participant noting that the balance has shifted in favour of cartel litigation, and away from abuse of dominance litigation, in recent years. Another participant submitted that there had been a marked increase in litigation over the weeks immediately preceding the interview, although he/she stressed that this did not amount to the large increase in competition litigation predicted in some quarters. There was only one participant with the impression that competition litigation is not picking up. He felt that the availability of the pass on defence, the high costs as well as the difficulties in proving the amount of damages and the non-availability of punitive damages would be significant hurdles which a claimant would face with when bring such an action before a national court.

5.2. Competition law enforcement: NCA and/or courts

Although the above data appear to suggest that competition litigation is picking up in England, a closer look at the collected data shows that the majority of the participants are of the view that the increase is only in respect of follow-on actions. In this context, it should be noted that the questions were broadly drafted and there were no questions which were asking the participants whether the increase is in respect of follow-on or standalone actions. Despite this, the participants clearly stated on 13 occasions that the follow-on actions are the ones picking up. One participant went further to state that: 'there are far fewer standalone actions than follow on damages actions now.' A similar opinion was expressed by four other participants. Although litigation has increased, and cartel litigation in particular, this increase would appear overwhelmingly to involve follow-on litigation.

Therefore, it seems clear that, in the present enforcement system, a regulator's decision would be at the heart of the follow on damages actions. This raises the question as

the prevalent strategy employed by victims of EU competition law infringements. The respondents were asked if such a person would launch a complaint with a competition authority or whether he would rather bring a private action and seek damages before national courts. Participants seemed to share the assumption that there is nothing wrong in principle with the public funding of private claims in this context, implicitly endorsing the English approach which blends public and private enforcement. In particular, it appears that the majority of the participants express the view that going to the competition authority first would be a normal strategy. This view has been expressed on 14 occasions.

However, institutional concerns reappeared about the role of National Competition Authorities, in particular the Office of Fair Trading. On the one hand, many noted that National Competition Authorities have access to public resources, making them attractive venues to the extent that a plaintiff need not meet the full costs of his action. It is also notable that the NCA is often well-placed to bring considerable pressure to bear following a complaint, not least for reputational reasons. On the other hand, the institutional limitations of NCAs surfaced several times. The most important downsides, which were put forward in this respect by many participants, can be summarised as follows. First, on 12 occasions, participants were concerned that a complaint may not be taken up. It is well established that 'public enforcers cannot investigate all complaints, but must set priorities in their treatment of cases.'[105] As a result, recent research has shown that the Office of Fair Trading has rendered only few infringement decisions.[106] Secondly, the time which a competition authority would need to proceed with a complaint indicates that someone who needs a quick fix (or an injunction) would be better off to go to the courts. This observation has been put forward on 10 occasions. Thirdly, lack of control is another drawback of proceedings before national competition authorities where there is no real prospect for settlement. This was put forward as a factor in five cases. Fourthly, another drawback relates to the inability of a regulator to award damages or injunctive relief, which was seen as a problem by respondents on three occasions. Fifthly, some participants also alluded to political problems in terms of finding a sympathetic ear at the NCA. Finally, a few respondents also noted the possibility that the involvement of administrative bodies such as NCAs may prevent robust precedents from developing as they might in courts.

[105] Notice on the handling of complaints, (n 84), para. 8. See also: W. J. Wils, "Discretion and prioritisation in public enforcement, in particular EU antitrust enforcement" (2011) 34 *World Competition* 353.
[106] E. Burrows and T. Gilbert, "OFT Competition Act enforcement: Key developments over the first decade" (2010) *Competition Law Journal* 178, 179-182.

In the context of private proceedings, one participant has put forward the following observation:

> 'I think if there hadn't be a regulatory decision, it would be a big step to bring your own damages claim without relying on any kind of predetermined regulatory decision. I'm not sure that would be a particularly fruitful route.'

Another participant has neatly summarised the main factors, which may need to be considered when deciding whether to seise courts or NCAs, by submitting that 'there are a series of factors that a claimant needs to weigh in the balance, and they unquestionably include cost, control and remedy.' However, a closer analysis of data indicates that the choice is only available to big companies with deep pockets: this was indicated on eight occasions.[107]

It should be noted that the majority of the questions were framed in terms of EU competition law infringements, generally construed. Nevertheless, on five occasions, the participants appear to suggest that there might be different tactics depending on whether it is abuse of a dominant position case or a cartel. As a result, on four occasions participants have stated that the courts are the better place to go especially in abuse of a dominant position cases. This can be further illustrated by the recent judgment of the High Court in *Purple Parking Ltd and Meteor Parking Ltd v Heathrow Airport Ltd*,[108] which addressed the use of injunctive relief in dominance cases. Despite a recent and prominent case, the responses appear to indicate that stand-alone actions before English courts would be preferable only when someone needs a quick fix (or an injunction). This has been put forward on 10 occasions during the course of the qualitative interviews.

The prospects of success under either path are still quite low, however, as one participant noted:

> 'Although competition authorities are usually in the best position to achieve results quickly, the only thing that you can rely on is that they're not going to do it. So for example if you are in real trouble, then there's nothing you can do because if you go to court with an application for an interim injunction and, for example, you are bringing proceedings against a dominant undertaking, there is a high possibility that you will get crushed to death, and if you go to a competition authority, you can guarantee that they will do nothing to help you.'

Another participant also observed that claimants may face difficulties when bringing such actions before English courts:

> 'The courts have said these are very difficult actions, we should lean against those actions, we always require very, very full pleading at a stage when that pleading can't really be made. So the courts are attempting to lay down all sorts of hurdles in the way of getting those

[107] See below regarding claimant types.
[108] *Purple Parking*, (n 15).

> actions going here in the UK. Maybe not so much damages claims, but when you think of the Chancellor's judgment in *Emerald*[109]…'

Indeed, the decision of the Court of Appeal in *Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Ltd*[110] indicates that, even in a follow-on action, a claimant would face numerous evidential hurdles. As the Court noted, 'since a finding of infringement does not require proof that damage has in fact been caused to a rival undertaking, the fact that an infringement has been established does not show, as a necessary implication, that such damage has been caused.'[111] However, it may be far from efficient to have one set of proceedings before an NCA in order to establish a breach of competition law, and another set of proceedings before Member State courts in order for a claimant to prove that damage has been caused to him. Mechanisms allowing for some form of consolidation of the two sets of proceedings before national courts[112] might be desirable as the outcome in the follow-on action would be highly dependent upon on the evidence gathered in the course of the proceedings establishing the infringement.[113] Indeed, the interaction of the European Commission, National Competition Authorities (NCAs) and national courts present problems which may need to be addressed by reforms increasing the role for private enforcement. At present, the interaction between the European Commission and NCAs is well-defined in Regulation 1/2003, which provides for a balance of power based on oversight and soft-law guidance. The relative jurisdictions of an NCA located in one Member State and a court located in another Member State are not defined by the Regulation, however.

Some participants were concerned that an excessively claimant-friendly system would overcompensate through encouraging unmeritorious claims. In particular, some suggested that the class actions available to claimants under the federal antitrust laws of the United States led to overcompensation. Nonetheless, one regarded American-style litigation as a remote possibility in a system where the number of cases is so low to start with.[114] Therefore, the developments in the United States, where private antitrust cases have come to outnumber public enforcement by approximately a ten-to-one ratio, seem to be in a sharp contrast with

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[109] *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch); [2010] EWCA Civ 1284.
[110] [2011] EWCA Civ 2.
[111] ibid para. 130.
[112] Compare: Department for Business Innovation & Skills, *A Competition Regime for Growth: A Consultation on Options for Reform*, 16 March 2011 < http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-758-competition-regime-for-growth-impact-assessment.pdf > paras 241-243.
[113] *Pfleiderer*, (n 55); *National Grid*, (n 61). See also: Case: 1077/5/7/07, *Emerson Electric Co v. Mersen UK Portslade Limited (sued as LE Carbon (Great Britain) Limited* [2011] CAT 4.
[114] Other distinguishing factors include the one-way nature of cost shifting in favour of claimants in federal American antitrust cases, as well as the possibility of treble damages in most cases: see above, n 36.

the approach which is developing in Europe and England where the limited private litigation which occurs normally proceeds as a follow-on action based on a public enforcement action.[115] This could be a particular problem because public enforcement relies very heavily on leniency applications, and almost all litigation follows on from these decisions at present, but these applications could dry up in the wake of the uncertainty stemming from potential access to documents under *Pfleiderer*, as noted above.

The essential role of leniency applications in the initial detection of cartels suggests that an important issue which must be considered relates to the incentives created by the leniency programme, and the possible friction between the incentives created by leniency programmes and damages actions, as widely discussed at present**.**[116] The majority of the respondents share the view that leniency programmes create incentives for the infringing undertakings to submit leniency applications, this being submitted on 19 occasions. Only one participant thought that the various leniency programmes do not create incentives for infringing undertakings to submit leniency applications. Nevertheless, another respondent, who thought that although leniency programmes create incentives for the infringing undertakings to submit leniency applications, elaborated further, stating that one 'cannot assume that leniency applications are actually made by guilty undertakings. Some of them are not and may blame some undertakings.' It may be that some parties make strategic applications when not at fault themselves, or even where they do not believe there to be a cartel. If this allegation is true, the incentives to submit leniency applications would appear to be so strong that there is little prospect for private damages claims materially to diminish them. Far from civil damages undermining the incentives, parties appear to be willing to pretend to have breached competition law simply to make strategic use of the leniency programme, even though this exposes them to the risk of potential civil liability.

On only four occasions was it submitted that leniency applicants would not be deterred by the potential damages actions which could be brought against them. One

[115] E.g. *Provimi*, (n. 40). See also: Case No: 1087/7/9/07, *The Consumer Association v JJB Sports PLC*, [2009] CAT 2, 30 January 2009; *Emerald*, (n 109); Case No: 1088/5/7/07, *ME Burgess, JJ Burgess and SJ Burgess (trading as JJ Burgess & Sons) v W Austin & Sons (Stevenage) Limited and Harwood Park Crematorium Limited*, pending – registered 3 August 2008; *Cardiff City Transport*, (n 80); *National Grid*, (n 61); *Enron*, (n 110); *Cooper Tire*, (n 69).

[116] J. Almunia, 'Policy Public enforcement and private damages actions in antitrust' (European Parliament, ECON Committee Brussels, 22 September 2011) at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/598&format=PDF&aged=0&language=EN&guiLanguage=en (last accessed 18 Jan. 2012). See also: J. T. Rosch, "Does the EU Need a System of Private Competition Remedies to Supplement Public Law Enforcement?" (Remarks at the 2011 LIDC Congress, Christ Church, Oxford, England, September 23, 2011), 32 at http://www.ftc.gov/speeches/rosch/110923privatecomp.pdf (last accessed 21 Mar. 2012).

participant drew attention to the so-called '*Masterfoods* problem'[117] whereby a leniency applicant can come to be disadvantaged. Normally a defendant to follow-on private damages claims can appeal the underlying Commission or NCA decision, which delays a follow-on claim based on it. However, if the party obtained leniency from the Commission or NCA, it may not have standing to bring an appeal against the enforcement proceeding and would not therefore benefit from the stay in the private damages case. The leniency applicant might therefore be liable for all the damages from the cartel under the principle of joint and several liability, including those of the parties named in the leniency application, until the appeal against the regulatory decision is concluded. This could well chill leniency applications.

One might think that leniency applicants could be further discouraged by the judgment of the Court of Justice in *Pfleiderer*.[118] As already mentioned, *Pfleiderer* held that EU law must be interpreted as not precluding victims of a cartel from being granted access to documents voluntarily submitted by leniency applicants to an NCA. In other words, claimants who bring follow-on damages claims might have access to such documents.[119] This has led some to suggest that this might cause 'the end of the EU cartel leniency programme.'[120] The judgment may yet bring home the disclosure problems previously confined to the amicus briefs the Commission frequently submitted to safeguard the leniency programme from permissive discovery in American litigation.[121]

Although the prevailing view, put forward on 16 occasions, was that leniency applicants would be deterred by the potential damages actions which could be brought against them, the majority of the participants went further to state that the damage exposure is there anyway, and the leniency applicants would normally weigh it up. Only five participants observed that there is a chance that a more efficient damages system might undermine the leniency programme. In this context, one participant noted that although 'there is a possibility it will undermine the leniency programme' to a degree, it was unlikely to 'destroy the programme ... it will just mean that some cartels don't get reported that might otherwise be.'

[117] Case C-344/98, *Masterfoods v. HB Ice Cream*, [2000] ECR I-11369.
[118] *Pfleiderer*, (n 55). See also: Case T-437/08, *CDC Hydrogene Peroxide Cartel Damages Claims v. Commission*, [2012] 4 CMLR 12.
[119] I. Vandenborre, "The confidentiality of EU Commission cartel records in civil litigation: the ball is in the EU Court," (2011) 32 *ECLR* 116 (published between the AG's opinion in *Pfleiderer*, (n 55), and the judgment of the Court).
[120] A. Gieger, "The end of the EU cartel leniency programme", (2011) 32 ECLR 535.
[121] See Vandenborre, (n 119), 118.

This suggests that the possible friction between leniency programmes and damages actions may be overstated to a degree.[122]

5.3. An enforcement gap?

A case for the existence of an enforcement gap could be made if one tries to identify the class of the parties bringing the actions in at the moment. In view of that, the questions were drafted in order to identify the types of claimants who would sue in the courts and the types of claimants who would rather rely on competition authorities. The majority of our participants (14 out of 20 cases) seem to indicate that it is normally the large companies that tend to bring EU competition law actions. A review of the reported cases would show that there appears to be only one claim which was brought on behalf of the consumers in the UK.[123] Few claims are brought by SMEs.[124] Several participants appear to indicate that there is an enforcement gap as there is no redress for consumers and SMEs who are not particularly active in bringing competition law actions at the moment.

It was not surprising that the overwhelming view was that the consumers fare relatively badly under the current system, submitted on 17 occasions. Only on one occasion was the view expressed that consumers fare acceptably under the current system. Another participant submitted that 'consumers rely on regulators to look after their rights,' while litigation is 'far too expensive for an SME to get involved in.' This leaves the 'heavy lifting of damages claims' to 'bigger businesses' such as 'direct suppliers,' for better or worse.

On five other occasions, it was stated that undertakings[125] generally (encompassing large businesses and SMEs) are more active than consumers. It was only once stated that consumers being gathered by lawyers are active. 13 participants went to further to indicate that consumers may not have incentives to bring actions. Seven participants thought that an opt-out regime (representative or a hybrid "opt in" and "opt out" regime) could be used to encourage actions brought by consumers or on behalf of consumers.[126] Others thought that some innovative solutions could be considered. Three participants thought that ADR[127] (or

[122] Compare: *Private Actions in Competition Law: A Consultation on Options for Reform* (n 16) paras 7.1 - 7.11. See also: *National Grid* (n 61) paras 56-60.
[123] *JJB Sports*, (n 115).
[124] *Purple Parking*, (n 15). See also: *Burgess*, (n 115); *Cardiff City Transport*, (n 80) (still pending – registered 18 January 2011).
[125] E.g. *National Grid*, (n 61); *Enron*, (n 110); *Cooper Tire*, (n 69); case No 1077/5/7/07 *Emerson Electric* [2008] CAT 8, 28 April 2008; *Emerald*, (n 109).
[126] Compare: *Private Actions in Competition Law: A Consultation on Options for Reform* (n 16) paras 5.1 - 5.53.
[127] Compare: *Private Actions in Competition Law: A Consultation on Options for Reform* (n 16) paras 6.1 - 6.46. See also: C. Hodges, "European Competition Enforcement Policy: Integrating Restitution and Behaviour Control –An Integrated Enforcement Policy, Involving Public and Private Enforcement with ADR" (2011) 34

administrative proceedings) could be the solution. However, four participants questioned whether consumers' claims should be incentivised at all.[128] In particular, one participant thought that 'there is a question about the utility of, or the proportionality of devoting a great deal of time and trouble to satisfy a very, very small concern.'

However, the real concern is that the pattern which is developing in Europe and England in particular appears to indicate that the limited private litigation which occurs normally proceeds as a follow-on action based on a public enforcement action. As illustrated above, it may be far from efficient to have one set of proceedings before an NCA in order to establish a breach of competition law, and another set of proceedings before Member State courts in order for a claimant to prove that damage has been caused to him. Mechanisms allowing for some form of consolidation of the two sets of proceedings before national courts might be desirable to reconcile some of the conflicts identified between public and private enforcement in the current system, while retaining the desirable features of both systems of enforcement to the greatest possible extent. Courts seem well placed to mediate in the resolution of the tensions between private and public enforcement, provided that they receive clear guidance from the legislator and case law. The issue may stem from the fact that the modernisation programme of Regulation 1/2003 increased the role for national courts, but has in practice provided less guidance about how to exercise it than might be desirable from the perspective of consistency.

Furthermore, the current private litigation pattern might suggest that there could be an enforcement gap as the public enforcers across Europe are unlikely to have the resources to investigate all the complaints they receive; private litigation might therefore provide extra resources to assist enforcement, which at present seems underdeveloped. Indeed, 'the fact that a complainant can secure the protection of his rights by an action before a national court'[129] may be factored in by the public enforcers when deciding if they would take a complaint or not. In other words, if the private enforcement system, which is in its nascent form in Europe, is not adequately reformed to safeguard the rights of individuals derived from Articles 101 and 102, then there would be an enforcement gap.[130] The most effective way to improve antitrust enforcement is likely to involve elements of both public and private enforcement, and it is difficult to argue that private litigation has no role to play.

World Competition 383; C. Hodges, "Collective Redress in Europe: The New Model" (2010) 29 *Civil Justice Quarterly* 370.

[128] See J. Davies and E. Szyszczak, "ADR: effective protection of consumer rights" (2010) 35 *European Law Review* 695.

[129] Notice on the handling of complaints, (n 84)para. 17.

[130] Compare: Notice on the handling of complaints, (n 84) para.18.

6. Ways forward – concluding remarks

Drawing the foregoing concerns together, the most significant problem appears to lie in the uncertainty facing claimants under the current system. The procedural points, especially concerning the level of national procedural autonomy and its tension with the effective enforcement of EU law would need to be looked at carefully. Damages claims, in particular regarding the defence of passing-on, should be addressed. The high level of uncertainty surrounding those issues leads to excessive expense, which is compounded by evidentiary problems and costs. Thus, if the EU legislator wishes to strengthen the incentives for private enforcement of EU competition law it may have to create an appropriate institutional enforcement structure to allow case law precedents to become more clearly established and developed, in turn encouraging more claims. This appears to raise some policy concerns surrounding the European Courts structure as it stands and the role of National Competition Authorities and their interaction with courts. These are important issues which seemingly require some attention by the policy-makers. This section will conclude by addressing these institutional points in the context of the foregoing analysis, which affect the substance of a potential reform as well its format.

6.1. Alternative Dispute Resolution

An important concern when considering possible reforms is the nature of redress most appropriate. The current administrative solutions appear at present to have failed. As already outlined, participants were concerned with the cost and delay of cumbersome administrative systems. Furthermore, regulators do not have the resources to investigate and prosecute all EU competition law infringements, but only a subset of infringements considered to do the most harm. Indeed, even if administrative resources were to increase, a system of prioritisation of cases would still seem to be inevitable. Proceedings before regulators also raise due process concerns which would be an important consideration following the entry into force of the Lisbon Treaty, and would need to be addressed before the expansion of administrative procedures.[131] With these concerns in mind, the prospect of an administrative system to collect and distribute compensation was poorly received by some. This contrasted with some participants who regarded an administrative system as the only viable approach to compensate end consumers, if that is taken to be a valid aim.

[131] W. Weiss, "Human Rights and EU antitrust enforcement: news from Lisbon", (2011) 32 *ECLR*, 186; I. Forrester, 'A challenge for Europe's judges: the review of fines in competition cases' (2011) 36 *E L Rev* 185.

Nevertheless, the majority of the participants appear to indicate that ADR when used on a voluntary basis could be an appropriate and helpful mechanism to be used for settlement of some cross-border EU competition law actions and follow on actions in particular. This has been submitted on 19 occasions. Only one participant submitted that it is questionable whether ADR is appropriate in competition law cases which are not purely private disputes: 'one should bear in mind that competition law aims to safeguard the process of competition.'

On another occasion, although mediation was believed to be an appropriate mechanism, it was argued that 'arbitration ... is a bad forum because you are not usually getting arbitrators who are competent judges anyway in the competition law and competition law in any event has a large public interest element to it which a court will always bear in mind but an arbitrator simply won't.' Two participants who thought that ADR could be useful went on to state that ADR as a mechanism would not allow for developing precedents which could promote certainty. On two other occasions, it was submitted it would be important to decide the stage of the dispute at which to adopt the mechanism. Three participants thought that ADR could be useful for resolving consumer claims; three other participants thought that ADR would not be appropriate to consumer disputes. Another interesting opinion in this context was: 'You need a dispute before you can go to ADR, and consumer cases are not coming.' In addition, some believed that ADR would only work in the context of a workable judicial system.

There was a variation of opinions regarding which ADR mechanisms would be more appropriate. Nonetheless, it seems that mediation was favoured on 16 occasions. One participant, however, doubted that mediation would be all that useful in cartel damages actions where 'there's no dispute about what's gone on because it's written in the Commission decision.' This was seen to limit the incentive for defendants to mediate.

Determination of certain issues such as damages by an expert witness may be more promising, and was seen as an appropriate mechanism on four occasions (one participant thought that it could be used in the context of leniency applications; another that it could be useful with regard to claims brought on behalf of consumers). Three other participants were of the opinion that expert determination would not appeal to corporates and, as a result, might be a thorny issue.

However, one might wonder whether ADR is likely to develop before court actions themselves develop further from their very low base. In view of this, it appears that encouraging the competition law action is the pre-requisite for promoting ADR, which could be a good solution once the body of case law has been developed.

6.2. Encouraging EU competition law damages claims further – some policy concerns

One potential path for reform would be a new Regulation or Directive addressing some or all of the above concerns, but few participants saw much scope for this. In particular, they were concerned that new laws from Brussels would be unlikely to address the fundamental uncertainty that currently deters many claims, and might even enhance it. A solution including increased involvement of the European courts, which could provide for more certainty, was also rejected on the basis of concerns about increased delay. There was therefore little focus on whether a directive or regulation would be preferable. Very few participants considered soft law solutions to the issue. This leaves competition law enforcement in a difficult position, with widespread agreement that the system is malfunctioning but few suggestions of the direction reform could take.

The overwhelming majority of respondents instead favoured allowing the current system to evolve in its current form. As already submitted, the main reason articulated was that, although competition law actions have evolved from a low base, the number of actions is on the rise. Moreover, the concern that the number of cases in the current system is underdeveloped may be overstated: there have only been competition law actions for approximately ten years in comparison with, for example, contract law actions which took 200 years to develop. (An interesting observation which was submitted on one occasion.) The majority of participants favoured modest reforms to the current system at the national level, allowing competition to develop between different jurisdictions. Although an increased number of claims might be seen, this compensation could come at a high price to the deeply embedded aim of cross-border consistency in European competition law. In this way, strong jurisdictions for bringing claims might emerge, but the question of their cross-border compatibility would remain largely unaddressed in the absence of case law or legislation to promote consistency: the substantive rules would continue to be dominated by procedural differences.

Taken together, these considerations mean that the private international law solution appears to receive more support. Although it is justifiable to employ private international law when allocating jurisdiction and identifying the applicable law in cross-border private EU competition law actions brought against defendants who are not domiciled in a Member State, it might be questioned whether the EU should use the current EU private international law framework with regard to EU competition law brought in the European context. Indeed, Articles 101 and 102 TFEU, which form part of each Member State's legal order, are at the heart of an EU competition law claim. Council Regulation (EC) No 44/2001 on jurisdiction

and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)[132] is not suited to deal with the specific issues which arise in the context of cross-border enforcement before Member State courts and NCAs.[133] In other words, the EU legislator may wish to consider whether the European Union should use the current EU private international law framework with regard to cross-border EU competition law claims.

Furthermore, employing a private international law instrument in the context of cross-border EU competition law enforcement would suggest that an institutional reform, which might consider the role of the EU courts, would need to be considered. The need for such a reform was first signalled by a Report by the Working Party on the Future of the European Communities' Court System.[134] The report clearly stated that '… the Working Party considers that preliminary questions concerning judicial cooperation should be withdrawn from the Court of Justice and assigned to a Community court with members drawn from specialist private international lawyers.'[135] Similarly, Hill has submitted that: 'The suggestion that, within the ECJ, there should be established a specialist chamber (of PIL experts) to deal with references under the Brussels I Regulation (and other PIL instruments) has been knocking around for well over 30 years. Such reform is seriously overdue.'[136] The current institutional architecture might need to be reviewed if the EU legislator decided to employ private international law when allocating jurisdiction and identifying the applicable law in cross-border private EU competition law actions, which seem to pose particularly acute problems under the current system. This would be necessary in order to address the issue of the uniform interpretation and application of the employed private international mechanism across Europe.

[132] O.J. 2001 L12/1.
[133] Danov (n 21).
[134] Report by the Working Party, (n 52).
[135] Ibid 33.
[136] J. Hill, 'Comments on the Review of the Brussels I Regulation' at http://conflictoflaws.net/2009/brussels-i-review-jonathan-hill/ (last accessed 21 Mar. 2012).

Money Advice and Community Support

I would like to contribute to the consultation. The organisation I work for is an independent advice centre but is not a law centre and so has no direct interest in the outcome of the consultation.

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

I think it is an excellent idea, in principle, to pay unclaimed sums to a single body. Its important though that there is a clear definition of 'unclaimed', so that individuals did not unreasonably lose out for the sake of expediency.

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?

Yes, this is a very fair solution to ensure that maximum benefit is gained from unclaimed funds

Yours faithfully
Jackie Grigg
Director
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National Farmers Union

NFU Consultation

Title:	Private actions in competition law – a consultation on options for reform	Date:	24 July 2012
		Ref:	13.1.2jp24072012
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If this issue or area of work is of a particular interest to you and you would like to become actively involved in future consultations, please send your email address to the above contact to be added to the consultation panel.

Private actions in competition law – a consultation on options for reform

Introduction

The NFU has 56,000 Farmer and grower members and represents 47,000 farm businesses in England & Wales. In addition we have 40,000 countryside members with an interest in farming and the countryside.

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

A Amending Section 16 of the Enterprise Act to enable the courts to transfer competition cases to the Competition Appeal Tribunal (CAT) would appear a useful reform by facilitating competition law actions which are not reliant on prior infringement decisions and to strengthen the CATS position as a centre of competition expertise.

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

A Amending the Competition Act to allow the CAT to hear stand alone as well as follow on cases would enable SME's to bring stand-alone proceedings to remedy anti-competitive behaviour even when there was no prior infringement decision. This should make competition law remedies more accessible to SME's in situations when the competition authorities have not taken prior infringement decisions.

Q.3 Should the CAT be allowed to grant injunctions?
This would serve to improve access to justice and would provide an additional remedy which in some circumstances would be of equal value to the victims of anti-competitive breaches as damages. The example in paragraph 4.22 of the consultation document of private actions to obtain injunctions and declarations of 'voidness' of anti-competitive contracts could be of significant potential use to SME's to challenge contracts with anti-competitive clauses. In the agricultural sector for example many agricultural products are traded on the basis of contracts with exclusivity, price and long termination clauses derived from long standing custom and practice. A forum to challenge such contracts might benefit producers and consumers were a suitable procedure available.

Were the CAT to be allowed to grant interlocutory injunctions it would also benefit the victims of anti-competitive breaches to be able to gain immediate relief pending the hearing of the main action.

Q.4 Do you believe a fast track route in the CAT would help enable SMEs to tackle anti-competitive behaviour?
We believe that a fast track route could be effective to enable SMEs to challenge anti-competitive behaviour promptly. Indeed, for an SME suffering anti-competitive behaviour a challenge might be impossible if delayed for some months due to the risk of serious or terminal business damage to the victim of anti-competitive behaviour.

Q.5 How appropriate are the design elements proposed, in particular cost thresholds, damage capping and the emphasis on injunctive relief?
The availability of injunctive relief would be worthwhile in some circumstances to provide an effective resolution to disputes. Cost thresholds and damage capping appear appropriate to ensure that the fast track is available on a timely and affordable basis to SMEs.

Q.6 Should anything else be done to enable SMEs to bring competition cases to court?
Preceding the fast track procedure by a letter being written to the alleged infringer would presumably bring many matters to a prompt settlement. Clearly a letter written by a body such as CPBS will have authority, but letters written by other professional representatives such as solicitors would also appear suitable, and also letters written by the claimant. Were the letter to be written by the CAT or OFT there is a risk that the impartiality of those bodies will be bought into question, or transformed into an inquisitorial forum, and there is also the risk of adding a further stage to the procedure should these bodies issue letters warning of a reasonable cause of action.

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?
The introduction of a rebuttable presumption of loss into cartel cases would certainly help reduce the disincentives for parties to start litigation against cartels by addressing the imbalance of information which presently favours the defendant. The effect of shifting the burden of proof would further increase this effect. However, these proposals may carry with them a risk of spurious claims against defendants which might disadvantage the suppliers and consumers of innocent defendants if defendants had to devote resources to defending spurious claims. This risk would be reduced if proceedings were designed in two stages to initially establish a cartel, and subsequently to assess damages.

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?
The NFU has no views on directly addressing the passing-on defence in legislation.

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 effectively in-accessible to SME businesses because it is not open to representative bodies and due to the cost. The NFU would welcome proposals to facilitate SMEs to prepare private actions to correct breaches of competition law through enabling collective actions and also actions by representative bodies on behalf of their members.

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.
Whilst the NFU welcomes proposals to enable collective and representative actions, it understands that rules relating to the parties being able to prepare such actions should be carefully drawn to prevent speculative actions. For this reason we believe that consumer and trade representative bodies should be allowed to bring such actions, but would be concerned about the possibility of speculative actions bought forward by third party funders.

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 for breaches of competition law should be granted to both businesses and consumers.

Q.12 Should any restrictions be introduced to prevent such cases being used as a vehicle for anti-competitive information sharing?
Any perceived need to prevent anti-competitive information sharing should be balanced by the principle of open justice which is best served by conducting all aspects of legal proceedings in open court unless there are very strong reasons to conduct them in private.

Private actions in competition law: a consultation on options for reform
Q.13 Should collective actions be allowed in stand-alone as well as in follow-on cases?
Collective actions should be allowed in stand-alone as well as in follow-on cases to provide effective redress against anti-competitive activity.

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.
The NFU would welcome permitting opt-out collective actions in addition to both pure opt-in and pre-damages opt-in actions. In a trading environment where many businesses have on-going links to infringers and where there is often a 'climate of fear' which discourages businesses from taking action, an opt-out model might significantly increase the possibility of bringing actions against competition law infringers. The NFU proposes both opt-in and opt-out approaches to allow the greatest flexibility in assembling claims against competition law infringers.

Q.15 What are your views on the proposed list of issues to be addressed at certification?
On the whole the NFU regards the list of issues to be addressed at certification as appropriate, except for the following issues. The NFU does not understand why numerosity should be an issue, particularly as sufficient funds to cover the costs of the defendant if unsuccessful is dealt with individually on the list. In agriculture and the agricultural food chain there are frequently a small number of specialist producers producing a particular crop and similarly there may be a small number of processors or packers who agglomerate produce from many small producers. Furthermore, the NFU is uncertain what is meant by the relevance of sufficient commonality of issues among the claimants and expects an explanation to be published of the type of issues to be considered relevant for this purpose.

Q.16 Should treble or other punitive damages continue to be prohibited in collective actions?
The NFU accepts the reasoning expressed in the consultation for rejecting US style triple damages on the basis of distorting the relative incentives between bringing an action in competition and contract law and the role of the competition authorities to undertake enforcement activity.

Q.17 Should the loser-pays rule be maintained for collective actions?
The NFU supports the proposal to retain the loser-pays rule 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?
Flexibility to allow the court a discretion to make departures in certain circumstances, in particular for the interests of justice (by cost-capping) and to extract the costs of the claimant from a damages fund, where this would be appropriate, would appear suitable to depart from the usual rule.

Q.19 Should contingency fees continue to be prohibited in collective action cases?
The NFU agrees that contingency fees could be problematic for competition claims.

Q.20 What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums.
The NFU has no views on this issue.

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 NFU has no views on this issue.

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?
Trade associations should also be able to bring opt-out collective actions for breaches of competition laws which may have impacted upon a large number of their members or the sector that they represent.

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?
The risk of legal firms or third party funds bringing claims could result in a litigation culture or spurious claims. This risk could be controlled if such organisations were able to put forward claims for assessment at the certification stages and the certification authority having discretion to refuse certification to unmeritorious applications.

Private actions in competition law: a consultation on options for reform
Q.24 Do you agree that ADR in competition private actions should be strongly encouraged but not made mandatory?
ADR should be encouraged where appropriate, but it should not be made mandatory.

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

Q.26 Should the CAT rules governing formal settlement offers be amended?
The NFU has no views on this issue.

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.
The NFU does not envisage establishing any initiatives to facilitate the provision of ADR relating to competition law at this time.

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 NFU has no views on this issue.

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?
The competition authorities should be given a power to order a company found in breach of competition law to implement a scheme of redress or 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?
The extent to which a company has made redress should be taken into account by competition authorities when determining the level of fine to impose. In some circumstances voluntary redress might be sufficient to negate the imposition of a fine.

Q.31 The Government seeks your views on whether and how an extended role for private actions would positively complement current public enforcement.
An extended role for private actions could complement current public enforcement by enabling private actors to directly initiate actions. However, it is to be noted that the certification process would dampen the facilitation of private actions and filter out actions viewed as unmeritorious in the view of the tribunal.

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?
Subject to suitable judicial monitoring, the protection of some leniency documents from public disclosure might encourage whistle blowing, particularly in a business environment subject to a 'climate of fear' when suppliers might be concerned about punitive action by purchasers of their product for reporting an infringer.

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?
The NFU agrees that whistleblowers should be protected from joint and several liability.

Q.34 The Government seeks your views on whether there are measures, other than protecting leniency documents or removing joint and several liability, where action should be taken to protect the public enforcement regime.
The NFU has no views on this issue.

North East Legal Support Trust

Dear Sirs,

We write in response to the consultation on *Private Actions in Competition Law: A Consultation on Options for Reform*.

The North East Legal Support Trust (NELST) is a charitable foundation which raises funds to support the provision of legal advice in the voluntary and not-for profit sector in the North East of England.

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:

● NELST agree that collective actions should be introduced and unclaimed sums should be paid to a single specified body

● NELST agree that access to justice is the area of public service most appropriate for gaining benefit from these funds.

● NELST 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

Paul McKeown
Trustee
On behalf of the North East Legal Support Trust

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.

NELST 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.

NELST views the disadvantages of the other possible options as being:

Cy-près

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

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

- The second major option to pay the residue funds to an organisation, usually a charity, considered the next best beneficiary to the harmed individuals involves the need to decide who the most appropriate recipient is. This may again place undue demands on the time and funding available.

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

Escheat to the Treasury

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

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?

NELST 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 North East 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.

North Kensington Law Centre

North Kensington Law Centre

Response to Private Actions in competition law: a consultation on options for reform

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

Yes

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

Yes

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

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

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

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

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

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

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

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

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

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

Q.13 Should collective actions be allowed in stand-alone as well as in follow-on cases?
Q.14 The Government seeks your views on the relative merits of permitting opt-out collective actions, at the discretion of the CAT, when compared to the other options for collective actions.

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

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

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

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

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

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

NKLC 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.

NKLC 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?

NKLC 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

Sean Canning

23 July 2012

North West Legal Support Trust

Dear Sirs,

I am responding to your consultation paper on Options For Reform on behalf of the North West Legal Support Trust of which I am a trustee and Treasurer.

The NWLST is one of a number of regional charitable institutions which raises funds to support the provision of legal services by making grants to organisations who provide services to areas of the community who are unable to obtain the legal advice they require.

We support a variety of organisations such as law centres , community groups and those who advise and provide support to a number of minority and deprived groups who provide advice.

In summary we that there is a benefit to the community as a whole in collective actions being introduced and un allocated sums paid to a single organisation and that Access to Justice Foundation would be an appropriate recipient.

In response to the specific questions asked we respond as follows.

Question 20.

The merits of paying unclaimed or allocated sums to a single body are as follow:

It is axiomatic that there would be unidentified beneficiaries and if procedures had to be set up in each individual case "after the event " the time and cost in deciding how such monies should be allocated would be burdensome, cumbersome and would no doubt reduce the monies available and therefore their beneficial effect.

Having a named fund would lessen the bureaucracy, speed up the process and ensure that the monies available would be put to the most beneficial use.

Anti competitive organisation may be discouraged in their activities in the knowledge that breach could expose them to more significant cost by way of compensation and cost than would otherwise have been the case.

Such a scheme would be more advantageous than other options such as cy pres or reversion to the treasury as a simple set of guidelines could be introduced and there would be identifiable benefit to the community at large rather than accrued benefit to the "State" in an unidentified manner.

Q21

I believe that the Access To Justice Foundation would be the most appropriate because.

The purpose of the proposals is to provide access to justice to those who would not usually receive it and the object of the Access to Justice Foundation is to provide the opportunity for such people to have access. Thus by funding the Foundation the same "class" of the community would benefit.

There is an increasing need for the provision of legal services to those who cannot afford to obtain such advice through the traditional legal channels.

The Foundation is an established organisation already operating in the appropriate sphere and is organised on a National level with the ability to see that funds are placed in areas and with groups of people who have the expertise to see that there is real public and local benefit.

yours faithfully

Paul Rose
for and on behalf of the North West Legal Support Trust

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Norton Rose LLP

NORTON ROSE

Norton Rose Response to Department of Business Innovation & Skills

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

This is Norton Rose's response to the Department for Business Innovation and Skills (BIS) consultation on options for reform of private actions in competition law (the Consultation Paper).

The Norton Rose Group is a leading international legal practice operating from 40 offices across Europe, Asia, Australia, Canada, Africa, the Middle East and Latin America.

We welcome the opportunity to comment on the BIS proposals. We have experience acting on large and complex competition litigation cases in England[1] as well as across our international network. In particular, the Norton Rose Group now extends to Canada and Australia, which have relatively well-developed and sophisticated class action procedures in competition cases. We have drawn on this experience in preparing this response.

1 Overview

1.1 Over the last decade, there have been very significant developments in private enforcement of competition law cases in England (and, to differing extents, in other Member States in the EU). In our view, these developments can be explained by the combination of three important drivers that have encouraged the victims of breaches of competition law to bring claims in England, which are as follows:

(a) **Commercial** - there are now a number of specialist class action law firms and third party funders operating in England looking for opportunities to bring proceedings against companies that have been targeted by the competition authorities. These firms might offer "no win, no fee" conditional fee arrangements, combined with after-the-event costs insurance, effectively removing the commercial risks for claimants otherwise associated with litigation in England.

(b) **Legal** - the English courts have been prepared to take a wide view of their jurisdiction for cross-border cartels. When combined with the English disclosure rules (requiring parties to disclose all documents that both support and also undermine their case) and an increasingly experienced judiciary, the English courts have become an attractive forum for competition claims. Although there remain some areas of legal uncertainty, the legal basis on which competition law claims are founded is increasingly clear.

(c) **Political** - Companies that believe they have been harmed by competition law infringements have been encouraged by the EU and UK competition authorities to take direct action in the courts.[2]

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[1] Acting in the leading competition case brought in the High Court by the Health Authorities of England, Wales, Scotland and Northern Ireland in respect of an alleged cartel for certain generic drugs issued in 2004 (and settled in 2008), as well as for defendants in a number of "follow on" claims, including in relation to cartel decisions concerning candle waxes and gas insulated switchgear, and stand alone cases.

[2] OFT report on private actions (2007); Civil Justice Council Report – Improving Access to Justice through Collective Actions (2008); European Commission White Paper on Private Actions (2008); and European Commission public consultation – Towards a Coherent European Approach on Collective Redress (2011)

1.2 When considering the extent to which further reforms in this area are necessary, it is important to recognise that the landscape will undoubtedly continue to develop. Notwithstanding this dynamic situation, we recognise that there are a number of features of the current private enforcement regime that merit careful consideration to assess whether, and if so how, they might be improved. In particular:

(a) The role of the CAT has been limited by its procedural framework. The current distinction between the High Court and the CAT is, in some important respects, illogical and confusing.

(b) The collective redress mechanisms available to victims of competition law infringements have not resulted in any successful actions to date. For example: (i) the claim brought by Which? against JJB Sports[3] resulted in costs which far outweighed the limited compensation ultimately paid to consumers; and (ii) the only attempt to bring a representative action under Part 19 of the Civil Procedure Rules[4] was not permitted.

(c) To the extent that competition law cases - in common with all complex commercial litigation - are resource intensive and tend to be expensive, there is a particular issue with access to justice for consumers and SMEs.

1.3 In our view, the most important guiding principle for BIS when assessing the appropriate features of a private enforcement regime for competition law claims is the need to ensure that an effective balance is maintained between, on the one hand ensuring that victims of anti-competitive conduct are fairly compensated for their loss, while on the other hand not incentivising unmeritorious claims. In particular, it is important to ensure that reforms do not result in defendants being incentivised to settle unmeritorious claims simply to avoid legal costs.

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3 *Consumers' Association v JJB Sports Plc* [2009] CAT 2

4 *Emerald Supplies v British Airways* [2009] EWHC 741 (Ch); [2010] EWCA Civ 1284

An effective balance in competition law claims

There are four particularly important respects in which the Consultation Paper risks upsetting the balance between the rights of claimants and defendants in competition law cases:

(1) **Collective redress:**

- A fundamental consideration is whether any system of collective redress should be available on behalf of group members on an "opt-in" or an "opt-out" basis. In our view, many of the excesses associated with the US process stem from the central feature of it being an opt-out class action system. For this reason, in our view, any system for collective actions adopted in England should not be on an opt-out basis, but should be based around an opt-in approach.

- However, as an exception to this general approach, we consider that the role of consumer representative bodies (such as the Consumers' Association) may be reviewed and potentially expanded to allow them to commence proceedings on behalf of a carefully defined group of consumers on an opt-out basis (subject to the action naming at least one representative individual as a co-claimant).
- Opt-out actions by representative bodies would need to be subject to strict procedural controls - any such actions would need to be limited to specific designated bodies; subject to "certification" by the courts; advertised to enable consumers to opt out; only possible where there is a pre-existing decision of a competition authority that determines liability and where it is clear that the (direct) victims of the infringement are final consumers; and any unclaimed damages must be returned to the defendants.

(2) **Maintaining the distinction between public and private enforcement:**

- The objective of private enforcement in general, and of any collective redress in particular, should be to compensate the victims of unlawful behaviour (or prevent the act continuing or occurring in the first place), rather than to punish wrongdoers.

- In our view, it is important that there is a clear distinction between the public role of the relevant regulatory authority and the private role of individual or group litigants. For example, in the context of private competition law claims, the relevant competition authority may have taken enforcement action to deter and punish the conduct in question, leaving private litigants to issue proceedings in order to recover the loss suffered.

- This distinction has been recognised in the English courts where a claim for punitive (or "exemplary") damages in follow-on proceedings was dismissed.[5] The ability of US class action claimants to recover treble damages for antitrust breaches is at odds with this principle and leads to awards that sometimes bear little resemblance to the loss suffered. In our view the government should ensure that while the role of the OFT interacts with private enforcement, it is important to maintain a clear distinction between the two.

[5] *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch); [2008] EWCA Civ 1086

(3) **Costs rules:**

- The "loser pays" principle is fundamental to ensuring that claims brought are meritorious. In our view, parties should not be permitted to bring risk-free litigation because, as in the US, this feature can lead to unmeritorious claims being issued without the risk of an adverse consequence.
- Although we recognise that in some circumstances the risk of paying the other side's costs can impose a chilling effect on bringing otherwise legitimate claims, in our view fee caps (particularly if set at only £25,000) and other proposals to remove the "loser pays" principle are not necessary or appropriate responses.
- A means of addressing this concern without changing the "loser pays" principle is to permit claimants to take out "after-the-event" insurance policies and/or enter into some form of conditional fee arrangement (whereby the legal representative shares some of the risk of an adverse outcome) and/or to permit third party funding, where funders are only likely to finance claims that have a good prospect of success.

(4) **Rebuttable presumption of loss:**

- The possible introduction of a rebuttable presumption that a victim of conduct that infringed competition law suffered loss as a result is in our view seriously flawed.
- Each damages claim is fact-sensitive and it is wrong to assume that a cartel has caused any loss. Certainly, the level of overcharge and the degree to which the purchaser was able to pass-on that overcharge are highly fact sensitive and as such are key areas of dispute in claims following on from an infringement finding.
- The proposed figure of 20 per cent is arbitrary and, as such, a potentially misleading starting point. Further, we do not anticipate that the introduction of such a presumption at this or any figure would expedite proceedings and may well deter settlement to the extent that claimants hold out for an unrealistically high level of damages.

1.4 We have seen an advanced draft of the International Chamber of Commerce UK's (ICC UK) response to the Consultation and our position is broadly aligned with the ICC UK. On this basis, we have not sought to answer each of the 34 Consultation questions (listed in the Annex to this Submission) in detail. Instead, we have commented on each section of the Consultation Paper, focusing on the questions that we consider to be the most important.

1.5 The remaining sections of this submission follow the top-level heading structure of the Consultation Paper. For most questions we have grouped our responses together, as indicated at the beginning of each section.

2 The role of the Competition Appeal Tribunal

Expanding the role of the CAT

[This section addresses questions 1 to 3]

2.1 The Competition Appeal Tribunal (CAT) was intended to be the specialist competition law forum. However, its ability to hear competition claims has been limited by its procedural rules and the fact that it can only hear follow-on claims under sections 47A and 47B of the Competition Act 1998. As a result the High Court has to a large extent become the forum of choice for both stand alone and follow-on competition claims in the UK.

2.2 We consider that the current distinction between the High Court and the CAT is, in some important respects, illogical and confusing. Expanding the CAT's jurisdiction so that it can hear stand alone claims and order injunctive relief will provide greater scope for injured parties to obtain redress and we support these proposals.

A fast-track procedure for SMEs

[This section addresses questions 4 and 5 - Do you believe that a fast track route in the CAT would enable SMEs to tackle anti-competitive behaviour? How appropriate are the design elements proposed, in particular cost thresholds, damage capping and the emphasis on injunction relief?]

2.3 We consider that the introduction of a fast track procedure in the CAT (along similar lines to the fast track procedure that is currently available in the High Court) is a good idea in principle. However, the key criteria for the CAT in determining how to allocate a claim to any such fast track ought to be the size and complexity of the claim rather than the status of the claimant.[6] Although it may be the case that many claims brought by SMEs would be appropriate for allocation to the fast-track, this would not automatically be the case for all claims brought by SMEs.

2.4 Also, we suggest that the reality is that competition law claims are unlikely to be so simple and straightforward that they can be dealt with in six months with legal costs capped at £25,000. There is a danger that, in setting unrealistic expectations, the CAT would be overwhelmed by fast track claims that take up a disproportionate amount of the CAT's time and resources. If a fast track procedure is to be introduced, it is important that each claim is first assessed by the court before being allocated to a track.

2.5 We consider that certain features of the proposed fast track procedure are appropriate, but not in all cases. Also, some of the features discussed in connection with a fast track process ought not necessarily be confined to the fast track but should apply to all claims before the CAT. We set out our views on the key features identified in the Consultation Paper below.

Injunctions

2.6 Cross undertakings in damages are an important safeguard for defendants who might be seriously harmed by an interim injunction which is ultimately discharged. Not to impose a cross-

[6] In the High Court, claims are allocated to different tracks depending on the amount claimed.

undertaking in damages requires careful assessment of the facts and to this extent any presumption in all fast track cases that such a cross-undertaking will not be imposed.

2.7 Rather, in our view, for all applications for an injunction to the CAT it would be preferable to assess all relevant facts including the strength of the case and discretionary factors (applying the usual *American Cyanamid* test). This might properly include consideration of the status of the claimant and whether imposing the cross-undertaking would effectively deny that claimant access to injunctive relief.

Speed (six months and case dealt with on paper)

2.8 It is important that in deciding the appropriate procedure for any case, the CAT evaluates how best to achieve that balance between the speedy resolution of a case and achieving justice on the facts. For simple cases, a fast track procedure over six months without extensive oral evidence might be appropriate. However, for cases where there is contested factual evidence, this would not be appropriate either in terms of duration or format. To provide a set approach to all cases on the fast track would not be appropriate.

Costs cap

2.9 A mandatory cap, particularly if set at a low level, risks seriously undermining the fundamental principle of competition litigation - that the unsuccessful party reimburses the successful party's reasonable costs.

2.10 It may be appropriate for the CAT to indicate at a relatively early stage that costs should be capped at a particular level (for at least parts of the procedure). However, this must be done on a case by case basis. In particular, we would not regard the introduction of a cap of £25,000 on defendants' costs to be appropriate in most (if not all) cases for the following reasons:

(a) It would run contrary to one of the key principles of the English legal system - that the unsuccessful party is liable to pay the successful party's reasonable costs. Although we recognise that in some circumstances the risk of paying the other side's costs can impose a chilling effect on bringing otherwise legitimate claims, we do not consider that removing the majority of the costs risk suffered by claimants is the correct way of going about this.

(b) Rather, we consider that the policy concern (that the costs risk discourages valid competition claims) could be addressed without changing the "loser pays" principle by the existing, and developing, mechanisms to protect claimants from the risks inherent in any competition litigation, including:

- "after-the-event" insurance policies;
- conditional fee arrangements (whereby the legal representative shares some of the risk of an adverse outcome); and/or
- third party funding (where funders are only likely to finance claims that have a good prospect of success).

(c) If a cap is to be imposed at the discretion of the CAT, assessing the facts of any given case, it must be pitched at an appropriate level. A cap on claimants' costs liability at £25,000 is very unlikely to cover the actual costs incurred for almost any conceivable

competition law claim. It is also too low, in our view, to deter frivolous claims. Competition claims are resource intensive and the legal and economic fees that a defendant would incur in defending a claim would almost always be significantly in excess of that figure meaning that in many cases it would not be in a defendant's financial interests to defend an unmeritorious claim. One of the perceived excesses of the US system identified by government is the possibility of risk-free litigation which a cap on costs at this level would provide.

Rebuttable presumption of loss

[This section addresses 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?

2.11 We do not agree with the proposal that there should be a rebuttable presumption of loss in cartel cases, which in our view is seriously flawed for the reasons set out below:

(a) First, we do not agree that a formal presumption of loss should operate to the benefit of a claimant. The burden of proof to make out a claim for damages falls on the claimant. Of course, to the extent that a claim is brought that follows on from an infringement decision, that will establish liability against the defendant and in practice means that the defendant will need to adduce clear evidence to demonstrate that the cartel did not have any (or only minor) effect. However, it would be wrong to assume that all cartels are effective. A cartel might fail in its aims for any number of reasons (for example, cheaper imports from outside of the EU might compete with the cartelised product to prevent the cartelists' ability to charge inflated prices). All cases should be assessed on their facts and a presumption in favour of a claimant is inappropriate.

(b) Secondly, it would be practically impossible to arrive at a figure for presumed average loss that would be applicable in all (or even a reasonable proportion of) cartel cases. The number provided as an example of where to pitch any presumed average loss - 20 per cent - is necessarily an arbitrary figure that may not be reflective of the loss suffered in any given cartel. The extent of any overcharge and the ability of the claimants to pass that overcharge on to their consumers are contested points in any cartel damages claim.

(c) Thirdly, there is a real danger of unintended consequences resulting from a presumption that a certain level of loss resulted from any given cartel. It is highly likely that both claimant and defendant would seek to rebut that presumed loss by adducing evidence that the actual loss suffered was either higher or lower than the presumed average loss. As a result, a presumption of loss would be unlikely to save time or costs. Indeed, it may make claims harder to settle to the extent that defendants resist any settlement below the presumed level, irrespective of the evidence in any given case.

(d) Finally, it is important to consider the impact of the proposal on possible claims by non-direct purchasers. Clearly, due to the double jeopardy principle, not all possible claimants down the purchasing chain should be able to benefit from the presumption of loss, recognising that damages claims should be compensatory rather than punitive (in particular, given that in many follow on claims the defendants may have already been fined by the authorities).

Passing-on defence

[This section addresses 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?]

2.12 We agree with the conclusion that there is no strong case for new legislation explicitly addressing the passing-on defence. Although there is no precedent in the English courts for the availability of the passing-on defence, it is widely acknowledged that the defence is likely to be available. In particular:

(a) The European Court of Justice cases of *Manfredi*[7] and *Courage v. Crehan*[8] support this view.

(b) In the *Devenish* case[9] (although the passing-on defence was not the subject of the appeal) the Court of Appeal remarked that if the claimant has in fact passed a charge on to its customers "*there is no very obvious reason why the profit made by the defendants (albeit undeserved and wrongful) should be transferred to the claimant without the claimant being obliged to transfer it down the line to those who have actually suffered the loss*".[10]

2.13 As a result we do not consider that explicitly permitting the defence in law would result in any real change to the current position.

2.14 We also agree with the observation in paragraph 4.47 of the Consultation Paper that forbidding the passing-on defence would be "unjust". The general principle in English tort law is that damages are compensatory. In competition litigation a claimant should only be entitled to recover the loss that it has suffered as a result of the defendant's infringing conduct. If it is proved that the claimant was able to pass on an overcharge to its customers, it should not be entitled to recover that overcharge. The proper claimant (and the person that should be compensated) is the claimant that ultimately suffered loss.

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7 *Manfredi v. Lloyd Adriatico* [2006] ECR I-6619

8 [2001] ECR I-6297

9 *Devenish Nutrition v. Sanofi-Aventis* [2008] EWCA Civ 1086

10 Paragraph 146

3 Collective actions

3.1 There are existing mechanisms for bringing "collective" actions in England. The current competition damages claims before the court include several where a number of businesses are represented by a single firm. There is also the possibility of Group Litigation Orders under CPR Part 19. That said, we recognise that attempts by claimants to bring representative actions have not succeeded[11] and that the claim brought by Which? against JJB Sports[12] was not a success. To address these perceived failures, any system of collective redress must seek to achieve the difficult balance between facilitating effective group litigation in meritorious cases whilst deterring or preventing abusive litigation.

Opt-out collective actions

[This section addresses 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]

3.2 In our view, many of the excesses associated with the US process stem from the central feature of it being an opt-out class action system. For this reason, in our view, any system for collective actions adopted in the UK should not be on a full opt-out basis, but should be based around an opt-in approach.

3.3 It is important to draw a distinction between collective claims brought directly by victims of anticompetitive conduct and those brought by representative bodies. We address each in turn below.

Claims brought directly by victims

3.4 We consider that collective claims brought directly by the victims of unlawful conduct should only be permitted on an opt-in basis.

3.5 Before a collective claim brought directly by victims can be served, we consider that it should be subject to judicial scrutiny to ensure: (i) the persons represented are suitably identified; and (ii) the claim has a reasonable prospect of success. We set out our views on the issues to be addressed at certification in more detail in paragraphs 3.9 to 3.11 below.

Claims brought by representative bodies

3.6 As an exception to this general approach, we consider that there may be a case for the role of consumer representative bodies to be reviewed and expanded to allow them to commence proceedings on behalf of a carefully defined group of consumers on an opt-out basis where:

- there is a previous decision of a competition authority that determines liability; and
- it is clear that the (direct) victims of the infringement are final consumers.

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11 For example *Emerald Supplies v British Airways* [2009] EWHC 741 (Ch); [2010] EWCA Civ 1284

12 *Consumers' Association v JJB Sports Plc* [2009] CAT 2

3.7 It would be necessary to ensure that there are significant safeguards in place before any such system is adopted, including the following:

(a) The representative body must be designated by the government (or otherwise regulated) and have a clear mandate to act in the interests of the consumers represented (e.g. as reflected in its articles of association).

(b) A claim by a representative body should name at least one representative individual as a co-claimant to provide the court with a reasonable basis for determining causation and loss.

(c) To proceed, a claim by a designated body would be subject to "certification" by the courts (potentially pre-service), which would require assessment of the class against strict criteria to ensure that the members of the class have the same interest at all times in the claim.

(d) A certified claim would need to be advertised to enable consumers to opt out.

(e) The representative body should not be financially incentivised to bring unmeritorious claims (i.e. it should not be able to bring claims for its own direct benefit). The court should be required to approve the proposed distribution of any damages awarded or settlement fund. In accordance with the compensatory principle, any unallocated monies should be returned to the defendants (i.e. rather than allocated by the representative body or awarded for any wider "public benefit" purpose including to the Access to Justice Foundation).

3.8 For a more detailed explanation of our position, see our response to the European Commission's Consultation - Towards a Coherent European Approach to Collective Redress (http://ec.europa.eu/competition/consultations/2011_collective_redress/norton_rose_llp_en.pdf).

Certification process

[This section addresses question 15 - what are your views on the proposed list of issues to be addressed at certification?]

3.9 For any collective claim to proceed, whether brought on an opt-in basis or by a representative body on an opt-out basis, it is important that safeguards are in place to ensure that defence rights are protected. Significant legal costs and disruption to business would result from a claim being able to proceed which should have been struck out at an early stage (e.g. because the representative basis of the claim is ill-conceived).

3.10 Before a collective claim can be served, we consider that it should be subject to judicial scrutiny to ensure at least: (i) the persons represented are suitably identified; and (ii) the claim has a reasonable prospect of success.

3.11 In addition, we suggest the following points should apply to judicial scrutiny at an early stage (and potentially pre-service):

(a) The process should provide a filtering mechanism to "weed out" frivolous claims that do not disclose on their face a reasonable cause of action if the facts alleged are assumed to

be true - this should not, however, require the court to look into the substantive merits of the claim, other than to ensure there is an arguable case.

(b) Defendants should be given an opportunity to adduce evidence where the allegations are either erroneous or incomplete, without proceeding too deeply into the merits of the case (i.e. they should have the right to produce limited evidence, for example documentary and/or uncontested in nature), to demonstrate the untruthfulness of key allegations or to supply key documents that are not alleged (e.g. the contract forming the basis of the case).

(c) The criteria should include a demonstration that the facts and legal issues raised are similar or identical for all persons seeking to be included in the claim - otherwise a single judgment will not be able to dispose of the claims of all those included in the case and collective proceedings will not save judicial resources.

Standing to bring a collective claim

[This section addresses 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?]

3.12 In our view, the government should not mandate a system whereby lawyers and third party funders are able to act as representative bodies to initiate collective redress actions in their own interests. This is one of the features of the US system which encourages abusive claims. The role of the lawyer should be limited to the provision of legal representation to their clients, whether individuals or representative bodies. A wider role risks prejudicing lawyers' duties to act independently in the best interests of their clients.

The "loser pays" rule

[This section addresses questions 17 and 18 - Should the loser-pays rule be maintained for collective actions? Are there circumstances in which it should be departed from?]]

3.13 The "loser pays" principle - that the unsuccessful party should pay the costs of the successful party - is essential to discourage frivolous and unmeritorious litigation. When deciding whether to bring a claim, a claimant should consider the possibility of paying the defendant's costs in the event of the claim being unsuccessful. This discourages claims which have a low chance of success. The absence of a "loser pays" principle is one of the features of the US system which encourages potentially abusive litigation.

3.14 In any event, it is open to a claimant to seek after-the-event insurance which provides costs protection, which in combination with a conditional fee arrangement (and potentially third party funding) reduces costs risk for the claimant.

3.15 The ability of a claimant to pay a defendant's costs in the event that the claim is unsuccessful ought to be a consideration for the CAT when certifying the claim. In circumstances where it is unclear whether the claimant satisfies this requirement security for costs should be ordered.

Unclaimed sums

[This section addresses questions 20 and 21]

3.16 If an opt-out system is adopted and a portion of damages remain unclaimed we consider that these funds should be returned to the defendant. Given that the purpose of private litigation is to compensate victims for their loss and not to punish the defendants (which may have been achieved by public enforcement), it would be inappropriate for funds obtained from the defendants to be applied other than to compensate the victims of the infringing conduct.

Public collective actions

[This section addresses question 22]

3.17 We are not in favour of public collective actions (actions brought by the competition authorities). Although there is an obvious interaction between public enforcement of competition law and private collective redress given that competition authorities' decisions establish liability for follow on claims, we consider that collective redress should remain separate from enforcement action undertaken by public authorities. The purpose of collective redress is to compensate victims of unlawful conduct. By contrast, the purpose of public enforcement is to punish and deter parties that have committed unlawful acts and to deter others from engaging in similar conduct.

3.18 It is important to recognise that any policy desire to extend the role of the competition authorities in order to facilitate redress/compensation for victims - for example, requiring the OFT to undertake a full effects analysis to quantify the loss for victims and/or facilitating a settlement between defendants and victims as part of the administrative process - would necessitate a fundamental shift in the focus of the OFT and have a serious impact on its resources. There are material downsides to these changes which, in our view, mean that the role of the competition authorities in this respect should not be changed fundamentally and that the status quo should be preserved.

3.19 We do not consider that it would be advantageous for the OFT to carry out a greater effects analysis or to identify the victims of the infringement of competition law because:

(a) First and foremost, this change would impose a very considerable evidential burden on top of the already significant task faced by the OFT to establish whether the evidence establishes a breach of competition law, whether this in turn justifies an infringement decision and, if so also, the imposition of a precisely-calculated pecuniary penalty. The evidential issues of who suffered what loss are more properly dealt with before a court under the established procedural rules (including any disclosure obligation) designed for that purpose.

(b) Second, this additional process would make investigations considerably longer, even more heavily contested (including through rights of appeal) and consequently more expensive both for the OFT and for the companies involved.

(c) Third, such a process could conflict with the leniency procedure, discouraging potential whistleblowers who would also have to factor in the unknown cost of damages that might also be awarded against them in the administrative process. This additional uncertainty could be enough to weigh against uncovering a cartel and/or cooperating with an investigation, which would seriously threaten public enforcement objectives.

(d) Fourth, such a process could result in defendants being less willing to agree a settlement with the OFT, compromising the OFT's new settlement system and undermining the overall efficiency of public enforcement.

4 Encouraging alternative dispute resolution

4.1 It is unusual in a substantial case for parties not to engage at some stage in some form of settlement discussions to save the extensive costs of complex competition litigation. We support proposals to encourage parties to use alternative dispute resolution (ADR) in competition litigation cases. However, we do not consider it necessary to have separate rules for ADR for competition cases or to mandate ADR in all cases. Rather, we consider that the position that applies in commercial litigation before the High Court - where costs sanctions might apply to any party that unreasonably refuses to engage in mediation - would be sufficient for competition litigation cases before the CAT.

4.2 In our experience mediation is only effective where the parties voluntarily choose to proceed down this path. In particular, where one party attending a mediation is not willing to explore settlement options, it is unlikely that the mediation will succeed. Most forms of ADR can be expensive and to mandate it in circumstances in which the parties are unwilling to engage constructively would impose additional and unnecessary costs on the parties in an already expensive process. Rather, parties should recognise that a refusal unreasonably to mediate upon the suggestion of another party is likely to have costs consequences for the refusing party.

CAT pre-action protocol

[This section addresses 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?]

4.3 Currently there is no pre-action protocol in the CAT. In principle, we consider that the introduction of such a protocol would be a useful tool to achieve efficient management of cases in their early stages. However, any protocol would need to reflect the reality that in competition follow-on claims claimants often do not send pre-action letters to avoid so-called "Italian torpedo" actions by potential defendants to seize jurisdiction in other countries perceived to be more favourable. As such, it may be that any protocol should apply to steps expected of claimants in the early stages of a case rather than necessarily pre-action.

Enhanced settlement procedure

[This section addresses 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?]

4.4 We do not support the introduction of a new wide-ranging OFT power to order infringers to implement a redress scheme. While there might be cases where such a settlement mechanism might be appropriate (for instance, the settlement of the class action brought in the US in relation to the price fixing agreement between British Airways and Virgin Atlantic for fuel surcharges on transatlantic flights resulted in British Airways and Virgin Atlantic setting aside an open fund for passengers that had paid the price surcharge), we consider that the value of such a procedure should not be overstated.

4.5 A settlement fund may only be effective in the limited circumstances where the victims of the infringing conduct are final customers and the level of overcharge is the same for all customers.

Its application in relation to more complicated infringements could be contentious and difficult to administer.

4.6 In particular, requiring an open settlement fund in cases where the direct purchasers of the cartelised product are not the "end users" would be fraught with difficulty. It could lead to lengthy arguments regarding the extent to which each claimant "passed on" the overcharge in advance of any claim being made from the fund. A more appropriate forum for these complicated economic arguments is likely to be a court (with its expertise and case management powers and the availability of expert evidence) rather than before a fund manager as part of the settlement process.

4.7 We consider that the appropriateness of open settlement funds should remain within the discretion of defendants in infringement proceedings. However, we agree that the OFT should have the procedural ability to implement and administer funds that are proposed by defendants. Careful consideration would need to be given to whether potential claimants should have the ability to opt out of a settlement fund and seek to pursue their rights to compensation directly before the courts.

4.8 However, it should only be approved upon the instigation of the defendant and the OFT should not have the power to unilaterally order such a settlement. As set out in section 1 above, we consider it important to recognise the distinction between the roles of the OFT, as the body responsible for public enforcement, and private claims to recover compensation. Just because there has been an infringement of competition law does not mean that loss has been suffered.

5 Complementing the public enforcement regime

Leniency documents

[This section addresses question 32 - Do you agree that leniency documents should be protected from disclosure, and if so, what sort of documents do you believe should be protected?]

5.1 The disclosure of leniency material has recently been the subject of a number of cases before the EU courts[13] and various national courts, including the High Court. These decisions have considered in detail the balancing act between: (i) making private actions practicable through effective disclosure; and (ii) continuing to encourage leniency applications to competition authorities.

5.2 While protection of leniency material is important, in circumstances where a follow-on claim is proceeding without access to the infringement decision on which it is based, it is understandable that Mr Justice Roth decided in *National Grid*[14] to permit disclosure of certain limited leniency material including parts of the infringement decision (having regard to the safeguards in place including confidentiality rings etc.).

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13 *Pfleiderer AG v. Bundeskartellamt* (Case C-360/09) [2011] WLR (D) 196

14 *National Grid v. ABB* [2012] EWHC 869 (Ch)

Whistleblower immunity from follow-on claims

[This section addresses question 34 - Do you agree that whistleblowers should be protected from joint and several liability, and to what degree, if at all, do you think this should be extended to other leniency recipients?]

5.3 We recognise the public policy imperative of encouraging leniency applications by those blowing the whistle on cartels and, in our view, it would be appropriate to incentivise applications for leniency by offering the whistle blower an advantage in any subsequent civil claims.

5.4 In theory, we consider that the removal of joint and several liability is the most appropriate means to achieve this end. This would ensure that a leniency applicant has some degree of certainty as to its exposure if a civil damages claim is brought. We consider that this certainty would not deter (and indeed may further incentivise) whistle blowing.

5.5 However, in practice, the fact of establishing a party's individual liability may be difficult to achieve owing to the complexity of quantifying the actual loss caused by each defendant. The loss could be quantified on the basis of actual sales by each defendant, but it may be that this is not an accurate apportionment of liability as, but for the collusion of all members of the cartel, the cartel might not have existed. Therefore it is possible that a leniency applicant defendant whose actual sales were small could also be liable indirectly for some of the loss caused by a non-leniency applicant defendant with higher sales, but quantifying this amount would be difficult.

5.6 The alternative option proposed in the Consultation Paper - to allow the case to proceed against the defendants, including the leniency applicant, under normal principles of joint and several liability and for the court to be empowered to allow the immunity recipient to seek contributions of up to 100 per cent from non-leniency recipients - also faces a number of practical difficulties:

- It does not necessarily offer a whistle-blower certainty of costs and risk (in contrast to knowing that it will only be liable for the actual loss it caused).

- It could lead to unfairness for peripheral defendants that did not apply for leniency but who in reality caused a considerably smaller proportion of the damage than leniency applicant defendants.

- It would also be procedurally much less complicated to simply remove joint liability from the leniency applicant than to introduce the prospect of secondary actions amongst defendants to allocate liability.

Contributors

The following people have contributed to this response and would be happy to respond to any questions the Department may have arising out of this submission.

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Annex - Consultation Questions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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